

December 12, 2006

Nancy M. Morris  
Secretary  
Securities and Exchange Commission  
Station Place  
100 F Street NE  
Washington, DC 20549-0609

Re: SR-NASDAQ-2006-040 Listing Fee Proposal

Dear Ms. Morris:

The NASDAQ Stock Market LLC (“Nasdaq”) has asked us, as their antitrust counsel,<sup>1</sup> to provide a comment in this docket addressing assertions by other commenters that certain aspects of Nasdaq’s proposed listing fee changes might be anticompetitive or violate the antitrust laws of the United States.<sup>2</sup> For the reasons set out below, those assertions are unsupported and inaccurate. As the Supreme Court has stated, the antitrust laws are designed for “the protection of competition not competitors,”<sup>3</sup> and Nasdaq’s proposal will enhance competition.

As we understand it, Nasdaq has proposed to increase its listing fees, based upon the increased costs that it has incurred in implementing enhancements to its world-class regulatory programs and trading systems. At the same time, Nasdaq has indicated that it will provide additional benefits and value to those companies that list on Nasdaq.<sup>4</sup> Those new benefits consist of a variety of services designed to assist companies listed on Nasdaq in fulfilling their disclosure and regulatory obligations and shareholder communications. While the new benefits are being offered to Nasdaq listed companies,

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<sup>1</sup> The authors are partners in Arnold & Porter LLP’s antitrust practice group. Michael Sohn is a former General Counsel of the Federal Trade Commission. Donna Patterson is a former Deputy Assistant Attorney General in the Antitrust Division of the United States Department of Justice.

<sup>2</sup> Nasdaq will file its own response to the comments in this proceeding.

<sup>3</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977)

<sup>4</sup> All listing exchanges provide a variety of services to their listed companies, and not all companies take advantage of each of those benefits and services.

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there is no *requirement* that companies use them. Nasdaq listed companies will remain free to choose not to use those benefits. Some commenters have suggested that the addition of some of those new benefits may be anticompetitive because they are “bundled” with or “tied” to the listing fee.<sup>5</sup> Other commenters seem to believe that they will be required to use the benefits, or to pay for them whether or not they use them. Those suggestions reflect a lack of understanding both of the facts and of the requirements of the antitrust laws.

In order to constitute impermissible “tying,” a company must be able to force its customers to take a product they do not want, or would prefer to purchase elsewhere (the “tied” product), as a condition of purchasing a product that they do want (the “tying” product).<sup>6</sup> Except under certain stringently defined conditions, selling multiple products or services as a bundle, or providing a package of products and services, does not constitute a violation of the antitrust laws.<sup>7</sup> The United States Supreme Court has acknowledged that such packaged offerings often “have procompetitive justifications that make it inappropriate to condemn without considerable market analysis.”<sup>8</sup> Indeed, such bundled or packaged offerings are common forms of competition.<sup>9</sup>

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<sup>5</sup> See, e.g., Letter from Holme Roberts & Owen to Edward Knight at 2 (Oct. 24, 2006); Comment of PR Newswire (Nov. 3, 2006); Comment of Robert Falconi (Nov. 27, 2006); Comment of Shannon H. Burns, Gander Mountain Company (Dec. 1, 2006); Comment of Margaret R. Blake & Mark R. Paul, Baker McKenzie LLP on behalf of PR Newswire (Dec. 11, 2006).

<sup>6</sup> *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), *abrogated on other grounds*, *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006).

<sup>7</sup> See, e.g., *id.* at 11-12; *N. Pac. R. Co. v. United States*, 356 U.S. 1, 7 (1956) (“[I]f one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar, it would hardly tend to restrain competition if its competitors were ready and able to sell flour by itself.”).

<sup>8</sup> *National Collegiate Athletic Ass’n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 (1984) (citing *Jefferson Parish Hospital Dist. No. 2*, 466 U.S. at 11-12).

<sup>9</sup> For example, car stereo systems are “bundled” with the sale of an automobile, beverages are provided with the sale of an airline ticket, etc.

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In traditional tying violations, the seller forces its customers to purchase an unwanted product in order to be able to purchase the desired product.<sup>10</sup> That is not the situation here. Nasdaq's proposed fee schedule is fully justified by the improvements it has made in its trading systems. Nasdaq is not requiring customers to use the additional benefits it intends to provide, such as press releases. Rather, it will be the customer's option, as it is with some current benefits, whether or not to take advantage of what Nasdaq has made available. Accordingly, commenters' allegations of illegal tying or bundling are misplaced.

In any event, a necessary precondition of any tying violation is that the company has market power (in a properly defined market) in the tying product, which commenters allege is the Nasdaq listing.<sup>11</sup> Far from a simple measure of a company's size or regulatory status as one commenter proposes,<sup>12</sup> market power is the ability successfully to increase prices or reduce output without regard to the actions of one's competitors.<sup>13</sup> That is not the case here. As the Commission has noted, Nasdaq is engaged in fierce competition for listings with a number of other exchanges, including the New York Stock Exchange, NYSE Arca, and the American Stock Exchange.<sup>14</sup>

If the Commission were to assume erroneously that the new listing fee is "tying" and that Nasdaq has market power in a properly defined product market, that would not end the inquiry. Contrary to the comments filed yesterday by PR Newswire's counsel, the law requires a showing that competitors would be foreclosed from a substantial portion of the market in which they conduct business and that there is an anticompetitive effect in the "tied market." See, e.g., *Carl Sandburg Vill. Condominium Ass'n v. First*

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<sup>10</sup> See *Jefferson Parish Hospital Dist. No. 2*, 466 U.S. at 12.

<sup>11</sup> *Jefferson Parish Hospital Dist. No. 2*, 466 U.S. at 13-14.

<sup>12</sup> See Comment of Margaret R. Blake & Mark R. Paul, Baker McKenzie LLP on behalf of PR Newswire at 10 (Dec. 11, 2006).

<sup>13</sup> *Jefferson Parish Hospital Dist. No. 2*, 466 U.S. at 14; *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992).

<sup>14</sup> Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 2 and 3 Thereto Relating to the Nasdaq Market Center, Exchange Act Release No. 34-54155, 71 Fed. Reg. 41,291, 41,298 (July 14, 2006).

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*Condominium Dev. Co.*, 758 F.2d 203, 210 (7th Cir. 1985) (requiring “a substantial danger that the tying seller will acquire market power in the tied product market”).<sup>15</sup> The complaining competitors here cannot make such a showing. For example, Nasdaq is proposing to make available four press releases per year to each of its listed companies. Although we do not know the precise number of press releases issued by companies in the United States each year, we do know that Business Wire and PR Newswire, the two leading competitors, claim to issue about 1,000 press releases daily.<sup>16</sup> The four annual press releases issued for Nasdaq’s 3,193 listed companies, assuming that all companies listed on Nasdaq decided to avail themselves of this benefit, would comprise only a small percentage of the hundreds of thousands of press releases issued on behalf of American public companies each year. That small percentage could not constitute a sufficient percentage of the total available market to hamper the viability of highly successful companies such as Business Wire and PR Newswire.

Similarly, the claims of Nasdaq’s listed customers that the provision of the new benefits and services constitute anticompetitive bundling are misplaced. For the reasons stated above, Nasdaq does not have the requisite market power to support a finding of a violation of the antitrust laws based on the mere fact of bundling several services at one price. And while it will be offering new benefits to its listed companies, it will not require companies to use those benefits.

Contrary to the suggestions that Nasdaq’s offering is anticompetitive, these benefits will lead to procompetitive outcomes for its customers, and many of those customers have commented as such.<sup>17</sup> Just as no listed company is required to use

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<sup>15</sup> See also *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 57-58 (2d Cir. 1980); *United Farmers Agents Ass’n v. Farmers Ins. Exch.*, 89 F.3d 233, 237-38 (5th Cir. 1996); cf. *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 16 (“[W]e have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby.”).

<sup>16</sup> See “Buffet seals the deal: Business Wire is latest addition to billionaire investor’s portfolio,” *San Francisco Chronicle*, Jan. 18, 2006 (“The two companies [Business Wire and PR Newswire] spar over who moves more press releases each day, with each claiming about 1,000.”).

<sup>17</sup> See, e.g., Comments of Willa M. McManmon, Dir. Investor Relations, Trimble (Dec. 9, 2006); Comments of Roland Sackers, CFO, QIAGEN N.V., (Dec. 11, 2006); Comments of David H. Chun, CEO, Equilar, Inc. (Dec. 8, 2006); Comments of Matthew J. Pfeffer, CPA, CFO and SVP, Finance and Administration (Dec. 11, 2006); Christopher

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existing benefits such as investor conferences, reports and market opening ceremonies, Nasdaq listed companies will not be required to use the proposed new benefits. Nasdaq has determined to provide those benefits to assist its listed companies with their investor communications obligations, but it will not force companies that would prefer to obtain such services elsewhere to use the services provided by Nasdaq as part of the listing. The evidence in the record demonstrates that Nasdaq's offering will infuse badly needed competition into a market for press releases currently dominated by only two companies.<sup>18</sup>

Listed companies benefit from this competition. Indeed, there is nothing to stop Nasdaq listed companies from using the fact that Nasdaq has provided a number of press releases as part of its listing fee as a lever to bargain with their current providers of such services for a discount.<sup>19</sup> We have been told that one method by which Business Wire and PR Newswire compete today with other providers of press release services is by use of volume discounts. While we do not have available to us the data concerning profitability of press release services, we do know that both Business Wire and PR Newswire earn considerable profits.<sup>20</sup> There is no basis to conclude that those companies could not profitably compete with the press release services offered as a part of the Nasdaq listing by altering their discounting program.<sup>21</sup> This is precisely the sort of procompetitive activity the antitrust laws are designed to encourage because the law

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S. Keenan, Dir. Investor Relations, Cytokinetics (Dec. 11, 2006); Gale Blackburn, Corporate V.P. of Investor Relations, AmCOMP Inc. (Dec. 11, 2006).

<sup>18</sup> See *infra* note 16.

<sup>19</sup> Indeed, most courts would also consider whether such competitors have the ability to compete profitably with the services provided by Nasdaq by offering a discount to customers who might consider using the services provided by Nasdaq. See, e.g., *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000).

<sup>20</sup> See "Buffet seals the deal: Business Wire is latest addition to billionaire investor's portfolio," *San Francisco Chronicle*, Jan. 18, 2006 ("Business Wire's 2005 revenue of \$127 million makes it smaller, financially, than its chief rival, PR Newswire...which reported revenue of \$173.5 million in 2004.").

<sup>21</sup> These companies' opposition to the new services Nasdaq intends to offer comes as no surprise as it will force them to compete more vigorously, but such competition is to the benefit of customers.

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ARNOLD & PORTER LLP

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protects competition, not competitors.<sup>22</sup> Accordingly, there is no basis to conclude that the decision to offer additional benefits is anticompetitive or would harm Nasdaq's customers.

Of course, no customer likes increased prices. But the fact remains that Nasdaq's listing fees, even with the proposed increases, generally are below the listing fees of its competitors. The proposed increases in the listing fees are fully justified by the enhancements that Nasdaq already has made to its world-class regulatory programs and trading systems and the additional benefits Nasdaq intends to provide will lead to procompetitive outcomes for its customers.

Thank you for the opportunity to express our views. Please contact us if you have any questions.

Sincerely,



Michael N. Sohn  
Donna E. Patterson

cc: Alex Kogan, Esq.

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<sup>22</sup> See *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977).