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Via Hand Delivery and Electronic Posting

BOULDER

Dr. Erik R. Sirri, Director, Division of Market Regulation
Robert L. D. Colby, Deputy Director, Division of Market Regulation
Katherine A. England, Assistant Director, Division of Market Regulation
Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

COLORADO SPRINGS

Re: *SR-NASDAQ-2006-040*
Conference with Business Wire Representatives Regarding
NASDAQ Proposed Rule Change to Modify Fees & Bundle Services
and NASDAQ's Further Modification of its Proposal

DENVER

LONDON

Dear Director Sirri, Deputy Director Colby, Assistant Director England, and Secretary Morris:

LOS ANGELES

We would like to express our sincere thanks for the time and attention you and your staff devoted to meeting with us and Business Wire's CEO Cathy Baron-Tamraz before the holidays. We appreciate the opportunity and believe the meeting was extremely productive.

MUNICH

In addition, we would like to supplement our December 11 comment to respond to NASDAQ's recent modification of its proposal (and the January 16 letter from NASDAQ posted yesterday in support of its modification). Business Wire is strongly opposed to the proposal as modified, particularly in light of NASDAQ's actions over the last month, which have confirmed our suspicions that NASDAQ is abusing its powers as a national exchange even to the point of flouting their disregard for the Commission's regulatory role.

SALT LAKE CITY

NASDAQ's Third Amendment

As the Commission is aware, on October 2, 2006, NASDAQ filed its original proposal to significantly increase its fees justified in substantial part by tying certain ancillary services (including Information Dissemination Services

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Dr. Erik R. Sirri
Robert L.D. Colby
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Nancy M. Morris
January 25, 2007
Page 2

provided by its recently acquired PrimeNewsWire¹ subsidiary) to its listing services. As detailed at length in Business Wire's December 11 comment letter, (1) NASDAQ's proposed pricing structure was in clear violation of the antitrust laws, and (2) the very fact that NASDAQ sought to provide Information Dissemination Services to its largely captive listed companies created an impermissible conflict of interest. After further consideration, NASDAQ and its antitrust counsel apparently agreed that the proposed pricing structure violated the antitrust laws, and NASDAQ has now filed a third amendment to their proposal on January 16 that purports to eliminate the tie between listing services and Information Dissemination Services. In view of the lack of specificity in its amended proposal as to the exact nature of the "free" offering of PrimeNewsWire services and the connection to a NASDAQ listing, Business Wire remains suspicious of the claim that tying has been completely eliminated.² For that reason, Business Wire strongly objects to the

¹ PrimeNewsWire is the new name for Prime Zone, which was the reference in our prior submission.

² In its latest amendment at footnotes 2 and 7 and in sales pitches to Business Wire clients, NASDAQ apparently continues to tie the "free" pricing and certain discount pricing of PrimeNewsWire services to a NASDAQ listing, or at least to a meeting with NASDAQ and completion of the registration process. As noted in Business Wire's December 11 comment, the fact that a tied product is touted as being "free" does not by itself mean that there is no illegal tying arrangement. This is particularly true where, as here, the offer of a "free" tied product is accompanied by a significant increase in the cost of the tying product (and especially where the increase is justified in part by reference to the tied product). As one Court of Appeal noted: "Of course, in a tying case if the evidence shows that the price of a bundled product reflects any of the cost of the tied product, customers are purchasing the tied product, even if it is touted as being 'free.'" *U.S. Philips corp. v. International Trade Commission*, 424 F.3d 1179, 1191 n. 4 (Fed. Cir. 2005) (quoting *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 63 F.3d 1540, 1548 (10th Cir. 1995)); see also Areeda & Hovenkamp, ANTITRUST LAW

Holme Roberts & Owen LLP
Attorneys at Law

Dr. Erik R. Sirri
Robert L.D. Colby
Katherine A. England
Nancy M. Morris
January 25, 2007
Page 3

blithe assertion in NASDAQ's January 24 comment that its amendment eliminates the burden on competition inherent in both its original and amended proposal.

Equally important, the amendment fails completely to deal with the even more fundamental issue, *viz.*, that allowing NASDAQ to sell ancillary services at all creates an insuperable conflict of interest between its role overseeing its listed companies and its role in selling them ancillary services. As described in the December 11 comment, NASDAQ's proposal to sell Information Dissemination Services creates at least three types of improper conflicts. *First*, NASDAQ's authority to rule on the adequacy of listed companies' disclosures makes it inappropriate for NASDAQ to be making the disclosures. *Second*, NASDAQ is in a position to determine how much disclosure is required in the first instance; being in the business of selling disclosure would create an institutional bias toward requiring inappropriate disclosure or countenancing inadequate disclosures of best customers. *Third*, NASDAQ's entry into ancillary business creates an unsatisfactory situation in which NASDAQ must determine how much of its capital, management experience, and other resources should be used for its core listing function and how much for its ancillary, for-profit, services.

NASDAQ's Disregard for the Commission

As discussed during our December meeting, at no point did NASDAQ request Commission approval for, or even seek Commission comment on, the potential acquisition of PrimeNewsWire. Since then, it has only compounded its brazen attempt to ignore the proper relationship between a Self-Regulatory Organization ("SRO") such as NASDAQ and the Commission.

Vol. IIIA ¶ 760b, p. 49 (2002) ("[T]he tie may be obvious, as in the classic form, or somewhat more subtle, as when a machine is sold or leased at a price that covers 'free' servicing.").

Holme Roberts & Owen LLP
Attorneys at Law

Dr. Erik R. Sirri
Robert L.D. Colby
Katherine A. England
Nancy M. Morris
January 25, 2007
Page 4

After its unauthorized acquisition of PrimeNewsWire, NASDAQ on October 2, 2006 filed its initial application attempting to justify its significant fee increase by pointing the Commission specifically to the inclusion of PrimeNewsWire services.³

Since this justification for its price increase created a tying arrangement that violated the antitrust laws, NASDAQ tried to soften the connection in its first amendment filed October 30, 2006 by telling the Commission something else.⁴ There, instead of arguing that the fee increases were justified by the PrimeNewsWire services, NASDAQ mentioned the new services only briefly, near the end of the three pages devoted to justifying the increases. NASDAQ 10/31/06 amendment at 12-15.

Finally, after apparently concluding that the softening in the purported justifications was not enough to save the illegal tying arrangement, NASDAQ

³ NASDAQ's initial proposal states:

The change in fees largely reflects the costs of providing issuer services and will allow enhancements to the services offered to NASDAQ listed companies. Issuers listed on NASDAQ will receive a suite of products and services intended to assist companies with compliance functions, shareholder communications, and other corporate objectives. In addition, the fee increases will help defray the costs of monitoring issuers for ongoing compliance with NASDAQ's listing standards. NASDAQ believes that these fee changes, and the enhanced services that will be made available as a result, will enable NASDAQ to better compete for listings both with other domestic exchanges and worldwide. (NASDAQ proposal at 10-11; emphasis added.)

⁴ NASDAQ filed a second amendment the next day on October 31 that is substantially the same as its first amendment.

Holme Roberts & Owen LLP
Attorneys at Law

Dr. Erik R. Sirri
Robert L.D. Colby
Katherine A. England
Nancy M. Morris
January 25, 2007
Page 5

last week filed its third amendment. In that amendment, NASDAQ completed its *volte-face* from the justifications offered in the original proposal, stating now that “[t]hese services do not serve as a justification for the proposed fee increase.” 1/16/07 Amendment at 3. Nonetheless, NASDAQ insists that it “still intends to offer these services to NASDAQ-listed companies and companies listed on other securities exchanges” *Id.* n. 2.

In short, NASDAQ has serially sought to avoid the Commission’s authority and scrutiny over its actions with respect to PrimeNewsWire by (1) refusing even to consult the Commission in connection with its purchase of PrimeNewsWire; (2) changing for no principled reason its official submissions to the Commission regarding the significance of the PrimeNewsWire services as support, or not, for its significant fee increases, based only on what was expedient at the time without consideration of its duty to be candid and forthright; and (3) filing a third amendment seeking expedited approval in a further effort to avoid having the Commission consider the most fundamental issue of all – whether an SRO like NASDAQ can reasonably be permitted to use the self-regulatory power that it has over its listed companies in support of its efforts to sell them additional services.

NASDAQ’s Proposal Should Be Rejected

NASDAQ’s third amendment does not address the central problem with its proposal, which is not whether NASDAQ should be permitted to raise its listing fees by some appropriate amount (a matter upon which Business Wire of course has no opinion) but whether NASDAQ should have unbridled and unilateral discretion to transform itself from a regulated entity in the narrow market for listing services into any form of diversified company it chooses no matter the conflicting interests or opportunities to exercise undue influence that will or may arise. Business Wire respectfully submits that the answer is no.

First, there is little question that the diversified entity would have conflicts of interest that would undermine the transparent, efficient, and fair functioning of the securities markets. NASDAQ would have the ability and the incentive to

Holme Roberts & Owen LLP
Attorneys at Law

Dr. Erik R. Sirri
Robert L.D. Colby
Katherine A. England
Nancy M. Morris
January 25, 2007
Page 6

skew (even if not intentionally) its decisions regarding the level and adequacy of disclosures and the allocation of its resources in ways designed to maximize its own profit rather than to ensure proper functioning of the securities markets.

Second, the substantial pressure that NASDAQ can bring to bear on its listed companies would significantly distort competition in the market for Information Dissemination Services. For example, NASDAQ could explicitly or implicitly suggest that more favorable treatment would be available to listed companies that “support” NASDAQ by purchasing other services. Even absent such a suggestion, listed companies – particularly smaller ones with less clout and fewer or no alternatives – might well conclude that it is better to be safe than sorry, and purchase services from NASDAQ notwithstanding a view that the services are inferior to and/or more expensive than those offered by competitors such as Business Wire and PR Newswire. In addition, the NASDAQ’s special role as a national exchange provides opportunities to unduly influence their listed companies. As simply one example, Business Wire has learned that NASDAQ went directly to the CFO of a listed company attempting to sell PrimeNewsWire service; the CFO took the meeting only because it was NASDAQ, with prior decisions having been made at a lower level in the PR Department. These types of built in advantages skew competition, and the skewing of competition not only harms those companies legitimately in the market, but also over the long run inhibits the creative development of better and cheaper services that is the hallmark of fair competition.

Third, NASDAQ’s significant unfair advantages described above, particularly along with its apparent willingness to price at or below cost,⁵ create a significant danger of NASDAQ accumulating significant market or even

⁵ NASDAQ’s third amendment states that it will initially give the services away for “free.” p. 3 n.2. Further, Business Wire has learned that NASDAQ – again acting without notification to or approval from the Commission – has offered free press releases and 50% discounts on other PrimeNewsWire items.

Holme Roberts & Owen LLP
Attorneys at Law

Dr. Erik R. Sirri
Robert L.D. Colby
Katherine A. England
Nancy M. Morris
January 25, 2007
Page 7

monopoly power in the market for Information Dissemination Services for NASDAQ-listed companies. This concern is validated by the fact that several Business Wire customers have expressed that they feel pressure to use NASDAQ's "free" PrimeNewsWire services notwithstanding their existing contracts – and satisfaction – with Business Wire and its Information Dissemination Services.

Fourth, NASDAQ apparently will "fund" these below cost offerings through subsidies from the listing fees it is seeking to increase. Using an increase in listing fees to subsidize ancillary services is an obvious conflict that also contradicts the statutory mandate for equitable allocation of fees.⁶ *See*, Section 6(b)(4) of the Exchange Act, which requires that NASDAQ "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities."

The January 24 comment by NASDAQ's General Counsel briefly addresses the issue of NASDAQ's ownership of PrimeNewsWire, but in doing so only highlights NASDAQ's untenable position.

First, NASDAQ notes the undisputed fact that news dissemination may be done in any manner complying with Regulation FD. That is true, but has no bearing on any of the four problems detailed above.

Second, NASDAQ claims that its only regulatory role is to determine whether to halt trading and that the listed company's "choice of news dissemination

⁶ NASDAQ's listed companies have good reason to question why the claimed "unbundling" of these ancillary services that were once included as NASDAQ's primary justification for the increase in the listing fees did not result in a *smaller increase*. The inequity in this allocation of fees is clearly demonstrated by the fact that the increase remains the same as initially proposed when the value initially claimed has lessened by NASDAQ's own logic.

Holme Roberts & Owen LLP
Attorneys at Law

Dr. Erik R. Sirri
Robert L.D. Colby
Katherine A. England
Nancy M. Morris
January 25, 2007
Page 8

service plays no role in this regulatory function.” To the contrary, NASDAQ’s own Regulatory Requirements provide that (1) listed companies must comply with Regulation FD (p.5), with such compliance monitored by NASDAQ, (2) NASDAQ will “exercise broad discretionary authority over the initial and continued inclusion of securities in NASDAQ [and may] suspend or terminate the inclusion of particular securities in NASDAQ as inadvisable or unwarranted in the opinion of NASDAQ, even though the securities meet all enumerated criteria” (p. 2). Thus, NASDAQ’s claim that its regulatory function is limited to trading halts is simply wrong. And NASDAQ’s claim that the choice of news dissemination service will not effect its regulatory decisions is nothing more than NASDAQ’s say-so. And even if it turns out to be true, there is no doubt that many listed companies will never be sure that it is true, thus significantly skewing the competitive process.

Third, NASDAQ claims that it has informed and will inform actual and potential listed companies that there are “several providers of those services that claim to satisfy the broad, non-exclusionary distribution requirements of Regulation FD.” That statement is unintentionally quite revealing. What NASDAQ is saying is that it will approach companies and tell them that NASDAQ has the power to list, not list, or de-list them; that NASDAQ will be evaluating whether they comply with Regulation FD; and that the company can disseminate news either through NASDAQ’s wholly owned subsidiary or through another provider that “claims” to comply.

As is apparent from the discussion above, each of the four problems detailed above are inherent in NASDAQ’s ownership of PrimeNewsWire. Business Wire strongly believes that NASDAQ can and should be required to sell PrimeNewsWire to an independent third party or parties so that

Holme Roberts & Owen LLP
Attorneys at Law

Dr. Erik R. Sirri
Robert L.D. Colby
Katherine A. England
Nancy M. Morris
January 25, 2007
Page 9

PrimeNewsWire can compete with Business Wire, PR Newswire, Market Wire and others on a fair, standalone basis.⁷

Alternatively, if the Commission believes that divestiture is too intrusive a remedy at this juncture, Business Wire believes that NASDAQ should at a minimum be ordered to operate PrimeNewsWire on a strict arms-length basis. The specific restrictions likely should be determined after an opportunity for comment by the public generally (including NASDAQ), but might well include complete separation of NASDAQ's regulatory functions and governance from PrimeNewsWire, as well as stringent prohibitions on (1) cross-selling by NASDAQ of PrimeNewsWire products and services; (2) cross-marketing of NASDAQ and PrimeNewsWire products and services; (3) coordination of pricing of NASDAQ and PrimeNewsWire products and services; and (4)

⁷ Business Wire believes that the Commission has and should exercise the authority to order such a divestiture. In particular, we believe that the Commission's mandate to protect "competition" under Exchange Act §§ 6(b)(8) and 15A(b)(9) is not limited to "competition" among various exchanges, but rather encompasses competition in other areas, such as in the market for Information Dissemination Services. This conclusion flows initially from the plain language of the Exchange Act, which places no limitation on the types of competition meant to be protected. It is confirmed by the Commission's March 21, 2005 filing in the *Billing v. Credit Suisse First Boston* matter, which stated that conduct with anti-competitive effects on "aftermarket prices following registered offerings" may be approved by the Commission "only where it is persuaded by substantial evidence that the conduct will have other important beneficial effects on the functioning of the securities markets." *Id.* at 2-3. Since the competition at issue in *Billings* is not competition among exchanges, the filing necessarily means the Commission views its responsibilities to include protecting other forms of competition.

Holme Roberts & Owen LLP
Attorneys at Law

Dr. Erik R. Sirri
Robert L.D. Colby
Katherine A. England
Nancy M. Morris
January 25, 2007
Page 10

leveraging of the actual and perceived authority and market power of NASDAQ in connection with ancillary products and services.⁸

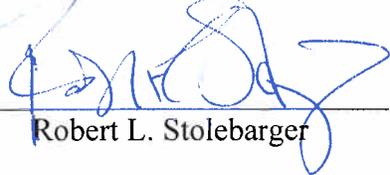
In conclusion, thank you again for your time and consideration, both in reviewing our submissions and in meeting with us in December. It is evident to us, and we believe very appropriate under the circumstances, that the Division is giving this pending proposed rule change its most serious attention.

If you believe we could be of any further assistance in responding to your questions or providing any additional information, please call upon us.

Respectfully Submitted,

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By: 
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⁸ Useful analogs in fashioning the restrictions might include the Euronext approach and/or Federal Energy Regulatory Commission regulations regarding regulated energy transmission and distribution companies entering into more traditional for-profit power generation markets.