



Elizabeth K. King

Chief Regulatory Officer, ICE.
General Counsel & Corporate Secretary, NYSE

11 Wall Street
New York, NY 10005
T+202.661.8948

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Via Email

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Re: Securities Exchange Act Release Nos. 88168 (February 11, 2020) (SR-NYSE-2020-05); 88169 (February 11, 2020) (SR-NYSEAMER-2020-05); 88170 (February 11, 2020) (SR-NYSEArca-2020-08); 88172 (February 11, 2020) (SR-NYSECHX-2020-02); and 88171 (February 11, 2020) (SR-NYSESTAT-2020-03); 88237 (February 19, 2020) (SR-NYSE-2020-11); 88238 (February 19, 2020) (SR-NYSEAMER-2020-10); 88239 (February 19, 2020) (SR-NYSEArca-2020-15); 88240 (February 19, 2020) (SR-NYSECHX-2020-05); and 88241 (February 19, 2020) (SR-NYSESTAT-2020-08) (collectively, the “Wireless Filings”)

Dear Ms. Countryman:

NYSE Group, Inc. (“NYSE Group”), on behalf of the New York Stock Exchange LLC (“NYSE”), NYSE American LLC, NYSE Arca, Inc. (“NYSE Arca”), NYSE Chicago, Inc. and NYSE National, Inc. (“NYSE National” and together, the “NYSE Exchanges”) submits this letter to respond to the comment letters submitted in connection with the Wireless Filings.¹

¹ See letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., to Ms. Vanessa Countryman, Secretary, Securities and Exchange Commission (“Commission”), dated March 10, 2020 (“Bloomberg Letter”); letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Ms. Vanessa Countryman, Secretary, Commission, dated April 27, 2020 (“FIA PTG Letter”); letter from Tyler Gellasch, Executive Director, Healthy Markets Association, to Ms. Vanessa Countryman, Secretary, Commission, dated March 9, 2020 (“Healthy Markets Letter”); letter from Andrew Stevens, General Counsel, IMC Chicago, LLC (“IMC”), to Ms. Vanessa Countryman, Secretary, Commission, dated March 12, 2020 (“IMC Letter”); letter from Jim Considine, Chief Financial Officer, McKay Brothers LLC (“McKay Brothers”), to Ms. Vanessa Countryman, Secretary, Commission, dated March 10, 2020 (“McKay Letter”); letter from Ellen Greene, Managing Director, Securities Industry and Financial Markets Association, to Ms. Vanessa Countryman, Secretary, Commission, dated April 3, 2020 (“SIFMA Letter”); letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc. (“Virtu”), to Ms. Vanessa Countryman, Secretary, Commission, dated March 10, 2020 (“Virtu Letter”); and letter from Matt Harburda, President, XR Securities LLC (“XR”), to Ms. Vanessa Countryman, Secretary, Commission, dated March 18, 2020 (“XR Letter”). Unless otherwise defined herein, capitalized terms used herein have the same meaning as in the Wireless Filings.

For the reasons set forth below and in the Wireless Filings, the NYSE Exchanges respectfully request that the Commission approve the Wireless Filings so that the 11 current customers with Wireless Connections and 11 current customers with Wireless Market Data Connections will not lose the provider of the 31 Wireless Services that they take.²

If instead the Commission disapproves the Wireless Filings, ICE Data Services (“IDS”) will have to cease offering the services described in the Wireless Filings (the “Wireless Services”), causing dislocation for the current customers and a reduction of competition in the market for those services. Any customers that wanted to retain a wireless connection between Mahwah and Secaucus or Carteret, New Jersey would have to purchase a new one from the two remaining commercial providers or buy space on a proprietary data network, if available. Those wireless connections would not be regulated by the Commission, and so the providers would be free to increase prices, negotiate individual rates, or favor some customers with faster network connections. Customers, especially smaller customers that cannot afford to build proprietary networks, would have no other choice but to meet the providers’ demands. In the case of the connections to Markham, Canada, disapproval would mean that customers would be left with no wireless connectivity options.

This reduction in competition may be what some of the letter writers prefer. The NYSE Exchanges cannot help but note that at least three of the eight letters were submitted by firms that would benefit commercially if the Commission disapproves the Wireless Filings. McKay Brothers is one of the two primary commercial wireless competitors of ICE Data Services (“IDS”) and IMC and XR are two of McKay Brothers’ investors.³ If other commentators use a proprietary wireless network for connections within New Jersey, they would also benefit if IDS could no longer offer a wireless service to its competitors.

In reality, even if the Commission approves the Wireless Filings, McKay Brothers, other commercial wireless competitors, and the owners of proprietary wireless networks are the beneficiaries of the staff’s determination that it believes the Wireless Connections are facilities of the Exchange and so must be filed as part of its rules. As stated in the Wireless Filings,⁴ filing the Wireless Connections places an undue burden on

² Because some customers purchase both Wireless Services, there are 17 customers in all. Five additional customers have ordered pending services.

³ See McKay Letter, at note 3; IMC Letter, at 2; and XR Letter, at note 3. See also “McKay Brothers Receives Minority Investment from Jane Street Group,” March 6, 2018, at <https://www.mckay-brothers.com/mckay-brothers-receives-minority-investment-jane-street-group/> (stating that Jane Street Group LLC, IMC, Tower Research Capital, Susquehanna International Group and XR Trading are minority investors in McKay Brothers).

⁴ See, e.g., Securities Exchange Act Release Nos. 88168 (February 11, 2020), 85 FR 8938, at 8941 (February 18, 2020) (SR-NYSE-2020-05) (notice of filing of proposed rule change to establish a Schedule of Wireless Connectivity Fees and Charges with wireless connections); and 88237 (February 19, 2020), 85 FR 10752, at 19756 (February 25, 2020) (SR-NYSE-2020-11) (notice of filing of proposed rule change to amend the

competition on the ICE Affiliates that offer the market data connections, compared to their market competitors. This burden on competition arises because IDS would be unable, for example, to offer a client or potential client a connection to a new data feed it requests, without the delay and uncertainty of a filing, but its competitors will. Similarly, if a competitor decides to undercut IDS' fees because IDS, unlike the competitor, has to make its fees public, IDS will not be able to respond quickly, if at all. Indeed, because its competitors are not required to make their services or fees public, and are not subject to a Commission determination of whether such services or fees are "not unfairly discriminatory" or equitably allocated, IDS would be at a competitive disadvantage from the very start.⁵

The Wireless Filings

There are two sets of Wireless Filings. In the first, the NYSE Exchanges propose a schedule of Wireless Connectivity Fees and Charges (the "Wireless Fee Schedule") with wireless connections between the Mahwah, New Jersey data center and three data centers that are owned and operated by third parties unaffiliated with the Exchange ("Wireless Connections").⁶ In the second, the NYSE Exchanges propose to add wireless connectivity services that transport market data of the NYSE, NYSE Arca, and NYSE National ("Wireless Market Data Connections") to the Wireless Fee Schedule.⁷ Market

Schedule of Wireless Connectivity Fees and Charges to add wireless connectivity services).

⁵ For the stated reasons and as evidenced by the arguments presented by the McKay Letter, the SIFMA Letter is incorrect to posit that "Exchanges remain the exclusive purveyors of connectivity services." SIFMA Letter, at 3.

⁶ See 85 FR 8938, supra note 4, and Securities Exchange Act Release Nos. 88169 (February 11, 2020), 85 FR 8946 (February 18, 2020) (SR-NYSEAMER-2020-05); 88170 (February 11, 2020), 85 FR 8956 (February 18, 2020) (SR-NYSEArca-2020-08); 88172 (February 11, 2020), 85 FR 8923 (February 18, 2020) (SR-NYSECHX-2020-02); 88171 (February 11, 2020), 85 FR 8930 (February 18, 2020) (SR-NYSENAT-2020-03) (notice of filing of proposed rule change to establish a Schedule of Wireless Connectivity Fees and Charges with wireless connections). See also Securities Exchange Act Release No. 88539 (April 1, 2020), 85 FR 19553 (April 7, 2020) (SR-NYSE-2020-05, SR-NYSEAMER-2020-05, SR-NYSEArca-2020-08, SR-NYSECHX-2020-02, and SR-NYSENAT-2020-03) (notice of designation of a longer period for Commission action on proposed rule changes to establish a schedule of Wireless Connectivity Fees and Charges with wireless connections between the Mahwah, New Jersey data center and other data centers).

⁷ See 85 FR 10752, supra note 4, Securities Exchange Act Release Nos. 88238 (February 19, 2020), 85 FR 10776 (February 25, 2020) (SR-NYSEAMER-2020-10); 88239 (February 19, 2020), 85 FR 10786 (February 25, 2020) (SR-NYSEArca-2020-15); 88240 (February 19, 2020), 85 FR 10795 (February 25, 2020) (SR-NYSECHX-2020-05); and 88241 (February 19, 2020), 85 FR 10738 (February 25, 2020) (SR-NYSENAT-2020-08) (notice of filing of proposed rule change to amend the Schedule of Wireless Connectivity Fees and Charges to add wireless connectivity services). See also Securities Exchange Act Release No. 88540 (April 1, 2020), 85 FR 19562 (April 7, 2020) (SR-NYSE-2020-11, SR-NYSEAMER-2020-10, SR-NYSEArca-2020-15, SR-NYSECHX-2020-05, and SR-NYSENAT-2020-08) (notice of designation of a longer period for Commission action on proposed rule changes to amend the schedule of Wireless Connectivity Fees and Charges to add wireless connectivity services).

participants that purchase a Wireless Connection or Wireless Market Data Connection would be subject to initial and monthly fees, as set forth in the Wireless Filings.

In the Wireless Filings⁸ the NYSE Exchanges state that they do not believe that the proposed rule changes are, in fact, changes to the “rules of an exchange”⁹ required to be filed with the Commission under the Securities Exchange Act of 1934 (the “Act”).¹⁰ They base this position on the definition of “facility” in the Act¹¹ and an assessment of the specific facts and circumstances of the Wireless Connections, which lead them to conclude that the Wireless Services are not facilities of the NYSE Exchanges within the meaning of the Act, and therefore do not need to be included in its rules. Nevertheless, the Wireless Filings go on to do exactly what the NYSE Exchanges conclude is not required under the Act: file the Wireless Services as changes to the rules of an exchange.¹²

Commenters Incorrectly Assert that Commission Approval of the Wireless Filings Would Decrease Competition

Some of the letters argue that approving the Wireless Filings would decrease competition, providing IDS with a latency advantage that “could be discriminatory, anti-competitive, and result in unreasonable and inequitable fees.”¹³ There are currently at least two commercial wireless network providers and several proprietary wireless networks that offer the same service as the Wireless Connections. It is unclear how forcing IDS to cease offering the Wireless Services to its clients would improve the competitive landscape for these services.

In addition, many of the commenters’ arguments are based on incorrect premises: that the Wireless Services are new; that they would use the roof of the Mahwah data center; and that, because it has use of a pole that is closer to the Mahwah data center, IDS has an unbeatable latency advantage. None of these premises are true.

First, although several of the letters describe the Wireless Services as “new” services,¹⁴ they are not new. They are existing services that the Staff of the Commission has

⁸ See, e.g., 85 FR 8938, supra note 4, at 8938 to 8941, and 85 FR 10752, supra note 4, at 10752 to 10756.

⁹ 15 USC §78c(a)(27) (defining the term “rules of an exchange”).

¹⁰ 15 USC 78a.

¹¹ 15 USC §78c(a)(2) (defining the term “facility” as applied to an exchange). The definition of “exchange” under the Act includes “the market facilities maintained by such exchange.” 15 USC §78c(a)(1). Accordingly, if the Wireless Connections are facilities of the NYSE Exchanges, they are subject to the rulemaking requirements.

¹² See, e.g., 85 FR 8938, supra note 4, at 8946, and 85 FR 10752, supra note 4, at 10753.

¹³ Healthy Markets Letter, at 8. See also McKay Letter, at 10-11.

¹⁴ See Bloomberg Letter, at 1, and Healthy Markets Letter, at 3. The Healthy Markets Letter seems to misunderstand the Wireless Filings at a more basic level, describing the filings for the Wireless Market Data Connections as “a second round of filings to detail the fees.” Id., at 3. The two sets of filings are for entirely distinct sets of Wireless Services and fees.

instructed the NYSE Exchanges to file. Accordingly, any statements positing that introduction of the “new” Wireless Services would change the competitive environment are incorrect—they are already part of the environment.

Second, most of the letters include arguments based on the assumption that the Wireless Services would use equipment on the roof of the Mahwah data center, drawing on a 2019 hearing in the Township of Mahwah.¹⁵ The Wireless Connections do not use the roof. In fact, IDS has advised the NYSE Exchanges that it does not use equipment on the roof for any services it offers and does not expect to put any equipment there or allow others to do so.

Third, some of the letters argue that, because IDS has the use of a pole on the grounds of the Mahwah data center (the “Data Center Pole”), IDS has a latency advantage to which no alternatives can offer comparable speed.¹⁶ The McKay Letter estimates that the Data Center Pole is approximately 700 feet closer to the NYSE Exchanges’ matching engines than the closest commercial tower.¹⁷ The equipment on the Data Center Pole belongs to IDS and Anova Technologies, LLC (“Anova”), the non-ICE entity that owns the wireless network used for the Wireless Connections to Secaucus and Carteret.¹⁸ All other third parties, including the letter writers, do not have access to the Data Center Pole.

If the Data Center Pole actually gave IDS such a significant latency advantage, IDS would have the fastest wireless connections on the Mahwah-Carteret and Mahwah-Secaucus routes. In fact, IDS believes that the wireless network it uses for the Wireless Connections is second or third among the three commercial wireless competitors, depending on the route. It would seem that McKay Brothers would agree, as on its website, under the heading “McKay Brothers NJ Equity Triangle Network,” it claims the

¹⁵ See Bloomberg Letter, at 2 (stating that, “[s]ince no other provider is permitted to operate equipment on the roof, the NYSE communications equipment would enjoy exclusive access and an inherent advantage”); Healthy Markets Letter, at 6 (“[p]ut simply, the ‘services’ contemplated by the filings are little more than exclusive access to the physical portal that is located on the roof of the facility where the [NYSE] Exchanges operate”); McKay Letter, at 10 (stating that there is “no question that the [NYSE] Exchange’s motive is to reduce the latency of the Wireless Connections “ through placing wireless equipment on the data center roof); FIA PTG Letter, at 2 (referring to “their plans to move their equipment to the roof of the data center”), and XR Letter, at 3 (stating that it is “concerned that the [NYSE] Exchange’s steps towards placing wireless equipment on the roof of the Mahwah datacenter would extend the latency advantage and leave broker-dealers, such as [XRS], with no competitive alternative for the fastest wireless connectivity between the [NYSE] Exchange and the Third Party Data Centers”).

¹⁶ See Bloomberg Letter, at 5 (“[t]here are no alternatives that offer comparable speed to the proposed Wireless Connections”); McKay Letter, at 10 (referring to the “existing advantage afforded to the Wireless Connections through use of the NYSE Private Pole”); Virtu Letter, at 3 (referring to an “exclusive latency edge”); and XR Letter, at 3 (alleging that “[n]o other wireless service provider can replicate this latency advantage”).

¹⁷ McKay Letter, at 3.

¹⁸ The Wireless Connections with Markham, Canada do not use equipment on the Data Center Pole.

“Lowest Known Latency Bandwidth Service.”¹⁹ Similarly, the website for its affiliate Quincy Data states that it “redistributes US equity feeds in the native exchange format at the lowest latency.”²⁰

While having a pole 700 feet closer to a facility is a positive factor for latency, it is just one in a list of factors that determine the network’s latency levels. As noted in the Wireless Filings²¹ and as shown by IDS’ belief that its wireless network is not the fastest commercial option, the determinants of a wireless network’s latency also include the wireless equipment utilized; the route of, and number of towers or buildings in, the network; and the fiber equipment used at either end of the connection. Even if IDS changed the equipment on the Data Center Pole, it still may not have the fastest connections.

Like the Wireless Services, the Data Center Pole is not new: it has been in place since 2016.²² The fact that competition has continued to develop over the intervening years demonstrates that use of the Data Center Pole is not required for third parties to compete with the Wireless Connections. The letters may claim that “the numerous market participants concerned about latency would have little choice but to use” the Wireless Connections²³ or that adding equipment to the Data Center Pole would create a monopoly that would allow IDS “to charge exorbitant fees for access to its antenna, while other wireless providers that could provide competition to the NYSE vendor [Anova] are arbitrarily blocked from participating fairly in the market,”²⁴ but these claims have already been shown to be incorrect. Other wireless providers compete with IDS, and market participants have a choice about what connection to use—and often choose not to use IDS.

The NYSE Exchanges note that the McKay Letter and the letters from its investors are particularly concerned with the Data Center Pole and its impact on competition.²⁵ If the Commission disapproved the Wireless Filings, the impact on competition would be that McKay Brothers would have one less competitor, in an already small market.

¹⁹ McKay Brothers website, at <https://www.mckay-brothers.com/product-page/> (last visited on April 29, 2020).

²⁰ Quincy Data website, at <https://www.quincy-data.com/raw-data-qrqpd/> (last visited on April 29, 2020). The feeds offered include the Arca Integrated and NYSE Integrated feeds. Id.

²¹ See, e.g., 85 FR 8938, supra note 4, at 8943, and 85 FR 10752, supra note 4, at 10757.

²² See Securities Exchange Act Release No. 76748 (December 23, 2015), 80 FR 81609 (December 30, 2015) (SR-NYSE-2015-52) (order approving proposed rule change to the co-location services offered by the NYSE (the offering of a wireless connection to allow users to receive market data feeds from third party markets) and to reflect changes to the NYSE’s price list related to these services).

²³ McKay Letter, at 1-2. See also XR Letter, at 1-2.

²⁴ Virtu Letter, at 2.

²⁵ McKay Letter, at 3; IMC Letter, at 2; and XR Letter, at 2.

The objection some commenters raise is not that the Data Center Pole exists, but that they are not allowed on it.²⁶ As the Wireless Filings explain, practical factors are a real concern: IDS does not sell rights to third parties to operate wireless equipment on the pole due to space limitations, security concerns, and the interference that would arise between equipment placed too closely together.²⁷

The McKay Letter and Virtu Letter contest this.²⁸ First, the McKay Letter argues that the fact that IDS believes that the Data Center Pole could handle four additional antennas “casts doubt on the veracity of past representations” that there were space limitations with respect to the pole,²⁹ especially when public towers are capable of supporting additional market participants’ wireless equipment. As noted in the letters, IDS got approval to put four additional antennas on the Data Center Pole.³⁰ What the letter writers do not know is that IDS had to rework the placement of the equipment already on the Data Center Pole simply to make room for those antennas. Comparing the use of the 160 foot Data Center Pole with the use of 350 foot commercial towers doesn’t make the 160 foot Data Center Pole taller.³¹

For its part, the Virtu Letter calls the representation that there is limited capacity on the Data Center Pole “puzzling” because the NYSE Exchanges “for years [have] operated a thriving business allowing third-party firms to collocate on its premises through other means.” The comparison is meaningless: the fact that there is room for the co-location of customers’ equipment inside the large Mahwah data center does not have anything to do with the capacity of a 160 foot pole.

The Virtu Letter makes much of the fact that the NYSE Exchanges “selected” one wireless provider to locate its antennas on the Data Center Pole.³² In fact, an important distinction applies to the Anova wireless equipment. Only its equipment for the wireless network used for the IDS Wireless Services is allowed on the Data Center Pole. The equipment for services Anova offers under its own name is not allowed on the Data Center Pole.

²⁶ See Virtu Letter, at 3; XR Letter, at 1-2.

²⁷ See, e.g., 85 FR 8938, supra note 4, at 8943, and 85 FR 10752, supra note 4, at 10759.

²⁸ See also XR Letter, at 2.

²⁹ McKay Letter, at 8.

³⁰ Id., at 8.

³¹ The XR Letter cited the example of a tower near a Chicago Mercantile Exchange, Inc. data center with capacity for approximately 35 microwave dishes. XR Letter, at 2; see also FIA PTG Letter, at 2. That tower is 350 feet tall -- approximately 190 feet taller than the Data Center Pole. See Bloomberg Businessweek, “The Gazillion-Dollar Standoff Over Two High-Frequency Trading Towers,” March 8, 2019, at <https://www.bloomberg.com/news/features/2019-03-08/the-gazillion-dollar-standoff-over-two-high-frequency-trading-towers>.

³² Virtu Letter, at 2.

The Letters' "Facility" Arguments Are Not Conclusive

Most of the letters take issue with the NYSE Exchanges' conclusion that the Wireless Services are not facilities of the Exchanges as defined under the Act.³³ A careful review of the letters shows nothing that causes the NYSE Exchanges to change their conclusion, which is based on an assessment of the specific facts and circumstances of the Wireless Services.

The definition of "facility" in the Act³⁴ can be broken into four prongs, as follows:

The term "facility" when used with respect to an exchange includes [1] its premises, [2] tangible or intangible property whether on the premises or not, [3] any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and [4] any right of the exchange to the use of any property or service.

The Wireless Services Are Not the Premises of the NYSE Exchanges

The first prong provides that the term "facility" includes an exchange's premises. Premises are generally defined as referring to an entity's building, land, and appurtenances.³⁵ The prong is not applicable in this case, because the Wireless Services are services, not premises.

The Bloomberg Letter contests that the Wireless Connections are premises of the NYSE Exchanges because they "are physically located on the property of the data center."³⁶ In fact, the Wireless Services use the entire wireless network between the Mahwah data center and Third Party Data Centers. That wireless network is largely owned, operated and maintained by Anova. Even if the statement in the Bloomberg Letter were true, however, it would still not make the Wireless Services facilities under the first prong: the fact that a service uses physical premises does not transform that service itself into

³³ See Bloomberg Letter, at 3; Healthy Markets letter, at 6-7; IMC Letter, at 2; McKay Letter, at 1; Virtu Letter, at 3; and XR Letter, at 1.

³⁴ 15 USC §78c(a)(2).

³⁵ See, e.g., definition of "premises" in Merriam-Webster Dictionary, at <https://www.merriam-webster.com/dictionary/premises>, and Cambridge English Dictionary, at <https://dictionary.cambridge.org/us/dictionary/english/premises>.

³⁶ Bloomberg Letter, at 4. The Virtu Letter accepts that the first prong of the definition of "facility" is not applicable, but claims that in their argument, the Wireless Filings "acknowledge... that the Commission has the right to regulate the NYSE's premises, but on the other hand make ... an untenable argument that everything that exists on those premises is shielded from [Commission] regulation." Virtu Letter, at 6. This is clearly untrue. The NYSE Exchanges have long submitted those services on NYSE Exchange premises and Mahwah data center grounds that are, in fact, facilities of the NYSE Exchanges to Commission regulation. See, e.g. Securities Exchange Act Release No. 62960 (September 21, 2010), 75 FR 59310 (September 27, 2010) (SR-NYSE-2010-56).

premises.

The Wireless Services Are Not the Property of the NYSE Exchanges

The second prong of the definition provides that a facility includes an exchange's "tangible or intangible property whether on the premises or not." The question, then, is whether the Wireless Services are tangible or intangible property of the NYSE Exchanges. They are not: they are services. Similar to the first prong, the fact that a service uses property does not transform that service itself into property.

Some letters suggest that, despite what the Wireless Filings say, the Mahwah data center and its grounds must be the property of the NYSE Exchanges. For example, the McKay letter posits that because the NYSE Exchanges have made statements in prior Commission filings about the use of the Data Center Pole, the NYSE Exchanges must own it, and so the Wireless Connections must be facilities.³⁷ However, making statements about something does not convert it into NYSE Exchange property. Although it supports equipment related to filed wireless co-location services,³⁸ the Data Center Pole does not belong to any of the NYSE Exchanges. The McKay Letter continues by contesting that "[i]t is unclear who else but the [NYSE] Exchange[s] could have, or would have been motivated to, limit access to the [Data Center] Pole to just"

³⁷ McKay Letter, at 4-5. The McKay Letter is incorrect in suggesting that the NYSE Exchanges must offer an explanation as to why the Data Center Pole is not the property of the NYSE Exchanges. *Id.*, at 4. The Act does not require that exchange affiliates justify why they own particular assets. Similarly, it is incorrect to suggest that the Wireless Connections are facilities simply because they connect to the Data Center Pole "located on the premises" of the NYSE Exchanges. *Id.* Any determination that a service is a facility must be based on the definition in the Act, not rhetoric. The McKay Letter accurately points out that past co-location filings described the Mahwah data center as being operated by the NYSE Exchanges. *See, e.g.*, 75 FR 59310, *supra* note 37, at 59310 ("NYSE represented that it planned to begin operating a data center in Mahwah, New Jersey, from which it will offer co-location services"); and Securities Exchange Act Release No. 88227 (February 18, 2020), 85 FR 100499 (February 24, 2020) (SR-NYSE-2020-09) (stating that "[t]he Exchange operates a data center in Mahwah, New Jersey (the 'data center') from which it provides co-location services to Users"). That formulation began to be used in 2010, well before ICE purchased the NYSE Exchanges. In truth, the reference was a simplified description of the relationship, as neither the NYSE nor NYSE American LLC operated the entire Mahwah data center, although they used it for co-location services. Likewise, the NYSE Exchanges recognize that two NYSE Group engineers testifying at the Mahwah hearing referred to the Mahwah data center as a facility of, and the property of, the NYSE. *See* Healthy Markets Letter, at 5. Their use of the NYSE instead of IDS or NYSE Group was incorrect as a factual matter. The Facilities of the NYSE Exchanges are located in the Mahwah data center, but the data center is not owned or operated by any of the NYSE Exchanges.

³⁸ *See, e.g.*, 80 FR 81609, *supra* note 22, and Securities Exchange Act Release No. 80125 (February 28, 2017), 82 FR 12658 (March 6, 2017) (SR-NYSE-2017-05) (notice of filing and immediate effectiveness of proposed rule change to the co-location services offered by the Exchange adding a wireless connection to Toronto Stock Exchange third party data).

IDS and Anova.³⁹

The response is simple: the pole was built on grounds that ICE already leased and over which it had control for security purposes. The existing township height limitation for the pole was 90 feet, so a variance had to be obtained for permission to make it 160 feet tall. The variance request indicated that the tower was not designed for the collation of the antennas of other communications companies. In other words, IDS built the pole it needed for the services it planned to offer.

The McKay Letter notes that the Commission has previously found that services operated by an entity unaffiliated with an exchange can constitute a facility of that exchange.⁴⁰ The NYSE Exchanges agree with that statement; they do not contend that no service operated by a third party could be a facility. The NYSE Exchanges simply contend that, in this case, the Wireless Services do not meet the requirements of the definition set forth in the Act.

The McKay Letter contends that, “if the mere use of an affiliate or a third party to carry out an exchange function or service renders that function or service as no longer a ‘facility’ of an exchange, exchanges would delegate all their functions and services to third parties to avoid subjecting them to the rule filing process.”⁴¹ In a footnote it goes on to state that on this basis “the Exchange could simply circumvent categorizing a product or service as a facility by moving ownership to its parent or affiliate.”⁴² Again, these comments mischaracterize the NYSE Exchanges’ facility analysis. Only the first two prongs of the definition of facility focus on ownership, either of premises or property. The third and fourth prongs are focused on rights, not ownership, and so delegating a function or transferring ownership to a third party or corporate affiliate would not make something cease being a facility or otherwise remove it from the rule filing process, and the NYSE Exchanges do not contend that it would.⁴³ It would simply mean that the first two prongs did not apply.⁴⁴

³⁹ McKay Letter, at 5.

⁴⁰ Id.

⁴¹ Id.

⁴² Id., at note 20. See also SIFMA Letter, at note 7.

⁴³ For example, co-location in the Mahwah data center is a facility of the NYSE Exchanges and subject to Commission regulation, even though the Mahwah data center is owned by ICE Affiliates, not any of the NYSE Exchanges.

⁴⁴ Similarly, the Virtu Letter argues that the “contention that the Wireless Connections are not facilities of an exchange because they are being offered by corporate affiliates fails on a number of fronts, and is merely an effort to obfuscate the facts with a false narrative of form over substance.” Virtu Letter, at 4. This mischaracterizes the analysis set forth in the Wireless Filings. The Virtu Letter makes much of the fact that the NYSE Group both submitted the variance application to the Town of Mahwah Zoning Board and is an affiliate of the NYSE Exchanges. Id. Indeed, it goes so far as to call proposal “NYSE’s variance proposal” and allege that the NYSE “selected an affiliated entity as the provider” of wireless services. Id., at 2. In so doing, the Virtu Letter seems to conflate the NYSE Group and the NYSE. It is correct that the NYSE Group is the parent of the NYSE

Instead, the Wireless Filings state that the Act does not automatically collapse affiliates into the definition of an “exchange,” and thus that the services offered by the ICE Affiliates do not automatically fall within the definition of a “facility.” In fact, the Commission staff recently stated that a self-regulatory organization (“SRO”) may have an affiliate that is not a facility.⁴⁵

The definition of facility focuses on ownership and the right to use properties and services, not corporate relationships. Indeed, if the term “exchange” in the definition of a facility included “an exchange and its affiliates,” then the rest of the functional prongs of the facility definition would be meaningless. And, as noted in the Wireless Filings,⁴⁶ if every affiliate of the NYSE Exchanges were automatically a facility, then the Commission would have jurisdiction over hundreds of ICE subsidiaries worldwide, including futures markets and clearing houses, which would be an absurd reading of the Act.

The McKay Letter also argues that the Wireless Connections meet the requirements of the second prong because the technical specifications for the Wireless Connections, the “ICE Global Network and Colocation Technical Specifications” have an NYSE logo on them, as well as the ICE logo. The McKay Letter argues that “[i]f this is not the type of use of the ‘intangible property’ of the [NYSE] Exchange[s] contemplated by Congress in defining the term ‘facility,’ then it is unclear what would be.”⁴⁷ The statement is incorrect. Putting an NYSE logo on a document that, as stated in its very title, applies to co-location—which is a facility of the NYSE Exchanges—does not in any way relate to the question of whether the Wireless Connections are facilities of the NYSE Exchanges.

The NYSE Exchanges Do Not Have the Right to Use the Wireless Services to Effect or Report a Transaction

The third prong of the definition of “facility” provides that a facility includes

any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or

Exchanges. However, those are not its only subsidiaries, as stated in the very text that the Virtu Letter quotes. *Id.*, at 4. Among other entities, NYSE Group is also the indirect parent of NYSE Technologies Connectivity, Inc., which is one of the IDS entities.

⁴⁵ See Securities Exchange release 88216, 85 FR 16726 (March 24, 2020) (proposed rule on market data infrastructure), at note 537 (noting that an “SRO could operate a competing consolidator in a separate affiliated entity, not as a facility”) and 16837 (noting that “SROs that wish to become competing consolidators could find it convenient to arrange an affiliate to do this work so as to avoid having their competing consolidator business subject to the same regulatory regime as an SRO”). National securities exchanges, including the NYSE Exchanges, are SROs.

⁴⁶ See, e.g., 85 FR 8938, *supra* note 4, at 8939 and note 17, and 85 FR 10752, *supra* note 4, at 10753 and note 22.

⁴⁷ McKay Letter, at 7.

otherwise, maintained by or with the consent of the exchange).⁴⁸

Whether this prong applies in a given case is a factual question regarding rights of use and the purpose of any such rights. A review of the relevant information shows that, irrespective of what the letters may contend, this prong does not capture either of the Wireless Services.

The Wireless Connections. With respect to the Wireless Connections, the facts are that the NYSE Exchanges do not know whether or when a market participant has entered into an agreement for a Wireless Connection and has no right to approve or disapprove of the provision of a Wireless Connection, in the same way that they would have no right to approve or disapprove of the provision of connectivity to a market participant in co-location or elsewhere by any other provider. The NYSE Exchanges do not put content onto the Wireless Connections. When a customer terminates a Wireless Connection, the NYSE Exchanges do not consent to the termination. ICE Affiliates and Anova own and maintain the underlying wireless network and ICE Affiliates, not the NYSE Exchanges, offer and provide the Wireless Services to customers.

The Wireless Connections do not connect to the NYSE Exchanges' trading and execution systems. As such, the Wireless Connections are not provided for "the purpose of effecting or reporting a transaction on" any of the NYSE Exchanges. Rather, a Wireless Connection facilitates the customer's interaction with itself. Each Wireless Connection connects the IDS equipment in the Third Party Data Center and IDS equipment in the Mahwah data center. At either end of the Wireless Connection, the customer uses a cross connect or other cable to connect its own equipment to the IDS equipment. In the Mahwah data center, the cross connect leads to the customer's server in co-location, not the NYSE Exchanges' trading and execution systems.

The McKay Letter argues that the Wireless Connections are nonetheless facilities for two reasons: first, because "they may be used to effect transactions on the [NYSE] Exchange[s] (and report transactions or other market data disseminated from the [NYSE] Exchange[s]) using Exchange Property (e.g., the [Data Center] Pole),"⁴⁹ and second, because it believes that a cross connect is used to connect to the NYSE Exchanges' systems from the Wireless Connections.⁵⁰ Both are incorrect. As discussed above, the Data Center Pole is not the property of the NYSE Exchanges, and the Wireless Connections connect to the customers' own equipment, not the Exchange Systems.

It is important to remember that the customers' equipment in the Mahwah data center is not provided by, part of, or a facility of, the Exchange. The Exchange provides the space

⁴⁸ 15 USC §78c(a)(2).

⁴⁹ McKay Letter, at 6. See also Bloomberg Letter, at 4, and SIFMA Letter, at 2. It is not clear to the NYSE Exchanges why the SIFMA Letter alleges that the wireless connectivity feeds are "exclusively provided by NYSE to NYSE Affiliate." Id., at 2. If the letter is referring to the Wireless Market Data Connections, the NYSE data is provided to all purchasers. If it is referring to the Wireless Connections, those are not provided by to IDS by the NYSE Exchanges.

⁵⁰ McKay Letter, at 6.

in which customers' equipment is housed, and permits customers to use their equipment to communicate with the SRO Systems through services, such as connections to the local area networks, that are filed with the Commission.⁵¹ Accordingly, even if a customer were to use a Wireless Connection to send instructions to trade or to receive a report of a trade, the customer would not be sending instructions to the Exchange, but rather to its own equipment.

The Virtu Letter contends that the Wireless Connections are nonetheless facilities of the NYSE Exchanges:

Even though the customer's equipment is sitting in between [the NYSE Exchanges] and the Wireless Connections, the Wireless Connections are an integral and necessary part of a competitive transaction on the NYSE [E]xchanges and a "must have" for the market makers in a competitive world where speed is critical.⁵²

Contrary to this statement, the Wireless Connections are not "must haves," since most of the high speed traders of which IDS is aware do not have Wireless Connections. Many of them have proprietary networks. For those that do not, as noted above, other wireless providers compete with IDS, and market participants have a choice about what connection to use—and often choose not to use IDS. The definition of "facility" does not ask whether a service is a "must have." Rather, it asks about rights, control and consent.

The Wireless Market Data Connections. With respect to Wireless Market Data Connections, the facts are that the NYSE Exchanges do not know whether or when a customer has entered into an agreement for a Wireless Market Data Connection and has no right to approve or disapprove of the provision of a Wireless Market Data Connection, any more than they would if the provider was a third party. They do not put the Selected Market Data content onto the Wireless Market Data Connections or send it to customers. When requesting authorization from the NYSE, NYSE Arca or NYSE National to provide a customer with Selected Market Data, the ICE Affiliate providing the Wireless Market Data Connection uses the same on-line tool as all data vendors. When a customer terminates a Wireless Market Data Connection, the NYSE Exchanges do not consent to the termination. In addition, it is not possible to use a Wireless Market Data Connection to effect a transaction on an NYSE Exchange: they are one-way connections away from the Mahwah data center.⁵³ Customers cannot use them to send trading

⁵¹ See Securities Exchange Act Release No. 75 FR 59310, supra note 37. As described by the Commission, co-location is when a "trading center . . . rents rack space to market participants that enables them to place their servers in close physical proximity to a trading center's matching engine." Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (concept release on equity market structure), at 3610 (noting that "[c]o-location helps minimize network and other types of latencies between the matching engine of trading centers and the servers of market participants").

⁵² Virtu Letter, at 6.

⁵³ The Virtu Letter contests that the Wireless Market Data Connections must be bi-directional. Id., at 7. In fact, the NYSE Exchanges do offer connectivity to third party market data within co-location. Such connectivity is a separate service from the Wireless

orders or information of any sort to the SRO Systems, and the NYSE Exchanges do not use them to send confirmations of trades. Instead, Wireless Market Data Connections solely carry Selected Market Data.

The Virtu Letter seems to read the parenthetical in the third prong of the definition of “facility” as an independent prong of the definition, stating that the NYSE Exchanges contend

that the Wireless Connections are not facilities of an exchange "because the Exchange does not have the right to use the Wireless Market Data Connections to effect or report a transaction on the Exchange." This argument conveniently ignores the second, very clear half of definition of a facility — specifically "(including, among other things, any **system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange**)."⁵⁴

In other words, the Virtu Letter believes that it does not matter if there is a right to the use of premises or property or any service thereof: it presents the parenthetical as its own separate prong. Such a reading would ignore that the parentheses and the word “including” clearly indicate that “any system of communication to or from an exchange . . . maintained by or with the consent of the exchange” is explaining the preceding text. By its terms, the parenthetical is providing a non-exclusive example of the type of property or service to which the prong refers, and does not remove the requirement that there must be a right to use the premises, property or service to effect or report a transaction on an exchange. It is making sure the reader understands that “facility” includes a ticker system that an exchange has the right to use, not creating a new fifth prong to the definition. In fact, if the “right to use” requirement were ignored, every communication provider that connected to an exchange, including any broker-dealer system and telecommunication network, would become a facility of that exchange so long as the exchange consented to the connection, whether or not the connection was used to trade or report a trade, and whether or not the exchange had any right at all to the use of the connection.

In addition, the NYSE Exchanges vigorously object to statements in the Virtu Letter that “[t]here can be no dispute that both the private bandwidth and market data offerings constitute systems of communication 100% controlled and maintained by NYSE [Exchanges], for [their] own benefit and for the benefit of [their] customers,”⁵⁵ that the Wireless Connections “exist, in part, **on NYSE's premises**, where NYSE's affiliated colocation and connectivity vendors are given preferential treatment relative to other

Market Data Connections, and is filed with the Commission. See, e.g., 80 FR 81609, supra note 22, and 82 FR 12658, supra note 39.

⁵⁴ Virtu Letter, at 5. Emphasis in the original.

⁵⁵ Id.

competitive offerings,”⁵⁶ and that the NYSE Exchanges have the right to use the Wireless Market Data Connections.⁵⁷

In making these and similar statements, the Virtu Letter is accusing the NYSE Exchanges of lying to the Commission in the Wireless Filings. It is wrong. The facts are as were stated there and here: IDS, not the NYSE Exchanges, controls and maintains the Wireless Connections; the NYSE Exchanges do not own the Mahwah data center or Data Center Pole; and, as detailed above, the NYSE Exchanges do not have the right to use the Wireless Market Data Connections.⁵⁸

The NYSE Exchanges Do Not Have the Right to Use the Wireless Services

The fourth prong of the definition provides that a facility includes “any right of the exchange to the use of any property or service.” As described above, the Exchange does not have the right to use the Wireless Services. Instead, the Wireless Market Data Connections are used by market participants who decide to use that service, and the customers of the Wireless Connections are customers who enter into an agreement with ICE Affiliates for connections over a wireless network, much of which is owned, operated and maintained by Anova.

The Letters’ More General Arguments Are Not Determinative

Several of the letters offer general arguments that are not as tied to the definition of “facility.”

First, the Bloomberg Letter offers a catch-all argument, stating that “these connectivity services have been considered for some time, including in prior NYSE filings, to fall within the definition of facility.”⁵⁹ Unlike the Bloomberg Letter, the NYSE Exchanges understand that not all connectivity services are the same. Some, like the filed co-location services, connect to trading engines. Others, like the Wireless Connections, connect to non-Exchange equipment. The mere fact that the former is a facility does not imply that the latter is one as well.

⁵⁶ Id. Emphasis in the original. The Virtu Letter makes additional similar allegations, to which the NYSE Exchanges also object.

⁵⁷ Id.

⁵⁸ The Virtu Letter asks how, if the NYSE Exchanges do not have the right to use the Wireless Market Data Connections, the data could be transmitted. The answer is as stated in the Wireless Filings: the NYSE Exchanges do not put the Selected Market Data content onto the Wireless Market Data Connections or send it to customers; IDS does. The relevant NYSE Exchange provides confirmation to IDS that a customer is authorized to receive the relevant Selected Market Data, but does not know how or where that customer receives it. If the customer is already taking the relevant Selected Market Data through another medium or at a different site, IDS does not need to seek the NYSE Exchange’s approval before providing the data on a Wireless Market Data Connection.

⁵⁹ Bloomberg Letter, at 4. The letter does not cite any support for its statement.

Second, the Healthy Markets Letter makes general arguments contending that the “‘facility’ of an exchange should cover access to the physical facility”⁶⁰ and that “the ‘facility of an exchange’ clearly encompasses any operation that includes access to or information from the exchange--whether physical or not.”⁶¹ These statements are not based on the actual definition in the Act, which relies on premises, property, and rights related thereto, not “access to or information from.”

The Healthy Markets Letter goes on to describe the history of legislation that was proposed, but not passed, almost three years ago to contend that the NYSE Exchanges are relying on draft legislation, not the Act, in the Wireless Filings.⁶² This contention is clearly incorrect -- the pages of legal analysis of the definitions of “exchange” and “facility” set forth in the Wireless Filings show that the NYSE Exchanges carefully and thoughtfully walked through the provisions in the current Act in making their decisions.⁶³

As stated in the Wireless Filings,⁶⁴ the legal conclusion that the Wireless Services are not facilities of the Exchange is strongly supported by the facts. The Wireless Services are neither necessary for, nor integrally connected to, the operations of the Exchange. The Wireless Connections are empty pipes that customers can use as they like. In this context, IDS simply acts as a vendor selling connectivity, just like the other vendors that offer wireless connections in the Carteret and Secaucus Third Party Data Centers and fiber connections to all the Third Party Data Centers. For their part, the Wireless Market Data Connections are one-way connections away from the Mahwah data center. In this context, IDS simply acts as a vendor, selling connectivity to Selected Market Data just like the other vendors that offer wireless connections in the Carteret and Secaucus Third Party Data Centers and fiber connections to all the Third Party Data Centers. In both cases, the fact that it is ICE Affiliates that offer the Wireless Connections does not make the Wireless Connections facilities of the Exchange any more than are the connections offered by other parties.

The Letters’ Request For Additional Information Is Disingenuous

Various of the letters contend that the Wireless Filings should include additional information regarding the Wireless Connections. Most notable is the list of questions set forth in the McKay Letter, not least because McKay Brothers is the commentator that would most benefit from IDS making the information available.

The McKay Letter asks for more detail regarding the purported latency advantage it believes that the Wireless Connections have. First, “to the extent that there is a speed or other advantage,” it demands information regarding:

⁶⁰ Healthy Markets Letter, at 6.

⁶¹ Id., at 7.

⁶² Id., at 7-8. See also Bloomberg Letter, at 5-6.

⁶³ See, e.g., 85 FR 8938, supra note 4, at 8939 - 8941, and 85 FR 10752, supra note 4, at 10754-10756.

⁶⁴ See, e.g., 85 FR 8938, supra note 4, at 8941, and 85 FR 10752, supra note 4, at 10755-10756.

(1) *Magnitude* – the magnitude of the advantage, as measured in microseconds, distance (e.g., in the case of a geographic latency advantage), or otherwise; [and]

(2) *Implementation* – how the exchange (with or through affiliates or vendors) provides such advantage (e.g., by reducing geographic latency or adding latency to other connections through a longer fiber route)[.]⁶⁵

The NYSE Exchanges cannot describe the magnitude of an advantage they do not believe IDS has.⁶⁶ Importantly, IDS already makes its latency figures public.⁶⁷ What it cannot do is provide information regarding the magnitude of an alleged advantage, in microseconds or distance, for a reason that the McKay Letter omits to mention: the lack of comparable information. Neither commercial competitors like the McKay Brothers nor entities with proprietary wireless networks are obligated to make their latency figures or geographic path public. The McKay Brothers can see IDS' latency figures, but IDS cannot see theirs. The request is particularly disingenuous given that McKay Brothers' own website claims that it has the "Lowest Known Latency Bandwidth Service" in the New Jersey triangle of Mahwah-Secaucus-Carteret.⁶⁸

The McKay Letter asks about geographic latency. The Wireless Services between Mahwah and Secaucus and Carteret use the Data Center Pole, and so to the extent that there is a geographic advantage in the fiber portion from one end of the wireless network to the Mahwah data center, it would be there. However, that is just approximately 700 feet of the approximately 28 and 40 miles between Mahwah and the Secaucus and Carteret Third Party Data Centers, respectively. Because third parties do not make their entire network path public, IDS cannot assess whether, or where, geographic differences may lie.

Indeed, wireless providers have a strong incentive not to make such sensitive competitive information publicly available. Latency is one of their primary points of competition. If they made information public regarding their latency or the factors that feed into it, such as the wireless equipment utilized, the route of, and number of towers or buildings in, the network, and the fiber equipment used at either end of the connection, their competitors could use that information to compete. If all wireless providers were required to provide such information, the consumer arguably might benefit. But that is not what the McKay Letter is suggesting. The McKay Letter asks only that IDS provide this information, presumably so that McKay Brothers can use it to better compete with IDS.

⁶⁵ McKay Letter, at 12.

⁶⁶ There is no commercial competitor for the Mahwah-Markham, Canada route.

⁶⁷ ICE Global Network latency information for the wireless provision of market data and for wireless circuits within New Jersey is posted on its website at <https://www.theice.com/market-data/connectivity-and-feeds/wireless/new-jersey-metro>.

⁶⁸ See notes 19 and 20, supra.

The McKay Letter asks for additional disclosure “to the extent that there is a speed or other advantage.” Specifically, it asks for information regarding:

(3) *Availability* – who may be provided with the advantage and on what terms and conditions as well as who would not be able to use the advantage;

(4) *Impact* – how those who do not avail themselves of the advantage (or are not able to) may be negatively impacted by the advantage;

(5) *Exchange’s Interest* – how the exchange (or its affiliates or selected vendors) are likely to benefit by providing the advantage; [and]

(6) *Consistency with the Exchange Act* – as with all rule filings, a description of why the advantage is consistent with Exchange Act requirements including how the advantage does not unfairly discriminate against market participants and does not unduly burden competition.⁶⁹

The requested information is already in the Wireless Filings.⁷⁰ The proposed Wireless Services would apply to all market participants equally. The NYSE Exchanges would not, for example, provide connectivity with lower latency levels to select customers, a commitment IDS does not believe any of the Wireless Connectivity’s competitors have made. The proposed pricing is set forth in the Wireless Filings. The services in the Wireless Filings are provided in a competitive market. Market participants that want a connection between a Third Party Data Center and the Mahwah data center may have or create a new proprietary wireless connection, connect through another market participant, or utilize fiber connections offered by the NYSE Exchanges, ICE Affiliates, other service providers and third party telecommunications providers.

The Healthy Markets Letter points to recent guidance from the Commission staff regarding exchange fee flings to contend that the Wireless Filings should include additional information regarding the Wireless Services.⁷¹ However, a review of the requested information shows that, although it overlaps with the information requested in the McKay Letter, very little of it is either available or relevant. The Healthy Markets Letter starts by asking whether third party wireless providers would be able to install equipment on the roof of the Mahwah Data Center, which, as noted above, is irrelevant because neither the Wireless Services nor other IDS services utilize the roof.⁷² Next, the Healthy Markets Letter asks what the timing difference would be between third party wireless providers and the Wireless Services of IDS or the Securities Information Processor; what the impact on subscribers would be versus the “slower third-party

⁶⁹ McKay Letter, at 11-12.

⁷⁰ See, e.g., 85 FR 8938, supra note 4, at 8942-8945, and 85 FR 10752, supra note 4, at 10756-10759.

⁷¹ Healthy Markets Letter, at 9, citing *Staff Guidance on SRO Rule Filings Relating to Fees*, Sec. and Exch. Comm’n, May 21, 2019, available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

⁷² Healthy Markets Letter, at 9.

wireless connectivity” and versus non-subscribers would be.⁷³ As noted above, these questions are not answerable, as third parties are not required to make latency figures available. Further, the NYSE Exchanges reject the Healthy Markets Letter premise that third party wireless connectivity offerings are necessarily slower. The NYSE Exchanges simply cannot know that and, in fact, believe other services are faster--as, apparently, McKay Brothers does as well.⁷⁴

The Healthy Markets Letter asks two relevant questions.⁷⁵ First, it asks how many new subscribers the NYSE Exchanges predict for the Wireless Services. The response is that the NYSE Exchanges do not predict that they will have any new subscribers as a result of the filings. Instead, due to the competitive disadvantages filing these services create, IDS expects that the filings would lead to fewer subscribers, as customers will move to competitors that can undercut IDS’ fees, negotiate for services, and connect to a new data feed without the delay and uncertainty of a filing.

Second, like the Bloomberg Letter and SIFMA Letter,⁷⁶ the Healthy Markets Letter asks how the NYSE Exchanges established the proposed fees. In fact, the Wireless Filings address why the proposed pricing for the Wireless Services meet the requirements of the Act in the competitive environment in which they are offered.⁷⁷ IDS’ assessment of that competitive environment led it to set the proposed fees.

Finally, the XR Letter alleges that the NYSE Exchanges have a conflict of interest because their affiliates offer wireless connectivity services:

A potential conflict of interest arises in any instance in which an exchange, directly or indirectly, offers services that are also provided by other market participants (e.g., routing broker, wireless connectivity). As a for profit entity, the Exchange is incentivized to provide any available advantage to its services so as to maximize their profitability and has done so here by providing the Wireless Connections with a faster means of connecting to the Exchange.⁷⁸

The reality is that the Exchange Act does not bar exchanges from having affiliates. Moreover, the NYSE Exchanges do not, as a functional matter, control IDS. The XR Letter’s claim that the NYSE Exchanges provided the Wireless Connections with a faster means of connecting suggests that it was the NYSE Exchanges that chose where to place the Data Center Pole. In reality, they had nothing to do with it: IDS made the decisions.

⁷³ Id., at 10. The Securities Information Processor is a fiber connection and not relevant to the question of whether the Wireless Filings should be approved.

⁷⁴ See notes 19 and 20, supra.

⁷⁵ Healthy Markets Letter, at 10.

⁷⁶ See Bloomberg Letter, at 5, and SIFMA Letter, at 2-3.

⁷⁷ See, e.g., 85 FR 8938, supra note 4, at 8943-8944, and 85 FR 10752, supra note 4, at 10757-10759.

⁷⁸ XR Letter, at 2.

Ms. Vanessa Countryman
May 8, 2020
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For the reasons set forth above and in the Wireless Filings, the NYSE Exchanges respectfully request that the Commission approve the Wireless Filings.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Elizabeth K. King". The signature is fluid and cursive, with a prominent initial "E" and a long, sweeping underline.

Elizabeth K. King

cc: Honorable Jay Clayton, Chairman
Honorable Hester M. Peirce, Commissioner
Honorable Elad L. Roisman, Commissioner
Honorable Allison Herren Lee, Commissioner
Brett Redfearn, Director, Division of Trading and Markets