Elizabeth K. King

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

[redacted]

September 29, 2021

Via Email

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

Re: Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Amend the Fee Schedule to Add Meet-Me-Room Connectivity Services Available at the Mahwah Data Center (Exchange Act Release No. 92368)

Dear Ms. Countryman:

The New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (collectively, the "Exchanges") respectfully submit this comment letter in response to the above-referenced order by the Securities and Exchange Commission (the "Commission").[1] The Order instituted proceedings to determine whether to approve or disapprove proposed rule changes[2] that would amend the schedule of wireless, circuits, and non-colocation connectivity services available at the Mahwah Data Center (the "Fee Schedule") to include services available to customers in the meet me rooms in the Mahwah Data Center ("MMRs"), to establish fees for such services, and to add procedures for the allocation of cabinets and power to such customers.

The MMRs were not originally part of the Mahwah Data Center building. Prior to January 2013, NYSE Euronext, then the parent of three of the Exchanges,[3] controlled all connectivity options

---

1 See Securities Exchange Act Release No. 92368 (July 9, 2021), 86 FR 37356 (July 15, 2021) (SR–NYSE–2021–25, SR–NYSEAMER–2021–21, SR–NYSEArca–2021–24, SR–NYSECHX–2021–07, SR–NYSENAT–2021–09) (Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Amend the Fee Schedule to Add Meet-Me-Room Connectivity Services Available at the Mahwah Data Center) ("Order")).

2 See Securities Exchange Act Release Nos. 91598 (April 16, 2021), 86 FR 21373 (April 22, 2021) (SR-NYSE-2021-25); 91599 (April 16, 2021), 86 FR 21365 (April 22, 2021) (SR-NYSEAMER-2021-21); 91600 (April 16, 2021), 86 FR 21384 (April 22, 2021) (SRNYSEArca-2021-24); 91601 (April 16, 2021), 86 FR 21410 (April 22, 2021) (SRNYSECHX-2021-07); and 91602 (April 16, 2021), 86 FR 21393 (April 22, 2021) (SRNYSENAT-2021-09) (collectively, the "Filings"). Capitalized terms not otherwise defined herein are used as defined in the Filings.

3 NYSE Chicago, Inc. and NYSE National, Inc. were acquired after 2013.

into the building. In response to customer demand for more connectivity choices, the MMRs were opened to Telecoms[4] in January 2013, enabling Telecoms to compete with the parent companies of the Exchanges (first, NYSE Euronext, and then later Intercontinental Exchange, Inc.) to provide access to services in the Mahwah Data Center. ICE Data Services ("IDS") now operates the Mahwah Data Center, and the MMR structure makes it possible for Telecoms to offer their customers circuits into and out of the Mahwah Data Center in competition with IDS's circuit offerings.

In the Order, the Commission questioned "whether the Exchanges have provided sufficient information to demonstrate that the proposals, including the proposed fees for MMR services, are consistent with the Act."[5] As discussed in more detail below, the Exchanges believe that the information provided herein and in the Filings demonstrates that the proposed change meets the requirements of the Act, and the Commission should therefore approve the Filings.

Background

All customers of services offered in the Mahwah Data Center, whether such customers obtain co-location services directly from the Exchanges or purchase services available to customers that are not co-location Users (together, "Mahwah Customers"), require circuits connecting into and out of the Mahwah Data Center. Those circuits enable Mahwah Customers to connect their equipment outside of the Mahwah Data Center to their equipment or port within the Mahwah Data Center. As noted above, MMRs were not originally part of the Mahwah Data Center building; the MMRs opened in January 2013. Today, the MMRs enable 15 Telecoms to offer their customers circuits into and out of the Mahwah Data Center in direct competition with IDS.[6]

The 15 Telecoms offer connections to the Mahwah Customers in the form of wired circuits into and out of the two MMRs in the Mahwah Data Center. Currently, the Telecoms offer their customers almost 400 circuits—more than 22 times the number of IDS's 18 circuits. All but two of the Mahwah Customers that use IDS circuits also connect to Telecom circuits in the MMRs.

A Telecom completes a circuit by placing equipment in a MMR and installing carrier circuits between its MMR equipment and one or more points outside the Mahwah Data Center.[7]

---

4 A "Telecom" is a third-party telecommunications service provider that provides wired circuits into and out of the Mahwah Data Center. Even if its network is otherwise wireless, a Telecom's circuits into and out of the Mahwah Data Center must be wired. Telecoms are licensed by the Federal Communications Commission and are not required to be, or be affiliated with, a member of the Exchange or of an Affiliate SRO.

5 Order, supra note 1, at 37360. See 15 U.S.C. 78s(b)(1).

6 The Exchanges have filed proposed rule changes regarding the IDS circuits. See, e.g., Securities Exchange Act Release No. 91217 (February 26, 2021), 86 FR 12715 (March 4, 2021) (SR-NYSE-2021-14); see also 86 FR 21373, supra note 2, at note 11.

7 A Telecom also may sell access to its circuits to a second Telecom, which allows the second Telecom to use the first Telecom's circuit to access the Mahwah Data Center. In this way, the second Telecom gains access to the Mahwah Data Center, where it installs its

Mahwah Customers that have contracted with the Telecom to use the circuit connect to the Telecom's MMR equipment using a cross connect. Once connected to the Telecom's equipment, the Mahwah Customers can use the Telecom's circuit to transport data into and out of the Mahwah Data Center.

Telecoms are required to terminate their connections at a MMR. They cannot go further into the Mahwah Data Center building. IDS receives the terminated Telecom circuits' hand-off in a MMR, and then manages connectivity from the MMR to the Mahwah Customer's equipment in colocation or for non-colocation services, depending on the Mahwah Customer's demand.

The Filings propose to amend the Fee Schedule to add the services available in the MMRs and establish fees for such services. The MMR services and fees would be added to the Fee Schedule under the new heading "C. Meet-Me-Room ('MMR') Services." The Filings also propose procedures for the allocation of cabinets and power to Telecoms in the Fee Schedule and would change the title of the Fee Schedule to "Wireless and Meet-Me-Room Connectivity Fees and Charges."

The Proposed Services Are Consistent with the Act

The Exchanges believe that the proposed rule change is reasonable and equitable because the MMR services facilitate the availability of competitive Telecom services in the Mahwah Data Center in a manner designed to be secure and fair. Absent the MMR services, IDS would be the only service provider for circuits into and out of the Mahwah Data Center. The Filings set forth the reasons why the Exchanges believe that the proposed fees are consistent with the Act.[8] As noted therein, the Exchanges understand that most Mahwah Customers use Telecom circuits into and out of the Mahwah Data Center, and most of the Telecoms that provide circuits do so at fees lower than those of IDS for comparable services.[9] This evidences that MMR fees are set at a level that allows Telecoms to be competitive with each other and IDS.

The Exchanges' conclusion that the proposed rule change is consistent with the Act takes into account the fact that no third party can establish a meet me room in the Mahwah Data Center, leaving IDS the sole entity that can control a MMR. IDS's operation and maintenance of the Mahwah Data Center MMRs is both rational and consistent with the normal commercial practice of data centers. While the Exchanges understand that most data centers offer meet me rooms, they are not aware of any data center operator, within or outside the U.S., that allows a third party to run a meet me room.

Although IDS faces no direct competition from any other party regarding its provision of MMR services, the fees that IDS sets for MMR services are nevertheless constrained by significant competitive forces.

---

equipment in an MMR, without incurring the cost of installing proprietary circuits to the Mahwah Data Center.

8 See 86 FR 21373, supra note 2, at 21377-21379; see also 15 U.S.C. 78f(b)(4), (5) and (8).

9 Id., at 21377.

First, if IDS attempted to set the fees for MMR services at a supra-competitive level, Telecoms would cease using MMR services, as a rational Telecom would not expend the effort and cost required to set up one or more circuits into a MMR and to sell its services to customers unless it were commercially viable. In other words, if it cost too much to use the MMRs, few or no Telecoms would use them, as Telecoms are not obligated to provide circuits to the Mahwah Data Center. Instead, they would only be present, or increase their presence in, the competing meet me rooms in third party data centers. The existence of other data centers with meet me rooms in which Telecoms can provide service to their customers imposes competitive pressures on MMR service fees. In IDS' experience, Telecoms in the MMRs rarely leave, suggesting that the Telecoms find their presence there to be commercially viable.

In addition to the Mahwah Data Center, the competition among data centers includes third party data centers in Secaucus and Carteret, New Jersey, and, to some extent, Chicago, Illinois. The meet me rooms in those data centers are provided by the data center operators, such as Equinix, which are not subject to regulation by the Commission.

The Mahwah Data Center does not hold a dominant position in the competition among these data centers: the others lease space to markets that account for larger shares of the U.S. equities and options trading volumes than the Exchanges in the Mahwah Data Center. Specifically, the Mahwah Data Center holds the matching engines of the five Exchanges, which include five equities and two options markets, as well as one alternative trading system ("ATS"). Together, the Exchanges have less than 25% of the U.S. equity volume and less than 20% of the U.S. options volume.[10] By comparison, the data center in Secaucus, New Jersey is home to eight equities exchanges, eight options exchanges, and dozens of ATS and single dealer platforms.[11] Alone, the Secaucus data center handles about 50% of the U.S. equities volume and about 50% of the U.S. options volume. The data center in Carteret, New Jersey has three equity exchanges, six options venues and at least one ATS,[12] and handles approximately 20%

---

[10] Daily, five-day, and month-to-date volumes are available at https://www.cboe.com/us/equities/market_statistics/ for the equities market and https://www.cboe.com/us/options/market_statistics/ for the options market.

[11] The Secaucus, New Jersey data center holds the matching engines for BOX Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Long-Term Stock Exchange, Inc., MEMX LLC, MIAX Emerald, LLC, Miami International Securities Exchange, LLC, and MIAX Pearl, LLC. Customers access Investors Exchange LLC in the Secaucus data center as well; its matching engine is in Weehawken, New Jersey. See Securities Exchange Act Release No. 91016 (January 28, 2021), 86 FR 8238 (February 4, 2021) (SR-IEX-2020-18). The Cboe markets' secondary data centers are in Chicago. See https://cdn.cboe.com/resources/membership/US_Equities_Options_Connectivity_Manual.pdf, at 4.

[12] The Carteret, New Jersey data center holds the matching engines for Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, and The Nasdaq Stock Market LLC. Their secondary data centers are in Chicago. See https://www.nasdaqtrader.com/Trader.aspx?id=POPs.

of the U.S. equity and approximately 33% of the U.S. options volume. Ultimately, the Exchanges cannot assume that being in the Mahwah MMRs is as valuable to a Telecom as being in the Secaucus or Carteret data center meet me rooms.

Second, setting fees for MMR services at too high a level would discourage Telecoms from building connectivity into Mahwah, which would in turn diminish the overall value of the Mahwah Data Center to the Mahwah Customers and IDS. It is in the Exchanges' and IDS's interest to have as many Mahwah Customers as possible. To that end, the Exchanges and IDS are strongly incentivized to ensure that every potential Mahwah Customer can have circuits into and out of the Mahwah Data Center and, ideally, is offered a range of circuit options that make connecting to the Mahwah Data Center as convenient as possible. As noted, the vast majority of Mahwah Customers use the Telecoms' circuits to connect their equipment outside of the Mahwah Data Center to their equipment or port within the Mahwah Data Center.[13] The Exchanges' and IDS's commercial interests are to keep MMR prices at a level acceptable to the Telecoms so that the Telecoms will use the MMRs, enabling as many Mahwah Customers as possible to connect in and out of the Mahwah Data Center. Having more Telecom circuits available, and having those circuits span a variety of options,[14] maximizes the Mahwah Customers' ability to connect to the Mahwah Data Center and to purchase non-MMR services.

The Staff of the Commission has asked how a Telecom could offer its circuits more cheaply than IDS, when the Telecom has to pay MMR fees.[15] There are at least three reasons.

First, a Telecom can spread all the costs related to its circuits and presence in the MMR, including its MMR fees, across as many customers as it can obtain—which customers include IDS.[16] As discussed above, IDS has no incentive to set fees for MMR services at too high a level, which means that the Telecoms have lower MMR fees to divide among their customers. This makes it easier for Telecoms to charge their customers less. Second, a Telecom can tailor its offerings to its customer's needs without incurring the costs, financial and otherwise, of having to comply with the Act. None of this is proposed to change: the Filings would not set a cap on how many customers a Telecom can have, would not mandate whether a Telecom could be a proprietary entity, would not limit the latency, bandwidth or endpoints of the circuits it can offer, and would not set separate criteria for Telecom circuits based on whether they lead to wireless or fiber networks. Third, although IDS is not subject to MMR fees, it bears other costs when providing its circuits, including Mahwah Data Center infrastructure costs and the fees it

---

13 As noted above, the Telecoms' circuits represent the great majority of the connections to the Mahwah Data Center—almost 400 circuits, compared to 18 IDS circuits.

14 For example, a Telecom can offer a circuit tailored to a Mahwah Customer's bandwidth or latency needs, or that connects to whatever end point outside of the Mahwah Data Center the customer wishes. IDS does not offer such tailored circuits to its customers.

15 Telephone conversation between Commission staff and representatives of IDS and the Exchanges, July 9, 2021.

16 IDS purchases circuits from Telecoms in order to provide IDS circuits. IDS is not a Telecom.

pays to Telecoms. Also, IDS is a specialty provider and not a Telecom. As a result, it cannot take advantage of any economies of scale or efficiency that may be available to Telecoms.

Entirely apart from fees, the Exchanges believe that the proposed rule change is consistent with Section 6(b)(5) of the Act, which among other things requires the rules of exchanges to be designed "to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest."[17] Safeguarding the security of the U.S. national market system—in this case, the data center where the Exchanges maintain their trading engines and publish market data, and where the Securities Industry Automation Corporation ("SIAC") publishes the National Market System ("NMS") data feeds for which it is the exclusive securities information processor—is essential to the operation of a free and open market and national market system and protecting investors and the public interest. The MMR structure furthers that goal.

First, having IDS control the MMRs limits third parties' need to enter the Mahwah Data Center, minimizing security risks. IDS controls who can place equipment inside the Mahwah Data Center, who can access that equipment, and what path they follow once on the data center grounds. Because it controls the MMRs, IDS can establish and enforce usage policies designed to protect the MMRs' security and treat the Telecoms equally and consistently. IDS's control also ensures that the Telecoms cannot go farther into the Mahwah Data Center than the MMRs, and essentially makes the MMRs the demarcation point for Telecom circuits coming into the Mahwah Data Center. If a third party established a meet me room in the Mahwah Data Center, IDS could not ensure its control of any of these matters.

Second, the structure reduces security risks because it allows the Exchanges' trading engines, SIAC's NMS market data publishers, and the ICE Global Network, including the IDS circuits, to be physically and logically segregated from vendors and other third party service providers, including Telecoms.

Third, the MMR structure provides Mahwah Customers with the opportunity to use Telecom circuits to create systems that are potentially more redundant and resilient than if they relied on just one exclusive provider. For example, while the original exclusive NYSE Euronext connectivity option to the Mahwah Data Center (now non-exclusive IDS) was designed to be redundant and resilient,[18] today 15 additional Telecoms make circuits available to Mahwah Customers and help to maintain a securities market infrastructure that is even stronger and

---

[17] 15 U.S.C. 78f(b)(5).

[18] See, e.g., oral testimony of Robert L.D. Colby, Deputy Director, Division of Market Regulation, Securities and Exchange Commission, before the House Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, Committee on Financial Services (February 12, 2003) (*Testimony Concerning Recovery and Renewal: Protecting the Capital Markets Against Terrorism Post 9/11)*, at https://www.sec.gov/news/testimony/021203tsrc.htm.

more robust than originally created. The Exchange believes that the fact that most customers for IDS circuits also purchase Telecom circuits shows the structural importance of the MMR.

The Order Fails to Provide Notice of the Grounds for Disapproval Under Consideration

When instituting proceedings, the Exchange Act obligates the Commission to provide "notice of the grounds for disapproval under consideration."[19] The Commission's own regulations reinforce this statutory notice command.[20] This notice requirement serves important purposes: neither the Exchanges, nor the public, should be forced to guess what the Commission believes may be lacking in a rule filing. Congress designed the notice requirement to ensure that interested parties know what issues are under consideration so that those issues can be fully addressed in the subsequent proceeding.

But the Order here leaves everyone guessing as to the Commission's concerns. The Commission's rote recitation in the Order of the content of the Filings and the requirements of the Act[21] — accompanied by the vaguely circular question "whether the Exchanges have provided sufficient information to demonstrate that the proposals … are consistent with the

---

19 15 U.S.C. 78s(b)(2)(B).

20 See 17 C.F.R. 201.700(b)(2) ("The grounds for disapproval under consideration shall include a brief statement of the matters of fact and law on which the Commission instituted the proceedings, including the areas in which the Commission may have questions or may need to solicit additional information on the proposed rule change or NMS plan filing.").

21 Order, supra note 1, at 37360 ("Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchanges have demonstrated how the proposed fees are consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange 'provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities';
- Whether the Exchanges have demonstrated how the proposed fees are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be 'designed to perfect the operation of a free and open market and a national market system' and 'protect investors and the public interest,' and not be 'designed to permit unfair discrimination between customers, issuers, brokers, or dealers'; and
- Whether the Exchanges have demonstrated how the proposed fees are consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange 'not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].'")

(Internal footnote references omitted.)

Act"[22] – does not satisfy the statutory and regulatory notice requirement because it offers no meaningful guidance on what, if anything, the Commission believes is lacking in the Filing. This defect renders the Order deficient.[23]

The Commission May Be Applying Improper Standards to the Rule Filing

Although the Commission has failed in the Order to put the Exchanges on sufficient notice of what information is lacking relating to the Filings or what the Commission's genuine concerns are, the Commission may be applying a misplaced assumption about the types of information necessary to satisfy the Exchange Act's requirements. In particular, the Commission may be improperly demanding that the Exchanges provide cost data in connection with all rule filings. If so, such a demand would be unlawful.

Neither the Exchange Act nor the Commission's regulations require presentation of cost data in connection with every rule filing.[24] And any demand for cost data in cases where evidence of a competitive market exists would be substantively unjustified.

---

[22] Id.

[23] The Commission's general and vague description of the issues under consideration leaves the Exchanges and other stakeholders in the dark as to what "grounds for disapproval" are actually "under consideration" by the Commission. This undermines the purpose of the review process and violates the statute and the Commission's implementing regulations. Cf. Gerber v. Norton, 294 F.3d 173, 180 (D.C. Cir. 2002) (interpreting notice requirement in Endangered Species Act to mean that "opportunity for comment must be a meaningful opportunity"). In addition, although it would not cure the Commission's failure to provide sufficient notice when it issued the Order, the Commission must also provide non-conclusory and detailed reasoning in approving or disapproving the Filings. In particular, were the Commission to disapprove the Filings, it must provide a reasoned explanation for how and why the Filings fail to satisfy particular statutory or regulatory standards. Indeed, this is "[o]ne of the most fundamental principles of administrative law." Sw. Airlines Co. v. Fed. Energy Regul. Comm'n, 926 F.3d 851, 855 (D.C. Cir. 2019). To satisfy this requirement, moreover, "conclusory statements" – of the type set forth in the Order – "will not do; an 'agency's statement must be one of reasoning.'" Amerijet Int'l, Inc. v. Pistole, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (citation omitted). As the D.C. Circuit has made clear in the rule filing context, it is incumbent on the Commission to explain how a "proposed rule change is [or is not] consistent with the requirements of [the Act] and the rules and regulations issued under [the Act] that are applicable to [the Exchange]." 15 U.S.C. 78s(b)(2)(C)(i)-(ii).

[24] In May 2019, the Division of Trading and Markets issued "Staff Guidance on SRO Rule Filings Relating to Fees" (the "Guidance"), and that Guidance does refer to the potential use of cost data. See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), available at https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees. However, the Exchanges do not have to meet the specific demands of the Guidance in their Filings in order for the Commission to approve those Filings. As then-Chairman Jay Clayton stated, the Guidance "is not a rule, regulation, or statement of the Commission." Chairman Jay Clayton, Statement on Division of Trading and Markets Staff Fee Guidance (June 12, 2019),

Of particular relevance is NetCoalition v. SEC.[25] In that case, the D.C. Circuit held that an exchange can establish that its fees for market data products are fair and reasonable through *either* a cost-based analysis *or* a "market-based approach" that examines whether the exchange is subject to significant competitive forces in setting its fees.[26] In other words, a cost-based analysis is separate and distinct from a market competition-based analysis. An exchange does not and should not have to demonstrate both – and here, the Exchanges have provided ample evidence that the proposed services and their associated fees are constrained by competition.[27] It would be inconsistent with NetCoalition I and the Commission's embrace of market-based pricing for the Commission to require the Exchanges to also satisfy a rigorous cost-based analysis.[28] Indeed, as basic rate regulation theory and economics explain, cost-based regulation

---

available at https://www.sec.gov/news/public-statement/statement-division-trading-and-markets-staff-fee-guidance ("Statement on Guidance"). Rather,

> [t]he SRO rule filings related to fees addressed by the TM Staff Guidance are governed by Exchange Act Section 19(b), Exchange Act Rule 19b-4, and court decisions interpreting those provisions. Like all staff guidance, the TM Staff Guidance has no legal force or effect: as it states, it does not alter or amend applicable law, and it creates no new or additional obligations for SROs or the Commission.

Id. (footnote omitted). Any effort by the Commission to apply the Guidance so as to inflexibly demand cost data in connection with all rule filings would be unlawful because the Guidance was not promulgated pursuant to notice and comment, as the Administrative Procedure Act requires of binding regulations. See, e.g., Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta, 785 F.3d 710, 717 (D.C. Cir. 2015) ("agency action that creates new rights or imposes new obligations on regulated parties or narrowly limits administrative discretion constitutes a legislative rule" is subject to the notice-and-comment requirements of the APA).

[25] NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010) ("NetCoalition I"). See also Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (approving proposed rule change to establish fees for a depth-of-book market data product).

[26] NetCoalition I, 615 F.3d at 535.

[27] See text accompanying notes 9 to 18, above, and 86 FR 21373, supra note 2, at 21377-21379. See also Securities Exchange Act Release No. 90217 (October 16, 2020), 85 FR 67392, 67396 (October 22, 2020) (Order Approving a Proposed Rule Change To Establish Fees for the NYSE National Integrated Feed) (noting that ''[t]he inquiry into whether a market for a product is competitive . . . focuses on . . . the product's elasticity of demand'' (citing NetCoalition I, 615 F.3d at 542)).

[28] NetCoalition I does state in passing that costs might be relevant to a determination of the reasonableness of fees, but that statement appears to have been based on the record in that case (which did not contain direct evidence of proprietary data product competition and platform competition) as well as the questionable assumption that "in a competitive market,

is simply unnecessary in a competitive market because market forces – rather than rate regulators – will help to ensure competitive pricing.

The Exchanges looked to the Act, Rule 19b-4, and relevant court decisions, including NetCoalition I, in assessing the information it provided in the Filings. Based on their review, the Exchanges believe that the Filings provide sufficient information demonstrating that the proposed rule changes are consistent with the Act. Nevertheless, by this letter, the Exchanges are supplementing the Filings with additional information.

*****

For the reasons set forth in the Filings and herein, the Exchanges believe that they have provided the Commission sufficient information to demonstrate that the proposed rule changes, including the proposed fees for the MMR services and procedures for the allocation of cabinets and power to Telecoms, are consistent with the Act.

Respectfully submitted,

Elizabeth K. King

cc: Honorable Gary Gensler, Chair
Honorable Hester M. Peirce, Commissioner
Honorable Elad L. Roisman, Commissioner
Honorable Allison Herren Lee, Commissioner
Honorable Caroline A. Crenshaw, Commissioner
David Saltiel, Acting Director, Division of Trading and Markets

---

the price of a product is supposed to approach its marginal cost." NetCoalition I, 615 F.3d at 537. But the economic theory that "price equals marginal cost" has limited real-world application outside of agricultural commodity products. As highlighted by Professor Kenneth Elzinga, "[f]ew firms fit the textbook definition of perfect competition," and in fact, marginal-cost pricing in "technology-driven industries . . . is neither feasible nor desirable." Kenneth G. Elzinga & David E. Mills, The Lerner Index of Monopoly Power: Origins and Uses, 101 Am. Econ. Rev. 558, 560 (2011). Moreover, the statement in NetCoalition I simply reflects the reality that, in a competitive marketplace, market forces should work to ensure that firms cannot engage in supra-competitive pricing, whereas the question at issue here is not whether or how prices should bear some relationship to costs, but whether market forces or a rate regulator should make that determination.