UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Petition of:

CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED

File No. SR-ISE-2009-35

BRIEF IN SUPPORT OF INTERNATIONAL SECURITIES EXCHANGE, LLC'S MOTION TO LIFT THE COMMISSION RULE 431(e) AUTOMATIC STAY OF DELEGATED ACTION TRIGGERED BY CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED'S NOTICE OF INTENTION TO PETITION FOR REVIEW

Pursuant to Commission Rules of Practice 154 and 401, International Securities Exchange, LLC respectfully files this Brief in support of its Motion to Lift the Commission Rule 431(e) Automatic Stay of Delegated Action Triggered by Chicago Board Options Exchange, Incorporated's Notice of Intention to Petition for Review.

INTRODUCTION

On August 28, 2009 the Commission approved ISE's rule filing SR-ISE-2009-35 (the "Filing").[1] The Filing establishes a new order type for the ISE, the Qualified Contingent Cross ("QCC"). The Commission's Division of Trading and Markets ("Division") approved the Filing on behalf of the Commission via delegated authority. On September 4, 2009 the Chicago Board Options Exchange, Incorporated ("CBOE") filed a Notice of Intention to Petition for Review ("Notice") under Commission Rule of Practice 430(b)(1) regarding the Filing. Under Commission Rule of Practice 431(e), upon the filing of such notice the action by delegated authority "shall be stayed until the Commission orders otherwise...." We hereby petition the

[1] Release No. 60584 under the Securities Exchange Act of 1934 ("Exchange Act") (August 28, 2009); 47 F.R. 45663 (September 3, 2009) (the "Approval Order").

Commission to order the lifting of the automatic stay of the Division's approval of our Filing by delegated authority.

Commission Rule 431(e) clearly authorizes the Commission to order the lifting of an automatic stay. As discussed below, the CBOE had ample opportunity to express its objections to the Filing, and the Division carefully considered the CBOE's objections before issuing the approval order. The QCC does not pose any irreparable harm to any market participants, but is potentially significant to the ISE from a competitive standpoint. Moreover, the Division is well versed in this type of intra-market priority rule, which does not raise any novel policy issues, so it is unlikely that the Commission will over-turn the Division's approval of the Filing. Finally, while we respect the safeguards that Commission Rule 431(e) provides to all market participants, it is vitally important in this particular situation, and as the precedent that will be set for similar challenges going forward, that exchanges not be permitted to manipulate the administrative process to delay its competitors without showing irreparable harm and a likelihood of success on the merits.

APPLICABLE AUTHORITY

The Commission has discretion to lift an automatic stay triggered by Commission Rule 431(e). Like Rule 431(e), predecessor Rule 26(e) of the Commission's Rules of Practice stated, in part, "[u]pon communication to the Secretary of a notice of intention to petition for review, the determination at a delegated level shall thereafter be stayed **until the Commission orders otherwise**." 17 C.F.R. § 201.26 (1979) (emphasis added) (attached as Exhibit A hereto). Rule 26(e) has been applied under circumstances materially identical to the matter here. *See In the Matter of Institutional Networks Corp.*, File No. 3-6926, Release No. 25039, 1987 WL 756909 (Oct. 15, 1987) (hereinafter, "*Instinet*"; Exhibit B hereto).

As the Commission explained in *Instinet*, the Division of Market Regulation (i.e., the Division's predecessor), under delegated authority, issued an order authorizing the ongoing operation of a "Pilot Program" that exchanged information between the NASD and an exchange. *See id.* Another exchange filed a notice of intention to petition for review of the order under then-applicable Rule 26(c) of the Commission's Rules of Practice. *See id.* Although the Commission noted that "[p]ursuant to Rule 26(e) of the Commission's Rules of Practice, the filing of a notice of intention to petition for review of an order issued pursuant to delegated authority automatically stays the delegated decision until the Commission orders otherwise," the Commission ordered the stay "removed" until it had the time to make a final determination on the merits. *Id.* The Commission reasoned, *inter alia*, that the stay was "**not in the public interest**" and the petitioner "**will not suffer irreparable harm** if the Commission lifts the stay and permits the Pilot Program to continue operating." *Id.* (emphasis added).

The *Instinet* criteria are in accord with the Commission's criteria for determining whether to grant a stay pending judicial review. *See In the Matter of the Application of Marshall Spiegel for Stays of Comm'n Orders Approving Proposed Rule Changes by the Chicago Board Options Exchange, Inc.*, File Nos. SR-CBOE-2004-16 & SR-CBOE-2005-19, Release No. 34-52611, 2005 WL 2673495, *2 (Oct. 14, 2005) (Exhibit C hereto). In this case, the Commissioner should consider a request for a stay in light of four criteria: (A) whether the petitioner has shown a strong likelihood that he will prevail on the merits of the appeal; (B) whether the petitioner has shown that, without a stay, he will suffer irreparable injury; (C) whether there would be

substantial harm to other parties if a stay were granted; and (D) whether the issuance of a stay would likely serve the public interest.[2] *Id.*

When those criteria are applied here, the automatic stay is inappropriate as it merely serves CBOE's strategic goals and is not in the public interest. Similarly, CBOE cannot show that its Petition for Review under Rule 430 will likely succeed or that CBOE or market participants would suffer irreparable harm in the absence of a stay.

ARGUMENT

I. The Division's Approval Was Correct and CBOE's Petition to Overturn It Is Not Likely to Succeed

The Division has carefully reviewed the Filing, the CBOE's comment letter[3], a second comment letter,[4] and our response to those letters[5], and correctly concluded that "the Commission finds that the proposed rule change is consistent with the requirements of the [Exchange] Act and the rules and regulations thereunder applicable to national securities exchanges." Thus, this is far from arbitrary staff action. Indeed, the Approval Order carefully analyzes the objections of the commenters and correctly concludes that they provided no legal basis to deny approval of the rule change.

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2 *See also Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (Exhibit D hereto).

3 Letter from Angelo Evangelou, Assistant General Counsel, CBOE, to Elizabeth Murphy, Secretary, Commission dated July 16, 2009 ("CBOE Letter").

4 Letter from Gerald D. O'Connell, Chief Compliance Officer, Susquehanna International Group, LLP, to Elizabeth Murphy, Secretary, Commission dated August 10, 2009.

5 Letter from Michael Simon, Secretary, ISE, to Elizabeth Murphy, Secretary, Commission dated August 20, 2009 ("ISE Letter").

The Approval Order makes clear that the ISE adopted the QCC as a means to offer the same type of trading opportunities under the new "distributive linkage"[6] as were available to our members under the old "centralized linkage."[7] Indeed, the QCC is actually somewhat more restrictive with respect to trading flexibility for ISE members than was available under the centralized linkage. The centralized linkage plan had a "block exception" for all trade-throughs of 500 or more contracts.[8] This gave members great latitude in executing all large options orders. In contrast, the QCC is limited to those trades of 500 or more contracts where the options leg is tied to a stock trade. This "tied-to-stock" requirement is a significant limitation on the QCC, which was not required when executing large orders under the centralized linkage plan.

Moreover, the process of delegated approval used here was reasonable and appropriate. In considering whether a stay pending Commission review of the Division's approval of our Filing is appropriate, the Commission should take into consideration whether the process that led to the Division's exercise of delegated approval provided a reasonable opportunity for the public to express its views. In this case, the Division followed the regular process for a rule proposal submitted under Section 19(b)(2) of the Exchange Act. The Filing was published for public comment for the customary 21-day period. Two comment letters were submitted[9] and the ISE

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6 Options Order Protection and Locked/Crossed Market Plan. *See* Exchange Act Release No. 60405 (July 30, 2009), 74 F.R. 39362 (August 6, 2009).

7 Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Centralized Plan")

8 Sections 2(3) and 8(c)(i)(C) of the Centralized Plan; ISE Rule 1902(d)(2).

9 Letter from Angelo Evangelou, Assistant General Counsel, CBOE, to Elizabeth Murphy, Secretary, Commission dated July 16, 2009 ("CBOE Letter"). Letter from Gerald D. O'Connell, Chief Compliance Officer, Susquehanna International Group, LLP, to Elizabeth Murphy, Secretary, Commission dated August 10, 2009.

provided a written response to those comment letters.[10] Only after considering these comments did the Division conclude that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to national securities exchanges. Thus, there was nothing arbitrary or unreasonable in the staff's exercise of delegated authority in this instance. Indeed, the Approval Order carefully analyzes the objections of the commenters and concludes that they provided no legal basis to deny approval of the Filing.

Finally, while the QCC may present a potential competitive threat to the CBOE floor-based crossing business, the QCC does not present any novel policy issues. Indeed, all seven of the options exchanges have different variations on their intra-market priority rules, some with price-time priority, some with pro-rata allocations, and all with exceptions to the general rules in different circumstances. Offering different execution principles, fee structures, and systems is how options exchanges compete with each other.

II. No Irreparable Harm to CBOE or Others

Even if the Commission eventually decides to grant the appeal – and even if the Commission eventually decides to overturn the approval of the Filing – there is no irreversible harm in lifting the stay. As discussed, the Filing simply adds a new order type. The QCC is an intra-market priority rule that has no impact on the execution of orders in other market centers. The QCC will allow ISE members to execute large stock/options combination orders in an efficient manner. The options leg of the order must be executed at a price at or within the national best bid and offer, so no QCC will be disadvantaged by receiving an execution on the ISE. In the very unlikely event that the Commission ultimately rules that the ISE cannot continue use of this order, ISE simply will eliminate the order type on a going-forward basis.

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[10] Letter from Michael Simon, Secretary, ISE, to Elizabeth Murphy, Secretary, Commission dated August 20, 2009 ("ISE Letter").

To argue that there is some form of irreversible harm in lifting the stay is to argue that the QCC is inappropriate in the first place. However, such an argument inappropriately focuses on the ultimate merits of the QCC, which is not the standard by which to judge the continuation of the stay.

Accordingly, there is no irreparable harm to any market participant in allowing the ISE to offer QCCs while the petition process proceeds.

III. Manipulating the Administrative Process for Competitive Purposes Is Not in the Public Interest

Finally, but perhaps of most importance, maintaining the automatic stay (which exists now only by operation of Rule, not by any threshold proof from CBOE) would permit the CBOE to abuse the regulatory process for its own competitive advantage. As discussed in detail in the ISE Letter, the CBOE's objections to the QCC are based on perceived policy issues. The CBOE Letter made it clear that even their policy concerns were not with the concept of the QCC, but on the ISE implementing a clean cross on a unilateral basis. Indeed, CBOE conceded that "there may be a time and place to discuss as an industry" the special handling of large orders. As we stated in our response, we believe any coordination of intra-market execution priority rules would be anti-competitive and inconsistent with the Exchange Act.

The CBOE is using a rarely-invoked procedural device to prevent the ISE from continuing to offer the same type of trading mechanism that was available under the centralized linkage plan. In objecting to the ISE's use of the QCC – while at the same time specifically acknowledging that there may be a time and a place to discuss this type of order – it is clear CBOE simply is attempting to delay the ISE's implementation of the QCC while they fashion a competitive response. The Commission should not permit a competitor to misuse the process for its competitive gain.

Every day the stay remains in effect the ISE is suffering significant competitive harm to its market. The CBOE can continue to execute large stock/option trades on its floor in open outcry, an alternative not available to the fully-electronic ISE. That market provides CBOE members with an opportunity to gauge the likelihood of effecting a large trade without break-up. In stark contrast, there is no ability to pre-shop orders in this manner on the ISE, where all trades are executed in our electronic system. Due to this difference in market structure, we must devise innovate ways to accommodate our members' trading needs. We have done so with the QCC. Of course, all such innovation must be consistent with the requirements of the Exchange Act, and the careful analysis and well-formed conclusions in the Approval Order create a strong presumption that the QCC is consistent with all applicable legal requirements. By filing its Notice, CBOE was able to "game" the system to maintain its competitive advantage. In so doing it is stifling innovation, impeding competition, and abusing the administrative process.

CONCLUSION

The only way to address CBOE's abuse of the administrative process is for the Commission promptly to lift the automatic stay. This will permit the ISE to implement its approved QCC without prejudicing any party while the Commission considers the merits (or lack thereof) of the petition. For these reasons, we respectfully petition the Commission to use its

authority under Rule of Practice 431(e) to lift the automatic stay preventing the ISE from implementing the QCC.

DATED: New York, New York
September 11, 2009

Respectfully submitted,

By: _____

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EXHIBIT A

TITLE 17--COMMODITY AND SECURITIES EXCHANGES
Chapter II--Securities and Exchange Commission
Part 201--Rules of Practice
Subpart A--Rules of Practice

s 201.26 Review by the Commission of determinations at a delegated level.

(a) Scope of rule This rule is applicable to determinations at a delegated level made pursuant to authority delegated in Article 30-1 et seq. of Subpart A of the Commission's Statement of Organization and Program Management, § 200.30-1 et seq. of this chapter.

(b) Petition for review; when available Commission review of any matter determined at a delegated level in accordance with 15 U.S.C. 78d-1, as amended, shall be available as therein provided.

(c) Petition for review; procedure Any party or intervenor who seeks review of a determination at a delegated level shall communicate to the Secretary of the Commission by telegram or otherwise a notice of intention to petition for review. Such communication shall be made within one day after receipt of actual notice of the determination or within five days after notice has been mailed to the person's last address listed with the Commission, whichever is shorter. The notice of intention to petition for review shall identify the petitioner and the determination complained of. Within five days after such notice has been communicated, a petition for review containing a clear and concise statement of the issues to be reviewed and the reasons review is appropriate shall be filed with the Commission.

(d) Review by the Commission on its own initiative The Commission may on its own initiative order review of any determination at a delegated level at any time; except that any review by the Commission on its own initiative will be ordered within five days after the determination where there are parties to or intervenors in the matter.

(e) Effect of delegated determinations; stays, etc Any determination at a delegated level shall have immediate effect and be deemed the action of the Commission. Upon communication to the Secretary of a notice of intention to petition for review as provided in paragraph (c) of this section, the determination at a delegated level shall thereafter be stayed until the Commission orders otherwise. An order directing review on the Commission's own initiative or granting a petition for review will set forth the procedure to be followed thereafter, including the time within which any party or intervenor may file a statement in support of or in opposition to the determination, whether a stay should be granted or continued and whether oral argument will be heard. As against any person who shall have acted in reliance upon any determination at a delegated level, any stay or any modification

or reversal by the Commission of such determination shall be effective only from the time such person receives actual notice of such stay, modification or reversal.

(Sec. 1, 76 Stat. 394, (15 U.S.C. 78d-1, 78d-1(b), as amended))

[28 FR 2857, Mar. 22, 1963, as amended at 28 FR 12616, Nov. 27, 1963; 29 FR 3567, Mar. 20, 1964. Redesignated at 32 FR 9828, July 6, 1967, and amended at 40 FR 54774, Nov. 26, 1975; 44 FR 75383, Dec. 20, 1979]

Authority: Secs. 19, 23, 48 Stat. 85, as amended, 901, as amended, sec. 20, 49 Stat. 833, sec. 319, 53 Stat. 1173, secs. 38, 211, 54 Stat. 841, 855; 15 U.S.C. 77s, 78w, 79t, 77sss, 80a-37, 80b-11, unless otherwise noted.

17 CFR s 201.26

END OF DOCUMENT

EXHIBIT B

H

Release No. 25039, Release No. 34-25039, 39 S.E.C. Docket 529, 1987 WL 756909 (S.E.C. Release No.)

Securities and Exchange Commission (S.E.C.)

Securities Exchange Act of 1934

In the Matter of
Institutional Networks
Corporation

File No. 3-6926

October 15, 1987

ORDER LIFTING STAY

I.

On October 2, 1987, the Division of Market Regulation ("Division") issued an order, pursuant to delegated authority, 17 CFR 200.30-3(a)(12), approving the continued operation of the Pilot Program for the exchange of quotation information between the National Association of Securities Dealers, Inc. ("NASD") and the International Stock Exchange of the United Kingdom and the Republic of Ireland, LTD. ("Exchange").[FN1]

FN1 Securities Exchange Act Release No. 24979 (October 2, 1987), 52 FR 37684 (October 8, 1987).

On October 9, 1987, the Institutional Networks Corporation ("Instinet") filed a notice of intention to petition for review of the order pursuant to Rule 26(c) of the Commission's Rules of Practice.[FN2] Pursuant to Rule 26(e) [FN3] of the Commission's Rules of Practice, the filing of a notice of intention to petition for review of an order issued pursuant to delegated authority automatically **stays** the delegated decision until the Commission **orders otherwise.**

FN2 17 C.F.R. 201.26(c).

FN3 17 C.F.R. 201.26(e).

The Commission finds that a stay of the Division's order is inappropriate in this instance. The NASD's Pilot Program has been operational since April 21, 1986 and has been the subject of five interim extensions to address the concerns of Instinet, the sole commentator on the proposal. The Commission finds that the automatic stay would interrupt the dissemination of information through the Pilot Program. Such an interruption is not in the public interest and has the potential to harm investors and disrupt the orderly operation of that segment of the international equities securities market affected by the Pilot Program. The Commission finds that such an interruption of information dissemination is, under the circumstances, inadvisable. In addition, Instinet will not suffer irreparable harm if the Commission lifts

the stay and permits the Pilot Program to continue operating.

The Commission finds that the NASD and the Exchange are presently acting in a manner consistent with the delegated determination. The Commission will not disturb that determination until it has an opportunity to review Instinet's petition for review.

IT IS THEREFORE ORDERED, that the stay automatically imposed by Rule 26 of the Rules of Practice be, and hereby is removed, until such time as the Commission makes a final determination on the merits.

By the Commission.

Jonathan G. Katz
Secretary

Release No. 25039, Release No. 34-25039, 39 S.E.C. Docket 529, 1987 WL 756909 (S.E.C. Release No.)
END OF DOCUMENT

EXHIBIT C

H

Release No. 52611, Release No. 34-52611, 86 S.E.C. Docket 1200, 2005 WL 2673495 (S.E.C. Release No.)

S.E.C. Release No.

Securities Exchange Act of 1934

IN THE MATTER OF THE APPLICATION OF MARSHALL SPIEGEL FOR STAYS OF COMMISSION ORDERS APPROVING PROPOSED RULE CHANGES BY THE CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED

File Nos.
SR-CBOE-2004-16 and SR-CBOE-2005-19

October 14, 2005

ORDER DENYING STAY

On June 17, 2005 and July 18, 2005, Petitioner Marshall Spiegel ("Petitioner") filed, in the United States Court of Appeals for the District of Columbia Circuit, Petitions for Review of two Securities and Exchange Commission ("Commission") Orders approving proposed rule changes of the Chicago Board Options Exchange, Incorporated ("CBOE").[FN1] Pending such reviews, Petitioner filed with the Commission on July 18, 2005, two motions, pursuant to Section 25(c)(2) of the Securities Exchange Act of 1934 ("Exchange Act"),[FN2] requesting a stay of each of the Commission's Orders.[FN3] On July 20, the CBOE filed its response to Petitioner's stay requests.[FN4] On July 22, Petitioner filed a reply to the CBOE's response.[FN5] After reviewing the foregoing submissions, as well as the record underlying its issuance of the Orders approving each of the CBOE's proposed rule changes, the Commission has determined, for the reasons discussed below, that the Motions to Stay should be denied.[FN6]

I. Background

Since the inception of the CBOE in the early 1970s, the members of the Board of Trade of the City of Chicago, Inc. ("CBOT") have been entitled to become members of the CBOE without having to acquire a separate CBOE membership (referred to as the "Exercise Right"). This entitlement was compensation for the time and money the CBOT and its members expended in the development of the CBOE, and is established by Article Fifth(b) of the CBOE's Certificate of Incorporation ("Article Fifth(b)"), which provides, in relevant part, that:

> [E]very present and future member of the [CBOT] who applies for membership in the [CBOE] and who otherwise qualifies shall, so long as he remains a member of [the CBOT], be entitled to be a member of the [CBOE] notwithstanding any limitation on the number of members and without the necessity of acquiring such membership for consideration or value from the [CBOE]....

Article Fifth(b) explicitly states that no amendment may be made to it without the approval of at least 80% of those CBOT members who have "exercised" their right to be CBOE members and 80% of all other CBOE members.

The CBOT's announcement that it intended to demutualize and issue separately transferable interests representing the Exercise Right component of a membership in the CBOT (this transferable right is referred to as the "Exercise

Right Privilege") raised the question of who would constitute a "member of [the CBOT]" under Article Fifth(b) because it would be possible for a CBOT member to sell the Exercise Right Privilege separately. The CBOE's proposed rule changes, which the Petitioner is challenging, sought to clarify the application of Article Fifth(b) in light of the CBOT's actions. Specifically, the proposed rule changes provide guidance regarding the eligibility of a CBOT member to utilize his or her Exercise Right to become a member of the CBOE.

A. SR-CBOE-2004-16

*2 Before its demutualization, the CBOT stated its intent to issue separately transferable Exercise Right Privileges to its members. In response, the CBOE submitted a proposed rule change to the Commission to interpret Article Fifth(b) to clarify which individuals will be entitled to the Exercise Right upon distribution by the CBOT of the Exercise Right Privileges. Specifically, the CBOE proposed to interpret the term "member of [the CBOT]" as used in Article Fifth(b) to mean an individual who holds an Exercise Right Privilege, holds a CBOT Full Membership which gives him all other rights and privileges appurtenant to a CBOT full membership, and who meets the CBOT's membership eligibility requirements.[FN7] The CBOE's proposal revised its Rule 3.16(b) to incorporate this new interpretation.

On July 15, 2004, the Commission, by authority delegated to the Division of Market Regulation, approved the CBOE's proposed rule change.[FN8] On August 23, 2004, Petitioner submitted to the Commission a notice of intention to file a petition for review of the July 15, 2004 Order, and Petitioner filed a petition for review on September 13, 2004.[FN9] On September 17, 2004, the Commission acknowledged receipt of these documents and confirmed that the automatic stay provided in Rule 431(e) of the Commission's Rules of Practice was in effect. On February 25, 2005, the Commission set aside the July 15, 2004 Order, approved the proposed rule change, and lifted the automatic stay.[FN10] On March 7, 2005, Petitioner submitted a Motion for Reconsideration in which he asked the Commission to set aside the February 25th Order based on allegations of manifest errors of law and fact. On April 18, 2005, the Commission issued an Order denying Petitioner's Motion for Reconsideration.[FN11]

B. SR-CBOE-2005-19

When the CBOT's proposed demutualization was nearing completion, the CBOE submitted a proposed rule change to further revise CBOE Rule 3.16(b) to interpret Article Fifth(b) to address the effect on the Exercise Right of the CBOT's restructuring and the expansion of electronic trading on the CBOE and the CBOT.[FN12] Specifically, to be considered a "member of [the CBOT]" for purposes of Article Fifth(b), and therefore entitled to the Exercise Right, a person would have to possess all parts distributed in respect of his or her membership in the CBOT's restructuring (i.e., the Class A shares of common stock of CBOT Holdings, Inc. and the Series B-1 membership), and an Exercise Right Privilege. On May 24, 2005, the Commission approved the CBOE's proposed rule change.[FN13]

II. Discussion

Under Section 25(c)(2) of the Exchange Act, the Commission may grant a stay pending judicial review if it finds that "justice so requires."[FN14] The Commission generally considers a request for a stay in light of four criteria: (A) whether the petitioner has shown a strong likelihood that he will prevail on the merits on appeal; (B) whether the petitioner has shown that, without a stay, he will suffer irreparable injury; (C) whether there would be substantial harm to other parties if a stay were granted; and (D) whether the issuance of a stay would likely serve the public interest.[FN15]

*3 The Commission has considered carefully each of the Petitioner's submissions in light of these four criteria. Because the Motions to Stay raise substantially similar arguments, this Order responds to both motions. As discussed below, the Commission finds that the Petitioner has not demonstrated a substantial likelihood of success on the merits for either matter, nor has he demonstrated that the other three factors strongly favor interim relief.

A. Petitioner Has Not Demonstrated a Substantial Likelihood of Success on the Merits of His Appeal

To obtain a stay of a Commission order pending judicial review, Petitioner must demonstrate a strong likelihood of success on the merits of his appeal. The Commission notes that the imposition of a stay pending judicial review of an action by an administrative agency is an extraordinary remedy.[FN16] The judicial standard for review of a Commission order is circumscribed in scope. A court generally will only overturn a Commission decision if the court finds the decision to have been arbitrary, capricious, or an abuse of discretion.[FN17] This standard of review is deferential, presuming an agency's action to be valid and "requir[ing] affirmance if a rational basis exists for the agency's decision."[FN18] The Commission does not believe that Petitioner has presented sufficient evidence to suggest that his appeal stands a substantial likelihood of success on the merits to justify the imposition of a stay of these matters.

1. Petitioner's Claim That the Commission's Orders Were Arbitrary and Capricious Is Baseless

In his Motions to Stay, Petitioner asserts that the Commission's February 25 th and May 24th Orders are "arbitrary and capricious agency action" in that they, among other things, failed to independently evaluate Delaware law and uncritically relied on the CBOE's allegedly erroneous arguments regarding the application of Delaware law.[FN19]

When it considers a proposed rule change submitted by a self-regulatory organization ("SRO"), like the CBOE, Section 19(b)(2) of the Exchange Act provides that the Commission shall approve such proposed rule change "if it finds that such proposed rule change is consistent with the requirements of [the Exchange Act] and the rules and regulations thereunder applicable to such organization."[FN20]

Petitioner asserts that the Commission's Orders constitute "arbitrary and capricious agency action" because the Commission did not independently evaluate CBOE's compliance with Delaware law. However, the Exchange Act does not require the Commission to find that the CBOE's proposed rule changes are consistent with Delaware law. The Exchange Act only requires the Commission to determine that a proposed rule change is consistent with the Exchange Act, including the requirement that an exchange comply with its own rules. In this regard, the Commission considered, as it is required to do for proposed rule changes submitted by SROs, the full record in each matter, including the submissions of the CBOE and the comment letters on each filing. Based on this record, the Commission determined that the CBOE provided a "sufficient basis on which the Commission can find that, as a federal matter under the Exchange Act, the CBOE complied with its own Certificate of Incorporation in determining that the proposed rule change" constituted an interpretation, rather than an amendment, of Article Fifth(b).[FN21]

*4 The Commission found that the arguments raised in Petitioner's comment letters did not refute the CBOE's analysis.[FN22] Petitioner argued that the new interpretation of the term "member of [the CBOT]" "denigrate[d] the definition of CBOT member 'by permitting CBOT members to carve up membership rights and sell them separately to third parties without extinguishing their rights to exercise CBOE memberships under Article Fifth(b)....'"[FN23] According to Petitioner, this fundamental change and augmentation in the economic and legal rights of CBOT members and the structure of CBOT membership materially and profoundly affected the economic and legal rights of CBOE membership and governance, and as such constituted an amendment to the provisions of Article Fifth(b).

The Commission determined, however, that neither the new interpretation proposed by the CBOE nor the proposed rule change incorporating that new interpretation altered CBOT memberships in the manner alleged by Petitioner. The Commission found that, to the extent changes to CBOT memberships were being made, they were being made by the CBOT as part of its restructuring. The Commission noted that the CBOE believed it needed to interpret Article Fifth(b) to address the ambiguity with respect to the definition of "member of the CBOT" that was created by the CBOT's actions. Accordingly, the proposed rule change merely set forth how the CBOE proposed to apply its rules once the CBOT restructured.

The Commission indicated that the changes the CBOT made to its memberships, such as the CBOT's pending re-

structuring, themselves did not result in any amendment to CBOE's Certificate of Incorporation. The CBOT and the CBOE were, the Commission noted, separate corporate entities.

Petitioner asserts that the Commission "erroneously opines that compliance by the [CBOE] Board with Section 242 of DGCL Law when materially changing the meaning of its Certificate of Incorporation is discretionary."[FN24] The Commission never made such a finding, nor did the Commission ever find that the CBOE materially changed the meaning of its Certificate of Incorporation.

Further, Petitioner claims that the April 18th Order disavows that the Commission relied on the CBOE's Statement in Support, which Petitioner uses to suggest that the Commission's action was arbitrary and capricious.[FN25] In the April 18th Order, the Commission responded to Petitioner's criticism of the CBOE's statement that conducting a shareholder vote of the proposed rule change would "paralyze" the CBOE. In its Order, the Commission noted that it had not made, and did not make, any specific findings that failing to approve the CBOE's proposed rule change would "paralyze" the CBOE.[FN26] Petitioner seeks to extend this statement to suggest that the Commission somehow disavowed the utility of the CBOE's Statement in Support. Petitioner then uses this asserted disavowal to claim that the Commission's "contradictory and confusing position leaves the February 25 Order without rational basis for its conclusions," and thus indicates that the Commission's Order is arbitrary and capricious action.[FN27] The Commission believes there is no support for this conclusion. In its February 25th and April 18th Orders, the Commission unambiguously stated that it "found persuasive CBOE's analysis of the difference between 'interpretations' and 'amendments,' and the letter of [CBOE's] counsel that concludes that it is within the general authority of the CBOE's Board to interpret Article Fifth(b)...."[FN28] Whether a vote would paralyze the CBOE is a separate issue with respect to the Commission's consideration of the CBOE's proposals, and did not affect the Commission's analysis of the difference between an interpretation and an amendment and the general authority of the CBOE Board under Delaware law.[FN29]

*5 Petitioner also criticizes the Commission's "refusal" to consider the legal opinion of Michael J. Maimone that Petitioner, along with three other CBOE members, submitted in connection with a Motion for Reconsideration of the Commission's Order approving SR-CBOE-2005-19 due to, in Petitioner's words, "an ambiguous technicality."[FN30] The Commission did not "refuse" to consider anything in the record before it. The legal opinion of Mr. Maimone was only sent to the Commission with Petitioner's attempted Motion for Reconsideration after the Commission had already approved the CBOE's proposed rule change in SR-CBOE-2005-19. Accordingly, the Commission did not consider Petitioner's legal opinion because it was not part of the record before the Commission when the Commission initially considered the CBOE's proposed rule change. Petitioner failed to provide the legal opinion to the Commission during the comment period on the CBOE's proposed rule change, and he fails to explain why he was unable to do so.[FN31] As part of his present motion, Petitioner has again submitted the legal opinion of Mr. Maimone. However, as is the case with a motion for reconsideration, the Commission generally does not accept new evidence challenging the merits of the underlying order in a motion for stay when such evidence could have been provided to the Commission during the applicable comment period and there is an unexplained failure to have done so.

2. Petitioner Mischaracterizes the CBOE's Proposals to Erroneously Conclude That Article Fifth(b) Was Amended

To support his claim that the proposed rule changes constitute amendments to Article Fifth(b), Petitioner asserts that the CBOE and the CBOT "endeavored to change the Exercise Right to sanction transferability through the new 'interpretation' in the 2003 Agreement."[FN32] Petitioner further argues that "the new interpretation sanctions the transfer of the Exercise Right to third parties who are not members of the CBOT."[FN33] Petitioner asserts that "[t]he 2003 Agreement seeks to permit the CBOT to proceed with separating the Exercise Right from the CBOT membership[,]" and that the "effect of this interpretation is to implicitly recognize that persons may now hold an Exercise Right separate and apart from holding a full CBOT membership."[FN34] Petitioner opines that "the interpretation's undis-

puted purpose and effect is to permit the Exercise Right to be separated from CBOT membership and be held separately from a CBOT Full Membership, without jeopardizing its validity under Article Fifth(b)."[FN35]

Contrary to the Petitioner's contentions, however, the CBOE's rule filings do not "sanction the transfer of the Exercise Right" nor do they "permit the CBOT to proceed with separating the Exercise Right." The CBOE and the CBOT are legally separate entities. Accordingly, the CBOE has no ability or authority to tell the CBOT what it can or cannot do with respect to the Exercise Right. The Exercise Right belongs to the CBOT members. Petitioner seems to suggest that the CBOE's rule filings effectively allowed the CBOT to establish separately transferable Exercise Right Privileges. This is incorrect. The CBOE's sole concern, and the focus of each of the rule filings at issue here, is how the CBOE is to apply the terms of its Article Fifth(b) in light of the changes that occurred at the CBOT. As the CBOE notes in its response, "[t]he Exercise Right Privilege represents the Exercise Right component of a CBOT Full Membership. Although the Exercise Right Privilege is transferable, the Exercise Right itself may not be transferred separately from a transfer of all of the other rights and privileges represented by a CBOT Full Membership."[FN36]

*6 Finally, Petitioner's steadfast insistence that the rule filings imposed "so material a change to the historic and well-established meaning and terms of Article Fifth(b) as to be in reality an amendment" is unsupported.[FN37] Without elaborating on his conclusory statements, Petitioner argues that the rule filings "confer[] rights on persons in contravention of the terms of Article Fifth(b)," give "a significant measure of economic and political power over CBOE governance and the CBOE's ability to restructure itself" to outside parties, and "effectively dilut[e] the economic value and voting power of CBOE members."[FN38] Petitioner fails to provide support for these claims. For example, while Petitioner suggests that the CBOE's rule change "had the effect of altering shareholder rights[,]" he fails to specify which shareholder rights have been altered.[FN39] The Exercise Rights of CBOT members to become CBOE members, which are enshrined in Article Fifth(b), operate to the same extent as they operated before the issuance of the separately transferable Exercise Right Privileges.[FN40] The Commission does not find support for Petitioner's claim that the CBOE's rule filings imposed "so material a change" to Article Fifth(b) as to be an amendment to that provision.

In accordance with the foregoing, the Commission does not believe, based on the record before us, that Petitioner has met the requisite burden of showing that his appeal is likely to succeed on the merits.[FN41]

B. Petitioner Has Not Demonstrated That He Would Suffer Irreparable Injury in the Absence of a Stay

In order to obtain a stay, Petitioner must also demonstrate that he will suffer irreparable injury absent a stay of the Commission's Orders. Petitioner has failed to articulate any irreparable injury in the absence of a stay.

Petitioner argues that he will suffer irreparable harm if a stay is not granted because the Commission Orders deny CBOE members voting rights guaranteed by Article Fifth(b).[FN42] As CBOE highlights, however, the right to vote on the interpretations at issue would not be irreparably lost absent a stay because the Commission Orders would be set aside and the interpretations submitted to a vote of CBOE and CBOT members if the petitions in the Court of Appeals are successful.

Petitioner also asserts that the transferability of the Exercise Right Privilege allows third parties to "gain influence over the CBOE" pending the outcome of his appeal,[FN43] yet he fails to elaborate how such third parties would gain influence over the CBOE or what type of influence they would hold, or what harm this influence would cause, particularly in light of the fact, as discussed above, that an Exercise Right Privilege is only useful to invoke the Exercise Right if the person holding the Exercise Right Privilege possesses all the other rights and privileges of CBOT membership.[FN44]

*7 Petitioner argues further that the harm inflicted by the Commission's Orders is heightened by the fact that, under CBOE Rule 6.7A, CBOE members cannot bring an action against the CBOE or its officials to redress perceived wrongs.[FN45] Petitioner believes that the Commission effectively permitted the CBOE to insulate its corporate governance from judicial review through Rule 6.7A because that rule was promulgated under Section 19(b)(3)(A) of the Exchange Act,[FN46] which rendered it effective upon filing, and was therefore never subject to public comment or approval by the Commission. As the Commission explained in its February 25th Order, however, since the rule was promulgated under Section 19(b)(3)(A), the Commission did not issue an order finding that the rule change was consistent with the requirements of the Exchange Act, and therefore a court considering a challenge to this rule preventing review of CBOE actions would not have the authoritative views of the Commission and would have to consider whether the rule was consistent with the Exchange Act or preempted state law de novo.[FN47]

C. Substantial Harm to Other Parties Would Occur If a Stay Is Granted

The third factor to be considered in determining whether to grant a stay is the harm, if any, such a stay would impose on other parties. Petitioner argues that a stay would not impose any substantial harm on any person.[FN48] Petitioner argues that CBOT Exercise Right holders assumed the risk that, should the Commission commence disapproval proceedings with respect to the rule filings at issue, then the "viability of their Exercise Rights could be significantly impaired and perhaps extinguished."[FN49] Petitioner contends that CBOT members have already assumed the risk that the resolution of this matter could be stayed pending judicial review.[FN50]

The Commission disagrees with Petitioner's analysis. If the Commission were to issue a stay of both rule filings, the CBOE could suffer substantial harm, as could holders of the Exercise Right Privileges. The CBOE would be left in the precarious position of having to consider requests by CBOT members, made during the course of a stay, to invoke their Exercise Right without the benefit and certainty of the rule filings approved by the Commission. Accordingly, the status and ability of the CBOT members who have retained their Exercise Right Privileges to invoke their rights under Article Fifth(b) to become CBOE members would be placed in doubt and the CBOE would be left without any guidance as to how to comply with its own rules. In addition, the status of those CBOT members who have exercised their right to become CBOE members would be brought into question.

D. Issuance of a Stay Would Not Serve the Public Interest

Finally, Petitioner contends that a stay would serve the public interest, in that it would protect the rights of CBOE members in connection with a matter involving potential agency mistake.[FN51] However, Petitioner fails to explain how a stay would serve the public interest beyond the interests of CBOE members who disagree with the rule changes. As the Commission has repeatedly found, the CBOE, in both rule filings, presented sufficient evidence to warrant a Commission finding that the CBOE's rule filings were consistent with the Exchange Act. Accordingly, the Commission does not believe that the issuance of a stay in these matters would serve the public interest.

III. Conclusion

*8 Petitioner's arguments largely reiterate positions that were raised in his public comments on the proposed rule changes and evaluated by the Commission in approving the proposed rule changes. Nevertheless, the Commission has reviewed Petitioner's Motions to Stay and finds that Petitioner has failed to satisfy any of the four criteria requisite to the granting of a stay pending judicial review. Accordingly, the Commission finds that, in these instances, justice does not require a stay.

IT IS THEREFORE ORDERED, pursuant to Section 25(c)(2) of the Exchange Act, that the application of Petitioner filed on July 18, 2005 for stays of the Order approving SR-CBOE-2004-16 and the Order approving SR-CBOE-2005-19 be, and hereby are, denied.

By the Commission.

Jonathan G. Katz
Secretary

FN1. See Securities Exchange Act Release Nos. 51252 (Feb. 25, 2005), 70 FR 10442 (Mar. 3, 2005) (Commission approval order for File No. SR-CBOE-2004-16) ("February 25th Order"); and 51773 (May 24, 2005), 70 FR 30981 (May 31, 2005) (Commission approval order for File No. SR-CBOE-2005-19) ("May 24 th Order"). On July 26, 2005, Petitioner filed a motion to consolidate his two appeals.

FN2. 15 U.S.C. 78y(c)(2).

FN3. Motion of Petitioner Marshall Spiegel For a Stay of the February 25, 2005 Order and Brief in Support Thereof, dated July 18, 2005 ("Petitioner's First Brief"); and Motion of Petitioner Marshall Spiegel For a Stay of the May 24, 2005 Order and Brief in Support Thereof, dated July 18, 2005 ("Petitioner's Second Brief") (collectively, "Motions to Stay").

FN4. Response of CBOE to Spiegel's Motion for a Stay Pending Appellate Review, dated July 19, 2005 ("Response of CBOE").

FN5. Reply of Marshall Spiegel to CBOE Opposition to Motion for a Stay Pending Appellate Review, dated July 22, 2005 ("Petitioner's Reply to Response of CBOE").

FN6. The Commission recently filed the certified list in the appeal of the February 25th Order. Section 25(c)(2) of the Exchange Act provides that, "[u]ntil the court's jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires." 15 U.S.C. 78y(c)(2). This provision does not preclude the Commission from denying a motion for a stay. Cf. Piper v. DOJ, 374 F. Supp. 2d 74 (D.D.C. 2005) (stating that where the filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal, the district court may outright deny, but cannot outright grant, a Rule 60(b) motion.").

FN7. See February 25th Order, supra note 1. See also CBOE Rule 3.16(b).

FN8. See Securities Exchange Act Release No. 50028 (July 15, 2004), 69 FR 43644 (July 21, 2004) (approval order for File No. SR-CBOE-2004-16).

FN9. See Letter from Marshall Spiegel, CBOE Equity Member, to Margaret H. McFarland, Deputy Secretary, Office of the Secretary, Commission, dated September 13, 2004.

FN10. See February 25th Order, supra note 1.

FN11. See Securities Exchange Act Release No. 51568 (Apr. 18, 2005), 70 FR 20953 (Apr. 22, 2005) ("April 18th Order").

FN12. See Securities Exchange Act Release No. 51463 (Mar. 31, 2005), 70 FR 17732 (Apr. 7, 2005) (notice for File No. SR-CBOE-2005-19).

FN13. See May 24th Order, supra note 1.

FN14. 15 U.S.C. 78y(c)(2).

FN15. See, e.g., William Timpinaro, Order Denying Stay, Securities Exchange Act Rel. No. 29927 (Nov. 12, 1991), 50 SEC Docket 283, 290; Christian Klein & Cogburn, Inc., Order Denying Stay, Securities Exchange Act Rel. No. 33377 (Jan. 5, 1994), 55 SEC Docket 2622, 2624; see also Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); Commonwealth-Lord Joint Venture v. Donovan et al., 724 F.2d 67, 68 (7th Cir. 1983) (holding that the standard to be used in deciding applications for stays of administrative actions pending review is the same as for stays of district court orders pending review).

FN16. See, e.g., Busboom Grain Co., Inc. et al. v. ICC et al., 830 F.2d 74, 75 (7th Cir. 1987) ("A strong presumption of regularity supports any order of an administrative agency; a stay pending judicial review is a rare event and depends on a demonstration that the administrative process misfired.").

FN17. See, e.g., Natural Resources Defense Council, Inc., et al. v. SEC, et al., 606 F.2d 1031, 1049 (D.C. Cir. 1979); Bradford Nat'l Clearing Corp. et al. v. SEC, 590 F.2d 1085, 1093 (D.C. Cir. 1978). See also 5 U.S.C. 706(2)(A) (Administrative Procedure Act).

FN18. See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976).

FN19. See Petitioner's First Brief, supra note 3, at 8 and 10; Petitioner's Second Brief, supra note 3, at 9-10.

FN20. 15 U.S.C. 78s(b)(2).

FN21. February 25th Order, supra note 1, at 10444; May 24th Order, supra note 1, at 30984.

FN22. See February 25th Order, supra note 1, at 10444; and May 24th Order, supra note 1, at 30984.

FN23. February 25th Order, supra note 1, at 10444 (citing Legal Memorandum of Points and Authorities in Support of the Statement of Petitioner Marshall Spiegel in Opposition to Staff Action, October 26, 2004, at 6).

FN24. Petitioner's Second Brief, supra note 3, at 11.

FN25. See Petitioner's First Brief, supra note 3, at 10.

FN26. See April 18th Order, supra note 11, at 20955.

FN27. Petitioner's First Brief, supra note 3, at 10.

FN28. February 25th Order, supra note 1, at 10444; April 18th Order, supra note 11, at 20954. See also May 24th Order, supra note 1, at 30984.

FN29. The CBOE's representation on that point is irrelevant to the issue of whether the CBOE's rule changes are consistent with the Exchange Act.

FN30. Petitioner's Reply to Response of CBOE, supra note 5, at 2. On June 6, 2005, Thomas Bond, Donald Cleven, Marshall Spiegel, and Norman Friedland filed a Motion for Reconsideration of the Commission's Order approving SR-CBOE-2005-19. Pursuant to Rule 470(a) of the Commission's Rules of Practice, 17 CFR 201.470(a), a party may file a motion for reconsideration of a final order issued by the Commission if such person was aggrieved by a determination in a "proceeding," as that term is defined in Rule 101(a)(9)(i) - (viii), 17 CFR 201.101(a)(9)(i) - (viii). The Commission's Order approving SR-CBOE-2005- 19 does not fall into any of the enumerated eight categories in Rule 101(a)(9). By contrast, the Commission's Order approving SR-CBOE-2004-16 was issued in response to a petition for review of an action by delegated authority as specified in Rule 101(a)(9)(iv). Accordingly, the Deputy Secretary of the Commission properly rejected Petitioner's Motion for Reconsideration of the order approving SR-CBOE- 2005-19 on the grounds that the motion was improperly filed. See Letter from Margaret H. McFarland, Deputy Secretary, Commission, to Thomas A. Bond, Donald Cleven, Marshall Spiegel, and Norman Friedland, dated June 9, 2005.

FN31. Further, the Commission notes that even if Petitioner had submitted the legal opinion as part of a validly-filed motion for reconsideration, the Commission would still not have been in a position to consider it. The Commission, on a motion for reconsideration, accepts only that evidence the movant could not have known about or adduced before entry of the order subject to the motion for reconsideration. See Fundamental Portfolio Advisors, Inc., Order Denying Motion for Reconsideration, Securities Exchange Act Rel. No. 51725 (May 23, 2005), at note 5, available at http:// www.sec.gov/litigation/admin/33- 8574.pdf.

FN32. Petitioner's First Brief, supra note 3, at 3.

FN33. Id.

FN34. Id. at 4.

FN35. Id. at 4-5.

FN36. Response of CBOE, supra note 4, at 2.

FN37. Petitioner's First Brief, supra note 3, at 4.

FN38. Id. at 5. Petitioner also attempts to argue that "the reason the CBOE had to file its proposed rule change under Section 19 was precisely because its interpretation in fact materially changed the meaning of Article Fifth(b)." Petitioner's Second Brief, supra note 3, at 10. This is incorrect. The reason the CBOE filed its proposed rule change under Section 19 of the Exchange Act was because it revised CBOE Rule 3.16(b) to incorporate the new interpretation of the term "member of [the CBOT]."

FN39. Petitioner's First Brief, supra note 3, at 9, note 4.

FN40. If a CBOT seat holder sells his or her Exercise Right Privilege to a non-CBOT seat holder third party, that person cannot invoke the provisions of Article Fifth(b) to become a CBOE member because that third party would not be considered to be a "member of the [CBOT]" under Article Fifth(b). The third party could, however, tender the Exercise Right Privilege to someone (e.g., the CBOE) for value. At one point in his brief, Petitioner curiously asserts that "[p]ursuant to the 2003 interpretation, potentially all of [the remaining] 1,334 Exercise Rights could be held by persons who are not members of the CBOT." Petitioner's First Brief, supra note 3, at 6. First, as stated

above, the 2003 Agreement does not confer onto CBOT members the Exercise Right Privileges, CBOT's own restructuring is the source of the Exercise Right Privileges. Second, it is only Exercise Right Privileges, not Exercise Rights, that could be held by non-CBOT members. In order to invoke the Exercise Right, a person must possess all rights and privileges of CBOT membership in addition to an Exercise Right Privilege.

FN41. Additionally, the fact that Petitioner sold his seat on the CBOE on July 14, 2005 raises the question of whether the challenges reflected in Petitioner's Petitions for Review before the D.C. Circuit are moot.

FN42. See Petitioner's First Brief, supra note 3, at 11-12; Petitioner's Second Brief, supra note 3, at 14.

FN43. Petitioner's First Brief, supra note 3, at 12. The Commission notes that, subsequent to the filing of the opening brief, Petitioner sold his seat on the CBOE. See Response of CBOE, supra note 3, at Exhibit 1. In his reply brief, Petitioner claims that he is currently considering proposals to participate in a partial purchase of a seat. Petitioner's recent sale of his CBOE membership and the uncertainty over whether he will purchase a CBOE seat in the future debilitate his argument that he will suffer irreparable harm if the Commission's Orders are not stayed.

FN44. To the extent that Petitioner argues that the transferability of Exercise Right Privileges to third parties will harm CBOE members by diluting their voting power and therefore decreasing the economic value of their seats, the Commission has held repeatedly that financial detriment does not rise to the level of irreparable injury warranting issuance of a stay. See, e.g., Robert J. Prager, Order Declining to Review Denial of Stay on Delegated Authority, Securities Exchange Act Rel. No. 50634 (Nov. 4, 2004), 84 SEC Docket 162, 163; see also William Timpinaro, Order Denying Stay, Securities Exchange Act Rel. No. 29927 (Nov. 12, 1991), 50 SEC Docket 283, 290 ("The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.") (citing Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)).

FN45. Petitioner's First Brief, supra note 3, at 13.

FN46. 15 U.S.C. 78s(b)(3)(A).

FN47. In footnote 33 of the February 25th Order, the Commission noted that a court considering the validity of the rule would not have the benefit of the Commission's views on the rule because the rule was filed under Section 19(b)(3)(A) of the Exchange Act and thus became effective upon filing. Petitioner argues that the Commission missed the point because judicial review could never occur in the first instance since the rule prohibits court challenges to CBOE Board actions. The relevance of the filing under Section 19(b)(3)(A), however, is that, were a court to consider a challenge to Rule 6.7A itself, the court could consider whether the rule validly operated to preclude action against the CBOE.

FN48. See Petitioner's First Brief, supra note 3, at 13-14; Petitioners Second Brief, supra note 3, at 14-15.

FN49. Petitioner's First Brief, supra note 3, at 13. Petitioner references the disclosures made to CBOT members in CBOT's Form S-4 distributed to its members in connection with its demutualization. See id.

FN50. See id. at 13-14.

FN51. See id. at 14; Petitioner's Second Brief, supra note 3, at 15.

Release No. 52611, Release No. 34-52611, 86 S.E.C. Docket 1200, 2005 WL 2673495 (S.E.C. Release No.)
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EXHIBIT D

ous issues raised by the equal access tariffs, had not established separate comment cycles for each issue raised. The use of one here, therefore, further negates any inference that the FCC's actions bore the same motives as the CAB's in *Moss*.

[2] Petitioners argue that the FCC's description, in a later order, of the May 15 order as a prescription, demonstrates that the FCC did indeed prescribe the 50 cents/two free call rate. Counsel for the FCC stated at oral argument that this description was inaccurate and that its staff sometimes makes such errors. As we have noted, it is not the FCC's description that is relevant, but the actual impact of its actions. *See AT&T v. FCC*, 487 F.2d 865 (2d Cir.1973). This principle does not excuse the FCC from teaching its staff to use accurate language in all its pronouncements, precisely in order to avoid the sort of confrontation presented here. Insofar as the FCC's later description may have any persuasive weight, it is counterbalanced by the implications of the language of the May 15 order. In the same paragraph, the FCC stated that it "required" AT&T to implement the long distance rate reduction and that AT&T "may file" the suggested IDA rate. There is no question that the FCC meant to prescribe the long distance rate reduction. The differences in the language used by the FCC strongly imply that the FCC did not intend to prescribe IDA charges at the time it issued the order.

[3] We therefore find that the FCC did not prescribe rates pursuant to section 205, and therefore did not violate section 205. The May 15 order thus only represents the FCC's determination not to suspend and investigate an IDA tariff in conformity with its suggestion. As we have stated, that decision is not reviewable. *See supra* page 968. Moreover, the May 15 order is not a final order representing the culmination of the administrative process. Petitioners and intervenors are free to file a complaint under section 208 to challenge the IDA tariff, which will give all the concerned parties an opportunity to fully litigate the questions concerning the appropriateness of the rate and its structure.

This case is a textbook example of the reason for nonreviewability prior to the completion of all administrative proceedings. Much of the debate at oral argument and in the briefs concerned whether the FCC was relying upon evidence in the record, whether the FCC had made findings or was merely accepting estimates provided by AT&T, and whether there was sufficient evidence in the record to support the alleged rate prescription. Had the parties proceeded by complaint, as they are still free to do, these issues would have been explored and the record would have been clearer and more definite. We note that the complaint proceeding that may now take place is no different from the one which should have preceded petitioner's recourse to this court. There is no preclusive effect to anything the Commission said on the IDA rate before this court. The decks are now clear for a complete and proper resolution of the issues raised by the petitioners and intervenors.

Accordingly, Direct Marketing Association's petition for review is

Denied.

Mario M. CUOMO, Governor of the State of New York and County of Suffolk, Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and United States of America, Respondents, Long Island Lighting Co., Intervenor.

No. 85-1042.

United States Court of Appeals, District of Columbia Circuit.

Order Filed July 3, 1985.

Opinion Filed Sept. 17, 1985.

As Amended Sept. 20, 1985.

County and state governor sought emergency stay of Nuclear Regulatory

Commission Licensing Board decision which authorized issuance of license for low power testing at nuclear power station. The Court of Appeals held that petitioners failed to establish that they had substantial case on the merits or to demonstrate that balance of equities or public interest strongly favored granting of stay.

Motion denied.

1. Administrative Law and Procedure ⇐674

Factors to be considered in determining whether stay is warranted are likelihood that moving party will prevail on merits, likelihood that moving party will be irreparably harmed absent stay, prospect that others will be harmed if court grants stay and public interest in granting stay.

2. Administrative Law and Procedure ⇐674

To justify granting of stay, movant need not always establish high probability of success on the merits; stay may be granted with either high probability of success and some injury, or visa versa.

3. Health and Environment ⇐25.10(4)

As with duty to prepare initial environmental impact statement, duty to supplement EIS is governed by "rule of reason" under which agency is not required to supplement EIS when remote and highly improbable consequences are alleged.

4. Health and Environment ⇐25.10(4)

Reasonableness of decision not to require supplemental environmental impact statement depends on such factors as environmental significance of new information, probable accuracy of information, degree of care with which agency considered information and evaluated its impact and degree to which agency supported its decision not to supplement with statement of explanation or additional data.

5. Administrative Law and Procedure ⇐674

Party moving for stay is required to demonstrate that injury claimed is both certain and great.

6. Administrative Law and Procedure ⇐674

As with irreparable harm claimed to arise absent stay, Court of Appeals would test opposing party's contentions concerning harm it might suffer from grant of motion, for substantiality, likelihood of occurrence and adequacy of proof.

7. Administrative Law and Procedure ⇐674

Self-imposed costs sustained by party are not properly subject of inquiry on motion for stay.

8. Administrative Law and Procedure ⇐674

On motion for stay, it is movant's obligation to justify court's exercise of such extraordinary remedy.

9. Electricity ⇐8.5(2)

Motion for stay of Nuclear Regulatory Commission Licensing Board decision which authorized issuance of license for low power testing at nuclear power station would be denied where petitioners failed to establish that they had substantial case on the merits or to demonstrate that balance of equities or public interest strongly favored granting of stay.

Petition for Review of an Order of the Nuclear Regulatory Commission

Herbert H. Brown, Lawrence Coe Lanpher, Washington, D.C., Karla J. Letsche and Robert Abrams, New York City, were on the emergency motion for stay filed by petitioners.

William H. Briggs, Jr., Solicitor, E. Leo Slaggie, Deputy Solicitor, Herzel H.E. Plaine, Gen. Counsel, Michael B. Blume and Karla D. Smith, Attorneys, Nuclear Regulatory Commission, Washington, D.C., were on the opposition to emergency motion for stay, filed by respondent United States Nuclear Regulatory Commission.

Donald P. Irwin and Robert M. Rolfe, Richmond, Va., on the response to emergency motion for stay, filed by intervenor.

Before WRIGHT, WALD and EDWARDS, Circuit Judges.

Opinion PER CURIAM.

On Petitioners' Emergency Motion for Stay

PER CURIAM:

Petitioners, Mario M. Cuomo, Governor of the State of New York, and Suffolk County, seek an emergency stay of a United States Nuclear Regulatory Commission Licensing Board decision, issued June 14, 1985, which authorizes the issuance of a license for low-power testing (up to five percent of rated power) at the Shoreham Nuclear Power Station. We have closely examined the petitioners' contentions, as well as those of the respondents, United States Nuclear Regulatory Commission ("NRC") and United States and intervenor, Long Island Lighting Company ("LILCO"). We conclude that petitioners have not met their burden of showing that exercise of the court's extraordinary injunctive powers is warranted.

[1, 2] The factors to be considered in determining whether a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir.1977). To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*. We summarize our analysis of these factors, as applied to the circumstances of the instant case, as follows.

I. Likelihood of Success of the Merits

Without prejudice to a later contrary showing by petitioners, we conclude that petitioners have failed to make out "a substantial case on the merits." *Holiday Tours*, 559 F.2d at 843. We concentrate here on only the most significant objections to petitioners' position.

In this motion for stay, petitioners confine their argument to the claim that provisions of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, require that the NRC supplement an environmental impact statement ("EIS") prepared in 1977. The essence of petitioners' NEPA argument is that the 1977 EIS did not consider the possibility that the Shoreham plant might never operate at full power. Petitioners further contend that circumstances have dramatically changed since 1977, in that Congress and the NRC now require that an emergency evacuation plan be developed and approved prior to the issuance of a full-power license. *See* Pub.L. No. 96–295, 94 Stat. 780 (1980); 10 C.F.R. §§ 50.33(g), 50.47(d) (1984). In addition, petitioners contend that the likelihood that a final operating license will be granted is virtually nil, since both the State of New York and County of Suffolk have refused to participate in the preparation of an emergency evacuation plan. Petitioners, thus, would have the NRC prepare a supplemental EIS to consider the possibility that full-power operation will be denied, and to consider whether alternatives, such as delaying low-power operations until emergency planning issues are resolved, should be undertaken. *See* Memorandum Supporting Emergency Stay Motion at 28.

[3, 4] As with the duty to prepare an initial EIS, the duty to supplement an EIS is governed by a "rule of reason." *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1301 (D.C.Cir.1984), *vacated in part and rehearing en banc granted on other grounds*, 760 F.2d 1320 (D.C.Cir. 1985); *see Friends of the River v. FERC*, 720 F.2d 93, 109 (D.C.Cir.1983) (citing reasonableness standard). In addition, "[g]enerally, the initial decision whether a supplemental EIS is required should be made by the agency, not by a reviewing court." *Id.* at 108–09.

Under this rule of reason, an agency is not required to supplement an EIS when "remote and highly improbable consequences" are alleged. *San Luis Obispo Mothers*, 751 F.2d at 1300; *see Friends of the River*, 720 F.2d at 109 (noting that agency need not supplement EIS "every time some new information comes to light"); 40 C.F.R. § 1502.9(c)(1)(ii) (1984) (requiring that agency supplement EIS when there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts") (Council on Environmental Quality guideline). Rather, as the Ninth Circuit states the rule:

> Reasonableness depends on such factors as the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data.

Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1024 (9th Cir.1980); *see People Against Nuclear Energy v. NRC*, 678 F.2d 222, 234 (D.C.Cir.1982) (citing Ninth Circuit statement of rule with approval), *rev'd on other grounds sub nom. Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 103 S.Ct. 1556, 75 L.Ed.2d 534 (1983). Considering each of these factors in turn, it does not appear that the NRC has violated the rule of reason in this case.

Petitioners implicitly concede that there are no environmental consequences associated with low-power testing that were not considered in the 1977 EIS. Rather, the heart of petitioners' contention is that, because of the absence of a viable emergency evacuation plan, there is an increased likelihood that the environmental harms of low-power testing will not be balanced by eventual benefits from full-power operation. *See* Memorandum Supporting Emergency Stay Motion at 32.

The accuracy of petitioners' contention that no full-power license will ever be granted, due to the lack of an emergency evacuation plan, is far from indisputable. We note, in this regard, the recent actions of the Suffolk County Executive, suggesting the possibility of County cooperation in an emergency plan. *See* Suffolk County Exec. Order No. 1–1985 (May 30, 1985). Although this order has apparently been nullified by judicial action, *see* Order, *In re Town of Southampton*, No. 85–10520 (N.Y.Sup.Ct. Suffolk County June 10, 1985), *aff'd*, No. 3004E (N.Y.App.Div., 2d Dep't June 19, 1985), the dispute between the County Executive and Legislature remains, *see* Letter from Martin Bradley Ashare, Suffolk County Attorney, to Nunzio J. Palladino, Chairman of NRC (June 3, 1985) (indicating that counsel for Suffolk County has been discharged), and will undoubtedly result in additional litigation and political confrontations. Under these circumstances, it is virtually impossible to predict how long the State and County will maintain their opposition to the emergency evacuation plan.

The NRC's consideration of petitioners' contention has been neither cursory nor lacking in due process. The NRC has, on three occasions, considered and rejected petitioners' claim. *See* Memorandum and Order, *In re Long Island Lighting Co.*, Docket No. 50–322–OL (NRC June 24, 1985); Order, *In re Long Island Lighting Co.*, CLI–85–12 (NRC June 20, 1985); *In re Long Island Lighting Co.*, 19 NRC 1323 (June 5, 1984). In one of these orders, moreover, the NRC explicitly determined that, even if some new calculation of the costs and benefits of low-power operation were required, consideration of the contentions advanced by petitioners would not necessitate denial of a low-power license. Order at 4–5, *In re Long Island Lighting Co.*, CLI–85–12 (NRC June 20, 1985).

Finally, we conclude that the NRC has adequately supported its conclusion with a statement of reasons and relevant data. The central conclusion in the NRC's orders is that some possibility always exists at the time a low-power license is issued that a

final operating license may not be granted. *See In re Long Island Lighting Co.*, 19 NRC 1323, 1327 (June 5, 1984). The NRC points out that the outcome of litigation and political conflicts frequently surrounding the grant of a final license is particularly speculative. *Id.* If the NRC were required to supplement the EIS for a nuclear power plant every time the risk that a final operating license would not be granted changed, the Commission might find itself forced to continually reevaluate the cost to benefit ratio of various stages of each project. Even if, as the petitioners assert, the NRC is capable of resolving this line-drawing problem by assessing in each case whether there is a substantial likelihood that a final license will not be granted, we do not think that the facts of this case would clearly justify such a conclusion. Moreover, as the NRC notes, *see* Order at 5, *In re Long Island Lighting Co.*, CLI-85-12 (NRC June 20, 1985), to delay low-power testing while such risks are evaluated could eliminate the benefits—including early detection of problems—of low-power testing under 10 C.F.R. § 50.57(c) (1984), which permits low-power operation prior to the resolution of full-power issues such as emergency evacuation planning.

II. Irreparable Injury

[5] Petitioners assert that three types of injury may follow from immediate low-power testing. First, petitioners note that low-power testing will result in irradiation of the reactor, an irreversible change from the status quo. Petitioners, however, only vaguely sketch the contours of this asserted harm. Workers will be exposed to some level of radiation during and following the test. Petitioners' Reply Memorandum in Support of Emergency Stay Motion at 37. There also is inevitably some extremely small possibility that radiation could be released into the surrounding environment as a consequence of the test. *Id.* While it is true that these potential harms, should they occur, cannot be repaired by mere money, their likelihood of occurrence is too small to meet an irreparable harm standard. A party moving for a stay is required to demonstrate that the injury claimed is "both certain and great." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C.Cir.1985).

Petitioners' second claim of irreparable harm is the possibility that their claims will be mooted if a stay is not granted. Petitioners do not claim that the propriety of the granting of a lower-power license could not be reviewed even after low-power testing is complete, *see* Petitioners' Reply Memorandum in Support of Emergency Stay Motion at 39, as well they should not. *See San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1317 (D.C.Cir.1984) (holding that claims related to low-power hearing do not become moot upon completion of low-power testing), *vacated in part and rehearing en banc granted on other grounds*, 760 F.2d 1320 (D.C.Cir.1985). Rather, petitioners contend that their claims will become effectively moot if low-power testing is permitted because no effective relief could be granted. *See* Memorandum Supporting Emergency Stay Motion at 41–42. This argument, however, merely recasts the irreparable injury contention discussed above. No doubt low-power testing represents an irreversible change from the status quo, but the significance of this change does not amount to irreparable harm.

Finally, petitioners contend that the potential NEPA violation in this case presumptively justifies a stay. *See* Memorandum Supporting Emergency Stay Motion at 43. In the ordinary case, "when an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance." *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C.Cir.1977). This, however, is far from the ordinary case. The NEPA violation in this case has not been clearly established, *see* Part I, *supra*, as should be done in order to justify injunctive relief. *See Realty Income*, 564 F.2d at 456 (calling for "particularized analysis" of violations that have occurred). In

addition, there is no contention in this case that additional environmental consequences should be considered prior to proceeding with the project. *See id.* (indicating that the first rationale for injunctions is that "a project should not proceed, with its often irreversible effect on the environment, until the possible adverse consequences are known"). To a lesser extent, the need for an injunction is also undercut by the NRC's stated position that, even after considering the possibility that a full-power license will not be granted, the Commission would still grant a low-power license. *See* Order at 4–5, *In re Long Island Lighting Co.*, CLI–85–12 (NRC June 20, 1985). While we have cautioned that courts should not prejudge the reconsiderations that agencies may make upon compliance with NEPA, *Realty Income,* 564 F.2d at 456, where, as here, the agency has already considered the environmental consequences of a proposed action and has explicitly stated that petitioners' proposed recalculation of the cost to benefit ratio would not change its decisions, "the rationale of preserv[ing] for the agency the widest freedom of choice," *id.*, may not justify injunctive relief.

III. Harm to Others

[6] LILCO, for its part, advances three contentions concerning the harms it may suffer from a delay in low-power testing. As with irreparable harm to the movant, we test these harms for substantiality, likelihood of occurrence and adequacy of proof. *See Wisconsin Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C.Cir.1985). On this analysis, we find LILCO's allegations of harm no more conclusive on the need for a stay than the allegations advanced by the petitioners.

LILCO first suggests that a delay in testing may deprive the utility of an opportunity for training personnel and for early detection of problems. Response of Long Island Lighting Company to Emergency Stay Motion at 60. While there is unquestionably a theoretical benefit to early testing and training, it apparently is impossible for LILCO to estimate what the level of benefits might be. *See* Affidavit of John D. Leonard, Jr., at 15 (indicating that major problems are not expected to be revealed from low-power testing but that "the possibility cannot be ignored"). In any event, the benefits of early testing essentially assume that the plant will achieve full-power operation, which, as we discussed in Part I, is a matter for speculation.

[7] LILCO next notes that delay may cause the utility to lose valuable personnel and that, in any event, experts brought to the plant to perform low-power testing must be paid for their time during the period that low-power testing is delayed. Response of Long Island Lighting Company to Emergency Stay Motion at 61. The possibility that the utility may lose personnel as a result of delay is wholly unquantified and, apparently, inherently unquantifiable. *See* Affidavit of John D. Leonard, Jr., at 23 (noting that, if delay caused personnel to leave, "the effect of delay would be increased by an unquantifiable but potentially long period"). The effect of the loss of personnel, moreover, is apparently increased delay of full-power operation. *See id.* The possibility that full-power operation will ever be achieved is, however, a matter for speculation. The cost of keeping experts hired for low-power testing presents a different problem. LILCO apparently hired these experts in the anticipation that a low-power license would eventually be granted. In making these contracts, LILCO took a risk that a low-power testing license might not be granted or might be delayed. Such self-imposed costs are not properly the subject of inquiry on a motion for stay.

LILCO's final argument, that delay will require it to purchase new neutron calibration sources, *see* Response of Long Island Lighting Company to Emergency Stay Motion at 62, suffers from the same defect as the utility's claim concerning the hiring of experts. This nuclear fuel was purchased in December of 1984, without any assurance that low-power testing would go forward. This, again, is a self-imposed risk.

IV. The Public Interest

Of the four factors relevant to a decision on a motion for stay, the calculation of the public interest is perhaps the most difficult:

> The public interest may, of course, have many faces—favoring at once both the rapid expansion of utilities and the prevention of wasteful and repetitive proceedings at the taxpayers' or consumers' expense; both fostering competition and preserving the economic viability of existing public services; both expediting administrative or judicial action and preserving orderly procedures.

Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C.Cir.1958). This calculation is no less difficult in this case.

Petitioners' argument concerning the public interest proceeds in three parts: First, the public interest favors maintenance of the status quo. Memorandum Supporting Emergency Stay Motion at 53. Second, the views of the State and the County should be held to represent the public interest. *Id.* at 54. Third, the harms associated with low-power operation of the plant would directly affect the public living in the area of the Shoreham plant; these are the people who will suffer any environmental or economic costs. *Id.* at 55. The first and the third of petitioners' arguments may be quickly dispatched, since they essentially rehearse petitioners' arguments about the irreparable harm associated with low-power operation of the plant. Petitioners' second argument, that the State and County views are entitled to substantial deference, is much more difficult. The State and County governments are composed of elected representatives and, in that sense, must be presumed to represent the interests of their constituents. There is, however, another sense by which the public interest should be gauged. Congress, the elected representatives of the entire nation, decreed in the Atomic Energy Act of 1954 and its subsequent amendments that the NRC and its predecessor should be responsible for the "national security, public health, and safety" concerns associated with nuclear power. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 550, 98 S.Ct. 1197, 1215, 55 L.Ed.2d 460 (1978). In any event, petitioners do not contend that their views on the public interest should be considered conclusive. *See* Petitioners' Reply Memorandum in Support of Emergency Stay Motion at 52.

The NRC and LILCO both contend that the dominant public interest concern should be safety. *See* Respondent United States Nuclear Regulatory Commission's Opposition to Emergency Motion for Stay at 41; Response of Long Island Lighting Company to Emergency Stay Motion at 65–66. These safety considerations, of course, have already been resolved in LILCO's favor by the NRC. To the extent that these safety considerations are not grounds for stay of low-power operation, the NRC further contends, the public interest lies in avoiding delays in the productive use of resources. *See* Respondent United States Nuclear Regulatory Commission's Opposition to Emergency Motion for Stay at 44. This argument, like those advanced by petitioners, again appears to merely recast the arguments made concerning the second and third factors in the stay analysis (irreparable injury and harm to others), discussed above. It is impossible to say, therefore, that the public interest either strongly favors or disfavors the grant of a stay in this case.

Conclusion

[8, 9] On a motion for stay, it is the movant's obligation to justify the court's exercise of such an extraordinary remedy. In this case, the petitioners have failed to establish that they have a substantial case on the merits, and have further failed to demonstrate that the balance of equities or the public interest strongly favors the granting of a stay. For these reasons, the motion for stay is denied.

It is so ordered.