

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98149; File No. SR-NYSEAMER-2023-39)

August 16, 2023

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing of Proposed Change to Amend the Connectivity Fee Schedule Regarding Power Allocation

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on August 3, 2023, NYSE American LLC (“NYSE American” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Connectivity Fee Schedule to provide an alternative procedure by which the Exchange can allocate power in the Mahwah Data Center via deposit-guaranteed orders from Users made within a 90-day “Ordering Window.” The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Connectivity Fee Schedule to provide an alternative procedure by which the Exchange can allocate power in the Mahwah Data Center (“MDC”)⁴ via deposit-guaranteed orders from Users made within a 90-day “Ordering Window.”

Background

Shortly after the onset of the Covid-19 pandemic, the Exchange began experiencing unprecedented User⁵ demand for cabinets and power at the MDC. In order to manage its inventory, in late 2020, the Exchange filed to create purchasing limits and a waitlist for cabinet orders.⁶ In early 2021, the Exchange filed to create additional purchasing limits and a waitlist for orders for additional power in the MDC.⁷ Pursuant to the terms of those filings, a Combined

⁴ Through its Fixed Income and Data Services (“FIDS”) business, Intercontinental Exchange, Inc. (“ICE”) operates the MDC. The Exchange and its affiliates NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (the “Affiliate SROs”) are indirect subsidiaries of ICE. Each of the Exchange’s Affiliate SROs has submitted substantially the same proposed rule change to propose the changes described herein. See SR-NYSE-2023-29, SR-NYSEARCA-2023-53, SR-NYSECHX-2023-16, and SR-NYSENAT-2023-16.

⁵ For purposes of the Exchange’s colocation services, a “User” means any market participant that requests to receive colocation services directly from the Exchange. See Securities Exchange Act Release No. 76009 (September 29, 2015), 80 FR 60213 (October 5, 2015) (SR-NYSEMKT-2015-67). As specified in the Connectivity Fee Schedule, a User that incurs colocation fees for a particular colocation service pursuant thereto would not be subject to colocation fees for the same colocation service charged by the Affiliate SROs.

⁶ See Securities Exchange Act Release No. 90732 (December 18, 2020), 85 FR 84443 (December 28, 2020) (SR-NYSE-2020-73, SR-NYSEAMER-2020-66, SR-NYSEArca-2020-82, SR-NYSECHX-2020-26, SR-NYSENAT-2020-28,) (establishing the procedures in current Colocation Note 6(a) and 7(a)).

⁷ See Securities Exchange Act Release No. 91515 (April 8, 2021), 86 FR 19674 (April 14, 2021) (SR-NYSE-2021-12, SR-NYSEAMER-2021-08, SR-NYSEArca-2021-11, SR-NYSECHX-2021-02, SR-NYSENAT-2021-03) (establishing the procedures in current Colocation Note 6(b) and 7(b)).

Waitlist is currently in place.

In 2021 and 2022, the Exchange expanded the amount of space and power available in the MDC by opening a new colocation hall (i.e., Hall 4), yet User demand for additional power continues to climb. Currently, the waitlist includes 27 Users collectively requesting in excess of an additional 700 kilowatts (“kW”) of power. That number, however, may be a mere fraction of Users’ true demand for additional power at the MDC, since, due to the existing waitlist procedures, the Exchange may not accept orders for more than 32 kW of power, and a User and its Affiliates⁸ may have only one order on the waitlist at a time. Of the 27 Users on the current waitlist, many have mentioned that they are actually interested in purchasing much more than 32 kW of power, with several claiming that they are seeking additional power of several hundred kilowatts.⁹

ICE is currently expanding the amount of colocation space and power available at the MDC. ICE is already developing a new colocation hall (i.e., Hall 5) to deliver power that would satisfy all orders currently on the waitlist with some extra power remaining.

ICE proposes this rule change to address two issues posed by the current situation. First, while the development of Hall 5 is underway, ICE must also evaluate whether customer demand would support additional expansion projects to provide further power. ICE must anticipate future demand now because each colocation expansion project is a significant capital project requiring long lead times, especially given current supply-chain constraints on equipment, and

⁸ An “Affiliate” of a User is defined as “any other User or Hosted Customer that is under 50% or greater common ownership or control of the first User.” Connectivity Fee Schedule, at 1.

⁹ Such demand for increased power is not unique to the MDC. Customers have told the Exchange that available power is in short supply at several other data centers as well, including the Equinex-owned data center in Secaucus, New Jersey, the Equinex-owned data center in Carteret, New Jersey, and the Digital Realty-owned data center at Cermak, Illinois. Since none of those data centers is operated by an exchange or regulated by the Commission, the operators of those data centers are free to ask customers to indicate their interest in future build-outs by submitting orders guaranteed by deposits.

substantial up-front investment. It may be possible for ICE to leverage certain efficiencies and economies of scale by planning for future expansion now.

Yet ICE currently lacks any real indication of customers' true demands. As noted above, the current waitlist of 700 kW may represent a mere fraction of Users' true power requirements, since waitlist orders are limited to one order of 32 kW per User. On the one hand, ICE does not know whether the extra power that will be provided in Hall 5 will be enough to meet Users' needs. On the other hand, ICE cannot justify the investment of time and expense that it would take to create additional colocation space based on only casual indications of interest from customers. Without firm, guaranteed commitments from Users to purchase the power if it is made available, ICE runs the risk of underestimating or overestimating Users' true demand for power and faces the possibility of undersupplying or oversupplying space and power.

Second, the existing procedures in the Connectivity Fee Schedule are not well-tailored to allocating large amounts of power that become available all at once, such as when a new colocation hall opens. Under the existing procedures, if less than 350 kW of unallocated power is available, the Purchasing Limits in Colocation Note 6 restrict all orders to 32 kW -- but any time more than 350 kW of unallocated power is available, Users can place unlimited orders that the Exchange must allocate on a first-come, first-served basis. Regarding Hall 5, the Exchange anticipates large amounts of unallocated power becoming available at several intervals. This could create a race condition in which the largest Users place early orders for many hundreds of kilowatts of power, effectively shutting out other customers with more modest power needs. The Exchange therefore believes that it needs a different procedure when allocating substantial amounts of power at one time due to a hall expansion or other similar expansion of available power.

Proposed “Ordering Window” Procedure

The Exchange proposes to solve these issues by providing a temporary procedure to permit the Exchange to accept unlimited, deposit-guaranteed orders from Users for a period of 90 days (the “Ordering Window”). The Colocation Notes in the Connectivity Fee Schedule would be amended accordingly.

Based on the total power ordered by Users during the Ordering Window, ICE would gain insight into whether further expansion beyond Hall 5 is likely to be required in the future. Requiring Users to submit deposits with their orders during this Ordering Window would encourage Users to carefully assess their true power needs and would protect against Users ordering more power than they actually intend to purchase. After the Ordering Window closes, the Exchange would allocate power to Users according to terms described below, which would ensure that every User submitting an order would receive at least some power and no Users would be shut out of the allocation. Following the Ordering Window, the existing purchasing limits and waitlist procedures in Colocation Notes 6 and 7 would then resume.

Specifically, the Exchange proposes to amend the Connectivity Fee Schedule to add new Colocation Note 8, entitled “Ordering Window.”

Paragraph (a) of Colocation Note 8 would provide that the Exchange may announce, by customer notice, a 90-day Ordering Window during which the Exchange may accept orders and deposits pursuant to the terms below. Paragraph (a) would specify that if the Exchange announces an Ordering Window while the Cabinet and Power Purchasing Limits in Colocation Note 6 and/or the Cabinet and Combined Waitlist provisions in Colocation Note 7 are in effect, the terms of the Ordering Window as set out in Colocation Note 8 would temporarily supersede

those terms.¹⁰

Paragraph (b) of Colocation Note 8 would specify the procedures for placing orders and paying deposits during the Ordering Window. Subparagraph (1) would provide that during the Ordering Window, Users may submit orders for their anticipated power needs, subject to the following. First, a User and its Affiliates, if any, may finalize only one order for power during the Ordering Window. Second, the provision of Colocation Note 7 that prohibits the Exchange from accepting orders for more than four dedicated cabinets and/or 32 kW of power would not apply. Third, a User may submit an order during the Ordering Window even if it already has an order pending on a waitlist pursuant to Colocation Note 7.

Subparagraph (2) of paragraph (b) would provide that orders submitted during the Ordering Window are subject to deposits equal to two months' worth of the monthly recurring costs of the amount of new power ordered.¹¹ The subparagraph would further provide that a User's order would be finalized when the User's signed order form and deposit are received by the Exchange, and that orders that are not finalized before the Ordering Window closes will be considered void. Subparagraph (2) of paragraph (b) would further provide that the deposit would be applied to the User's first and subsequent months' invoices after the power is delivered until the deposit is depleted. If the User withdraws its order during the Ordering Window, the deposit would be returned.¹²

¹⁰ During the Ordering Window, any orders submitted by Users must meet the requirements of Colocation Note 8. The Exchange would not accept new orders to the waitlist established under Colocation Note 7 while the Ordering Window is open.

¹¹ For instance, the required deposit would be calculated as the number of kilowatts ordered by the User in its Ordering Window order, multiplied by the appropriate "Per kW Monthly Fee" as indicated in the Connectivity Fee Schedule. The Per kW Monthly Fee is a factor of the total number of kilowatts allocated to all of a User's dedicated cabinets and varies based on the total kilowatts allocated to a User.

¹² In the event that a User wishes to reduce an order that it placed during the Ordering Window, its deposit would not be reduced or returned, but rather would be applied against the User's first and subsequent months' invoices after the power is delivered until the deposit is depleted.

Subparagraph (3) of paragraph (b) would provide that a User may modify its order during the Ordering Window, but such modification would not be finalized until the User's signed modified order form and any additional deposit are received by the Exchange.

Paragraph (c) of Colocation Note 8 would specify the Exchange's procedure for allocating available power after the Ordering Window ends. After determining the total amount of power available to allocate, the Exchange would allocate the available power as follows. In Step 1, per subparagraph (1) of paragraph (c), the Exchange would allocate power to fill any orders on any waitlist in effect pursuant to Colocation Note 7 (e.g., the current waitlist of 32 kW orders totaling 700 kW).

In Step 2, per subparagraph (2) of paragraph (c), the Exchange would allocate up to 32 kW of power to each User that finalized an order during the Ordering Window, subject to the following. If sufficient power is available, the Exchange would allocate 32 kW of power to each User, except that orders for less than 32 kW would be filled only up to the number of kilowatts actually ordered. If sufficient power is not available to allocate 32 kW of power to each User, the Exchange would allocate the available power equally among all Users (rounded to a whole number of kilowatts), except that no User would be allocated more kilowatts than it actually ordered. If no power remains to be allocated after Step 2, all orders finalized during the Ordering Window would be considered to be completed.¹³

In Step 3, per subparagraph (3) of paragraph (c), if any power remains to be allocated after Step 2, the Exchange would allocate power to any orders that were not completely filled

¹³ To illustrate, if a User finalized an order for 100 kW during the Ordering Window and was allocated 32 kW of power during Step 2 and no further power remained to be allocated after Step 2, the User's order would be considered completed. The residual 68 kW ordered would not be transferred to a waitlist. The User would be free to submit a new order for additional power after the Ordering Window (subject to the Purchasing Limits, if then in effect).

during Step 2, as follows. If sufficient power is available, the Exchange would allocate power to completely fill all remaining orders finalized during the Ordering Window. If sufficient power is not available to completely fill all such orders, the Exchange would allocate power to fill an identical percentage of each remaining order (rounded to a whole number of kilowatts). All such orders would then be considered completed.¹⁴

Paragraph (d) of Colocation Note 8 would specify that any orders received by the Exchange after the end of the Ordering Window would not be included in the allocation process described in Colocation Note 8. Such orders would be subject to the terms of Colocation Notes 6 and 7.

Application and Impact of the Proposed Changes

The Exchange currently anticipates invoking the proposed Ordering Window procedure to assist in determining Users' power needs and to allocate power in Hall 5. The procedure could also be used in the future each time the Exchange or ICE must assess customer demand for additional space and power in the MDC or allocate large amounts of power that become available at one time.

The Exchange does not propose to eliminate or alter the existing purchasing limits and waitlist procedures in Colocation Notes 6 and 7. Rather, those procedures would be temporarily superseded during the Ordering Window and would resume immediately after the Ordering Window ends.

The Exchange expects that the proposed changes would apply equally to all types and sizes of market participants. All Users would receive equal notice of the opening of the Ordering

¹⁴ To illustrate, if a User finalized an order for 100 kW during the Ordering Window and was allocated a total of 90 kW of power in Steps 2 and 3, the order would be considered completed. The residual 10 kW ordered would not be transferred to a waitlist. The User would be free to submit a new order for additional power after the Ordering Window (subject to the Purchasing Limits, if then in effect).

Window; the Ordering Window dates would be the same for all Users; and each order during the Ordering Window would be secured with a deposit equal to two months of the monthly recurring costs of the power ordered during the Ordering Window.

The proposed Ordering Window procedure would not disadvantage Users on the current waitlist pursuant to Colocation Note 7, since power would be allocated to those orders first under the Ordering Window procedure.

Smaller Users with more modest power needs would not be disadvantaged by the proposed changes. In Step 2, each User that finalized an order during the Ordering Window would be allocated up to 32 kW of power (subject to sufficient power being available) before any User's order for more than 32 kW would be filled. This would ensure that all Users that participate in the Ordering Window would receive at least some power and no Users would be shut out of the allocation. In addition, because the deposit is proportional to the size of the order, and not a fixed amount, smaller Users would not be disproportionately affected by the deposit requirement.

The proposed changes are not otherwise intended to address any other issues relating to colocation services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁶ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just

¹⁵ 15 U.S.C. 78f(b).

¹⁶ 15 U.S.C. 78f(b)(5).

and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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 and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed rule change is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system by creating an alternative procedure by which the Exchange can allocate power in the MDC. The current procedures provide for only two allocation methods: orders that must be limited to 32 kW when the Purchasing Limits are in effect, and unlimited orders that the Exchange must fill on a first-come, first-served basis when the Purchasing Limits are not in effect. Neither of those current procedures gives the Exchange a way to obtain accurate information from Users about their actual and anticipated power needs -- information that the Exchange requires in order to properly plan for future hall expansions at the MDC. The current procedures are not well-tailored to allocating large amounts of power that become available all at once, such as when a new colocation hall opens. When a large amount of power becomes available at one time, such as through a hall expansion, the current procedures could create a race condition in which the largest Users place early orders for many hundreds of kilowatts of power that the Exchange must fill on a first-come, first-served basis, effectively shutting out other customers with more modest power needs. In contrast, the proposed alternative procedure would remove impediments and perfect the mechanism of a free and open market and a national market system by permitting the Exchange to allocate up to 32 kW of power (subject to sufficient power being available) to each User before any User's order for more than 32 kW would be filled. This would ensure that each

User submitting a finalized order during the Ordering Window would be guaranteed to receive at least some power and no Users would be shut out of the allocation.

The proposed requirement that orders submitted during the Ordering Window be guaranteed by a deposit is also designed to remove impediments and to perfect the mechanism of a free and open market and a national market system. The current procedures give the Exchange no way to accurately measure User demand for additional power. The existing waitlist is no indication of Users' actual demand, since waitlist orders are capped at 32 kW. Users' comments that they are interested in purchasing hundreds more kilowatts of power are mere casual mentions, which, in the Exchange's experience, Users sometimes walk back when the power actually becomes available. Without firm, guaranteed commitments from Users to purchase the power if it is made available, the Exchange runs the risk of underestimating or overestimating Users' true demand for power. The proposed deposit requirement would address these issues by discouraging Users from submitting orders for more power than they actually intend to purchase and would indicate the true amount of additional power that each User would agree to purchase if it were made available. The proposed deposit requirement of two months' worth of the monthly recurring costs of the amount of new power ordered during the Ordering Window is reasonable because, on the one hand, it is not so onerous as to dissuade Users from submitting orders, and, on the other hand, it is not so trivial that it would fail to deter Users from submitting exaggerated orders.¹⁷ The Exchange requires market participants to submit deposits in other contexts, and as such, the deposit requirement here would not be novel.¹⁸

¹⁷ To illustrate, for a large User ordering an additional 300 kW of power, the deposit required would be \$540,000 (i.e., two times the monthly recurring cost of \$270,000), while a smaller User ordering an additional 32 kW of power would pay an estimated deposit of \$60,000 (i.e., two times the monthly recurring cost of \$30,000), depending on how much power it already had at the MDC.

¹⁸ For example, since 2012, the Exchange has required prospective issuers to pay a \$25,000 initial application fee as part of the process for listing a new security on the exchange. This fee functions as a deposit that is

Under the proposed procedure, if a User wishes to reduce an order that it placed during the Ordering Window, its deposit would not be reduced or returned, but rather would be applied against the User's first and subsequent months' invoices after the power is delivered until the deposit is completely depleted. The Exchange believes that this would remove impediments and perfect the mechanism of a free and open market and a national market system because it would ensure that a User would be reimbursed for all of its deposit even if it reduces its order after the Ordering Window closes. This would remove any incentive a User otherwise might have to understate its needs for power out of a concern that it would not be reimbursed for the full amount of its deposit.

The proposed rule change would protect investors and the public interest in that it would provide the Exchange with accurate insight into Users' true power requirements. It is in the public interest for the Exchange to take User demand into account and to make reasoned, informed decisions about whether and how to expand the MDC.

The proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The proposed changes would apply equally to all types and sizes of market participants. All Users would receive equal notice of the opening of the Ordering Window; the Ordering Window dates would be the same for all Users; and each order during the Ordering Window would be secured with a deposit equal to two months of the monthly recurring costs of the power ordered. Smaller Users with more modest power needs would not be disadvantaged by the proposed changes. In Step 2, each User that finalized an order during the Ordering Window would be allocated up to 32 kW of power (subject to

credited toward the issuer's listing fees after it is listed on the exchange. The deposit functions as "a disincentive for impractical applications by issuers." The deposit is forfeited if the issuer does not ultimately list on the exchange. See Securities Exchange Act Release No. 68470 (December 19, 2012), 77 FR 76116 at 76117 (December 26, 2012) (SR-NYSE-2012-68).

sufficient power being available) before any User's order for more than 32 kW would be filled. This would ensure that all Users that participate in the Ordering Window would receive at least some power and no Users would be shut out of the allocation. In addition, because the deposit is proportional to the size of the order and not a fixed amount, smaller Users would not be disproportionately affected by the deposit requirement. Finally, the proposed Ordering Window procedure would not disadvantage Users on the current waitlist pursuant to Colocation Note 7, since power would be allocated to those orders first under the Ordering Window procedure.

For all these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,¹⁹ the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes that the proposed rule change would not place any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would provide an alternative procedure by which the Exchange can allocate power in the MDC that both provides the Exchange with reliable information about Users' true power needs and allows all Users that submit deposit-guaranteed orders during the Ordering Window to be assured of receiving at least some additional power. The Exchange does not expect the proposed rule change to impact intra-market or intermarket competition between exchanges, Users, or any other market participants.

¹⁹ 15 U.S.C. 78f(b)(8).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSEAMER-2023-39 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-NYSEAMER-2023-39. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

protection. All submissions should refer to file number SR-NYSEAMER-2023-39 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Sherry R. Haywood,

Assistant Secretary.

²⁰ 17 CFR 200.30-3(a)(12).