

further believes that listing Third Friday NDXP would not have any adverse effects or impact on market volatility and the operation of fair and orderly markets on the underlying cash market at or near the close of trading in its Nasdaq-100 Index options.²¹ Further, the Exchange states it does not believe that any market disruptions will be encountered with the introduction of Nasdaq-100 Index options with third-Friday-of-the-month expiration dates.²² The Exchange states it will monitor for any such disruptions or the development of any factors that could cause such disruptions.²³ Finally, the Exchange represents it has sufficient capacity to handle additional traffic associated with listing Third Friday NDXP options and that it has in place adequate surveillance procedures to monitor trading in Third Friday NDXP options.²⁴

The Commission has had concerns about the adverse effects and impact of p.m.- settlement upon market volatility and the operation of fair and orderly markets on the underlying cash market at or near the close of trading on expiration days.²⁵ However, the Commission recently approved proposals from several exchanges, including the Exchange, to permanently establish programs permitting the listing and trading of certain p.m.-settled broad-based index options.²⁶ In approving these proposals, the Commission reviewed data provided by the exchanges in their filings, the exchanges' pilot data and reports, as well as an analysis conducted at the direction of Staff from the Commission's Division of Economic and Risk Analysis and concluded that analysis of the pilot data did not identify any significant economic impact on the underlying component securities surrounding the close as a result of expiring p.m.-settled options nor did it indicate a deterioration in market quality for an existing product when a new p.m.-

settled expiration was introduced.²⁷ Further, the Commission stated that significant changes in closing procedures in the decades since index options moved to a.m. settlement may also serve to mitigate the potential impact of p.m.-settled index options on the underlying cash markets.²⁸

As noted above, the Exchange currently may trade Third Friday NQX options in addition to p.m.-settled NDX option with nonstandard expirations.²⁹ The Exchange's proposal, which would permit p.m.-settled Third Friday NDX, is reasonably designed as a limited expansion of existing p.m.-settled broad-based index option programs and may provide the investing public and other market participants more flexibility to closely tailor their investment and hedging decisions. The Exchange has represented that it has an adequate surveillance program in place to monitor trading in the Third Friday NDXP options and has the necessary systems capacity to support the new options series.³⁰ The Commission expects the Exchange to continue to monitor any potential risks from large p.m.-settled positions and take appropriate action on a timely basis if warranted.

Accordingly, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act³¹ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,³² that the proposed rule change (SR-ISE-2023-20) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³

Sherry R. Haywood,

Assistant Secretary.

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²⁷ See e.g., ISE Pilot Approval, 88 FR at 66114.

²⁸ See *id.*

²⁹ See *supra* note 19. In addition, the Commission previously approved a pilot program permitting the listing and trading of Third Friday NDX options on Nasdaq PHLX LLC ("Phlx"). See Securities Exchange Act Release No. 81293 (August 2, 2017), 82 FR 37138 (August 8, 2017) (approving SR-Phlx-2017-04). Phlx did not list any options under the program and subsequently removed the rule from its rule book. See Securities Exchange Act Release No. 87517 (November 13, 2019), 84 FR 63910 (November 19, 2019) (SR-Phlx-2019-49).

³⁰ See *supra* note 24 and accompanying text.

³¹ 15 U.S.C. 78f(b)(5).

³² 15 U.S.C. 78s(b)(2).

³³ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98937; File Nos. SR-NYSE-2023-29, SR-NYSEAMER-2023-39, SR-NYSEArca-2023-53, SR-NYSECHX-2023-16, SR-NYSEAT-2023-18]

Self-Regulatory Organizations; New York Stock Exchange LLC; NYSE American LLC; NYSEArca, Inc.; NYSE Chicago, Inc.; NYSE National, Inc.; Order Approving Proposed Rule Changes To Establish Certain Alternative Procedures for the Allocation of Power in Co-Location

November 14, 2023.

I. Introduction

On August 3, 2023, New York Stock Exchange LLC, NYSE American LLC, NYSEArca, Inc., and NYSE Chicago, Inc. (the "Exchanges") each filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposal to amend its connectivity fee schedule to include an alternative procedure to allocate power in the Mahwah Data Center based on deposit-guaranteed orders from colocation Users in certain circumstances. On August 17, 2023, NYSE National, Inc., filed with the Commission the same proposed amendments to its connectivity fee schedule. The proposed rule changes were published for comment in the **Federal Register** on August 22, 2023³ and August 25, 2023.⁴ The Commission received no comments on the proposed rule changes. This order grants approval of the proposed rule changes.

II. Description of the Proposed Rule Changes

A. Background

As more fully set forth in the Notice, the Exchanges represent that in recent years they have experienced "unprecedented" demand from colocation Users for cabinet space and power at the Mahwah Data Center ("MDC").⁵ The Exchanges filed, and the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release Nos. 98148 (August 16, 2023), 88 FR 57150 (SR-NYSE-2023-29); 98149 (August 16, 2023), 88 FR 57154 (SR-NYSEAMER-2023-39); 98150 (August 16, 2023), 88 FR 57142 (SR-NYSEArca-2023-53); 98151 (August 16, 2023), 88 FR 57159 (SR-NYSECHX-2023-16).

⁴ See Securities Exchange Act Release No. 98171 (August 21, 2023), 88 FR 58364 (SR-NYSEAT-2023-18). Each proposal is referred to as the "Notice" and for ease of reference, page citations are to the Notice for NYSE-2023-29.

⁵ Notice, *supra* note 3, at 57150. For purposes of each Exchange's colocation services, a "User"

Continued

²¹ See *id.*

²² See *id.*

²³ See *id.*

²⁴ See *id.*

²⁵ See Securities Exchange Act Release No. 65256 (September 2, 2011), 76 FR 55969, at 55972 (September 9, 2011) (SR-C2-2011-008) (Order approving proposed rule change to establish a pilot program to list and trade SPXPM options on the C2 Options Exchange, Incorporated).

²⁶ See e.g., ISE Pilot Approval; Securities Exchange Act Release Nos. 98451 (September 20, 2023), 88 FR 66088 (September 26, 2023) (SR-Phlx-203-07) (Order approving a nonstandard expirations pilot program and p.m.-settled XND options) and 98454 (September 20, 2023), 88 FR 66103 at 66103-04 (September 26, 2023) (SR-CBOE-2023-005) (Order approving p.m.-settled Third Friday SPX options).

Commission approved, rules establishing purchasing limits and waitlists for cabinet space and power orders when supply is limited.⁶ Pursuant to these rules, if available cabinet inventory and/or power fall below certain thresholds, certain purchasing limits on cabinets and power apply (“Cabinet and Power Purchasing Limits”), including that a User may not purchase more than 32 kW of power and four dedicated cabinets.⁷ If the amount of available power is zero, or if a User requests an amount of power that, if provided, would cause the amount of available power to be zero, the Exchanges place orders on a waitlist (“Combined Waitlist”).⁸ Orders on the Combined Waitlist are subject to the Cabinet and Power Purchasing Limits.⁹ The Exchanges represent that a Combined Waitlist is in effect.

The Exchanges represent that although they expanded the amount of cabinet space and power available in the MDC in 2021 and 2022 by opening new colocation Hall 4, User demand for power continues to increase.¹⁰ The Exchanges are currently building a new

means any market participant that requests to receive colocation services directly from the Exchange. *Id.* at 57150 n. 5.

⁶ *Id.* 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, and SR–NYSENAT–2020–28) (Notice of Filings of Amendment No. 1 and Order Granting Approval of Proposed Rule Changes, Each as Modified by Amendment No. 1, Amending the Exchanges’ Co-Location Services To Establish Procedures for the Allocation of Cabinets to Co-located Users if Cabinet Inventory Falls Below Certain Thresholds). 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) (Notice of Filing of Amendment Nos. 1 and 2 and Order Granting Accelerated Approval of Proposed Rule Changes, Each as Modified by Amendment Nos. 1 and 2, to Establish Procedures for the Allocation of Power in Co-Location When Availability Falls Below Certain Thresholds). See Colocation Notes 6 and 7 in the Exchanges’ Connectivity Fee Schedule, available at https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf.

⁷ See Colocation Note 6b in each Exchange’s Connectivity Fee Schedule. Cabinet space is offered in the form of dedicated cabinet, which come with 4 to 8 kW of power, and partial cabinets, available in increments of eight-rack units of space, which may be allocated 1 or 2 kW of power.

⁸ See Colocation Note 7b in each Exchange’s Connectivity Fee Schedule. If only the Cabinet Limit is reached, pursuant to Colocation Note 7a, a Cabinet Waitlist is created. See Colocation Note 7a in each Exchange’s Connectivity Fee Schedule.

⁹ See Colocation Note 7b in each Exchange’s Connectivity Fee Schedule.

¹⁰ Notice, *supra* note 3, at 57150. The Exchanges represent that the Combined Waitlist includes 27 Users requesting in excess of an additional 700 kW of power *Id.* at 57151.

colocation hall (“Hall 5”) to satisfy this increased demand.¹¹ The Exchanges are also evaluating whether there is sufficient customer demand for additional power for it to invest in additional expansion.¹²

The Exchanges state that the current Combined Waitlist is inadequate to determine total demand for power because when the Combined Waitlist is in effect, current rules permit the Exchanges to accept one order at a time from a User and its Affiliates¹³ of at most 32 kW of power.¹⁴ The Exchanges represent that the approximately 700 kW of demand on the current Combined Waitlist may represent a “mere fraction of User’s true power requirements.”¹⁵ The Exchanges state that several Users on the current Combined Waitlist have expressed interest in purchasing more than 32 kW of power, specifically additional power of “several hundred kilowatts.”¹⁶ The Exchanges seek better knowledge of User demand for power, and also state that their current rules regarding waitlist procedures are not well-tailored to allocating large amounts of power that become available all at once (e.g., a new colocation hall opens).¹⁷ Although there is a 32 kW limit on orders when less than 350 kW of unallocated power is available, any time that more than 350 kW of unallocated power is available (*i.e.*, the Combined Waitlist is not in effect), current rules permit Users to place unlimited orders that the Exchanges must allocate on a first-come, first-served basis.¹⁸ The Exchanges anticipate that the availability of large amounts of power in Hall 5 in several intervals may result in the largest Users placing early orders for many hundreds of kilowatts of power that could effectively prevent Users with more modest demand from receiving newly available power.¹⁹

B. Proposed Alternative Power Allocation Procedures

To address these concerns, the Exchanges propose to add as Colocation Note 8 “alternative” procedures to assess power demand and allocate power in the Mahwah Data Center in

¹¹ *Id.*

¹² *Id.*

¹³ 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.” See Connectivity Fee Schedule, at 1.

¹⁴ Notice, *supra* note 3, at 57151.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Notice, *supra* note 3, at 57153.

certain circumstances.²⁰ Specifically, the Exchanges propose that they may announce, by customer notice, a 90-day window (“Ordering Window”) during which the Exchanges may accept unlimited deposit-guaranteed orders from Users.²¹ If they announce an Ordering Window while the Cabinet and Power Purchasing Limits and/or the Cabinet and Combined Waitlist provisions are in effect, the terms of the Ordering Window would temporarily supersede the Cabinet and Power Purchasing Limits and/or the Cabinet and Combined Waitlist.²²

Under the proposal, Users may submit orders for their anticipated needs, but each User (and its Affiliates) may finalize only one order for power during the Ordering Window.²³ During the Ordering Window, the provision of the Cabinet and Combined Waitlists in Colocation Note 7 that prohibits the Exchanges from accepting orders for more than four dedicated cabinets and/or 32 kW of power would not apply.²⁴ During the Ordering Window, a User may submit an order even if it already has an order pending on a Cabinet or Combined Waitlist.²⁵ While the Ordering Window is open, the Exchanges would not accept new orders to the Cabinet or Combined Waitlist established under Colocation Note 7, and any order submitted by a User must meet the requirements of the Ordering Window procedures as set forth in Colocation Note 8.²⁶

Orders submitted during the Ordering Window are to be accompanied by a deposit equal to two months’ worth of the monthly recurring costs of the amount of the new power ordered.²⁷ This deposit will be applied to the User’s invoices for the first and subsequent months after power is delivered until the deposit is depleted.²⁸ The Exchanges further propose to finalize a User’s order upon receipt of a User’s signed order form and deposit, and to consider void any orders not finalized before the Ordering Window

²⁰ *Id.* at 57152.

²¹ Notice, *supra* note 3, at 57151.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 57151 n.10.

²⁷ *Id.* The Exchanges state that 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. See Notice, *supra* note 3, at 57151 n.11.

²⁸ Notice, *supra* note 3, at 57152.

closes.²⁹ A User may modify its order during the Ordering Window, but such modification will not be finalized until the Exchange receives the User's signed modified order form and any additional deposit.³⁰ If the User withdraws its order during the Ordering Window, the deposit will be returned.³¹

The Exchanges propose allocation procedures for power after the Ordering Window ends. To prevent larger Users from placing large orders for power and preventing allocation of power to Users with more modest power needs, the Exchanges propose a multi-step allocation procedure. In step one, the Exchanges will allocate power to fill orders in effect on any waitlist in effect pursuant to Colocation Note 7 (e.g., the current Combined Waitlist).³² In step two, the Exchanges will allocate up to 32 kW of power to each User that finalized an order during the Ordering Window based on whether sufficient power is available.³³ If sufficient power is available, the Exchanges will 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.³⁴ If sufficient power is not available, the Exchanges will allocate the available power equally among all Users (rounded to a whole number of kilowatts), except the Exchanges will not allocate a User more kilowatts than it actually ordered.³⁵ If, after step two, there is no power to allocate, all orders finalized during the Ordering Window will be considered completed.³⁶

If any power remains to be allocated after step two, the Exchanges will allocate power in step three to any orders that were not completely filled during step two.³⁷ If sufficient power is available, the Exchanges will allocate power to completely fill all remaining orders finalized during the Ordering

²⁹ *Id.* The Exchanges state that if User wishes to reduce an order that it placed during the Ordering Window, the User's deposit would not be reduced or returned, but instead would be applied against the User's first and subsequent months' invoices after the power is delivered until the deposit is depleted. *Id.* at 57152 n.12.

³⁰ Notice, *supra* note 3, at 57152.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* To illustrate, if a User finalized an order for 100 kW during the Ordering Window and was allocated 32 kW of power during step two 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). *Id.* at 57152 n.13.

³⁷ Notice, *supra* note 3, at 57152.

Window.³⁸ If sufficient power is not available to completely fill all such orders, the Exchanges will allocate power to fill an identical percentage of each remaining order (rounded to a whole number of kilowatts).³⁹ All such orders will then be considered complete.⁴⁰ Further, any orders received after the end of the Ordering Window will not be included in the Ordering Window allocation process but instead will be subject to the terms of the Cabinet and Purchasing Power Limits and the associated waitlists.⁴¹

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁴² In particular, the Commission finds that the proposed rule changes are consistent with section 6(b)(5) of the Act,⁴³ which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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 not be designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The Commission believes that the Exchanges' proposed Ordering Window and associated procedures for allocating power requested during the Ordering Window provide a rational objective means for the Exchanges to assess power demand by Users prospectively and to fairly allocate power requested by Users in circumstances where large amounts of power become available at once (e.g., a new colocation hall opens). The Exchanges will allocate power for orders received during the Ordering

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* 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 two and three, 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). *Id.* at 57152 n.14.

⁴¹ See Notice, *supra* note 3, at 57152, and Colocation Notes 6 and 7 in each Exchange's Connectivity Fee Schedule.

⁴² In approving this proposed rule change the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁴³ 15 U.S.C. 78f(b)(5).

Window pursuant to a three step process.⁴⁴ In step one, Users on the Combined Waitlist will have their orders filled first. In step two, Users would be allocated power equally, each receiving up to 32 kW of power requested during the Ordering Window if supply is sufficient (and each receiving power equally if power is not sufficient), with no User allocated more kilowatts than it actually ordered. In step three, if any power remains to be allocated, the Exchanges will allocate power to any orders that were not completely filled during step two if sufficient power is available (and will allocate power to fill an identical percentage of each remaining order if sufficient power is unavailable). The proposed allocation procedures would provide that that each User who has placed an order for power gets its order at least partially filled, and that larger Users do not use the Ordering Window to prevent power allocation to smaller Users with more modest power demands. Accordingly, the Commission believes that the proposed Ordering Window and associated allocation procedures are reasonably designed to facilitate an equitable allocation of available power and are not designed to permit unfair discrimination between customers, issuers, brokers or dealers. For the foregoing reasons, Commission finds that the proposals are consistent with the Act.

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,⁴⁵ that the proposed rule changes (SR-NYSE-2023-29, SR-NYSEAMER-2023-39, SR-NYSEARCA-2023-53, SR-NYSECHX-2023-16, SR-NYSENAT-2023-18) be, and hereby are approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁶

Sherry R. Haywood,

Assistant Secretary.

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⁴⁴ See text accompanying notes 32-41 *supra*.

⁴⁵ See *id.*

⁴⁶ 17 CFR 200.30-3(a)(12).