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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-66011; File No. SR-Phlx-2011-142)

December 20, 2011

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Approving a Proposed Rule Change to Modify its Co-Location Fee Schedule Regarding Low Latency Network Connections

I. Introduction

On October 31, 2011, NASDAQ OMX PHLX LLC (“Phlx” or the “Exchange”) 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 proposed rule change to modify the Exchange Fee Schedule, Section X(b) entitled “Co-Location Services” to establish a program for offering low latency network connections and to establish the initial fees for such connections. The Exchange also proposed administrative modifications to the Exchange Fee Schedule, Section X(b). The proposed rule change was published for comment in the Federal Register on November 10, 2011.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposed to modify the Exchange Fee Schedule, Section X(b), entitled “Co-Location Services,” to offer new options for low latency network telecommunication connections and to establish the fees for such connections. As its initial offering, the Exchange proposed to offer point-to-point telecommunication connectivity from the co-location facility to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 65689 (November 4, 2011), 76 FR 70187 (“Notice”).

select major financial trading and co-location venues in the New York and New Jersey metropolitan areas, Toronto, and Chicago.⁴

According to the Exchange, the enhanced point-to-point connectivity would provide the Exchange's co-location customers with the opportunity to obtain low latency network connectivity with greater ease than is currently the case, and at a competitive price.⁵ The Exchange represented that co-location customers currently obtain similar services by negotiating fees, obtaining service level agreements, and executing service agreements directly with approved telecommunication carriers, and that such co-location customers are currently charged a monthly negotiated fee by the telecommunications carrier in addition to a cross connection fee by the Exchange.⁶ The Exchange represented that for its low latency network connection services, it would obtain wholesale rates from the carriers and then charge a markup to compensate the Exchange for its efforts to negotiate and establish the arrangement, for integrating the connectivity into the Exchange co-location connectivity offering, and for administrative costs associated with establishing and maintaining each new connection.⁷

According to the Exchange, co-location customers would have the opportunity to request these new low latency network telecommunication connections through the same process used to

⁴ Id. at 70188. The Exchange represented that it currently provides a cross connect from a client's cabinet to its requested telecommunication carrier's cabinet (known as a "telco cross connect"). According to the Exchange, clients would have the option to use the enhanced point-to-point connectivity service to receive low latency network connectivity from the Exchange's data center to the client's chosen venue(s), in addition to the telco cross connect. These connections could be utilized to send market data to and receive orders from the chosen venues.

⁵ Id.

⁶ Id.

⁷ Id.

request a new co-located cabinet and other co-location services.⁸ Co-location customers would retain the option of contracting directly with telecommunication providers, including either the providers that participate in the program, the current providers in the data center who have not yet agreed to participate, or any new carrier that is approved to install equipment in the Exchange's data center.⁹

The Exchange proposed one-time fees for the installation of telecommunication connectivity to select major financial trading and co-location venues in the New York and New Jersey metropolitan areas, Toronto, and Chicago, as well as per-month connectivity fees, at connectivity levels of 100MB, 1G, and 10G, respectively.¹⁰ The Exchange represented that the fees were based on anticipated bandwidth necessary for the connections and distances to these select venues. The Exchange indicated its belief that the fees are reasonable, because they are similar and competitive with fees charged for similar services by other entities.¹¹

The Exchange also proposed to eliminate references to certain fee waivers that expired July 31, 2011.¹²

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id. at 70189.

¹² Id.; see also Securities Exchange Act Release No. 64630 (June 8, 2011), 76 FR 34783 (June 14, 2011) (SR-NASDAQ-2011-074); and Securities Exchange Act Release No. 64858 (July 12, 2011), 76 FR 42152 (July 18, 2011) (SR-NASDAQ-2011-094).

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹³ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,¹⁴ which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,¹⁵ which requires, among other things, that the rules of a national securities exchange be designed 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.

In the Notice, the Exchange represented that the low latency network connections would be offered to market participants in a manner that is not unfairly discriminatory.¹⁶ The Commission believes that this program to offer low latency network connectivity, in the manner described in the proposal, is consistent with Section 6(b)(5) the Exchange Act insofar as NASDAQ makes these connectivity options uniformly available to all members who voluntarily request them and pay the associated fees. Additionally, the Commission notes that members may choose not to obtain low latency network connectivity through the Exchange and instead negotiate connectivity options

¹³ 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).

¹⁴ 15 U.S.C. 78f(b)(4).

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ See Notice, 76 FR at 70189.

separately through other vendors on site.

Regarding the associated fees, the Exchange represented that they will be applied uniformly and will not unfairly discriminate between similarly situated market participants that use such co-location services.¹⁷ The Exchange also represented that the fees are reasonable because, among other things, they enable the Exchange to recoup its share of the costs associated with the proposed low latency network telecommunication connections.¹⁸ The Exchange further represented that the fees and associated costs of the co-location services are comparable to the costs and fees associated with comparable services offered by other trading venues.¹⁹ Finally, the Exchange noted its expectation that this service will result in a reduction in fees charged to market participants due to enhanced competition.²⁰ In light of the Exchange's representations, the Commission believes that the fees associated with the low latency network connection services are consistent with Section 6(b)(4) of the Exchange Act.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id. at 70189-90.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²¹ that the proposed rule change (SR-Phlx-2011-142) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

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Deputy Secretary

[FR Doc. 2011-33118 Filed 12/23/2011 at 8:45 am; Publication Date: 12/27/2011]

²¹ 15 U.S.C. 78s(b)(2).

²² 17 CFR 200.30-3(a)(12).