February 6, 2017

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F. Street N.E.
Washington, D.C. 20549-1090

RE: <u>Securities Exchange Act Release No. 78713 (August 29, 2016); SR-Nasdaq-2016-120</u>

Dear Mr. Fields:

Bats Global Markets, Inc. ("Bats") appreciates the opportunity to submit this third comment letter on the above-referenced proposed rule change in which the Nasdaq Stock Market LLC ("Nasdaq") proposes to adopt the Third Party Connectivity Service under Nasdaq Rules 7034(b) and 7051 (the "Proposal").[1] Bats previously submitted two comment letters on the Proposal: the first on September 12, 2016[2] and the second on October 12, 2016.[3] Nasdaq submitted a response to our first letter on October 5, 2016 ("Nasdaq's First Response").[4] Nasdaq submitted a second response letter[5] ("Nasdaq Second Response") and filed an amendment to the Proposal on January 26, 2017 ("Amendment No. 1"). Nasdaq filed a second amendment to the Proposal on January 31, 2017 (collectively with Amendment No.1, the "Amendments"). Nasdaq's Second Response and Amendments fail to meaningfully respond to the issues raised in Bats' first and second comment letters - that the Proposal is anti-competitive, unnecessary, and constitutes an Access Services Fee for UTP SIP ("UTP") data. Bats now submits this third letter to address Nasdaq's Second Response and Amendments and again urges the Securities and Exchange Commission ("Commission") to disapprove the proposed rule change as it is inconsistent with Sections 6(b)(4) and (5) of Securities Exchange Act of 1934 (the "Act").[6]

---

[1] *See* Securities Exchange Act Release No. 78713 (August 29, 2016), 81 FR 60768 (September 2, 2016) (SR-Nasdaq-2016-120).

[2] *See* letter from Eric Swanson, EVP and General Counsel, Bats, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, dated September 12, 2016. In this letter, Bats set forth its basis for believing the proposed rule change: (i) constitutes a UTP Access Services Fee required to directly receive UTP data, and such fee was not approved by the UTP Operating Committee; (ii) is anti-competitive as it benefits Nasdaq's proprietary data products over UTP data; and (iii) is technically unnecessary, despite Nasdaq's assertions to the contrary.

[3] *See* letter from Eric Swanson, EVP and General Counsel, Bats, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, dated October 12, 2016.

[4] *See* letter from Jeffery S. Davis, Vice President and Deputy General Counsel, Nasdaq, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, dated October 5, 2016.

[5] *See* letter from T. Sean Bennet, Principal Associate General Counsel, Nasdaq, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, dated January 26, 2017.

[6] 15 U.S.C. 78f(b)(4) and (5).

I. Nasdaq's Second Response and Amendments Fail to Successfully Argue that the Proposal Does Not Constitute an Access Services Fee for UTP Data

Bats believes the Proposal, as amended, constitutes an Access Services Fee for UTP data and must be approved by the UTP Operating Committee.[7] First, Nasdaq inappropriately relies on the UTP Operating Committee's past silence as a relinquishment of authority regarding UTP data recipients' access to the UTP data. By permitting Nasdaq to charge for connectivity, the UTP Operating Committee in no way relinquished its authority over connectivity fees for UTP data and we believe retains its authority over such fees should issues arise with connectivity. As we have stated in our previous comment letters, the UTP Operating Committee permitted this arrangement because there is significant overlap between those firms that want direct UTP access and those that have direct access to Nasdaq's proprietary services and the perceived benefits and cost savings of leveraging a single physical connection for access to both Nasdaq and UTP services. In addition, Nasdaq's fees for connectivity are not only constrained by competition with other exchanges and market participants, but also Nasdaq's own business need to not increase connectivity fees excessively as such an increase could also harm access to its own proprietary products and to the Nasdaq exchanges. Approval of the Proposal would remove this important competitive constraint and leave Nasdaq free to increase fees for its exclusive provision of access to UTP data without prior UTP Operating Committee approval.

Second, Nasdaq again argues that the proposed service is not an Access Services Fee because neither the UTP Plan nor the recently negotiated contract with Nasdaq regarding its role as the processor addresses connectivity. This is incorrect. The Section IV.B.3 of the UTP Plan specifically states

> "[t]he affirmative vote of two-thirds of the Participants entitled to vote shall be necessary to constitute the action of the Operating Committee with respect to the *establishment of new fees*, the deletion of existing fees, or increases or reductions in existing fees relating to Quotation Information and Transaction Reports in Eligible Securities" (*emphasis added*).[8]

---

7 In the Amendments, Nasdaq proposed to provide the first 1 GB and 10 GB connection for free to those subscribers who would utilize the connection solely for accessing UTP data. While the Exchange appreciates Nasdaq's willingness to offer limited free connectivity, this ignores that most UTP subscribers will purchase at least 2 ports for redundancy and other business reasons for which they would be required to pay for even if used solely for access to UTP data. Nasdaq also stated in the Amendments that it "may access a fee at some point in the future to the extent the cost of offering the connectivity become excessive." *See* footnote 20 and accompanying text of Amendment No. 1 and No. 2 to SR-Nasdaq-2016-120. Therefore, the Exchange continues to believe that the Proposal constitutes an Access Services Fee.

8 *See* Section IV.B.3 of the *Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis*, Securities Exchange Act Release No. 55647 (April 19, 2007), 72 FR 20891 (April 26, 2007).

Past practice notwithstanding, to argue that fees for connectivity related to accessing the "Quotation Information and Transaction Reports in Eligible Securities" are not covered by the Plan simply because the term "connectivity" is not mentioned is misguided. Interpretation of this clause must include connectivity fees, and not be limited to the fees for the production and use of the data. Not doing so would set bad precedent that could lead to other fees related to UTP data falling outside of the UTP Plan.

II. Nasdaq's Proposed Attestation Requirements Set Forth in Amendments is Unreasonable and not Consistent with the Act

Nasdaq continues to insist that a 1 GB connection is insufficient based on it witnessing "bursts" exceeding a 1 GB capacity for a one (1) microsecond timeframe during testing of the new INET UTP SIP. Utilizing a one (1) microsecond "burst" to determine a bandwidth recommendation is misplaced and not consistent with industry practices as the observed peak is not sustained over a full second. In addition, as explained in our first and second comment letters, Nasdaq's bandwidth recommendations are excessive, given that Nasdaq's bandwidth recommendations for its own proprietary data products are much lower than what has been proposed to receive UTP data.

Nasdaq proposes in the Amendments to allow subscribers to receive UTP data via a 1 GB connection only where the customer acknowledges that they are "aware of the risks associated with such action."[9] Nasdaq further states that such attestation would absolve Nasdaq of any responsibility for harm to the customer resulting from the use of the 1 GB connection.[10] First, Bats believes requiring customers to affirmatively sign such an attestation is impracticable since Bats expects most customer would be averse to providing Nasdaq such a broad exemption from liability. Bats further believes providing a "choice" between a 1 GB and a 10 GB connection is an illusion because the proposed attestation would unnecessarily coerce customers into purchasing the higher bandwidth that does not require the proposed attestation. While the first connection may be free, those customers are also more likely to purchase additional 10 GB connections for the reasons stated above at the much higher $5,000 monthly rate and to the sole monetary benefit of Nasdaq. Bats also believes providing Nasdaq such a broad exemption from liability for any harm to the customer resulting from the use of the 1 GB connection is not consistent with the Act.

III. Increased Capacity Requirements do not require the Creation of a Third Party Connectivity Service

---

9 *See* footnote 15 and accompanying text of Amendment No. 1 and No. 2 to SR-Nasdaq-2016-120.

10 *Id*. The Exchange also believes the form of attestation should be subject to notice and comment and included as Exhibit 3 of the Form 19b-4. Bats believes that market participants should be provided the opportunity to comment on the proposed attestation requirements.

Nasdaq states in the Amendments that increased capacity is an issue requiring a UTP data recipient to obtain a 10 GB connection in order to support higher bandwidth requirements. If it were the case that a higher bandwidth connection was required, it does not follow that a separate network and service would also be required to address the issue. Nasdaq has provided no information justifying the creation of a separate network or explained why the existing network could not support the additional capacity needs of UTP data recipients and firms that want UTP data could simply obtain an existing 10 GB connection if needed.

IV. <u>Recommendation and Conclusion</u>

Bats appreciates the opportunity to again comment on the above proposed rule change and, for the reasons set forth above as well as in its first and second comment letters, strongly urges the Commission to disapprove the Proposal. However, Bats continues to believe its concerns would be alleviated should Nasdaq amend its proposal to no longer require firms to subscribe to the proposed Third Party Connectivity Service to receive UTP data. Nasdaq should provide firms the choice to receive UTP data via their existing connections, via the proposed Third Party Connectivity Service, or via an extranet provider. If it is the case that Nasdaq's current network cannot support the increased UTP capacity requirements, we ask that Nasdaq provide detail regarding their capacity limits. If the current network can satisfy UTP capacity requirements, we ask that Nasdaq explain why a separate network is justified.

Please feel free to contact me if you have any questions related this matter.

Sincerely,

Eric Swanson
EVP, General Counsel and Secretary