October 12, 2016

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 second 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 a comment letter on the Proposal on September 12, 2016.[2] Nasdaq submitted a response to our first letter on October 5, 2016 ("Nasdaq Response").[3] The Nasdaq Response fails to meaningfully respond to the issues raised in Bats' first letter and serves only to distract from the true issues at hand – that the Proposal is anti-competitive, unnecessary, and constitutes an Access Services Fee for UTP SIP ("UTP") data. Bats now submits this letter to address the Nasdaq Response, reiterate its concerns with the Nasdaq Proposal that Bats raised in its first letter, and again urge the Securities and Exchange Commission ("Commission") to disapprove the proposed rule change as inconsistent with Section 6(b)(4) and (5) of Securities Exchange Act of 1934 (the "Act").[4]

I. <u>The Nasdaq Response Fails to Address Bats' Assertions that the Proposal is Anti-Competitive as Bats Believes it Clearly Benefits Nasdaq's Proprietary Data Products over UTP Data</u>

Nasdaq continues to argue that the proposed rates are lower than their rates for current connectivity to Nasdaq, but continues to fail to mention that this in turn makes the cost of access

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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 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.

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

to UTP data higher than to its own competitive proprietary products.[5] Nasdaq incorrectly believes that this alleviates any competitive issues and continues to ignore the fact that Nasdaq members would be required to purchase two connections – one for trading, quoting, and receiving Nasdaq proprietary data products and a second to receive UTP data – and to pay two separate fees for those connections. Nasdaq members who maintain direct connections to Nasdaq for trading and quoting purposes would be able to continue to receive Nasdaq's proprietary data products for no additional charge. Meanwhile, those that wish to also obtain UTP data will be required to purchase an additional connection via the proposed Third Party Connectivity Service, thereby making access to UTP data materially more expensive. This alone provides a competitive advantage to Nasdaq's proprietary products over UTP data.

The Nasdaq Response also incorrectly argues that the Proposal will not impact competition because extranet providers connect to the network and provide competing data distribution services. This argument ignores the key issue raised in our first letter; that these same extranet providers must subscribe to and pay for the proposed service in order to receive and redistribute UTP data. This would be in addition to the fees charged to these extranet providers who connect directly to Nasdaq for purposes of trading, quoting, and receiving Nasdaq proprietary market data. For these reasons and those also set forth in our first letter, Bats continues to believe the proposed rule change is anti-competitive and in violation of Section (6)(b)(8) of the Act[6] because it clearly benefits Nasdaq's proprietary data products over UTP data.

II. <u>Nasdaq Fails to Explain why the Proposed Rule Change is Necessary and not a Simple Attempt to Increase Nasdaq Revenue by Charging Fees for UTP Access</u>

The Nasdaq Response fails to address why the Third Party Connectivity Service is necessary, nor does it adequately respond to the issues raised in our first letter with regard to its proposed bandwidth recommendations. The Nasdaq Response states that during testing of the new INET UTP SIP, they witnessed "bursts" exceeding a 1G capacity for a one (1) microsecond timeframe in 18 of 23 trading days. Utilizing a one (1) microsecond "burst" to determine a bandwidth recommendation is misplaced as the observed peak is not sustained over a full second. As stated in our first letter, Nasdaq, through the Nasdaq SIP, published new INET UTP SIP bandwidth recommendations that are not consistent with and much higher than 150% of

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[5] The Nasdaq Response also argues, for the first time, that the proposed Third Party Connectivity Service is designed to reduce the potential for conflicts of interest arising from its role as both the Processor and as an exchange. Bats believes the Nasdaq Response, citing conflict of interest as the reason for the proposed network, is being used by Nasdaq as a distraction from the true issues raised by the Proposal. Nasdaq does not correctly describe the conflict of interest concerns, which were related to allowing SIP information to be viewed by their proprietary data product personnel. In the Proposal, Nasdaq stated that it is proposing the new service in response to increased capacity requirements, to more efficiently allocate services, and to assist the subscriber with risk management. Bats believes these reasons for proposing the new service are unfounded for the reasons set forth in its initial letter.

[6] 15 U.S.C. 78f(b)(8).

current peak UTP message traffic.[7] The recommendation, which is cited within Nasdaq's filing, states that firms should accommodate a total of 3.4 Gbps of bandwidth (1.7 Gbps per data feed) when the current 150% of peak only requires approximately 500Mbps of bandwidth. The 3.4 Gbps bandwidth recommendation reflects the maximum burst rate capability of the new system and does not reflect the current capacity requirement.

In addition, as explained in our first letter, 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. The Nasdaq Response does not address this issue. Bats continues to believe Nasdaq's inclusion of these numbers will have the effect of misleading UTP data recipients into purchasing higher cost 10 Gb connections vs. a 1 Gb connection that could safely support the capacity needs when receiving data from the new INET UTP SIP. As such, Bats continues to believe Nasdaq's new service is technically unnecessary and simply designed to increase Nasdaq's revenue at the expense of direct UTP data recipients.

III. Nasdaq Fails to Successfully Argue that the Proposed Rule Change Does Not Constitute an Access Services Fee for UTP Data

The Nasdaq Response unsuccessfully argues that the proposed Third Party Connectivity Service does not constitute an Access Services fee for UTP data. Nasdaq 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. Nasdaq also inappropriately relies on the UTP Operating Committee's past acquiescence permitting Nasdaq to allow firms to obtain a single direct physical connection to receive UTP data, Nasdaq proprietary data, as well as access to each of Nasdaq's exchanges. Nasdaq is correct that for over 25 years the UTP Operating Committee permitted this arrangement and has done so because there is significant overlap between those firms that want direct UTP access and those that have direct access to Nasdaq's proprietary services. By leveraging a single physical connection for access to both Nasdaq and UTP services, firms can save on the total cost of access, which is a worthwhile benefit to direct UTP data recipients. Over those same 25 years, Nasdaq has never raised the need for developing separate connectivity for UTP data, including in the context of the recent selection of a new processor, as Nasdaq indicated in its own letter. In 2014, during the selection of a new processor, several alternative candidate firms proposed the creation of a separate connectivity network for UTP data, whereas Nasdaq again indicated there would be no change, given their historical precedent of using their own network to support UTP data distribution. In fact, their ability to leverage existing connectivity was a factor in the selection process. It was not until June 2, 2016, that Nasdaq issued a notice regarding the

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7 *See* UTP Vendor Alert #2016-13, *REVISED Bandwidth Recommendations for the Enhanced INET Platform Migration*, July 22, 2016, *available at* http://www.nasdaqtrader.com/TraderNews.aspx?id=utp2016-13. *See also*, *UTP SIP Key Quarterly Operating Metrics of Tape C*, *available at* http://www.utpplan.com/DOC/UTP%202016-Q1%20Stats%20with%20Processor%20Stats.pdf.

proposed Third Party Connectivity Service.[8] It did not provide the UTP Operating Committee with any advance notice of the Proposal despite the fact that such Proposal represented a departure from 25 years of history, direct discussions regarding the need for a separate connectivity network in connection with the negotiations discussed above, and the practices of the New York Stock Exchange, Inc. ("NYSE"), which acts as the sole distributor of Consolidated Tape Association ("CTA") data via the CTS and CQS data feeds.[9] It was, in fact, Bats who briefed the UTP Operating Committee participants on Nasdaq's plan and its effect on UTP data recipients.

Nasdaq also argues that it is not specifically targeting UTP data recipients because the Third Party Connectivity Service encompasses access to services other than the UTP. This premise is misguided and is served up by Nasdaq as a distraction of the true issue – that the proposed service is, at its core, targeted to UTP data recipients. The Nasdaq Response states that "[a]lmost 90% of clients that take SIP Data via a direct connection to Nasdaq also take another third party service from Nasdaq."[10] Bats believes this statistic is irrelevant to the issue of whether the Proposal constitutes an Access Services Fee as it is the access to UTP data that is at issue, not its coupling with other third party services. In addition, Nasdaq fails to further explain this statistic and precisely what other third party connections firms are purchasing. Finally, the Nasdaq Response cites Nasdaq Rule 7025, which sets forth a separate access fee for extranet providers, but exempts extranet providers from the access fee if only UTP data is being distributed.[11] Bats believes that Nasdaq's exempting UTP data from the extranet access fee evidences that additional fees for access to UTP data constitute an Access Services Fee, as Nasdaq clearly understood they had no authority to charge the fee for UTP data access. Thus, Bats continues to believe that the proposed rule change constitutes a UTP service and fee that Bats believes must first be approved by the UTP Operating Committee.[12]

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8 *See* Equity Technical Update #2016-7, *Nasdaq Announces New Connectivity to Third Party Services in Carteret*, dated June 2, 2016.

9 It is worth noting that NYSE recently submitted a proposed rule change to the Commission that proposes just the opposite of what Nasdaq has proposed to do, which is to continue to make available CTS and CQS data via a subscriber's current connections to the NYSE along with access to NYSE proprietary data feeds for one price. *See* Securities Exchange Act Release Nos. 78556 (August 11, 2016), 81 FR 54877 (August 17, 2016) (SR-NYSE-2016-45); 78887 (September 20, 2016), 81 FR 66095 (September 26, 2016) (Amendment No. 1 to SR-NYSE-2016-45); *and* 78966 (September 28, 2016), 81 FR 68475 (October 4, 2016) (Notice of Designation for Longer Period of Time for Commission Action).

10 *See* the Nasdaq Response at page 3, *supra* note 3.

11 *See* the Nasdaq Response at note 8, *supra* note 3. *See also* Nasdaq Rule 7025.

12 *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).

IV. Recommendation and Conclusion

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 letter, strongly urges the Commission to disapprove it. However, Bats believes 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.

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

Sincerely,

Eric Swanson
EVP, General Counsel and Secretary