

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57741 / April 30, 2008

Admin. Proc. File No. 3-12384

In the Matter of the Application of
NASDAQ STOCK MARKET, LLC
For Review of Action Taken by the
CONSOLIDATED TAPE ASSOCIATION

ORDER REMANDING CASE TO ADMINISTRATIVE LAW JUDGE FOR ISSUANCE OF
INITIAL DECISION PURSUANT TO RULE OF PRACTICE 360

On June 30, 2006, The Nasdaq Stock Market, LLC (“Nasdaq”), a member of the Consolidated Tape Association (“CTA”), petitioned for review of action taken by the CTA Operating Committee pursuant to Section 11A(b)(5) of the Securities Exchange Act of 1934 ^{1/} and Exchange Act Rule 608(d). ^{2/} On March 23, 2006, the CTA Operating Committee voted to impose on Nasdaq a new entrant fee of \$833,862 to join the CTA Plan. ^{3/} Nasdaq alleged that the new entrant fee was excessive and constituted an unlawful denial of access to the CTA’s

^{1/} 15 U.S.C. § 78k-1(b)(5) (providing that, upon application by an aggrieved person, any prohibition or limitation of access to services by a registered securities information processor “shall” be subject to Commission review). The CTA is registered as an exclusive securities information processor. See Securities Exchange Act Rel. No. 12035 (Jan. 22, 1975), 8 SEC Docket 1099 (granting registration to the CTA).

^{2/} 17 C.F.R. § 242.608(d) (providing that the Commission “may, in its discretion,” entertain appeals in connection with the implementation or operation of any effective national market system plan).

^{3/} The new entrant fee also entitled Nasdaq to join the Consolidated Quotation (“CQ”) Plan. Nasdaq’s petition contests the application of the entry fee to Nasdaq’s entry into the CQ Plan, as well as the CTA Plan.

systems. For relief, Nasdaq requested reversal of the CTA Operating Committee's action and an order that the entrant fee be assessed at \$233,132.

By order dated June 14, 2007 (the "Order"), we accepted jurisdiction over Nasdaq's petition. Noting that disputes involving registered securities information processors, national market system plans, or transaction reporting plans under Exchange Act Section 11A and the rules thereunder are governed by the Rules of Practice, we directed that an administrative law judge be designated to preside over the case. We also determined that the record before us was insufficient to permit the necessary determinations and directed the parties and any interested persons, including the then Division of Market Regulation, now the Division of Trading and Markets (hereinafter the "Division"), to address a series of questions. Those questions were set forth in the Order.

In accordance with the Order, a law judge was appointed to preside over the proceeding. The law judge conducted a hearing on November 8 and 9, 2007, during which the parties called numerous witnesses and introduced exhibits into evidence. At the conclusion of the hearing, the law judge set a briefing schedule for post-hearing submissions. Briefs were filed by the parties and the Division as *amicus curiae*. Once the briefing was completed, the law judge transmitted the record to the Secretary for decision by the Commission, without preparing an initial decision with findings, conclusions, and supporting reasons pursuant to Rule of Practice 360(b). ^{4/} The transcripts of the pre-hearing conferences indicate that the law judge believed that the Order did not require him to make any findings or conclusions with supporting reasons.

We recognize that the Order did not explicitly instruct the law judge to prepare an initial decision, but we intended our decision designating a law judge to preside over the proceeding to include the preparation of an initial decision in accordance with Rule of Practice 360(a)(1). Unlike the law judge, we have not observed the parties and witnesses who appeared and testified at the two-day hearing. As the presiding officer at the hearing, the law judge is in the best position to make findings of fact, including credibility determinations, and resolve any conflicts in the evidence. Our review of the record cannot replace the law judge's personal experience with the witnesses.

^{4/} 17 C.F.R. § 201.360(b) (stating that "[a]n initial decision shall include: findings and conclusions and the reasons or basis therefor, as to all the material issues of fact, law or discretion presented on the record and the appropriate order, sanction, relief, or denial thereof").

Accordingly, it is ORDERED that the proceeding be, and it hereby is, remanded to the administrative law judge for issuance of an initial decision; and it is further

ORDERED that the initial decision be filed with the Secretary of the Commission within 120 days from the date of this remand order.

By the Commission.

Nancy M. Morris
Secretary