UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 59927 / May 14, 2009

Admin. Proc. File No. 3-13088

In the Matter of the Application of BOSTON OPTIONS EXCHANGE GROUP, LLC c/o Allan Horwich and Michael L. Meyer Schiff Hardin LLP 6600 Sears Tower Chicago, IL 60606 For Review of Action Taken by OPRA	ORDER DISMISSING APPLICATION FOR REVIEW

Boston Options Exchange Group, LLC ("BOX"), a party to the Options Price Reporting Authority ("OPRA"), has applied for review of the $2,300,000 participation fee OPRA assessed in 2003 when the Boston Stock Exchange, Inc. ("BSE") sought to become a party to OPRA. OPRA argues that we should dismiss BOX's petition for review as untimely. For the reasons discussed below, we dismiss the proceeding.

I.

1. History of OPRA OPRA is a National Market System Plan approved by the Commission pursuant to Section 11A of the Securities Exchange Act of 1934. 1/ OPRA operates pursuant to the OPRA Plan for Reporting of Consolidated Options Last Sale Reports and Automation Information (the "OPRA Plan"). 2/ The OPRA Plan governs the process by which options market data are collected from OPRA Plan participant exchanges, consolidated, and disseminated.

1/ 15 U.S.C. § 78k-1.

2/ The Commission approved the OPRA Plan. American Stock Exchange, Inc., Chicago Board Options Exchange, Inc., Pacific Stock Exchange, Inc., Philadelphia Stock Exchange, Inc., Securities Exchange Act Rel. No. 17638 (Mar. 18, 1981), 22 SEC Docket 484.

Upon entry to OPRA, each new party pays a participation fee "determined by a vote of the majority of the parties to the Plan as fairly and reasonably compensating OPRA for costs it has incurred in developing and maintaining the OPRA system and for costs it will incur in providing for the new party's participation." The OPRA Plan states that, in determining the amount of the participation fee, OPRA considers three factors:

> 1) capital expenditures "for the development, expansion, and maintenance of OPRA's facilities" that would have been amortized over the five years preceding the admission of the new party;
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> 2) an assessment of costs related to the entry of the new party into the OPRA Plan; and
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> 3) previous participation fees paid by other new parties.

The OPRA Plan does not indicate how the OPRA parties should weigh these factors in assessing the participation fee.

2. BSE's Entry into OPRA BOX is a Delaware limited liability company formed in 2002 to operate as the options trading facility of BSE. In 2002, BSE had a controlling ownership interest in BOX. 3/

In approximately March 2002, BSE and OPRA entered into discussions about BSE's participation in OPRA. At that time, the International Stock Exchange, Inc. ("ISE") was the most recent new OPRA party, having paid a $1,350,000 participation fee in 2000. The parties to the OPRA Plan at that time were the American Stock Exchange, the Chicago Board Options Exchange, the ISE, the New York Stock Exchange, the Pacific Stock Exchange, and the Philadelphia Stock Exchange. On August 23, 2002, OPRA informed BSE that it owed a $2,300,000 participation fee. OPRA did not explain how it arrived at that figure. On September 17, 2002, in response to questions from BSE about how OPRA determined the fee, OPRA sent BSE a spreadsheet showing OPRA-related costs incurred by the Securities Industry Automation Corporation ("SIAC"), as well as an amortization schedule for these costs over the preceding five-year period. 4/ This spreadsheet represented that SIAC had incurred

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3/ On January 3, 2004, BOX was approved by the Commission as the options trading facility of BSE pursuant to Section 3(a)(2) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(2). In August 2008, BSE became a wholly owned subsidiary of Nasdaq OMX Group, Inc. As part of the same transaction, BSE sold its ownership interest in BOX to the Bourse de Montreal, but BOX remains the options trading facility of BSE.

4/ SIAC acts as the facility for gathering the last sale and quote information from each of the OPRA participant exchanges and consolidating and disseminating the information to approved vendors. All of the transactions executed on, and price quotations for options

(continued...)

approximately $2,300,000 per participant in OPRA-related expenses during the relevant time period.

At the time that it provided the SIAC spreadsheet in September 2002, OPRA also acknowledged that some of the SIAC costs included in the spreadsheet were operating expenses, as opposed to capital expenditures, and therefore, according to the OPRA Plan, should not have been considered in determining the amount of BSE's participation fee. However, OPRA told BSE that OPRA had made additional non-SIAC capital expenditures that were not included in the spreadsheet. According to OPRA, these additional capital expenditures, when added to the capital expenditures shown on the SIAC spreadsheet, totaled approximately $2,300,000. OPRA never provided any documentation to BSE to support the existence or amount of the non-SIAC capital expenditures. BSE subsequently requested and received from OPRA a similar spreadsheet showing the SIAC costs related to the participation fee paid by the ISE in 2000.

On February 14, 2003, BSE sent OPRA an email noting, among other things, that ISE's 2000 participation fee was nearly $1,000,000 less than BSE's assessed fee. On February 28, 2003, OPRA acknowledged that BSE's participation fee was higher than ISE's 2000 fee, but explained that "OPRA participants invested substantially more in OPRA infrastructure over the past five years than they invested in the five years before ISE became a participant." On appeal, BOX acknowledges that it "initially [was] satisfied with OPRA's information."

Although BSE is the entity that applied to become a party to the OPRA Plan, BOX paid the participation fee at issue in this proceeding from its own funds and therefore asserts that it is an "aggrieved party" in this appeal. After discussions between BSE and OPRA about the terms and timing of BOX's payment of the participation fee, the parties agreed to a payment plan under which BOX paid the fee over the course of the following four years. In approximately March 2003, BSE became an OPRA party and participated in the OPRA Plan thereafter. BOX subsequently made all required payments of its participation fee, making its last payment in approximately March 2007.

3. Nasdaq's Entry into OPRA In early 2007, the Nasdaq Stock Market, LLC ("Nasdaq") applied to become a party to the OPRA Plan. At that time, the parties to the OPRA Plan had not changed since BSE became a party in March 2003. On May 22, 2007, OPRA informed Nasdaq that it owed a $2,300,000 participation fee (the same amount as BSE's fee) without explanation of how OPRA arrived at that figure. On May 29, 2007, in response to Nasdaq's request for information about how OPRA determined the amount of the participation fee, OPRA stated that "it would not be fair to establish a participation fee for Nasdaq that was less than the fee paid by BOX several years ago." OPRA, however, acknowledged that the SIAC

4/ (...continued)
generated by, each options exchange are communicated to the public by OPRA through the facilities of SIAC, which is OPRA's exclusive processor. See http://www.Opradata.com /faqs/faqanswers.jsp.

costs related to Nasdaq's application totaled only $1,300,000, "utilizing a revised method of calculation suggested by SIAC, with which [OPRA did] not necessarily agree, that had the effect of reducing the amount of these costs."

On May 31, 2007, Nasdaq applied for Commission review of OPRA's participation fee. On September 4, 2007, Nasdaq withdrew its application for review, after OPRA and Nasdaq reached a settlement agreement under which Nasdaq apparently paid a $1,750,000 participation fee. Nasdaq then became a party to the OPRA Plan.

4. BOX's Appeal of its Participation Fee On October 17, 2007, BOX requested that OPRA reduce the amount of BOX's then fully-paid participation fee in light of the reduction of Nasdaq's participation fee pursuant to its settlement with OPRA. On October 30, 2007, OPRA rejected BOX's request.

On January 9, 2008, the Director of the Commission's Division of Trading and Markets requested an explanation from OPRA of how it determined BOX's participation fee. On February 19, 2008, OPRA responded to the Division Director's request, stating that the participation fee calculation "cannot be formulaic and perfect" and that participation fees are best determined through a "process of discussion and agreement." OPRA stated that Nasdaq's payment of a lower fee four years after BOX's fee assessment was irrelevant to any determination of whether OPRA's initial assessment of BOX's fee was fair. OPRA further noted that many "Y2K"-related expenses had been amortized over the five years prior to BSE's membership in the OPRA Plan and that this was not the case for Nasdaq in 2007. OPRA also pointed out that there were more parties to the OPRA Plan when Nasdaq became a participant, thus reducing the per-party costs, and that BSE sought and received favorable payment terms, which Nasdaq did not receive.

On July 7, 2008, BOX filed an application for Commission review of "OPRA's assessment of a $2.3 million participation fee paid for BOX's entry into the OPRA Plan."

II.

BOX has sought Commission review under Exchange Act Section 11A(b)(5) 5/ or, alternatively, Exchange Act Rule 608(d). 6/ Section 11A(b)(5) states that an aggrieved party may request Commission review of an action by a securities information processor ("SIP") such as OPRA that "prohibits or limits any person in respect of access to services offered, directly or indirectly, by [the SIP]." Rule 608(d), which expressly applies only in situations not covered by Section 11A(b)(5), permits the Commission, in its discretion, to "entertain appeals in connection with the implementation or operation of any effective national market system plan."

5/ 15 U.S.C. § 78k-1(b)(5).

6/ 17 C.F.R. § 242.608(d).

Section 11A(b)(5) states that, in the event that a SIP prohibits or limits access to its services, the SIP must promptly file notice with the Commission and that an aggrieved party is required to file with the Commission any application for review "within thirty days after such notice has been filed with the Commission and received by such aggrieved person, or within such longer period as the Commission may determine." Rule 608(d) requires that any application for review under the Rule must be "filed not later than 30 days after notice of such action or failure to act or within such longer period as the Commission may determine."

BOX has not specifically identified which OPRA action it requests the Commission to review. However, all of the relevant OPRA actions occurred more than thirty days before BOX filed its application for review on July 7, 2008. OPRA initially assessed the $2,300,000 participation fee in August 2002. OPRA and BSE reached an agreement on the terms of BOX's payment of the fee in February 2003. Under these terms, BOX has stated that it made its last payment of the fee in early 2007. Following the Nasdaq-OPRA settlement, OPRA refused BOX's request to modify its participation fee in October 2007. OPRA responded to the Division Director's request in February 2008. BOX did not file its application for review until July 7, 2008, over four months after OPRA's response to the Division Director. Thus, all of the relevant OPRA actions occurred well beyond the thirty-day windows in Section 11A(b)(5) and Rule 608(d). 7/ It is undisputed that BOX failed to file its petition for review within the specified time period.

BOX argues that the Commission should exercise its discretion under both Section 11A(b)(5) and Rule 608(d) to review SIP actions beyond the thirty-day period "within any longer period as the Commission may determine." BOX contends that it did not challenge the participation fee until 2008 because only then did it become aware of the methodology OPRA employed in assessing Nasdaq's participation fee. BOX states, "Until BOX reviewed the record in the Nasdaq case in 2007, including its income, it had no reason to doubt that the fee it had paid was a fair one."

BOX contends that the Nasdaq-OPRA dispute showed BOX that OPRA had emphasized different factors in assessing participation fees to BOX and Nasdaq. According to BOX, "The fairest conclusion to be drawn from this pattern of behavior is that OPRA's strategy is to try to maximize the fee paid by new entrants into the market and that it has no interest in applying the

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7/ As noted above, the thirty-day period for filing an application for review with the Commission under Section 11A(b)(5) begins to run on the date on which an aggrieved party receives notice from an SIP, filed with the Commission, of an action that prohibits or limits access to the SIP's services. Here, OPRA has not filed any such notice, as OPRA's position is that it has taken no action prohibiting or limiting BOX's access to OPRA's services. In fact, subsequent to the assessment of the fee, BOX made all of the required payments, and BSE has been an OPRA party without interruption. In any event, BOX did not file its application for review until more than thirty days after any of the possible OPRA actions at issue.

three factors in an even-handed way." BOX further claims that the reduction of Nasdaq's participation fee from $2,300,000 to $1,750,000 in connection with the Nasdaq-OPRA settlement "put into question the truthfulness of OPRA's representation [to BOX in 2003] that it had capital costs of its own that offset the operational costs in the SIAC spreadsheet." 8/ Finally, based on SIAC's revised approach to calculating its capital expenditures as of the time of OPRA's assessment of Nasdaq's fee, BOX argues that "it is not clear that the spreadsheet [OPRA provided to BOX in 2003] was accurate."

OPRA contends that the amount of Nasdaq's subsequent fee should have no bearing on BOX's fully-paid earlier fee. In support of its position that the Commission should dismiss BOX's application for review, OPRA argues, "If the amount paid by a subsequent party to the OPRA Plan is reason enough to reopen the issue of the fee of an earlier party, there will never be finality." OPRA argues that BOX paid the assessed fee with full disclosure and, in the interests of finality, cannot challenge the amount of the fee over five years later.

The Commission has stated that "parties to administrative proceedings have an interest in knowing when decisions are final and on which decisions their reliance can be placed." 9/ BOX acknowledges that it was put on notice that OPRA's assessment of its fee in 2003 was based on an approximation, rather than an exact calculation, of the relevant capital expenditures. Despite this notice, BOX elected not to appeal the fee at the time, and waited until July 2008 to file the current appeal because it now believes that the 2003 spreadsheet was inaccurate. BOX claims that new information provided by the Nasdaq-OPRA dispute justifies BOX's delay in filing the appeal. However, even after BOX became aware of the Nasdaq-OPRA dispute, BOX failed to file its appeal until nine months after OPRA rejected BOX's request to reduce the fee and over four months after OPRA responded to the Division Director's request for an explanation of the fee assessment. BOX has provided no explanation for this additional delay.

8/ The record does not establish how Nasdaq and OPRA reached the $1,750,000 participation fee amount upon which they ultimately settled. Settlements can be reached for any of a number of reasons, and settlements are not precedent. Richard J. Puccio, 52 S.E.C. 1041, 1045 (1996) (citing David A. Gingras, 50 S.E.C. 1286, 1294 (1992), and cases cited therein).

9/ Lance E. Van Alstyne, 53 S.E.C. 1093, 1098 n.10 (1998) (quoting Nequoia Ass'n, Inc. v. U.S. Dep't of Interior, 626 F. Supp. 827, 836 (D. Utah 1985)).

In furtherance of the interest in finality and in light of BOX's failure to file its petition for review until over four months after the last possible OPRA action of which BOX seeks Commission review (and over five years after the fee was initially assessed), we find that BOX has failed to show that we should exercise our discretion and accept a filing outside of the specified thirty-day time period.

Accordingly, IT IS ORDERED that the Boston Options Exchange Group, LLC's application for review be, and it hereby is, dismissed.

By the Commission.

Elizabeth M. Murphy
Secretary