

connecting DQE's generating facilities to the airport facilities.

DQE and Energy Services now propose to cause the execution of an Operation and Maintenance Services Agreement ("O&M Agreement") between ADC and an entity that will be formed as a subsidiary of Energy Services ("Newco"). The term of the O&M Agreement will be 5 years and Newco will receive compensation in the approximate amount of \$4.5 million. Under the O&M Agreement, Newco will serve as operator of ADC's electrical and thermal energy facility located at the Midfield Terminal Complex.

On January 22, 1997, ADC entered into: (1) The Heinz Facility Lease ("Lease") between Heinz USA ("Heinz") and ADC; and (2) the Energy Supply Agreement ("Supply Agreement"), among Heinz, ADC and Duquesne Energy, Inc., a subsidiary of Energy Services. Both agreements provided for the assignment of all of ADC's rights and obligations to DH Energy. The Applicants now propose to have ADC assign to DH Energy all of ADC's rights and obligations under the two agreements.

The Lease provides, among other things, that DH Energy will lease, operate and maintain an inside the fence energy facility ("Facility") for Heinz that will provide energy in the form of steam, electricity and compressed air. The Facility has two 3 MV steam turbine generators capable of generating 40 million kilowatt hours of electricity per year and coal/gas fired boilers capable of generating one billion pounds of steam per year. Under the Supply Agreement, DH Energy will be obligated to sell to Heinz electricity and steam produced by the Facility for use in Heinz' manufacturing processes.

Following the consummation of the transactions, the Applicants state that DQE and Energy Services will be exempt public utility holding companies under section 3(a)(1) and rule 2 of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-38614; File No. SR-BSE-96-10]

Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 3 and 4 to Proposed Rule Change by the Boston Stock Exchange, Inc., To Amend the Execution Guarantee Rule and BEACON Rule 5

May 12, 1997.

I. Introduction

On December 1, 1997,¹ the Boston Stock Exchange, Inc. ("BSE" or "Exchange") submitted to the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")² and Rule 19b-4 thereunder,³ a proposed rule change to amend Chapter II, Section 33, the Execution Guarantee Rule ("Execution Guarantee Rule"), and Chapter XXXIII, Section 5, the Boston Exchange Automated Communication Order-Routing Network ("BEACON System") Rule ("BEACON Rule 5").

The proposed rule change, including Amendment Nos. 1 and 2, was published for comment in Securities Exchange Act Release No. 38331 (February 24, 1997), 62 FR 9470 (March 3, 1997). No comment letters were received on the proposal. The Exchange subsequently filed Amendment Nos. 3 and 4 to the proposed rule change on March 26, 1997 and April 7, 1997, respectively.⁴

¹ The Exchange also filed Amendment Nos. 1 and 2 on February 14, 1997 and February 19, 1997, respectively, the substance of which was incorporated into the notice. See letters from Karen A. Aluisse, Assistant Vice President, BSE, to Michael Walinkas, Senior Special Counsel, Market Regulation, Commission, dated February 10, 1997 ("Amendment No. 1") and February 13, 1997 ("Amendment No. 2") respectively.

² 15 U.S.C. 78s(b)(1).

³ 17 CFR 240.19b-4.

⁴ Amendment No. 3 amends proposed Interpretation and Policy .05 to the Execution Guarantee Rule to state that an adjustment in price may be allowed if the displayed quotations of the Consolidated Quote System ("CQS") can be demonstrated to be in error or a market center is experiencing system problems which result in an invalid quotation in CQS. Amendment No. 4 amends proposed Interpretation and Policy .06 to state that specialists can seek relief from the requirements of the Execution Guarantee Rule from two out of three floor officials, and specifies that floor officials include floor members of the Board of Governors and the Market Performance Committee. See letters from Karen A. Aluisse, Assistant Vice President, BSE, to Michael Walinkas, Senior Special Counsel, Market Regulation, Commission, dated March 20, 1997

II. Background and Description

The BSE proposes to amend certain provisions of the Execution Guarantee Rule and BEACON Rule 5. The Execution Guarantee Rule provides customers with primary market price protection on small size orders ranging in size from 100 shares up to and including 1,299 shares, regardless of the displayed bid or offer size in the primary market at the time the order is entered. The proposed rule change deletes the current language of the Execution Guarantee Rule that indicates that the 1,299 share guarantee applies "regardless of the size of the order." The proposed rule change now states that BSE specialists must guarantee execution on all agency market and marketable limit orders from 100 up to and including 1,299 shares.

The proposed rule change also eliminates the 2,500 execution guarantee for most actively traded stocks ("MATS") from the Execution Guarantee Rule. The proposed rule change moves rule text covering the obligation for filling limit orders from the Interpretations and Policies section to the body of the Execution Guarantee Rule and labels it as paragraph (c). The proposed rule change also renumbers and clarifies the remaining Interpretations and Policies to the Execution Guarantee Rule.

The proposed rule change clarifies proposed Interpretation and Policy .03 of the Execution Guarantee Rule to limit a specialist's obligation for simultaneous orders to the accumulated displayed national best bid and offer ("NBBO") size. Under proposed Interpretation and Policy .04, the size of limit order executions will be governed by the size displayed on the Consolidated Quote System ("CQS"). Amendment No. 3 amends proposed Interpretation and Policy .05 to state an adjustment in execution price may be allowed (as prescribed in proposed Interpretation and Policy .06) if the displayed quotations of the CQS can be shown to be in error or a market center is experiencing system problems that result in invalid quotations in CQS. Finally, under proposed Interpretation and Policy .06, as amended by Amendment No. 4, specialists can obtain relief from the requirements of the remainder of the Execution Guarantee Rule⁵ upon approval from

("Amendment No. 3") and April 4, 1997 ("Amendment No. 4"), respectively.

⁵ The Commission notes that the proposed Interpretation and Policy .06 also amends the rule to state that the specialist can now seek relief from the remainder of the entire Execution Guarantee Rule, rather than from just the Interpretations and Policies.

two out of three Floor Officials, rather than the current standard of requiring the approval of two floor members of the Board of Governors or the Market Performance Committee. Floor officials include floor members of the Board of Governors and the Market Performance Committee.⁶

BEACON Rule 5 addresses the function of the BEACON System on the trading floor. The automatic execution function in BEACON aids specialists in the execution of customer orders. The system performs a price check and automatically executes certain qualifying orders without the intervention of a specialist, except for potential price improvement and the fact that the specialist must stop orders that would be outside the primary market price range for the day, under current BEACON Rule 5. The 1,299 share automatic execution parameter in the current BEACON Rule 5 is the same size as the execution guarantee contained in the Execution Guarantee Rule, although higher (2,500 shares) and lower (599 shares) parameters are available in BEACON in certain situations.

Current BEACON Rule 5 contains three automatic execution parameters; 2,500 shares, 1,299 shares (Tier I), and 599 shares (Tier II). The proposed rule change to paragraph (a) of BEACON Rule 5 eliminates all references to Tier I and II stocks, effectively subjecting all the stocks covered by BEACON Rule 5 to the 1,299 automatic execution parameter unless they are specifically exempted under paragraph (b). The proposed rule change to paragraph (b) of BEACON Rule 5, which also eliminates all references to Tier I and Tier II stocks, still allows the specialist to request a 599 automatic execution parameter under certain circumstances. In addition, paragraph (a) still allows specialists to provide automatic execution parameters larger than the 1,299 minimum requirement.

The Exchange has also proposed certain technical changes to BEACON Rule 5. Members will still have access to review the automatic execution parameters, which will be published on the System but will not be published in hard copy anymore, as is currently done. All references to the word "guarantee" will be replaced with "automatic execution parameters" or "parameters." The proposed rule change also amends paragraphs (c) and (d) of BEACON Rule 5 to eliminate all references to the "BEACON quotation" and replaces them with "BEACON reference price."

The proposed rule change to paragraph (c) of BEACON Rule 5 changes the BEACON reference price from the primary market best bid or offer price to the consolidated best bid or offer ("CQ/BBO") price. All market and marketable limit orders will be filled in their entirety, up to the BEACON Rule 5 automatic execution parameter, regardless of the displayed size of the CQ/BBO. In addition, the proposed rule change to paragraph (c) of BEACON Rule 5 eliminates the last sentence of paragraph (c), which refers to bids and offers superior in price to the BEACON reference price.

The proposed rule change also amends paragraph (d) of BEACON Rule 5 to give specialists discretion to stop orders that would be executed outside the primary market price range for the day, by replacing "will be 'stopped'" with "should be 'stopped'." The proposed rule change eliminates both paragraphs (e) (requiring that "stopped" orders must be executed by the close of trading) and (f) (stating that principal orders will not be subject to the execution guarantee as defined in this section) of BEACON Rule 5.

III. Discussion

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, and, in particular, with the requirements of Section 6(b)(5).⁷ Specifically, the Commission believes that the proposed rule change is designed to promote just and equitable principles of trade and 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 is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Accordingly, as discussed below, the rule proposal is consistent with the requirements of Section 6(b)(5) that Exchange rules facilitate transactions in securities while continuing to further investor protection and the public interest.⁸

The Commission believes that the proposed rule change to the Execution Guarantee Rule that deletes the "regardless of the size of the order" language from the execution guarantee, thereby stating that the guarantee applies to all agency market and

marketable limit orders from 100 up to and including 1,299 shares, is consistent with the Act. The Commission notes that the Exchange has stated that the Execution Guarantee Rule provides customers with primary market price protection on small size orders and that orders over 1,299 shares were not originally intended to receive a partial execution of 1,299 shares, but were to be handled, consistent with best execution obligations, based on prints in the primary market. The Commission believes that this portion of the proposed rule change ensures the protection of investors and the public interest by continuing to require on the BSE an execution guarantee for orders up to 1,299 shares. The Commission notes that for orders greater than 1,299 shares, members must continue to satisfy the applicable best execution obligations, thereby ensuring appropriate handling of such orders.

The Commission believes that the proposed rule change eliminating the MATS 2,500 guarantee from the Execution Guarantee Rule is consistent with the Act. The Commission notes that there is no requirement under the federal securities laws that BSE guarantee a particular level of execution of shares. BSE previously instituted the MATS guarantee in order to compete more effectively for small order business and attract order flow;⁹ however, it has now determined that the MATS guarantee is no longer desirable. The Commission believes that the MATS guarantee is not necessary to ensure an acceptable quality of market depth and liquidity on the BSE, particularly since the Execution Guarantee Rule retains a guarantee on all market and marketable limit orders from 100 up to and including 1,299 shares. Moreover, the Commission notes that the specialists' best execution obligations should serve to ensure proper execution of transactions formerly subject to the MATS guarantee.

The Commission believes that the changes to the Interpretations and Policies section of the Execution Guarantee Rule are consistent with the Act because they should facilitate the trading of securities in a free and open market, while continuing to protect investors and serve the public interest. The Commission notes that the original language of Interpretation and Policy .03, regarding simultaneous orders, was adopted prior to electronic order routing and was not designed to address the potentially high volume of today's electronic trading environment. The

⁷ 15 U.S.C. 78f(b)(5).

⁸ In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁹ See Securities Exchange Act Release No. 20029 (August 1, 1983), 48 FR 36043 (August 8, 1983).

⁶ See Amendment No. 4.

Commission believes that when multiple orders are received in a short period of time, particularly in illiquid stocks, it is appropriate to limit a specialist's obligation to the NBBO size. The Commission believes that such a limit will serve to protect the specialist by limiting their exposure, while at the same time continuing to ensure that customers receive the best price that is available in the intermarket system in the stock, up to the accumulated NBBO size.

The Commission notes that proposed Interpretation and Policy .04 of the Execution Guarantee Rule now explicitly addresses limit order size only; the size of limit orders will be governed by the size displayed on the CQS. The proposed rule change restricts this Interpretation and Policy to limit orders because treatment of market order and marketable limit order size is separately addressed in proposed paragraph (a) of the Execution Guarantee Rule.¹⁰ The Commission also notes that the guaranteed price of market orders is governed by the CQS/BBO, under paragraph (b) of the Execution Guarantee Rule, and that marketable limit orders are in effect also governed by the CQS/BBO since they are limit orders whose stated limit price equals the market price when the orders are entered.

Under Amendment No. 3, the Exchange will now be able to adjust the execution price of trades in all situations where another market center is experiencing system problems of any kind that result in an invalid quotation in CQS or if the displayed CQS quotations can be demonstrated to be in error. The Commission notes that this change to proposed Interpretation and Policy .05 is intended to broaden the range of instances when the Exchange can adjust the execution price, and that this change should serve to protect both investors and the specialists by ensuring that the Exchange will have the ability to remedy incorrect prices whenever they occur.

Under the proposed rule change to Interpretation and Policy .06,¹¹ specialists can now obtain relief from the requirements of the Execution Guarantee Rule upon approval of two out of three Floor Officials, rather than the current standard of two floor members of the Board of Governors or the Market Performance Committee. The Commission notes that Floor Officials

include floor members of the Board of Governors and the Market Performance Committee.¹² Under the proposed rule change, specialists would need the approval of two out of the first three floor officials they ask.¹³ The Commission believes that this change provides a clear standard that prevents specialists from lobbying numerous floor officials until they find two who agree with their point of view. The Commission also believes that this change should provide a tie-breaker in the instance that two floor officials do not agree with each other.

The Commission believes that the proposed rule change to paragraph (a) of BEACON Rule 5, which eliminates all references to Tier I and II stocks, thereby subjecting all BEACON stocks to a 1,299 automatic execution parameter, is consistent with the Act. The change should aid specialists in the execution of customer orders and help the BEACON System function more efficiently because the standard 1,299 BEACON automatic execution parameter now equals the standard 1,299 execution guarantee. The Commission notes that a specialist may provide a lower (599 shares) or higher execution parameter. The Commission believes that this change to BEACON Rule 5 will continue to adequately serve the needs of investors. Particularly, the standard 1,299 automatic execution parameter provides an adequate measure of depth for automatic executions. Although a specialist can request a lower automatic execution parameter of 599 shares, the Commission notes that the Exchange can only grant such a request upon a showing of good cause. The Commission believes that this change is not substantive because under current BEACON Rule 5 all BEACON stocks are subject to the 1,299 guarantee unless they are exempted and guaranteed a 599 parameter, which is only granted for good cause shown, or are guaranteed a higher 2,500 parameter for stocks identified by specialists. The proposed change eliminates the labels on the different automatic execution parameters but retains the ability of the specialist to request and receive a 599 exemption or to provide a guarantee higher than the 1,299 parameter.¹⁴

¹² See Amendment No. 4, *supra* note 4.

¹³ Phone conversation between Karen A. Aluisse, Assistant Vice President, BSE, and Heather Seidel, Attorney, Market Regulation, Commission, on April 4, 1997.

¹⁴ The proposed rule change also makes certain technical changes to BEACON Rule 5. All references to the word "guarantee" will be replaced with "automatic execution parameters" or "parameters" because the Exchange believes that

The proposed rule change to paragraph (c) of BEACON Rule 5 changes the BEACON reference price from the primary market best bid or offer to the consolidated market best bid or offer ("BBO"). The Commission notes that the proposed rule change eliminating the last sentence of paragraph (c) of BEACON Rule 5, which refers to bids and offers superior in price to the BEACON reference price, reflects the incorporation of these quotations into the BEACON reference price by the changing of the reference price from the primary market BBO to the consolidated BBO. The Commission believes that this change in the reference price should ensure that investors obtain a better execution price for their trades because specialists would be executing trades at the best price available in the entire intermarket system, instead of merely the primary market price.

The Exchange believes that the proposed rule change to paragraph (d) of BEACON Rule 5, to give specialists discretion to stop orders that would be executed outside the primary market price range for the day, is consistent with the Act. The Commission notes that there is no requirement that the specialist must stop the stock under such circumstances and believes that allowing discretion will not negatively impact on the best execution obligation of the specialist.¹⁵

The Commission finds good cause to approve Amendment Nos. 3 and 4 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. As noted above, Amendment No. 3 amends proposed Interpretation and Policy .05 to the Execution Guarantee Rule to state that an adjustment in price may be allowed if the displayed quotations of the CQS can be demonstrated to be in error or a market center is experiencing system problems which result in an invalid quotation in CQS. By broadening the

the use of the word "guarantee" in regard to the required automatic execution parameter in BEACON Rule 5 has been confusing. The proposed rule change also amends paragraphs (c) and (d) of BEACON Rule 5 to eliminate all references to the "BEACON quotation", which the Exchange believes is more closely associated with the specialist's displayed quotation, and replaces them with "BEACON reference price."

¹⁵ The Commission notes that the Exchange is eliminating BEACON Rule 5(e) because Chapter II, Section 38(d), the BSE's stopping stock rule, states that all orders stopped pursuant to that section shall be executed by the end of the trading day on which the order was stopped; and that the Exchange is eliminating BEACON Rule 5(f) because BEACON Rule 1(a) states that only agency orders will be eligible for automatic execution in the BEACON System.

¹⁰ Under the proposed rule change to the Execution Guarantee Rule, specialists must now guarantee execution on all agency market and marketable limit orders from 100 up to and including 1,299 shares.

¹¹ See Amendment No. 4, *supra* note 4.

range of instances where the Exchange can adjust the execution price, Amendment No. 3 should continue to help protect specialists and investors and the public interest by ensuring that the Exchange has the ability to remedy erroneous prices whenever they occur. Amendment No. 4 amends proposed Interpretation and Policy .06 to the Execution Guarantee Rule to state that a specialist who wants to receive relief from the requirements of the Execution Guarantee Rule must obtain the approval of two out of three floor officials, and specifies that floor officials include floor members of the Board of Governors and the Market Performance Committee. Amendment No. 4 will prohibit "forum shopping" among floor officials and will provide a tie-breaker in the situations where two floor officials disagree. Accordingly, the Commission believes that it is consistent with Section 6(b)(5) of the Act to approve Amendment Nos. 3 and 4 to the proposal on an accelerated basis.

Interested persons are invited to submit written data, views, and arguments concerning Amendment Nos. 3 and 4 to the rule proposal. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-BSE-96-10 and should be submitted by June 6, 1997.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁶ that the proposed rule change (SR-BSE-96-10), including Amendment Nos. 3 and 4, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-38607; File No. SR-CBOE-97-10]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by Chicago Board Options Exchange, Incorporated Relating to Minimum Sizes for Closing Transactions, Exercises, and Responses to Requests for Quotes in FLEX Equity Options

May 9, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on February 21, 1997, the Chicago Board Options Exchange, Incorporated ("CBOE or Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to reduce from 100 contracts to 25 contracts the minimum value size of closing transactions in and exercises of FLEX Equity Options, and to make a comparable reduction in the minimum value size of FLEX Equity Quotes in response to a Request for Quotes.

The text of the proposed rule change is available at the Office of the Secretary, CBOE and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CBOE has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to reduce from 100 contracts to 25 contracts the minimum value size of closing transactions in an exercises of FLEX Equity Options, and to make a comparable reduction in the minimum value size of FLEX Equity Quotes in response to a Request for Quotes.

The reason for reducing the minimum value size of closing and exercise transactions in FLEX Equity Options is that, based on the Exchange's experience to date with such options, it appears that the existing 100 contract minimums are too large to accommodate the needs of certain firms and their customers.¹ These firms may purchase 100 or more FLEX Equity Options in an opening transactions for a single firm account in which more than one of the firm's clients have an interest. If one of these clients wants to redeem its investment in the account, the firm likely will want to engage in a closing or exercise transaction in order to reduce the account's position in those FLEX Equity Options by the number being redeemed. Currently, Rule 24A.4(a)(4)(iii) imposes a 100 contract minimum on all transactions in FLEX Equity Options unless the transaction is for the entire remaining position in the account. Thus, if the redeeming client's interest is less than 100 FLEX Equity Options and does not represent the total remaining position in the account, Rule 24A.4(a)(4)(iii) as it stands presently, prevents the firm from closing or exercising positions of this size.

The Exchange believes that the proposed rule change to Rule 24A.4(4)(iii) would remedy the situation described above, by permitting an order to close or exercise as few as 25 FLEX Equity Option contracts. The corresponding change to Rule 24A.4(a)(iv), which governs the minimum size for FLEX Equity Quotes that may be entered in response to Request for Quotes, is necessary in order to provide the liquidity needed to facilitate the execution of closing orders between 25 and 99 FLEX Equity Option contracts that would be permitted by the

¹ The Exchange notes that the existing customer base for FLEX Equity Options includes both institutional investors, in particular mutual funds, money managers and insurance companies, and high net worth individuals who meet the "sophisticated investor" criteria applied to various clients by Exchange member firms. See Letter from William J. Barclay, Vice President, Strategic Planning and International Development, CBOE, to Sharon Lawson, Senior Special Counsel, Office of Market Supervision, Division of Market Regulation, Commission, dated April 21, 1997 ("CBOE Letter").

¹⁶ 15 U.S.C. 78s(b)(2).

¹⁷ 17 CFR 200.30-3(a)(12).