

The Commission also believes that the proposed grant to the ISCA of the responsibility to allocate capacity-related costs above a \$5 million ceiling would allow the exchanges to avoid the difficult task of having to differentiate the costs and expenses attributable to capacity expansion from the costs and expenses attributable to maintaining and operating the OPRA system. However, as discussed above, the Commission specifically requests comment on whether \$5 million would be an appropriate limit before the ISCA may begin allocating the capacity-related costs among the parties.

The Capacity Guidelines provide that the ISCA is ordinarily expected to provide the parties with the systems capacity they have requested. However, the ISCA has some discretion to provide less than all the capacity requested if it determines that the capacity requests of one or more of the parties are unreasonable. A party's request may be found by the ISCA to be unreasonable if it concludes that a party does not have a reasonable need for all the capacity it has requested within the timeframe to which the request applies.

In 1999, the Commission ordered the exchanges to discuss the feasibility of strategies to avoid quote traffic congestion, including quote mitigation strategies.<sup>27</sup> In that Order the Commission recognized that increases in quote message traffic have implications not only for the options exchanges, but all users of options market data. Moreover, the increase in quote message traffic has accelerated since the Commission issued that order. As of September 2003, the exchanges' peak dissemination of messages per second was 15,000 messages per second. As the options exchanges modify their trading rules to permit competing market makers to independently quote, it is anticipated that each exchange's demands on capacity will increase substantially. In addition, the Boston Stock Exchange ("BSE") has proposed to operate a fully electronic options exchange, which would, if approved by the Commission, place further demands

on capacity. For these reasons, the Commission believes that the ISCA may consider whether a party has made reasonable efforts to mitigate the amount of systems capacity that its market data requires of OPRA and other market participants in determining whether a party does not have a reasonable need for all the capacity it has requested.

The Capacity Guidelines also provide that the ISCA may provide less than all the capacity requested if it determines that it is not reasonable to develop or maintain a system that has capacity sufficient to satisfy the request of the parties. In this regard, the Capacity Guidelines provide that the ISCA may determine that it is not reasonable to develop or maintain a system with all of the capacity that has been requested if it concludes that it is not technically feasible to do so, or that a significant number of OPRA vendors cannot or will not carry the amount of message traffic disseminated by such a system. Because of the implications that increases in message traffic have on all users of options market data, the Commission believes it is important that the ISCA consider the technical feasibility for all users of options market data, including vendors, brokers-dealers, and customers, to develop or maintain a system with all of the capacity that has been requested.

In addition, the Commission notes that, under the proposed Capacity Guidelines, the ISCA would not be permitted to increase systems capacity in excess of 15,000 mps during a twelve-month period without the approval of 75% of the parties to the Plan. The Commission believes that some restriction on the ISCA's authority is important to prevent large increases in systems capacity, which could have a significant impact on down-stream users of OPRA data, such as vendors and broker-dealers.

Furthermore, the Plan amendment would require OPRA to file its selection of the ISCA with the Commission as an amendment to the Plan, which would become effective upon filing.<sup>28</sup> This requirement would provide the

Commission with the opportunity to review OPRA's choice of the ISCA. Under this Plan amendment, OPRA has proposed to select OCC to function as the ISCA. Because of OCC's status as an SRO, the Commission will be able to monitor its obligations under the Plan to maintain the exchanges' individual capacity projections and requests confidentially.

The Commission believes that the proposed Capacity Guidelines adequately provide for the allocation of capacity to new parties to OPRA. Under Guideline No. 2 of the proposed Capacity Guidelines, a prospective new options exchange would have to inform the ISCA, at least 6 months prior to the time it proposes to commence trading, of the initial amount of system capacity it would need. The ISCA would then aggregate this request for capacity with the requests received from the existing exchanges. Also, under Guideline No. 6 of the proposed Capacity Guidelines, if the new party has not received the capacity it has requested at the time it has commenced trading options, and to the extent there is any excess capacity available in the system that has not been provided to any of the parties, the ISCA would be able to allocate to the new party all or a portion of any such excess capacity in order to provide the new party with the amount of capacity determined by the ISCA to be sufficient to satisfy the reasonable needs of the new party until it has been provided with the capacity it initially requested. These provisions in the proposed Capacity Guidelines, which specifically contemplate new entrants and provide a mechanism for them to acquire capacity, together with the prohibitions imposed on the ISCA from using confidential capacity-related information in any of its other business activities that may result in the information being made available to any of the parties to the Plan or in any manner inconsistent with the ISCA's obligations to hold such information in confidence, are designed to ensure that the existing exchanges would not be able to restrain new entrants from joining OPRA and acquiring the capacity that they require.

Finally, the Commission finds that it is appropriate to put the proposed OPRA Plan amendment, as modified by Amendments No. 1 and 2, into effect summarily upon publication of notice on a temporary basis not to exceed 120 days to permit OPRA to implement the capacity planning process at the soonest practicable time. Since September 2000, when the respondent exchanges entered into the Settlement Order with the

<sup>27</sup> See Securities Exchange Act Release No. 41843 (September 8, 1999), 64 FR 50126 (September 15, 1999). In addition, the Commission staff sent a letter to each of the options exchanges stating that the exchanges should continue to work together to, among other things, implement strategies to mitigate quote message traffic. See letters from Annette L. Nazareth, Director, Division, Commission to Salvatore F. Sodano, Chairman and Chief Executive Officer, Amex; William J. Brodsky, Chairman and Chief Executive Officer, CBOE; David Krell, President and Chief Executive Officer, ISE; Philip D. DeFeo, Chairman and Chief Executive Officer, PCX; and Meyer S. Frucher, Chairman and Chief Executive Officer, Phlx, dated September 13, 2000.

<sup>28</sup> Although filed effective upon filing, the Commission may, at any time within 60 days of the filing of the amendment, summarily abrogate the amendment and require that such amendment be refiled in accordance with paragraph (b)(1) to Rule 11Aa3-2 under the Act and reviewed in accordance with paragraph (c)(2) of the Rule, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect mechanisms of a national market system or otherwise in furtherance of the purposes of the Act. 17 CFR 240.11Aa3-2(c)(3).