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November 9, 1999

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VIA FACSIMILE AND FEDERAL EXPRESS

Jean A. Webb
Office of the Secretariat
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Kansas City Board of Trade ("KCBT") Western Natural Gas Futures Contract (64 Fed. Reg. 57442)

Dear Ms. Webb:

The New York Mercantile Exchange ("NYMEX") appreciates the opportunity to comment to the Commodity Futures Trading Commission ("CFTC" or the "Commission") on the above-referenced proposal.[1] Under the proposal, the KCBT plans to adopt a new method of trading natural gas futures contracts using the NYMEX mark and using NYMEX's proprietary financial information. The KCBT lacks the requisite legal authority from NYMEX to utilize these materials. Consequently, we object to KCBT's proposal and have demanded that KCBT immediately remove its proposal from consideration by the CFTC.

KCBT's proposal, if put into place, would constitute copyright infringement. The CFTC should be aware that courts have held that numerical values (such as settlement prices) are copyrightable. CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc., 44 F.3d 61, 67 (2d Cir. 1994). NYMEX derives its settlement prices using not only its own proprietary formulae but also its members' and staff's professional judgment and interpretation. These settlement prices are protected by copyright laws, and KCBT's unauthorized use of the settlement prices in the manner proposed would be a violation of NYMEX's copyrights because it would result in the creation of an unauthorized derivative work.

Using NYMEX's settlement prices, KCBT would also reap the benefits of NYMEX's labor and thereby commit unfair competition and misappropriation. Courts have made very clear that the use of another's financial information without authorization as part of one's own financial product is prohibited. Standard & Poor's v. Commodity Exchange, Inc., 683 F.2d 704 (2d Cir. 1982); Board of Trade of The City of Chicago v. Dow Jones & Co., Inc., 108 Ill. App. 3d 681 (1st Dist. 1982). In Standard & Poor's and Board of Trade, the Commodity Exchange, Inc. and the Chicago Board of

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Trade sought to create futures contracts using the proprietary financial information of another party without that party's permission. In both of these cases, as in KCBT's proposal, the figure used by the infringing parties was the closing value of the other party's index on the last trading day. In both cases, the court found that the infringer's use of this information misappropriated the owner's intellectual property rights.

In Standard & Poor's, the court found that the owner's misappropriation claim was strengthened by the fact that the use of the owner's financial information resulted in direct competition between the owner and the infringing party. Standard & Poor's, 683 F.2d at 711. Also contributing to the court's finding of unfair competition in Standard & Poor's was the fact that the owner could be held liable to third parties through the infringer's contract, because the owner's financial information was used as an integral part of the infringer's financial product. Id. Lastly, the court found that if there was trading in the infringer's futures contracts and the infringer was enjoined from using the owner's proprietary information, traders would be harmed because they would be unable to extract themselves from the infringer's futures contracts and would consequently lose money. As you know, the KCBT directly competes with NYMEX. Furthermore, if the CFTC approves KCBT's proposal, traders could be harmed if KCBT is enjoined from using NYMEX's proprietary information because traders would be unable to extricate themselves from KCBT's infringing futures contracts.

Moreover, according to the proposal, KCBT plans to use NYMEX's trademark prominently in connection with its new method of trading natural gas futures. This proposed unauthorized use of the NYMEX mark would infringe NYMEX's trademark rights, because it would be likely to mislead investors into believing the futures contracts listed by KCBT are associated with or approved by NYMEX. Courts have enjoined this type of usage when it is likely to mislead investors. See Standard & Poor's Corp., 683 F.2d at 708-9.

Based on the information above, NYMEX has significant legal objections to the KCBT proposal and respectfully requests that the Commission disapprove the KCBT contract amendments.

Sincerely,

Christopher K. Bowen

Christopher K. Bowen
Senior Vice President
and General Counsel