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Securities
Commission

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**IN THE MATTER OF
OMEGA SECURITIES INC.**

**REASONS ON APPLICATION FOR A TEMPORARY ORDER
(Subsections 127(5) of the *Securities Act*, RSO 1990, c S.5)**

Hearing: November 17, 20 and 21,
2017

Decision: December 14, 2017

Panel: Mark J. Sandler
AnneMarie Ryan
Deborah Leckman
Chair of the Panel
Commissioner
Commissioner

Appearances: Keir Wilmut
Eliot Kolers
Sinziana Hennig
For Staff of the Commission
For Omega Securities Inc.

TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | INTRODUCTION | 1 |
| II. | THE LAW | 3 |
| III. | THE ARCHITECTURE OF OSI’S TRADING ENVIRONMENT..... | 6 |
| IV. | SHOULD AN ORDER SUSPENDING OSI’S REGISTRATION AND REQUIRING OSI TO CEASE TRADING BE MADE?..... | 7 |
| A. | Are the allegations serious? | 7 |
| B. | Is there <i>prima facie</i> evidence supporting the allegations?..... | 8 |
| 1. | Disseminating inaccurate post-trade information by reversing the buyer broker identification and the seller broker identification for mid-point peg transactions..... | 8 |
| 2. | Making information available regarding trades to a person or company prior to making that information available to the information processor..... | 9 |
| 3. | Content discrepancies across OSI’s data feeds | 10 |
| 4. | Failing to accurately capture and disseminate time | 11 |
| (a) | Trade Executions..... | 12 |
| (b) | Orders | 15 |
| 5. | Engaging in conduct contrary to the public interest..... | 16 |
| C. | Does the public interest favour making a cease trade and suspension of registration temporary order? | 16 |
| V. | SHOULD ANY TEMPORARY ORDER BE MADE?..... | 18 |
| VI. | THE DURATION OF A SUBSECTION 127(5) ORDER | 19 |
| VII. | CONCLUSION..... | 22 |

REASONS FOR DECISION

I. INTRODUCTION

- [1] Omega Securities Inc. (**OSI**) is an Ontario corporation founded in 2007. It is based in Toronto, and is a registered dealer, regulated by the Commission and by IIROC. It operates two alternative trading systems (**ATS** or **ATSS**): Omega ATS (commencing in 2007) and Lynx ATS (commencing in 2014). An ATS is an alternative marketplace, distinguished from a traditional exchange. It is defined in subsection 1(1) of the *Securities Act* RSO 1990, c S.5 (the **Act**).
- [2] ATSS are governed by the regulatory framework set out, in part, in the Act, as well as in National Instrument 21-101 (**NI 21-101**), which is made pursuant to section 143 of the Act.
- [3] According to IIROC, Omega ATS has about 5% market share of Canadian equities trading. It meets the regulatory threshold as a protected marketplace for the purposes of the Commission's "Order Protection Rule"¹, meaning that a better priced visible order on Omega ATS must generally be executed before an inferior priced order on another marketplace. Lynx ATS has about 0.5% market share and does not qualify as a protected marketplace. Together, they serve over 60 subscribers and over 650 direct access clients of those subscribers.
- [4] On November 14, 2017, Staff filed an application for a temporary order (the **Application**) alleging that OSI may have breached Ontario securities law in the following ways:
- a. Disseminating inaccurate post-trade information by reversing the buyer broker identification and the seller broker identification for mid-point peg transactions (defined below in paragraph [39]) when the buyer was active (that is, when the buyer's order was matched with a previously entered sell order) in relation to transactions executed on its marketplaces, in breach of subsection 7.2(1) and subparagraph 11.2(1)(d)(vi) of NI 21-101;
 - b. Making information regarding trades available to a person or company prior to making it available to the information processor, in breach of subsections 7.1(3) and 7.2(2) of NI 21-101;
 - c. Failing to disseminate accurate information to the information processor as a result of market participants and regulators receiving different data via different ports or feeds of OSI, in breach of subsection 7.2(1) and Part 11 of NI 21-101;
 - d. Failing to accurately disseminate to the information processor the time in milliseconds a transaction was executed, in breach of subsection 7.2(1) and subparagraph 11.2(1)(d)(iv) of NI 21-101;
 - e. Failing to accurately capture and disseminate the time in milliseconds that an order was first originated or received by Omega ATS or Lynx ATS, in breach of subsection 7.1(1) and subparagraph 11.2(1)(c)(xi) of NI 21-101; and

¹ Part 6 of National Instrument 23-101 – *Trading Rules* (**NI 23-101**).

f. Engaging in conduct contrary to the public interest.

- [5] Staff acknowledges that OSI rectified the breach identified in (a) above in June 2016, but alleges that the remaining breaches are ongoing. Accordingly, it seeks a temporary order, pursuant to subsection 127(5) of the Act that the registration of OSI be suspended and that trading in any securities by OSI cease until the conclusion of the hearing on the merits, or such other time as ordered by the Commission.
- [6] On November 16, 2017, Staff filed a Statement of Allegations against OSI. The hearing into those allegations formally commenced through the issuance of a Notice of Hearing which specified an initial hearing date on November 17, 2017. It is not expected that the hearing on the merits of these allegations will be completed for a number of months. A hearing on the merits, if contested, will only follow Staff's disclosure of all relevant information in its possession, the exchange of relevant documents and witness particulars, the evidence and submissions presented to a hearing panel, and the panel's decision or decisions.
- [7] Staff submits that the time required to conclude a hearing on the merits could be prejudicial to the public interest, and that, in the circumstances, the requested temporary order is necessary in the public interest.
- [8] OSI forcefully denies that it has violated Ontario securities law, but submits that, in any event, any violations have been rectified or are in the process of being rectified. It further contends that any alleged violations are not so serious as to justify the exceptional order sought by Staff, which would not only irreparably damage OSI in the short term, but would also make it highly unlikely that OSI could ever recover.
- [9] Staff tendered the evidence of two witnesses, Alexandru Badea, Investigator, Enforcement Branch of the Commission and Gregory Ljubic, Senior Investigation Counsel, Enforcement Branch of the Commission, initially by affidavit and supplemented by their oral testimony. Each was cross-examined by counsel for the respondent.
- [10] OSI tendered the evidence of three witnesses, two initially by affidavit, with all providing oral testimony. These were Raymond Tung, Chief Operating Officer of OSI, Sean Debotte, Chief Executive Officer of OSI and Dr. Liam Cheung, Chief Executive Officer and Chief Compliance Officer of Tactex Asset Management Inc. Dr. Cheung is also a shareholder of OSI. All were cross-examined by Staff.
- [11] Staff sought to introduce the affidavit of Tracey Stern, Manager, Market Regulation Branch of the Commission in reply. In our view, paragraph 17 of Ms. Stern's affidavit simply reflected her opinion as to the merits of the Application and was not appropriately before us. Further, the balance of the affidavit did not constitute reply evidence and, in any event, the proposed evidence was largely captured in the evidence already relied upon by Staff. Accordingly, we did not allow the affidavit to be introduced into evidence.
- [12] Much of the evidence was uncontroverted or became so as the testimony developed. In large measure, the most significant factual dispute between the parties related to the significance or impact of any deficiencies identified by Staff to or on the capital markets and investors. Staff alleges that continuing deficiencies, most particularly in how times of orders and times of execution of trades are recorded and disseminated, undermine the integrity of the

marketplace, and compel the order requested. OSI contends that the vast majority of the times recorded and disseminated are accurate, even by its regulators' standards, and that deviations are almost invariably measured in several milliseconds only, which are irrelevant.

- [13] In these reasons, we have reminded ourselves that we are not deciding on the ultimate merits of Staff's allegations, and accordingly, only refer to such evidence and only make those findings necessary to address the Application.
- [14] For the reasons that follow, we concluded that Staff did not meet its burden of demonstrating that a temporary order suspending OSI's registration and requiring OSI to cease trading was in the public interest. On the other hand, we found that it was in the public interest that some terms and conditions be placed on OSI's registration. By placing terms and conditions on OSI's registration, we sought to give Ontario's capital markets notice of the issues identified at the hearing and encourage OSI to resolve those issues in an expeditious manner.
- [15] On November 23, 2017, we issued our order to that effect. Pursuant to s. 127(6) of the Act, our order took effect immediately and expired on December 8, 2017, the fifteenth day after its making, unless extended by the Commission. Our temporary order has since been extended to January 29, 2018, on consent of the parties.
- [16] These are the reasons for our decision.

II. THE LAW

- [17] Subsection 127(5) of the Act states:
- Despite subsection (4), if in the opinion of the Commission the length of time required to conclude a hearing could be prejudicial to the public interest, the Commission may make a temporary order under paragraph 1, 2, 2.1 or 3 of subsection (1) or subparagraph ii of paragraph 5 of subsection (1).
- [18] It follows that a temporary order may only be made if the Commission concludes that the length of time required to conclude a hearing could be prejudicial to the public interest. If that precondition is met, the Commission may only make one or more of the orders contemplated by paragraphs 1, 2, 2.1 or 3 of subsection (1) or subparagraph ii of paragraph 5 of subsection (1). For convenience, these possible orders are reproduced here:
1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.
 2. An order that trading in any securities by or of a person or company or that trading in any derivatives by a person or company cease permanently or for such period as is specified in the order.
 - 2.1 An order that the acquisition of any securities by a particular person or company is prohibited permanently or for the period specified in the order.

3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order.

...

5. If the Commission is satisfied that Ontario securities law has not been complied with, an order that a release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular, offering memorandum, proxy solicitation or any other document described in the order,

...

ii. not be provided by a market participant to a person or company,

- [19] The availability of temporary orders under the Act recognizes that a “regulatory agency charged with oversight of the capital markets must have the capacity to move quickly to stop transactions which it considers to be injurious to the capital markets.” Subsection 127(5) of the Act, as well as the power to extend temporary orders contained in subsections (7) and (8), assist in ensuring that the Commission is able to intervene in both a timely and an effective manner to protect investors and the capital markets.²
- [20] The authority to issue a temporary order is directly related to the Commission’s statutory mandate set out in section 1.1 of the Act to provide protection to investors from unfair, improper or fraudulent practices; and to foster fair and efficient capital markets and confidence in those markets.³
- [21] Here, Staff seeks an order suspending OSI’s registration and requiring OSI to cease trading for a period potentially of indefinite duration. On the available evidence, we accept that this order, if granted, would likely cause irreparable harm to OSI both short-term and long-term.
- [22] The jurisprudence establishes that, in order for Staff’s Application to succeed, Staff bears the burden of demonstrating that a three-part test has been met: namely,
- a. the allegation(s) made must be serious;
 - b. there must be *prima facie* evidence supporting the allegation(s); and
 - c. the public interest must favour granting this extraordinary remedy.
- [23] It is clear (and reinforced by the language contained in the third prong of that test) that the issuance of a temporary cease trade order is an extraordinary remedy and one that should not be exercised lightly.⁴ The Commission has also said that “[t]o obtain a temporary cease trade order, the party requesting such an order has a heavy onus to provide sufficient evidence to support issuing such an order in the public interest.”⁵ Nonetheless, the evidence required may fall

² *Re Doulis* (2011), 34 OSCB 9597 (**Doulis**) at paras 23 and 24, citing *Canadian Tire Corp. (Re)* 1987, 10 OSCB 857 at para 127.

³ *Re Western Wind Energy Corp.* (2013), 36 OSCB 6749 (**Western Wind**) at para 9.

⁴ *Western Wind* at para 10.

⁵ *Western Wind* at para 11.

short of that which Staff would be required to produce at a hearing on the merits, but must amount to more than mere suspicion or speculation.⁶

- [24] The requirement that there must be *prima facie* evidence supporting the allegation is perhaps an imperfect way of describing the nature and quality of the evidence sufficient to justify a temporary order. Indeed, in other contexts, including criminal law, courts have used the phrase “*prima facie* evidence” or a “*prima facie* case” in inconsistent ways. For example, it has been used to describe the test for a non-suit or directed verdict, a test which generally involves no assessment of credibility or reliability, but simply a determination of whether there is some evidence which, if accepted, would support the case being advanced. It has also been used to describe a test which involves some threshold assessment of credibility or reliability in determining whether there is a case to meet.
- [25] In our view, the phrase should be interpreted in the context of an application pursuant to subsection 127(5) of the Act to mean that:
- a. the available evidence supports the material parts of the allegation(s) made by Staff; and
 - b. in the opinion of the Commission, the evidence appears to be credible and reliable, having regard to all of the circumstances, including its source, detail, and the presence or absence, at this preliminary stage, of any explanations or evidence that may contradict it.
- [26] This interpretation accords with how the phrase has been applied in the past. The parties did not take issue with this interpretation.
- [27] Ultimate determinations of credibility or reliability are not to be made on an application for a temporary order. Those are to be made by a hearing panel when the hearing on the merits takes place. Equally, even if the evidence presented is credible or reliable, ultimate determinations as to whether that evidence is sufficient, in fact or in law, to prove Staff’s allegations are to be made when the hearing on the merits takes place.
- [28] Unlike the test for injunctive relief, the existence or absence of irreparable harm does not constitute one of the three components of the applicable test. This reflects the overriding public interest which must guide the Commission’s decision. However, the existence of irreparable harm may nonetheless play a significant role in determining whether it is in the public interest to make the requested order. In *Re Valentine* (2002), 25 OSCB 5329 (**Valentine**) at p 5331, this point is explained:

In *Biller v British Columbia (Securities Commission)*, [1998] B.C.J. No. 451 (BCCA), the BCSC had made a temporary order against Mr. Biller. Mr. Biller alleged that a temporary order was akin to an injunction and, as such, the BCSC erred in failing to consider the tests of irreparable harm and balance of convenience. At paragraph 11 the BCCA stated:

⁶ *Western Wind* at para 11; *Doulis* at para. 26, citing *Re Watson* (2008), 31 OSCB 705 at para 41.

The submission is, in my view, misconceived. **Temporary orders under the Act undoubtedly have much the same effect as interlocutory injunctions but are fundamentally different in that they are based upon statutory provisions which empower the orders to be made if the Commission or executive director "considers it to be in the public interest"** [Emphasis added in original]. To apply the tests applicable to common law injunctions to the exercise of that power would create a confusion of concepts. **One may expect that the Commission will have due regard to the potential for harm to those who are subjects of the orders and reasonable regard to the convenience of any persons who might be affected by them** [Emphasis added in our reasons]. **But, because the basic issue is whether it is in the public interest to make the order, the matters to be balanced are different.** [Emphasis added in original]

... Having regard to the legislative scheme as contained in s. 127, as well as the length of time required to conclude a hearing in this matter, we must satisfy ourselves, at this time, that there is sufficient evidence of conduct which may be harmful to the public interest.

In exercising its regulatory authority, the Commission should consider all of the facts including, as part of its sufficiency consideration, the seriousness of the allegations and the evidence supporting them. The Commission should also consider any explanations or evidence that may contradict such evidence. **This will allow it to weigh the threat to the public interest against the potential consequences of the order.** [Emphasis added in original]

III. THE ARCHITECTURE OF OSI'S TRADING ENVIRONMENT

[29] What follows is a quick overview of OSI's systems architecture.

[30] When an order is sent to OSI (OSI uses the same trading system for orders placed on Lynx ATS and Omega ATS), it enters OSI's trading environment through one of two gateways, which then check the order to ensure it conforms to OSI's order entry specifications. If the order is compliant, the order originator receives an acknowledgement via OSI's FIX Feed (described below), which includes, among other information, the time at which the order was received by the gateway. The degree of precision of the times conveyed (i.e. whether to the level of seconds or milliseconds) is discussed below.

- [31] The order is then passed from the gateway to the matching engine, in sequential order. The original time stamp of receipt of the order is not passed to the matching engine, which is a software program that is intended to ensure the orders are executed at the best price. If an order is not immediately executed, it is held by the matching engine and placed into the order book for future trade execution.
- [32] OSI uses multiple data feeds to disseminate information with respect to orders and executions:
- a. The **ITCH Feed** disseminates data to the public, including to the TMX Information Processor (**TMX IP**), which consolidates and disseminates order and trade information to market participants, and data vendors. The ITCH Feed utilizes the ITCH 3.0 protocol to transmit data. The ITCH Feed includes data both with respect to orders, and executed trades. Data from the ITCH Feed is disseminated to the public via three ports: Port 4002, Port 4005 and Port 4006. Port 4002 disseminates data from Lynx ATS, while Ports 4005 and 4006 disseminate data from Omega ATS;
 - b. The **MRF Feed** disseminates data to IIROC, OSI's regulation services provider. It utilizes the FIX 5.2 protocol to transmit data. Included in the MRF Feed is data relating to orders and executed trades, as well as additional information, such as trader identification and regulatory markers required for regulatory oversight, not present in the other feeds; and
 - c. The **FIX Feed** disseminates data using the Fix 4.2 protocol. It sends information to trade execution systems, including order acknowledgements to the order originator, as well as authorized "drop copies" of the FIX Feed. The Canadian Depository for Securities (**CDS**) also receives trade execution records via the FIX Feed. OSI keeps a complete record of the FIX Feed.
- [33] When a trade execution has occurred in the matching engine, the time of execution is recorded and details of the trade are then passed to the feeds. The time of execution is maintained on the FIX Feed. However, the time of execution in the matching engine is replaced when processed by the ITCH Feed and the MRF Feed and the trade execution is assigned a new "time label", which reflects the time at which the information is disseminated by the feeds.

IV. SHOULD AN ORDER SUSPENDING OSI'S REGISTRATION AND REQUIRING OSI TO CEASE TRADING BE MADE?

- [34] To answer this question, we apply the three-pronged test set out in paragraph [22] above.
- A. Are the allegations serious?**
- [35] As earlier indicated, Staff contends that the deficiencies and inaccuracies identified in how orders and trades are recorded and disseminated by OSI are serious, in that they undermine the integrity of Ontario's capital markets and investor confidence. Staff also submits that OSI's failure to meet its information requirements has prevented regulators from effectively protecting investors.
- [36] OSI acknowledges that, framed in this way, the allegations sound serious indeed. However, it contends that there is a disconnect between how those

allegations are framed, and the nature of the deficiencies and inaccuracies actually at issue.

- [37] In our view, OSI's contention is better addressed in the context of deciding whether a *prima facie* case exists to support some or all of Staff's allegations. In our view, while some of the allegations are less serious than others, it is fair to say that the allegations, while not at the highest end of the spectrum of seriousness, are sufficiently serious to trigger examination of the other prongs of the test for a temporary order. The allegations, if meritorious, relate to violations of provisions which represent important parts of Ontario securities law and protect the integrity of the capital markets, and which are directly connected to the Commission's statutory mandate set out in section 1.1 of the Act.

B. Is there *prima facie* evidence supporting the allegations?

- [38] This step of the test requires that the Panel assess the evidence in relation to each of the allegations made by Staff of possible breaches of Ontario securities law committed by OSI. First, we address those allegations of possible breaches made by Staff which ultimately do not support the making of a temporary order, before turning to the balance of the allegations.

1. Disseminating inaccurate post-trade information by reversing the buyer broker identification and the seller broker identification for mid-point peg transactions

- [39] **Mid-point peg orders** are dynamic, hidden orders which rest at the mid-point between the National Best Bid and Offer (**NBBO**). Since this type of order is hidden, or dark, a mid-point peg order is not disseminated until there is a trade execution.
- [40] When a mid-point peg order is executed as part of a trade within OSI's trading system, information regarding the trade, including the identification numbers (**IDs**) of the brokers involved, is disseminated to the public via OSI's ITCH Feed. The Panel heard evidence that other marketplaces identify parties involved in such trades with terms such as "broker" and "contra broker"; however, OSI's ITCH Technical Specification Guide uses the terms "Buyer Broker" and "Seller Broker".
- [41] In the course of its investigation, Staff identified over 65,000 trades in which OSI had reversed the ID numbers of the Buyer Broker and the Seller Broker on its ITCH Feed. This occurred over a three year period beginning in July 2013, when OSI introduced the option for users to enter mid-point peg orders. Staff submits that this may be a breach of subsection 7.2(1) and subparagraph 11.2(1)(d)(vi) of NI 21-101, which provide that a marketplace must provide accurate and timely information regarding trades to an information processor and maintain a record of the identity of the participants on each side of a trade.
- [42] OSI submits that it switched the IDs as a result of an incorrect belief that the Buyer Broker ID and the Seller Broker ID were reversed as a matter of industry practice. In June 2016, IIROC and Staff informed OSI of the issue, after having been notified about the problem by a member of the public. OSI engaged software developers to fix the issue. Mr. Debotte testified that it took approximately two weeks for this issue to be rectified.

[43] In the Application, Staff acknowledges that this issue had already been resolved by OSI.

[44] Accordingly, while the Panel was provided with evidence in support of this allegation, Staff does not rely upon it to justify the need for a temporary order. We agree with that assessment.

2. Making information available regarding trades to a person or company prior to it making that information available to the information processor

[45] Staff alleges that due to some of the processing involved in its formatting, latency is sometimes introduced into the ITCH Feed, resulting in subscribers to the FIX Feed receiving information regarding trades prior to subscribers to the ITCH Feed, including the TMX IP. As a result of disseminating this information to others prior to disseminating it to the TMX IP, Staff alleges that OSI may be breaching subsections 7.1(3) and 7.2(2) of NI 21-101, which require a marketplace not to make information regarding orders or trades available to any person or company before it makes it available to an information processor.

[46] More particularly, Staff asserts that the processing involved in formatting the ITCH Feed includes the addition of a time label and, until rectified in June 2016, the switching of the Buyer and Seller Broker IDs. Staff contends that these steps resulted in latency being introduced to the ITCH Feed. A more detailed description of how and why a time label is added is given later in these reasons. Staff contends that because this same processing does not occur for the FIX Feed, information transmitted via the FIX Feed would necessarily become available to subscribers of that feed before it became available to subscribers of the ITCH Feed.

[47] OSI strenuously maintains that this is not the case, and that this allegation by Staff is based on "sheer speculation". It submits that Staff has failed to present any evidence that any one of the feeds is faster than another. It also notes that one of the causes of latency asserted by Staff, the switch of the Broker IDs, has not been in place since June 2016.

[48] It further submits that the efficiency of the ITCH 3.0 protocol compared to the FIX 4.2 protocol means that if any feed is indeed slower, it should be the FIX Feed. Dr. Cheung testified that the FIX Feed is an inefficient feed because it "carries a huge amount of redundant information that reduces its efficiency, both in terms of how much bandwidth it requires and how much time it takes for a matching engine or a FIX server to be able to compose the messages". By comparison, he described the format of the ITCH Feed as "far more efficient".

[49] Mr. Debotte testified that OSI has also recently installed two new "10-gigabyte" lines which it now uses to transmit data pursuant to the ITCH Feed, though Staff contends that the speed at which information travels after it leaves OSI does not address the issue identified here.

[50] In his evidence, Mr. Tung stated that OSI employed a "sniffer" to attempt to determine whether any feed was indeed sending messages with respect to the same information at a different time than another and that the sniffer confirmed that this was not occurring.

- [51] In its closing argument, Staff submitted that no information had been given to the Panel confirming the results of this testing and that Staff continues to have concerns regarding latency in the ITCH Feed vis-à-vis the FIX Feed.
- [52] OSI also noted that the FIX Feed primarily disseminates information back to the originator of the order. It contends that the allegation that OSI has been disseminating information to subscribers before making that information available to the information processor has had a detrimental effect on OSI's business activities since the allegation, as framed, has left the impression that OSI is selectively favouring some subscribers over others.
- [53] Based on the existing record, we are not satisfied that a *prima facie* case has been made out in support of this allegation. We agree that the evidence, at this stage, on this point is fairly characterized as speculative.

3. Content discrepancies across OSI's data feeds

- [54] During its investigation, Staff discovered that information regarding trades sent via the ITCH Feed was not always identical with respect to its two computer ports (Port 4005 and Port 4006). It also discovered that the information regarding trades sent to IIROC pursuant to the MRF Feed was not always identical to the information sent to the public via the ITCH Feed.
- [55] Staff contends that, as a result, OSI may have breached sections 7.1, 7.2 and 11.2 of NI 21-101, which require a marketplace to provide accurate and timely information regarding orders and trades to an information processor, and to keep records of those orders and trades.
- [56] More particularly, Staff's allegation is based upon its discovery during its investigation that, on some days, certain orders or trades were not included on the ITCH Feed from one port, but were included on the ITCH Feed from the other port. Similarly, Staff discovered that, on some days, the number of orders or trades disseminated on the MRF Feed differed from the number of orders or trades disseminated on the ITCH Feed. Staff submits that the information sent via each of the ITCH Feed's two ports and the information sent via the MRF Feed should be identical (other than the added categories of information which IIROC requires to be sent to it).
- [57] OSI submits that Staff has only identified, in the evidence presented, five trading days on which there was a discrepancy in the information disseminated on the two different ITCH Feed ports or as between the MRF and ITCH Feeds. Two of those days recorded fewer than 10 discrepancies out of millions of messages. With respect to the three other days, OSI experienced known systems difficulties, which were addressed according to procedures used by IIROC and were resolved to IIROC's satisfaction. Simply put, it is OSI's position that the existing regulatory regime recognizes that systems failures can occur without enforcement implications, and that Staff failed to determine to what extent the identified discrepancies were events reported to, and addressed by, IIROC. In any event, OSI maintains that some tolerance for discrepancies is inherent in any regulation of systems, and that these discrepancies have not been shown to be so substantial or frequent as to demonstrate true non-compliance.
- [58] The existence of the discrepancies identified by Staff was not contested by OSI at the temporary order hearing. A reasonable inference available to a hearing panel is that information sent via two computer ports should be identical, as

should information sent pursuant to two different Feeds. Another reasonable inference available to a hearing panel is that the nature and extent of the discrepancies identified here are sufficient to establish non-compliance with National Instrument 21-101. To be clear, a hearing panel may or may not draw these inferences on the totality of the evidence available to it. But we are satisfied that a *prima facie* case exists in support of this allegation.

[59] That being said, the limitations on the evidence, identified by OSI and described briefly above, are relevant to whether Staff has shown that the requested temporary order is required in the public interest. The evidence presented to us leaves the record unclear as to how significant these deficiencies are, and the extent to which they are typical or atypical for comparable marketplaces.

4. Failing to accurately capture and disseminate time

[60] Staff alleges that OSI may be breaching various provisions relating to the capture and dissemination of time with respect to orders or trade executions. For convenience, the relevant provisions are set forth below.

7.1 Pre-Trade Information Transparency - Exchange-Traded Securities

(1) A marketplace that displays orders of exchange-traded securities to a person or company must provide accurate and timely information regarding orders for the exchange-traded securities displayed by the marketplace to an information processor as required by the information processor or, if there is no information processor, to an information vendor that meets the standards set by a regulation services provider.

7.2 Post-Trade Information Transparency - Exchange-Traded Securities

(1) A marketplace must provide accurate and timely information regarding trades for exchange-traded securities executed on the marketplace to an information processor as required by the information processor or, if there is no information processor, to an information vendor that meets the standards set by a regulation services provider.

11.2 Other Records

(1) As part of the records required to be maintained under section 11.1, a marketplace must include the following information in electronic form:

...

(c) a record of each order which must include

...

(xi) the date and time the order is first originated or received by the marketplace,

...

(d) in addition to the record maintained in accordance with paragraph (c), all execution report details of orders, including

...

(iv) the date and time of the execution of the order

[61] In the passages that follow, we first consider the allegations as they relate to trade executions, and then orders.

(a) Trade Executions

[62] Time events, for example, a trade execution, that occur in OSI's matching engine are assigned a "time stamp" when they occur in the matching engine. These time stamps are passed from the matching engine to the FIX Feed and maintained on OSI's FIX Feed. However, this is not the case with the ITCH and MRF Feeds. It was uncontested at the hearing that when that time information is passed from the matching engine to the ITCH Feed and the MRF Feed, the time stamp that had previously been attached to the time event is not passed to those respective feeds. Instead, those events are then assigned what was referred to as a "time label", reflecting the time at which that information passed through the respective feed. This has been described as "suppressing" the time stamp.

[63] Staff's position is that the practice of suppressing the time stamps recorded in the matching engine and having the ITCH Feed and the MRF Feed separately apply new time labels may violate subsection 7.2(1) and subparagraph 11.2(1)(d)(iv) of NI 21-101. Simply put, Staff contends that the application of time labels takes time, and that it sometimes results in a different time than the time recorded in the matching engine. Staff also contends that because the FIX Feed does not always record or disseminate time to the millisecond level, rather than to the second level (discussed more fully below), OSI may be committing a further violation of subparagraph 11.2(1)(d)(iv). It is central to Staff's position that the obligations under the Act and NI 21-101 to record and disseminate accurate information necessarily include the obligation to do so accurately to the millisecond level.

[64] In support of Staff's position, the evidence did disclose that as a result of latency that will sometimes occur in the ITCH Feed and the MRF Feed, OSI's practice of applying time labels has produced two types of discrepancies relevant to the time of events:

- a. the time labels applied by the respective processes involved in preparing the ITCH Feed and the MRF Feed are sometimes different than the actual time of execution recorded in the matching engine; and
- b. the time labels applied by the respective processes involved in preparing the ITCH Feed and the MRF Feed are sometimes different from each other.

[65] While Staff did not provide evidence of the rate of occurrence of the type of discrepancy described in (a) above, OSI did not contest that in instances where OSI's systems were experiencing heavy load, latency would be introduced into

the system, causing the time label to record a different time than the original time stamp, at the millisecond level.

[66] Indeed, we know that the type of discrepancy described in (a) was occurring because of Staff's work in identifying the type of discrepancy described in (b). It is only logical that if the ITCH Feed and MRF Feed were different from each other, the FIX Feed must have been different from at least one of them. Staff found approximately 85,000 instances in which the time label applied to the ITCH Feed was different than the time label applied to the MRF Feed. In the majority of instances, the time discrepancy was one or two milliseconds. Staff also found that approximately 3,500 trades had a time label difference greater or equal to three milliseconds across the data feeds.

[67] Dr. Cheung provided OSI's explanation for why the MRF Feed uses a time label:

Originally, Omega sent IIROC abbreviated trade data consisting only of quotes and executions. IIROC then requested all trading data, including, for instance, "cancel order" messages. Since the additional messages arise from orders where there was no execution, by definition, there is no time stamp by the Matching Engine for time of execution. Instead, Omega attaches a time label to each outgoing data packet to IIROC. For execution messages, the time stamp from the Matching Engine is suppressed in the outgoing data packet, so that a single, consistent set of time labels is applied to all messages sent to IIROC.

(Exhibit 3, para 20)

[68] In relation to the ITCH Feed, OSI submits that it adopted time labels recording the time of transmission because the ITCH 3.0 protocol does not support embedded time stamps in its messages. OSI submits that conveying the time of message transmission, rather than the time of execution, has been an industry-wide accepted practice.

[69] While OSI did not contest that in some instances, the process of applying time labels had resulted in one or both of the two types of discrepancies described above, it submits that by Staff's own evidence, the process of applying a time label resulted in no change in the millisecond description of the time event in over 98% of trade executions.

[70] OSI submits that in rare circumstances, the discrepancies resulting from the time labels can be measured in minutes. According to OSI, these appear to be anomalous inaccuracies, related to specific technical issues or systems being down on particular days. NI 21-101 contemplates that these will happen, and establishes some protocols involving reporting. Based on the evidence available to us, we have not focused on the "anomalous" larger infrequent inaccuracies in determining whether a temporary order should be made.

[71] The key allegations in this hearing relate to how time is recorded and disseminated on the different feeds, as those times pertain to millisecond precision and accuracy. Subsection 7.2(1) of NI 21-101 requires that information be accurate.

- [72] OSI's primary position is that there is no obligation for it to be precise or accurate to the millisecond level. It submits that nowhere in Ontario securities law are milliseconds specifically required. As a result, Staff's assertions that OSI is violating Ontario securities law are akin to asking the Panel to "mak[e]... rules through litigation".
- [73] In the alternative, OSI submits that if the Panel does find that there is an obligation on OSI to record or disseminate time to the millisecond level, OSI's practices bring it well within the level of accuracy required.
- [74] OSI submits that the only guidance issued by any regulator that addresses the topic of time accuracy is IIROC Notice 16-0022 -*Guidance on Time Synchronization* (the **IIROC Notice**). The IIROC Notice allows for a 50+/- millisecond drift by a marketplace from the Coordinated Universal Time (**UTC**). While neither party suggested that the issue in this Application was OSI drift from UTC, OSI submits that the Panel should take into consideration that IIROC considers a 100 millisecond drift (since one marketplace can drift 50+ and one 50-) between marketplaces acceptable. According to OSI, it follows that differences of a few milliseconds resulting from the process of applying time labels in the ITCH and MRF Feeds are obviously tolerated.
- [75] OSI also introduced evidence that the issue of time drift has been the focus of some attention of regulators in the United States. It submits that the Panel should view this evidence as demonstrating that these issues are live ones in the marketplace and require time and careful evaluation before any decisions are made.
- [76] In response, Staff stresses that the IIROC Notice relates to clock synchronization and drift from UTC, not different time labels among different feeds from the same marketplace. Staff also notes that the IIROC Notice requires marketplaces to "ensure that system clocks are continually synchronized..."
- [77] Staff also submits that the suppression of the time stamp representing the true time of execution in favour of a label reflecting, in a significant number of instances, a different time has nothing to do with "time drift", but instead represents a deliberate choice to disseminate an inaccurate time.
- [78] Both parties agreed that the MRF Feed which OSI sends to IIROC records time to the millisecond level because the specifications for IIROC's MRF Feed require OSI to do so. Pursuant to Part 7 of NI 21-101, OSI is obligated to provide the information which its regulator, IIROC, requires.
- [79] Staff submits that the obligation to transmit and record time events to the millisecond level is not confined to the MRF Feed. Staff says that the obligation to do so in relation to other feeds should be inferred not only from IIROC's requirements, but from the requirements of the marketplace itself. For example, the respondent's own ITCH 3.0 protocol disseminates information at the millisecond level. This information is consumed by the TMX IP and then transmitted to the marketplace publicly. Staff submits that OSI's systems and personnel have demonstrated that they view the dissemination of information at the millisecond level as necessary.
- [80] In our view, on the totality of the available evidence, it can reasonably be inferred that the dissemination of times at the millisecond level represents the industry standard. It is significant that both OSI's information processor, the

TMX IP, and its regulation services provider, IIROC, require times to be disclosed to the millisecond level.

- [81] A hearing panel may also reasonably infer that, if the obligation exists to record and disseminate in milliseconds, the obligation under NI 21-101 to record and disseminate accurate information is not met where the reported milliseconds deviate from those recorded internally. A hearing panel may also conclude that tolerance in relation to time synchronization does not imply additional tolerance for deviations due to the deliberate suppression of the time of trade execution in favour of a time label, which will sometimes be later in milliseconds than the time of trade execution internally recorded. Simply put, a hearing panel may reasonably infer that substitution of a different time, albeit a difference measured in milliseconds, does not meet the requirements of NI 21-101. The accurate time for trades is the time of execution recorded in the matching engine, not a later time at which the trade is sent out on any feed.
- [82] Accordingly, we are satisfied that a *prima facie* case exists in support of this allegation. However, we recognize that there are arguments advanced by OSI which are not frivolous. Most deviations relied upon in support of this allegation were confined to one or two milliseconds. We again observe (as we did in relation to an earlier allegation) that the evidence presented to us leaves the record unclear as to how significant these deficiencies or their frequency are, and the extent to which they are typical or atypical for comparable marketplaces. This is relevant to whether it is in the public interest to make the temporary order requested by Staff.

(b) Orders

- [83] At one point in the hearing, Staff contended that OSI does not record the time at which it first receives orders, in breach of subsection 7.1(1) and subparagraph 11.2(1)(c)(xi) of NI- 21-101. However, this position was modified based on new information provided by OSI through its witnesses during the hearing. (The parties debated whether this resulted from OSI's failure to provide Staff with the requisite information it needed to conduct its investigation or whether this was simply a miscommunication. It is unnecessary for us to resolve this debate.) It now appears that OSI does capture the time at which it receives an order at the gateway level. However, the precision at which it records and disseminates such times may differ based on the instructions of the order originator.
- [84] Mr. Tung testified that if a order originator instructs OSI that it wishes to receive information with respect to time events at the millisecond level via the FIX Feed, OSI will provide the order originator data to that level. However, if an order originator only wishes to receive information with respect to time events at the level of seconds, rather than milliseconds, OSI will provide the order originator data to that level only. OSI admitted that in the latter instance, OSI does not record the time event on its FIX Feed to the millisecond level. In either case, it should be noted that the time that the order was received at the gateway by OSI is not passed on to the matching engine. OSI stated that, instead, OSI places orders sequentially into the book in "priority order".
- [85] For the reasons already given, we are satisfied that a *prima facie* case exists that OSI is obligated to record and disseminate time information at the millisecond level, and that its failure to do so for some order originators, albeit on their

election, may represent non-compliance with the obligation to display and store accurate information about orders in its marketplace. Again, we are mindful of the counterarguments presented by OSI, which are not frivolous.

5. Engaging in conduct contrary to the public interest

[86] In its Application, Staff alleges that OSI may have engaged in conduct contrary to the public interest. In so alleging, Staff relies upon the same conduct particularized above. Accordingly, it is unnecessary to address this as an additional allegation in determining whether we should make a temporary order.

C. Does the public interest favour making a cease trade and suspension of registration temporary order?

[87] The allegations against OSI are serious. Two of Staff's allegations are supported by a *prima facie* case, although the content discrepancies as between two ports and as between feeds unrelated to time accuracy figure less prominently in our analysis. We must now consider whether granting the temporary order requested by Staff is in the public interest.

[88] Staff submits that OSI's failure to comply with the requirements to record and disseminate accurate information will cause public harm in three ways:

- a. Regulators are unable to conduct proper oversight of the markets;
- b. The fair and efficient operation of capital markets is impeded;
- c. Investor confidence in the capital markets is negatively impacted.

[89] Staff further submits that it would be prejudicial to the public interest to await a hearing on the merits without a temporary cease trade order in place. Staff observed that there is no right to operate a marketplace in Ontario.

[90] OSI submits that an order suspending OSI's registration and requiring OSI to cease trading would cause it irreparable harm and likely "shutter" the business.

[91] OSI points to the positive impact of a multiple marketplace structure in Canada and argues that it provides a valuable contribution to the capital markets. OSI further contends that the small time discrepancies should have no impact on retail investors who usually receive market data on a 15 minute time delay.

[92] While again, we are not usurping the role of a hearing panel to decide the issues raised by the parties, we do not accept OSI's argument that the evidence goes so far as to demonstrate no risk of harm to anyone as a result of the deficiencies identified here. The issues identified in Staff's allegations potentially strike at the heart of the integrity of the efficient operation of our markets. The multiple market framework outlined in NI 21-101 and NI 23-101 specifies the rules which apply to all marketplaces in Canada. In today's world, the timeliness and accuracy of the arrival time of an order to a market and the time of execution of a trade are extremely important in determining whether each marketplace is operating fairly for its own participants and whether each marketplace is integrated in a fair and effective manner with other marketplaces. A hearing panel may reasonably infer that requirements set out in NI 21-101 do not contemplate that a marketplace can "substitute" a different time on an order or a trade because the architecture of its system has been developed that way.

- [93] We agree with Staff that OSI has potentially impeded effective regulatory oversight of its activities. The fact that the matching engine does not maintain the time stamp of receipt of an order and the fact that the regulatory feed to IIROC contains a "time label" which may be different from the actual time of trade execution in the matching engine may mean that IIROC has no possible way to determine if orders were treated fairly.
- [94] The risk of harm created by OSI's alleged failures to meet its regulatory obligations may potentially also extend to other market participants, including the dealers who subscribe to OSI as well as other marketplaces which fall under the Order Protection Rule regime or which rely on OSI to provide accurate and timely information to them.
- [95] Similarly, we also do not agree that the evidence demonstrates that retail investors cannot be harmed by inaccuracies to the millisecond level. It is highly important to the dealers who route orders on behalf of the retail clients that they can trust the accuracy and timeliness of the data they receive from OSI and that they know that all orders will be treated fairly and assigned the priority they deserve.
- [96] Thus the question that the Panel must answer is whether the alleged failures identified relating to the inaccurate content and recording and dissemination of data require that we exercise the extraordinary remedy of granting the requested temporary order. Is the appropriate remedy in this case to grant Staff's Application to suspend OSI's registration and requiring OSI to cease trading?
- [97] As we stated above, the existence or absence of irreparable harm does not constitute one of the three components of the applicable test. This is appropriate as the Commission must act in accordance with the public interest. However, the existence of irreparable harm, as articulated in Commission decisions, should be given some weight in determining whether the public interest favours making a temporary order.
- [98] We are very mindful of the likely consequences to OSI of the temporary order sought by Staff. To grant such an order would not only stop OSI's operations in the short term, it would make it extremely difficult for OSI to restore its business at a future date. There is no indication at this time as to when the merits hearing would be held or how long the hearing and ultimate decision might take to be completed. Thus to grant the temporary order at this time, would, as OSI points out, essentially "provide Staff with the desired outcome of a hearing on the merits without actually having to undertake to prove its case".
- [99] In our view, the limitations on the case presented by Staff, at least at this stage of the proceedings, and the irreparable harm which would likely result from a cease trade order and suspension of registration, figure prominently in whether it is in the public interest to make the requested order. We also accept that OSI has already taken some steps, and is prepared to take additional steps on a timely basis, to address many or all of the issues identified by Staff (including the implementation of a MRF Feed "patch" and an upgrade from the ITCH 3.0 protocol to the ITCH 5.0 protocol as expeditiously as possible). In the circumstances, Staff has not met its burden of demonstrating that the requested order is in the public interest.

[100] In so concluding, we do not accept that there is no risk of harm whatsoever to investors, arising out of the deficiencies identified. However, that risk, which is itself difficult to quantify given the limitations on the evidence, is mitigated, in our view, by the steps being taken and to be taken to rectify existing deficiencies.

V. SHOULD ANY TEMPORARY ORDER BE MADE?

[101] While the Panel has determined that an order suspending OSI's registration and requiring OSI to cease trading is not in the public interest, it is open to the Panel to consider whether another, less onerous order, should be made.

[102] Subsection 127(5) of the Act describes the types of temporary orders available to the Commission. These have been reproduced in paragraph [18] of our reasons above.

[103] Pursuant to paragraphs 1 and 2 of subsection 127(1) of the Act, we have jurisdiction to impose an order suspending OSI's registration and requiring OSI to cease trading. However, the scope of subsection (5) also tells us that we have jurisdiction to impose less onerous terms and conditions. For example, pursuant to paragraph 1 of subsection 127(1), we have jurisdiction to impose terms and conditions on OSI's registration, rather than suspend it altogether.

[104] Fairness requires the Commission to advise the parties when it is considering alternative terms and conditions to those proposed in Staff's Application, and to give the parties an opportunity to be heard in that regard. We have done precisely that here. Before deciding that we would impose an alternative order imposing terms and conditions on registration, we had the benefit of the parties' submissions on what terms and conditions might be considered.

[105] In our analysis above we have found that the allegations made by Staff are serious and that there is at least a *prima facie* case to be made with respect to some of those allegations. And while we do not consider an order suspending OSI's registration and requiring OSI to cease trading to be in the public interest, we do believe that the potential harm to investors and to the integrity of the markets requires some response on the part of the Commission, while balancing OSI's interest in staying in business, until the allegations are proven or dismissed.

[106] In our view, the terms and conditions incorporated into our order assist in mitigating any risk associated with the deficiencies identified during this hearing, and thereby assist in protecting the public and maintaining public confidence in the capital markets. Those terms and conditions, reproduced below, were informed by our understanding of the intentions already expressed by OSI as to how to address the identified issues, the importance that these issues be addressed in a timely way, and finally, the need for regulatory oversight as changes are being made. As earlier indicated, in crafting these terms and conditions, the Panel attempted to address the public interest in two ways: first, by providing notice to the capital markets of the issues identified at this hearing, and second, by encouraging OSI to resolve those outstanding issues in a way that instills confidence in the accuracy of information recorded and disseminated by it.

[107] Finally, we wish to comment on an issue raised by OSI at the conclusion of its closing argument. The Order Protection Rule requires marketplaces to establish,

maintain and ensure compliance with written policies and procedures reasonably designed to prevent inferior-priced orders from “trading through”, or being executed before immediately accessible, visible, better-priced limit orders. In certain circumstances, marketplaces and market participants are allowed to declare “self-help” pursuant to NI 23-101, exempting them from the Order Protection Rule. Before this Application was heard, Staff issued OSC Staff Notice 23-706. This Staff Notice notified the capital markets that marketplaces and marketplace participants could consider declaring “self-help” under subsection 6.2(a) or paragraph 6.4(a)(i) of NI 23-101 until further notice.

- [108] OSI submits that the Staff Notice was an overreaction, given the limited nature and scope of the discrepancies identified by Staff. In its view, the Staff Notice was “singularly destructive to the business”. It urged us to take action to redress the situation.
- [109] On this Application for a temporary order, we have no jurisdiction to “strike” the Staff Notice. Nor would it be wise for us to comment on regulatory activity not properly before us. We expect that Staff will consider our reasons in determining the appropriate approach moving forward. Similarly, we expect that our reasons will inform the capital markets’ approach to OSI. It is not for us to say what those approaches should or must be.

VI. THE DURATION OF A SUBSECTION 127(5) ORDER

- [110] We have already reproduced subsection 127(5) of the Act. An application for an initial temporary order pursuant to subsection 127(5) may be brought without notice or on notice to the respondent.⁷ Indeed, in *Money Gate* and here, Staff provided notice to the respondents that it was seeking a temporary order.
- [111] Subsection 127(6) of the Act provides that:
- The temporary order shall take effect immediately and shall expire on the fifteenth day after its making unless extended by the Commission.
- [112] We recognize that the 15 day expiry date was undoubtedly intended largely, if not exclusively, to address the typical case in which the initial temporary order was sought and made without notice. It would be fundamentally unfair for a temporary order to be made for a lengthy period of time without the opportunity for the respondent(s) to be heard.
- [113] That having been said, subsection (6) does not expressly limit its application to those initial temporary orders made without notice, but appears to apply, without restriction or qualification, to all temporary orders made under subsection (5).
- [114] Staff is fully entitled to seek an extension of an initial temporary order under subsections (7) and (8). They read as follows:
- (7) The Commission may extend a temporary order until the hearing is concluded if a hearing is commenced within the fifteen-day period.

⁷ Re *Money Gate Mortgage Investment Corporation* (2017), 40 OSCB 4440 (***Money Gate***) at para 19.

(8) Despite subsection (7), the Commission may extend a temporary order under paragraph 2 or 2.1 of subsection (1) for such period as it considers necessary if satisfactory information is not provided to the Commission within the fifteen-day period.

[115] Indeed, subsection (6) specifically contemplates that the initial temporary order will expire in 15 days “unless extended by the Commission.” The Commission’s decision in *Money Gate* draws a clear line between an initial temporary order and an extension order.⁸

[116] We have been provided with two decisions which might arguably have relevance to this jurisdictional point. In *Re Quadrex Secured Assets Inc.* (2013), 36 OSCB 1671, an application for a temporary order pursuant to subsection 127(5) was brought, on notice to the respondents who opposed the application. The Commission granted the application. The temporary order it made took effect immediately, but by its terms, was to expire on the 15th day after it was made unless extended by order of the Commission. The limited duration of this temporary order is consistent with an interpretation of subsections (5) and (6) which confines the duration of an initial temporary order, even made on notice to the respondent(s), to 15 days. However, the order was unaccompanied by reasons, and therefore has limited precedential value here.

[117] In *Doulis*, the Commission considered an application for a temporary order, again on notice to the respondents. The respondents opposed the application. The Commission said this at paragraph 3:

As Staff did not obtain a Temporary Order on an *ex parte* basis under subsection 127(5) of the Act, this Application, brought at the first appearance in this proceeding, provides the first opportunity for the Commission to consider whether it is in the public interest to issue a Temporary Order with respect to the Respondents.

[118] In its reasons for granting the order, the Commission relied upon the statements made in *Valentine* about the criteria for extending a temporary order, including its reference to subsection 127(7). Accordingly, it appears that the Commission considered the extension provisions in subsection 127(7) in deciding whether to grant the application for an initial temporary order. However, what is unusual about this case is that it was apparently argued in March 2011, though the Commission’s decision was released in September 2011. We do not know what factors informed the timing of the application or the Commission’s decision. There is no indication, in any event, that the jurisdictional issue raised here was a live one in that case.

[119] In our view, the language in subsection 127(6), even adopting a purposive interpretation of the legislation in accordance with the Commission’s public interest mandate, is unequivocal that an application for an initial temporary order, whether on notice or without notice, expires in 15 days. However, we also recognize that there is little or no reason why a Commission should be unable, when an application is made for a temporary order on notice to the respondent(s), to make an order which lasts more than 15 days. The way to

⁸ *Money Gate* at para 37.

reconcile the language contained in section 127 with that recognition is relatively simple. In our view, the legislation does not preclude Staff, where notice has been given to the respondent(s), from applying at the same time both for an initial temporary order under subsection (5) and for an extension of that order, if granted, under subsection (7) or (8).

- [120] In circumstances where the respondents have notice of these applications in a timely way, and the full opportunity to respond, the Commission may exercise its discretion to allow both applications to be heard at the same time. Indeed, in a number of instances, respondents may favour this approach. Rather than hear the initial application only, and then require the parties to return in 15 days when the circumstances are unlikely to have changed, it makes sense to decide both applications at the same time – or at least to have that option available.
- [121] The ability to bring an application for an initial temporary order and an extension at the same time also means that Staff does not have a disincentive from bringing its application(s) on notice to the respondent, where circumstances permit.
- [122] Here, Staff did not dispute that an initial temporary order made pursuant to subsection 127(5) is normally limited to 15 days in duration. However, it submitted that the rationale for a temporary order so limited in duration disappears when notice has been provided to the respondent, resulting in the full presentation of evidence and submissions by both sides. It therefore urged the Commission to treat the Application as made pursuant to both subsection (5) and (7).
- [123] OSI did not take serious issue with the proposition that Staff might, in appropriate circumstances, apply at the same time for both the initial temporary order and its extension, on notice to the respondent. However, it points out that no Statement of Allegations had been issued when Staff first brought its Application for a temporary order. Accordingly, this Application could not reasonably be regarded as an application for both an initial temporary order and an extension pursuant to subsection 127(7). Nor was it treated as such by OSI based on the materials filed. Secondly, OSI submits that the Application was never amended so as to embrace an application for an extension pursuant to subsection (7). Finally, OSI observes that the process of assembling evidence on short notice for this Application was “a scramble”, and that OSI cannot safely assume that it would be unable to supplement its position on a subsequent application for an extension.
- [124] As already stated, in our view, on appropriate notice, Staff is entitled to bring an application both for an initial temporary order and for its extension at the same time. In the particular circumstances of this case, we are not satisfied that Staff’s Application was brought in such a manner or equally importantly, that OSI would not be prejudiced by treating this matter as an application for an extension.
- [125] In this instance therefore, we have treated this Application as one made pursuant to subsection 127(5) and not as an application for an extension. As earlier indicated, the Order dated November 23, 2017, was to expire on the 15th day after its making.

VII. CONCLUSION

[126] For the reasons given, we made the following order on November 23, 2017:

- a. Staff's requests for a temporary order that the registration of OSI be suspended and that trading in any securities by OSI cease until the conclusion of the hearing on the merits or such other time as ordered by the Commission are denied;
- b. Pursuant to subsection 127(5) and paragraph 1 of subsection 127(1) of the Act, the registration of OSI is subject to the following terms and conditions:
 - i. OSI shall forthwith provide notice on its website and to its subscribers in writing that the time of execution of trades disseminated pursuant to its ITCH protocol may differ, at the millisecond level, from the time internally recorded by OSI in its matching engine for the execution of these trades;
 - ii. OSI shall upgrade from the ITCH 3.0 protocol to the ITCH 5.0 protocol as expeditiously as possible, in compliance with existing regulatory requirements;
 - iii. OSI shall report, on a monthly basis, in writing, to Staff of the Commission and to IIROC, if IIROC so requests, on the ongoing steps taken by OSI to comply with b(ii) above;
 - iv. OSI shall implement a MRF Feed patch as expeditiously as possible, in compliance with existing regulatory requirements, including IIROC approvals or certification;
 - v. OSI shall forthwith notify its subscribers that after seven days, all order acknowledgement messages sent pursuant to its FIX Feed will be sent at the millisecond level, except to such subscribers which notify OSI in writing within seven days that they choose not to receive such acknowledgements to the millisecond level;
 - vi. OSI shall comply with the terms of the notification referred to in b(v) and provide a written report to Staff of the Commission within 14 days and to IIROC, if requested by IIROC, outlining steps taken to so comply; and

