

122 FERC ¶ 61,231
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Amaranth Advisors L.L.C.

Docket No. IN07-26-000

Amaranth LLC

Amaranth Management Limited Partnership

Amaranth International Limited

Amaranth Partners LLC

Amaranth Capital Partners LLC

Amaranth Group, Inc.

Amaranth Advisors (Calgary) ULC

Brian Hunter

Matthew Donohoe

ORDER ADOPTING PROTECTIVE ORDER

(Issued March 14, 2008)

1. On March 4, 2008, the Office of Enforcement, Division of Investigations, of the Federal Energy Regulatory Commission (Enforcement Staff) filed an unopposed motion for the expedited issuance of a protective order in this proceeding. The Commission established this proceeding in its Order to Show Cause and Notice of Proposed Penalties issued July 26, 2007.¹ In that order, the Commission directed the above-captioned Respondents to show cause why they have not violated section 4A of the Natural Gas Act and section 1c.1 of the Commission's regulations,² as well as to show cause why they should not be assessed civil penalties and be required to disgorge unjust profits, plus interest.

2. On November 30, 2007, the Commission issued an order denying a request for expedited rehearing of the OSC filed by four of the Respondents.³ The Commission also

¹ *Amaranth Advisors L.L.C.*, 120 FERC ¶ 61,085 (2007) (OSC).

² 18 C.F.R. § 1c.1 (2007).

³ *Amaranth Advisors L.L.C.*, 121 FERC ¶ 61,224 (2007) (Rehearing Order).

Certain other Respondents filed requests for rehearing that were not addressed in the Rehearing Order.

directed the Respondents to answer the OSC no later than December 14, 2007. The Respondents filed their answers and, in an order issued February 1, 2008, the Commission directed Enforcement Staff to file a brief addressing the answers and identifying any issue that should be set for a trial-type evidentiary hearing, as well as specifying any issue that is purely legal and does not require such a hearing, and stating the bases for these positions.⁴ The February 1, 2008 Order also designated certain members of the Enforcement Staff as nondecisional employees.

3. Typically, a request for a protective order is submitted to a Presiding Administrative Law Judge (Presiding Judge) in the context of a hearing. However, the Commission has not established a hearing in this proceeding. Therefore, pursuant to the procedures established in the February 1, 2008 Order, non-decisional Enforcement Staff submitted its motion directly to the Commission.

4. Enforcement Staff states that it intends to file its brief soon and that the brief also will present Enforcement Staff's opposition to the several motions for summary disposition that accompanied the answers to the OSC. According to Enforcement Staff, the brief will contain references to, and will attach substantial amounts of, documents, transcripts, and information obtained during the investigation that led to this proceeding. Enforcement Staff states that most of the factual material from the investigation consists of information and documents that one or more Respondents provided under the protections of 18 C.F.R. Part 1b.⁵ Enforcement Staff explains that it also obtained a significant amount of material from entities that are not Respondents. Enforcement Staff points out that, absent a protective order, it will be unable to serve on the Respondents the nonpublic, unredacted version of its brief, to which the Respondents will have 20 days to respond, as provided in the February 1, 2008 Order.

5. Enforcement Staff specifically states that the proposed protective order would require the five-day notice provided for in 18 C.F.R. § 388.112 before any release of nonpublic material obtained during the course of the prior investigation. Upon making such notification, Enforcement Staff will provide a copy of the protective order to the recipient of the notice so that it can be assured of the protection of the materials afforded by the protective order or otherwise can seek to protect their rights.

⁴ *Amaranth Advisors, L.L.C.*, 122 FERC ¶ 61,087 (2008) (February 1, 2008 Order).

⁵ Enforcement Staff states that this includes information that was obtained by other federal agencies and shared with Enforcement Staff, with the consent of the Respondents, and under either the Commission's "Memorandum of Understanding" with the Commodity Futures Trading Commission or letter agreement authorized by Commission nonpublic order and which commit the Commission to protecting said information, while utilizing it for Commission purposes.

6. Enforcement Staff states that the documents and information also would be highly relevant to any evidentiary hearing that may be established in this proceeding. Although the Commission has not yet established any such evidentiary hearing, Enforcement Staff represents that both it and the Respondents agree, without waiving any arguments or rights with respect to their status in this proceeding or its ultimate outcome, that it would be appropriate, efficient, and likely in furtherance of the expeditious resolution of this proceeding for the Respondents to be provided the documentation and information now, all subject to the proposed protective order that would otherwise maintain the confidentiality sufficient to protect the interest of any entity that submitted information to Enforcement Staff under Part 1b.

7. Enforcement Staff states that the proposed protective order is based primarily on the Model Protective Order used in other Commission proceedings, but also contains provisions that are appropriate for the particulars of this matter, or were requested by Respondents and are not objectionable, specifically as follows: paragraph 1 (allowing for notice before modification of the order), paragraph 2 (acknowledging that a Presiding Judge has not yet been assigned), paragraph 4b (acknowledging that some covered materials were obtained in a nonpublic investigation and the applicability of 18 C.F.R. Part 1b), paragraph 22 (adding a notice of process provision), paragraph 23 (providing for return of inadvertently produced material claimed to be privileged), paragraph 24 (clarifying that entry of this order and the Respondents' consent to it does not waive any argument as to any of the Respondents' status in, or the outcome of this proceeding), and paragraph 25 (providing for the release to Respondents of the investigative material obtained by Enforcement Staff from entities or persons other than any of the Respondents).

8. On March 5, 2008, the Commission issued a notice shortening the answer period to Enforcement Staff's motion to and including March 7, 2008. No person filed comments or an answer within that period.

9. For good cause shown, the Commission adopts the requested Protective Order and Non-Disclosure Certificate with one modification, as attached to the Appendix to this order. Although Enforcement Staff commits to provide the five-day notice pursuant to 18 C.F.R. § 388.112 prior to releasing any nonpublic material obtained during the course of its prior investigation, paragraph 25 of the Protective Order as proposed would not condition the release of such materials on the provision of that notice. The Commission has revised paragraph 25 to make explicit the obligation to comply with the five-day notice requirement.

The Commission orders:

Enforcement Staff's March 4, 2008 motion is granted, and the attached Protective Order and Non-Disclosure Certificate, as modified, are adopted.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

APPENDIX

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

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PROTECTIVE ORDER

(Issued March 14, 2008)

1. This Protective Order shall govern the use of all Protected Materials produced by, or on behalf of, any Participant. Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Presiding Administrative Law Judge (Presiding Judge) or the Federal Energy Regulatory Commission (Commission). Before modifying or terminating this Protective Order, however, the Presiding Judge and the Commission shall provide all Participants with at least fourteen (14) days prior notice and an opportunity to be heard concerning the proposed modification or termination.
2. Each Participant governed by this Protective Order has the right to seek, with notice to all Participants, changes in it as appropriate from the Presiding Judge or the Commission, and any function of the Presiding Judge may be performed by the Commission if no Presiding Judge has been assigned or is otherwise unavailable.
3. A Participant may designate as protected those materials which customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant (including a Participant's owners, corporate affiliates, employees and/or agents) or its customers or investors or another entity who has supplied information in this proceeding to risk of competitive disadvantage or other injury.

4. Definitions -- For purposes of this Order:

(a) The term "Participant" shall mean a Participant as defined in 18 CFR § 385.102(b).

(b) (1) The term "Protected Materials" means (A) all materials (including deposition transcripts or videos) provided by a Participant in response to discovery requests or provided pursuant to 18 C.F.R. Part 1b and designated by such Participant as protected; (B) any information contained in or obtained from such designated materials; (C) any other materials which are made subject to this Protective Order by the Presiding Judge, by the Commission, by any court or other body having appropriate authority, or by agreement of the Participants; (D) Notes of Protected Materials; and (E) copies of Protected Materials. Protected Materials specifically include any and all materials previously provided or disclosed pursuant to the Commission's investigation in this proceeding under 18 C.F.R. Part 1b and designated as confidential pursuant to 18 C.F.R. § 1b.20. The Participant producing the Protected Materials shall physically mark them on each page as "PROTECTED MATERIALS" or with words of similar import as long as the term "Protected Materials" is included in that designation to indicate that they are Protected Materials.

(2) The term "Notes of Protected Materials" means memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses materials described in Paragraph 4(b)(1). Notes of Protected Materials are subject to the same restrictions provided in this order for Protected Materials except as specifically provided in this Protective Order.

(3) Protected Materials shall not include (A) any information or document contained in the files of the Commission (with the exception of those materials previously provided or disclosed pursuant to the Commission's investigation in this proceeding under 18 C.F.R. Part 1b and designated as confidential pursuant to 18 C.F.R. § 1b.20), or any other federal or state agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court, or (B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order.

(c) The term "Non-Disclosure Certificate" shall mean the certificate annexed hereto by which Participants who have been granted access to Protected Materials shall certify their understanding that such access to Protected Materials is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be served on all parties on the official service list maintained by the Secretary in this proceeding.

(d) The term “Reviewing Representative” shall mean a person who has signed a Non-Disclosure Certificate and who is:

- (1) Commission Trial Staff designated as such in this proceeding;
- (2) an attorney who has made an appearance in this proceeding for a Participant;
- (3) attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in Subparagraph (2);
- (4) an expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for or testifying in this proceeding; or
- (5) a person designated as a Reviewing Representative by order of the Presiding Judge or the Commission.

5. Protected Materials shall be made available under the terms of this Protective Order only to Participants and only through their Reviewing Representatives as provided in Paragraphs 8-10.

6. Protected Materials shall remain available to Participants until the later of the date that an order terminating this proceeding becomes no longer subject to judicial review, or the date that any other Commission proceeding relating to the Protected Material is concluded and no longer subject to judicial review. If requested to do so in writing after that date, the Participants shall, within 15 days of such request, return the Protected Materials (excluding Notes of Protected Materials) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts, and exhibits in this proceeding that contain Protected Materials and Notes of Protected Materials may be retained, if they are maintained in accordance with Paragraph 7 below. Within such time period, each Participant, if requested to do so, shall also submit to the producing Participant an affidavit stating that, to the best of its knowledge, all Protected Materials and all Notes of Protected Materials have been returned or have been destroyed or will be maintained in accordance with Paragraph 7 above. To the extent Protected Materials are not returned or destroyed, they shall remain subject to the Protective Order.

7. All Protected Materials shall be maintained by the Participant in a secure place. Access to those materials shall be limited to Reviewing Representatives specifically authorized pursuant to Paragraphs 9-10. The Secretary shall place any Protected Materials filed with the Commission in a non-public file. By placing such documents in a non-public file, the Commission is not making a determination of any claim of privilege. The Commission retains the right to make determinations regarding any claim of privilege and the discretion to release information necessary to carry out its jurisdictional responsibilities subject to the terms of this Protective Order. For Protected

Materials submitted to Commission Trial Staff (Staff) that the Commission has deemed necessary to release to carry out its jurisdictional responsibilities, Staff shall follow the notification procedures of 18 C.F.R. § 388.112 before making public any Protected Materials.

8. Protected Materials shall be treated as confidential by each Participant and by the Reviewing Representative in accordance with the Non-Disclosure Certificate executed pursuant to Paragraph 10 below. Protected Materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information to carry out that person's responsibilities in this proceeding. Reviewing Representatives may make copies of Protected Materials, but such copies become Protected Materials. Reviewing Representatives may make notes of Protected Materials, which shall be treated as Notes of Protected Materials if they disclose the contents of Protected Materials.

9. (a) If a Reviewing Representative's scope of employment includes the marketing or trading of energy related products, the direct supervision of any employee or employees whose duties include the marketing or trading of energy related products, the provision of consulting services to any person whose duties include the marketing or trading of energy related products, or the direct supervision of any employee or employees whose duties include the marketing or trading of energy related products, such Reviewing Representative may not use information contained in any Protected Materials obtained through this proceeding to give any Participant or any competitor of any Participant a commercial advantage.

(b) In the event that a Participant wishes to designate as a Reviewing Representative a person not described in Paragraph 4 (d) above, the Participant shall seek agreement from the Participant providing the Protected Materials. If an agreement is reached, that person shall be a Reviewing Representative pursuant to Paragraph 4(d) above with respect to those materials. If no agreement is reached, the Participant shall submit the disputed designation to the Presiding Judge for resolution.

10. (a) A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Protected Materials pursuant to this Protective Order unless that Reviewing Representative has first executed a Non-Disclosure Certificate; provided, that if an attorney qualified as a Reviewing Representative has executed such a certificate, the other attorneys, paralegals, secretarial and clerical personnel under the attorney's instruction, supervision or control need not do so. A copy of each Non-Disclosure Certificate shall be provided to counsel for the Participant asserting confidentiality prior to disclosure of any Protected Material to that Reviewing Representative.

(b) Attorneys qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this order.

11. Any Reviewing Representative may disclose Protected Materials to any other Reviewing Representative as long as the disclosing Reviewing Representative and the receiving Reviewing Representative both have executed Non-Disclosure Certificates. In the event that any Reviewing Representative to whom the Protected Materials are disclosed ceases to be engaged in this proceeding, or is employed or retained for a position whose occupant is not qualified to be a Reviewing Representative under Paragraph 4(d), access to Protected Materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Order and the Non-Disclosure Certificate.

12. Subject to Paragraph 1 above, the Presiding Judge shall resolve any disputes arising under this Protective Order. For a period of time either before a Presiding Judge is assigned or after the Presiding Judge's adjudication, any filing, ruling, or other function, normally handled by the Presiding Judge may be handled by the Commission. Prior to presenting any dispute under this Protective Order to the Presiding Judge, the parties to the dispute shall use their best efforts to resolve it. Any Participant that contests the designation of materials as protected shall notify the party that provided the Protected Materials by specifying in writing the materials the designation of which is contested. This Protective Order shall automatically cease to apply to such materials five (5) business days after the notification is made unless the designator, within said five-day period, files a motion with the Presiding Judge or the Commission, as applicable, with supporting affidavits, demonstrating that the materials should continue to be protected. In any challenge to the designation of materials as protected, the burden of proof shall be on the Participant seeking the protection. If the Presiding Judge or the Commission finds that the materials at issue are not entitled to protection, the procedures of Paragraph 17 below shall apply.

13. All copies of all documents reflecting Protected Materials, including the portion of the hearing testimony, exhibits, transcripts, briefs and other documents which refer to Protected Materials, shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "PROTECTED MATERIALS" and shall be filed under seal and served under seal upon the Presiding Judge and all Reviewing Representatives who are on the service list. For anything filed under seal, redacted versions, or where an entire document is protected, a letter indicating such also will be filed with the Commission and served on all parties on the service list and the Presiding Judge. Counsel for the producing Participant shall provide to all Participants who request the

same a list of Reviewing Representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that Protected Materials are not distributed to unauthorized persons.

14. If any Participant desires to include, utilize, or refer to any Protected Materials or information derived therefrom in testimony or exhibits during the hearing in this proceeding in such a manner that might require disclosure of such material to persons other than Reviewing Representatives, such Participant shall first notify both counsel for the disclosing Participant and the Commission or the Presiding Judge of such desire, identifying with particularity each of the relevant Protected Materials. Thereafter, use of such Protected Material will be governed by procedures determined by the Presiding Judge.

15. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the use of Protected Materials on any legal grounds.

16. Nothing in this Protective Order shall preclude any Participant from requesting the Presiding Judge, the Commission, or any other body having appropriate authority, to find that this Protective Order should not apply to all or any materials previously designated as Protected Materials pursuant to this Protective Order. Subject to Paragraph 1 above, the Presiding Judge may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

17. All Protected Materials filed with the Commission, the Presiding Judge, or any other judicial or administrative body, in support of, or as a part of, a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials subject to this Protective Order.

18. If the Presiding Judge finds at any time in the course of this proceeding that all or part of the Protected Materials need not be protected, those materials shall, nevertheless, be subject to the protection afforded by this Protective Order for three (3) business days from the date of issuance of the Presiding Judge's determination, and if the Participant seeking protection files an interlocutory appeal or requests that the issue be certified to the Commission, for an additional seven (7) business days after the issue is resolved. None of the Participants waives its rights to seek any additional administrative or judicial remedies that may otherwise be available after the Presiding Judge's decision respecting Protected Materials or Reviewing Representatives, or the Commission's denial of any appeal thereof. The provisions of 18 C.F.R. §§ 388.112 and 388.113 shall apply to any requests under the Freedom of Information Act (5 U.S.C. § 552) for Protected Materials in the files of the Commission.

19. Nothing in this Protective Order shall be deemed to preclude any Participant from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Protective Order.

20. None of the Participants waives the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Protected Materials.

21. The contents of Protected Materials or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this proceeding. Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

22. If a party in possession of Protected Materials receives a subpoena or other compulsory process from a non-Participant to this Protective Order seeking production or other disclosure of such Protected Materials, that party shall give written and telephone notice to counsel for the producing Participant within three (3) business days after receipt of the subpoena or other compulsory process; such notice shall identify the Protected Material(s) sought and enclose a copy of the subpoena or other compulsory process. If the producing Participant timely seeks a protective order, the party to which the subpoena or other compulsory process was issued or served shall not produce the Protected Material(s) called for prior to receiving a court order or the consent of the producing party. In the event that such Protected Material(s) is produced to the non-party, such material shall still be treated in accordance with this Protective Order by the Participants to this Protective Order.

23. In the event that a Participant inadvertently produces to any other Participant any materials that are privileged or otherwise immune from discovery, in whole or in part, pursuant to the attorney-client privilege, work product doctrine, or other applicable privilege, such privileged materials may be retrieved by the producing Participant by giving written notice to all Participants to whom the producing Participant inadvertently provided copies of the produced privileged materials of the claim of privilege and the identity of the documents inadvertently produced. This notice must be provided within five (5) business days of the date on which the producing Participant becomes aware of the inadvertent production. Upon receipt of such notice, all Participants or other persons who have received copies of the inadvertently produced materials shall promptly return any and all copies of those materials to the producing Participant. Any notes derived from the inadvertently produced materials shall also promptly be destroyed. The terms of this paragraph shall not be deemed as a waiver of a party's right to challenge the producing Participant's designation of materials as privileged (provided, however, that any such challenge to the designation may only be made following the return of such

identified documents to the producing Participant), nor shall such inadvertent production of any material that is subsequently retrieved pursuant to this paragraph be deemed to be a waiver of the claim of privilege asserted. No party shall use any inadvertently produced privileged materials in connection with this proceeding or for any other purpose, except that the receiving Participant may make reference to the contents of the materials in any motion in this proceeding to compel production of the material, but said motion shall not assert as a ground for entering an order to compel production that the producing party waived any privilege because of the inadvertent production.

24. Nothing in this Protective Order shall be deemed a waiver of any Participant's objection, defense, or argument, including, but not limited to, the exercise of personal jurisdiction over any Participant or to the Commission's jurisdiction over natural gas futures trading. Any Participant's agreement to this Protective Order is without prejudice to that Participant's ability to raise, modify, supplement, or amend these objection(s), defense(s), or argument(s).

25. Enforcement Staff is authorized, subject to the terms of this order and compliance with the notice requirements of 18 C.F.R. § 388.112, to release to Participant the evidentiary documents and information obtained from sources outside the Commission other than the respondents during the investigation that resulted in this proceeding, such material to be designated as "Protected Materials" by Enforcement Staff, where appropriate, prior to release to Participants.

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NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Protected Materials is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of the Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Order. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: _____

Title: _____

Representing: _____

Date: _____