

121 FERC ¶ 61,238
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Amaranth Advisors L.L.C.
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

Docket No. IN07-26-002

ORDER DENYING EMERGENCY MOTION FOR STAY OR, IN THE
ALTERNATIVE, EXTENSION

(Issued December 6, 2007)

1. In this order, the Commission denies the motions for stay filed by Amaranth Advisors L.L.C. and certain other Respondents (collectively Amaranth).¹ The Stay

¹ *Emergency Motion of Amaranth Advisors L.L.C., Amaranth Advisors (Calgary) ULC, Amaranth Management Limited Partnership, Amaranth Partners LLC, Amaranth Capital Partners LLC, and Amaranth Group Inc., To Stay Proceedings Or, Alternatively, For Extension of Time To Answer Order To Show Cause (Amaranth Stay Motion) (December 3, 2007); Amaranth International Limited's Joinder of Motion to Stay Proceedings Or, Alternatively, For Extension of Time To Answer Order To Show Cause (December 3, 2007); and Emergency Motion of Amaranth LLC To Stay Proceedings Or, Alternatively, For Extension of Time To Answer Order To Show Cause (December 4, 2007) (collectively referred to as Stay Motions). On December 5, 2007, Brian Hunter and Matthew Donohoe each filed an *Emergency Motion to Stay Proceedings or, Alternatively, for Extension of Time to Answer Order to Show Cause*. The Commission will address those requests in separate orders.*

Motions seek either a stay of this proceeding pending judicial review of the Commission's preliminary jurisdictional findings in the Order to Show Cause (OSC) issued in this matter on July 26, 2007, or alternatively an extension of the time to file a response to the OSC until two weeks after a denial of a "related motion to stay filed with the D.C. Circuit" that Amaranth's Stay Motion suggests may be filed shortly.²

2. On August 27, 2007, Amaranth Advisors, L.L.C., Amaranth Advisors (Calgary) ULC, Amaranth Management Limited Partnership, and Amaranth Group (collectively "Amaranth") filed a request for expedited rehearing of the OSC (Rehearing Request). Amaranth sought to terminate the OSC proceeding because it claimed that the Commission lacks subject matter jurisdiction over Amaranth's alleged manipulative trading of natural gas futures contracts. In an order denying Amaranth's request for rehearing issued on November 30, 2007, we explained that the language and legislative history of the Natural Gas Act, and relevant legal precedent, support our conclusion that the Commission has jurisdiction to punish manipulative trading so that energy markets remain fair and competitive.³ On December 3 and 4, 2007, Amaranth filed the instant Emergency Stay Motions.

3. The Stay Motions repeat arguments made in their request for rehearing in this proceeding that we lack jurisdiction. Amaranth argues that absent the stay or extension "Amaranth would be subjected to intense and expensive litigation seeking hundreds of millions of dollars in penalties by a regulator that lacked authority to bring the action in the first place."⁴ Amaranth claims that its anticipated appellate actions would raise "an admittedly difficult and important issue of first impression concerning the Commission's jurisdictional authority to regulate Amaranth's futures transactions."⁵

4. We deny the motions for stay. In evaluating requests for stay, the Commission applies the standards set forth in section 705 of Title 5 of the United States Code, and grants a stay when "justice so requires."⁶ To determine whether justice requires a stay, the Commission considers: (1) whether the moving party will suffer irreparable harm without a stay; (2) whether the stay will substantially harm other parties; and (3) whether

² Amaranth Stay Motion at 1.

³ Order Denying Rehearing, *Amaranth Advisors et al.*, 121 FERC ¶ 61,224 (2007).

⁴ Amaranth Stay Motion at 2.

⁵ *Id.*

⁶ 5 U.S.C. § 705 (2006).

a stay is in the public interest.⁷ The key element in the inquiry is irreparable harm to the moving party. If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.⁸

5. Amaranth failed to demonstrate irreparable harm. Amaranth's claimed harm amounts to monetary loss arising from the expense of litigation and the prospect of civil penalties. In determining whether an injury is irreparable, it is "well settled that economic loss does not, in and of itself, constitute irreparable harm."⁹ In particular, defense effort and litigation costs do not meet the standard of irreparable harm.¹⁰ Thus, Amaranth's claim of economic loss does not constitute irreparable harm. In addition, we observe that, as a practical matter, Amaranth is unlikely to suffer harm because at this point in the proceedings, Amaranth has only been ordered to respond to the OSC. Amaranth has had several months to prepare this response and presumably Amaranth has done much of this work by now. Therefore, other claims of less immediate potential harm from additional proceedings are, at best, speculative.

6. We disagree that an applicant is entitled to a stay because it claims that the agency has acted outside the scope of its jurisdiction. The parties briefed this issue in the litigation in the Southern District of New York in the context of Amaranth's request for an injunction of the OSC. As we explained in our brief there, federal courts will not enjoin an administrative proceeding simply because a respondent alleged "that the administrative agency is without 'jurisdiction' and that to allow the proceeding to continue in such circumstances will put the respondent to needless expense." *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208, 213 (2d Cir. 1942) (citing *Myers v. Bethlehem*

⁷ See, e.g., *Application of Federal Power Act Section 215 to Qualifying Small Power Production and Cogeneration Facilities*, 119 FERC ¶ 61,320, at P8 (2007); *CMS Midland, Inc.*, 56 FERC ¶ 61,177 at 25 (1991), *aff'd sub. nom.*, *Michigan Coop. Group v. FERC*, 990 F.2d 1377 (D.C.Cir.), *cert. denied*, 510 U.S. 990 (1993). In evaluating whether to grant a stay, courts also consider the likelihood of success on the merits. As explained in our Order Denying Rehearing, Amaranth is unlikely to succeed on its jurisdictional arguments. *Amaranth Advisors et al.*, 121 FERC ¶ 61,224.

⁸ *Application of Federal Power Act Section 215 to Qualifying Small Power Production and Cogeneration Facilities*, 119 FERC ¶ 61,320, at P8.

⁹ *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir 1985). See also *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

¹⁰ *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980). See also *Renegotiation Bd. v. Bannerkraft Co.*, 415 U.S. 1, 24 (1973) ("mere litigation expenses, even substantial and unrecoupable cost, does not constitute irreparable injury").

Corp., 303 U.S. 41 (1938)). See also *The Times Mirror Co. v. FTC*, No.78-3422, 1979 U.S. Dist. LEXIS 11738 (C.D. Cal. June 13, 1979) (court denied The Times Mirror's motion for preliminary injunction to enjoin the FTC's administrative action on the ground that the FTC lacked subject matter jurisdiction because the FTC administrative proceedings should be exhausted). The Southern District of New York court denied the request for injunction and the same reasoning applies here.¹¹ Absent evidence of irreparable harm, there is no basis to stay an agency's jurisdictional determinations.

7. We also find that a stay is not in the public interest. Responses to the OSC were originally due to be filed more than three months ago. At Amaranth's and other Respondent's requests, we extended this deadline on three different occasions. Most recently, we extended the deadline for response until after we resolved Amaranth and others' request for rehearing on the same jurisdictional question that is raised here. Now that the Commission's jurisdiction has been established and re-affirmed, the Commission's administrative process requires Amaranth and other respondents to answer the allegations in the OSC. The public interest is best served by allowing this matter to proceed at the Commission.

8. Therefore, we deny the stay requests and, for the same reasons, we also deny the alternative requests for another extension of time to respond to the Order to Show Cause.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹¹ *CFTC v. Amaranth Advisors L.L.C., et al.*, 07-Civ-6682 (DC), 2007 U.S. Dist. LEXIS 80978 (S.D.N.Y. Nov. 1, 2007).