

122 FERC ¶ 61,122  
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.

Energy Transfer Partners, L.P.  
Energy Transfer Company  
ETC Marketing, Ltd.  
Houston Pipeline Company  
Oasis Pipeline, L.P.  
Oasis Pipeline Company Texas, L.P.  
ETC Texas Pipeline Ltd., Oasis Division

Docket No. IN06-3-003

ORDER ADOPTING PROTECTIVE ORDER

(Issued February 11, 2008)

1. On January 24, 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 the above-captioned proceeding. This proceeding was established by the Commission's July 26, 2007 Order directing Energy Transfer Partners, L.P. (ETP) to show cause why it should not be found to have violated Market Behavior Rule 2 by allegedly manipulating wholesale gas prices at the Houston Ship Channel by suppressing them to benefit ETP's financial positions and other physical positions for the period from December 2003 through December 2005.<sup>1</sup> In addition, on December 20, 2007, the Commission issued an order denying ETP's expedited request for rehearing and stay, and addressed certain aspects of the Commission's civil penalty procedures that would apply in this case and future cases in which civil penalties under the Natural Gas Act (NGA), Natural Gas Policy Act of 1978 (NGPA), and Federal Power Act (FPA) are proposed.<sup>2</sup> The December 20, 2007 Order also established procedures to designate certain members of the Enforcement Staff as non-decisional employees. Typically, a request for a protective order is submitted to an Administrative Law Judge

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<sup>1</sup> *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 (2007).

<sup>2</sup> *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 (2007) (December 20, 2007).

(ALJ) in the context of a hearing. However, no hearing has yet been established in this proceeding. Therefore, pursuant to the procedures established in the December 20, 2007 Order, non-decisional Enforcement Staff submitted its motion directly to the Commission.

2. The protective order would cover certain documents produced by the McGraw-Hill Companies, Inc. (McGraw-Hill), the owner of Platts *Inside FERC*, in response to a September 28, 2007 subpoena issued by the Enforcement Staff. Enforcement Staff states that these documents show specific information regarding sales and purchases at the Houston Ship Channel that were reported to Platts by ETP and other market participants for the relevant months. Enforcement Staff asserts that the subject documents are relevant to the issue of whether ETP violated Market Behavior Rule 2. Enforcement Staff states that McGraw-Hill regards these documents as highly confidential and has previously resisted subpoenas to produce documents containing wholesale natural gas transactions reported to Platts. Enforcement Staff states that the protective order is based on the model Protective Order on the Commission's website and has been modified to reflect the concerns and interests of ETP and McGraw-Hill. Enforcement Staff states that it is authorized to state that neither ETP nor McGraw-Hill object to the issuance of the attached protective order. Enforcement Staff seeks expedited issuance of the attached protective order to permit it to provide documents from McGraw-Hill to ETP as soon as possible.

3. For good cause shown, the Protective Order and Non-Disclosure Certificate attached as an Appendix to this order are hereby adopted.

The Commission orders:

Enforcement Staff's January 24, 2008 motion is granted and the attached Protective Order and Non-Disclosure Certificate are adopted.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

APPENDIX

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

**Energy Transfer Partners, L.P.  
Energy Transfer Company  
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Houston Pipeline Company  
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ETC Texas Pipeline Ltd., Oasis Division**

**Docket No. IN06-3-003**

**PROTECTIVE ORDER**

**(Issued February 11, 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 Federal Energy Regulatory Commission (“Commission”), including a designated Presiding Administrative Law Judge (“Presiding Judge”).

2. This Protective Order applies to the following two categories of materials: (A) 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 or its customers to risk of competitive disadvantage or other business injury; and (B) A Participant shall designate as protected those materials which contain critical energy infrastructure information, as defined in 18 CFR § 388.113(c)(1) (“Critical Energy Infrastructure Information”).

3. Definitions -- For purposes of this Order:

(a) The term “Participant” shall mean a Participant as defined in 18 CFR § 385.102(b) and, solely as it relates to its own documents, data, and other materials subject to the terms of this Protective Order, non-party The McGraw-Hill Companies, Inc. (“McGraw-Hill”).

(b) (1) The term “Protected Materials” means (A) all materials (including depositions) provided by a Participant in response to discovery requests or subpoenas and designated by such Participant as protected; (B) all materials provided by McGraw-Hill

to FERC's Office of Enforcement (Enforcement) in the investigation in Docket No. IN06-3; (C) any information contained in or obtained from materials identified in subsection (A) or (B) immediately preceding; (D) any other materials which are made subject to this Protective Order by the Commission or a Presiding Judge, or by agreement of the Participants; (E) notes of Protected Materials; and (F) copies of Protected Materials. 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. If the Protected Materials contain Critical Energy Infrastructure Information, the Participant producing such information shall additionally mark on each page containing such information the words "Contains Critical Energy Infrastructure Information - Do Not Release."

(2) The term "Notes of Protected Materials" means memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses the contents of materials described in Paragraph 3(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 public files of the Commission, 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, or (C) any information or document labeled as "Non-Internet Public" by a Participant, in accordance with Paragraph 30 of FERC Order No. 630, FERC Stat. & Reg. ¶ 31,140 (2003). Protected Materials include any information or document contained in the files of the Commission that has been designated as Critical Energy Infrastructure Information.

(c) The term "Non-Disclosure Certificate" shall mean the certificate annexed hereto by which Reviewing Representatives 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 Reviewing Representatives have read the Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be served on all Participants and 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 consultant, or an employee of an expert or consultant, retained by a Participant for the purpose of advising a Participant;
- (5) a person designated as a Reviewing Representative by order of the Presiding Judge or the Commission; or
- (6) officers, directors, employees or other representatives of Participants who review Protected Materials to assist or advise a Participant in connection with a claim or defense in this case.

4. 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 7-9.

5. 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 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 fifteen 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 Material may be retained, if they are maintained in accordance with Paragraph 6, 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 6. To the extent Protected Materials are not returned or destroyed, they shall remain subject to the Protective Order.

6. All Protected Materials shall be maintained by the Participant in a secure place. Access to those materials shall be limited to Reviewing Representatives, subject to the provisions of Paragraphs 8-9. 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. For documents submitted to Commission Trial Staff (“Staff”), Staff shall follow the notification procedures of 18 C.F.R. § 388.112 before making public any Protected Materials.

7. Protected Materials shall be treated as confidential by each Participant and by the Reviewing Representative in accordance with the certificate executed pursuant to Paragraph 9. 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. No Protected Materials may be disclosed to any person who has not been designated as a Reviewing Representative or to a Court or other governmental agency that is not directly involved in the adjudication of 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.

8. (a) Reviewing Representatives, including, but not limited to, those whose scope of employment includes the marketing of natural gas, the direct supervision of any employee or employees whose duties include the marketing of natural gas, the provision of consulting services to any person whose duties include the marketing of natural gas, or the direct supervision of any employee or employees whose duties include the marketing of natural gas, 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 3 (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 Paragraphs 3(d) above with respect to those materials. If no agreement is reached, the Participant shall submit the disputed designation to the Presiding Judge or the Commission for resolution.

9. (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 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 Protective Order.

10. 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 a Non-Disclosure Certificate. In the event that any Reviewing Representative to whom the Protected Materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a Reviewing Representative under Paragraph 3(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 certification.

11. Subject to Paragraph 18, the Commission or the Presiding Judge shall resolve any disputes arising under this Protective Order. Prior to presenting any dispute under this Protective Order to the Commission or the Presiding Judge, the parties to the dispute shall use their reasonable best efforts to resolve it in the following manner. If any Participant believes, in good faith, that any materials designated as protected under this Protective Order should not be designated as such, the Participant shall notify the Participant who provided the Protected Materials of such belief. Such notice shall be made in writing, shall specifically identify the Protected Materials at issue, and shall set forth with particularity the basis for the belief that the materials should not be protected by this Order. If the designating Participant believes in good faith that the material should properly remain subject to the protections of this Order, the designating Participant shall have five (5) business days from receipt of such notice to provide a written response to the challenging party setting forth with particularity the basis for the belief that the materials should remain protected. If the challenging party continues to believe that the designation is inappropriate, the challenging party shall notify in writing the designating Participant of that belief. This Protective Order shall automatically cease to apply to such materials five (5) business days after such notification is given to the designating Participant by the challenging Participant unless the designator, within said 5-day period, files a motion with the Commission or the Presiding Judge, 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 protection. If the Presiding Judge or the Commission finds that the materials at issue are not entitled to protection, the procedures of Paragraph 18 shall apply. The procedures described above shall not apply to protected materials designated by a Participant as Critical Energy Infrastructure Information. Materials so designated shall remain protected and subject to the provisions of this Protective Order, unless a Participant requests and obtains a determination from the Commission's Critical Energy Infrastructure Information Coordinator that such materials need not remain protected.

12. 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. Such documents containing Critical Energy Infrastructure Information shall be additionally marked "Contains Critical Energy Infrastructure Information - Do Not Release." For anything filed under seal, redacted versions, or where an entire document is protected, a letter indicating such, will also 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.

13. 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 these proceedings 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 the relevant Protected Materials. Thereafter, use of such Protected Material will be governed by procedures determined by the Commission or the Presiding Judge.

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

15. 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. The Presiding Judge or the Commission may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding, subject to the rights of any Participant to appeal such modification pursuant to the procedure set forth in Paragraph 18 below.

16. Each Participant governed by this Protective Order has the right to seek changes in it as appropriate from the Presiding Judge or the Commission.

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. Such documents containing Critical

Energy Infrastructure Information shall be additionally marked “Contains Critical Energy Infrastructure Information – Do Not Release.”

18. If the Commission or 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 five (5) business days from the date of issuance of the Presiding Judge’s determination. If the Participant seeking protection files an interlocutory appeal or requests that the issue be certified to the Commission, or if the Commission addresses the issue in the first instance, the protections afforded by this Protective Order shall remain in effect for an additional seven (7) business days after the Commission’s final order, including a Commission order on request for rehearing, if such request is made within five (5) business days of the issuance of the Commission’s initial order. 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 CFR §§ 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 (these) proceeding(s). Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary

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**Docket No. IN06-3-003**

**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: \_\_\_\_\_