

114 FERC 61,119  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

Morgan Stanley

Docket No. EC06-68-000

ORDER GRANTING CONDITIONAL BLANKET AUTHORIZATION  
FOR ACQUISITION OF SECURITIES

(Issued February 7, 2006)

1. Morgan Stanley filed an application under section 203(a)(2) of the Federal Power Act (FPA)<sup>1</sup> seeking blanket authorization for itself and certain affiliates to acquire securities<sup>2</sup> of any “electric utility company,” as that term is used in section 203(a)(2), any “transmitting utility,” as that term is defined in section 3 of the FPA, as amended by section 1291 of the Energy Policy Act of 2005 (EPAct 2005), or any “holding company” in any “holding company system” as those terms are defined in section 1289(a)(6) of EPAct 2005, that includes a transmitting utility or electric utility company, subject to certain proposed conditions and limitations.<sup>3</sup> We will conditionally grant the blanket authorizations subject to the conditions and limitations described below.

**Background**

2. Morgan Stanley is a financial services firm with subsidiaries and both utility and non-utility affiliates. Its utility subsidiary, Morgan Stanley Capital Group Inc. (Capital Group), and four subsidiaries of Capital Group have Commission authorization to sell power at market-based rates. These subsidiaries, however, do not own or control generation or transmission facilities, or a public utility with a franchised service territory.

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<sup>1</sup> 16 U.S.C. § 824b (2000) (FPA section 203), *amended by* Energy Policy Act of 2005 § 1289, Pub. L. No. 109-58, 119 Stat. 982-93 (2005) (EPAct 2005).

<sup>2</sup> For purposes of this order, the term “securities” is used consistent with the meanings and limitations given it in EPAct 2005.

<sup>3</sup> Morgan Stanley seeks this authorization only if the Commission determines that Morgan Stanley is a holding company under the Public Utility Holding Company Act of 2005 (PUHCA 2005). *See* EPAct 2005 §§ 1261-77, 119 Stat. 594, 972-78.

Capital Group has ownership interests in three subsidiaries that own and operate Exempt Wholesale Generators (EWGs), under section 32 of the Public Utility Holding Company Act of 1935 (PUHCA 1935).<sup>4</sup> Capital Group and certain affiliates are subject to regulation by the Commission as “public utilities” under the FPA.

3. Neither Morgan Stanley nor any of its subsidiaries is currently subject to regulation by the Securities and Exchange Commission under PUHCA 1935 as holding companies or as public utility companies. Morgan Stanley and its Nonutility Affiliates<sup>5</sup> regularly acquire securities in the ordinary course of business.

4. Morgan Stanley describes its business as providing, among other things, investment banking services; securities underwriting and distribution; financial advisory services, including advice on mergers and acquisitions, restructurings, real estate and project finance. It engages in selling, trading, financing and market-making activities in equity securities and related products, including securities futures products, fixed income securities and foreign exchange and commodities products. It also engages in real estate investment management, aircraft financing, benchmark indices and risk management analytics and research.

### **Application**

5. Morgan Stanley asks the Commission to determine that it is not a holding company under PUHCA 2005 and for purposes of FPA section 203 because Morgan Stanley holds within its corporate system interests only in EWGs, power marketers and Qualifying Facilities within the meaning of the Public Utility Regulatory Policies Act of 1978, as amended.<sup>6</sup>

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<sup>4</sup> 15 U.S.C. §§ 79a *et seq.* (2000).

<sup>5</sup> Morgan Stanley’s Nonutility Affiliates are all of its subsidiaries except the following: Morgan Stanley Capital Group, Inc.; the four entities owned by Capital Group and authorized to sell power at market-based rates (Power Contract Finance, L.L.C., Power Contract Finance II, Inc., Power Contract Finance II, L.L.C. and Utility Contract Funding II, LLC); and the three entities in which Capital Group has ownership interests (Naniwa Energy LLC, South Eastern Electric Development Corp. and South Eastern Generating Corp.), which own and operate EWGs.

<sup>6</sup> 16 U.S.C. §§2601 *et seq.* (2000).

6. If the Commission finds that Morgan Stanley is a holding company for purposes of FPA section 203, then Morgan Stanley asks the Commission for blanket authority for it and all its Nonutility Affiliates to hold:

(1) up to the 10% limit established in section 33.1(c)(2) of the Commission's rules<sup>7</sup> of voting securities (10 % limit) held as principal of each class of voting securities issued by a utility or holding company, provided that ownership does not include a right to control the jurisdictional activities of the issuer;

(2) without limitation, voting and non-voting securities on behalf of customers as a fiduciary or, in the ordinary course of business, as an underwriter or dealer;

(3) securities in connection with underwriting activities, without regard to the 10% limit, provided that Morgan Stanley (a) files a request for approval under section 203(a) of the FPA within 45 days of any failed underwriting to retain the securities, and (b) commits, while the application remains pending, not to vote the securities held as a result of the failed underwriting;

(4) securities in the normal course of its dealer/trading activities, not subject to the 10% limit;

(5) securities as a lender such that the acquisition of debt securities is not subject to the 10% limit, except that an application under section 203 of the FPA would be required before Morgan Stanley or a Nonutility Affiliate could take control of the jurisdictional activities of the issuer by foreclosure, bankruptcy or otherwise;

(6) securities of any entity formed to acquire, finance, and lease utility assets to any public utility, electric utility company, or transmitting utility, under the terms of a long-term net lease;

(7) securities in the course of routine dealing and trading as principals for their own account such that any securities so acquired as principals for hedging purposes are excluded from the 10% limit, provided

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<sup>7</sup> *Transactions Subject to FPA Section 203*, 71 Fed. Reg. 1348 (2006), Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *reh'g pending*, (to be codified at 18 C.F.R. § 33.1(c)(2)).

that Morgan Stanley commits not to vote such securities in excess of that limit; and

(8) securities of any company owning generating facilities that total 100 MW or less in size and are used fundamentally for its own load or for sales to affiliated end-users.

7. Morgan Stanley argues that granting its requests will not: adversely affect competition or give Morgan Stanley or its affiliates horizontal or vertical market power; adversely affect rates, as Morgan Stanley will not acquire control over the jurisdictional activities of an electric utility company, transmitting utility, or holding company; adversely affect regulated utilities' jurisdictional status under the FPA or applicable state laws; or give Morgan Stanley the practical ability to cause the utilities in which it has an interest to cross-subsidize non-utility companies or encumber utility assets.

### **Notice of Application**

8. Notice of Morgan Stanley's application was published in the *Federal Register*, 71 Fed. Reg. 6068 (Feb. 6, 2006), with interventions or protests due on or before February 6, 2006. None was filed.

### **Discussion**

9. Section 203(a)(4) of the FPA provides that the Commission is to approve a transaction that is jurisdictional under section 203 if, "it finds that the proposed transaction will be consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge or encumbrance will be consistent with the public interest." The Commission's Merger Policy Statement<sup>8</sup> provides that the Commission will generally take into account three factors in analyzing proposed section 203 transactions: (1) effect on competition; (2) effect on rates; and (3) effect on regulation. Order No. 669 provides additional guidance for implementing the Commission's responsibilities with respect to amendments of section 203(a) of EPAct 2005.

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<sup>8</sup> *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121, 94 FERC ¶ 61,289 (2001) (Merger Filing Requirements).

10. Morgan Stanley's request for blanket authorization covers transactions substantially similar to those addressed in a companion order issued today concerning The Goldman Sachs Group, Inc.<sup>9</sup> The conditions proposed by Morgan Stanley that will govern the transactions are also substantially similar.

11. The Commission finds that, with the conditions discussed in the companion *Goldman* order, the transactions will not adversely affect competition, rates or regulation and will not result in cross-subsidization or a pledge or encumbrance of assets. However, we are in the early stages of implementing EAct 2005. For that reason, and in order to preserve the status quo of Morgan Stanley's activities permitted by the Securities and Exchange Commission under PUHCA 1935, the Commission concludes that it is appropriate to grant the authorization, to the extent it is not already granted under Order No. 669, for one year. The authorization expires one year from the effective date of this order without prejudice to requests to extend the authorization and subject to any relevant Commission action on rehearing of Order No. 669, including the imposition of any additional conditions, to be prospectively applied, that may be necessary for the protection of ratepayers.

The Commission orders:

(A) Morgan Stanley's proposed transactions are temporarily and conditionally authorized, as discussed in the body of this order and with the same conditions contained in *Goldman*.

(B) The approvals granted herein are subject to the outcome of Commission action on rehearing of Order No. 669, Docket No. RM05-34-000, including any additional conditions for ratepayer protections that the Commission may impose on any similar blanket authorizations granted in association with that docket.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

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<sup>9</sup> *The Goldman Sachs Group, Inc.*, 114 FERC ¶ 61,118 (2006) (Docket Nos. EL06-27-000 and EC06-38-000 (*Goldman*)).

(E) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(F) Morgan Stanley shall make any appropriate filings under sections 205 of the FPA, as necessary, to implement the proposed transactions.

(G) The effective date of this order is February 8, 2006.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.