

115 FERC ¶ 61,302  
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. EC06-68-001

ORDER DENYING REHEARING

(Issued June 9, 2006)

1. On March 9, 2006, Morgan Stanley filed a request for rehearing of a Commission order issued on February 7, 2006.<sup>1</sup> The February 7 Order granted blanket authorization under section 203(a)(2) of the Federal Power Act (FPA)<sup>2</sup> to Morgan Stanley and certain affiliates to acquire securities of any electric company, transmitting utility, or holding company that includes a transmitting utility or electric utility company, subject to the same conditions that the Commission imposed in an order issued the same day concerning The Goldman Sachs Group, Inc.<sup>3</sup> Morgan Stanley asks the Commission to reconsider its treatment of Morgan Stanley in the February 7 Order as a holding company but, if it nonetheless determines that Morgan Stanley is a holding company, grant Morgan Stanley the blanket authorization it requested with the conditions it requested and not the conditions imposed in *Goldman Sachs*.

2. The Commission denies the request for rehearing. For the reasons explained below, we continue to find that Morgan Stanley is a holding company. Further, the blanket authorization requested by Morgan Stanley is similar to that requested by Goldman Sachs, and the conditions imposed on the blanket authorization for Goldman Sachs are appropriately applied to Morgan Stanley.

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<sup>1</sup> *Morgan Stanley*, 114 FERC ¶ 61,119 (2006) (February 7 Order).

<sup>2</sup> 16 U.S.C. § 824b (2000), as amended by Energy Policy Act of 2005 § 1289, Pub. L. No. 109-58, 119 Stat. 594 (2005) (EPAAct 2005).

<sup>3</sup> *The Goldman Sachs Group, Inc.*, 114 FERC ¶ 61,118 (2006) (*Goldman Sachs*), *reh'g denied*, 115 FERC ¶ 61,303 (2006).

## **Background**

3. Morgan Stanley describes its business as providing, among other things, investment banking services, including securities underwriting and distribution, and financial advisory services, which include 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. Morgan Stanley's 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. Capital Group and certain affiliates are subject to regulation by the Commission as "public utilities" under the FPA. Morgan Stanley and its Nonutility Affiliates<sup>4</sup> regularly acquire securities in the ordinary course of business.

4. Section 203(a)(2) requires prior Commission authorization for holding companies to acquire certain securities of transmitting utilities, electric utility companies or holding companies containing such entities with values in excess of \$10 million. On January 24, 2006, Morgan Stanley asked the Commission to determine that it is not a holding company under the Public Utility Holding Company Act of 2005 (PUHCA 2005)<sup>5</sup> and for purposes of FPA section 203 because Morgan Stanley holds within its corporate system interests in exempt wholesale generators (EWGs) and Qualifying Facilities (QFs).

5. In the alternative, if the Commission found that Morgan Stanley is a holding company, Morgan Stanley applied for blanket authorization for itself and its Nonutility Affiliates to acquire the securities of a utility or holding company: (1) subject to a 10 percent limit of each class of voting securities issued by the utility or holding company (10 percent limit), as a principal; and (2) not subject to the 10 percent limit but subject to certain other restrictions, as a fiduciary, underwriter, dealer/trader, lender, or hedger, or of any entity formed to acquire, finance, and lease utility assets, or of any company owning generating facilities that total 100 megawatts or less in size and are used fundamentally for its own load or for sales to affiliated end-users.

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<sup>4</sup> Morgan Stanley defines its Nonutility Affiliates as 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, L.L.C.); 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>5</sup> See EAct 2005 §§ 1261-77, 119 Stat. 594, 972-78.

6. The February 7 Order treated Morgan Stanley as a holding company and conditionally granted the requested blanket authorization, to the extent it was not already granted under Order No. 669,<sup>6</sup> for one year subject to the same conditions contained in an order concerning a similar request for blanket authorization by Goldman Sachs.<sup>7</sup>

### **Request for Rehearing**

7. In its rehearing request, Morgan Stanley argues that: (1) the Commission did not address Morgan Stanley's request that the Commission find that it is not a holding company, and (2) the Commission imposed conditions on the authorization that were not requested and that were not imposed on similarly situated entities.

8. Morgan Stanley states that the February 7 Order did not address the request that the Commission find Morgan Stanley not to be a holding company because it owns EWGs and QFs. To the extent that the February 7 Order implied that Morgan Stanley is a holding company by granting the blanket authorization, Morgan Stanley requests a rehearing of this determination. Morgan Stanley argues that the Commission's recent regulations implementing PUHCA 2005 expressly provide that EWG owners, as well as companies that own power marketers, foreign utility generators (FUCOs), and QFs, are not holding companies.<sup>8</sup> Morgan Stanley contends that the Commission's differing interpretation in Order No. 669, that companies that own only EWGs are holding companies for purposes of section 203(a)(2),<sup>9</sup> is contrary to Congress' directive that the Commission use the definition of a holding company from PUHCA 2005.

9. If the Commission does determine that Morgan Stanley is a holding company, Morgan Stanley requests that the Commission grant the blanket authorization with the conditions it requested, rather than the conditions imposed in *Goldman Sachs*. Morgan Stanley argues that it did not request the *Goldman Sachs* conditions and that the Commission is required to consider the conditions that Morgan Stanley proposed. In

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<sup>6</sup> *Transactions Subject to FPA Section 203*, Order No. 669, 71 Fed. Reg. 1,348 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, 71 Fed. Reg. 28,422 (May 16, 2006), *reh. pdg.*

<sup>7</sup> *Goldman Sachs*, 114 FERC ¶ 61,118.

<sup>8</sup> *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, 70 Fed. Reg. 75,592 (Dec. 20, 2005), FERC Stats. & Regs. ¶ 31,197 (2005), *order on rehearing*, Order No. 667-A, 115 FERC ¶ 61,096 (2006), *reh. pdg.*

<sup>9</sup> Order No. 669 at P 59.

addition, Morgan Stanley argues that no rational basis has been identified that supports imposing the quarterly reporting requirement imposed in *Goldman Sachs* on Morgan Stanley when the Commission's generally applicable blanket authorization under Order No. 669 for any holding company to hold less than 10 percent of utility securities does not have a quarterly reporting requirement.<sup>10</sup>

### **Discussion**

10. Order No. 669, issued under the authority of EAct 2005, explains that companies that hold only EWGs and QFs are holding companies for purposes of section 203 of the FPA.<sup>11</sup> The Commission affirmed that determination in Order No. 669-A.<sup>12</sup> Morgan Stanley argues that the Commission's treatment of it in the February 7 Order as a holding company is not consistent with the definition of a "holding company" provided by section 1289(a)(6) of EAct 2005. The Commission addressed this argument and our reasons for rejecting it in Order No. 669-A.<sup>13</sup> For the reasons Morgan Stanley's argument was rejected in Order No. 669-A, it is rejected here and this part of Morgan Stanley's request for rehearing of the February 7 Order is denied.

11. Morgan Stanley next argues that the Commission imposed conditions on it that were not imposed on holding companies that were given blanket authorizations under section 203(a)(2) of the FPA in Order No. 669 and that, instead, the Commission erroneously imposed on Morgan Stanley the conditions imposed on Goldman Sachs. Morgan Stanley claims that it requested conditions different from those requested by Goldman Sachs. It notes that, under Order No. 669, the Commission granted a generally applicable blanket authorization for holding less than 10 percent of utility securities without a quarterly reporting requirement. Morgan Stanley did not propose the quarterly reporting condition proposed by Goldman Sachs. Finally, Morgan Stanley states that the Commission did not explain why the quarterly reporting requirement is needed.

12. The Commission, in the February 7 Order, determined that Morgan Stanley's request for blanket authorization covered transactions substantially similar to those addressed in *Goldman Sachs*, an order also issued on February 7.<sup>14</sup> The blanket authorization granted in *Goldman Sachs* was more extensive than the blanket

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<sup>10</sup> 18 C.F.R. § 33.1(c).

<sup>11</sup> Order No. 669 at P 70.

<sup>12</sup> Order No. 669-A at P 49-51.

<sup>13</sup> Order No. 669-A at P 25-54.

<sup>14</sup> *Goldman Sachs* at P 10.

authorizations available under Order No. 669, and now available under Order No. 669-A, as explained in *Goldman Rehearing* issued concerning Goldman Sachs.<sup>15</sup> In the *Goldman Rehearing*, we deny the request of Goldman Sachs to rescind the quarterly reporting requirement and replace it with the reporting requirement applicable under Order Nos. 669 and 669-A. Morgan Stanley asserts on rehearing that the conditions it requested were not the same as the conditions requested by Goldman Sachs, but does not explain how they differ. Significantly, however, Morgan Stanley does not dispute our finding in the February 7 Order that the authorizations it requested were substantially similar to the authorizations requested by Goldman Sachs. Therefore, for the same reasons given in *Goldman Rehearing*, we deny Morgan Stanley's request.<sup>16</sup>

The Commission orders:

Morgan Stanley's requests for rehearing are hereby denied as discussed in the body of the order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>15</sup> *The Goldman Sachs Group, Inc.*, 115 FERC ¶ 61,303 (2006)(Docket Nos. EL06-27-001 and EC06-38-001) (Goldman Rehearing).

<sup>16</sup> Morgan Stanley asserts that, if rehearing on the reporting requirement is denied, it will be required to make two sets of reports to the Commission, the quarterly report and the copies of the filings made to the Securities and Exchange Commission (SEC), as specified in Order Nos. 669 and 669-A. The Commission clarifies that the requirement to file a particular report or form is a function of the authority exercised. If Morgan Stanley exercises the authority granted in the February 7 Order, the quarterly report is required. If, however, Morgan Stanley exercises the authority granted under Order Nos. 669 and 669-A then filing the SEC forms with the Commission is required.