

134 FERC ¶ 61,234
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Morgan Stanley

Docket No. EC11-5-000

ORDER GRANTING BLANKET AUTHORIZATION

(Issued March 25, 2011)

1. On October 8, 2010, Morgan Stanley, on behalf of itself and its non-utility affiliates (collectively, Applicants), filed a request pursuant to section 203(a)(2) of the Federal Power Act (FPA)¹ for reauthorization and extension of the blanket authorization granted to Applicants on October 18, 2007 in Docket Nos. EC07-45-000, EC07-45-001, and EC07-45-002² (the Blanket Reauthorization). Granting this request would extend the 2007 Blanket Authorization for an additional three years and permit Applicants to acquire, in the ordinary course of business, the voting securities of public utilities, subject to the same conditions and limitations set forth in the 2007 Blanket Authorization order.
2. The Commission has reviewed the application under the Commission's Merger Policy Statement.³ In this order, we modify the 2007 Blanket Authorization, extend it for an additional three years, and find it consistent with the public interest.

¹ 16 U.S.C. § 824b (2006).

² *Morgan Stanley*, 121 FERC ¶ 61,060 (2007), *order granting clarification*, 122 FERC ¶ 61,094 (2008) (2007 Blanket Authorization).

³ *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement); *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001); *see also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200

(continued)

I. Background

A. Description of the Applicants

1. Morgan Stanley

3. Morgan Stanley, a holding company under the Public Utility Holding Company Act of 2005, is a financial services firm with subsidiaries and both utility and non-utility affiliates. The Commission has authorized Morgan Stanley's wholly-owned subsidiary, Morgan Stanley Capital Group, Inc. (Capital Group) and its subsidiaries to sell power at market-based rates.⁴

2. Non-utility Affiliates

4. Applicants state that Morgan Stanley's non-utility affiliates participate in one of three business segments: Institutional Securities; the Global Wealth Management Group (GWMG); and the Asset Management Group. Nonutility affiliates in the Institutional Securities business segment engage in activities such as investment banking; sales, trading, financing, and market-making activities; and other activities such as providing benchmark indices and risk management analytics and research to corporate and individual customers. Applicants assert that GWMG's activities include retail brokerage, investment advisory programs for separately managed accounts, mutual fund asset allocation programs, and GWMG discretionary accounts.⁵ Applicants state that generally

(2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

⁴ The following entities are public utility affiliates of Morgan Stanley: Capital Group; 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); MS Solar Solutions Corp., a wholly-owned, indirect subsidiary of Capital Group that is authorized to sell power at market-based rates and that does not own generation or transmission facilities; and three entities in which Capital Group has ownership interests (Naniwa Energy LLC, South Eastern Electric Development Corp., and South Eastern Generating Corp.) that own and operate exempt wholesale generators (EWG).

⁵ Applicants state that approximately 20 percent of GWMG's United States advisory assets are held in discretionary accounts. According to Applicants, clients can give their financial advisor or investment representative full investment discretion and, in some cases, proxy voting rights with respect to their accounts. Applicants state that their request for reauthorization under 203(a)(2) for activities in the GWMG business segment extends only to the discretionary accounts activity.

Morgan Stanley & Co. Incorporated, the registered investment adviser, does not exercise proxy voting authority or possess investment discretion with respect to securities held in brokerage accounts.

5. Applicants state that Morgan Stanley conducts its asset management business mainly through Morgan Stanley Investment Management, which manages investment products, such as U.S. open- and closed-end registered investment companies, unit investment trusts, private investment funds, and separately managed accounts.

B. Request for Extension of Blanket Authorization

6. Applicants seek an extension of the 2007 Blanket Authorization under section 203(a)(2) to acquire and hold an unlimited amount of utility voting securities, subject to certain conditions.

7. Specifically, Applicants seek blanket authorization for a period of three years to acquire an unlimited amount of utility voting securities in the following circumstances:

- When acting as a fiduciary on behalf of individual, corporate, and institutional customers;
- When such securities are provided as collateral for a loan or for purposes of liquidation in connection with an antecedent debt; and
- In connection with trading activities, including market-making customer facilitation and prime brokerage activities, and the provision of trade execution services for customers.⁶

8. Additionally, Applicants state that the 2007 Blanket Authorization is also subject to the following requirements and conditions:

- Applicants are subject to audit to determine whether they are in compliance with the representations, conditions, and requirements upon which the authorizations are herein granted and with applicable Commission rules, regulations, and policies. In the event of a violation the Commission may take action within the scope of its oversight and enforcement authority.

⁶ Application at 10.

- Applicants will file with the Commission contemporaneous with the Securities Exchange Commission (SEC) the Schedule 13D and 13G⁷ filings that are relevant to the authorizations granted in this order. Any changes in the information provided on the initial Schedule 13G must be reflected in an annual amended filing due within 45 days of the end of each calendar year. Applicants will file with the Commission any comment letter or deficiency letters received from the SEC that concern Schedule 13G-related compliance audits conducted by the SEC. Such informational filings shall be made in this docket or in appropriate sub-dockets of this docket.
- Morgan Stanley will file with the Commission on a calendar quarterly basis, a report by aggregation unit separately identifying: (1) holdings of voting securities acquired and held as principal for its own account; (2) holdings as a result of liquidations; (3) holdings by a market-maker; (4) holdings as a fiduciary; and (5) total holdings of voting securities irrespective of the capacity in which such securities are held. Each report will list the holdings of the utility voting securities, stated in terms of the number of shares held and as a percentage of the outstanding shares. The reports for each category of holdings are due within 45 days of the close of the calendar quarter and are subject to a *de minimis* threshold of one percent.
- If a new entity is to be covered by this blanket authorization, Morgan Stanley must provide notice, for informational purposes, in a report with the name, functions, and regulatory safeguards applicable to that entity, as well as a reiteration of Morgan Stanley's commitment not to acquire securities that will result in a transfer of control of a public utility. The reports for each category of holdings by any new entity shall be filed within 45 days of the close of the calendar quarter in which they are formed.
- Applicants must inform the Commission within 30 days, of any material change in circumstances that would reflect a departure from the facts, policies, and procedures the Commission relied upon in granting the request.

⁷ Schedules 13D and 13G provide information concerning the acquiring person's intention and purposes with respect to the issuer of the security. The SEC requires the person acquiring a security to report investments undertaken with the intention of exerting control or with the effect of exerting control on Schedule 13D. However, Applicants note that in order to file a Schedule 13G, an investor must certify that the securities were not acquired for the purpose or with the effect of changing or influencing control over the issuer. (2007 Blanket Authorization 121 FERC ¶ 61,060 at n.15)

- Applicants will retain the records of its transactions concerning public utility securities as required under the Advisers Act and the 1940 Act for five years.⁸

9. Applicants commit to continue to comply with all the terms, conditions, and requirements of the 2007 Blanket Authorization including that they will not acquire control over the public utilities whose securities they will acquire as a result of the Blanket Reauthorization.⁹

C. Notice of Filing and Responsive Pleadings

10. Notice of the application was published in the *Federal Register*, 75 Fed. Reg. 65,312 (2010), with interventions and comments due on or before October 29, 2010. None was filed.

II. Discussion

A. Standard of Review Under Section 203

11. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.¹⁰ Section 203 also requires the Commission to find that the transaction "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."¹¹ The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹²

⁸ Application at 11-12.

⁹ Application at 12.

¹⁰ See Merger Policy Statement, FERC Stats. & Regs. at 30,111.

¹¹ 16 U.S.C. § 824b(a)(4) (2006).

¹² 18 C.F.R. § 33.2(j) (2010).

B. Analysis Under Section 203**1. Effect on Competition, Rates, and Regulation****a. Applicants' Analysis**

12. Applicants state that the Commission previously determined that the 2007 Blanket Authorization would have no adverse effect on competition, rates, or regulation and that there have been no changes in the material facts and circumstances that would alter or affect the Commission analysis. As a result, they assert that the Blanket Reauthorization would have no adverse effect on competition, rates, or regulation.

b. Commission Determination

13. We will extend the 2007 Blanket Authorization with modification as discussed below, for an additional three-year period. We note, however, that since the Commission issued the 2007 Blanket Authorization, Morgan Stanley has become a bank holding company.¹³ Thus, Morgan Stanley and its subsidiaries are able to acquire securities under the blanket authorization set forth in section 33.1(c)(9) of the Commission's regulations to the extent they meet the qualifying requirements and conform to the conditions contained in the blanket authorization.¹⁴

14. The Commission will modify the 2007 Blanket Authorization with respect to Applicants' investment advisory and management functions. Since the Commission issued the 2007 Blanket Authorization, the Commission has determined that investment managers acting as fiduciaries may acquire less than 20 percent of a public utility per Schedule 13 reporting group and less than 10 percent of the outstanding voting securities per individual investment fund or individually managed account subject to restrictions under the Investment Advisers Act,¹⁵ the Investment Company Act,¹⁶ and the 1934 Act.¹⁷ In granting this more limited authorization, the Commission has found that investment managers have sufficient ability to conduct business and deploy capital in a timely

¹³ Application at 2.

¹⁴ 18 C.F.R. § 33.1(c)(9) (2010).

¹⁵ 15 U.S.C. § 80b-2, *et seq* (2006).

¹⁶ 15 U.S.C. § 80a-1, *et seq* (2006).

¹⁷ 15 U.S.C. § 78a, *et seq* (2006).

fashion while providing the Commission greater assurance that there will not be a change of control over a public utility.¹⁸

15. Applicants have not reported acquisitions of greater than 20 percent of the voting securities of any public utility in any of the filed quarterly reports submitted to the Commission. Additionally, Applicants have not demonstrated their need to acquire greater than 20 percent of the voting securities of a public utility for the purposes of advising and managing client investment accounts. Therefore, consistent with conditions set for other investment managers,¹⁹ we will limit the percentage of voting securities that Morgan Stanley may acquire in any public utility to less than 20 percent of its outstanding voting securities per reporting group within the GWMG and the Asset Management Group and a limit of less than 10 percent of the outstanding voting securities of a public utility in any single investment fund or any single individually managed account.

16. Applicants state they seek reauthorization to continue to make acquisitions of utility securities for investment purposes only and not for purposes of obtaining or exercising control over the issuers of those securities. Applicants commit to continue to comply with all the terms, conditions, and requirements of the 2007 Blanket Authorization, including the overall condition that Applicants must not acquire control over issuers whose securities they acquire as a result of the Blanket Authorization. The Commission has found that when a purchaser of a minority interest in a public utility lacks the ability to influence control over that acquired public utility, the Commission will not consider the purchase a consolidation of utility assets and therefore the acquisition will not adversely impact competition in any market.²⁰ Additionally, the Commission has determined that a purchase of securities in a public utility that does not convey the ability to control that public utility will not impact existing rates or regulation.²¹ Therefore, based on Applicants' commitments, renewal of the 2007 Blanket

¹⁸ *Franklin Resources, Inc.*, 126 FERC ¶ 61,250 at P 39-43, *order on reh'g*, 127 FERC ¶ 61,224 (2009) (*Franklin Resources*).

¹⁹ *Franklin Resources*, 126 FERC ¶ 61,250; *Horizon Asset Management, Inc.*, 125 FERC ¶ 61,209, (2008) (*Horizon*); *Legg Mason, Inc.*, 121 FERC ¶ 61,061 (2007) (*Legg Mason*); *Capital Research and Management Co.*, 116 FERC ¶ 61,267 (2006).

²⁰ *Entegra Power Group LLC.*, 125 FERC ¶ 61,143, at P 43 (2008) (*Entegra Power*).

²¹ *Franklin Resources*, 126 FERC ¶ 61,250 at P 46, 48; *Horizon*, 125 FERC ¶ 61,209 at P 52, 54; *Entegra Power*, 125 FERC ¶ 61,143 at P 48; *Legg Mason*, 121 FERC ¶ 61,061 at P 34, 36.

Authorization, as modified, will not have an adverse effect on competition, rates, or regulation.

2. Cross-Subsidization

a. Applicants' Analysis

17. Applicants assert that the Blanket Reauthorization will not result in any transfer of facilities between a traditional public utility associate company that has captive customers, or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company. Applicants also state that the Blanket Reauthorization will not result in any new security issuances by a traditional public utility associate company that has captive customers, or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company. Further Applicants make assurances that the Blanket Reauthorization will not involve any new pledges or encumbrances of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company. Finally, Applicants state that the Blanket Reauthorization will not involve any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under section 205²² and 206²³ of the FPA.²⁴

b. Commission Determination

18. Based on the facts as presented in the application, we find that authorizing the Blanket Reauthorization will not result in cross-subsidization, or the pledge or encumbrance of utility assets for the benefit of an associate company.

C. Other Considerations

19. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215. Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, and operating systems. If affiliates, personnel or

²² 16 U.S.C. § 824d (2006).

²³ 16 U.S.C. § 824e (2006).

²⁴ Application at 77.

investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cyber security standards. The Commission, the North American Electric Reliability Corporation or the relevant Regional Entity may audit compliance with reliability and cyber security standards.

20. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to adequately protect public utility customers against inappropriate cross-subsidization may be impaired absent access to the parent company's books and records. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. The approval of the Blanket Reauthorization is based on such examination ability.

The Commission orders:

(A) The 2007 Blanket Authorization is renewed for a period of three years, subject to a 20 percent limit on the acquisition by any one reporting group in the GWMG or the Asset Management Group and a limit of less than 10 percent of the outstanding voting securities of a public utility in any single investment fund or any single individually managed account.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other 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.

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

(D) Applicants are subject to audit to determine whether they are in compliance with the representations, conditions and requirements upon which the authorizations are herein granted and with applicable Commission rules, regulations and policies. In the event of a violation, the Commission may take action within the scope of its oversight and enforcement authority.

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

(F) Applicants shall file with the Commission contemporaneous with filing at the SEC the Schedule 13D and 13G filings that are relevant to the authorizations granted in this order. Any changes in the information provided on the initial Schedule 13G must be reflected in an annual amended filing due within 45 days of the end of each calendar year. Applicants shall file with the Commission any comment letter or deficiency letters received from the SEC that concern Schedule 13G-related compliance audits conducted by the SEC. Such filings shall be made in this docket or in appropriate sub-dockets of this docket.

(G) Morgan Stanley shall file with the Commission on a quarterly basis, within 45 days of the end of the quarter, the three separate reports as follows: (1) a report of holdings as a result of liquidations; (2) a report of holdings by a market-maker; and (3) a report of holdings as a fiduciary. Each report should list the holdings of the utility voting securities, stated in terms of the number of shares held and as a percentage of the outstanding shares.

(H) If a new entity is to be covered by this blanket authorization, Morgan Stanley must provide notice in a report with the name, functions, and regulatory safeguards applicable to that entity, as well as a reiteration of Morgan Stanley's commitment not to acquire securities that will result in a transfer of control of a public utility, on a quarterly basis, within 45 days of the end of the quarter.

(I) Applicants must inform the Commission, within 30 days, of any material change in circumstances that would reflect a departure from the facts, policies, and procedures the Commission relied upon in granting the request and specifying the terms and conditions under which the blanket authorization is set forth in section 33.1(c)(5) of the Commission's regulations will be available to them.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.