

114 FERC ¶61,142  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Commission Authorization to Hold  
Interlocking Positions

Docket No. RM05-6-001

ORDER NO. 664-A

ORDER DENYING REHEARING AND STAY

(Issued February 16, 2006)

1. On October 17, 2005, Morgan Stanley Capital Group Inc., Merrill Lynch Commodities, Inc and Merrill Lynch Capital Services, Inc. (Morgan Stanley/Merrill Lynch) filed a request for rehearing and stay of Order No. 664, concerning applications to hold and Commission authorization to hold interlocking positions.<sup>1</sup> In this order, we deny Morgan Stanley/Merrill Lynch's request for rehearing and stay.

**Background**

2. In Order No. 664, the Commission amended Part 45 of its regulations<sup>2</sup> to clarify that individuals seeking Commission authorization to hold interlocking positions must obtain such authorization from the Commission prior to holding the interlocking positions. Order No. 664 also clarified the regulations to define the term "holding" as "acting as, serving as, voting as, or otherwise performing or assuming the duties and responsibilities of" the interlocking positions requiring Commission authorization. Order No. 664 also amended the regulations to require that an individual filing an informational

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<sup>1</sup> *Commission Authorization to Hold Interlocking Positions*, Order No. 664, 70 Fed. Reg. 55717 (September 23, 2005) FERC Stats. & Regs. ¶ 31,194.

<sup>2</sup> 18 C.F.R. Part 45 (2005).

report for automatic authorization under section 45.9 of the Commission's regulations<sup>3</sup> must file such informational report prior to holding the interlocking positions and that the informational report must include a statement or affirmation that the individual has not yet assumed the duties or responsibilities of the interlocking position for which the automatic authorization is sought. In amending the regulations, the Commission sought to bring the regulations into full compliance with section 305(b) of the Federal Power Act (FPA).<sup>4</sup>

3. Morgan Stanley/Merrill Lynch filed a request for rehearing and stay of Order No. 664 arguing that the Commission failed to address many issues raised by the commentors, did not provide adequate support and reasoning, and failed to provide clarification as to the entities covered by Order No. 664.

## **Discussion**

### **A. Did the Commission Err in Not Expanding the Automatic Authorization Procedures Under Section 45.9 of the Commission's Regulations to Encompass Interlocks Involving Power Marketers?**

#### **1. Request for Rehearing**

4. Morgan Stanley/Merrill Lynch argue that the Commission erred in not expanding the reach of the automatic authorization procedures found in section 45.9 to include power marketers. Specifically, Morgan Stanley/Merrill Lynch argue that the Commission did not explain why granting the request to expand section 45.9 to power marketers would frustrate the underlying purpose of section 305(b) of the FPA. Morgan Stanley/Merrill Lynch claim that Order No. 664 discriminates against power marketers based on corporate structure and requests that the Commission revise the regulations to "eliminate this disparate treatment."<sup>5</sup> To remedy this "disparate treatment" Morgan Stanley/Merrill Lynch request that the Commission allow section 45.9 to apply to any interlocks between power marketers that are owned by the same ultimate parent company. Morgan Stanley/Merrill Lynch also request that, in light of the recent repeal of the Public Utility Holding Company Act of 1935 (PUHCA '35) and the enactment of the Public Utility Holding Company Act of 2005 (PUHCA '05), the Commission clarify the definition it will use for "holding company" when interpreting section 45.9 in the future.

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<sup>3</sup> 18 C.F.R. § 45.9 (2005).

<sup>4</sup> 16 U.S.C. § 825d(b) (2000).

<sup>5</sup> Morgan Stanley/Merrill Lynch Request for Rehearing at pg. 6.

5. In support of its request that the Commission expand the reach of section 45.9 to permit power marketers to file for authorization under section 45.9, Morgan Stanley/Merrill Lynch argue that, over the last twenty years, the Commission has never vacated an interlock between power marketers based on a finding that such interlock is not in the public interest. Morgan Stanley/Merrill Lynch's argument is bolstered, it claims, by the fact that the Commission granted blanket authority to hold interlocking positions to officers and directors of power marketers in order to enable the electric industry to become more competitive.<sup>6</sup> Morgan Stanley/Merrill Lynch state that, by not allowing officers and directors of power marketers to file under section 45.9, the Commission is "changing the interlock rules on the theory that it needs to 'prevent' versus 'correct' threats to ratepayers arising from interlocks involving officers and directors of power marketers."<sup>7</sup>

6. Morgan Stanley/Merrill Lynch argue that the regulations enacted by Order No. 664 would result in unduly burdensome monitoring and compliance requirements for power marketers. Given the numerous financial services companies (and affiliated companies) that have entered the power trading business over the past decade, Morgan Stanley/Merrill Lynch argues, each company may not be aware of the wide range of business activities that its affiliates may be involved in. Therefore, according to Morgan Stanley/Merrill Lynch, "it would be burdensome, and in many cases impossible," for officers and directors of these financial institutions to seek and receive Commission authorization before holding an interlocking position.<sup>8</sup> Furthermore, Morgan Stanley/Merrill Lynch argue that Order No. 664 could have an adverse effect on competition if power marketers' officers and directors are not permitted to file under section 45.9 but some other entity's officers and directors are permitted to file under section 45.9 as a result of their status as part of a holding company structure. All of these issues, Morgan Stanley/Merrill Lynch argues, are made worse by the Commission's prohibition on late filings.

7. Finally, Morgan Stanley/Merrill Lynch argue that Order No. 664 greatly underestimates the procedural and filing burden that the revised regulations impose on power marketers. Morgan Stanley/Merrill Lynch state that the Commission's estimate of 51.8 hours to comply with the regulations is low and that the time that power marketers will require to comply will far exceed the Commission's estimate. Morgan

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<sup>6</sup> *Id.* at pg. 10.

<sup>7</sup> *Id.* at pg. 10-11.

<sup>8</sup> *Id.* at pg. 12.

Stanley/Merrill Lynch request that the Commission revise its regulations to eliminate these burdens and provide a reasonable and more streamlined approach for officers and directors to meet the requirements of section 305(b) of the FPA.

## 2. Commission Determination

8. We deny Morgan Stanley/Merrill Lynch's request for rehearing. Order No. 664 carries out the language and intent of section 305(b) of the FPA, and we are not persuaded that Order No. 664 erred in doing so.

9. Under the statute and regulations, *all* public utility officers and directors are subject to the requirement that they need prior Commission authorization to hold otherwise proscribed interlocking positions. Whether or not the public utility is a traditional public utility or is a power marketer, their officers and directors were and are treated alike by the statute and the regulations; the proscribed interlocking positions are just that, *i.e.* proscribed, absent prior Commission authorization. What the Commission did in Order No. 664 was to conclude that its prior practice of treating officers and directors of traditional public utilities and officers and directors of power marketers (which had been granted market-based rate authority, and thus, as to their officers and directors, waiver of the full requirements of Part 45) differently in practice was no longer justified; that is, the Commission would now treat them the same and subject them to the same requirements. Doing so was hardly discriminatory and, indeed, the continuation of the prior practice is what would have been discriminatory.

10. As the Commission explained in Order No. 664, the process for obtaining Commission authorization to hold interlocking positions is different from the process required to receive authorization to sell power at market-based rates.<sup>9</sup> Authorization to sell power at market-based rates is granted to a company that has no market power or that has mitigated its market power; Commission authorization to hold an otherwise proscribed interlocking position reflects the Commission's conclusion that neither public nor private interests would be adversely affected by that particular person holding those particular interlocking positions.<sup>10</sup> Indeed, an interlock may give rise to the concerns that

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<sup>9</sup> Order No. 664 at P 34.

<sup>10</sup> The treatment of Morgan Stanley/Merrill Lynch's officers and directors under Part 45 prior to Order No. 664 was based on Morgan Stanley/Merrill Lynch's status as holders of market-based rate authority, which provided them with a waiver of the full requirements of Part 45. Morgan Stanley/Merrill Lynch's argument that power marketers should be treated the same as companies under section 45.9 stems from that market-based rate authority waiver, which, essentially, allowed officers and directors of companies

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underlie section 305(b) of the FPA and Part 45 of the regulations, as discussed in Order No. 664,<sup>11</sup> even if the relevant public utility has market-based rates. The mere fact that a power marketer may not have or may have mitigated its market power and so may receive Commission authorization to sell power at market-based rates does not speak to an individual officer or director's satisfaction of the Commission's criteria for authorization to hold interlocking positions.

11. Morgan Stanley/Merrill Lynch argue that we are treating power marketers differently than other utilities under Part 45. We disagree. Initially, we note that whether or not an officer or director that desires to hold an otherwise proscribed interlock can take advantage of the abbreviated filing requirement laid out in section 45.9 depends on whether the officer and director, and the relevant companies, meet the criteria laid out in section 45.9. Whether or not a public utility has market-based rates is not one of the criteria of section 45.9. Moreover, section 45.9 is equally available to officers and directors of public utilities with market-based rate authority just as it is available to officers and directors of public utilities that do not have market-based rate authority. Section 45.9 does not discriminate against public utilities with market based rate authority and their officers and directors. For purposes of applying for automatic authorization under section 45.9, any individual who is an officer or director of a public utility that meets the criteria laid out in section 45.9 may file under section 45.9. That was the case before Order No. 664 and that has not changed under Order No. 664. Morgan Stanley/Merrill Lynch do not provide the Commission with any valid reason why power marketers and their officers and directors should be any more entitled to take advantage of section 45.9 than any other utility and its officers and directors.

12. Morgan Stanley/Merrill Lynch have requested that the Commission clarify what definition of holding company we will use for purposes of interpreting and applying section 45.9 in the future. While Morgan Stanley/Merrill Lynch are correct that the definition of holding company in PUHCA '05 differs from the definition in PUHCA '35, Part 45 of the Commission's regulations contains its own definition of holding company

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holding market-based rate authority to file applications and informational reports similar to officers and directors entitled to avail themselves of section 45.9. Therefore, while Morgan Stanley/Merrill Lynch talk only about power marketers (and their officers and directors), we address all holders of market-based rate authority (and their officers and directors) in this discussion.

<sup>11</sup> *Id.* at P 5.

to be used in interpreting and applying section 45.9.<sup>12</sup> The Commission finds that definition of holding company applies when interpreting section 45.9.

13. The Commission finds it irrelevant that we have never unwound an interlock involving power marketers on the grounds that such interlock was not in the public interest;<sup>13</sup> that is precisely how the statute should work. Under section 305(b) of the FPA, the Commission can only authorize an interlock if it finds, prior to authorization, that such interlock will not adversely affect public or private interests.<sup>14</sup> The fact that we have never unwound an interlock involving power marketers simply demonstrates that we have fulfilled our duty and that interlocks have been authorized only when appropriate. The Commission also points out that Order No. 664 did not seek to change the regulations “on the theory that [the Commission] needs to ‘prevent’ versus ‘correct’ threats” arising from interlocking positions; the statute has always sought prevention above correction. Indeed, Order No. 664, as stated above, merely sought to bring Part 45 of its regulations into full compliance with section 305(b) of the FPA.

14. Morgan Stanley/Merrill Lynch complain that the new regulations are overly burdensome on financial services companies and their power marketers because of the wide range of business activities these companies, and their affiliates, engage in and that they do not, and perhaps cannot, know what business activities they are engaged in. The Commission finds this argument demonstrates the need for caution in not permitting power marketers to file abbreviated applications under section 45.9 simply because of their status as power marketers. If, as Morgan Stanley/Merrill Lynch allege, power marketers, and their affiliates, weave a wide web of activities through a wide array of companies and that even they may not know the nature and scope of such activities, the Commission appropriately should not lightly allow abbreviated applications -- to ensure, as required by the statute, that no interlock will adversely affect public or private interests.

15. Finally, in response to Morgan Stanley/Merrill Lynch’s argument that the reporting requirements stemming from the new regulations are overly burdensome, we disagree. We do not believe that the information we require under Part 45, which we emphasize we require equally of applicants regardless of whether or not the public

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<sup>12</sup> 18 C.F.R. § 45.8(f) (2005).

<sup>13</sup> *Cf. Hatch v. FERC*, 654 F.2d 825, 832 (D.C. Cir. 1981) (“[The Commission need not approve all applications for interlocks simply on the assurance, even if that assurance is backed by favorable history, that no such abuses will occur.”).

<sup>14</sup> 16 U.S.C. § 825d(b)(1) (2000).

utilities they serve have market-based rates, is excessive or overly burdensome. It is reasonable to require an officer or director of a public utility to tell us every position that she holds with that public utility as well as other companies for which she is an officer or director. If an individual finds it overly burdensome to account for her corporate positions and responsibilities, that certainly raises a concern that public and private interests are being adversely affected if she holds so many positions that she cannot keep track of them.

16. For the reasons discussed above, we deny Morgan Stanley/Merrill Lynch's request for rehearing on this issue.

**B. Was the Commission's Decision to Change its Past Practice of Granting Blanket Authorization of Interlocking Positions to Officers and Directors of Power Marketers Arbitrary, Capricious and an Abuse of Discretion?**

**1. Request for Rehearing**

17. Morgan Stanley/Merrill Lynch argue that the Commission's decision to change its practice of granting blanket authorization for interlocks involving power marketers in orders granting the power marketers authority to charge market-based rates was arbitrary, capricious, and an abuse of discretion. Morgan Stanley/Merrill Lynch argue that interlocks involving power marketers<sup>15</sup> pose no risk of harm and that the blanket authorizations that historically applied to power marketers should be reinstated. Morgan Stanley/Merrill Lynch argue that the Commission has not met its burden of providing justification for departing from its practice of granting blanket authorization for interlocks involving power marketers.

18. Morgan Stanley/Merrill Lynch explain that, while the Commission stated that the regulations did not comply with section 305(b) of the FPA, the Commission was incorrect. Blanket grants of authority, such as those previously given to power marketers and other entities with market-based rate authority, are a legally sufficient form of Commission approval.<sup>16</sup> Furthermore, Morgan Stanley/Merrill Lynch add that, in the last

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<sup>15</sup> Contrary to the implication that we only authorized interlocking positions between power marketers, our past practice was to grant blanket authorization to hold any otherwise proscribed interlocks – including interlocks with not only other power marketers but also non-power marketer public utilities, securities underwriters and electrical equipment suppliers.

<sup>16</sup> Morgan Stanley/Merrill Lynch Request for Rehearing at pg. 17.

twenty years, the Commission's use of blanket grants of approval for interlocking positions has not been struck down by the courts as inconsistent with section 305(b) of the FPA.<sup>17</sup>

19. Morgan Stanley/Merrill Lynch argue that the Commission should have provided a more targeted and less burdensome approach to ensuring that power marketers (and others with market-based rate authority) provide the necessary information required under the statute and regulations to support an application for authorization to hold interlocking positions. Specifically, Morgan Stanley/Merrill Lynch suggest that the Commission could have issued "rules that clearly defined what information the Commission needs to assess whether the interlock involving power marketers might adversely affect public or private interests."<sup>18</sup> Morgan Stanley/Merrill Lynch also echo requests from commentors to the NOPR that the Commission should establish clear deadlines by which officers and directors must provide the required information.<sup>19</sup>

## 2. Commission Determination

20. We deny Morgan Stanley/Merrill Lynch's request for rehearing.

21. The Commission explained in Order No. 664 the reason for no longer granting entities with market-based rate authority a waiver of the full requirements of Part 45.<sup>20</sup> The Commission has always had the right to no longer grant waiver of its regulations, *i.e.*, to no longer grant waiver of the full requirements of Part 45, and instead to hold applicants to the requirements of its regulations, *i.e.*, to impose the full requirements of Part 45, and in Order No. 664 the Commission provided justification for ceasing to grant such waiver. Any other reading would eviscerate the statutory protections of section 305(b) and the corresponding protections of Part 45. Indeed, past orders in which the Commission granted waiver of the full requirements of Part 45 also expressly stated that "in order to protect against any potential harm... the Commission will reserve the right to require a further showing at any time that public or private interests are not adversely affected."<sup>21</sup>

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<sup>17</sup> Morgan Stanley/Merrill Lynch do not state, however, whether this practice was ever the subject of court review in any case.

<sup>18</sup> *Id.* at pg.19.

<sup>19</sup> *Id.*

<sup>20</sup> Order No. 664 at P 34.

<sup>21</sup> *E.g.*, *Citizens Energy Corporation*, 35 FERC ¶ 61,198 at 61,455 (1986).

22. While Morgan Stanley/Merrill Lynch argue that the blanket grants of authority to hold interlocking positions given in orders granting authority to make sales at market-based rates were legally sufficient, the Commission reasonably found that it was not required to continue this practice and should not continue this practice.<sup>22</sup> While courts may have never overturned the Commission's use of blanket grants of authority and waivers of the full requirements (and it is not clear, we add, that the issue ever came up), that is beside the point. The Commission was not required to continue to waive its regulations indefinitely, and instead chose to no longer waive them. The Commission responded to confusion about when an individual may hold interlocking positions under section 305(b) of the FPA given inconsistent language in the Commission's regulations. Order No. 664 responded, in large part, to that confusion and sought to clarify the timing (and content) of an application for authorization to hold interlocking positions and to eliminate any contradictory or confusing language in the Commission's regulations – providing for *prior* authorization.

23. The Commission's Order No. 664, as well, struck a balance between the information required to determine if an interlocking position will adversely affect public or private interests and the reporting burden placed upon applicants.

24. As explained above, we do not agree with Morgan Stanley/Merrill Lynch's assertion that the regulations are overly burdensome and, therefore, disagree that we should have provided some alternative approach to requiring compliance with section 305(b) of the FPA. In response to Morgan Stanley/Merrill Lynch's specific request for clarification of what information and what deadlines are required to ensure compliance with section 305(b) of the FPA, we note that Part 45 of the Commission's regulations as amended by Order No. 664 specifies what information needs to be submitted and specifies that prior authorization is required.

25. For the reasons discussed above, we deny Morgan Stanley/Merrill Lynch's request for rehearing on this issue.

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<sup>22</sup> In doing so, though, the Commission expressly found that persons that were then currently authorized to hold otherwise proscribed interlocking positions would be allowed to continue to hold such positions. Order No. 664 at P 36. The Commission did not revoke any authorizations previously granted or require any person to vacate any interlocking position then held.

**C. What Procedures Should Apply to Interlocking Positions Created at the Time the Commission Grants Authority to Charge Market-Based Rates?**

**1. Request for Clarification**

26. Morgan Stanley/Merrill Lynch request clarification on what procedures applicants for market-based rate authority must follow. Morgan Stanley/Merrill Lynch recommend that the Commission grant blanket authorization for all Commission-jurisdictional interlocks formed “at the moment the Commission approves the applicant’s market-based rate authorization,” subject to a thirty-day notice requirement.

**2. Commission Determination**

27. Part 45 of the regulations, as amended by Order No. 664, is clear. Prior authorization is required. Coincident with a timely request for market-based rate authority (and we take it as a given that such requests will, of course, be timely), officers and directors of the public utility seeking market-based rate authority may file timely applications to hold otherwise proscribed interlocks. The Commission declines to accept Morgan Stanley/Merrill Lynch’s recommendation to grant what appears to be essentially the same blanket authorization and the same waiver of the full requirements of Part 45 that the Commission concluded in Order No. 664 that it would no longer grant. Granting such blanket authorization and waiver based simply on an entity’s status as a seller at market-based rates would, as explained in Order No. 664 and above, frustrate what the D.C. Circuit has characterized as the “prophylactic” protections provided by section 305(b) of the FPA.<sup>23</sup>

**D. Should the Commission Grant Morgan Stanley/Merrill Lynch’s Request for Stay?**

**1. Request for Stay**

28. Morgan Stanley/Merrill Lynch request that the Commission stay the implementation of Order No. 664 until the Commission has the opportunity to act on this request for rehearing. They argue that granting such stay is in the public interest and will ensure regulatory symmetry and eliminates the need for affected public utilities to expend unnecessary resources to ensure compliance with the regulations.

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<sup>23</sup> *Hatch v. FERC*, 654 F.2d 825, 831-32 (D.C. Cir. 1981); accord Order No. 664 at P 5 & nn.8-9.

**2. Commission Determination**

29. The Commission will deny Morgan Stanley/Merrill Lynch's request for stay. Morgan Stanley/Merrill Lynch requested stay until the Commission had an opportunity to act on this request for rehearing, which we do in this order. Therefore, Morgan Stanley/Merrill Lynch's request for stay has been overtaken by events. Furthermore, the Commission does not, for reasons outlined in Order No. 664 and elsewhere in this order, find a stay necessary to ensure regulatory symmetry.

**The Commission orders:**

Morgan Stanley/Merrill Lynch's request for rehearing and stay is hereby denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.