

125 FERC ¶ 61,282
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.

UBS AG

Docket Nos. EL02-105-003
EC02-91-003

ORDER ON CLARIFICATION

(Issued December 12, 2008)

1. UBS AG filed a request for clarification of the Commission orders granting blanket authorization¹ for UBS AG as a public utility to acquire public utility securities under section 203 of the Federal Power Act (FPA).² For the reasons discussed below, we clarify the UBS AG-Specific Blanket Authorization previously granted under section 203(a), and also clarify that UBS AG and its subsidiaries have the same generic authorizations as other qualifying entities under section 203(a)(2).

I. Background

A. Description of UBS AG in Request for Clarification

2. UBS AG states that “it is a global financial services company providing wealth asset management, investment banking and securities businesses, including businesses involving the trading of physical and financial energy products throughout North America.”³ Shares of its common stock are traded on the New York Stock Exchange and several other major international exchanges. UBS AG is a public utility with market-based rate authority.⁴

3. UBS AG is organized into three distinct business units: UBS Investment Bank, UBS Global Wealth Management and Business Banking, and UBS Global Asset

¹ *UBS AG*, 101 FERC ¶ 61,312 (2002), *order on reh’g*, 103 FERC ¶ 61,284, *order on reh’g*, 105 FERC ¶ 61,078 (2003) (UBS AG-Specific Blanket Authorization).

² 16 U.S.C. § 824b(a) (2006).

³ Request for Clarification at 4.

⁴ *UBS AG*, 98 FERC ¶ 61,255 (2002).

Management Business Group. The request for clarification states that UBS Investment Bank provides products, research and advice, and comprehensive access to the world's capital markets to its corporate and institutional clients, governments, financial intermediaries and alternative asset managers. UBS AG states that UBS Global Wealth Management and Business Banking provides a comprehensive range of products and services individually tailored for clients worldwide and is a market leader in Switzerland, providing a complete set of banking and securities services for individual and corporate clients. UBS AG describes UBS Global Asset Management Business Group as a leading investment manager, providing traditional, alternative and real estate investment solutions to private, institutional, and corporate clients.

4. UBS AG also states that it has various affiliates and subsidiaries conducting the businesses described above that generally are not holding companies as defined by the Commission. However, UBS AG states that it and its subsidiary, UBS Americas, are holding companies because they own exempt wholesale generators (EWG) and qualifying facilities (QF).⁵ UBS AG states that UBS Americas wholly owns AIG Highstar, which holds 50 percent of the membership interests in Northern Star Generation LLC,⁶ which owns or controls 13 generation projects that are either EWGs or QFs.

B. UBS AG Company-Specific Blanket Authorization

5. In 2002, UBS AG requested a declaratory order finding that UBS AG's acquisition of securities as a public utility through its banking business did not require prior Commission approval under section 203(a) of the FPA as it then existed (before enactment of the Energy Policy Act of 2005).⁷ In the alternative, UBS AG also requested authorization to acquire public utility securities, subject to certain conditions. The Commission denied UBS AG's request for declaratory order to disclaim jurisdiction because the Commission's prior approval of the acquisition of public utility securities by another public utility, above a certain monetary value, is a statutory requirement. The Commission granted the requested blanket authorization subject to certain conditions and

⁵ EWG status is under the Public Utility Holding Company Act of 2005, enacted by the Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594 (2005); 18 C.F.R. §§ 292.201 *et seq.* (2008). QF status is under the Public Utility Regulatory Policies Act, 16 U.S.C. § 824a-3 (2006).

⁶ This transaction was approved by the Commission in 2007. *See UBS Americas Inc.*, 120 FERC ¶ 62,007 (2007).

⁷ Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005) (EPAAct 2005).

commitments, but only as to UBS AG as a public utility because at the time, section 203 applied to only public utilities.⁸

6. This UBS AG-Specific Blanket Authorization permits UBS AG to hold as principal up to five percent of the voting equity securities issued by a public utility, as long as the securities do not convey control through debt covenants or otherwise, of the management or operation of the public utility. The order explains how this authorization works in a variety of ways. The Commission excluded from the five percent limit those securities held in connection with lending, fiduciary and underwriting activities, and with dealing, trading and derivative activities, with certain qualifications discussed below.⁹ The Commission also determined that debt would not be considered in the five percent limitation unless the debt covenants provide control over the public utility borrower. The Commission said that voting equities acquired in an underwriting capacity would not count against the five percent limitation based on the commitment that the holders not vote the securities within 45 days if the shares held for underwriting had not been divested by that time. The authorizations also extended to holdings of securities to hedge derivative transactions so that such holdings would not count towards the five percent limitation. However, any such shares held in excess of five percent could not be voted. This blanket authorization was subject to reporting requirements.

C. Energy Policy Act of 2005 and Industry-Wide Blanket Authorizations

7. UBS AG notes that EAct 2005 amended in various ways FPA section 203 relating to the Commission's review of sales and purchases of utility assets and securities. The new provisions apply not only to public utilities, but also to certain holding companies.

8. Subsequent to the effective date of EAct 2005, the Commission granted industry-wide blanket authorizations that permit certain transactions to occur without prior case-by-case Commission approval under section 203(a)(2) (which addresses holding companies) and for certain related transactions under section 203(a)(1) (which addresses public utilities). UBS AG states that the limitations on these industry-wide blanket authorizations are somewhat less restrictive than those imposed on UBS AG under the UBS AG-Specific Blanket Authorization. For example, the Commission granted holding companies blanket authorization to acquire unlimited amounts of non-voting securities, less than ten percent of voting securities in electric utility companies, and securities of subsidiaries. Transactions covered by these blanket authorizations include: (1) when a holding company acquires non-voting securities in any amount, as long as control is not

⁸ The relevant provision of the statute that was in place at the time UBS AG received its blanket authorization is now found at section 203(a)(1)(C).

⁹ *UBS AG*, 103 FERC ¶ 61,284 at P 9.

conveyed;¹⁰ (2) when, after the transaction is completed, less than ten percent of voting securities will be conveyed;¹¹ and (3) when the securities are being acquired from a subsidiary within the holding company system.¹² Additionally, those that are holding companies solely by virtue of holding EWGs, Foreign Utility Companies (FUCOs), or QFs are permitted to acquire an unlimited amount of the securities of additional EWGs, FUCOs or QFs.¹³

9. UBS AG states that the Commission also adopted industry-wide blanket authorizations for holding companies that hold securities in any amount as fiduciaries in the normal course of business, as collateral for loans, or in connection with loan liquidation, when regulatory oversight over such entities is exercised by the Board of Governors of the Federal Reserve Bank or the Office of the Comptroller of the Currency.¹⁴ Additionally, the Commission granted industry-wide blanket authorization, with certain conditions, for holding companies to hold securities associated with failed underwritings.¹⁵ Banks that are holding companies are also permitted to hold covered securities for hedging purposes incidental to banking, as long as the bank does not vote more than ten percent of the outstanding shares.¹⁶

D. Request for Clarification

10. UBS AG seeks an order confirming that it, its affiliates, and its subsidiaries may use the industry-wide Part 33 blanket authorizations described above despite the more restrictive provisions of the UBS AG-Specific Blanket Authorization. UBS AG states that the UBS AG-Specific Blanket Authorization is more stringent than the Part 33 blanket authorizations in several respects: (1) the percentage of public utility securities that may be held without advance section 203 approval; (2) the amount of securities held that are associated with failed underwritings; (3) the percentage of securities held for

¹⁰ 18 C.F.R. § 33.1(c)(2)(i) (2008).

¹¹ *Id.* § 33.1(c)(2)(ii).

¹² *Id.* § 33.1(c)(2)(iii).

¹³ *Id.* § 33.1(c)(8).

¹⁴ *Id.* § 33.1(c)(9). Certain conditions and reporting requirements apply to this authorization, including that the holding does not confer control of the operation or management of the public utility through debt covenants or otherwise; the parent holding company must report all holdings of one percent or more of the outstanding shares to the Commission quarterly. *Transactions Subject to FPA Section 203*, FERC Stats. & Regs. ¶ 31,214, at P 124 (2006) (Order No. 669-A).

¹⁵ 18 C.F.R. § 33.1(c)(10)(i).

¹⁶ *Id.* § 33.1(c)(10)(ii).

hedging purposes; (4) the amount of debt securities is unlimited for UBS AG as long as UBS AG does not get control; and (5) limitations on the amount of EWG, FUCO or QF securities.

11. UBS AG seeks clarification that it may use the industry-wide blanket authorizations under Part 33 to engage in transactions that are not covered by the UBS AG-Specific Blanket Authorization. It says that it will continue to abide by the UBS AG-Specific Blanket Authorizations to conduct any activities not covered by the industry-wide blanket authorizations. UBS AG also commits to abide by the reporting requirements in the UBS AG-Specific Blanket Authorizations.

12. UBS AG states that when the Commission issued the UBS AG-Specific Blanket Authorization the Commission did not appear to intend to impose restrictions on UBS AG that were greater than those imposed on other industry participants.¹⁷ UBS AG argues that continued adherence to the more restrictive provisions of the UBS AG-Specific Blanket Authorization will have a discriminatory and unintended anti-competitive effect on UBS AG, its affiliates, and subsidiaries.

II. Notice of Filing

13. Notice of Applicants' filing was published in the *Federal Register*, 73 Fed. Reg. 60,683 (2008), with interventions and protests due on or before October 14, 2008. None was filed.

III. Discussion

14. UBS AG's need for clarification appears to arise from the fact that the UBS AG-Specific Blanket Authorization was issued to it in its capacity as a public utility, while the industry-wide blanket authorizations apply, primarily, to holding companies. The blanket authorizations under Part 33 of the Commission's regulations are of general applicability, subject to the qualifying requirements and conditions in the regulations. We hereby clarify that UBS AG and its subsidiaries, if they meet the requirements and conform to the conditions in those blanket authorizations, may use those authorizations to the same extent as any other entity.

¹⁷ UBS AG states that it "seeks clarification that its affiliates and subsidiaries that are not public utilities, that may or may not be holding companies, may acquire less than ten percent of the voting securities of public utilities as permitted by the Part 33 blankets and other applicable Commission precedent." Request for Clarification at 3. Entities that are holding companies were granted certain authorizations under Part 33. *See, e.g., supra* notes 10-16. The point or intention of the reference to "other applicable Commission precedent" is unclear.

15. The Commission will modify the UBS AG-Specific Blanket Authorization so that UBS AG will continue to have authorization under what is now section 203(a)(1)(C) to acquire up to five percent of voting securities, not including securities obtained for underwriting, hedging, or debt security purposes, or the amount of EWG, FUCO or QF securities acquired, of a public utility. However, this section 203(a)(1)(C) authorization will be subject to the same conditions applied in Part 33 of the Commission's regulations under section 203(a)(2). We find it appropriate to modify the UBS AG-Specific Blanket Authorization so that when UBS AG acts in its capacity as a public utility under section 203(a)(1)(C) it will be subject to the same restrictions that holding companies have to abide by in the generic blankets under section 203(a)(2). The statutory standard is the same, i.e., consistency with the public interest.

16. We also clarify that UBS AG and its subsidiaries have the same authorizations as other entities that qualify for the industry-wide authorizations under section 203(a)(2).

The Commission orders:

(A) The UBS AG-Specific Blanket Authorization is clarified as discussed in the body of this order.

(B) UBS AG and its subsidiaries have the same blanket authorizations as other qualifying entities under section 203(a)(2) to the extent they meet the qualifying requirements and conform to the conditions contained in those blanket authorizations.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.