

115 FERC ¶ 61,303
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

The Goldman Sachs Group, Inc.

Docket Nos. EL06-27-001
EC06-38-001

ORDER DENYING REHEARING

(Issued June 9, 2006)

1. On March 9, 2006, The Goldman Sachs Group, Inc. (Goldman) filed a request for rehearing of a Commission order.¹ The order granted in part and denied in part a petition for a declaratory order that the Commission concur in certain interpretations of section 203(a)(2) of the Federal Power Act (FPA).² It also granted blanket authorization under section 203(a)(2) for Goldman and for certain Goldman subsidiaries to acquire certain securities, subject to specified conditions and limitations, including a quarterly reporting requirement. Goldman asks the Commission to remove the quarterly reporting requirement and grant an additional authorization to acquire the securities of industrial self-generators.

2. For the reasons discussed below, the Commission denies the requested modification of the quarterly reporting requirement. We dismiss the request for blanket authorization to acquire securities of industrial self-generators; Goldman's request is already granted by a blanket authorization in Order No. 669-A.³

¹ *The Goldman Sachs Group, Inc.*, 114 FERC ¶ 61,118 (2006) (Declaratory Order).

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

³ *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).

Background

3. Goldman is an investment banking, securities, and investment management firm providing a range of financial services to corporations, financial institutions, governments, and high-net-worth individuals. Goldman indirectly owns several subsidiaries that engage in the generation and sale of electricity; accordingly, for purposes of section 203(a)(2), Goldman is a holding company. It also owns certain “Nonutility Subsidiaries”⁴ that regularly acquire utility securities in their capacities as broker-dealers and underwriters, as fiduciaries in connection with asset management operations, and for hedging purposes.

4. Section 203(a)(2) requires prior Commission authorization for holding companies to acquire securities with values in excess of \$10 million of transmitting utilities, electric utility companies or holding companies containing such entities. On December 12, 2005, Goldman filed an application under section 203(a)(2) for blanket authorization for Goldman and its Nonutility Subsidiaries to acquire securities, in the ordinary course of business, of any electric utility company, any transmitting utility, or any holding company in any holding company system that includes a transmitting utility or electric utility company, subject to substantially the same limitations, exclusions, and conditions that the Commission approved in the *UBS AG and Bank of America, N.A* decisions (*Bank of America*),⁵ provided that Goldman and the Nonutility Subsidiaries do not obtain control of the operation or management of the issuer.⁶ Of particular relevance here is the quarterly reporting requirement proposed by Goldman. The requirement is that it report for itself and its affiliates, by electric utility company, transmitting utility or holding

⁴ Goldman identified as “Nonutility Subsidiaries” Goldman Sachs & Co., a broker-dealer registered with the Securities and Exchange Commission (SEC), Goldman Sachs Asset Management Co., and various unnamed subsidiaries identified as “proprietary trading and merchant banking subsidiaries.”

⁵ *UBS AG and Bank of America, N.A.*, 101 FERC ¶ 61,312 (2002), *reh’g granted in part and denied in part*, 103 FERC ¶ 61,284 (2003), *reh’g granted*, 105 FERC ¶ 61,078 (2003).

⁶ Goldman requested an exception to the *Bank of America* conditions. Whereas *Bank of America* limited the approval to acquire and own, as principal, up to five percent of each class of voting securities, Goldman requested approval to acquire and own up to ten percent of each class of voting securities (10 percent limit). In addition, Goldman requested that the 10 percent limit not apply to voting securities acquired by Goldman and the Nonutility Subsidiaries in their fiduciary capacities, as dealer/traders, in connection with underwritings, or for hedging, subject to certain conditions. These requests were granted.

company, within 45 days after the close of each calendar quarter, (i) holdings of voting securities acquired under the requested authorization and held as principal, and (ii) total holdings of voting securities irrespective of the capacity in which such securities are held. The reports would be subject to a *de minimis* threshold of 1 percent. The Declaratory Order temporarily granted the requested blanket authority, with the proposed quarterly reporting requirement and other conditions.

Request for Rehearing

5. In its rehearing request, Goldman requests two modifications to the Declaratory Order: (1) that the quarterly reporting requirement be replaced by a requirement that Goldman provide the Commission copies of the relevant filings made with the SEC under the Securities Exchange Act of 1934, in the same manner as contemplated by new § 18 C.F.R. 33.1(c)(4);⁷ and (2) that the Commission grant blanket authorization under § 203(a)(2) to Goldman and the Nonutility Subsidiaries to acquire, without limitation, securities of any company owning generating facilities of 100 megawatts (MW) or less in size that are used fundamentally for its own load or for sales to affiliated end-users (industrial self-generators).

6. Regarding the reporting requirement, Goldman points out that in Paragraph 145 and footnote 107 of Order No. 669, the Commission refers to SEC Schedules 13D and 13G and Form 13F, which are reports of beneficial ownership of equity securities. Order No. 669 indicates that, because the same information already must be filed with the SEC, the reporting requirement under the rule would create a *de minimis* burden on companies subject to section 203(a)(2). Goldman further states that the quarterly reporting requirement imposed under the Declaratory Order is intended to provide the Commission with information on securities transactions that will enable it to monitor potential changes in control over public utilities, which is the ultimate concern underlying section 203. Accordingly, for consistency with Order No. 669, and because the SEC filings will provide the Commission with information needed to monitor potential changes in control, Goldman requests that the Commission modify the Declaratory Order to specify that, in

⁷ Goldman and other parties requested on rehearing of Order No. 669 that the Commission clarify the text of new § 33.1(c)(4) to be consistent with the Commission's expressed intent in Paragraph 145 of Order No. 669. Effective June 15, 2006, § 33.1(c)(4) will state "[a] holding company granted blanket authorizations in paragraph (c)(2) of this section shall provide the Commission copies of any Schedule 13D, Schedule 13G and Form 13F, at the same time and on the same basis, as filed with the Securities and Exchange Commission in connection with any securities purchased, acquired or taken pursuant to this section." Order No. 669-A at P 142.

lieu of the quarterly filing, Goldman must provide the Commission with copies of all SEC filings in connection with an acquisition in the same manner specified under new § 33.1(c)(4).

7. Regarding the requested blanket authorization for acquisition of securities of industrial self-generators, Goldman notes that the Commission granted such authorization in a recent order issued to Morgan Stanley.⁸ Goldman states that industrial self-generators that sell surplus power at wholesale to the local interconnected utility are public utilities under section 203(a)(2). Goldman and the Nonutility Subsidiaries, without separate Commission authorization under section 203(a)(2), are limited to acquiring up to 10 percent of the voting securities of a public utility, whether it is an industrial self-generator or a large, traditional electric utility company with captive customers. Goldman argues that the acquisition of securities of an industrial self-generator does not raise the same concerns as utility combinations or changes in control over traditional utilities, particularly under the proposed 100 MW size limit on generation by the industrial self-generator.

8. Goldman also argues that the grant of blanket authority to acquire securities of industrial self-generators would be consistent with the Commission's rule under the Public Utility Holding Company Act of 2005, which waives the accounting, record-retention, and filing requirements in 18 C.F.R. Part 366 for holding companies that own industrial self-generating facilities.⁹ Goldman states that the Commission notes in that rule that the grant of a waiver to such entities would eliminate what might otherwise be a barrier to the development of additional electric generation.¹⁰

Discussion

Goldman's Request to Modify Reporting Requirements.

9. Goldman asserts that the reporting requirement imposed by the Declaratory Order should be modified to conform to the reporting requirement in Order No. 669 at

⁸ *Morgan Stanley*, 114 FERC ¶ 61,119 (2006).

⁹ *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).

¹⁰ Order No. 667 at P 137.

new § 33.1(c)(4) of the Commission's regulations.¹¹ We deny this request because the blanket authorization granted to Goldman by the Declaratory Order is more extensive than the blanket authorizations available under Order Nos. 669 and 669-A.¹² The expanded authorization, for reasons explained below, carries an expanded reporting requirement.

10. The reporting requirement in the Declaratory Order concerns acquisitions of debt and equity securities of public utility companies by Goldman and its Nonutility Subsidiaries in several capacities. Goldman and its Nonutility Subsidiaries were conditionally granted blanket authorization for a period of one year for acquisitions when acting in the following capacities: on behalf of customers as fiduciaries; in the normal course of business as underwriters or dealers;¹³ in connection with trading activities as principals for their own account; in connection with lending activities; and, as passive lease financiers. The authorizations granted in the Declaratory Order were more extensive than those granted under Order Nos. 669 and 669-A to entities, such as Goldman, that are not regulated as banks. For example, the Declaratory Order granted authorization for Goldman to acquire as a fiduciary, an authorization granted only to banks under Order No. 669-A. Goldman was also granted authorization for acquisitions in connection with lending activities and as a passive financier. Neither of these authorizations are granted to non-banks under Order Nos. 669 and 669-A. Finally,

¹¹ The reporting requirement under the new regulations that is now requested by Goldman pertains to blanket authorization granted under new § 33.1(c)(2) to a holding company in a holding company system that includes a transmitting utility or an electric utility. The authorizations are for certain acquisitions of voting or non-voting securities that are limited by either quantity acquired or by whether control is conveyed, as well as for any securities of a subsidiary within the holding company. The Commission will receive these reports within 10 days of the beneficial owner's acquisition of more than 5 percent of the class of securities, rather than on a quarterly basis, as with the reporting requirements under the Declaratory Order.

¹² Several of the authorizations granted Goldman in the Declaratory Order are available under Order No. 669-A only to entities regulated as banks. Goldman did not assert in its Application that it was subject to that regulatory scheme, although it requested the same authorizations and at greater levels of acquisition authority than granted in *Bank of America*.

¹³ The Commission granted, in Order No. 669-A, conditioned blanket authorization to acquire the securities of a public utility or of a holding company that includes a public utility for purposes of conducting underwriting activities or for purposes of conducting hedging activities. See new § 33.1(c)(10).

Goldman was granted acquisition authorization as a dealer/trader in the Declaratory Order, an authorization not granted to any entity under Order Nos. 669 and 669-A.

11. In its original request for blanket authorization in this case, Goldman relied on the Commission's decisions in *Bank of America*. The two entities that received acquisition authorizations in those decisions were subject to an extensive regulatory regime by other Federal agencies, as discussed in those orders. Goldman is not subject to that same regulatory oversight, and neither in its Application nor its request for rehearing did it even assert that it was subject to any similar oversight. In *Bank of America*, the Commission conditioned the acquisition authority with certain quarterly reporting requirements. Goldman requested similar acquisition authority, although it requested a 10 percent, or unlimited in certain circumstances, limitation on the quantity of the securities authorized for acquisition instead of the 5 percent limitation that the Commission granted in *Bank of America*. Goldman proposed to make the same quarterly reports of acquisitions that the Commission has required of Bank of America and UBS AG since June, 2003.

12. Order Nos. 669 and 669-A grant a significant array of blanket acquisition authorizations. Some of these authorizations are general grants, some are restricted to entities regulated as banks and others are restricted to certain capacities. Goldman was granted, for a period of one year, acquisition authority that goes beyond these blanket authorizations. Further, the two banks upon whose orders Goldman relied in making its application for acquisition authority have made the same quarterly reports required of Goldman in the Declaratory Order for over two years. These reports are not transaction-specific, and Goldman had the opportunity to review those reports, filed with the Commission on a public basis, before proposing the same reporting obligation in its application. Finally, as noted in the Declaratory Order, the Commission is in the early stages of implementing EAct 2005. An important part of the Commission's rationale in granting Goldman its requested authorization in the underlying order was maintaining the status quo of Goldman's activities that it claims were permitted by the SEC under PUHCA 1935. Goldman has not provided a sufficient basis for revising the quarterly reporting requirement in the Declaratory Order, and we believe that the quarterly reports, in light of the early stage of implementation and the more extensive acquisition authority granted Goldman, are appropriate. Therefore, we deny rehearing on this issue.

Goldman's Request to Acquire Securities of Industrial Self-Generators.

13. Goldman's request is dismissed. The Commission's regulations now provide the relief that Goldman requests. The Commission notes that Order No. 669-A at new section 33.1(c)(1)(iii) grants blanket authorization for acquisition of the securities of an electric utility company that owns generating facilities that total 100 MW or less and that are fundamentally used for its own individual load or for sales to affiliated end-users.

The Commission orders:

Goldman's requests for rehearing are hereby denied or dismissed as discussed in the body of the order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.