

128 FERC ¶ 61,217  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

Montana Alberta Tie Ltd.  
MATL LLP

Docket Nos. ES09-46-000

ORDER AUTHORIZING ISSUANCE OF SECURITIES

(Issued September 1, 2009)

1. Montana Alberta Tie Ltd. (MATL) and MATL LLP (collectively, Applicants) filed an application seeking Federal Power Act (FPA) section 204<sup>1</sup> authorization to issue debt securities in an aggregate amount not to exceed \$161 million, and to assume obligations and liabilities pursuant to a financing arrangement with the Western Area Power Administration (Western), entered into under the American Reinvestment and Recovery Act of 2009 (Recovery Act).<sup>2</sup> Applicants seek this authorization to obtain financing for the development and construction of a 214-mile, 230 kV merchant transmission line from Lethbridge, Alberta, Canada to Great Falls, Montana (Transmission Line or Project). This order grants Applicants' request for authorization, subject to the conditions discussed below.

**I. Background**

2. MATL is a merchant transmission company, incorporated in Canada, and conducts business in the Province of Alberta and in the state of Montana. MATL is currently owned 100 percent by Tonbridge Power Inc. (Tonbridge), a Canadian corporation, and certain wholly-owned subsidiaries of Tonbridge. MATL LLP is a Montana limited partnership that is owned 99.5 percent by MATL, the limited partner, and 0.5 percent by Montana Alberta Tie U.S. Holdings Inc., a direct wholly-owned subsidiary of Tonbridge, the general partner.

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<sup>1</sup> 16 U.S.C. § 824c (2006).

<sup>2</sup> Recovery Act, Pub. L. No. 111-5, 123 Stat. 115 (2009).

3. MATL will develop and operate the Transmission Line pursuant to MATL LLP's Open Access Transmission Tariff (OATT)<sup>3</sup> and co-own it with its subsidiary, MATL LLP. MATL will own the Canadian portion of the Transmission Line, and MATL LLP will own the U.S. portion.

4. Applicants seek authorization to issue debt securities in the form of notes or other forms of debt instruments in an aggregate amount not to exceed \$161 million, and to assume obligations and liabilities through a secured senior debt financing from Western, consisting of a construction loan whereby Western will advance construction draws to Applicants to pay for the construction cost of the Project. Applicants state that upon completion of the construction of the Project and subject to certain conditions, the construction loan will mature and convert into a 30-year term loan. Applicants state that they will execute promissory notes, a security agreement and other agreements to evidence the indebtedness to Western. Applicants explain that draws, in accordance with definitive agreements, will begin immediately after the issuance to Applicants of a construction notice to proceed for the second phase of engineering, procurement and construction plan with the MDU Contractor Services Group of Helena, Montana. Applicants also state that the security interest will, among other things, give Western the right to assume control and operate the Project in the event of an uncured default by Applicants.<sup>4</sup> Applicants have filed, as Attachment 1 to the application, a copy of the term sheet (Term Sheet) entered into by and between Applicants and Western that sets forth the material terms of the proposed financing arrangement.

5. Applicants request waiver of the competitive bidding and negotiated placement requirements of sections 34.2(a)(1) and 34.2(a)(2) of the Commission's regulations.<sup>5</sup> Applicants state that MATL is a merchant, entrepreneurial transmission project developer

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<sup>3</sup> Applicants state that MATL filed the original section 205 application with the Commission for permission to sell transmission rights on the Project at market-based rates. Subsequently, MATL established MATL LLP as a U.S. entity to own and operate the U.S. portion of the Transmission Line and to provide transmission service under its OATT. In its orders granting permission to sell transmission rights at negotiated rates and accepting MATL LLP's OATT, the Commission treated both MATL and MATL LLP as public utilities. *Montana Alberta Tie Ltd.*, 116 FERC ¶ 61,071 (2006); *Montana Alberta Tie Ltd.*, 119 FERC ¶ 61,216 (2007). Thus, Applicants state that they are both submitting this application for Commission approval under section 204. Application at n.6.

<sup>4</sup> Applicants note that any such assumption of control would be subject to the prior receipt of any necessary regulatory approvals from the Commission under sections 203 and 205 of the FPA, as applicable. Application at n.10.

<sup>5</sup> 18 C.F.R. §§ 34.2(a)(1), 34.2(a)(2) (2009).

and is developing the Transmission Line to provide merchant transmission service to its customers and those of MATL LLP who will pay negotiated rates for transmission service. Applicants note that the purpose of the Western financing under the Recovery Act is to stimulate construction activity on an accelerated time schedule, making competitive bidding for the financing impracticable. Applicants state that they entered into the financing arrangements with Western after having been unsuccessful in their efforts over many months to obtain private financing on commercially acceptable terms and conditions due to adverse market conditions.

6. Applicants also request waiver of the requirement to provide financial data under sections 34.4(c)-(d) of the Commission's regulations and a limited waiver of section 34.4(e)<sup>6</sup> concerning the calculation of interest coverage to allow the Applicants to provide an estimate of interest coverage based on forecast revenues. Applicants state that they are development entities that have not yet constructed any jurisdictional facilities or commenced any service. Therefore, Applicants state they cannot provide the historical or actual financial data required for Exhibits C, D, and E. However, Applicants have provided estimated interest coverage calculations in their Exhibit E using projected revenues associated with the Project from the sale of transmission rights and other services. Applicants state that these estimates are based upon the construction of the Transmission Line, commencement of operations and other assumptions in Exhibit E. Applicants also provided, as part of Exhibit E, projections of cash flow available to service the Western debt. Applicants have requested confidential treatment under section 388.112 of the Commission's regulations for the interest coverage and debt service coverage projections filed as Exhibit E, as well as for the Term Sheet.<sup>7</sup>

7. Applicants request that the Commission grant the requested authorization and any necessary waivers by August 31, 2009, or as soon thereafter as possible. Applicants state that they face critical time restraints to close on their financing because their permits will expire at year-end if they have not begun construction.

## **II. Notices of Filing, Interventions, and Protests**

8. Notice of the original application was published in the *Federal Register*, 74 FR 42067 (2009), with interventions and protests due on or before August 25, 2009.

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<sup>6</sup> *Id.* §§ 34.4(c)-(d), (e).

<sup>7</sup> Under the Commission's regulation section 388.112(c)(i), the documents for which confidential treatment is sought are placed in a nonpublic file while the request for confidential treatment is pending. However, by placing the documents in a nonpublic file, the Commission is not making a determination on any claim of confidential status and retains the right to make such determination.

NaturEner USA, LLC (NaturEner) filed a timely motion to intervene and protest.<sup>8</sup> Western also filed a motion to intervene and comment, in which they provided clarifications.<sup>9</sup> Applicants filed an answer to NaturEner's protest on August 26, 2009.

**A. Protest**

9. NaturEner raises certain issues regarding the sufficiency of the financial statements and debt service coverage calculations contained in the application.<sup>10</sup> NaturEner argues that the application is deficient in the following respects: (1) revenues received by MATL pursuant to firm transmission service rights agreements are denominated and payable in Canadian currency whereas Applicants' indebtedness is denominated in U.S. dollars; (2) Applicants' revenue projections include recovery of certain non-recurring network upgrade credits while omitting network upgrade credits that Applicants will owe NaturEner in accordance with the terms of Applicants' Large Generator Interconnection Agreement (LGIA); and (3) Applicants project revenues from resales of northbound capacity, failing to acknowledge that NaturEner may assign its unused firm transmission capacity to third parties in bilateral transactions that do not utilize Applicants' OASIS for resales.

10. NaturEner also requests that the Commission condition approval of a revised application upon a demonstration that in the event Applicants default under the Western financing, NaturEner will be assured of continued service from whomever controls the Transmission Line pursuant to the terms of existing firm transmission service rights agreements.

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<sup>8</sup> On August 27, 2009, NaturEner filed a motion to partially withdraw its protest. NaturEner stated that, after discussions with Applicants, it withdraws its protest except for portions of Part II and Part III. Accordingly, only those portions of the protest will be summarized and addressed in this order.

<sup>9</sup> Western made certain clarifications regarding statements made by Applicants in the application. Applicants did not object to these clarifications and this order is consistent with those clarifications.

<sup>10</sup> Although these materials were filed with the Commission subject to Applicants' request for confidential treatment, NaturEner states that it was provided a copy of the non-public version of the application (which includes the confidential exhibits) pursuant to the terms of a protective order between NaturEner and Applicants.

**B. Answer**

11. Applicants concede that the projected interest coverage ratio in Exhibit E is less than the ideal 2:1 or greater coverage ratio that the Commission prefers.<sup>11</sup> However, Applicants maintain that the purported deficiencies in the application raised by NaturEner are not material and that the precise terms of Western's future ownership interest in the Project are irrelevant to the Commission's section 204 analysis. Applicants argue that the treatment of Canadian dollar payments on a par with U.S. dollars is a simplifying assumption given that the current value of the Canadian dollar is only slightly less than the U.S. dollar. Applicants further contend that this assumption is reasonable under present currency exchange rates and not material to the debt coverage calculation. With respect to NaturEner's arguments regarding network credits for upgrades, Applicants state that this point should be addressed in the LGIA that remains to be finalized between them. Additionally, Applicants maintain that NaturEner's arguments about resale of transmission rights is speculative and does not undermine the validity of Applicants' assumption that the commission on resales reflected only a small portion of projected project revenues.

**III. Discussion****A. Procedural Matters**

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>12</sup> the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,<sup>13</sup> prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' answer because it has provided information that assisted us in our decision-making process.

**B. Authorization**

14. FPA section 204(a) provides that requests for authority to issue securities or to assume liabilities shall be granted if the Commission finds that the issuance:

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<sup>11</sup> Applicants' Answer at 6.

<sup>12</sup> 18 C.F.R. § 385.214.

<sup>13</sup> *Id.* § 385.213(a)(2).

(a) is for some lawful object, within the corporate purposes of the applicant, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes.<sup>14</sup>

15. We conclude that Applicants' issuance meets the standards of FPA section 204. Applicants' proposed issuance of securities is for a lawful object within Applicants' corporate purposes and is consistent with Applicants' performance as a public utility. Applicants state that the purpose of the issuance is to fund the Project, which is a first-of-its kind undertaking to build a transmission line across the border between the United States and Canada to permit the economic and efficient allocation of wind energy to the benefit of both countries. Additionally, Applicants state that the Project promotes the goals of the Recovery Act to stimulate economic recovery by financing a construction project that has all the required permits in place and, except for closing on its construction financing with Western, is set to move forward by year-end. Applicants also state that they have no captive customers who depend on existing facilities to obtain service. Instead, Applicants state that MATL has marketed and sold transmission rights on the Transmission Line at negotiated rates to transmission customers who have voluntarily agreed to take service and pay negotiated rates.

16. The Commission generally requires that section 204 applicants demonstrate, on a pro forma basis in accordance with instructions to Exhibit E, that net income will equal or exceed twice total interest expense.<sup>15</sup> This is a screen test used primarily to provide the Commission with some level of comfort that the financing being authorized will not impair an applicant's ability to perform public utility service. Here, Applicants' Exhibit E computation of interest coverage shows an interest coverage of less than two times. Nevertheless, the Commission has stated that whether or not an applicant meets this interest coverage screen does not by itself determine whether the Commission will authorize or deny the application,<sup>16</sup> and the Commission has approved section 204 applications that have not met this threshold.<sup>17</sup>

17. Applicants are not a traditional franchised public utility but are a start-up single-project merchant transmission company that does not, at this point, have any operating

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<sup>14</sup> 16 U.S.C. § 824c(a) (2006).

<sup>15</sup> *Startrans IO, L.L.C.*, 122 FERC ¶ 61,253, at P 18 (2008).

<sup>16</sup> *Id.* n.7.

<sup>17</sup> See, e.g., *Westar Energy, Inc.*, 102 FERC ¶ 61,186, at P 15, *order on reh'g*, 104 FERC ¶ 61,018 (2003) (*Westar*); *Aquila, Inc.*, 107 FERC ¶ 61,044, at P 15 (2004).

history. They are requesting authorization to issue debt securities in order to fund construction of the Project, and without the requested authorization, Applicants assert that the Project may not be built. The Commission has previously noted that a proposed “facility cannot be brought into being and operated without adequate financing, and such financing is an established and proven method for financing power plant construction and operations.”<sup>18</sup> Moreover, Applicants have filed cash flow projections, which will also be used to support Western’s certification to the Department of Treasury under the Recovery Act,<sup>19</sup> showing that cash flow will be sufficient to service the loan from Western (that is, scheduled payments of principal and interest). Applicants also state that the financing documents provide for Western to have a first priority security interest in the Project, which will allow Western to assume ownership and operate the Project if Applicants default on the loan. For the foregoing reasons, the Commission finds that the proposed issuance of securities, as conditioned below, is necessary and appropriate, consistent with Applicants’ performance of service as public utilities, and will not impair their ability to perform that service.<sup>20</sup> This authorization is limited to the financing arrangements described in the application.

18. The Commission will authorize Applicants to issue debt securities in an aggregate amount not to exceed \$161 million as requested, subject to the following conditions. First, the securities are subject to the restrictions the Commission imposed on secured and unsecured debt in *Westar*.<sup>21</sup> In *Westar*, the Commission announced four restrictions on all future public utility issuances of secured and unsecured debt. First, public utilities seeking authorization to issue debt backed by a utility asset must use the proceeds of the debt for utility purposes. Second, if any utility assets that secure debt issuances are divested or “spun off,” the debt must follow the asset and also be divested or spun off. Third, if any of the proceeds from unsecured debt are used for non-utility purposes, the debt must follow the non-utility assets. Specifically, if the non-utility assets are divested

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<sup>18</sup> *Robbins Resource Recovery Partners*, 68 FERC ¶ 61,359, at 62,455 (1994) (*Robbins*).

<sup>19</sup> Applicants state that Western is under a statutory obligation to certify to the Secretary of the Treasury, before it is eligible to receive treasury funds, that “it is reasonable to expect that the proceeds of the project shall be adequate to make repayment of the loan.” Application at 15. Applicants also state that Western itself has confirmed the expectation that Applicants will be able to repay the loan through an audit of Applicants’ pro forma financial data by Deloitte & Touche. Applicants state that they provided Deloitte & Touche with the same information submitted as part of Exhibit E to the application. Applicants’ Answer at 6.

<sup>20</sup> *Robbins*, 68 FERC ¶ 61,359 at 62,455.

<sup>21</sup> *Westar*, 102 FERC ¶ 61,186.

or spun off, then a proportionate share of the debt must follow the divested or spun-off non-utility asset. Finally, if utility assets financed by unsecured debt are divested or spun off to another entity, then a proportionate share of the debt must also be divested or spun-off.

19. Second, Applicants must file a Report of Securities Issued within 30 days after the sale or placement of the proposed debt securities, as stated in the Commission's regulations.<sup>22</sup> Third, Applicants must notify the Commission, no later than 5 business days prior to closing on the loan agreement between Applicants and Western, if the material financial terms set forth in the financing documents to be executed by Western and Applicants differ from the terms reflected in the Term Sheet and/or the assumptions made in preparing the interest coverage and cash flow projections filed as Exhibit E.

20. We agree with Applicants that the deficiencies in the application cited by NaturEner are not material to the Commission's determination under section 204 regarding impairment of Applicants' ability to perform as a public utility. Furthermore, as the Commission has previously stated, "a section 204 proceeding is not a vehicle to inquire into every issue that an objecting party may urge upon the Commission – including those that bear little, if any, relationship to the securities issuances or assumptions of obligations or liabilities at issue that are more properly pursued elsewhere, or that are not ripe for consideration."<sup>23</sup> Therefore, we find that these contractual issues are beyond the scope of this proceeding and will not address them.

The Commission orders:

(A) Applicants are hereby authorized to issue debt securities in the form of notes or other forms of debt instruments in an aggregate amount not to exceed \$161 million, and to assume obligations and liabilities through a secured senior debt financing from Western. Waivers of the competitive bidding and negotiated placement requirements under 18 C.F.R. § 34.2(a), and the requirements for the Balance Sheet, Income Statement and Statement of Cash Flows under 18 C.F.R. § 34.4 are hereby granted.

(B) This authorization is effective as of the date of this order and terminates two years thereafter.

(C) This authorization is subject to the conditions specified in the body of this order and the restrictions in the *Westar* order.

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<sup>22</sup> 18 C.F.R. §§ 34.10, 131.43.

<sup>23</sup> *Robbins*, 68 FERC ¶ 61,359 at 62,455.

(D) Applicants must file a Report of Securities Issued, under 18 C.F.R. §§ 34.10 and 131.43, no later than 30 days after the sale or placement of the proposed debt securities.

(E) Applicants must notify the Commission, within 5 business days prior to closing on the loan agreement between Applicants and Western, if the material financial terms to be set forth in the final financing arrangements with Western differ from the terms reflected in the Term Sheet and/or the assumptions made in preparing the interest coverage and cash flow projections filed as Exhibit E.

(F) The authorization granted in Ordering Paragraph (A) above is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determination of cost or any other matter whatsoever now pending or which may come before this Commission.

(G) Nothing in this order shall be construed to imply any guarantee or obligation on the part of the United States with respect to any security to which this order relates.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.