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Electric Authority of Georgia, and
the City of Dalton, Georgia*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re	:	Chapter 11
	:	
WESTINGHOUSE ELECTRIC	:	Case No. 17-10751 (MEW)
COMPANY LLC, et al.,	:	(Jointly Administered)
	:	
Debtors.¹	:	Re: Docket No. 19
	:	
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¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if any, are: Westinghouse Electric Company LLC (0933), CE Nuclear Power International, Inc. (8833), Fauske and Associates LLC (8538), Field Services, LLC (2550), Nuclear Technology Solutions LLC (1921), Nuclear Holding Co., Inc. (7944), PaR Nuclear, Inc. (6586), PCI Energy Services LLC (9100), Shaw Global Services, LLC (0436), Shaw Nuclear Services, Inc. (6250), Stone & Webster Asia Inc. (1348), Stone & Webster Construction Inc. (1673), Stone & Webster International Inc. (1586), Stone & Webster Services LLC (5448), Toshiba Nuclear Energy Holdings (UK) Limited (2348), TSB Nuclear Energy Services Inc. (2348), WEC Carolina Energy Solutions, Inc. (8735), WEC Carolina Energy Solutions, LLC (2002), WEC Engineering Services Inc. (6759), WEC Equipment & Machining Solutions, LLC (3135), WEC Specialty LLC (N/A), WEC Welding and Machining, LLC (8771), WECTEC Contractors Inc. (4168), WECTEC Global Project Services Inc. (8572), WECTEC LLC (6222), WECTEC Staffing Services LLC (4135), Westinghouse Energy Systems LLC (0328), Westinghouse Industry Products International Company LLC (3909), Westinghouse International Technology LLC (N/A), and Westinghouse Technology Licensing Company LLC (5961). The Debtors' principal offices are located at 1000 Westinghouse Drive, Cranberry Township, Pennsylvania 16066.



**OBJECTION OF THE VOGTLE PLANT OWNERS
TO THE DEBTORS' DIP FINANCING MOTION**

Georgia Power Company ("GPC"), Oglethorpe Power Corporation, Municipal Electric Authority of Georgia and the City of Dalton, Georgia, as joint owners (collectively, the "Owners") of the Vogtle Electric Generating Plant (the "Vogtle Plant") hereby file this objection to final approval of the Motion of Debtors Pursuant to 11 U.S.C. §§ 362, 363, 364, 507 and 105 and Fed. R. Bankr. P. 2002, 4001, 6003, 6004 and 9014 for Interim and Final Orders (I) Authorizing the Debtors to Obtain Senior Secured, Superpriority, Postpetition Financing, (II) Granting Liens and Superpriority Claims, and (III) Scheduling a Final Hearing [Docket No. 19] (the "DIP Financing Motion").² The Owners object to the proposed grant to the DIP Lenders of liens in the intellectual property needed to complete construction of two new nuclear-fueled electric generating units (the "Project") at the Vogtle Plant. In support of this objection, the Owners respectfully represent as follows:

Relevant Background

The Project

1. The Project, one of the largest ongoing construction projects in the United States, involves the construction of a commercial nuclear power plant, which together with the V.C. Summer nuclear power plant also currently under construction, represent the first commercial nuclear power plants built in this country in the past thirty years.

2. In April 2008, GPC, for itself and as agent for the other Owners, entered into an Engineering, Procurement and Construction Agreement, dated April 8, 2008 (as amended, the "EPC Agreement") with Debtors Westinghouse Electric Company LLC and

² Capitalized terms not otherwise defined herein have meaning given to them in the DIP Financing Motion, or Interim DIP Order (each as defined herein).

WECTEC Global Project Services Inc. (together, "WEC") pursuant to which WEC agreed to design, engineer, procure, construct and test the two new electric generating units (Units 3 and 4) comprising the Project at the Vogtle Plant.

3. The design for the Project is based upon WEC's proprietary AP1000 nuclear power plant design ("AP" refers to WEC's "advanced passive" design), and the Project is one of the first of a new generation of commercial nuclear plants to be built in the United States. Project is also the first to employ a passive reactor cooling system that requires no electrical power to cool the reactor for several days. If completed, new Units 3 and 4 would together generate enough electricity to power 400,000 homes and businesses in Georgia.

4. The current guaranteed completion date for Unit 3 is June 2019 and for Unit 4 is June 2020. As of the date hereof, WEC's engineering and design for the Project is approximately 95% complete, with certain engineering deliverables remaining outstanding. Procurement of plant equipment and materials for the Project is approximately 85% complete, and construction work is approximately 40% complete. In total, the Project is considered to be approximately 60% complete.

5. Certain intellectual property owned by WEC is required to complete construction of the Project, including intellectual property reasonably necessary for the design, engineering, permitting, fabrication, procurement, assembly, installation, construction, testing, start-up, completion, commissioning, ownership, operation, maintenance, certification and/or regulatory approval of the Facility (as defined in the EPC Agreement) (the "Intellectual Property").³

³ The Intellectual Property includes patents, trademarks, copyrights, trade secrets, inventions, know-how, other intellectual property, all associated property, and other proprietary property, related information, documentation, materials, data, technology, software and other property, including proprietary computer programs expressed in a source code language consisting of a full source language statement of the

The Interim Assessment Agreement

6. Following WEC's decision to discontinue construction of the Project, prior to the commencement of these cases the Owners engaged in extensive negotiations with WEC in an effort to reach agreement on the terms of an interim arrangement pursuant to which the Owners would maintain the status quo (by providing funding for subcontractors, vendors and WEC to continue construction of the Project) for a limited time to permit the Owners an opportunity to make a thorough and reasoned determination regarding the future course of the Project. Those negotiations were ultimately successful and, on the Petition Date, the Owners and WEC entered into an Interim Assessment Agreement, which was approved by this Court after the conclusion of the first day hearing [Docket No. 68] (the "Interim Assessment Agreement"). Since the approval of the Interim Assessment Agreement, the Owners have been funding the costs of ongoing construction pursuant to the terms of the agreement, and WEC has been providing services in connection with the continuing construction as well as information

(continued...)

programs the software is comprised of and all related compiler command files, build scripts, complete maintenance documentation, application programming interfaces, graphical user interfaces, schematic diagrams and annotations which comprise the pre-coding detail design specifications, and all other material necessary to allow a reasonably skilled programmer to maintain and enhance the software (including, without limitation, the compiling and linking of relevant source code into final executable object code) without the assistance of a contractor; all plans and designs, software, proprietary computer source code, information management databases (e.g., open item database, PCC outstanding issues list, DCP database, GLN database, ITAAC database), plans, designs, all calculations and models (e.g., seismic models, structural models, stress analyses, hazards analyses – flooding, PRHA, probabilistic risk assessment, etc.), design basis information, computer source code for CYS monitoring system and all CYS design documents, cyber security databases (e.g., CDA identification database, LRM assessment database, cyber sharepoint site, etc.) and all cyber security supporting documentation, simulator designs, BEACON Direct Margin Monitor System hardware and software and Target Computer System, and all other information, documentation, materials, data, technology, software and other property necessary to allow a reasonably skilled person to perform and complete any of the Services (as defined in the EPC Agreement) or the design, engineering, permitting, fabrication, procurement, assembly, installation, construction, testing, start-up, completion, commissioning, ownership, operation, maintenance, certification and/or regulatory approval of the Facility and (ii) Software, Configuration Data and Software Documentation described or licensed to the Owners in the Software License made as of April 8, 2008 and executed by GPC, as an owner and as agent for the other Owners.

requested by the Owners for purposes of evaluating potential options regarding the ultimate disposition of the Project.

7. The Interim Assessment Agreement expires on April 28, 2017 but can be extended by agreement of the parties. As of the date hereof, the Owners have made no decision regarding a possible extension of the Interim Assessment Agreement.

Interim DIP Order

8. On March 31, 2017, the Court entered the Interim Order (I) Authorizing the Debtors to Obtain Senior Secured, Superpriority, Postpetition Financing, (II) Granting Liens and Superpriority Claims, and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Code Sections 105, 362, 363, 364, and 507, Bankruptcy Rules 2002, 4001, 6003, 6004 and 9014 and Local Rule 4001-2 [Docket No. 86] (the "Interim Order").

9. Pursuant to the Interim Order, the DIP Lenders were granted liens on Collateral, which is defined to include all owned or hereafter acquired assets and property of the Loan Parties, except for

- (a) any assets and property (i) of the Loan Parties that are located at (x) the "V.C. Summer Project" site, being the site of the AP1000 nuclear plant owned by South Carolina Electric & Gas Company and certain others, and the related off-site storage facilities located at Two Blythewood and 375 Metropolitan Drive, West Columbia, South Carolina, and (y) the "Vogle Project" site, being the AP1000 nuclear plant owned by Georgia Power Company and certain others and the related off-site storage facility located at 321 Mills Road, Waynesboro, Georgia or (ii) owned by third-parties that are in the possession of the Loan Parties or (b) the contracts related to the "V.C. Summer Project" and the "Vogle Project".

See Interim Order, Exhibit 1, p. 7. The Collateral appears to include all Intellectual Property not located at the Vogle Project site or the off-site storage facility identified in the language set forth above.

10. Under the terms of the DIP Facility, no proceeds of the DIP Loans can be used to fund ongoing construction of the Project. Rather, pursuant to the 13-week cash flow that accompanied the DIP Financing Motion, proceeds are available to fund only certain "wind-down" expenses associated with the Project in the event construction of the Project ceases. See DIP Financing Motion, Exhibit 2.

Objection to the DIP Financing Motion

11. The Owners object to the DIP Financing Motion to the extent it proposes to grant the DIP Lenders liens on the Intellectual Property; i.e., the intellectual property needed to complete construction of the Project. A court must find that proposed postpetition financing is fair, reasonable and in the best interests of the debtor and its creditors. See, e.g., In re Los Angeles Dodgers, LLC, 457 B.R. 308, 312 (Bankr. D. Del. 2011) (stating that postpetition financing must be fair and reasonable and in the best interest of the debtor's estate); In re DB Capital Holdings, LLC, 454 B.R. 804, 822 (Bankr. D. Col. 2011) (same); In re Barbara K. Enterprises, Inc., 2008 WL 2439649, at *8 (Bankr. S.D.N.Y. June 16, 2008) (same); In re Mid-State Raceway, Inc., 323 B.R. 40, 60 (Bankr. N.D.N.Y. 2005) (same); In re Phase-I Molecular Toxicology Inc., 285 B.R. 494, 495 (Bankr. D. Del. 2002) (same); In re St. Mary Hosp., 86 B.R. 393, 401 (Bankr. E.D. Penn. 1988) (same); In re Crouse Grp., Inc., 71 B.R. 544, 549 (Bankr. E.D. Penn. 1987) (same). In making this determination, courts consider the particular facts and circumstances of the bankruptcy case and the impact of the proposed financing on the debtor and their creditors. See, e.g., In re Tenney Village Co., Inc., 104 B.R. 562, 568-69 (Bankr. D.N.H. 1989) (examining the "over-all effect" of the proposed financing and finding that it was improper because it provided unnecessary and inappropriate advantages to the lender as against other creditors); see also In re Barbara K. Enterprises, Inc., 2008 WL 2439649, at *8 (stating that

courts must consider whether proposed postpetition financing "would tilt the conduct of the bankruptcy case").

12. The primary purpose of the Interim Assessment Agreement is to fully preserve the opportunity for the Owners to complete the Project if they determine that is the best course of action given the circumstances. Consistent with that purpose, the Owners must continue to have access to the Intellectual Property, both to complete construction and safely operate the nuclear plant. Assuring that access is beneficial to these estates because it will minimize the risk of a shutdown of the Project, thereby minimizing the potential incurrence of wind down costs by the Debtors. If, however, the DIP Lenders are granted liens on the Intellectual Property, the possibility would exist that the DIP Lenders would later foreclose on the Intellectual Property, which could seriously disrupt or even potentially halt construction of the Project.

13. In contrast to this potential harm to the Owners and to the Debtors' bankruptcy estates, expanding the collateral carve-out to include the Intellectual Property will not harm the DIP Lenders. As noted above, none of the proceeds of the DIP Loans can be used to fund construction of the Project. Indeed, the Owners themselves are obligated to fund, and have been funding, the costs of construction, including making payments to WEC in the amount of \$5.4 million per week to cover WEC's overhead allocable to the Project. More importantly, the Debtors are already obligated to grant the DIP Lenders superpriority administrative claims in respect of their obligations under the DIP Facility, and those claims will entitle the DIP Lenders to receive the proceeds from any disposition of the Intellectual Property if necessary to repay the loan. Therefore, the DIP Lenders will be protected by their superpriority administrative claim, regardless of whether the Intellectual Property is sold separately or as part of a going concern

sale. In short, although an expansion of the carve-out as requested by the Owners will eliminate the potential risk of disruption of the Project and its attendant costs to the Debtors' estates, it will not in any respect affect the value of assets available to repay the DIP Loans.

14. In sum, it is simply not reasonable or equitable for the DIP Lenders to require liens on assets critical to the completion of the Project where (a) they are providing no funding for the construction of the Project, (b) the Owners instead are providing all the required funding, including to cover WEC's overhead, for the ongoing construction and (c) the DIP Lenders will nonetheless retain an economic entitlement to the value of the Intellectual Property.

15. However, to further ensure that the value of the Intellectual Property is available to the DIP Lenders, the Owners would not object if the final order on the DIP Financing Motion provides the DIP Lenders with a lien on any proceeds of the Intellectual Property. Alternatively, the Owners would not object to WEC granting a lien on the Intellectual Property but only if the DIP Lenders agree to marshalling as follows: The DIP Lenders would be required to look first to all Collateral other than the Intellectual Property to satisfy the Debtors' obligations under the DIP Facility and, only if necessary to repay the loan, could then look to the Intellectual Property.

Conclusion

WHEREFORE, for the foregoing reasons, the Owners respectfully request that the Court (i) deny the DIP Financing Motion to the extent it seeks to grant the DIP Lenders liens on the Intellectual Property and (ii) grant the Owners such other and further relief as the Court may deem proper.

Dated: April 26, 2017
(New York, New York)

Respectfully submitted,

/s/ Anna Kordas
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