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Westinghouse, a Truly International Chapter 11: From Atomic Start to Smashing Success in Only 363 Days

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Westinghouse: A Truly International Chapter 11

From Atomic Start to Smashing Success in Only 363 Days

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1 Background

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Westinghouse – Chapter 11 Filing

Westinghouse Electric Company, LLC (“WEC”) and its affiliates (together, “Westinghouse”) operate a global business providing design and engineering services, decommissioning services, and other operations to the construction of new nuclear power plants and the maintenance of the existing operating fleet of nuclear power plants

On December 27, 2016, Westinghouse announced a \$6 billion impairment, arising from escalating costs associated with the construction of 4 new nuclear power plants (the “Projects”) in the United States

- At the time, Westinghouse was majority-owned by Toshiba Corporation (“Toshiba”)
- As a consequence of the announcement, neither Westinghouse nor Toshiba were able to finalize audited financial statements for Q3 2016 (2016 fiscal year end March 31, 2017)

Toshiba was still struggling with the aftermath of its own accounting issues, which had been uncovered in 2015, and was unable to access capital markets or its lines of credit

Westinghouse informed the Project Owners that work on the Projects would cease on March 31, 2017, and began preparations to file for bankruptcy in the United States

- A shutdown would have affected 5,000 local jobs and triggered immediate liability for Toshiba under certain parent guarantees that Toshiba had provided to the owners of the Projects, which included public and private entities in the states of South Carolina and Georgia (together, the “Project Owners”)

Westinghouse and certain of its affiliates (together, the “Debtors”) filed for protection under chapter 11 of the United States Code on March 29, 2017

- Westinghouse sought immediate approval of interim agreements with the Project Owners in order to continue construction on the Projects for an interim period to allow the parties to negotiate either a transition or an orderly shutdown of construction

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Westinghouse – Turnaround and Exit

Between March 2017 and March 2018, Westinghouse and Toshiba engaged in hard-fought negotiations with various groups to achieve remarkable results:

- Orderly resolution of the Projects, including transition of the construction of the Georgia project to the Georgia Project Owners, and an orderly winddown of the South Carolina project
 - Settlement and payment in full of Toshiba's parent guarantee liability to all Project Owners, in a face amount of approximately \$6B
 - Resolution of accounting issues and timely issuance of FY2017 audited financials for both Westinghouse and Toshiba
 - Stabilization of Westinghouse's international business operations
 - Negotiation, confirmation, and consummation of fully consensual plan of reorganization which provided for:
 - Transfer of Westinghouse to new owner Brookfield Business Partners ("Brookfield"), for a purchase price of \$4.5B
 - Full payment of general unsecured creditors (other than The Baupost Group ("Baupost")), subject to a cap of \$1.15B, and transfer of all residual proceeds to Baupost
 - Releases for key supporting parties, including Toshiba
 - Transfer of Toshiba's claims against Westinghouse to Baupost in exchange for \$2.16B in cash
- Westinghouse's plan of reorganization was confirmed on March 27, 2018, less than one year after commencement of the chapter 11 cases
- Westinghouse exited from bankruptcy on August 1, 2018

2 Commencement Issues

Corporate Governance

On March 1, 2017, three individuals (Bill Transier, Marc Beilinson and Wyatt Wachtel) executed independent director agreements with Westinghouse, and were appointed as independent directors of WEC and certain affiliates

As of early March, 2017, WEC's board consisted of 9 members: 3 Toshiba designees, 3 members of Westinghouse's senior management team, and 3 independent directors

- The board of TNEH UK consisted of 2 Toshiba designee directors

On March 27, 2017, Toshiba utilized its powers as majority shareholder of TNEH US to reconstitute the board of WEC, removing the Westinghouse appointed directors and leaving the Toshiba appointees and certain independent directors

- During the course of the chapter 11 case, the Toshiba designee directors at TNEH UK were replaced by two additional independent directors (Jan Baker and Alan Miller), who worked closely with the WEC independent directors on the Westinghouse sale process

Corporate Governance (cont.)

The WEC independent directors formed a special committee and hired separate counsel

- The original mandate of the special committee included negotiating DIP financing and all matters connected with the Projects, including negotiating the terms of the interim agreements with the Project Owners
- Ultimately, the special committee's mandate expanded to include the sale of Westinghouse to Brookfield and the negotiation of the plan of reorganization with the key counterparties, including Toshiba, Baupost, and the Official Committee of Unsecured Creditors (the "UCC")

Given the highly regulated nature of Westinghouse's global business, international regulators were keen to understand who would be in charge of Westinghouse during the chapter 11 process

- The appointment of independent directors, combined with the continued tenure of Westinghouse's senior management team, provided reassurance to regulators that Westinghouse would remain in stable hands through the transition process from Toshiba to a new owner-operator

DIP Financing

Prior to filing, the debtors sought a DIP financing facility that would replace key sources of pre-petition liquidity for the global enterprise:

- Cash loans and equity infusions to the global enterprise from Toshiba Corp.
- Liquidity to the EMEA Entities on an as-needed basis to replace the cash pooling arrangement
 - The debtors' substantial pre-petition withdrawals from the BMG cash pool had left certain of the EMEA Entities with depleted liquidity, creating potential solvency concerns at the local levels
- Letters of credit issued on an as-needed basis to underwrite existing and future global business

Toshiba was unable to provide additional financing to the debtors on a post-petition basis, and the project owners declined to provide financing, so the debtors and their advisors sought, and obtained, an \$800 million DIP financing facility from Apollo with an interest rate of L+625

- Lack of opportunities in the credit markets led to a strong competitive process, to the benefit of the debtors
- The final DIP financing facility included a \$225 million sublimit to provide cash for a cash-collateralized L/C facility administered by Citibank, as well as a \$375 million on-lending subfacility to support the operations of the EMEA Entities
- The DIP facility also included non-economic terms which were off-market and therefore highly favorable to the Debtors:
 - No milestones
 - Minimal covenants and operational restrictions

Venue and Jurisdiction

WEC is incorporated in Delaware, and the other debtor entities are incorporated in various jurisdictions, including Delaware, Pennsylvania, and, in the case of TNEH UK, the United Kingdom

- WEC's principal offices were located in Cranberry, Pennsylvania, close to Pittsburgh
- TNEH UK directly or indirectly owned each of the Westinghouse affiliates located outside of the United States, including affiliates in Sweden, Germany, Italy, France, Japan, and other jurisdictions
 - Only TNEH UK filed a chapter 11 petition; the other foreign affiliates (together the "EMEA Entities") have remained non-debtors during the pendency of the chapter 11 case
- The debtors entered bankruptcy with no issued debt
 - The prepetition "cash pooling" arrangement among the debtors and their non-debtor foreign affiliates, which had been administered by Bank Mendes Gans, was suspended shortly following the filing and terminated shortly after the filing
 - » Prior to the filing, the debtors had been net borrowers under the cash pooling arrangement, while the EMEA Entities had been net lenders
 - The debtors and certain of the EMEA Entities also had a letter of credit facility with BNP Paribas, which was frozen following the bankruptcy filing
- TNEH UK had assets in the Southern District of New York:
 - Specifically, TNEH UK had bank accounts in New York and a retainer held by its New York counsel
 - » See, e.g., *In re Octaviar Administration Pty Ltd.*, 511 B.R. 361 (Bankr. S.D.N.Y. 2014)
 - In addition, Toshiba Corporation had funded a cash collateral account in New York in connection with Westinghouse's letter of credit facility, for the benefit of the debtors and the EMEA Entities

3 Post-Filing Challenges

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Audit Investigation

Westinghouse's inability to provide audited financial statements exacerbated a major ongoing threat to Toshiba on a continued post-petition basis

Toshiba is publicly listed on the Tokyo Stock Exchange ("TSE"), and as such is required to abide by the listing requirements of the TSE, including requirements to deliver audited financials on a quarterly and annual basis

Toshiba had received accommodations from the TSE for failing to deliver quarterly audited financials

However, if Toshiba failed to deliver audited financials for two consecutive fiscal years (FY 2016 and FY 2017), the company faced certain de-listing

- Toshiba released unaudited financial results for FY2016 in April 2017, stating that there was "substantial doubt" about the company's ability to continue as a going concern
- The consequences of delisting from the TSE would have included immediate loss of access to its credit lines, defaults to its main bank lenders, and inability to continue as a going concern

One of the primary issues underlying the audit issue was a disagreement between Toshiba/Westinghouse's FY2015 accounting firm and its FY2016 accounting firm regarding the timing of the recognition of the loss in relation to the acquisition of CB&I Stone & Webster by Westinghouse

- Ernst & Young, the FY2015 firm, issued an opinion on the FY2015 financial results which did not recognize the substantial S&W losses
- PwC, the FY2016 firm, disagreed with E&Y's conclusions and maintained that Toshiba/Westinghouse should have recognized increased S&W losses during FY2015

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Audit Investigation (cont.)

After 5 months of intense post-petition work, spearheaded by Westinghouse's independent directors and Toshiba's audit committee, Westinghouse was able to produce an audited balance sheet, and Toshiba was able to issue its FY2016 annual report and FY2017 Q1 report with a qualified opinion from PwC, stating that Toshiba's accounting procedures did not comply with generally accepted standards of corporate accounting in Japan

- PwC concurrently issued an adverse opinion in respect of Toshiba's internal control over financial reporting for FY2016

The reports were issued on August 9, 2018, within the TSE's deadline

Westinghouse's audited balance sheet was also an important foundation for its sale process

The issuance of the qualified opinion was sufficient to allow Toshiba, under the governing Companies Act, to seek approval from its shareholders for its FY2016 financial statements

- Toshiba issued a number of statements disputing PwC's conclusions, maintaining that it had complied with generally accepted standards, and emphasizing that Westinghouse had been deconsolidated from Toshiba upon the filing of the chapter 11 petitions (prior to the end of FY2016)
- Toshiba then convened an extraordinary general meeting of shareholders on October 24, 2017, and the proposal to approve Toshiba's non-consolidated financial statements was submitted for vote
 - Toshiba's shareholders approved the financial statements, notwithstanding PwC's qualified opinion, by a vote of 88% in favor to 11% against, with limited abstentions

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Nuclear Projects

While Westinghouse negotiated with the Project Owners regarding the disposition of the Projects, Toshiba engaged in parallel negotiations with the Project Owners regarding its parent guarantee exposure. After executing settlement agreements with the Project Owners, Toshiba paid the guarantee claims in full, becoming Westinghouse's single largest creditor.

March 2017: WEC and the Project Owners sign the interim agreements, allowing construction at the Projects to continue post-petition at the Project Owners' expense

June 2017: Toshiba and the Georgia Project Owners finalize a settlement agreement, capping Toshiba's exposure at \$3.68B and including a multi-year payment plan

July 2017: Toshiba and the South Carolina Project Owners finalize a settlement agreement, capping Toshiba's exposure at \$2.168B and including a multi-year payment plan

September 2017: Baupost buys the South Carolina Project Owners' claims against Westinghouse and Toshiba, priced at 92% of the Toshiba settlement agreement cap

November 2017: Toshiba announces intention to sell the majority of its claims against Westinghouse, as well as its residual equity interests in Westinghouse

- Successful completion of a sale prior to March 31, 2018 would reduce the tax impact of a mark-to-market event arising in connection with the sale of Toshiba's memory chip business

December 5, 2017: Toshiba raises approximately \$6B in the capital markets to repay the outstanding parent guarantee exposure to the Project Owners

December 14, 2017: Toshiba pays the Georgia Project Owners in full, acquiring the Georgia Project Owners' claims against Westinghouse

- Baupost had unsuccessfully attempted to outbid Toshiba for the Georgia Project Owners' claims

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4 Case Negotiation and Resolution

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Non-Debtor Insider Asset Sales

During the chapter 11 cases, a number of Toshiba/Westinghouse joint venture companies began to experience severe distress, necessitating a quick resolution. Toshiba/Westinghouse engaged in a series of transactions to resolve the situations quickly, in each case involving a transfer of equity from one partner to the other.

Mangiarotti

An Italian joint venture owned by Toshiba (70%) and a non-debtor subsidiary of TNEH UK (30%), Mangiarotti manufactured and supplied parts to a key foreign customer of Westinghouse

TNEH UK's subsidiary agreed to acquire Toshiba's 70% equity stake for €1, subject to: (1) Toshiba's cure of Mangiarotti's negative equity position, and (2) WEC and TNEH UK jointly supporting Mangiarotti by obtaining court approval to: (A) amend the DIP to provide additional on-lent funds to Mangiarotti, and (B) amend the DIP to insert Mangiarotti as applicable into the DIP and LFA

The transaction was closed in November 2017

NFI

A Japanese entity partially owned by a non-debtor subsidiary of TNEH UK (52%), and a number of unaffiliated third parties (48%), NFI was important to Toshiba's ongoing nuclear business in Japan

Toshiba agreed to acquire the 52% majority interest for \$1, subject to completion of certain claim swap transactions between Toshiba and a TNEH UK subsidiary, as well as satisfaction of certain other conditions

The transaction was closed in June 2018

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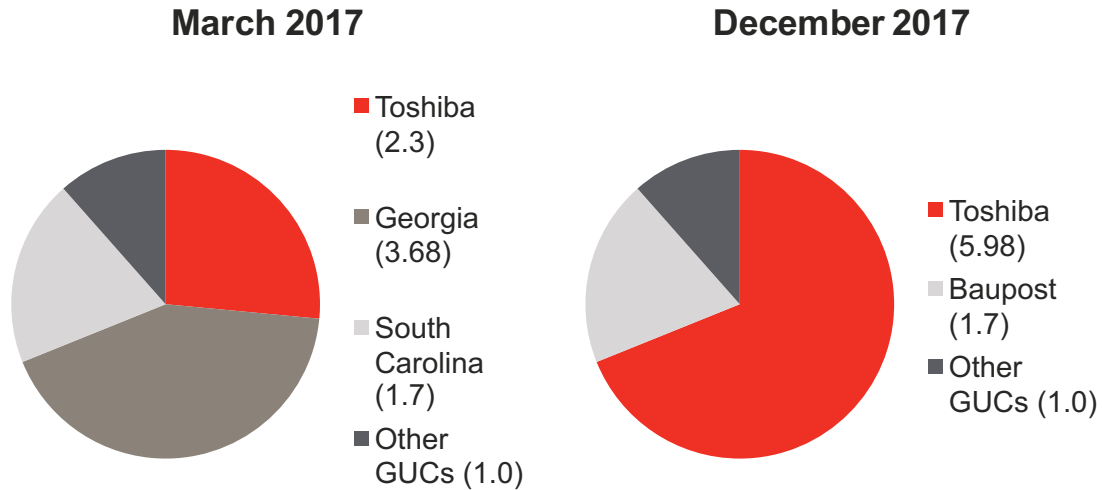
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Claims Trading

When the bankruptcy case was filed, the largest claims against Westinghouse belonged to the Project Owners and Toshiba. Nine months later, Toshiba had purchased the Georgia Project Owners' claim, and Baupost had purchased the South Carolina Project Owners' claim.



** All amounts represent USD billions.

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Claims Trading – Plan of Reorganization

Due to its capital markets transaction in December 2017, Toshiba had sufficient cash on hand to pay the remainder of its exposure under the South Carolina Project Owners' settlement agreement

- Toshiba completed full payment of the South Carolina guarantee claim on January 12, 2018, with a small deduction related to mechanic's lien claims filed against the Project site

At the same time that Westinghouse was running a sale process to transfer its business as a going concern to a new owner, Toshiba was running a sale process to monetize its claims against Westinghouse as well as its residual equity stake in Westinghouse

- On January 4, 2018, Westinghouse announced a deal with Brookfield for \$4.5B
- On January 17, 2018, Toshiba announced a deal with Baupost (claims sale for \$2.16B) and Brookfield (residual equity interest sale for \$1)

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Claims Trading – Plan of Reorganization (cont.)

A key component to the success of each of these deals was the execution of a plan support agreement (“PSA”) on January 17, 2018 among Westinghouse, TNEH UK, Toshiba, Baupost, Brookfield, and the UCC

The PSA represented a global compromise among Westinghouse and nearly all of its material stakeholders:

- All parties would support the sale of Westinghouse to Brookfield through a plan of reorganization
- Baupost would subordinate all of its claims, including the claims purchased from Toshiba, to repayment of other general unsecured claims, subject to a cap of \$1.15B
- All parties would work towards confirmation of the plan of reorganization by the end of March 2018
- All creditor parties agreed that any claim buyer would “step into” the shoes of the claim seller as a party to the PSA

Claims Trading – Driving Global Compromise

Although Toshiba’s claim sale process generated substantial interest among potential buyers, Toshiba ultimately worked in conjunction with Westinghouse’s sale process by binding its claim buyer (Baupost) to a global compromise and settlement

The resulting certainty and speed at which a plan was confirmed and consummated avoided substantial litigation regarding a number of issues, including but not limited to:

- Allocation of Brookfield’s \$4.5B purchase price among Westinghouse affiliates, especially allocation between the US Westinghouse entities and the EMEA Entities
- Amount of the general unsecured claim (if any) held by the South Carolina Project Owners/Baupost against Westinghouse in excess of the Toshiba settlement payment amount
- Alleged claims of Westinghouse against Project Owners and Toshiba
- Alleged claims of EMEA Entities against Westinghouse

Claims Trading – Driving Global Compromise (cont.)

In addition, the global compromise also provided stability and certainty to the continued operations of the EMEA Entities, thereby avoiding potential knock-on insolvencies of non-debtor entities which may have resulted in liquidation of valuable assets, destruction of key customer relationships, and associated negative impacts to Brookfield's purchase price

Toshiba closed the claim sale to Baupost on January 22, 2018, and closed the residual equity interest sales to Brookfield on April 6, 2018 (TNEH US equity sale) and July 31, 2018 (TNEH UK equity sale)

Westinghouse exited from bankruptcy under Brookfield's new ownership on August 1, 2018

Global Regulatory Approvals

Execution of the Westinghouse sale required a highly coordinated effort to obtain approvals from over a dozen governmental agencies around the world

The Brookfield/WEC transaction required approval from key regulators in more than a dozen jurisdictions across a number of areas, including nuclear regulation, foreign direct investment control, and antitrust

Key regulators included the Nuclear Regulatory Commission (U.S.), the Nuclear Decommissioning Authority (UK), and CFIUS (U.S.)

- Other regulators included the Ministère de l'Economie (France), the Federal Ministry for Economic Affairs and Energy (Germany), the European Commission Merger Review (EU), the Federal Agency for Nuclear Control (Belgium), and the Swedish Radiation Safety Authority (Sweden)
- In certain jurisdictions, more than one regulatory agency was required to provide approval of the transaction – for example, in the U.S. certain federal and state-level approvals were required

In some cases, the Toshiba/Brookfield transaction triggered approval requirements from the same regulators, which required close coordination of regulator communications among Toshiba, Westinghouse, and Brookfield given the sequencing of the transactions

Appendix

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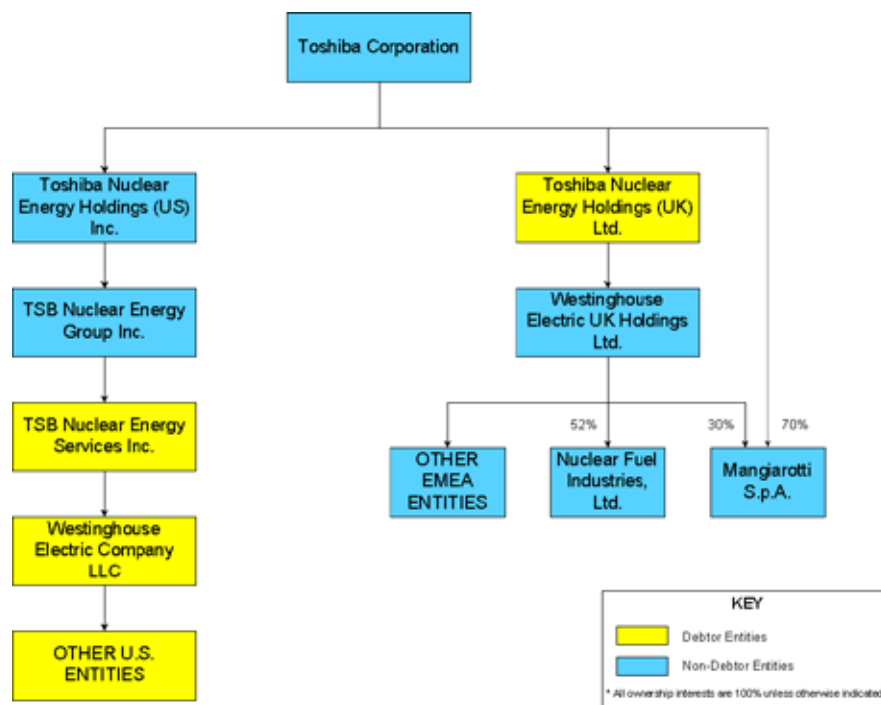
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Toshiba and Westinghouse – Corporate Structure



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Key Parties and Advisors

Party	Legal Advisor	Investment Banker	Financial Advisor
WEC	Weil, Gotshal & Manges LLP Baker & McKenzie	PJT Partners	AlixPartners
WEC Special Committee	Milbank, Tweed, Hadley & McCloy LLP		
TNEH UK	Togut, Segal & Segal LLP	PJT Partners	AlixPartners
Toshiba	Skadden, Arps, Slate, Meagher & Flom LLP	Lazard Freres & Co.	Berkeley Research Group
Brookfield	Willkie Farr & Gallagher LLP		
Baupost	Paul, Weiss, Rifkind, Wharton & Garrison LLP	Rothschild	
Project Owners	Jones Day Reed Smith LLP	Rothschild, Ducera Partners	
UCC	Proskauer Rose LLP	Houlihan Lokey	Alvarez & Marsal