

EVALUATION OF AND THRESHOLD DETERMINATION
ON THE SHARE PURCHASE AGREEMENT BETWEEN TOSHIBA CORPORATION
AND BROOKFIELD WEC HOLDINGS LLC

I. Introduction

Westinghouse Electric Company, LLC (Westinghouse), a Delaware limited liability company, holds two U.S. Nuclear Regulatory Commission (NRC) materials licenses issued under Title 10 of the *Code of Federal Regulations* (10 CFR) Part 70: one for the Columbia Fuel Fabrication Facility in Columbia, South Carolina (SNM-1107) and one for the Hematite Nuclear Fuel Manufacturing Facility in Festus, Missouri (SNM-33). Westinghouse also holds 29 export licenses.¹ Westinghouse is owned and controlled through several intermediate holding companies. Westinghouse's ultimate parent company is Toshiba Corporation (Toshiba).

On February 5, 2018, Westinghouse submitted a request to the NRC for a threshold determination (ADAMS Accession No. ML18036A982) that the acquisition by Brookfield WEC Holdings LLC (Brookfield) of Toshiba Nuclear Energy Holdings (US) Inc. (TNEH US), one of Westinghouse's intermediate parent companies, would not constitute a transfer of control of the Westinghouse licenses (Threshold Determination Request). Section 184 of the Atomic Energy Act of 1954 (AEA) and NRC's regulations 10 CFR 70.36 and 10 CFR 110.50(d) require the NRC's written consent prior to the direct or indirect transfer of control of NRC licenses.

II. Background

On March 29, 2017, Westinghouse filed a petition for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Southern District of New York (Bankruptcy Court). As part of its Chapter 11 reorganization plan, on January 4, 2018, Westinghouse entered into an agreement for acquisition of its nuclear business by a subsidiary of Brookfield Business Partners L.P. and its institutional partners. This transaction is referred to as the Ultimate Transaction. The Ultimate Transaction is subject to the Bankruptcy Court's approval. On January 29, 2018, Westinghouse submitted the Ultimate Transaction, as part of its Chapter 11 reorganization plan, for Bankruptcy Court approval.² The NRC reviewed the reorganization plan and underlying Ultimate Transaction for the purpose of protecting the NRC's interests in the bankruptcy proceeding. The Ultimate Transaction is not the subject of Westinghouse's Threshold Determination Request. In its Threshold Determination Request, Westinghouse notified the NRC that it plans to request NRC's prior written consent for the transfer of control of the licenses in connection with the Ultimate Transaction.

III. Interim Transaction

Prior to the closing date of the Ultimate Transaction, Toshiba, Westinghouse's ultimate parent company, will sell all of its shares of TNEH US, one of Westinghouse's intermediate parent companies, to Brookfield WEC Holdings LLC or one of its affiliates (collectively referred to as Brookfield) in accordance with a Share Purchase Agreement (SPA) that Brookfield and Toshiba

¹ XCOM1014, XCOM1047, XCOM1072, XCOM1082, XCOM1093, XCOM1094, XCOM1102, XCOM1111, XCOM1113, XCOM1116, XCOM1170, XCOM1188, XCOM1219, XCOM1246, XCOM1249, XCOM1252, XCOM1255, XCOM1262, XCOM1298, XSNM3006, XSNM3034, XSNM3163, XSNM3264, XSNM3461, XSNM3702, XSNM3769, XR169, XR176, and XR178.

² See Joint Chapter 11 Plan of Reorganization, In re Westinghouse Electric Company LLC, *et al.*, No. 17-10751 (MEW) (Bankr. S.D.N.Y. Jan. 29, 2018).

entered into on January 17, 2018. The closing date of this transaction is expected to be on or before March 31, 2018. This transaction is referred to as the Interim Transaction and is the subject of Westinghouse's Threshold Determination Request. Toshiba is Westinghouse's ultimate parent company through a chain of wholly owned intermediate parent companies. Exhibit A-1 of the Threshold Determination Request provides a simplified corporate organizational chart that depicts the current ownership structure. Upon closing of the Interim Transaction, Brookfield will replace Toshiba as Westinghouse's ultimate parent company. Exhibit A-2 of the Threshold Determination Request provides the simplified corporate structure upon closing of the Interim Transaction.

According to Westinghouse, the Interim Transaction is a key element of the overall Westinghouse restructuring and is a key inducement for Toshiba to enter into a Plan Support Agreement with respect to Westinghouse's Chapter 11 reorganization plan. Westinghouse states that the Interim Transaction is helpful to its timely emergence from bankruptcy. According to a Toshiba press release that describes the basis for its entry into the Interim Transaction, its shares in TNEH US have no material economic value, because of certain risks and uncertainties associated with them, and the sale of TNEH US by no later than March 31, 2018 will enable Toshiba to receive certain financial benefits. Therefore, Toshiba agreed to a nominal sale price of \$0.50 for ownership of TNEH US.³ According to Westinghouse's Disclosure Statement accompanying its Chapter 11 reorganization plan filed in the Bankruptcy Court, Brookfield intends to cancel its shares in TNEH US on the effective date of the reorganization plan (the Ultimate Transaction), which is expected to occur by the end of the third quarter of 2018.⁴ Therefore, Brookfield plans to own these shares of TNEH US for approximately 6 months.

In an effort to negate the control over the NRC licenses and licensed activities that Brookfield would otherwise have as the ultimate parent company of Westinghouse, Toshiba and Brookfield included a provision in the SPA that restricts Brookfield's ability to control Westinghouse. Westinghouse refers to these restrictions as the "Operating Control Restrictions." According to the Threshold Determination Request, the Interim Transaction was designed specifically to provide Brookfield with ownership of TNEH US without permitting it to exercise influence or control over NRC licensed activities. The Operating Control Restrictions appear in Section 6.2(c) of the SPA, which states,

During each Post-Closing Period (with respect to the Equity Interests (and corresponding Transferred Entities) acquired by Buyer at the Closing Date that occurred on the commencement of such Post-Closing Period), Buyer shall not, directly or indirectly, **except** (i) as required by applicable Law or to the extent necessary to comply with Nuclear Obligations, (ii) by order of the Bankruptcy Court or to the extent necessary in connection with the Bankruptcy Case, or (iii) as otherwise contemplated by or necessary to effectuate this Agreement:

- (i) grant any Lien on the Equity Interests;
- (ii) transfer or otherwise dispose of, grant any options, warrants, calls, or other rights of any kind to acquire, the Equity Interests;
- (iii) exercise any voting, nomination, appointment or similar rights (including to pass a resolution without a vote of members) attached to the Equity Interests,

³ Toshiba Corporation, Press Release, "Regarding Sales of Westinghouse-Related Assets Held by Toshiba and the Forecast for Toshiba's Shareholders' Equity at the end of FY2017," (January 18, 2018) (available at <https://www.toshiba.co.jp/about/ir/en/news/>) (last accessed March 14, 2018).

⁴ Disclosure Statement for Joint Chapter 11 Plan of Reorganization at 40, In re Westinghouse Electric Company LLC, *et al.*, No. 17-10751 (MEW) (Bankr. S.D.N.Y. Jan. 29, 2018).

except to: (A) appoint as a director of a Transferred Entity a person nominated in writing by WEC, but only if and to the extent that, absent such appointment, such Transferred Entity would have no directors at the time of such appointment; (B) appoint as a director of a Transferred Entity a person approved by the board of the Transferred Entity; (C) remove any director who, in the opinion of Buyer (acting reasonably), has engaged in a material breach of his or her fiduciary (or similar directors') duties to a Transferred Entity; (D) pass or vote on any resolution of a Transferred Entity to the extent such resolution has been approved unanimously by the board of such Transferred Entity; (E) pass or vote on any annual or similarly recurring resolution of a Transferred Entity required by applicable Law to be passed in connection with the ongoing solvency or standing of a Transferred Entity; (F) pass or vote on a resolution of a Transferred Entity reasonably necessary either (x) to give effect to or otherwise consummate the Transactions or (y) for a Party to perform its obligations under this Agreement, it being understood that nothing in this Section 6.2(c)(iii) shall prevent the independent directors of a Transferred Entity from appointing a director to fill a vacancy on the board of such Transferred Entity independently of Buyer;

(iv) enter into any legally binding commitment with respect to any of the foregoing; or

(v) in each case to the extent of any power it may have, permit or cause a member of the Transferred Group to do any of the foregoing (as though references therein to Equity Interests were to equity interests held by such Transferred Group member and references to Transferred Entities were to Subsidiaries of such Transferred Group member).

Threshold Determination Request at 5-6 (emphasis added). Further, Westinghouse stated in the Threshold Determination Request that the Toshiba-affiliated directors at Westinghouse and each of its intermediate parent companies would resign from those boards. Only the independent directors would remain. This is depicted in Exhibit A-2 of the Threshold Determination Request.

In the Threshold Determination Request, Westinghouse stated that the Interim Transaction does not involve a transfer of control of licensed activities because, "the entities and individuals who control Westinghouse today (other than Toshiba...and Toshiba-affiliated directors...) will continue to control Westinghouse following the close of the Interim Transaction and, pursuant to the Operating Control Restrictions, [Brookfield] will be unable to change such Operating Control Restrictions or exercise management influence or control prior to closing of the Ultimate Transaction. The officers and managers overseeing NRC-licensed activities at Westinghouse and its subsidiaries are unaffected by the Interim Transaction." According to Westinghouse, no transfer of control will occur until the Ultimate Transaction, for which Westinghouse will request NRC's prior written approval.

Westinghouse also noted in its Threshold Determination Request that the Interim Transaction has no effect on Westinghouse's financial qualifications and decommissioning assurance obligations. Westinghouse currently satisfies its decommissioning financial assurance obligation with a decommissioning trust fund in an amount equal to the decommissioning cost estimate for both the Columbia Fuel Fabrication Facility and the Hematite Nuclear Fuel Manufacturing Facility.

In a meeting on February 21, 2018, NRC requested Westinghouse, Brookfield, and Toshiba to clarify the extent to which Brookfield may control Westinghouse by exercise of the powers that it reserved in Section 6.2(c) of the SPA. These reserved powers are provided in the introductory

paragraph to paragraph (c) and in subparagraphs (c)(iii)(A)-(F) of the SPA. In response to NRC's inquiry, on March 1, 2018, Brookfield provided a letter dated February 28, 2018, (ADAMS Accession No. ML18036A982) in which it committed, as owner of TNEH US, that it has no intent to exercise any of the reserved rights in Section 6.2(c) of the SPA so as to exercise control over the licensed activities of Westinghouse. Brookfield further committed that if it planned to exercise any of these reserved rights it would provide the NRC with prior written notice as well as an explanation of why it would exercise the reserved rights.

IV. Regulatory Framework

Section 184 of the AEA provides that

No license granted hereunder...shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing.

The regulation at 10 CFR 70.36, "Inalienability of licenses," incorporates the requirements of Section 184 into NRC regulations governing special nuclear material licenses. The regulation at 10 CFR 110.50(d) incorporates the requirements of Section 184 into NRC regulations governing import and export licenses.

V. Evaluation

The NRC's guidance on materials license transfers is contained in NUREG-1556, Volume 15, Rev. 1, "Consolidated Guidance About Materials Licenses: Guidance About Changes of Control and About Bankruptcy Involving Byproduct, Source, or Special Nuclear Materials Licenses," dated June 2016.⁵ While this guidance provides examples of transfers of control, the NRC evaluates all transfers of control on a case-by-case basis. The guidance provides that,

[c]ontrol over licensed activities can be construed as the authority to decide when and how that license (licensed material and/or activities) will be used. A change of ownership may be an example of a change of control, depending on whether the authority over the license has transferred from one person to another. The transfer of stock or other assets is not necessarily a change of control. The central issue is whether the entity that has the right to exercise authority over the license has changed.

The NRC case law that describes what constitutes "control" of an NRC license is *Safety Light. Safety Light Corp.* (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350, 367 (1990). The Appeal Board in *Safety Light* explained that, "control is to be found in the person or persons who, because of ownership or authority explicitly delegated by the owners, possess the power to determine corporate policy and thus the direction of the activities under the license." *Id.* at 367. The extent to which a subsidiary's day-to-day operations are actually supervised by the parent company is irrelevant to determining whether there has been a transfer of control of a license. *Id.* at 367 n. 53. The Appeal Board deduced that "control of a license is in the hands of the person or persons who are empowered to decide when and how that license will be used." *Id.* at 364-65 n. 46.

Safety Light involved the transfer by the licensee's parent company of its entire interest in the licensee to three officers of the licensee. The Appeal Board found "no room for reasonable

⁵ The Office of International Programs also uses this guidance to aid in determining whether a transaction constitutes a transfer of control of an import or export license.

doubt” that this sale constituted a transfer of control. The full right of *Safety Light’s* prior parent company to control the license “became vested in the new owners.” *Id.* at 365. “[A]s possessors of the authority that accompanies 100% ownership of a corporation,” the parent company and its owners and senior management “necessarily could exercise, if they so desired, the ultimate decisional authority on all matters pertaining to the use of the license.” *Id.* at 366.

In accordance with *Safety Light*, absent any restrictions on the authority that accompanies 100 percent ownership of TNEH US, and 100 percent indirect ownership of Westinghouse, the Interim Transaction would constitute an indirect transfer of control. As Westinghouse stated in its Threshold Determination Request, Brookfield and Toshiba specifically included Section 6.2(c) in the SPA to avoid a transfer of control of the NRC licenses. Section 6.2(c) prohibits Brookfield from exercising the control that it would otherwise have over Westinghouse; however, this section also reserves some rights to Brookfield. NRC, therefore, evaluated whether the reserved rights in Section 6.2(c) of the SPA provides Brookfield with the authority to control Westinghouse licenses and licensed activities.

The reserved rights are narrow in scope. Brookfield has only the authority necessary to ensure that TNEH US and its subsidiaries, including Westinghouse, comply with the law, comply with orders of the Bankruptcy Court (and the NRC is participating in this bankruptcy proceeding), and take actions necessary to effectuate the SPA itself. The reserved rights necessary to comply with the law specifically include the minimum authority that Brookfield must be able to exercise to comply with Delaware corporate law. For example, to ensure compliance with Delaware corporate law concerning boards of directors, Section 6.2(c)(iii)(A) reserves to Brookfield the authority to appoint as a director of TNEH US, a person nominated by Westinghouse, if, absent such appointment, the company would have no directors. See 8 Del. C. § 141. The reserved rights also include, in Section 6.2(c)(iii)(C), the authority of Brookfield as the TNEH US shareholder to remove directors for breach of fiduciary duty, which is a right Brookfield must possess as shareholder to comply with Delaware corporate law. See *id.* Due to the short amount of time Brookfield expects to hold TNEH US shares, it is unlikely that Brookfield will have the opportunity to exercise some of the narrow rights it has reserved, for example, the right to vote on any annual or similarly recurring resolution.

In its February 28, 2018, letter, Brookfield stated that it would not exercise its reserved rights in a manner that would constitute control over the Westinghouse licenses or licensed activities and it explicitly committed to provide the NRC with prior written notice and explanation of its decision to exercise any of its Section 6.2(c) of the SPA reserved rights. Moreover, Brookfield plans to only hold its shares of TNEH US for a few months until closing of the Ultimate Transaction, for which Westinghouse will request NRC’s prior written consent as a license transfer. The NRC has determined that the Interim Transaction does not constitute a transfer of control because of (1) the restrictions on Brookfield’s authority over Westinghouse and its intermediate parent companies in Section 6.2(c) of the SPA; (2) the narrow scope of rights Brookfield has reserved in Section 6.2(c) of the SPA; (3) the limited time Brookfield will hold the TNEH US shares before cancelling them, and the likelihood that Brookfield would not have the opportunity to exercise some of its reserved rights; and (4) the fact that Westinghouse will soon submit to the NRC, for prior written consent, a license transfer application for the Ultimate Transaction, based on a reorganization plan that Westinghouse has already submitted for Bankruptcy Court approval and that the NRC has already reviewed for the purposes of representing its interests in the bankruptcy proceeding.

VI. Determination

Based on the description of the Interim Transaction contained in the Threshold Determination Request, the statements Brookfield made in its February 28, 2018, letter, and the evaluation

provided above, the NRC has determined that the Interim Transaction does not constitute a transfer of control of the Westinghouse licenses. Therefore, NRC's prior written consent under Section 184 of the AEA and 10 CFR 70.36 and 10 CFR 110.50(d) is not required for the Interim Transaction. The NRC's determination is subject to the statements that Brookfield made in its February 28, 2018, letter that it would not exercise its reserved rights in a manner that would constitute control over the Westinghouse licenses or licensed activities and would provide the NRC with prior written notice and an accompanying explanation if it chooses to exercise any reserved right.