WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
Gary T. Holtzer
Robert J. Lemons
Garrett A. Fail
David N. Griffiths

Attorneys for Debtors
and Debtors in Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
	:	**Chapter 11**
WESTINGHOUSE ELECTRIC COMPANY LLC, *et al.*,	:	**Case No. 17-10751 (MEW)**
	:	
Debtors.[1]	:	**(Jointly Administered)**

DEBTORS' REPLY TO LIMITED OBJECTION TO: (A) NOTICE REGARDING (I) EXECUTORY CONTRACTS AND UNEXPIRED LEASES, (II) PROPOSED CURE OBLIGATIONS, AND (III) RELATED PROCEDURES, AND (B) MOTION OF DEBTORS FOR AUTHORIZATION TO AMEND THE CHAPTER 11 PLAN AND FUNDING AGREEMENT AND FOR RELATED RELIEF

[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), PaR 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 (N/A), 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.

1710751180727000000000005

**TO THE HONORABLE MICHAEL E. WILES,
UNITED STATES BANKRUPTCY JUDGE:**

Westinghouse Electric Company LLC ("**WEC**") and its affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases ("**Westinghouse**," or the "**Debtors**") respectfully submit this reply to the response of the certain of the Debtors' key executives (the "**Objecting EPP Participants**") who are participants under the EPP (as defined below), dated July 27, 2018 [ECF No. 3635] (the "**Objection**"), to the Notice Regarding (i) Executory Contracts and Unexpired Leases, (ii) Proposed Cure Obligations, and (iii) Related Procedures [ECF No. 3614] (the "**Assumption Notice**") and (b) Motion of Debtors for Authorization to Amend the Chapter 11 Plan and Funding Agreement and for Related Relief [ECF No. 3615] (the "**Motion**").[2] In support of the Motion, and in reply to the Objection, the Debtors respectfully state as follows:

Preliminary Statement

1. The Objecting EPP Participants, who are members of the Westinghouse team, do not object to the assumption of the *Westinghouse Electric Company Executive Pension Plan* (as amended and restated on April 1, 2017, the "**EPP**") or a $0 cure payment. Indeed, Debtors have not defaulted on any payment obligation to the Objecting EPP Participants. Moreover, these individual WEC executives and managers have not yet satisfied the requirements to receive benefits upon retirement under the EPP. It is also undisputed (*see* Objection para. 21) that, under the terms of the EPP, the Objecting EPP Participants have no guarantee that they will satisfy, or be permitted to satisfy, the requirements to receive benefits in the future (e.g., that they will remain employed by WEC in an executive capacity for the time required under the EPP). Yet the

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Motion.

Objecting EPP Participants request precisely such a guarantee (*e.g.*, at paragraph 22 of the Objection) and thus to override the plain terms of the EPP in the guise of "adequate assurance of future performance." Not only has there been no default as to these particular EPP participants (who were not and presently are not entitled to payments under the EPP), but a debtor is not required to modify the terms of a contract to assume it under Section 365(b)(1)(B).

2. Similarly, as to their other request for adequate assurance in the form of a financial guarantee from the Plan Participant, no provision in the EPP or other agreement requires a third party or parent guarantee, and none should be required where, as here, the Debtors plainly can and will perform under the EPP. *See e.g., Declaration of Daniel Sumner in Support of Debtors' Motion for Authorization to Amend the Chapter 11 Plan and Plan Funding Agreement and for Related Relief* (the "**Sumner Declaration**") [ECF No. 3636]. Indeed, the Objecting EPP Participants do not allege that the Debtors cannot perform their obligations under the EPP and Objecting EPP Participants (who have worked hard to make WEC a success) certainly have not presented any evidence in that regard.

3. The Objecting EPP Participants' attempt to justify their impermissible requests for relief on two grounds. First, they assert that the EPP was until recently to be rejected, and they would have received approximately $60 million in cash under the Plan. Although irrelevant, the Objecting EPP Participants never had an *allowed* claim for $60 million. Accordingly, they did not have a risk free entitlement to $60 million; rather, they would have been subject to the risk that their contingent claim would be litigated, estimated and/or set aside until the objectors could establish over time that they met the requirements of the EPP. Second, the Objecting EPP Participants argue that, hypothetically, a *de facto* rejection of the EPP could occur whereby, upon assumption, all of them could be terminated or demoted. Upon assumption,

however, WEC is bound by the terms of the EPP. It will have all of the obligations (as well as rights) properly arising under that plan, and the objectors will have all of their rights. For these and other reasons discussed below, the Objection should be overruled.

A. Adequate Assurance of Future Performance is not Required Because there is no Default under the EPP

7. Under the terms of the EPP, the Debtors are not obligated to make any payments to the Objecting EPP Participants unless an Objecting EPP Participant has (a) met certain enumerated qualifications under the EPP and is otherwise "Retirement Eligible" (as defined in the EPP and (b) is "separated from service" as such term is used in Section 409A of the Internal Revenue Code. The Debtors are not aware that any of the Objecting EPP Participants are separated from service and thus, given that the Debtors are not obligated to make any payments under the EPP to the Objecting EPP Participants (on account of prepetition or postpetition obligations), there is no "default" under the EPP with respect to any of the Objecting EPP Parties.

8. Under 11 U.S.C. § 365(b)(1)(b), if there has been a default under an executory contract, a debtor may not assume such executory contract unless, among other things, the debtor provides "adequate assurance of future performance under such contract or lease." 11 U.S.C. 365(b)(1)(C). If no default exists with respect to an executory contract, however, "section 365(b)(1) is inapplicable in which case assumption of an unexpired lease may be ordered without regard to the cure, compensation and adequate assurance requirements." *Matter of U. L. Radio Corp.*, 19 B.R. 537, 543 (Bankr. S.D.N.Y. 1982); *See also In re Harry C. Partridge, Jr. & Sons, Inc.,* 43 B.R. 669, 671 (Bankr.S.D.N.Y.1984) ("[I]f no default exists . . . contract or unexpired lease may be assumed without the debtor having to provide adequate assurances to the creditor."); *In re Offices & Servs. of White Plains Plaza, Inc.*, 56 B.R. 607, 610 (Bankr. S.D.N.Y. 1986) ("[D]ebtor may obtain court approval to assume a lease without having to provide adequate

assurance to its landlord if the lease is not in default so that there is nothing to cure."); *In re Westview 74th St. Drug Corp.*, 59 B.R. 747, 754 (Bankr. S.D.N.Y. 1986) ("In the absence of a default, the debtor is entitled as a matter of course to assume a lease which appears to be in the best interests of the estate"). *See also In re Metromedia Fiber Network, Inc.*, 335 B.R. 41, 50 (Bankr. S.D.N.Y. 2005), *aff'd sub nom. Abovnet, Inc. v. SBC Telecom, Inc.*, No. 06 CV. 8269(CLB), 2007 WL 636602 (S.D.N.Y. Feb. 27, 2007) (to warrant a demonstration of "adequate assurance of future performance" under Section 365(b)(1)(C), creditor must show (a) that there has been a "default" under the applicable agreement and (b) such default must be sufficiently material.); *In re Bon Ton Rest. & Pastry Shop, Inc.*, 53 B.R. 789, 793 (Bankr. N.D. Ill. 1985) ("If no default exists, section 365(b)(1) is inapplicable in which case assumption of an unexpired lease may be ordered without regard to the cure, compensation and adequate assurance requirements."). Accordingly, given that there is no default under the EPP with respect to the Objecting EPP Participants, the Debtors have no duty, burden, or other legal obligation to demonstrate "adequate assurance of future payment" with respect to the Objecting EPP Participants in connection with the assumption of the EPP.

B. Section 365 of the Bankruptcy Code Does not Entitle the Objecting EPP Participants to an Enhancement of their Rights under the EPP

9. As stated above, the Debtors do not believe that there is any "default" under the EPP with respect to the Objecting EPP Participants. Even if this court were to find that the Debtors there is a "default" under the EPP with respect to the Objecting EPP Participants, the form of of "adequate assurance of future performance" sought by them is inappropriate under 11 U.S.C. 365(b)(1)(C).

10. The Bankruptcy Code does not define what constitutes "adequate assurance of future performance" under 11 U.S.C. § 365(b)(1)(C). However, in reviewing the statute's

legislative history, courts have, over time, come to a general consensus that Congress "intended [that courts] give the term a practical, pragmatic construction." *In re M. Fine Lumber Co., Inc*., 383 B.R. 565, 572–73 (Bankr. E.D.N.Y. 2008) (citations omitted) and that whether "adequate assurance of future performance" has been provided is determined by the facts and circumstances of each case. *Id.* Courts in this district and other have had occasion to apply a number of non-exclusive factors whether a debtor has met its burden in providing "adequate assurance of future performance," including the debtor's payment history, evidence of profitability, the general outlook in the debtor's industry, and, in the case of leases, the presence of a security deposit. *See In re Great Atl. & Pac. Tea Co., Inc.*, 472 B.R. 666, 675 (S.D.N.Y. 2012). Taken on the whole, "the primary focus of adequate assurance concerns the assignee's ability to fulfill the financial obligations" under the contract. *In re Martin Paint Stores*, 199 B.R. 258, 263 (Bankr.S.D.N.Y.1996); *see also Matter of U. L. Radio Corp.*, 19 B.R. 537, 542 (Bankr. S.D.N.Y. 1982) ("[T]he primary focus of adequate assurance is the assignee's ability to satisfy financial obligations under the lease."). Indeed, courts have explicitly held that "a guaranty is not required" to demonstrate adequate assurance of future performance. *In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985).

11. There should be no doubt about the Reorganized Debtors' financial wherewithal to meet their financial obligations under the EPP. *See e.g., Sumner Declaration*. The Objecting EPP Participants focus on the alleged deficit of "adequate assurance of future performance" attributable to the provisions of the EPP itself, which the Objecting EPP Participants concede grants to the Debtors certain rights that could be exercised post-assumption to the detriment of the Objecting EPP Participants. *Objection*, ¶19. The Objecting EPP Participants assert that, if the Debtors exercise their existing contract rights under the EPP, they could a

"accomplish a 'de facto' rejection of the EPP after the Effective Date with respect to any particular employee or class of employee" (*Id* at ¶21) and accordingly, the Debtors must not waive their existing (and uncontested) contract rights under the EPP to establish "adequate assurance of future performance" under 11 U.S.C. § 365(b)(1)(C). As construed by the Objecting EPP Participants, "adequate assurance of future performance" would require that the court amend the EPP to enhance the Objecting EPP Participants rights under the EPP to the detriment of the Debtors' rights under the EP. The Objecting EPP Participants provide no legal basis to support the proposition that Section 365 enables contract counterparties to improve their position. *See, e.g., In re Bon Ton Rest. & Pastry Shop, Inc.*, 53 B.R. 789, 803–04 (Bankr. N.D. Ill. 1985)("It is not intended that a non-debtor party should acquire greater rights in a case under the Code than he has outside the Code."); *Natco*, 54 B.R. 441 (citing *In re Webster Clothes, Inc.*, 36 B.R. 260, 264 (Bankr.D.Md.1984)). ("Section 365 gives no indication that a landlord . . . is to improve its position upon the bankruptcy of a tenant."); *In re Rock 49th Rest. Corp.*, No. 09-14557, 2010 WL 1418863, at *7 (Bankr. S.D.N.Y. Apr. 7, 2010) ("The statute affords no relief to a [contract counterparty] simply because it might seek to escape the bargain it made."). The court in *Bon Ton* considered a similar scenario where the Debtor moved to assume a commercial lease. The landlord objected, demanding that to satisfy the requirements of "adequate assurance of future performance" under section 365, the debtor had to install updated equipment and make certain improvements to the subject property. The *Bon Ton* court concluded that "A Lessor cannot insist that bankruptcy law gives him what the lease itself does not . . . [t]herefore, the court will not give the lessor herein a guaranty of future performance nor greater rights than it had pre-petition."

12. Similarly, the Objecting EPP Participants' request that Brookfield provide a financial guarantee with respect to the "financial component" of the EPP is without merit. *Id* at

¶24. The current formulation of the EPP is unfunded and non-guaranteed or otherwise insured by any third-party. Accordingly, because the Objecting EPP Participants demand to amend the EPP (cutting off the Reorganized Debtors' rights under the EPP), and that Brookfield provide a form of financial guaranty in connection with the EPP would constitute enhancements of the Objecting EPP Participants rights that did not exist prepetition, their request for "adequate assurance of future performance" should be denied.

C. There is No Statutory or Contractual Basis for Payment of Attorneys' Fees or Other Expenses in Connection with the EPP

13. Section 365(b)(1)(B) provides that if there has been a default in an executory contract, a Debtor may not assume such executory contract unless the debtor "compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default." 11 U.S.C. § 365(b)(1)(B). The Objecting EPP Participants assert that they are entitled to compensation for "their actual pecuniary losses resulting from the Debtors' defaults under the EPP" under Section 365(b)(1)(B) of the Bankruptcy Code, and that such "pecuniary losses" are comprised of their legal and actuarial expenses.

14. Section 365(b) of the Bankruptcy Code does not provide an independent basis for recovery of attorneys' fees. 11 U.S.C. § 365(b). *See, e.g., 16 Collier on Bankruptcy* ¶ 365.06[3]; In re Best Products Co., 148 B.R. 413, 414 (Bankr.S.D.N.Y.1992). A non-debtor counterparty to an executory contract may only recover attorneys' fees under section 365(b), entitled be entitled to attorney fees as a cure of defaults under section 365(b) if the can satisfy the following four factors: (a) a default under the applicable executory contract must have occurred; (b) that executory contract must specifically entitle the nondebtor party to reimbursement of attorney fees; (c) applicable nonbankruptcy law must recognize a right to attorney fees; and (d) the

attorney fees must be reasonable. *See, In re Child World, Inc.*, 161 B.R. 349 (Bankr. S.D.N.Y. 1993) (applying the standard and finding counterparty was not entitled to attorney fees because no default had occurred to trigger applicable provision in lease); *In re 2495 Broadway Supermarket, Inc.*, 97 B.R. 765 (Bankr. S.D.N.Y. 1989); *see also In re 2495 Broadway Supermarket, Inc.*, 97 B.R. 765 (Bankr. S.D.N.Y. 1989).

15. The Objecting EPP Participants have made no attempt to satisfy the standard for the recovery of attorneys' fees. As stated above, the Debtors do not believe there is any outstanding default under the EPP with respect to the Objecting EPP Participants. Even assuming there is a default under EPP with respect to the Objecting EPP Parties, they have not pointed to any provision under the EPP or Pennsylvania state law that would entitle them to recovery of attorney's fees or actuarial fees in connection with the EPP. Nor have they made any assertion that any such fees are reasonable.

Conclusion

16. For the reasons set forth herein and in the Motion, the Objection should be overruled and the Debtors' request to assume the EPP should be approved.

Dated: July 27, 2018
New York, New York

/s/ *Robert Lemons*

Gary T. Holtzer
Robert J. Lemons
Garrett A. Fail
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Attorneys for Debtors
and Debtors in Possession