

**BEFORE THE
NEW YORK STATE
PUBLIC SERVICE COMMISSION**

**In the Matter of the Verified Joint
Request of USRG Finance Company,
LLC and Sterling Energy Group, Inc.
for Expedited Approval Pursuant to
Section 70 of the Public Service Law for
Proposed Transfer of Ownership
Interests in Niagara Generation, LLC**

Case No. 13-E- ____

**VERIFIED JOINT REQUEST FOR EXPEDITED
APPROVAL OF TRANSFER OF OWNERSHIP INTERESTS
IN NIAGARA GENERATION, LLC PURSUANT TO
SECTION 70 OF THE PUBLIC SERVICE LAW**

Niagara Generation, LLC (“Niagara Generation”), USRG Finance Company, LLC (“USRG Finance”) and Sterling Energy Group, Inc. (“Sterling”) (together the “Petitioners”) jointly submit this Verified Joint Request for Expedited Approval Pursuant to Section 70 of the Public Service Law (“PSL”) pursuant to Rule 3.5 of the Commission’s Procedural Rules, 16 N.Y.C.R.R. § 3.5 (2013). As a result of this transaction, Niagara Generation will become a wholly-owned subsidiary of Sterling.

**INTRODUCTION AND
REQUEST FOR EXPEDITED ACTION**

On May 30, 2013, Niagara Generation filed a Verified Petition for an Expedited Declaratory Ruling seeking a ruling from the Commission that Niagara Generation has become an alternate energy production facility exempt from regulation under the PSL.¹ This petition is

¹ Case 13-E-0233 *Petition of Niagara Generation, LLC for a Declaratory Ruling that it has become an Alternate Energy Production Facility Exempt from Regulations under the Public Service Law* (Submitted on May 30, 2013).

currently pending before the Commission in Case 13-E-0233. In this proceeding, Petitioners are seeking the Commission approvals required for USRG Finance to sell 100% of the ownership interests in Niagara Generation to Sterling (the “Proposed Transaction”) in the event that the Commission denies Niagara Generation’s Verified Petition for an Expedited Declaratory Ruling in Case 13-E-0233 or is unable to grant that petition in the near future. If the Commission grants Niagara Generation the relief requested in its Verified Petition for an Expedited Declaratory Ruling before granting the relief requested in this petition, this petition will become moot.

Niagara Generation owns and operates Niagara Generation Facility which is an approximately 53 MW generating facility that can burn bituminous coal, petroleum coke, biomass and tire-derived fuel located in Niagara Falls, New York (the “Facility”). Because this transaction will not harm captive retail customers in New York State for the reasons discussed below, Petitioners respectfully request that the Commission find this transaction to be in the public interest as required by section 70 of the PSL for the reasons discussed below.

Petitioners respectfully request expedited action on this Petition so that this transaction may close on or before November 30, 2013.

BACKGROUND

I. THE PARTIES

A. Niagara Generation and the Facility

Niagara Generation is a limited liability company formed under the laws of Delaware. Niagara Generation is a direct, wholly-owned subsidiary of USRG Finance. Niagara Generation owns the Facility, which was originally constructed as a coal-fired, fluidized bed cogeneration facility supplying both electricity and steam. Electricity from the Facility was originally sold to Niagara Mohawk Power Corporation (“NiMo”) under a long-term power purchase agreement

that was subsequently terminated as part of NiMo's restructuring process. Thereafter, the Facility operated as a merchant supplier of electric power in the wholesale markets administered by the New York Independent System Operator, Inc. ("NYISO"). Thus, Niagara Generation does not and has never provided electric service directly to any retail customers in New York State.

By order dated April 26, 2002, the Commission authorized WPS Power Development, Inc. ("WPS") to acquire the Facility from Central Hudson Energy Services, Inc.² In that order, the Commission also granted lightened regulation to WPS for its operation of the Facility as a wholesale supplier of electric power. By order dated January 22, 2007, the Commission authorized Niagara Generation to acquire all of WPS's ownership interest in the Facility and to continue to operate the Facility as a wholesale supplier of electric power under lightened regulation.³

After its acquisition of the Facility, USRG Finance made substantial investments designed to permit the Facility to be co-fired using biomass and obtained a contract from the New York State Energy Research and Development Authority ("NYSERDA") under the Main Tier of the Commission's Renewable Portfolio Standard ("RPS") Program. Unfortunately, the low level of the payments received under that agreement and the substantial decline in wholesale market prices occurring in recent years have made operation of the Facility uneconomic. As a result, Niagara Generation informed the Commission by letter dated February 7, 2013 of its

² Case 02-M-0093, *WPS Power Development, Inc., CH Resources, Inc., and Central Hudson Energy Services, Inc. – Joint Petition for Approval of the Sale of Certain Electric Generating Facilities and a Steam Plant*, Order Approving Transfers, Providing For Lightened And Incidental Regulation, And Granting A Certificate Of Public Convenience And Necessity (Issued and Effective April 26, 2002) (Light Regulation Order).

³ Case 06-E-1301, *WPS Empire State, Inc., WPS Niagara Generation LLC and USRG Niagara Biomass LLC – Joint Petition For Expedited Approval of the Transfer of All Membership Interests*, Order Approving Transfer And Financing (Issued and Effective January 22, 2007).

intention to place the Facility into inactive or mothballed status effective May 9, 2013.⁴ The Facility ceased operations on that date and has remained in mothballed status at all times thereafter.

B. USRG Finance

USRG Finance, a Delaware limited liability company, is directly owned by USRG Power & Biofuels Fund II, L.P. (“USRG Fund II”), which holds a 60.36% ownership interest and USRG Niagara CB, LLC (“USRG Niagara”), which holds the remaining 39.64% ownership interest. USRG Niagara, in turn, is a wholly-owned subsidiary of USRG Power & Biofuels Fund II-A, L.P. (“USRG Fund II-A” and together with USRG Fund II, the “USRG Funds”). USRG Power & Biofuels Fund II GP, LLC (“USRG Fund II GP”) has management control and an approximately 20% economic ownership interest in each of the USRG Funds.⁵ The remaining interests in the USRG Funds are held by limited partner investors whose interests are passive and who do not exercise control, directly or indirectly over Niagara Generation and USRG Finance.

USRG Fund II GP is held by various individual investors and entities, most of whom hold less than a 10% ownership interest. The following individuals and entities hold a 10% or greater ownership interest in USRG Fund II GP: (i) Rusheen Capital Partners, LLC (approximately 19.5% and which is wholly owned by James McDermott); Lee Bailey (approximately 14.3%); Millwood Energy Holdings, LLC (approximately 13% and which is wholly owned by Jonathan Koch); and CrossRiver Capital, LLC (approximately 10.3% and

⁴ Case 05-E0889 *Proceeding on Motion of the Commission to Establish Policies and Procedures Regarding Generation Unit Requirements*, Niagara Generation, LLC Notice of Intent to Mothball its Facility at 5300 Frontier Avenue, Niagara Falls (February 8, 2013).

⁵ USRG Fund II GP holds an approximate 20% interest in each of USRG Fund II and USRG Fund II GP; while the remaining 80% ownership interests in each of USRG Fund II and USRG Fund II-A are held by passive limited partner investors, as noted above, USRG Fund II GP has management control over each of those funds.

which is wholly owned by Thomas King). An organizational chart illustrating the current ownership structure of Niagara Generation and USRG Finance is attached hereto as Exhibit A.

C. Sterling

Sterling, an Indiana corporation privately owned by its shareholders, is an energy company with operations in power generation and oil and gas production and transmission. Sterling is held by a group of individual private investors and entities, most of whom hold less than a 5% ownership interest. Sterling's personnel have extensive experience in the operation of generating facilities similar to the Facility and are confident that they can return the Facility to operational status and further increase the use of renewable fuel stocks in the Facility. The only individuals and entities that hold a 10% or greater ownership interest in Sterling are William J. Harrington, who holds approximately 47.5% and Fred L. Solomon, who holds approximately 31.6%.

Crawfordsville Energy, an Indiana limited liability company, is a direct, wholly-owned subsidiary of Sterling. Crawfordsville Energy holds a purchase contract with the city of Crawfordsville, Indiana for the acquisition of a 25 MW power plant currently owned and operated by Crawfordsville Electric Light & Power ("Crawfordsville Energy Facility"). Sterling also holds a 99% ownership interest in Gulfstar Oil & Gas, LLC, which is a Kentucky limited liability company ("Gulfstar"). Gulfstar owns and operates an approximately 20 mile natural gas pipeline and gathering system in Butler and Warren County, Kentucky.

Neither Sterling nor its affiliates currently own or control generation, transmission or distribution assets, or fuel inputs into generation in New York, New England or PJM control areas or any electric or natural gas utilities providing retail service to customers in New York State.

II. THE PROPOSED TRANSACTION

In the Proposed Transaction, Sterling will purchase, and USRG Finance will sell, 100% of its ownership interests in Niagara Generation in exchange for a combination of preferred stock in Sterling, which can be converted to common stock at USRG Finance's election, and a warrant to purchase additional common stock in Sterling. Additionally, USRG Finance will have the right to appoint a board member to a newly created sixth seat on Sterling's board of directors. As a result of the Proposed Transaction, Niagara Generation will become a wholly-owned subsidiary of Sterling, and Niagara Generation will no longer be affiliated with USRG Finance. An organizational chart illustrating the ownership structure of Niagara Generation and Sterling after the Proposed Transaction is attached hereto as Exhibit B.

ANALYSIS

I. THE PROPOSED TRANSACTION WILL HAVE NO ADVERSE IMPACTS ON CAPTIVE RATEPAYERS IN NEW YORK STATE

The Commission has consistently held that consumers in New York State are best served by properly functioning competitive markets. For example, in its Statement on Policy on Further Steps Toward Competition in Case 00-M-0504, the Commission adopted the following vision statement to guide its regulatory policies:

The provision of safe, adequate, and reliable gas and electric service at just and reasonable prices is the primary goal. Competitive markets, where feasible, are the preferred means of promoting efficient energy services, and are well suited to deliver just and reasonable prices, while also providing customers with the benefit of greater choice, value and innovation. Regulatory involvement will be tailored to reflect the competitiveness of the market.⁶

⁶ Case 00-M-0504, *Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities*, Statement Of Policy On Further Steps Toward Competition In Retail Energy Markets, slip op. at 18 (Issued and Effective: August 25, 2004).

In other contexts, the Commission has found that the existence of properly functioning competitive wholesale power markets eliminates any need for the Commission to regulate financial transactions by lightly regulated wholesale merchant generators. For example, in granting lightened regulation to Carr Street Generating Company, L.P., the Commission found that:

So long as there is an effectively competitive wholesale generation market, the public interest does not require that we investigate the financial manipulation or poor financial management of wholesale generators. We do not regulate the wholesale rates these providers charge, and the market will prevent them from charging higher electric rates even if their costs rise due to their poor management.⁷

In light of these determinations, the fundamental question in this proceeding is whether the Proposed Transaction will interfere in any way with the proper operation of New York's competitive wholesale power markets. The short answer to this question is that it will not.

The Proposed Transaction will not create or enhance horizontal or vertical market power in any relevant market in New York State. The Proposed Transaction involves the transfer of an approximately 53 MW generation facility from USRG Finance to Sterling in the NYISO market, which represents approximately 0.13% of the NYISO market.⁸ Because the Proposed Transaction will not have more than a *de minimus* impact on the NYISO market and because neither Sterling nor its affiliates controls any generating capacity in the New York, New England or PJM control areas, the Proposed Transaction cannot result in any increase in ownership concentration that could create or enhance horizontal market power. Indeed, to the extent that

⁷ Case 98-E-1670, *Carr Street Generating Station, L.P. – Petition for an Original Certificate of Public Convenience and Necessity and For a Declaratory Ruling On Regulatory Regime*, Order Providing For Lightened Regulation, slip op. at 9 (Issued and Effective April 23, 1999).

⁸ As of April 2013, the NYISO market had a total installed capacity of 41,452 MW. See 2013 Load & Capacity Data: a report by the New York Independent System Operator, "Gold Book" at 3 (Apr. 2013), available at http://www.nyiso.com/public/webdocs/markets_operations/services/planning/Documents_and_Resources/Planning_Data_and_Reference_Docs/Data_and_Reference_Docs/2013_GoldBook.pdf.

the Proposed Transaction allows the Facility to return to service as a wholesale merchant generator powered in substantial part by renewable resources, the Proposed Transaction may prove to be of substantial benefit to consumers.

The Proposed Transaction will not create vertical market power affecting captive retail customers in New York State, since neither Sterling nor any of its affiliates owns any electric or gas utilities serving captive retail customers in New York State. In addition, neither Sterling nor its affiliates have any ownership interest in or control of fuel supplies, fuel delivery systems, other inputs to electricity markets or any new sites for electric generation that could raise barriers to entry in the NYISO market. Accordingly, the Proposed Transaction does not raise any vertical market power issues.

Lastly, the Proposed Transaction will not have any adverse effect of rates because neither Niagara Generation nor Sterling has any transmission customers whose rates could be affected by the Transaction.

II. THE COMMISSION SHOULD APPROVE THE PROPOSED TRANSACTION UNDER PSL § 70

Petitioners respectfully request that the Commission approve the Proposed Transaction pursuant to PSL § 70 on an expedited basis. PSL § 70 prohibits any corporation from acquiring more than ten percent of the voting securities of any electric corporation, with certain exemptions not relevant here, without the consent of the Commission. PSL § 70 further provides that:

No consent shall be given by the Commission to the acquisition of any stock in accordance with this section unless it shall have been shown that such acquisition is in the public interest.

The Proposed Transaction satisfies this public interest requirement for the reasons set out below.

A. Matters Required for Section 70 Approval

None of the Petitioners directly own or operate any “electric plant” subject to regulation by the Commission under the Public Service Law. Petitioner USRG Finance is the owner of Niagara Generation, which directly owns the Facility. The market value of the interests in Niagara Generation to be acquired by Sterling is reflected in the purchase price being paid, which was determined by an arm’s length negotiation. Additionally, none of the interests in Niagara Generation to be acquired by Sterling are publicly traded.

On August 29, 2013, Petitioners filed an application with FERC seeking authorization of the transaction under Section 203 of the Federal Power Act. No other governmental authorizations or certifications required for the proposed transaction have been obtained. No municipal consents are required for the consummation of the Proposed Transaction.

Petitioners respectfully request that the Commission waive the requirements of §§ 39.1(a) and 39.1(c), 16 N.Y.C.R.R. §§ 39.1(a) and 39.1(c) (2012), requiring detailed information concerning the financial condition of the applicant and the market value of the securities to be transferred on the grounds that these requirements should not apply to lightly regulated entities such as Niagara Generation and its upstream owners and that the securities involved are not publicly traded.

B. The Proposed Transaction is in the Public Interest

The Commission has consistently ruled that it will review Section 70 petitions of wholesale generators with reduced scrutiny and consistent with the Commission’s concerns about market power issues. Petitioners will not be able to exercise market power as a result of the Proposed Transaction. As described above, the Proposed Transaction will not create or enhance vertical or horizontal market power.

Moreover, because Sterling and its affiliates do not serve captive customers pursuant to regulated tariffs in New York State, there is no risk that the Proposed Transaction could harm captive retail customers in New York State by creating or enhancing vertical market power. No change will occur in NYISO-administered markets for energy, capacity, or ancillary services as a result of the transaction and, consequently, no incremental risks of undue exercise of market power exist. Because no issues of vertical or horizontal market power are raised, the Proposed Transaction should be approved under PSL § 70.

C. Lightened Regulation

In the Light Regulation Order,⁹ the Commission concluded that the Facility is qualified for lightened regulation under PSL. As described herein, the Proposed Transaction will not affect Niagara Generation's participation in the wholesale generation market.

In following orders, the Commission has determined that Niagara Generation should continue to be lightly regulated following the consummation of transfers of ownership interests similar to the Proposed Transaction.¹⁰ Accordingly, following the consummation of the Proposed Transaction, the Commission should continue the lightened regulation of Niagara Generation under the terms and conditions established in the Light Regulation Order.

D. State Environmental Quality Review Act

Under the State Environmental Quality Review Act ("SEQRA"), Article 8 of the Environmental Conservation Law, and its implementing regulations (6 N.Y.C.R.R. § 617 and 16 N.Y.C.R.R. § 7), the Commission must determine whether certain actions it is authorized to

⁹ Case 02-M-0093, *WPS Power Development, Inc., CH Resources, Inc., and Central Hudson Energy Services, Inc. – Joint Petition for Approval of the Sale of Certain Electric Generating Facilities and a Steam Plant*, Order Approving Transfers, Providing For Lightened And Incidental Regulation, And Granting A Certificate Of Public Convenience And Necessity (Issued and Effective April 26, 2002).

¹⁰ Case 06-E-1301, *WPS Empire State, Inc., WPS Niagara Generation LLC and USRG Niagara Biomass LLC – Joint Petition For Expedited Approval of the Transfer of All Membership Interests*, Order Approving Transfer And Financing (Issued and Effective January 22, 2007).

approve may have a significant impact on the environment. SEQRA review is required in this case because the proposed transaction does not meet the definition of Type I or Type II actions listed in 6 N.Y.C.R.R. §§ 617.4, 617.5 and 16 N.Y.C.R.R. § 7 and, therefore, is an “unlisted” action requiring SEQRA review. Accordingly, the Commission should act as lead agency with respect to this application to conduct an environmental assessment and to determine the significance of the actions proposed.

The Proposed Transaction concerns the transfer of ownership interests in the Facility and will not change the operations of the Facility in a manner that would cause an adverse environmental impact. Sterling will continue to operate the Facility in accordance with all applicable environmental permits and environmental laws. The Proposed Transaction will not cause new environmental impacts, and Petitioner respectfully requests that should the Commission review the Proposed Transaction pursuant to PSL § 70, it should follow precedent and issue a negative declaration and undertake no further environmental review.

CONCLUSION

WHEREFORE, for the above stated reasons, Petitioners respectfully request that the Commission grant expedited approval of the Proposed Transaction pursuant to PSL § 70.

Respectfully submitted,

/s/ George M. Pond

George M. Pond, Esq.
Ekin Senlet, Esq.
Hiscock & Barclay, LLP
80 State Street
Albany, New York 12207

Dated: September 3, 2013

EXHIBIT A

Exhibit A: Pre-Transactional Organizational Structure

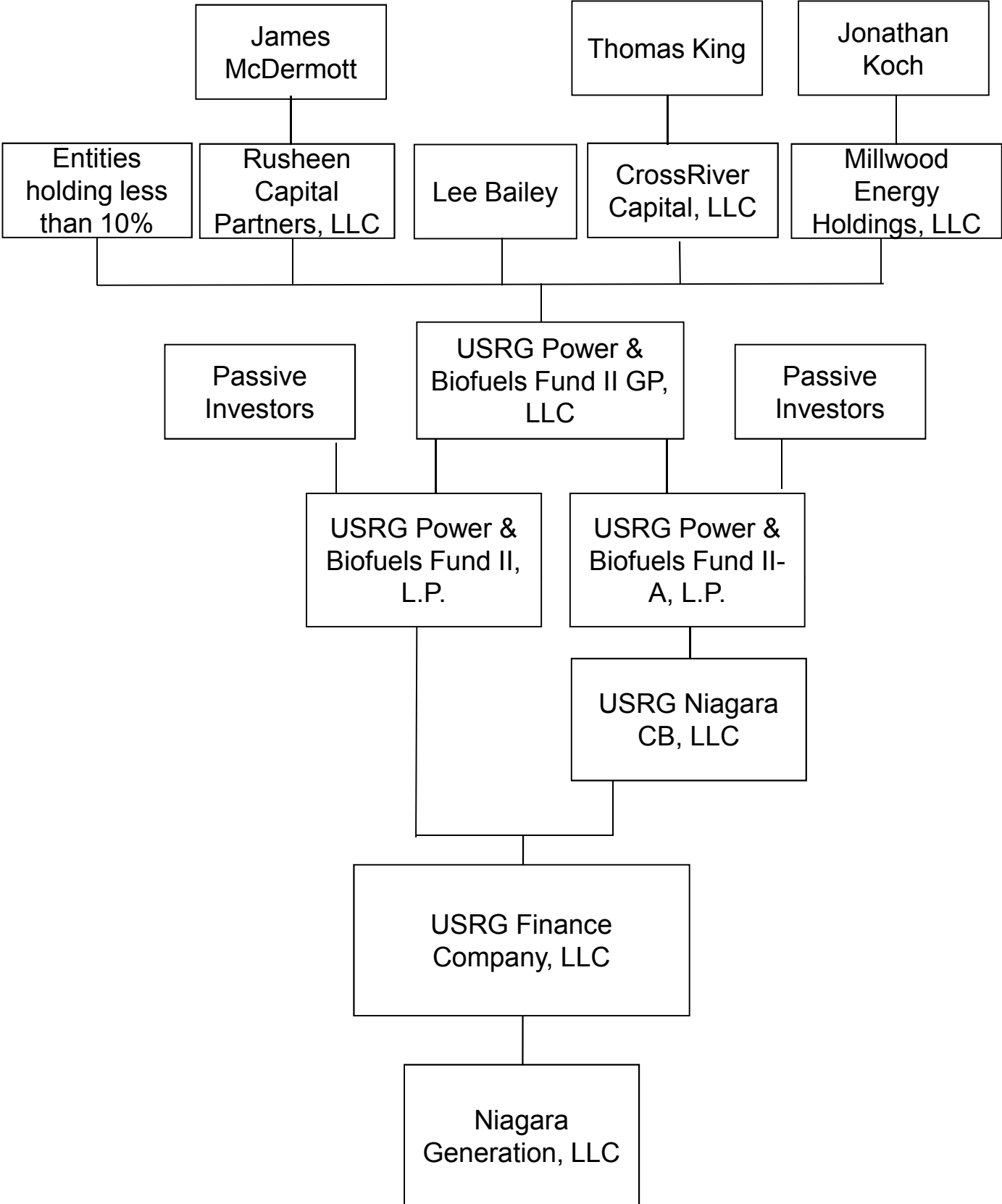
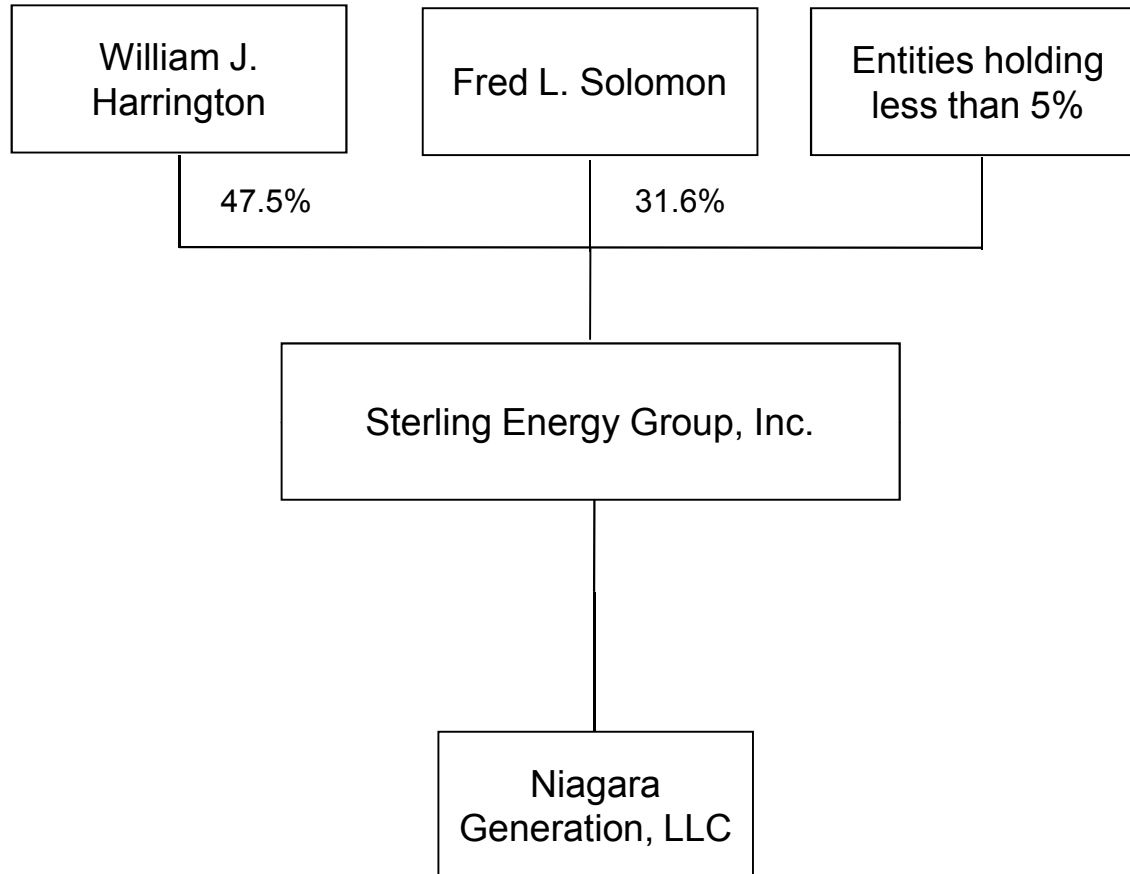


EXHIBIT B

Exhibit B: Post-Transactional Organizational Structure

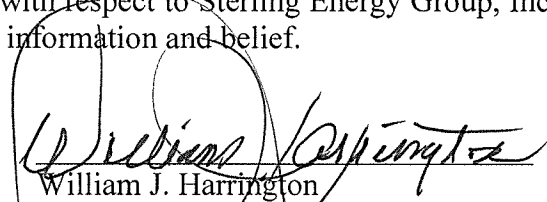


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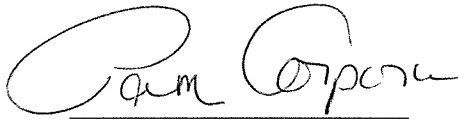
STATE OF NEW YORK)
) SS.
ONONDAGA COUNTY)

VERIFICATION OF
WILLIAM J. HARRINGTON

William J. Harrington, being duly sworn, deposes and says: I am the Chief Executive Officer of Sterling Energy Group, Inc., one of the Petitioners in this proceeding. I have read the foregoing Verified Joint Request of Expedited Approval of Transfer of Ownership Interests In Niagara Generation, LLC Pursuant to Section 70 of The Public Service Law and state that I know the contents thereof; and that the facts stated therein with respect to Sterling Energy Group, Inc. and its affiliates are true to the best of my knowledge, information and belief.


William J. Harrington
Chief Executive Officer
Sterling Energy Group, Inc.

Sworn to before me this
29th day of August, 2013



PAM CORPORA
Notary Public, State of New York
Qualified in Cort. Co., No. 01CO5066804
My Commission Expires Oct. 7, 2014

