



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

SUPPLEMENTAL

AGENDA ITEM#

11

PGCPB MEETING OF

12.18.14

14741 Governor Oden Bowie Drive
Upper Marlboro, Maryland 20772
TTY: (301) 952-4366
www.mncppc.org/pgco

PGCPB No. 14-119(c)

RESOLUTION

WHEREAS, the Maryland-National Capital Park and Planning Commission (“Commission”) is authorized by Maryland Code Annotated, Land Use Article, §18-309 to enter into an agreement with the owner of a facility for the generation of electricity that locates in Prince George's County for a negotiated payment by the owner in lieu of taxes (PILOT) imposed on real or personal property of the facility; and

WHEREAS, Keys Energy Center, LLC (“Keys”) wishes to develop, build and operate the Keys Energy Center Generating Facility, a nominally rated 735 MW electric generating plant (the “**Project**”) described in the Certificate of Public Convenience and Necessity (“**CPCN**”) filed with the Maryland Public Service Commission on July 3, 2012, to be located at Parcel 88 on Tax Map 146 (District 11 Account 1183086), a former sand and gravel mining site in the Brandywine area on North Keys Road in Prince George’s County (the “**Site**”); and

WHEREAS, Keys proposes to enter into a PILOT Agreement with the Commission to develop and operate the Project on the Site, the terms of which are attached hereto as Exhibit A; and

WHEREAS, Pursuant to Maryland Code Annotated, Land Use Article, §18-309(a)(3) Keys’ obligations under the PILOT Agreement: i) shall be guaranteed by Keys Energy Holdings, LLC, the terms of which are attached hereto as Exhibit B; ii) creates a covenant running with the land, iii) creates a lien attached to the property and fixtures of the Project; and iv) are secured by a security interest in the portions of the Project constituting personal property; and

WHEREAS, the Commission believes that the PILOT Agreement meets the requirements set forth in Maryland Code Annotated, Land Use Article §18-309 and that the Project’s construction and location in Prince George’s County would contribute to a secure and environmentally friendly power supply for the State and significantly benefit the County’s residents and businesses; and

WHEREAS, the Secretary-Treasurer of the Commission certified on October 22, 2014 that the PILOT Agreement and Guaranty reasonably conform to the requirements set forth in Maryland Code Annotated, Land Use Article §18-309 and that the Project on the Site is reasonably expected to generate more revenue for the Commission than would be generated if the Project for the generation of electricity did not locate in Prince George’s County.

NOW, THEREFORE, BE IT RESOLVED that the Prince George's County Planning Board at its meeting on October 23, 2014, approved the PILOT Agreement and Guaranty between the Commission and Keys and authorizes the Executive Director to execute the PILOT Agreement and Guaranty and implement this Resolution.

BE IT FURTHER RESOLVED, that the Prince George's County Planning Board at its meeting on December 11, 2014 approved the correction of the Guaranty name from KEC Holdings, LLC to Keys Energy Holdings, LLC and authorized the Executive Director to execute the Guaranty with the corrected entity name.

BE IT FURTHER RESOLVED, that an appeal of the Planning Board's action must be filed with the District Council for Prince George's County, Maryland within thirty (30) days of the final notice of the Planning Board's decision.

This is to further certify that the foregoing is a true and correct copy of the action taken by the Prince George's County Planning Board of The Maryland-National Capital Park and Planning Commission on the motion of Commissioner Shoaff, seconded by Commissioner Geraldo with Commissioners Hewlett, Bailey, Geraldo and Shoaff voting in favor of the motion, with Commissioner Washington absent at its regular meeting held on Thursday, December 11, 2014, in Upper Marlboro, Maryland.

Adopted by the Prince George's County Planning Board this ____ day of ____, ____.

Patricia Colihan Barney
Executive Director

By Jessica Jones
Planning Board Administrator

PCB:JJ:DC/map

GUARANTY

THIS GUARANTY is made as of this ____ day of _____, 2014, by KEYS ENERGY HOLDINGS, LLC a Delaware limited liability company ("Guarantor") in favor of **MARYLAND NATIONAL-CAPITAL PARK AND PLANNING COMMISSION** (the "Commission") pursuant to, and in order to induce the Commission to enter into the Payment in Lieu of Taxes Agreement (Keys Energy Project) of even date herewith between the Commission and Keys Energy Center LLC, a Delaware limited liability company ("Keys") (as the same may be amended, modified, extended, renewed or replaced from time to time, the "PILOT Agreement"), which shall be fair and sufficient consideration for the execution of this Guaranty.

1. Construction and Definitions. The use of the singular herein shall also refer to the plural and vice versa, and the use of the neuter or any gender herein shall also refer to the other gender and to the neuter. In addition to terms defined elsewhere in this Guaranty, the following terms shall have the following meanings when used herein:

"Commission Notice Address" shall mean the address set forth in Section 13 of the PILOT Agreement.

"Guarantor Notice Address" shall mean _____; Fax: _____.

"Obligations" shall mean all present and future obligations, indebtedness and liabilities of Keys to the Commission for the payment of money under the PILOT Agreement, whether or not now contemplated, whether arising in contract, tort or otherwise, whether or not any instrument or agreement relating thereto specifically refers to this Guaranty, as well as all modifications, renewals, extensions, consolidations and replacements thereof.

"person" shall mean any individual, corporation, limited liability company, partnership, joint venture, association, trust or entity of any kind.

2. Guaranty. Guarantor hereby unconditionally, directly and absolutely guarantees to the Commission, its successors and assigns, payment by Keys when due of all of the Obligations. This shall be a continuing guaranty and Guarantor hereby waives notice of acceptance of this Guaranty with regard to the Obligations that may now exist or may hereafter come into existence. If any of the Obligations are not paid when due or if a default or event of default under the PILOT Agreement shall occur, all of the Obligations shall at the Commission's option be due and payable for the purposes of this Guaranty and the liability of Guarantor hereunder. Guarantor further agrees that any claim which Guarantor may now or hereafter have against the Commission, Keys or any other person for any reason whatsoever shall not affect Guarantor's obligations under this Guaranty and shall not be used or asserted against the Commission as a defense to the performance of said obligations or as a setoff, counterclaim or deduction against any sums due hereunder. The liability of Guarantor shall not be conditioned upon or subject to a defense of reliance upon the guaranty of any other person. Notwithstanding any partial or entire payment of all or any of the Obligations, this Guaranty shall remain in effect or be reinstated, as the case may be, as though such payment had never been made, with respect to any such payment which is rescinded or recovered from or restored or returned by the

Commission under authority of any law, rule, regulation, order of court or governmental agency, whether arising out of any proceedings under the United States Bankruptcy Code or otherwise.

3. Representations, Warranties and Covenants. Guarantor represents, warrants and covenants that, except as heretofore disclosed by Guarantor to the Commission in writing:

(a) Guarantor is a limited liability company duly organized, legally existing and in good standing under the laws of the State of Delaware, has the power to own its property and to conduct its business, and is duly qualified to do business, and is in good standing, in each jurisdiction in which such qualification is required by law; (b) Guarantor has full power and authority to enter into this Guaranty and to incur and perform the obligations provided for herein, all of which have been duly authorized by all necessary corporate and other action, and no consent or approval of any person, including, without limitation, its stockholders and any governmental authority, which has not been obtained, is required as a condition to the validity or enforceability hereof; (c) this Guaranty has been duly and properly executed by Guarantor and constitutes, and will continue to constitute, the valid and legally binding obligation of Guarantor, and is, and will continue to be, fully enforceable against Guarantor in accordance with its terms, subject to bankruptcy and other laws affecting the rights of creditors generally; (d) the execution, delivery and performance by Guarantor of this Guaranty will not violate (i) any provision of law or any order, rule or regulation of any court or governmental authority, (ii) the organizational or governing documents of Guarantor, or (iii) any instrument, contract, agreement, indenture, mortgage, deed of trust or other document or obligation to which Guarantor is a party or by which Guarantor, or any of its property, is bound; (e) Guarantor is not in default under any instrument, contract, agreement, indenture, mortgage, deed of trust or other document or obligation to which Guarantor is a party or by which Guarantor, or any of its property, is bound; (f) there are no judgments, injunctions or similar orders or decrees outstanding against Guarantor and there are no material claims, actions, suits or proceedings pending or threatened against Guarantor, or any of its property, at law or in equity, by or before any court or governmental authority; (g) Guarantor is not insolvent (as defined in Section 101(32) of the United States Bankruptcy Code), unable to pay its debts generally as they mature or engaged in business for which its property is an unreasonably small capital; (h) Guarantor has filed all federal, State, local and foreign tax returns which are required to be filed by it, and Guarantor has paid all federal, State, local and foreign taxes shown to be due on such tax returns or which have been assessed against it; (i) Guarantor is not in violation of, or, to Guarantor's knowledge and belief after diligent inquiry, under investigation with respect to or threatened to be charged with or given notice of a violation of, any law, rule, regulation or order; (j) there are no strikes, work stoppages, material grievance proceedings or other material controversies pending or, to Guarantor's knowledge and belief, threatened between Guarantor and any employees of Guarantor or between Guarantor and any union or other collective bargaining unit representing employees of Guarantor; (k) Guarantor is not, and has not been, the subject of any bankruptcy, reorganization, insolvency, readjustment of debt, trusteeship, receivership, dissolution or liquidation under any law, statute or proceeding; (l) all representations and information heretofore made or supplied to the Commission by or on behalf of Guarantor or Keys were, at the time made or supplied to the Commission, true and complete in all material respects, and all representations and information hereafter made or supplied to the Commission by or on behalf of Guarantor or Keys will be, at the time made or supplied to the Commission, true and complete in all material respects; (m) Guarantor, to the best of its knowledge, has duly obtained and now holds all licenses, permits, certifications, approvals and the like which it is required to hold by

federal, State, local and foreign laws, and each remains valid and in full force and effect; and (n) Guarantor's chief executive office and only place of business is located at the Guarantor Notice Address, and Guarantor's books and records are located at the Guarantor Notice Address.

4. **Waivers.** Guarantor hereby waives notice of each and every one of the following acts, events and/or conditions and agrees that the creation or existence of any such act, event or condition or the performance thereof by the Commission (in any number of instances) shall in no way release or discharge Guarantor from liability hereunder, in whole or in part: (a) the renewal, extension, modification, or granting of any indulgence of any nature whatsoever with respect to any or all of the Obligations; (b) the assumption of any of the Obligations by any other person, whether by assignment, sale, sublease, conveyance or otherwise; (c) the institution of any suit or the obtaining of any judgment against Keys, any guarantor, maker, surety, endorser, indemnitor or other party primarily or secondarily liable for the payment and/or performance of any of the Obligations; or (d) any other event, circumstance or condition which might otherwise constitute a legal or equitable discharge of a surety or a guarantor. Guarantor hereby waives, to the extent the same may be waived under applicable law: (a) all claims, causes of action and rights of Guarantor against the Commission on account of actions taken or not taken by the Commission in the exercise of the Commission's rights or remedies hereunder or under law; (b) all claims and causes of action of Guarantor against the Commission for punitive, exemplary or other non-compensatory damages; (c) diligence in the enforcement or collection of any of the Obligations, presentment, demand, protest, notice of protest and notice of default with respect to all of the Obligations, and all other notices of any kind whatsoever; and (d) all subrogation and other rights and claims of Guarantor against Keys arising on account of this Guaranty or any sums paid by Guarantor collected by the Commission pursuant to this Guaranty. Any money or other property that the Commission may receive in respect of or as security for any of the Obligations from any source whatsoever may be applied to any of the Obligations as the Commission shall determine in its sole discretion.

5. **Expenses.** Guarantor agrees to pay to the Commission, on demand by the Commission from time to time, the amount of all expenses, including reasonable attorney's fees and expenses, paid or incurred by the Commission in defending any and all non-meritorious or previously waived demands, claims, counterclaims, crossclaims, causes of action, litigation and proceedings of every kind and nature asserted, commenced or instituted against the Commission, or any of the Commission's officers, directors or employees, by Guarantor or Keys on account of, as a result of or relating to any action taken or not taken by the Commission in connection with the Obligations or enforcement or exercise by the Commission of any rights or remedies of the Commission under this Guaranty or the PILOT Agreement. Guarantor also promises to pay to the Commission, on demand by the Commission from time to time, interest on the outstanding amount of such expenses paid by the Commission, from the date of the Commission's demand for payment of such expenses until the same are paid in full, at a rate equal to twelve percent (12%) per annum and calculated based upon a year of 360 days and the actual number of days elapsed.

6. **Performance by Guarantor.** Guarantor shall continue to observe, comply with and perform all warranties, covenants, conditions and agreements to be observed, complied with or performed by Guarantor under this Guaranty until all of the Obligations have been paid in full.

7. **Confession of Judgment.** Guarantor hereby authorizes any attorney-at-law to appear for Guarantor before any court, having jurisdiction, within the United States or elsewhere, and, after one or more complaints filed, confess judgment against Guarantor as of any time after any sums are payable hereunder for the amount of such sums, together with attorney's fees equal to fifteen percent (15%) of the amount of such sums, for collection and release of all errors, and without stay of execution, and inquisition and extension upon any levy on real estate is hereby waived and condemnation agreed to, and the exemption of personal property from levy and sale is also hereby expressly waived, and no benefit of exemption shall be claimed under any exemption law now in force or which may be hereafter adopted. The foregoing authorities and powers to confess judgment shall not be exhausted by one or more exercises of any of them, or by any imperfect exercise of any of them, and shall not be extinguished by any judgment entered because of any of them. Guarantor agrees that any agreements of Guarantor contained in this Guaranty to pay any costs or expenses, including attorney's fees and expenses, paid or incurred by the Commission shall not be merged into, or otherwise impaired by, any such judgment by confession, but the Commission shall not be entitled to recover on account of such costs or expenses any amount in excess of the greater of (a) such costs or expenses included in any judgments by confession (without duplication), or (b) such costs or expenses actually paid or incurred by the Commission.

8. **Modifications, Notices.** No modification or waiver of any provision of this Guaranty, and no consent by the Commission to any noncompliance by Guarantor therewith, shall in any event be effective unless the same shall be in writing, and then such waiver or consent shall be effective only in the specific instance and for the purpose for which given. No notice to or demand upon Guarantor in any circumstance shall entitle Guarantor to any other or further notice or demand in the same, similar or other circumstances. All written communications in connection with this Guaranty shall be deemed to have been given when hand-delivered to the party to whom directed, or, if transmitted by facsimile transmission or by mail (whether or not registered or certified), when transmitted by facsimile transmission or deposited in the mail postage prepaid, respectively, provided that any such notice or communication to Guarantor shall be hand-delivered or transmitted to Guarantor at the Guarantor Notice Address (or at such other address as Guarantor may specify to the Commission in writing from time to time), and any such notice or communication to the Commission shall be hand-delivered or transmitted to the Commission at the Commission Notice Address (or at such other address as the Commission may specify to Guarantor in writing from time to time).

9. **Applicable Law, Jurisdiction.** The performance and construction of this Guaranty shall be governed by the internal laws of the State of Maryland (exclusive of principles of conflicts of laws). Guarantor agrees that any suit, action or proceeding instituted by the Commission with respect to this Guaranty may be brought in any State or federal court located in the State of Maryland (in addition to such other courts in which jurisdiction and venue may be appropriate), and Guarantor consents to the in personam jurisdiction of such courts. Guarantor irrevocably waives any objection and any right of immunity on the ground of venue, the convenience of the forum or the jurisdiction of such courts or from the execution of judgments resulting therefrom.

10. **Successors and Assigns, Invalidity.** This Guaranty shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns, and each

reference in this Guaranty to any of the parties hereto shall be deemed to include the successors and assigns of such party, including, in the case of Guarantor, the debtor in possession in any case under any chapter of the United States Bankruptcy Code in which Guarantor is debtor. If any term, provision or condition, or any part thereof, of this Guaranty shall for any reason be found or held invalid or unenforceable by any court or governmental agency, such invalidity or unenforceability shall not affect the remainder of such term, provision or condition, nor any other term, provision or condition, and this Guaranty shall survive and be construed as if such invalid or unenforceable term, provision or condition had not been contained herein or therein. This Guaranty shall not impair, diminish or otherwise affect any obligation or liability of Guarantor to the Commission under or on account of any guaranties heretofore issued by Guarantor in favor of the Commission relating to any of the Obligations.

11. Merger. This Guaranty contains the entire agreement of the parties with respect to the matters covered and the transactions contemplated hereby, and no agreement, statement or promise made by any party hereto, or by any employee, officer, agent or attorney of any party hereto, which is not contained herein, shall be valid or binding.

12. WAIVER OF TRIAL BY JURY. GUARANTOR AND (BY ITS ACCEPTANCE HEREOF) THE COMMISSION EACH AGREES THAT ANY ACTION, SUIT OR PROCEEDING INVOLVING ANY CLAIM, COUNTERCLAIM OR CROSS-CLAIM ARISING OUT OF OR IN ANY WAY RELATING, DIRECTLY OR INDIRECTLY, TO THIS AGREEMENT OR THE OTHER LOAN DOCUMENTS, OR ANY LIABILITIES, RIGHTS OR INTERESTS OF GUARANTOR, THE COMMISSION OR ANY OTHER PERSON ARISING OUT OF OR IN ANY WAY RELATING, DIRECTLY OR INDIRECTLY, TO ANY OF THE FOREGOING, SHALL BE TRIED BY A COURT AND NOT BY A JURY. GUARANTOR AND THE COMMISSION EACH HEREBY WAIVES ANY RIGHT TO TRIAL BY JURY IN ANY SUCH ACTION, SUIT OR PROCEEDING, WITH THE UNDERSTANDING AND AGREEMENT THAT THIS WAIVER CONSTITUTES A WAIVER OF TRIAL BY JURY OF ALL CLAIMS, COUNTERCLAIMS AND CROSS-CLAIMS AGAINST PARTIES WHO ARE NOT PARTIES TO THIS AGREEMENT OR THE OTHER AGREEMENTS. THIS WAIVER IS KNOWINGLY, WILLINGLY AND VOLUNTARILY MADE BY GUARANTOR AND THE COMMISSION, AND GUARANTOR AND THE COMMISSION EACH ACKNOWLEDGES AND AGREES THAT THIS WAIVER OF TRIAL BY JURY IS A MATERIAL ASPECT OF THE AGREEMENTS BETWEEN GUARANTOR AND THE COMMISSION AND THAT NO REPRESENTATIONS OF FACT OR OPINION HAVE BEEN MADE BY ANY PERSON TO INDUCE THIS WAIVER OF TRIAL BY JURY OR TO MODIFY, LIMIT OR NULLIFY ITS EFFECT.

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IN WITNESS WHEREOF, Guarantor, intending to be legally bound hereby and intending this to be a sealed instrument, has caused this Guaranty to be duly executed under seal the day and year first above written.

ATTEST/WITNESS:

KEYS ENERGY HOLDINGS, LLC

By: _____(SEAL)
Name:
Title: