

ORDINANCE NO. 04-06

ORDINANCE APPROVING THE EXECUTION AND
DELIVERY BY THE COUNTY OF MARSHALL, KENTUCKY
OF A CERTAIN RELEASE AND AMENDMENT.

WHEREAS, the County of Marshall, Kentucky (the "County") has heretofore authorized and issued its County of Marshall, Kentucky Industrial Building Revenue Bonds (Duke Energy Marshall County, LLC Project), being outstanding in principal amount of \$318,159,276.80 (the "Bonds"); and

WHEREAS, Duke Energy Marshall County, LLC, a Delaware limited liability company, the obligor of the Bonds, and its corporate parent have encountered financial reverses because of national economic circumstances in the energy industry and have requested that the County agree to a certain Release and Amendment agreement, whereby the Project financed by the proceeds of the Bonds may be transferred to and beneficially used by a transferee entity; and

WHEREAS, the County has determined that the best interests of the County will be served by approving and entering into such Release and Amendment agreement; and

NOW THEREFORE BE IT ORDAINED BY THE COUNTY OF MARSHALL, KENTUCKY, ACTING BY AND THROUGH ITS FISCAL COURT AS FOLLOWS:

Section 1. That certain Release and Amendment agreement by and among (i) the County of Marshall, Kentucky, (ii) Duke Energy Marshall County, LLC, a Delaware limited liability company, (iii) Duke Capital LLC, a Delaware limited liability company, (iv) KGEN Power LLC, a Delaware limited liability company, and (v) Wachovia Bank, National Association (formally First Union National Bank), as trustee, is hereby approved and authorized. Such Release and Amendment agreement shall be executed and delivered by and on behalf of the County by the County Judge/Executive and the Fiscal Court Clerk, each of whom is hereby authorized and directed to so act.

Section 2. The County Judge/Executive, Deputy County Judge/Executive, Fiscal Court Clerk and all other County officials are hereby authorized and empowered to execute and deliver such other documentation as shall be reasonably required for the effectuation of the transaction contemplated by the Release and Amendment agreement.

Section 3. This Ordinance shall be in full force and effect from and after its adoption as provided by law.

GIVEN FIRST READING APPROVAL at a duly convened meeting of the Fiscal Court of the County of Marshall, Kentucky, held on the 1st day of June, 2004.

RELEASE AND AMENDMENT

THIS RELEASE AND AMENDMENT ("Agreement") is entered into this 15th day of June 2004, by and among (i) the COUNTY OF MARSHALL, KENTUCKY, a de jure county and a political subdivision of the Commonwealth of Kentucky and a public body corporate and politic (the "Issuer"), (ii) DUKE ENERGY MARSHALL COUNTY, LLC, a Delaware limited liability company (the "Company"), (iii) DUKE CAPITAL LLC, a Delaware limited liability company (the "Guarantor"), (iv) KGEN POWER LLC, a Delaware limited liability company (the "Transferee"), and (v) WACHOVIA BANK, NATIONAL ASSOCIATION (formally First Union National Bank), as trustee (the "Trustee").

RECITALS:

WHEREAS, the Issuer is a public body corporate and politic duly created and existing as a county and political subdivision of the Commonwealth of Kentucky pursuant to the provisions of Sections 103.200 to 103.286, inclusive, of the Kentucky Revised Statutes;

WHEREAS, the Issuer and Company have entered into the transaction contemplated by that certain Lease Agreement In Connection With Industrial Building Facilities dated April 1, 2001, as amended, (the "Lease") and of record in Miscellaneous Book 80, page 565, in the Office of the County Clerk of Marshall County, Kentucky regarding certain real and personal property described in the Lease (the "Project");

WHEREAS, the Company is a wholly owned subsidiary of Duke Energy North America, LLC ("DENA");

WHEREAS, pursuant to a Purchase and Sale Agreement dated as of May 3, 2004, by and among DENA, Duke Energy Capital of Texas, Inc. and KGen Partners LLC, a Delaware limited liability company and the owner of 100% of the equity interests of the Transferee, DENA has 100% of the equity interests in the Company to the Transferee;

WHEREAS, the Issuer and the Guarantor entered into that certain Guaranty dated April 1, 2001 by and between Issuer and Guarantor (the "Guaranty"), as an inducement for the Issuer to enter into the Lease;

WHEREAS, the Guarantor desires to be released from the Guaranty and the Issuer has agreed to grant such release to the Guarantor upon the terms and conditions set forth herein; and

WHEREAS, the Issuer, the Company, the Trustee and the Transferee desire to amend the Lease and the Indenture upon the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants and promises set forth herein and other good and valuable consideration, the parties hereby agree as follows:

1. **DEFINITIONS.** All capitalized words and terms herein shall have the meanings set forth in (i) that certain Indenture And Mortgage Deed Of Trust, as amended, by and between Issuer and Trustee dated April 1, 2001 (the "Indenture"), and (ii) the Lease, unless the context clearly otherwise requires.

2. **EFFECTIVE DATE.** Sections 6 and 7 of this Agreement shall become effective on the date of the transfer of the Bonds described in Section 5 of this Agreement (the "Effective Date"), provided that, if such Transfer does not occur within one year from the date hereof, this Agreement shall be null and void. All other Sections hereof shall become effective on and as of the date first above written. From and after the Effective Date, this entire Agreement shall continue in effect until the principal and the interest on the Bonds shall have been fully paid pursuant to the provisions of the Indenture.

3. **INCORPORATED BY REFERENCE.** The terms and conditions of the Lease and Indenture are incorporated herein by reference as if fully stated herein and the Issuer hereby reaffirms all of its obligations contained therein. The Company and Issuer hereby represent and warrant that there have not been, and are currently no amendments of, or modifications to, the Lease or the Indenture, except for that certain First Supplement to Indenture and Mortgage Deed of Trust dated as of August 1, 2003.

4. The Transferee hereby covenants and agrees to assume and carry out all of the duties, obligations, covenants, indemnities and payments (including but not limited to the payments in lieu of taxes to the Issuer of \$387,000.00 per annum) required by the Company under the Lease and/or the Indenture.

5. **TRANSFER OF BONDS.** At the time of the transfer of the Bonds, the Transferee may, upon compliance with applicable federal and state securities laws, if any, acquire all of the County of Marshall, Kentucky Industrial Building Revenue Bonds 2001 Series A and 2003 Series A (Duke Energy Marshall County, LLC Project) (the "Bonds") then outstanding. The Transferee agrees that if any Bonds are sold or transferred it will notify the Issuer, the Trustee and the Company of the name and address of the new owner of the Bonds, and it will, prior to delivery of such Bonds, make a notation on such Bonds of the date on which interest has been paid thereon and of the amount of any prepayments made on account of the principal thereof. No such transfer of Bonds shall occur unless such transfer complies with all applicable federal and state laws relating to such securities matters, including, in the case of a private placement of the Bonds, in whole or in part, execution and delivery by the new owner of the Bonds of appropriate representations of non-distributive intent, as applicable. The Transferee agrees to indemnify the other parties to this Agreement against any damage, claim or liability resulting from or arising in connection with any such transfer of the Bonds.

6. **RELEASE OF GUARANTY.** Issuer hereby remises, releases and forever discharges Guarantor, its successors and assigns, from all liability with respect to the Guaranty, such release to be effective on the Effective Date. After the Effective Date, the Issuer shall mark the face of the original Guaranty with the words "Canceled in Full as to all Obligations" and shall deliver such original cancelled Guaranty to Guarantor. The Trustee hereby consents to such release.

7. **LEASE/BOND PAYMENTS.** Notwithstanding any provision of the Indenture, or the Lease or of any Bond to the contrary, the parties hereto agree that all payments of principal and interest on such Bond or any part thereof (other than any payment of the entire unpaid principal amount thereof) may be made at a place and in a manner other than as provided in the Indenture and in the Bonds without presentation or surrender of such Bond, as may be designated by the Transferee and directly to the Transferee by the Company under the Lease. Any payment made in accordance with the provisions of this Agreement must be accompanied by sufficient information to identify the source and proper application of such payment. The Transferee shall notify the Trustee of any failure of the Company to make any payment of principal of or interest on the Bonds when due, and the Trustee will not be deemed to have any notice of such failure unless it has received such notice in writing and may assume that the Transferee has received all payments on the Bonds as and when due unless notified in writing by the Transferee to the contrary with a description of such non-payment.

8. **ASSIGNMENT.** The rights and obligations of the Issuer, the Company and the Transferee under this Agreement shall not be assignable upon the transfer of the Bonds or any portion thereof, although prior to the Effective Date the Transferee may assign this Agreement and its position as Transferee hereunder to any party that (a) the Transferee identifies in writing to the Trustee, the Issuer and the Company as a party that will acquire all of the Bonds outstanding at the time of acquisition and (b) the assignee assumes in writing the rights and obligations of the Transferee hereunder, including but not limited to, Sections 4 and 5 hereof.

9. **NOTICES.** Until all parties otherwise agree in writing and except as set forth below, all communications hereunder are to be delivered by hand delivery, by overnight delivery service, or by first class mail or registered or certified mail, postage prepaid, sent to the following addresses:

Issuer: County of Marshall, Kentucky
County Courthouse
Benton, Kentucky 42025
Facsimile:
Attention: County Judge/Executive

Company: Duke Energy Marshall County LLC
c/o Duke Energy North America
5400 Westheimer Court
Houston, Texas 77056-5310
Telephone: (713) 989-3297
Facsimile: (713) 989-3308
Attention: Tax Department (Robert Moroney, Jr.)

Trustee: Wachovia Bank, National Association
401 S. Tryon Street, 12th Floor
Charlotte, North Carolina 28288-1179
Attention: Corporate Trust Bond Administration

Transferee: KGen Power LLC
c/o MatlinPatterson Global Advisors LLC
520 Madison Avenue
New York, New York 10022-4213
Facsimile: (212) 651-4011
Attention: Robert H. Weiss

10. NO OTHER CHANGES. Except as otherwise expressly modified by this Agreement, the terms of the Indenture and the Lease shall remain in full force and effect.

11. MISCELLANEOUS. This Agreement may be executed in one or more counterparts, each of which together shall constitute an original. This Agreement shall be governed by, and construed in accordance with, the laws of the Commonwealth of Kentucky without giving effect to its conflict of laws.

[SIGNATURE PAGE TO FOLLOW]

IN WITNESS WHEREOF, Issuer, Company, Trustee, Guarantor and Transferee
have duly executed this Agreement as of the date first written above.

COUNTY OF MARSHALL, KENTUCKY

BY: Mike Miller
TITLE: Marshall County Judge/Ex
("ISSUER")

DUKE ENERGY MARSHALL COUNTY, LLC

BY: _____
TITLE: _____
("COMPANY")

DUKE CAPITAL LLC

BY: _____
TITLE: _____
("GUARANTOR")

KGEN POWER LLC

BY: _____
TITLE: _____
("TRANSFEREE")

WACHOVIA BANK, NATIONAL ASSOCIATION

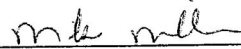
BY: _____
TITLE: _____
("TRUSTEE")

Lou: 878036v3

305255.3

GIVEN SECOND READING AND ADOPTED at a duly convened meeting of the Fiscal Court of the County of Marshall, Kentucky, held on 15th day of June, 2004, on the same occasion signed in open session by the County Judge/Executive as evidence of his approval, attested by the Fiscal Court Clerk, and ordered to be enrolled.

(SEAL)



MIKE MILLER
County Judge/Executive

ATTEST:



~~DAN DUKE~~
Fiscal Court Clerk

CERTIFICATION

I, the undersigned, do hereby certify that I am the duly qualified and acting Fiscal Court Clerk of the Fiscal Court of Marshall County, Kentucky, and as such official, I further certify that the foregoing is a true, correct and complete copy of an Ordinance duly adopted following second reading by said Fiscal Court at a meeting held on June 15, 2004, on the same occasion signed by the County Judge/Executive and now in full force and effect, all as appears from the official records of said Fiscal Court in my possession and under my control.

WITNESS my and the seal said Court, this 15th day of June, 2004.

(SEAL)



~~DAN DUKE~~
Fiscal Court Clerk

RESOLUTION AND ORDER

RESOLUTION AND ORDER APPROVING THE EXECUTION AND DELIVERY BY THE COUNTY OF MARSHALL, KENTUCKY OF A CERTAIN RELEASE AND AMENDMENT.

WHEREAS, the County of Marshall, Kentucky (the "County") has heretofore authorized and issued its County of Marshall, Kentucky Industrial Building Revenue Bonds (Duke Energy Marshall County, LLC Project), being outstanding in principal amount of \$318,159,276.80 (the "Bonds"); and

WHEREAS, Duke Energy Marshall County, LLC, a Delaware limited liability company, the obligor of the Bonds, and its corporate parent have encountered financial reverses because of national economic circumstances in the energy industry and have requested that the County agree to a certain Release and Amendment agreement, whereby the Project financed by the proceeds of the Bonds may be transferred to and beneficially used by a transferee entity; and

WHEREAS, the County has determined that the best interests of the County will be served by approving and entering into such Release and Amendment agreement; and

NOW THEREFORE BE IT RESOLVED AND ORDERED BY THE COUNTY OF MARSHALL, KENTUCKY, ACTING BY AND THROUGH ITS FISCAL COURT AS FOLLOWS:

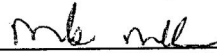
Section 1. That certain Release and Amendment agreement by and among (i) the County of Marshall, Kentucky, (ii) Duke Energy Marshall County, LLC, a Delaware limited liability company, (iii) Duke Capital LLC, a Delaware limited liability company, (iv) KGEN Power LLC, a Delaware limited liability company, and (v) Wachovia Bank, National Association (formally First Union National Bank), as trustee, is hereby approved and authorized. Such Release and Amendment agreement shall be executed and delivered by and on behalf of the County by the County Judge/Executive and the Fiscal Court Clerk, each of whom is hereby authorized and directed to so act.

Section 2. The County Judge/Executive, Deputy County Judge/Executive, Fiscal Court Clerk and all other County officials are hereby authorized and empowered to execute and deliver such other documentation as shall be reasonably required for the effectuation of the transaction contemplated by the Release and Amendment agreement.

Section 3. This Resolution and Order shall be in full force and effect from and after its adoption as provided by law.

ADOPTED at a duly convened meeting of the Fiscal Court of the County of Marshall, Kentucky, held on the 1st day of June, 2004, on the same occasion signed in open session by the County Judge/Executive as evidence of his approval, attested by the Fiscal Court Clerk, and ordered to be enrolled.

(SEAL)



MIKE MILLER
County Judge/Executive

ATTEST:



DAN DUKE
Fiscal Court Clerk

CERTIFICATION

I, the undersigned, do hereby certify that I am the duly qualified and acting Fiscal Court Clerk of the Fiscal Court of Marshall County, Kentucky, and as such official, I further certify that the foregoing is a true, correct and complete copy of a Resolution and Order duly adopted following second reading by said Fiscal Court at a meeting held on June 1, 2004, on the same occasion signed by the County Judge/Executive and now in full force and effect, all as appears from the official records of said Fiscal Court in my possession and under my control.

WITNESS my and the seal said Court, this 1st day of June, 2004.

(SEAL)



DAN DUKE

Fiscal Court Clerk