PERFORMANCE AGREEMENT

This Performance Agreement (the "Agreement") is made and entered this _____ day of _____, 2011, by and among the Virginia Tobacco Indemnification and Community Revitalization Commission (the "Commission"), a political subdivision of the Commonwealth, the County of _____, Virginia (the "Grantee"), a political subdivision of the Commonwealth, and _____ (the "Company"), a _____ *<corporation, LLC, partnership>* whose Federal Employer Identification Number is _____.

WITNESSETH:

WHEREAS the Grantee has been selected to receive a grant in the amount of $_____ (the "Grant") from the Commission for its use in inducing the Company to make capital investments and employ a significant number of persons in _____ (the "Locality"); and

WHEREAS the Grantee has indicated its desire to tender the Grant to the Company for its use and benefit, provided that the Company commits to the achievement of certain goals relating to employment and capital investment as described herein; and

WHEREAS the Commission, the Grantee and the Company desire to set forth their understanding and agreement as to the use of the Grant, the obligations of each party hereto, the conditions under which the Grant must be repaid, and the obligations of each party hereto in the event of default.

NOW, THEREFORE, in consideration of the foregoing, the mutual benefits and promises of the parties to this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby covenant and agree as follows:

Section 1. Disbursement of the Grant

The Commission shall disburse the Grant to the Grantee within 30 days of the Commission's receipt of (i) this Agreement, executed by all parties thereto, and (ii) a written request for disbursement from the Grantee, PROVIDED that the Grantee is not in default on its obligations to the Commission. In the event that the Grantee is in default on its obligations to the Commission, disbursement shall be withheld until such default is cured.

If disbursement to the Grantee has not occurred within 180 days from the date of this Agreement, the Grant shall be automatically rescinded. Unless otherwise agreed in writing by the parties hereto, Grantee shall disburse the Grant to the Company, or for the Company's benefit, within 30 days of receipt of the Grant from the Commission.

Section 2. **Use of the Grant**

Under this Agreement, the Commission places no restriction on the use of the Grant proceeds by the Company. Should there be any such restrictions imposed by the Grantee, the same shall be described in an Exhibit A and attached hereto, which shall not be binding upon the Company unless signed thereon by an authorized Company representative, and not by reference herein. The Grantee shall be responsible for enforcement of any restrictions described in Exhibit A.

Section 3. **Employment Commitment**

The Company shall employ at least _____ persons in the Locality with a quarterly aggregate payroll of at least $_____. Said employment and payroll will be in addition to those already employed in the Locality by the Company and paid during the calendar quarter ending on *<the last day of the quarter immediately prior to the date of this agreement>*, hereinafter called the "Base Period". Persons employed by the Company at other locations within the Commonwealth of Virginia and moved to the Locality shall not be counted as progress toward this commitment.

Section 4. **Capital Investment Commitment**

The Company shall make capital investments in the Locality of at least $_____ in assets subject to local tax levy, notwithstanding the local taxing authority's election to waive or refund the taxes so levied. Said investments will be in addition to those already made as of the end of Base Period. If the Company is exempt from the payment of property taxes by state law, the Company shall not be entitled to any portion of the Grant allocated to capital investment.

Section 5. **Determination of Performance - Employment**

To earn the Grant, the Company must meet its employment obligations hereunder not later than 36 months after the end of the Base Period. The Company's employment obligation will be deemed to have been fully met when it can document any three consecutive calendar quarters after the Base Period in which (i) the total wages paid by the Company to employees in each quarter exceed the wages paid by the Company to employees in the Base Period by at least the amount promised in Section 3 above, AND (ii) the average number of employees who received pay from the Company during each of those three consecutive quarters* exceeds the average number of employees who received pay in the Base Period by at least the number promised in Section 3 above, AND (iii) all such employees worked in the Locality. The foregoing shall be based upon payroll tax filings made by, or on behalf of, the Company to the Virginia Employment Commission (now/formerly made on Form VEC FC-20 or facsimile thereof). If such tax filings include Company employees who did not work in the Locality, it shall be the duty of the Company to provide additional information sufficient to identify those employees who did work in the Locality. Employees of subsidiary companies, related entities, entities under common ownership or control, or employees of independent contractors hired by

the Company shall not be counted as employees of the Company in fulfillment of its promise hereunder UNLESS such entities and their relationship to the Company are disclosed to and approved by the Commission in writing, AND such entities supply the Commission with the same employment documentation as described herein.

** the number of persons who received pay in any given quarter is calculated by adding together the number of persons who received pay in each month of the quarter and dividing that sum by three.*

Section 6. <u>Determination of Performance – Capital Investment</u>

The Company shall meet its capital investment obligations hereunder not later than 36 months after the end of the Base Period. The Company's capital investment obligation shall be deemed to have been fully met when

(1) the Grantee submits to the Commission a letter from the Commissioner of Revenue for the Locality attesting to:

(a) the highest <u>assessed value</u> of all real property acquired or leased by the Company during the 36 months after the end of the Base Period and owned or leased without interruption until 36 months after the end of the Base Period, notwithstanding the Locality's election to waive or refund taxes levied on such property, and

(b) the original <u>cost</u> of all personal property subject to taxation and acquired or leased by the Company during the 36 months after the end of the Base Period and owned or leased without interruption until 36 months after the end of the Base Period, notwithstanding the Locality's election to waive or refund taxes levied on such property. In the event that the original cost is not known to the Commissioner of Revenue, the assessed value shall be reported in lieu thereof, and

(2) the sum of items 1(a) and (b) above equals or exceeds the amount promised in Section 4. For purposes of this Agreement, leased assets are defined as those for which the Company is contractually obligated to pay the property taxes thereon during the term of the lease, and evidence of such contracts are presented to the Commission.

The Company hereby expressly grants its consent for (a) the Commissioner of Revenue for the Locality to release to the Commission or the Grantee all Company property records of any kind held by the Commissioner, and (b) the Virginia Employment Commission to release to the Commission all employment records of any kind held by the Virginia Employment Commission.

Section 7. **Repayment Obligation**

In the event that the Company does not meet its obligations hereunder within 36 months after the end of the Base Period, it shall repay to the Grantee the unearned portion of the Grant, which is calculated as follows:

a. A minimum capital investment of $1.0 million is required before **any** portion of the Grant is earned by the Company, hereinafter called the Minimum Investment Requirement.
b. For purposes of repayment, fifty percent (50%) of the Grant is allocated for the Company's capital investment commitment and fifty percent (50%) for its employment commitment.
c. After exceeding the Minimum Investment Requirement, the fraction of the Grant allocated to employment that is earned by the Company is determined by dividing the average number of employees receiving pay during the three consecutive quarters* with the highest employee count by the number of jobs promised in Section 3 notwithstanding the total wages paid by the employer.
d. After exceeding the Minimum Investment Requirement, the fraction of the Grant allocated to capital investment that is earned by the Company is determined by dividing the greatest value of assets attested to by the Commissioner of Revenue under Section 6 above by the capital investment promised in Section 4.
e. All unearned portions of the Grant shall be repaid by the Company to the Grantee not later than thirty days after the date on which the Company is notified of the unearned amount. The Grantee agrees to remit the same to the Commission. Any refund owed by the Company to the Grantee hereunder shall immediately constitute an obligation of the Grantee to repay the Commission and such Grantee obligation shall **not** be contingent upon successful collection of any amount from the Company. **The Grantee shall be liable for repayment to the Commission that portion of the Grant determined by the Commission to be due under the terms of this Section and hereby agrees to make such repayment without regard to whether Grantee has received repayment from the Company.**
f. Interest shall accrue on unpaid balances at the rate of 3% per annum beginning on the 31st day after the Company is notified of the amount due.

Section 8. **Events of Default**

If any of the following should occur within the 36-month period after the end of the Base Period, it shall constitute an event of default and the Commission may, at its election, accelerate the Company's obligation to repay the unearned portion of the Grant:

a. the Company applies for or consents to the appointment of a receiver, trustee or liquidator of all or a substantial part of its assets, files a voluntary petition of bankruptcy, makes a general assignment for the benefit of creditors, files a petition or an answer seeking reorganization or arrangement with creditors, or if an order, judgment or decree shall be entered by any court of competent

jurisdiction, on the application of a creditor, adjudicating the Company as bankrupt or insolvent or approving a petition seeking reorganization of the Company or appointing a receiver, trustee or liquidator of the Company or of all or a substantial part of its assets which remains undismissed, undischarged or unstayed for a period of forty-five (45) days.

b. the Company fails to fulfill at least one-fourth (25%) of either its employment commitment described in Section 3 above or its capital investment commitment described in Section 4 above within 18 months after the end of the Base Period.

Section 9. Verification of Performance

The Company shall provide, at the Company's expense, detailed verification satisfactory to the Commission and the Grantee, of the Company's progress toward meeting the capital investment and employment goals stated herein. Such verification includes, but is not limited to, Company's payroll tax filings, property tax filings, and internal documents in support thereof. Such progress reports will be provided at such time(s) as the Commission or the Grantee may require and failure to provide the same shall constitute default under this Agreement and the entire Grant will then become immediately due and payable.

Section 10. Acknowledgment and Notice

The Company and the Grantee each acknowledge and agree to its respective repayment obligation in accordance with Section 7 of this Agreement. Any notices required or permitted under this Agreement shall be given in writing, and shall be deemed to be received upon receipt or refusal after mailing of the same in the United States Mail by certified mail, postage fully pre-paid or by overnight courier (refusal shall mean return of certified mail not accepted by the addressee) and addressed as follows:

if to the Company, to:

NAME: _____
ADDRESS: _____
_____
Attention: _____

if to the Grantee, to:

NAME: _____
ADDRESS: _____
_____
Attention: _____

if to the Commission, to:

NAME: Tobacco Indemnification and Community Revitalization Commission
ADDRESS: 701 East Franklin Street, Suite 501
Richmond, Virginia 23219

Attention: Executive Director

This Agreement constitutes the entire agreement between the parties hereto as to the subject matter contained herein and may not be assigned, amended, or modified, except in writing, signed by each of the parties hereto. This Agreement is made, and intended to be performed, in the Commonwealth and shall be construed and enforced by the laws of that state. Jurisdiction and venue for any litigation arising out of or involving this Agreement shall lie in the Circuit Court located nearest to the Locality and such litigation shall be brought only in such court.

This Agreement may be executed in one or more counterparts, each of which shall be an original, and all of which together shall be one and the same instrument. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. If any provision of this Agreement is determined to be unenforceable, then the remaining provisions of this Agreement shall, in the sole discretion of the Commission, be voidable by the Commission or interpreted as in effect as if such unenforceable provisions were not included therein.

The provisions of this Agreement are intended to and shall survive closing, the delivery of any deed or other instrument, and any other event.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to become effective as of the date first written above.

TOBACCO INDEMNIFICATION AND
COMMUNITY REVITALIZATION
COMMISSION

By:_____
Executive Director

Date: _____

GRANTEE

By:_____

Title: _____

Date: _____

COMPANY

By:_____

Title: _____

Date: _____