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**VIRGINIA TOBACCO INDEMNIFICATION
AND COMMUNITY REVITALIZATION COMMISSION**

701 East Franklin Street, Suite 501
Richmond, Virginia 23219

Executive Committee Meeting
Wednesday, October 29, 2008
4:00 p.m.

The Institute for Advanced Learning and Research
Danville, Virginia

1 **APPEARANCES:**

2 The Honorable Charles R. Hawkins, Chairman

3 The Honorable Terry G. Kilgore, Vice Chairman

4 Mr. Clarence D. Bryant, III

5 The Honorable Kathy J. Byron

6 The Honorable Patrick S. Gottschalk, Secretary of Commerce and Trade

7 The Honorable Clarke N. Hogan

8 The Honorable Phillip P. Puckett

9 The Honorable Edward Owens

10 The Honorable Frank M. Ruff

11 The Honorable William C. Wampler, Jr.

12 Mr. James C. Thompson

13

14 COMMISSION STAFF:

15 Mr. Neal Noyes, Executive Director

16 Mr. Ned Stephenson, Deputy Director

17 Mr. Timothy Pfohl, Grants Program Administration Manager

18 Ms. Stephanie Wass, Director of Finance

19 Ms. Britt E. Nelson, Manager of Program Assessments

20 Ms. Sara Williams, Grants Coordinator Southwest Virginia

21 Ms. Sarah Capps, Grants Coordinator Southside Virginia

22

23 OFFICE OF THE ATTORNEY GENERAL:

24 Mr. Francis N. Ferguson, Deputy Attorney General, Counsel for the

25 Commission

1 SENATOR HAWKINS: All right, let's get started.
2 Neal, would you call the roll?
3 MR. NOYES: Mr. Bryant?
4 MR. BRYANT: Here.
5 MR. NOYES: Delegate Byron?
6 DELEGATE BYRON: Here.
7 MR. NOYES: Mr. Day?
8 MR. DAY: (No response.)
9 MR. NOYES: Secretary Gottschalk?
10 SECRETARY GOTTSCHALK: Here.
11 MR. NOYES: Delegate Hogan?
12 DELEGATE HOGAN: Here.
13 MR. NOYES: Delegate Johnson?
14 DELEGATE JOHNSON: (No response.)
15 MR. NOYES: Mr. Owens?
16 MR. OWENS: Here.
17 MR. NOYES: Senator Puckett?
18 SENATOR PUCKETT: Here.
19 MR. NOYES: Senator Reynolds?
20 SENATOR REYNOLDS: (No response.)
21 MR. NOYES: Senator Ruff?
22 SENATOR RUFF: Here.
23 MR. NOYES: Mr. Thompson?
24 MR. THOMPSON: Here.
25 MR. NOYES: Senator Wampler?

1 SENATOR WAMPLER: Here.

2 MR. NOYES: Delegate Kilgore?

3 DELEGATE KILGORE: Here.

4 MR. NOYES: Senator Hawkins?

5 SENATOR HAWKINS: Here.

6 All right. We've got several things to go through. We've got to
7 do something with Delegate Hogan, so let's get rolling.

8 Ned, Opportunity Fund?

9 MR. STEPHENSON: Yes, sir.

10 SENATOR HAWKINS: Let's first, do we have a
11 motion to approve the Minutes of July 30, 2008?

12 SENATOR RUFF: So moved.

13 SENATOR HAWKINS: It's been moved and
14 seconded we approve the minutes of July 30, 2008. All those in favor say
15 aye? (Ayes.) Opposed? (No response.) The motion carries.

16 MR. STEPHENSON: Members of the Committee,
17 I have several issues related to the TROF program which I am seeking your
18 guidance on, and I'll present them in order. I'll give you some statistics so
19 you can see what the program is doing overall.

20 There is a particular appeal from Charlotte County, who is
21 asking for relief on the TROF matter, and that falls within this Committee's
22 authority. The County Liability Clause that you've talked about on several
23 occasions is back with an appeal from the county for some relief on that.

24 Then, the other matters, I need policy guidance on what to do
25 for unfulfilled TROF obligations and a few other matters. I'll run on through

1 this rather quickly.

2 I put on the screen the statistics from the TROF program. Since
3 the inception of the Commission you've done 177 deals representing about
4 \$47 million that you put out under the TROF program. Eighty-nine of those
5 transactions are not yet mature, meaning they have not run the course of time
6 allowed in the agreement, and there is really nothing to talk about until
7 they've had a chance to perform. That leaves 88 transactions that are mature
8 or have run the time and the time is up. Among those 88 mature agreements
9 we have 48 of them who have met the promise, either by producing jobs
10 promised or by writing checks when they did not. You can see there that we
11 have eight companies who have made refunds when they were unable to
12 perform or fulfill their promise. We have 27 transactions that the promise
13 has not been met, meaning that jobs have not been created as agreed, but
14 neither has any refund been made for those transactions, so they're drifting a
15 little bit. We have yet 13 other transactions that I call unresponsive,
16 meaning we've asked for data and cannot get the company or the county to
17 respond. Sometimes there are two, three or four written requests, and they're
18 just ignored. I kind of give you that background, because in a few minutes
19 I'm going to ask you for some guidance, policy direction on what to do under
20 this situation. Maybe I'll do it right now.

21 The Southside Economic Development Committee back in
22 April was presented with a list of TROF transactions in counties that were
23 seeking new grants and had unfulfilled TROF grants. That particular
24 committee made the grant approvals that day, but they made a contingency
25 or a requirement that the disbursement of those grants be frozen until the

1 unresolved TROFs were resolved. The Southside Committee made the same
2 contingency last week, and it will be before the Commission tomorrow, as
3 did the Education Committee in the approvals it made last week. These
4 committees have asked that grants that they are recommending tomorrow,
5 that we freeze these TROF disbursements. A question I have for the
6 Executive Committee is whether or not you want to freeze all the grants until
7 unfulfilled TROF obligations are resolved.

8 Mr. Chairman, I put that to the Committee today for some
9 discussion and some guidance.

10 SENATOR HAWKINS: All grants, including
11 those that may not be in conflict with anything?

12 MR. NOYES: Mr. Chairman, the way that this
13 was worded, it's only to new grants, grants that have been made prior to the
14 decision of the Board last April and decisions that you may be making
15 tomorrow, and those are grandfathered. So, it would be only for new grants
16 that would apply. This would apply across the board for any new grants
17 recommended and approved by the Commission as we go forward.

18 MR. STEPHENSON: It's a little hard, but I'll tell
19 you that grants frozen by the Southside Committee, I'm getting incredible
20 attention now from those counties who need disbursement checks.

21 DELEGATE KILGORE: You're proposing that
22 you freeze all grants, and you're asking us if we want to freeze the grant, and
23 the effect of that would be until a grant recipient has responded or not
24 responded to obligations not met. If they haven't met the obligation, would
25 they refund that money? Would they have to refund that money before the

1 grant would be unfrozen?

2 MR. NOYES: The disbursement on any new
3 approved grant.

4 MR. STEPHENSON: It's not always a refund that
5 we're seeking. We request employment data to see what's going on, and we
6 don't get it with some.

7 DELEGATE KILGORE: So the employment data,
8 if they provide that, it comes back that they have not met, then you're
9 looking for a refund?

10 MR. STEPHENSON: Yes, unless the Committee
11 seeks otherwise. To be clear, what the Southside Committee did and
12 Education, they approved the grants they wanted to approve. They
13 authorized the grantee to begin, work and nothing has changed except when
14 it comes time for a reimbursement check to be cut for the grantee, they
15 would be frozen until that TROF deal is cured, then cut the check and turn it
16 loose.

17 SENATOR HAWKINS: Ed, do you have any
18 feelings on this as far as the Southside Committee?

19 MR. OWENS: The Southside Economic
20 Development Committee felt that if people can't do what they're obligated to
21 do, we shouldn't be furnishing any more money. If they don't furnish the
22 information and fulfill their written obligation, then no more money.

23 SENATOR HAWKINS: What we run into every
24 year, we should have a policy we can adhere to; if they don't agree to it, we
25 wouldn't have a policy. That wouldn't be in the best interest of the

1 Commission.

2 SENATOR WAMPLER: Ned, the effect of all
3 grants being frozen, would the freeze thaw automatically once the
4 information or the data is transmitted to you, or would it take action at our
5 next meeting to disburse dollars?

6 MR. STEPHENSON: It would thaw instantly.

7 SENATOR WAMPLER: I just wanted to make
8 sure that was right.

9 MR. FERGUSON: Mr. Chairman, just for
10 purposes of making sure the Minutes are complete. We're talking about
11 freezing potentially grant, that same grantee, that locality. When you say all
12 grants you're talking about --

13 MR. NOYES: -- The same grantee. You ask the
14 grantee who is not responsive or not complying with the agreement.

15 DELEGATE KILGORE: To answer your
16 question, Frank, that would, most of the grantees would be your locality.

17 MR. FERGUSON: I understand.

18 SENATOR HAWKINS: Also there needs to be, if
19 there is a hardship problem, come back to the Commission, a policy in place,
20 and adhere to the policy pretty much. If there is a hardship condition, there'd
21 be an ability to pay back, or we could put them in an undue position, but I
22 don't believe we would. This would at least give us the last word, is my
23 understanding. Is that right?

24 MR. STEPHENSON: Mr. Chairman, we try to be
25 careful to make sure that all of the grantees would have a right to appeal to

1 this Committee if they feel compelled to do so, so they can tell their story.

2 SENATOR RUFF: Mr. Chairman, let's say a
3 county was \$25,000 in the hole, and the request was for \$250,000. If we
4 have approved it, but we won't disburse the money, have we left the Staff
5 with a flexibility that they can pay \$225,000 of that so we wouldn't lose the
6 job prospects?

7 MR. STEPHENSON: Well, Frank, I think in the
8 banking world that's called a set-up; we haven't done that yet. We certainly
9 can. We want to make sure that what we do is with the consent of the
10 locality; they may not like that.

11 SENATOR RUFF: Mr. Chairman, I'd say they
12 probably wouldn't like that, but one of our responsibilities is revitalization in
13 the communities. I have some concern we might turn down a feasible
14 prospect because of a cash flow issue with the county, understanding they
15 have to pay it back, but they don't have the cash at this particular moment.

16 SENATOR HAWKINS: Building on that, is there
17 any other avenue of appeal other than coming before the full Commission at
18 our quarterly meetings?

19 MR. STEPHENSON: Each of these TROF
20 transactions is a unique story. I try to deal with them within the limits of my
21 authority, which is quite limited. The Director has been very helpful in
22 helping resolve some at this level. We will often try to present difficult
23 questions to the TROF Committee of four and honor their wishes. Then,
24 when it gets tough enough, it would come to the Executive Committee and
25 ultimately the Commission, which has not happened yet.

1 MR. NOYES: What Staff seeks to do is to provide
2 every benefit of the doubt to our grantees. As Ned said, we made some
3 findings in favor of grantees, and if we are unable to do it and if it's a clear
4 case of non-compliance, then those folks need to talk directly to this
5 Committee; otherwise, I would be exceeding my authority; and we give
6 them every benefit of the doubt, Mr. Chairman.

7 SENATOR HAWKINS: Referring to the scenario
8 that Senator Ruff stated, could the TROF Committee override that?

9 MR. NOYES: Yes.

10 MR. STEPHENSON: If you so empowered them.
11 Certainly, as Neal has said, the Staff is not authorized to make demands or
12 enforce anything. Our duty is to present the facts. Once the facts are
13 known, and this is part of the guidance that we're seeking, is whether or not
14 you want to ask the TROF Panel to adjudicate these and we will follow their
15 instructions, or whether you want all of them to come before this Committee
16 to be resolved.

17 DELEGATE HOGAN: It seems to me that we
18 probably have adequate safety checks on that. Every TROF that would
19 come before the Executive Committee would be adjudicated there.

20 SENATOR HAWKINS: The main thing I think
21 we want to do is to make sure we don't miss an opportunity based on some
22 obstacle that we put in place.

23 DELEGATE HOGAN: Mr. Chairman, it's also
24 important that when people say what they're going to do, they need to do
25 what they say they're going to do, because these people are requesting

1 money, and people need to do what they say they're going to do. I think
2 that's the sense of it.

3 SENATOR HAWKINS: I think the sense of the
4 Executive Committee is that we enforce by law these grants and make sure
5 that everyone has an opportunity to appeal it and has due process.

6 Is there a motion to freeze grants, as has been discussed?

7 SENATOR RUFF: I would make a motion on the
8 same terms as Southside and Education have.

9 MR. OWENS: Second.

10 SENATOR HAWKINS: It's been moved and
11 seconded. Any discussion? Everyone understand the question? All those in
12 favor say aye? (Ayes.) Opposed? (No response.) Motion carries.

13 MR. STEPHENSON: Mr. Chairman, we have a
14 county that has appealed to the Executive Committee for relief on a
15 particular TROF package, and there are some details, so bear with me if you
16 would, please. This is a chronology of the transaction. I'll go through it
17 quickly, and then you can ask questions. In December of '04 a particular
18 company accepted \$50,000 and gave a promise to create 25 new jobs. On
19 three or four different dates the Staff made written requests for the
20 employment data and has not received it. In April the Southside Committee
21 froze the disbursements, and in August the county was anxious to get that
22 cured, so that data did appear. It shows one employee. We advised the
23 county that a refund would be due if there was only one employee. The
24 county requested an 18-month extension, and the TROF Panel looked at that
25 and declined that 18-month extension. The county has come back and

1 appealed and requested a 20-month extension. We are here in front of you
2 today for relief. Lots of these transactions are like this, and we do our best
3 to try to keep them from getting here, but this is where we're coming from,
4 and we present this before you.

5 MR. NOYES: The request was for \$25,000.

6 MR. STEPHENSON: In this particular case, if
7 you remember in the early days, these TROF transactions had a 25-job
8 minimum. If you didn't make that hurdle, the entire grant was due to be
9 refunded. In this particular case they did not make the 25-job hurdle, so we
10 indicated the entire \$50,000 would be refunded. The reason for the 18-
11 month and 20-month extension was that the company was trying to
12 determine how many months extension they had to get to show the 25-job
13 hurdle.

14 SENATOR HAWKINS: Is the county going to
15 make a presentation before us, or are you going to argue their case?

16 MR. STEPHENSON: I don't see a county
17 representative here, and I got this yesterday late in the afternoon.

18 MR. OWENS: Didn't the TROF Committee deny
19 the 18 months, and now they want 20?

20 MR. NOYES: They came back with another
21 request for an extension on the 18 months to 20 months. I would say to the
22 members of the Executive Committee, I had a discussion with the county
23 administrator, and he said to me that they wanted an extension through the
24 end of this calendar year and that the job requirement minimum threshold of
25 25 would be met.

1 SENATOR HAWKINS: What's going to change
2 now?

3 MR. NOYES: The 90-day time extension was
4 different than the 18 months.

5 SENATOR HAWKINS: The proposal now is to a
6 drop-dead date of 90 days.

7 MR. NOYES: Ned got the most recent one that I
8 did not see.

9 SENATOR HAWKINS: I understand now they
10 said they would meet the full obligation in the time set?

11 MR. STEPHENSON: They're asking for 20
12 months and asserted they would have an adequate number of people in that
13 time frame. I haven't seen the employment data, so it's possible you could
14 grant 20 months today and they might still not make it.

15 SENATOR HAWKINS: Let's refer it back to
16 TROF and let them have a discussion and make a decision.

17 SECRETARY GOTTSCHALK: What is the
18 reason for the company advising that they have not made the number in
19 almost four years?

20 MR. STEPHENSON: Mr. Secretary, you're
21 familiar with all of these transactions, and there's always a story of
22 unanticipated problems, and the downturn is the long story. In this
23 particular case I did meet with the county and the company, and I got the
24 story, but when it was finished I'm not sure I understood it.

25 SENATOR HAWKINS: Let TROF deal with it;

1 we don't have all the information.

2 MR. STEPHENSON: Mr. Chairman, this next
3 matter is what we have referred to as the County Liability Clause. Most of
4 you know that your TROF agreements contain a paragraph, as you see
5 before you, that basically says that the county is liable for the replacement to
6 the Commission in the event the company defaults on its promise. To give
7 you a little history, when the TROF proposal began, and I understood that
8 the Commission believes that this was the case with all TROF transactions,
9 when in fact the agreement was quite unclear and several people said the
10 counties were not liable and read the agreement, and it was very difficult to
11 make the case that they were. After taking it up with you on two occasions,
12 you changed the language in the agreements to make it clear that the
13 counties are in fact liable, and that's been true since July a year ago. There
14 have been several counties who have not been pleased with this change.
15 One in particular has written to us several times and again last week
16 objecting to this clause. This particular county has asked that you reconsider
17 the question of county liability. They have also suggested a couple of
18 solutions to the problem for you to consider. One solution is that you waive
19 the county liability requirement for the counties to match dollars that you are
20 putting in.

21 A second suggestion is that we disburse the TROF award in
22 arrears, meaning only after the required jobs have appeared would the cash
23 be released, so there would be no question about liability.

24 SENATOR HAWKINS: Who do we hold liable,
25 anyone?

1 MR. STEPHENSON: There have been several
2 occasions where we have asked for employment data, and once it was
3 presented the data shows that the jobs were not created, and we would look
4 to the county to repay us, whether or not they have collected that from the
5 company, and several counties have done that.

6 SENATOR HAWKINS: It's being offered as an
7 option to do something different, and we would look to whom to pay us back
8 if not the county?

9 MR. STEPHENSON: If we disburse the arrears,
10 we would determine that the promise was met before we released any
11 money, and at that point it's not possible for them to be in default, and the
12 county would never have any exposure.

13 SENATOR WAMPLER: I'm just going to shoot
14 from the hip. Ned, if you would take that approach, only awarding the grant
15 after the fact when the threshold was met, and if the company had planned
16 on using that grant to buy down the cost of the project or use it as an up-
17 front capital, we would kill the rate of return on the deal?

18 MR. STEPHENSON: It does greatly diminish the
19 attractiveness of the TROF program if you give the money three years later.

20 SENATOR WAMPLER: So the Tobacco
21 Commission's liability is more rigid than the Governor's Opportunity Fund?

22 MR. STEPHENSON: I believe that to be true.

23 SENATOR WAMPLER: Mr. Chairman, it seems
24 to me that we probably need to visit this question again and give the counties
25 some reasonable relief on that liability question and make sure the emphasis

1 is there and meet with them and see if reasonable clawback provision to
2 taxpayers and other constituencies are assured, that we're going to do
3 everything we can to meet the obligations. Right now I don't know that I'm
4 ready to decide on the side of, I just think we need some relief on the county
5 level.

6 SENATOR HAWKINS: We have to have
7 something in place at all times, because if they're going to take our money
8 and transfer them all around the place, then the question is who has the
9 liability?

10 SENATOR WAMPLER: I'm just not sure that I'm
11 ready to give an opinion in either direction, whether we should be more rigid
12 or less. I think we ought to be closer to what the Governor's Opportunity
13 Fund is and not just, I know we have to have accountability. I don't have a
14 solution right now for it.

15 SENATOR HAWKINS: What does the
16 Governor's Opportunity Fund do?

17 MR. STEPHENSON: I'm hoping that the
18 Secretary can help me out on that.

19 SECRETARY GOTTSCHALK: This is where I
20 would like to have the question repeated.

21 MR. STEPHENSON: The question is, under the
22 Governor's Opportunity Fund grant, is the county or the locality liable for
23 replacement or repayment of that grant in the event the company defaults,
24 whether or not the company repays the grant?

25 SECRETARY GOTTSCHALK: Legally and

1 technically, yes.

2 SENATOR WAMPLER: Maybe in January we
3 could have the Secretary's Office give us an option to do this and try to align
4 what they're doing with the Governor's Opportunity Fund.

5 SENATOR HAWKINS: It's my understanding
6 we're going to adopt what our options are and worry about this tomorrow.

7 MR. STEPHENSON: I must add in the letter sent
8 to you from this particular county, that particular county asserts that this
9 body has not been clear on this requirement because you do not actually vote
10 on the language in the text. I'll simply say that the Staff needs a clear and
11 affirmatively clear direction, because this is real heartburn to all these
12 counties. If we have to enforce it, we need to know that's what we've agreed
13 to.

14 SENATOR RUFF: Mr. Chairman, I make a
15 motion that we drop that language until we come up with a better plan.

16 MR. OWENS: Second.

17 SENATOR HAWKINS: The motion is made and
18 seconded that we adopt new language until a better day. Any discussion?
19 The only thing I'd like to add is that when we loan the money to the counties,
20 what agreement do they sign at that time?

21 MR. STEPHENSON: The typical process is that
22 we make an offer and the county and company will accept that offer by
23 executing the performance agreement that makes the promise. Once they
24 execute that promise, we disburse the monies, hence the contract.

25 SENATOR HAWKINS: The motion has been

1 moved and seconded. Any discussion? All in favor say aye? (Ayes.)
2 Opposed? (No response.) The motion carries.

3 MR. STEPHENSON: Mr. Chairman, I have put
4 before you a snapshot of Virginia Employment Commission forms that
5 every employer in the Commonwealth of Virginia files every three months.
6 The Tobacco Commission Staff relies on the VEC filings as evidence of
7 employees in the company. You can see the first line there is a head count in
8 the first, second and third quarters as to how many employees get paid. This
9 is a document that we use to compare the contract to see if jobs were
10 produced or not.

11 The reason I put this before you is that we're looking for some
12 guidance about whether or not you want this level and intensity of
13 verification on the contracts. This is pretty tight, that they appear as
14 employees and got paid or they did not, we use these. I'm really asking you
15 to affirm 100 percent compliance checks on every grant. If you would like,
16 the Staff can do this on a spot check basis, or we can do it on a self-
17 verification basis and ask the company did you have the employees that you
18 said you had, and we can check them off. I want to be sure we're going
19 down the path that this Committee wants us to take.

20 DELEGATE KILGORE: What do we get now?
21 What information do we have, do we have this form now?

22 MR. STEPHENSON: We're using this form as the
23 test.

24 DELEGATE HOGAN: Mr. Chairman, I move we
25 continue to use that form for verification.

1 SENATOR HAWKINS: It's been moved and
2 seconded.

3 SENATOR RUFF: What happens if a company
4 has a policy of hiring through a temporary agency for the first four to six
5 months to see if this works out before they put them on the payroll full-time?

6 DELEGATE HOGAN: You're saying that goes on
7 the list of things that they can come back to the Staff if they have a question
8 about it, and if at that point they want to put together a temporary plan and
9 any mitigating factors, they're free to do that.

10 SENATOR RUFF: Does the Staff believe they
11 have that flexibility?

12 MR. STEPHENSON: Within limits, yes, sir.

13 SENATOR HAWKINS: Does this show any
14 reference to temps, when you get the form? I think we're on the right track.
15 I think there's a motion before us and a second. Any discussion? All those
16 in favor say aye? (Ayes.) Opposed? (No response.)

17 MR. STEPHENSON: That concludes my TROF
18 questions, Mr. Chairman.

19 SENATOR HAWKINS: Stephanie, you're up.

20 MS. WASS: I have one housekeeping amendment
21 to transfer. We'd transfer the remaining 2007 indemnification payments, and
22 these are the ones that are unclaimed for over a year. The balance is
23 \$783,234, transfer from indemnification line item to the general unrestricted
24 account. The FY08 experience with last year's budget, this would help clear
25 and transfer the indemnification to the unrestricted account. This is clearing

1 out the indemnification that goes unclaimed. That's on the very last tab, tab
2 8, the 2007 indemnification.

3 SENATOR HAWKINS: This is a normal process
4 we go through every year.

5 MS. WASS: One year after the final deadline, and
6 at this point, unclaimed.

7 SENATOR RUFF: I move we transfer these
8 funds.

9 SENATOR HAWKINS: It's been moved and
10 seconded. This is a normal process we go through every year. Any
11 questions or discussion? All those in favor say aye? (Ayes.) Opposed?
12 (No response.)

13 MS. WASS: Tab 6, the last page. The contract for
14 the indemnification process has already occurred with Troutman Sanders,
15 and it expired this year. After working with them, we received approval
16 from Troutman Sanders to finish out the indemnification services. At the
17 current rate it would be anticipated three more years for this contract. The
18 total for the three-year contract would be \$999,000. The fee goes down this
19 current year of \$355,000 to about \$331,000.

20 SENATOR HAWKINS: Does everyone
21 understand what we're doing? Any questions?

22 MS. WASS: This authorizes the Executive
23 Director, this covers the years 2009 through 2011, and it indicates what it is
24 for each of the years.

25 MR. BRYANT: I assume the acceleration is a

1 dead issue?

2 MR. NOYES: This can be modified, should be
3 Commission decide next April to accelerate it. In its present form it
4 provides for what we discussed the last two years, anyway.

5 SENATOR HAWKINS: It's been moved and
6 seconded. Any further discussion? All those in favor say aye? (Ayes.)
7 Opposed? (No response.) All right. I'll yield now to Delegate Hogan.

8 DELEGATE HOGAN: I'd like to give you some
9 background, for those of you who are not aware of this. In 2006 Mid-
10 Atlantic Broadband was running an operation deficit. At that point they
11 made a request for an operational grant, and we made a decision we didn't
12 want to grant operation dollars, but we'd be willing to loan them some
13 dollars for a two-year period or 18 months. At that point Staff said
14 administering a loan for us is a difficult process and we can have that loan
15 administered by Virginia Community Capital, which is a newly formed
16 economic development bank. So we did, under conditions that if we wanted,
17 we could take our money back. I think that's accurately reflected in the
18 Minutes. Somehow or other from that action until now Mid-Atlantic
19 Broadband is operational, they're operationally in the black, and they have
20 money to repay that loan and due to start shortly.

21 MR. NOYES: It's underway now.

22 DELEGATE HOGAN: Because of conversations
23 internally in the Technology Committee thinking about what's the next thing
24 to do with the money, instead of having Mid-Atlantic Broadband
25 Cooperative pay \$20,000 a month for eight years, we said that now that they

1 have this money, instead of us giving them a grant to do the things that
2 they're doing, why don't we forgive that loan. We gave them Virginia
3 Capital money, and that's part of the process that is ongoing at the moment.
4 That being said, within Technology there are a couple of ways to approach
5 it, but at least in Southside we probably have a lot of little projects, and that's
6 one of the things we'll take up tomorrow morning. For instance, if you want
7 to hook up these two businesses or 20 houses, those are relatively small runs
8 you can make. For those grants to Mid-Atlantic Broadband, some
9 arrangement with the ISPs seem to make sense. That's all part of the
10 conversation for this meeting.

11 In meeting with Virginia Capital, they found out we might be
12 interested in taking our money back, they blew a gasket. I'd like to ask
13 Frank to speak to this. Would you talk about the contract and make some
14 comments about it and the loan agreement granting the agreement between
15 the Tobacco Commission and Virginia Community Capital? I assume you're
16 aware of the various comments that have been made by various people.

17 SENATOR HAWKINS: We need to have
18 discussions, and a lot is going on about this.

19 MR. FERGUSON: The actual language of the
20 loan agreement that made the grant to VCC is very simple. It said the
21 applicant shall refund the grant to the Commission upon request, to the
22 extent that grant proceeds have not been loaned to a third party by the
23 applicant. I guess the two sides to the argument are if they have money in
24 their pocket that is not out on the street, if you will, in the form of a loan, we
25 have the right at any time to request that be refunded. Certainly a plain

1 reading of that language would lead you to that conclusion.

2 The other side of the coin or counter-argument, is that some of
3 us have heard what's been made very vehemently by folks who disagree with
4 that, is that once it's been loaned, it's been loaned, and therefore the
5 condition has been met. Even if they get repayment of the loan that doesn't
6 mean that the Commission can come back in and reach for this and pull the
7 money back. That interpretation would conclude that this is a one-time
8 activity and proceeds have not been loaned. Well, if proceeds have been
9 loaned, that's true, the entire proceeds were loaned to MBC. Their argument
10 is that that condition has been met, and therefore to pull back or clawback or
11 whatever you call it, refund provision is no longer viable, because the
12 conditions for paying it out have already been accomplished.

13 SENATOR HAWKINS: Before we go too far
14 down this road, we're talking about development. Can you give us a history
15 of the bank?

16 MR. FERGUSON: Somebody can give you a
17 better history of that than me.

18 DELEGATE HOGAN: I think those were two
19 different discussions. One originated in Technology, and we made a
20 transaction deal with the Virginia Community Capital. I don't think that
21 there's any question that the discussion and what was adopted by the full
22 Commission was that we could get this money to MBC and Virginia
23 Community Capital, they have an agreement to do it, and that's that. Never,
24 as part of that discussion, were there any comments made that we want to
25 create with a partner a revolving loan fund. I would suggest to you that to

1 the extent that that discussion happened in this Commission, Technology
2 shouldn't and never was the proper place to have that discussion.

3 It's my understanding that this Community Development Bank
4 took our \$2 million and put it together with some money that they were
5 given from VACD and some other places and used that and then represented
6 to the bank regulators that our \$2 million was part of the collateral. I
7 wouldn't say that if I wasn't sure, and I've been told that by some members of
8 the Board, members of the Board of Virginia Community Capital, and I
9 believe it's true. That gives me some concern. But all this amounts to
10 creating a bank that's grossly under-capitalized by anyone who is operating
11 with full faith and credit, and that's probably a discussion more appropriate
12 in the General Assembly than the Tobacco Commission, and I can assure
13 you we will probably have that discussion. I guess before we decide how we
14 want to fund a revolving fund, I think there are multiple ways to do it, and
15 maybe some revolving, but you know more about that than me. There are
16 probably some information that we've got to gather, but that's something that
17 troubles me, how we accomplish this goal and reserve the right to take it
18 back. It's our money, and how we're going to use it as part of the collateral,
19 and if we were going to do that, we could apply for a bank charter. That
20 would bring into question what would be the appropriate entity for us to
21 work with.

22 SENATOR HAWKINS: There has to be more to
23 it, and it's more complicated. My understanding is that they just received
24 their charter, and it's a non-profit bank that's for development of rural areas.
25 Over the years we've tried to figure out how can we put this on the street by

1 a loan, which we're not able to do, if there is an avenue of doing that. If we
2 poison the well, it may leave us no other avenue to deal with long-term
3 investment. We've got to worry about the long-term interest of this
4 Commission, though. We need an avenue to put monies into the economy,
5 which we're not able to do. This is a functioning bank, or that's my
6 understanding, that's been chartered. I'm not sure about the history, but in
7 this case I'm not sure of all of the ramifications of this but, Frank, do you
8 know?

9 MR. FERGUSON: Mr. Chairman, at this point it
10 might be a battle of legal opinions, and as Ned characterized it, I recently
11 received a fairly extensive legal briefing why VCC is not required to pay
12 money back to the Commission. I would observe that having been present at
13 the Committee meetings that Delegate Hogan referred to, it clearly was a
14 case that this was set up with the intent in mind that this was a vehicle to get
15 operational money to MBC. I would agree that was the sole purpose of
16 doing this, that was, at least, discussed publicly at the time, and its sole
17 purpose, to my knowledge.

18 Mr. Chairman, frankly saying much beyond that at a public
19 forum I'm a little uncomfortable, because I'm crossing over giving legal
20 advice to my client, and that legal advice may be saving the privilege which
21 you may want to maintain. I would need to advise you about the risk of
22 doing that before you chose to make that waiver.

23 SENATOR HAWKINS: I can understand that.

24 SENATOR WAMPLER: A couple of
25 observations, Mr. Chairman. By going outside the bounds of Delegate

1 Hogan's explanation, I think the first question remains essentially is we don't
2 get into the underwrite operations of support entities, and that's why we did
3 what we did in the first place, trying to find a way to help with cash flow,
4 and it appears that MBC has covered that now.

5 A primary concern I would have is what can we do to future
6 meetings to relieve them of that obligation of a loan, and that may correct
7 itself. That's a primary concern I would have at this point. Southwest
8 heretofore has elected to grant dollars to at least one entity for purposes of
9 loaning money. It was not the structure of the bank; it was a non-profit that
10 chose to do that, so we didn't have to get into the regulatory aspect of
11 obtaining a federal charter. If I understood what Mr. Ferguson told us, the
12 conditions of the grant that we made to this entity, while not offering an
13 opinion on a hundred percent certainty, it sounds like they probably met the
14 conditions and the money is turned back around, therefore we would not
15 have a claim with any kind of subordinated debtor or be in a priority position
16 to recover. That's a legal question that probably can't be answered here
17 today. I would just caution, whether it's a community bank or a non-profit,
18 it's kind of like taking tier one capital away from an entity. I would say no
19 matter what the size of your bank is, that \$2 million of tier one capital today
20 is very, very precious, and that probably doesn't come close to describing
21 what that \$2 million of cash means to any financial institution, regardless. I
22 think I understand where the discussion is going, but I would caution the
23 Executive Committee very carefully about trying to grab \$2 million or trying
24 to recover or claim \$2 million that's previously been granted. That would
25 have a chilling effect from a regulatory standpoint, and I would be very

1 cautious about this.

2 DELEGATE HOGAN: Given Frank's comments,
3 and responding to Senator Wampler, I would move that we go into
4 Executive Session.

5 SENATOR HAWKINS: It's been moved and
6 seconded that we go into executive session.

7 MR. FERGUSON: The motion needs to be a little
8 more specific than that.

9 MR. STEPHENSON: I move that we go into
10 executive session in accordance with the provisions of the Virginia Freedom
11 of Information Act, Section 2.2-3711(A)(5) of the Code of Virginia for the
12 purpose of consulting with legal counsel.

13 SENATOR HAWKINS: We have a motion to go
14 into executive session. We have a second. All in favor say aye? (Ayes.)
15 Opposed? (No response.)

16
17 NOTE: The Committee is in
18 executive session. Whereupon the Committee returns in open session.

19
20 MR. STEPHENSON: Whereas, the Executive
21 Committee of the Virginia Tobacco Commission has convened a closed
22 meeting on this date pursuant to an affirmative recorded vote and in
23 accordance with the provisions of the Virginia Freedom of Information Act;
24 and whereas, Section 2.2-3712(A)(5) of the Code of Virginia requires a
25 certification by the Committee that such a meeting was conducted in

1 conformity with Virginia law.

2 Now, therefore, be it resolved that the Committee hereby
3 certifies that to the best of each member's knowledge, that only public
4 business matters lawfully exempt from open meeting requirements under the
5 Act and only such public business matters as were identified in the motion
6 by which the closed meeting was convened were heard, discussed or
7 considered by the Committee in that meeting.

8 SENATOR HAWKINS: Roll call.

9 MR. NOYES: Mr. Bryant?

10 MR. BRYANT: Aye.

11 MR. NOYES: Secretary Gottschalk?

12 SECRETARY GOTTSCHALK: Aye.

13 MR. NOYES: Delegate Hogan?

14 DELEGATE HOGAN: Aye.

15 MR. NOYES: Mr. Owens?

16 MR. OWENS: Aye.

17 MR. NOYES: Senator Puckett?

18 SENATOR PUCKETT: Aye.

19 MR. NOYES: Senator Ruff?

20 SENATOR RUFF: Aye.

21 MR. NOYES: Mr. Thompson?

22 MR. THOMPSON: Aye.

23 MR. NOYES: Senator Wampler?

24 SENATOR WAMPLER: Aye.

25 MR. NOYES: Delegate Kilgore?

1 DELEGATE KILGORE: Aye.

2 MR. NOYES: Senator Hawkins?

3 SENATOR HAWKINS: Aye.

4 Let the Minutes reflect that Delegate Byron was not in the room
5 when the vote was taken.

6 All right, any public comment?

7 DELEGATE KILGORE: We need to adjourn to
8 take care of another matter.

9 SENATOR WAMPLER: Just so the record is
10 clear, tomorrow the Southwest delegation portion of the Commission would
11 ask that the one application from the Education Committee, I understand,
12 was transferred to Long Range Planning, concerning Virginia Intermont
13 College. We would ask that application be referred to Southwest Economic
14 Development Committee, and we're going to try to look at it from an
15 economic development standpoint.

16 SENATOR HAWKINS: All right. If nothing else,
17 I see you all in the morning at ten o'clock.

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19 PROCEEDINGS CONCLUDED.

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24 CERTIFICATE OF THE COURT REPORTER

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I, Medford W. Howard, Registered Professional Reporter and Notary Public for the State of Virginia at large, do hereby certify that I was the court reporter who took down and transcribed the proceedings of the **Virginia Tobacco Indemnification and Community Revitalization Commission Executive Committee Meeting when held on Wednesday, October 29, 2008 at 4:00 p.m. at The Institute for Advanced Learning and Research in Danville, Virginia.**

I further certify this is a true and accurate transcript, to the best of my ability to hear and understand the proceedings.

Given under my hand this 20th day of November, 2008.

Medford W. Howard

Registered Professional Reporter

Notary Public for the State of Virginia at Large

My Commission Expires: October 31, 2010.

Notary Registration Number: 224566