

1 **VIRGINIA TOBACCO INDEMNIFICATION AND COMMUNITY**
2 **REVITALIZATION COMMISSION**

3 701 East Franklin Street, Suite 501
4 Richmond, Virginia 23219
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9 Research and Development Committee Meeting
10 Wednesday, October 6, 2010
11 11:00 a.m.
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13 The Hotel Roanoke Conference Center
14 Roanoke, Virginia
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1 **APPEARANCES**

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3 The Honorable Kathy J. Byron, Chairperson

4 The Honorable Daniel W. Marshall, III, Vice Chairman

5 Mr. Burgess Hamlet

6 Ms. Connie L. Nyholm

7 The Honorable Edward Owens

8 The Honorable Philip P. Puckett

9 Mr. Kenneth O. Reynolds

10 The Honorable Frank M. Ruff, Jr.

11 Ms. Cindy M. Thomas

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14 **COMMISSION STAFF**

15 Mr. Neal Noyes, Executive Director

16 Mr. Ned Stephenson, Deputy Executive Director

17 Ms. Sarah Capps, Grants Coordinator, Southside Virginia

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DELEGATE BYRON: Let me call the meeting of the Research and Development Committee meeting to order, it is now 11:00 a.m. I want to welcome everyone that's here with us today. We want to give some direction to the staff and have a very in depth discussion. I want everyone to feel free to participate. With that, I'll ask Neal to call the roll.

10

MR. NOYES: Delegate Byron?

11

DELEGATE BYRON: Here.

12

MR. NOYES: Mr. Hamlet?

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MR. HAMLET: Here.

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MR. NOYES: Mr. Harwood

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MR. HARWOOD: (No response).

16

MR. NOYES: Delegate Marshall?

17

DELEGATE MARSHALL: Here.

18

MR. NOYES: Ms. Nyholm?

19

MS. NYHOLM: Here.

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MR. NOYES: Mr. Owens?

21

MR. OWENS: Here.

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MR. NOYES: Senator Puckett?

23

SENATOR PUCKETT: Here.

24

MR. NOYES: Mr. Reynolds?

25

MR. REYNOLDS: Here.

1 MR. NOYES: Senator Ruff?

2 MR. RUFF: Here.

3 MR. NOYES: Ms. Thomas?

4 MS. THOMPSON: Here.

5 MR. NOYES: Senator Wampler?

6 SENATOR WAMPLER: (No response)

7 MR. NOYES: You have a quorum Madam
8 Chairman.

9 DELEGATE BYRON: The minutes have been
10 posted on our website; do I hear a motion that we approve
11 those?

12 DELEGATE MARSHALL: So moved.

13 MR. OWENS: Second.

14 DELEGATE BYRON: All in favor of approving
15 the minutes say aye. (Ayes). Opposed. (No response). All
16 right, Ned, if you'd like to get started.

17 MR. STEPHENSON: Yes, Delegate Byron. I
18 have a few comments I'd like to make to try to frame the
19 discussion a little bit. I think the discussions we need to hold
20 today is mostly a forward looking discussion. We have some
21 grants that have been approved and are in the process of
22 being documented. The Committee and the Commission have
23 authorized staff and its counsel to work those documents out
24 and that has been happening. We're really not here today to
25 try to work out those remaining grantees but more to set the

1 stage for future grantees that are likely to come in the future.

2 I want to give you a very brief history to kind of
3 help you understand what got us here. Presently or like
4 today, this Committee and the Commission has approved 8 R
5 & D grants without terms with no documents. We told these
6 applicants they were awarded the money go work out the
7 documents with staff.

8 The story is very long but we have been
9 through many drafts and many drafting sessions, many
10 backlines, we been through two attorneys. Every grantee has
11 had comments about the content of these documents, some of
12 them helpful and some of them not and it has become a big
13 moving target that's been difficult to set it down what it is that
14 the R & D grants or what the terms should be? So we're really
15 here today to ask for guidance from the Commission to help
16 staff frame the terms under which you want to make R & D
17 grants and we hope to have those terms in a contract that will
18 be part of the application form that a potential grantee can see
19 up front and if for some reason he does not like those terms,
20 he may need to stop there rather than put you through a
21 complete process only to find out that the terms are
22 unacceptable.

23 So with your permission Madam Chairman,
24 what I would like to do, I have about five slides on the wall
25 that hit the high spots of the current grant agreements that we

1 have. I would like to quickly walk you through those five
2 slides with the big points and then pause and hear from your
3 committee and maybe the public as to how tight or loose you
4 want us to write these big points.

5 Quickly, just for frame of reference, on the wall
6 are the two batches of approvals you've already done and they
7 were approved in April and that's almost 6 months ago. Many
8 of those grantees certainly want to get started and we're trying
9 to get the documents straight. Your staff as of last night has
10 worked out all of the documents for the first three that batch
11 in April.

12 The next batch that were approved in July, we
13 have yet to work out the terms but again your committee
14 authorized the staff to work through that and we intend to do
15 that.

16 MR. NOYES: The first group which was April,
17 2010 all have executed the documents you have before you. I
18 want you to be aware of that. We went through a lot of
19 iteration. I think word for word as you're seeing it here.

20 MR. STEPHENSON: Actually, there was some
21 negotiation with Counsel Ferguson and one or two of these
22 grantees and it wasn't signed word for word as you have it
23 before you. The contract you have before you is a three party
24 contract; it's between the Commission, the grantee and what
25 we call the beneficiary. This is new for you and almost all of

1 our other contracts are simply between the Commission and
2 the grantee and the grantee is almost always a public entity.
3 So you're taking public funds from the Commission and
4 awarding them to a public entity grantee. The standards that
5 we used to do that are different than they are if you add a
6 beneficiary and the beneficiary is a privately held company.
7 That's what makes this much more difficult because we are
8 transferring wealth from a public entity, the Commission into
9 private hands and according to counsel we can only do that if
10 you get a public purpose benefit in return for your money.
11 That is what made this especially difficult is the presence of a
12 beneficiary which is a private entity.

13 I will note at this point that in the discussion
14 we concluded after talking to the grantee that in this
15 particular contract, you will notice that the grantee who is
16 typically a county or an IDA is not liable for any obligation in
17 this contract. That point took a lot of conversation and I don't
18 want it to be lost on the Committee that when the Commission
19 and a county and a private company sign this document you
20 cannot hold the county accountable for anything contractually
21 in this document. If you don't like what's going on, and you
22 call the county they can put their hands up and say I didn't
23 promise you anything. There are reasons for that and I just
24 wanted you to know that. In a moment we're going to go back
25 through these and I see some blank looks on faces, how come

1 that is and we may need to talk about it. The counties
2 generally are not liable.

3 Here are the big contract terms that I think are
4 important for you to know and I'm going to run through these
5 pretty quickly and then we can back up and talk about them
6 one at the time.

7 The first part of this contract is that we are
8 asking the grantee articulate a promise to the Commission.
9 They must set forth what it is they intend to deliver in
10 exchange for the money. The second part of the contract is
11 that the Commission itself will hold a lien on any intellectual
12 property that arises from this grant to secure the performance
13 of that promise. Note, if you will that when we started these
14 discussions six or eight months ago, it was contemplated that
15 the Commission would own the intellectual property rights,
16 this is not ownership, this is simply a lien to secure the
17 performance of the promise.

18 MR. OWENS: Is it built in here also a release
19 date for that lien?

20 MR. STEPHENSON: It is. The third bullet
21 here is built into the contract that when the promise is fulfilled
22 to the satisfaction of the Commission, the lien will be released
23 so that the beneficiary who creates the IP and owns the IP will
24 be set free from any claim of the Commission upon that IP
25 once they have performed their promise.

1 Again, I should have said at the outset as Neal
2 said this morning, this is where we are and this is not
3 necessarily where we must end up. This is where we are at
4 this point in time in the evolution of this document.

5 The document provides that there shall be
6 some refund to the Commission if the promise is not fulfilled
7 and you will get your money back. It further provides that
8 there are some penalties due in addition to simply refunding
9 the grant, there's a monetary penalty if the IP has to be used
10 outside of the region which was a big sticking point for the
11 Commission when it conceived this program. We understood
12 the Commission did not want to fund research and discover
13 something useful and have it go to another community to be
14 developed and sold. So there will be a penalty if it's used
15 outside of the region.

16 Now, there is a fine point that I would invite
17 your attention to and look at the asterisk. The penalty that is
18 due if it's used outside of the region, however that is not true if
19 the promise is fulfilled. In other words, if the beneficiary
20 delivers to you what they said they would and you release your
21 lien, it is possible for them then to go elsewhere and use that
22 intellectual property without penalty, they are free. You might
23 want to think about that for a moment.

24 I want to talk briefly about the penalty and
25 these penalties and refunds are a lightening rod with some of

1 the beneficiaries as to their comments on the contract. The
2 contract provides that the promise is fulfilled inside the region
3 as agreed to, there will be no refund. Notice, if you will, that
4 the promise that is made may not say we're going to discover a
5 cure for cancer and make everybody rich. The promise may
6 simply say we're going to do the best we can to do these things
7 and this may fail. If they have fulfilled their promise and done
8 what they said they were going to do, they're off the hook and
9 no refund is due. If they try their best and only partially
10 complete their promise, there will be a pro rata refund due for
11 the foregoing promise that was not completed.

12 Here's where it gets a little tough. If revenue is
13 generated to the beneficiary outside the region in excess of a
14 half million dollars, this contract provides that they owe you
15 three times the grant amount back. The message to the
16 beneficiaries is that the Commission is not interested in
17 making a loan to someone to figure something out and then go
18 elsewhere and develop it or commercialize it. If that's what
19 their intent is or if they're thinking about going elsewhere,
20 they need to know that there's a three time penalty involved if
21 that should occur. That's very tough and a number of
22 beneficiaries have pushed back on this and perhaps they may
23 speak today as to some of the reasons why.

24 I'm going to pause for a minute Madam
25 Chairman and ask if there's any instructions from the

1 Committee as to which one of these points they like or don't
2 like, do you want to change it or talk about it.

3 DELEGATE BYRON: Ned help explain option A
4 that comes with the application. Also that part of the
5 application that the Committee members will also see as far as
6 the promises are concerned?

7 MR. STEPHENSON: Yes. In the past your
8 agreement says the applicants will do everything they said
9 they were going to do in the application. Well, when you read
10 the application, the language in them is often what I call blue
11 sky language, it's often very murky and it often uses words
12 like intend and hope and believe and these other words that in
13 my view, do not constitute a deliverable promise so you can
14 determine whether it was met or not. We've kind of lived with
15 that for some years. It's not very clear. We have asked each of
16 the past grantees if they will write and I think I have a slide
17 here for this. Look at the last bullet as to the promises. We
18 have asked each grantee if they would write a clear, definitive,
19 measurable promise that is within the mission of the
20 Commission and worth the money that you paid to get it. It is
21 that promise that will be secured by the lien on the intellectual
22 property. It is that promise that the Commission will
23 determine whether it has been met or not before it releases the
24 IP. So we're trying to pin down what the grantee will do. This
25 is a good time for the promise which is Exhibit A in the

1 document and we also call that the deliverables which is a
2 contracting term when private interests are involved. We are
3 trying to take a course where the deliverables will be offered by
4 the beneficiary. In other words, we do not want to impose the
5 deliverables upon them but we want them to say to us that
6 they which they believe they can deliver, they will write us.
7 They will set the bar, you will either accept that or not as you
8 may choose. Then going forward, we will make sure that they
9 are held to account for performance on that promise.

10 MR. NOYES: If I may Madam Chairman, I just
11 want to repeat the point that's just been made that this will be
12 incorporated at point of application and this Committee will
13 know what that promise is at the point where you decide to
14 recommend the project go forward with that in there or not. I
15 can assure you that having worked with Ned on this and
16 Frank Ferguson on this that the promises that we're getting do
17 not closely resemble what you saw in the applications in the
18 past, they don't. When it comes down to having to perform,
19 applicants are saying well, you know, I may not be able to do
20 what I said in the application and that's about to end.

21 DELEGATE BYRON: I think it's also important
22 to stress that the Committee and looking at the promises
23 along with their applications, they should state some time as
24 far as VEDP and the money we're spending to have these
25 projects or these applications and the process of reviewing

1 them and then spending other funds going back and forth
2 trying to get everything lined up, the promises with the
3 application and keeping in mind the money that we're
4 spending to do this. So all this should help us and prompt us
5 along and the staff too. Delegate Marshall.

6 DELEGATE MARSHALL: Question for you
7 Neal. If at the end of this day when we go through all this and
8 decide one way or the other, does the full Board have to then
9 adopt this also?

10 MR. NOYES: It was given over to staff and
11 counsel to produce this document. We are seeking today
12 guidance from this Committee. I don't believe it has to go to
13 the full Commission. We will incorporate your instructions
14 here today and it will become part of the application. We're
15 going to be asking all of the July folks for their promise which
16 we have some of them. We've taken care of the first three.
17 There's been a lot of back and forth with the first three and it
18 was very useful. It was useful for the staff because we learned
19 what some of the concerns were. There were legitimate
20 concerns and we changed the documents as a result. Ned can
21 talk some more about that but the big sticking point was and
22 we believe will be cured after our meeting now is that we didn't
23 have this document when we first started making
24 recommendations and there was confusion on the part of
25 applicants and the grantees as to what was expected. The

1 Committee had discussed a year ago or 18 months ago what
2 our expectations are. Our expectations are commercialization
3 within the footprint and creation of jobs and private
4 investment. Not having it happen as a result of investment by
5 the Tobacco Commission in West Virginia or North Carolina
6 for a defined period of time. We truly benefited from hearing
7 from the beneficiaries and the grantees of these first three.
8 This is what's going to go with the application and we'll know
9 what the promise is and it's going to help VEDP to go through
10 the vetting process. It's a far more efficient way to accomplish
11 the Commission's or the Research and Development
12 Committee's objectives and programs.

13 DELEGATE MARSHALL: So then we have a
14 meeting on Wednesday, the 27th and there are several
15 applications before us. We will ask those people if we agree to
16 this today for a promise.

17 MR. NOYES: We hope to have the promises
18 from all 10, we have 10 applications under review at that time.
19 The Chairman has insisted that the staff work hard to get
20 those and some may not produce a promise and we'll know
21 who those are, know who will provide a promise, the ones that
22 don't you produce it, you can recommend we not go forward.

23 MR. HAMLET: Are there other Committees
24 making grants, do they have their own specific documents that
25 have similar types of promises or documents like Exhibit A?

1 MR. NOYES: If you're building a house and
2 need a sewer line, it's a little different than if you're building a
3 clean room in a building, that's a deliverable. Economic
4 development do have their own applications and they're
5 essentially saying the same thing but this is different as Ned
6 pointed out because we have the private sector beneficiaries.
7 That's the big difference in the Research and Development
8 Program.

9 MR. HAMLET: Our Committee is unique in
10 that way?

11 MR. NOYES: I believe it is unique.

12 DELEGATE BYRON: We're unique in the way
13 that we're going forward with Research and Development
14 which is a different goal. It's different than what we've looked
15 at in the past.

16 SENATOR RUFF: Is there a time period when
17 we are going to insist or talk about refunds, a timeframe on
18 the refunds?

19 MR. STEPHENSON: Yes, time limited Senator
20 Ruff. The refund formula is spelled out in the grant. There's
21 essentially a three to five year period of time expressed in the
22 document that the beneficiary has to perform on the promise
23 after which they're subject to the refund or penalty or
24 extension if you chose to go that route.

25 MR. NOYES: It is 3 to 5 years after the grant

1 period. That is the period within which the research is to be
2 completed, the timeframe. The beneficiary tells us in the
3 promise that they want it to be 36 months or 38 months or 60
4 months or some number, it could be less. Ordinarily it would
5 be three years to five years to get that commercialization up to
6 the promise contemplated.

7 DELEGATE MARSHALL: The last bullet,
8 revenue over 500k outside the region and we'd get a refund
9 three times the grant amount. How would we know if they did
10 over 500k, how are we going to know if they did over 500k
11 outside the region unless we look at their books?

12 MR. STEPHENSON: I think that's one of the
13 great difficulties in managing the use of intellectual property
14 on the planet. It's just hard to know. I think people in the
15 industry know whose doing what and where they're doing it
16 but I think the contractual terms on the penalty serve as a
17 deterrent to those that contemplate coming to our region only
18 because they can get this money.

19 DELEGATE BYRON: I think the point that
20 Ned's talking about is, I'm not saying I totally agree with all of
21 that but I'm trying to get an understanding of that penalty
22 figure. That is after, after everything is developed, could you
23 explain an example of that timeline?

24 MR. STEPHENSON: An example of the timing?

25 DELEGATE BYRON: Talking about after a

1 period of approximately 36 months after it's been developed in
2 the Tobacco region, is that right?

3 MR. STEPHENSON: The timeline that sets
4 forth is in your packet at the top of page two and it speaks to
5 the developed period. The development period that is given to
6 the beneficiary is three years following the date of his last
7 disbursement, two years from the contract whichever comes
8 first. He then has three years to perform on his promise.
9 When that clock is up, it would seem that your staff would
10 hold the beneficiary to account for whether they performed or
11 not. If they failed to perform, the money has to come back. If
12 we should discover Delegate Marshall that its actually being
13 used elsewhere, there could be a demand for three times.

14 MR. NOYES: The licensing of the IP that's
15 developed. I'd like to remind the Committee that some of the
16 applications which you have seen are very specific and say no,
17 we do not anticipate that IP will be developed as a result of
18 this research. For those applications that say that, they
19 shouldn't have any problem at all with the language in the
20 document unless they actually are going to develop some
21 intellectual property that they will like to commercialize
22 outside of the footprint but that's not what they told us in
23 their application. The applications are at least two, three or
24 four of them are very specific. No IP is anticipated.

25 SENATOR RUFF: Madam Chair, in addressing

1 some of your concerns, when you say the penalty is three
2 times, we would then have access to the books. If that's not
3 the case then they would want to show us their books.

4 MR. STEPHENSON: The contract provides
5 access to the books. You're entitled to that by the contract.

6 MR. NOYES: All grants contain that feature.

7 DELEGATE MARSHALL: Neal, the
8 applications that we have seen, how many of them do not have
9 intellectual property?

10 MR. NOYES: Three or four of them are specific
11 in the application that they do not anticipate developing
12 intellectual property in the project.

13 MS. THOMAS: How about if they already have
14 IP, it's already there?

15 MR. NOYES: If new knowledge results from
16 the new IP, if it's new IP and not background IP, it must
17 distinguish what is new and the document requires that the
18 beneficiary report within 30 days any discovery of patentable
19 information.

20 MS. THOMAS: It could be developed from
21 exactly what they already have.

22 MR. NOYES: That's right. Refined
23 background IP seems to me would be covered under the 3-
24 provisions.

25 MS. NYHOLM: Does that mean then that it

1 has to be an entirely new idea from start of the contract if you
2 will, that would not be subject to the three times?

3 MR. NOYES: Entirely new ideas would, yes.

4 MS. NYHOLM: Not only would it be subject
5 but if they have, if they refine it then the 5 million whatever?

6 MR. NOYES: They're commercializing
7 something that they learned as a consequence of this grant
8 outside of the footprint within the timeframe they would be
9 liable.

10 MS. NYHOLM: Outside the footprint within
11 the timeframe is the key to that sentence.

12 MR. NOYES: This Committee was very specific
13 in, the Commission was very specific the end goal for the
14 Tobacco Commission was commercialization within the
15 footprint so yes, we want good science, going through this
16 vetting process allows us to know whether the science is
17 worthwhile or whether it's been done in 17 different places in
18 the last year. The end game is commercialization when the
19 staff looks at the promises following the Board, and looking to
20 see what the commercialization promise is. We wouldn't know
21 if the science was good to begin with but we're not scientist.

22 MR. STEPHENSON: Madam Chairman, in
23 fairness to some of the beneficiaries, the three times penalty
24 gave a lot of push back from some of the grantees. You may
25 want to speak to that but some of the argument was it might

1 be a deal killer for some of their projects that may or may not
2 be true but I think the Committee would want to know that.
3 That brought some serious conversation.

4 MR. NOYES: When you speak about push
5 back, my discussion with some of the grantees and
6 beneficiaries was the issue of sole discretion from the
7 Commission as to whether or not the promise had been
8 satisfied. People say the Commission ought not be the only
9 deciding party. Well, you know, how many people do we want
10 to decide? If the promise is clear and it's measurable, there
11 can be argument about it, they either did or they didn't do it.
12 If you don't see that promise, you will form a judgment as to
13 whether or not this is what you want, whether its measurable
14 and if somebody has a disagreement with the present or future
15 staff interpretation of whether or not it was achieved during
16 that time period then everybody has a right to come and speak
17 in front of the entire Commission and say staff is wrong. If it's
18 really measurable, we will probably get it right.

19 SENATOR RUFF: It is Commission money
20 that's being used.

21 MR. NOYES: That is correct.

22 DELEGATE BYRON: The localities are not
23 taking the responsibility.

24 MR. NOYES: Let's talk about that because
25 that was, we moved, the staff and counsel, originally we had

1 the responsibility for our grantees, that public entity. Ned,
2 can you take us back in time a few months?

3 MR. STEPHENSON: Yes, when we make
4 grants as we have for 10 or 11 years and the only parties to
5 the grant are the Commission and the grantees, say a county,
6 we hold that county liable to perform the promises in that
7 grant. If they said they were going to build an industrial park
8 then they have to do that because they contracted and are
9 obligated. When we began making TROF grants where there
10 was a third party beneficiary or private company, what we
11 learned was that we were making these grants and when they
12 defaulted, everybody in the game was pushing and throwing
13 their hands up saying it's not my problem and not my fault.
14 This Committee, 6 or 7 years ago decided in those cases that
15 the grantee county would be liable for the performance of that
16 TROF grant. That single decision caused all of these TROF
17 grants to get cleaned up because the counties are unwilling to
18 take on that liability without carefully vetting the deal, making
19 sure it was going to work and if they're not sure, they get
20 cured and it's cleaned all that up. We use the same model
21 when approaching these and making the county liable but
22 after much discussion, we realized that if you take a normal
23 Tobacco Commission county and make them liable for \$5
24 million or potentially \$15 million refund because of some
25 action of some company that's trying to develop IP that failed

1 or maybe went elsewhere, that is not a liability that the county
2 can manage or secure or debt and it's really outside of their
3 ability to manage that risk. So after much discussion, the
4 grantees and Frank Ferguson and Neal and myself and Danny
5 and Kathy saw or felt like the grantees should not be made
6 liable or that would really shut down the program. It's hard to
7 make the grantee liable for research projects.

8 MR. NOYES: In a perfect world we could redo
9 the others but we could not get to their or in trying to work
10 this out and some of these projects will be like in the \$10 or
11 \$12 million range over a period of years. There's not really a
12 subdivision in the footprint that can manage that kind of risk
13 and could not put that out.

14 MR. STEPHENSON: Madam Chairman, you
15 might ask if the members of your committee are comfortable
16 with that asterisk and that's a pretty big thing.

17 DELEGATE BYRON: Are you talking about
18 number 5, the asterisk at the bottom?

19 MR. STEPHENSON: The asterisk at the
20 bottom which basically means that if they deliver on their
21 promise to you they are free to go elsewhere and do whatever if
22 you're willing to allow that to happen. The alternative is lock
23 them up forever.

24 SENATOR RUFF: I don't think you can do
25 that, lock them up. I think we got a good region to do

1 business in and we need to make sure that they are going to
2 stay there. I don't have any problem with it.

3 SENATOR PUCKETT: Madam Chair, I don't
4 have any. If you don't allow them to do that, you'll undo what
5 we've been talking about. Once the promise is fulfilled, that's
6 all we are entitled to. We can't do anything beyond that. I
7 don't think you can do that and I don't have a problem with it.

8 MR. STEPHENSON: The other pinch point is
9 the penalty in the event of use elsewhere. I would hope the
10 Committee could be clear on that today. It may be that
11 members of the public here today or grantees may want to
12 speak to that later on. That is a stiff penalty but it has been
13 suggested with some credibility that maybe two times the
14 grant would be a more palatable penalty but that's up to you.

15 SENATOR RUFF: Or you could go the other
16 way four times.

17 MR. NOYES: We, the staff didn't have the first
18 clue what the right number was but the point is that while the
19 risk for the Commission that the Science doesn't work out,
20 there's nothing that can be commercialized. That's the risk
21 we're taking with these funds. We also might be taking the
22 risk that somebody is going to be successful and develop the
23 technology outside of the footprint at least for a specific period
24 of time. Whether it's two times or three times, it is clear there
25 must be a consequence if somebody deliberately goes outside

1 the footprint during that time using our funds so there must
2 be a consequence. We're open to the guidance from this
3 Committee. We'll make whatever change you wish to make.

4 SENATOR PUCKETT: I assume we're going to
5 hear some comments on that later if someone thinks that's out
6 of line. If they think it's out of line and I think it's about where
7 it ought to be. If it is out of line and someone wants our
8 money, the cooperation that we have with that grantee and the
9 Commission I think will be much stronger. We're going to all
10 try to do the right thing. If somebody's coming in and asking
11 for whatever or a half million dollars or a million dollars of two
12 million dollars and there's no consequence in taking our
13 money, maybe we shouldn't be giving it to you. I'm not sure if
14 three times is right but if somebody think that's way too
15 much, I think it might be a comfortable place for me. I'm sort
16 of satisfied with that. I'll reserve my vote until I hear more.

17 DELEGATE BYRON: What we're doing today is
18 trying to get a consensus as to what direction we want to go
19 in. As far as the Committee getting to a point of
20 understanding, I would commend our staff. We been back
21 and forth on this thing and many circles and all sorts of things
22 to get it where it is. It looks like it's fairly easy as you put it up
23 there now but it took a lot to get to this point.

24 MR. NOYES: We had two half day meetings
25 with the Chair, Vice Chair with grantees and this was a good

1 experience going through this to hear what the concerns were,
2 think about everyone's concerns within the context of what the
3 Commission decides this program should accomplish. It's a
4 good process to go through. Where we are right now is that
5 everybody wants to redline the document and to modify it to
6 suit their own purposes. While getting into my little speech
7 here on the deliverables, the deliverables is attachment A.
8 That can and will be different for every applicant because
9 you've got some guys doing something with IP and somebody
10 is doing something with a different action but the promises are
11 different. The basic document points ratified by this
12 Committee and goes out and if folks don't want to sign the
13 basic document, if they're not prepared to do that, then we're
14 not the partner you're looking for.

15 DELEGATE BYRON: That's the main goal here
16 and getting there and getting this in order, doing this so we
17 feel comfortable with what we're doing in a way that we get to
18 where we want to go. This is a very critical meeting. If we can
19 just get an initial consensus and then we can hear from
20 everyone and decide what we want to do.

21 SENATOR RUFF: Madam Chairman, not being
22 a lawyer, if heaven forbid one of these goes bankrupt, what
23 happens to the intellectual property?

24 MR. STEPHENSON: On my non-legal
25 experience with this, intellectual property is an asset just like

1 any other asset and bankruptcy trustee will marshal all the
2 assets and make what deals he can.

3 SENATOR PUCKETT: That's the way bankers
4 would look at it.

5 MR. STEPHENSON: And Senator Ruff we
6 would be a lien holder along with perhaps other lien holders.

7 SENATOR RUFF: As I read this, they could
8 not put any other lien on that property, is that correct?

9 MR. STEPHENSON: That is what's known in
10 the trade Senator Ruff as a negative pledge. That means that
11 if they say I won't do it, well, you know, it happens.

12 SENATOR RUFF: Should that occur and we
13 end up as the owner of that intellectual property, is there a
14 method for doing something with it at that point, getting rid of
15 it one way or the other? Well, we're in the lead which is a good
16 place to be right now. The document says that the beneficiary
17 is the owner of the IP grants to the Commission a lien on the
18 IP and a lien on all of the grant funded assets and it permits
19 us to record those liens if we choose to. The Commission
20 never has recorded one yet. That language is in all the
21 documents. So if we choose not to record and he pledges
22 those assets to somebody else and they do record, you are in
23 second place behind the guy that did the record. You don't
24 have a lien you thought you had even though he promised he
25 wouldn't do it, the other guy is ahead of you. We could come

1 up very short under that scenario unless you want us to begin
2 recording the liens that might be a topic for another meeting.

3 MR. NOYES: That would be a matter that this
4 Committee could if you chose to bring it before the full
5 Commission. That's a policy issue that would require 31
6 votes.

7 MS. CAPPS: I was just wondering in my
8 observation on page four where IP is produced under B3 where
9 it says, "in the event no commercialization of the IP occurs
10 within the development period" recognizing that the
11 development period is the sooner of three years after the final
12 disbursement the sooner or the date of this agreement. Is that
13 in our best interest?

14 MR. NOYES: Is it long enough, is that what
15 you're saying?

16 MS. CAPPS: You're saying here it would be
17 sooner for the date that this is signed, two years from the date
18 this agreement is signed. Their loophole is if they don't
19 commercialize in two years, their out of any commitment.

20 MR. STEPHENSON: No, the clock starts in two
21 years, the three year clock begins after two years.

22 MS. CAPPS: The development period I believe
23 is defined as the sooner of the two.

24 MR. STEPHENSON: The development period is
25 the three year period. It begins either two years from the

1 document or when they get the last disbursement, whichever
2 comes first. We're trying to give them a full three years to do
3 their thing and we're assuming that once they do their last
4 check from the Tobacco Commission, whatever they're
5 building or doing it would be built and they got three years to
6 work. If they can't get that done in two years, we're going to
7 start the clock anyway. Everybody's got a five year window
8 max. We could change those numbers.

9 MR. NOYES: It's a good question. This is just
10 what we came up with and if the Committee wishes change,
11 we have three years on the TROF program and that's a max.
12 It's not a coincidence this is three years from the last
13 disbursement date of signature. Three years has been overall
14 useful, not the right or not the wrong, it is what it is.

15 MS. NYHOLM: In paragraph 7 the grant of
16 security interest on page 5. The way I read this leads me to
17 believe that they get the money up front, whatever this
18 amount is and their match. But this security that we're
19 requiring effectively is keeping them from borrowing any
20 additional money until completion of the project because if
21 they secure, if they pledge everything to us including a
22 continuation of any IP development with the property and
23 until that completion date comes and goes, they can't borrow
24 any more money, they can't pledge any collateral.

25 MR. STEPHENSON: Some beneficiary has

1 cited that problem as being an impediment to debt financing
2 regarding bond debt, it would come up in bond debt.

3 MS. NYHOLM: But even small companies have
4 –

5 MR. STEPHENSON: The cure for that is that
6 the Commission can either release or subordinate the request
7 and free them up to borrow.

8 MS. NYHOLM: We're not obligated to do that.

9 MR. NOYES: We're not obligated to do that, if
10 somebody is performing and something comes up and comes
11 before the Committee, the Committee can say we think it's
12 okay to subordinate and folks can go off and do it. What we're
13 arguing is that somebody taking the equipment or taking
14 whatever it is and going to Montana.

15 MS. NYHOLM: They covered that with other
16 penalties. This prohibits additional financing which could
17 potentially doom the project to failure.

18 MR. STEPHENSON: If they take our money
19 and they buy an electron microscope or something this says
20 they can't hock that to some other lender, that's grant funded
21 assets. We have a lien on it. They either have to get us to
22 release that or subordinate as to that microscope. All the rest
23 of the stuff they got somewhere else they can do that.

24 MS. NYHOLM: That's correct on the collateral.
25 I'm not disagreeing with the collateral but I'm disagreeing with

1 the securitization of the IP development.

2 MR. STEPHENSON: Yes, we would have a lien
3 on the IP and that could disturb the use of that for debt
4 financing.

5 MR. NOYES: Unless it's released.

6 MS. NYHOLM: Once it's released, there's no
7 method to guarantee the release. Sometimes you need to get a
8 release for a piece of collateral or pledge additional collateral
9 and you can limit it to some extent but you can continue to
10 borrow.

11 MR. NOYES: What is your solution?

12 MS. NYHOLM: I think that the collateral is
13 reasonable as far as security with interest to any and all IP. If
14 they can borrow more to complete their IP and take the IP to
15 the next level so long as it's still subject to the clawback
16 provision and penalty, who cares.

17 MR. OWENS: How do we get the value of the
18 IP?

19 MS. NYHOLM: Because it's still subject to the
20 performance period. They have to do the thing on Exhibit A
21 but they might be needing to get additional financing.

22 DELEGATE MARSHALL: I think the question
23 is if we put \$5 million out to start with and the IP is worth X
24 three years down the road, how do we know how much the IP
25 is worth, is that just going to be in space?

1 MS. NYHOLM: That's not the question, that's
2 not a question about additional financing.

3 DELEGATE MARSHALL: Well when you talk
4 about subordinate, how much money would the IP be worth, is
5 it worth three times or four times what the, the question is
6 how do you determine that?

7 MR. OWENS: What would be the determining
8 factors for the value of the IP. If we've got \$3 million on this IP
9 deal and they want to go out and borrow three more million
10 dollars is the total of the IP 6 or 12?

11 MS. NYHOLM: If they can't borrow the
12 additional \$3 million then our investment could be worth
13 nothing so the real, the way to solve the problem with IP in
14 general, how do you value it and how do you tie it up or is the
15 project doomed to failure if you don't get additional funds.
16 When you look at your Exhibit A, deliverables, at least in G,
17 there is no guarantee of the minimum IP value creation. There
18 is certain performance.

19 DELEGATE BYRON: If they know up front
20 what comes with the contract that they have to come back in
21 order to do that at that point, it would also be up to us to be
22 part of, if you're saying that the money is in jeopardy if we
23 don't allow them to go forward then it's our advantage to
24 release that as well. Then if going forward it's in further
25 jeopardy, it might be to our advantage not to go forward and

1 work it out.

2 SENATOR PUCKETT: Madam Chair, from a
3 pure banking standpoint, you're not going to get away with
4 that going to a banker and getting the money and then say,
5 you know, we're not going to give you this, whatever it is,
6 whether it's IP or a microscope or whatever. We want a new
7 CC on all of that, we want a lien on it. If it does go well, the
8 intent of this, maybe they'll come back to us. We're not done
9 in this. I mean if they need to borrow money it seems to me
10 that it ties it up for the Commission and grantee to really
11 make it work in our footprint. The thing that scares me about
12 that is they take our money and we don't have any hold on it
13 to speak of it we don't do that. Then it really works good and
14 they'd like to move forward I would really like for them to come
15 back to us and let us help them do that because that's an
16 advantage to us. If we don't have a hold of some kind of
17 intellectual property or just whatever you're buying they don't
18 have to come back to us and they very likely would not come
19 back to us because we're pretty much interested in our
20 footprint and they're not. They're interested in where they can
21 really make this thing work to make money.

22 MS. NYHOLM: I'm not explaining myself very
23 good I guess. Refunds and penalties attached to the time
24 period in the Tobacco Commission's footprint are absolutely
25 excellent and valid and should be enforced vigorously. What

1 I'm saying is that the IP securitization, it's like doing a
2 mortgage and you can't get a second. If you need a second in
3 order to make your project go forward because a lot of this
4 other stuff is if you get down the road and you can't go and
5 borrow more money to get to the finish line, that's not a good
6 thing. If they come back and or if there is a message for them
7 to come back to the Commission or some standard or reason
8 that's set up or some sort of standard that's been set up or the
9 authority then that would be okay but in five years you
10 couldn't see how our position has changed. I mean we fund
11 some things that we might not always want to do but the
12 reason is there that day. Five years from now can be a whole
13 different reasoning, different financial situation. Our opinions
14 may be dramatically changed from what they are today and
15 we're tying that Commission up with this decision.

16 SENATOR PUCKETT: Madam Chair, again the
17 concern for me is that if I'm the one that's making the loan, I
18 want you to come back and I want to make the second loan to
19 you if it's just the matter of getting the second loan or
20 something. If you're really doing well with that and you want
21 to continue with the work that's in that original project we
22 funded, we're going to try to help you do that. That's what
23 we're in business for and that's what this Commission is in
24 business for. If you're really doing what you said you would
25 do and what you promised, it's really working in our footprint,

1 then we'd be foolish not to help you continue to do that.

2 MS. NYHOLM: If I come back to you for a
3 second bite of the apple or another loan, you already got my
4 first loan and you're the only lender I would go to and you put
5 so many forms on that for my second loan, I'd have to go out
6 and refinance the first one.

7 SENATOR RUFF: Madam Chairman, listening
8 to that back and forth, doesn't that make the argument that
9 we should record these liens if they're on intellectual property
10 so we know what we have to get. Would it satisfy that if it was
11 secured?

12 MS. THOMAS: I do agree with Senator Ruff.
13 We're going to have to explore filing liens because as Ned
14 mentioned earlier, if we do not, then we'll have nothing. This
15 is not worth anything if we don't record them. If we're funding
16 this kind of money here, we're going to want to be in a first
17 lien position.

18 DELEGATE MARSHALL: Let me see if I can
19 focus the question, I think our concern is that under
20 paragraph 7, if someone signs this, then we're going to have
21 100 percent lien on the intellectual property. What you're
22 concerned about is that if someone goes to refinance for
23 additional capital to keep this afloat, they would not be able to
24 pledge any additional IP because it's all pledged to the Tobacco
25 Commission. As someone who's borrowed money before, when

1 I go to the bank, it's hard for me and I don't know if I have
2 ever been able to go to a bank and say Marshall Concrete's
3 goodwill is X, they don't care about my goodwill. What they
4 care about is hard assets. They will certainly get a lien on it. I
5 think maybe IP is along the same lines. It's kind of like a
6 company's good will. In the end you can sell good will but
7 here the IP is such a nebulous thing you can't, you can't go to
8 Kelley Blue Books and get a figure for good will. I don't know
9 if it's really an issue at all and maybe it's not a real problem.

10 DELEGATE BYRON: When you speak about
11 the collateral problem, collateral is one thing, you can put
12 your hands on it but when you talk about IP, it's a continuous
13 asset that makes potential development, it's not marketable or
14 commercialized, if it was, we'd look at it a whole different way
15 along with the projects.

16 MR. NOYES: It's very timely perhaps that
17 we're having this discussion because I have at the office a
18 request that is different from the ones in the application or a
19 little different anyway than the ones in the application. Our
20 funds are going to be used by companies to buy equipment
21 that that company would own. As a policy matter you said the
22 last five years we'd have to make sure that the stuff that they
23 bought with public funds didn't wind up in Utah and that it
24 remains in the footprint. The only way to accommodate this
25 request that I have and it's a real request is to put a lien on it

1 so that they can't dispose of it. The only way, and Ned and I
2 went back and forth a little bit on this yesterday not at each
3 other but friendly working through it together. My initial
4 reaction was to make it a joint ownership of our grantee and
5 the private sector partner and it came back that's not what the
6 private sector partner wanted because they wanted to use it as
7 collateral for a loan which is expressly against what this
8 Commission has told staff to do for at least the last five years.
9 So this is happening and this is very timely we're having this
10 conversation.

11 MS. NYHOLM: It's all collateral.

12 MR. NOYES: You can't use an asset financed
13 with Tobacco Commission funds as collateral.

14 MS. NYHOLM: I would agree, that's not what
15 I'm talking about. Maybe I'm not expressing myself very
16 clearly. Sentence one is on IP. After that it's all collateral. I
17 have no problem with the collateral. The machine would be
18 owned by the grantee and not the beneficiary and therefore the
19 beneficiary could not use it as collateral and I have no problem
20 with that.

21 MR. NOYES: In this one the beneficiary owns
22 the equipment. It's okay with me if it's okay with you and
23 there is a lien so that we at least know about it when
24 somebody, we would then have to release it. The other point
25 that I would make, I've been on this staff for five years and

1 there is a pathway and there is a pathway for a beneficiary to
2 come back and explain their situation and ask the
3 Commission to do it. That has always been there. The five
4 years I've been on your staff, the only unreasonable person
5 that I've run into is myself and you all can deal with that.

6 SENATOR RUFF: Madam Chairman, if we're
7 going to act like a bank then we ought to live like bankers. I
8 think it would cure the problem to include in the language and
9 to take out the language, and to any and all, you're saying a
10 security interest in IP and then require that the lien be
11 recorded or whatever matter it may be. Then down the road if
12 they need more money and it's worth twice that, they can
13 borrow the excess dollars wherever they want to.

14 DELEGATE MARSHALL: Paragraph 7 you'll
15 strike, "and to any and all".

16 MR. STEPHENSON: Before we do that Madam
17 Chairman, let's read the whole thing. "Any and all IP
18 produced using the funds awarded under this grant". We
19 don't want the IP to bring to the table, we only want that to get
20 created with our money. Connie, I understand your point that
21 if they enter into this contract and later want to borrow money
22 there's only one way out from under the lien and that is to
23 perform the promises. The only way they get out, if we don't
24 want to let them out, they can't get out except to perform the
25 promises and they may not be able to do that without

1 additional financing so they're trapped.

2 DELEGATE BYRON: Ned says it better than
3 me.

4 SENATOR PUCKETT: Madam Chair, I think
5 the way Ned read it, that's the way I read it and we're not
6 putting a lien or we're not holding anything that's not
7 produced with our money. So if a company has whatever, IP
8 or whatever it is, we haven't put any money into it and we
9 have no interest in it at all, we're not going to put a lien on it
10 but this I thought was pretty clear from the beginning, it
11 would resolve, the key word there seems to get the attention
12 but that again is all IP produced using funds awarded under
13 the grant. If it's not awarded under the grant, whatever IP
14 you've got belongs to you, you can go to anybody you want to.
15 We have no standing in anything. That's why I think the lien
16 needs to be exercised because it clearly indicates what we
17 have an interest in. Without the lien, we don't have any
18 interest in anything. So I'm personally convinced that the lien,
19 whatever we decide, the lien on whatever is produced we
20 should have and if it's produced with our money. If it's not
21 produced with our money, then we don't have any interest in it
22 at all.

23 MR. STEPHENSON: There are many ways of
24 looking at this Madam Chairman but one that comes to mind
25 is that when this party comes to us to get \$5 million, the IP

1 that they hope to create at that point is aspirational and really
2 has no value, they just hope it's going to happen. So we put
3 our money out and we take all of the downside risks that
4 nothing ever happens. However, if they do develop IP and the
5 value goes to the stratosphere, I think we must also have the
6 upside risk that happens because we were willing to take all
7 the downside risks if that makes any sense to you. Unlike
8 borrowing on other assets that do have value at the moment
9 that the money is loaned.

10 MR. HAMLET: I'm sympathetic to those asking
11 for the money and what they'll make and opening the door.
12 Just like Connie said, there are going to be companies that are
13 in various stages of development and they're going to need
14 venture capital, debt financing and whatever it takes. I think
15 as long as we understand that at some point in the future if
16 their growth exceeds what they laid out in their original plan
17 and they're going to need for whatever reasons additional
18 financing and as long as we're prepared to take a junior
19 position to subordinate. If they're doing the right thing and
20 then things are happening in a good way and we anticipated
21 this would be commercially successful and they're still in the
22 time period they're working through with the grant and there's
23 a need that they can leapfrog and become bigger as long as we
24 understand that at some point we have to take a junior
25 position it's a win win for all parties. If indeed on the back

1 side they're going to be extraordinarily successful if they can
2 get this one piece of financing and for that they need to have a
3 period just on the IP that's going to be win win. I don't see
4 where it's such a bad position for us to be, junior position in
5 servicing the area.

6 SENATOR PUCKETT: If your scenario works,
7 would they not come back to us and they don't have to come
8 back to us, we're not holding onto it so in my opinion, that's
9 why it has to be there. If they're doing well, I want the
10 Commission to help them do well, come back to us and tell us
11 what you need and show us what it's doing and we can do it
12 but if you don't have that first position, they don't have to
13 come back to us. They may be doing real well, if they don't
14 come back to us, we don't get a chance to participate in what's
15 coming down next. I think that if we're going to give somebody
16 our money, they ought to be looking at us as a willing partner,
17 that's what we are. We're not trying to lock somebody down
18 where they can't move in anyway but we're willing to help you
19 and that's what this thing is all about. If you give up that
20 position, you know, you have no control over what any
21 company will do beyond that day. Once you give it up, you're
22 at the mercy of whoever you're dealing with. I think this
23 partnership has to work both ways, come back to us and if we
24 don't like what you're doing and you've fulfilled your promise,
25 maybe then we'll release it and let you go where you want to

1 go. If it's a good thing, we still want to be in. I can't imagine
2 this Commission and I may not be here but I can't imagine
3 whoever is on the Commission not being willing to help a
4 grantee whose really doing well and need additional funds. I
5 certainly would be one of the first persons to support
6 something like that.

7 MR. HAMLET: What about when we can't give
8 them anymore money?

9 SENATOR PUCKETT: Why wouldn't we just
10 take a new application for whatever they're doing?

11 DELEGATE BYRON: Say in three years.

12 MS. NYHOLM: What about in three years and
13 we put out our money in a mega park and they come back in
14 the fourth year and maybe we won't have any money. I think
15 both the points brought up are certainly valid. My concern is
16 that if we commit ourselves to a first position up until
17 additional financing is required. I agree with what you're
18 saying that they should come back to us and give us the right
19 of first refusal but we need to be prepared to subordinate or
20 give additional funding. I'm not sure I'd be on the Commission
21 then either but I still would argue the point they're not
22 qualified grantees.

23 MR. STEPHENSON: Connie, would it cure
24 your issue if the contract provided for a lien liquidation
25 opportunity and that there was a dollar certain that the

1 beneficiary could wipe us out with a check and not have to ask
2 our permission for anything such as three times, I mean if
3 they want to pay us back to make us go away they could. If
4 they wanted to get free. I understand they've got to come and
5 ask and they don't know what the answer is going to be.

6 MS. NYHOLM: I definitely want to hold their
7 feet to the fire continuing their business with or without
8 additional funding in the footprint in that time period that you
9 determined. I think that's very reasonable and addresses our
10 concern about getting the promise fulfilled. My concern, if
11 they came to the project and we gave them \$5 million the total
12 amount and then they had a \$5 million match so they've got
13 \$10 million to get this thing going. Then in the fourth year,
14 they need two more million dollars to finish the project and
15 deliver on their promise. I want to make sure they can get
16 that \$2 million somewhere. They could come back to the
17 lender first but if we say we've changed our rules at that point
18 they need to be able to get that \$2 million to finish to deliver to
19 us on the promise.

20 MR. STEPHENSON: And this lien would stop?

21 MS. NYHOLM: Yes.

22 MS. THOMAS: From the banking standpoint,
23 it puts us, we reserve the right, it won't stop them at this point
24 but if we don't have the lien, we have no option.

25 MR. NOYES: In talking to the company CEO,

1 it was a very interesting development working through this
2 research. I asked him where he expected this piece of
3 business to be in five years and the answer was that he
4 expected GM to buy it. Came to us for money to support his
5 R&D effort and we tell him we want a lien, we definitely want a
6 lien because if he's going to sell his business to General
7 Motors and that works out, we'd have to get our money back,
8 we're going to want our money back. If we don't have a lien,
9 they're going to sell it anywhere.

10 SENATOR PUCKETT: Madam Chair, again,
11 again, we have nothing without that. As a matter of
12 protection, what this Commission is doing with the money.
13 Asking them to come back to us is not a bad thing as far as
14 I'm concerned.

15 MS. NYHOLM: If they sell this in the
16 performance period, they have to pay us back this money
17 unless they sell it to GM and continue the project in the
18 footprint then we still got everything that we wanted.

19 SENATOR PUCKETT: Madam Chair, if they
20 fulfill the promise, everything is done, they can go where they
21 want to, even with the lien. We should be required to release
22 that if they fulfill the promise.

23 MR. STEPHENSON: Can we think of a cure
24 short of not having any lien at all?

25 MS. NYHOLM: I'm not adverse to having one.

1 MR. STEPHENSON: I'm fishing for a cure.

2 MS. NYHOLM: I think that if the applicant or
3 the beneficiary needs to obtain additional financing, that's
4 where I'm hung up.

5 MR. STEPHENSON: Under this they've got to
6 ask us and if we want it so they don't have to ask us, then we
7 got to not have a lien.

8 MS. NYHOLM: I don't care if they ask us or
9 not, we have to be responsive to the ask.

10 MR. STEPHENSON: At that time.

11 MS. NYHOLM: Yes. We have to fund it or if
12 they can subordinate the position. Something that would
13 enable the project to go to conclusion. If they ask for \$2
14 million and we originally gave them five and they need another
15 five.

16 MR. STEPHENSON: The risk is we either won't
17 or can't, if something happens we can't get it.

18 DELEGATE BYRON: If we don't have a lien
19 against it, we'll never be asked.

20 MS. NYHOLM: I don't mind having a lien
21 against it. Then we have to agree to either subordinate that
22 lien when they come and ask for it.

23 MR. STEPHENSON: Connie are you
24 suggesting maybe that we build into this contract terms of lien
25 release so that they know on the front end what their pathway

1 is to a lien release if they need more money later so we're
2 already bound to it?

3 MS. NYHOLM: I think it would be the same as
4 Senator Puckett said. I don't want to release the lien until
5 they have fulfilled their promise in the Tobacco footprint. The
6 only time I'd even consider that statement is if they need
7 additional funding to fulfill their promise back to the footprint.
8 We need to, I'd like to make it that they come back to us or
9 however we do that is fine but if we can't perform for whatever
10 reason outside of our control today and thereby putting our
11 first \$5 million at risk, there needs to be a method of release of
12 that. If we have no money, we can't fulfill their additional
13 asking. Maybe the Governor at that time actually despises the
14 CEO of this company or whatever. I think I've stated my
15 position and I don't know if it's clear.

16 DELEGATE BYRON: Let's go ahead and take a
17 five minute break for lunch and then we'll continue with some
18 public comment.

19
20 NOTE: The Commission recesses at 12:15
21 p.m.; thereupon the Committee is back in session at 12:30 viz:

22
23 DELEGATE BYRON: I'll call the Committee
24 meeting back to order. We have some people that have signed
25 up to speak and I'll call on Dr. Roderick Hall. Would you

1 please tell us who you are?

2 DR. RODERICK A. HALL: Delegate Byron,
3 thank you. I'm Dr. Roderick Hall, Office of Vice President for
4 Research at Virginia Tech. I have my colleague here with me,
5 Stephen Capaldo who is Associate General Counsel for
6 Virginia Tech and also special Assistant Attorney General.

7 MR. NOYES: I don't think the mic is working
8 so if you could speak up a little bit louder.

9 DR. HALL: First I'd like to thank the
10 Commission for the partnership that we've enjoyed over the
11 years. I think we have served our constituents that overlap in
12 our work and we've done that very well. We look forward to
13 the continuing that effort. I also want to applaud the
14 Commission based on my experience over the last 30 years
15 working with agreements that were ill defined and putting
16 forth an effort to make sure that we have good definition of the
17 agreement so we can move forward so that the parties all know
18 what is expected of them in the future.

19 The reason that we come to you today is that
20 there are two legal reasons that Virginia Tech cannot sign the
21 agreement that's been proffered by the Commission staff. We
22 also want to talk about some of the practical consideration
23 about the intellectual property. Our main concerns are the
24 legal concerns that we have and are actually prohibited from
25 signing the agreement.

1 First, Virginia does not allow a state agency
2 and you need to keep in mind that we at Virginia Tech are a
3 state agency much different than the Tobacco Commission or
4 the Institute for Advanced Research in Danville. We are a
5 state agency and only given the authority that's vested in the
6 U.S. constitution of Virginia. In paragraph two of the
7 agreement there's essentially an indemnification clause where
8 it talks about the party's relationship. It's paragraph 2.2
9 where it talks about the party's relationship. That's an
10 indemnification clause that Virginia Tech is not legally able to
11 sign. Always the number one thing we look at in any of our
12 agreements that come in, we look to see if there's an
13 indemnification clause and regularly work with major
14 corporations around the country to tell them that we are
15 legally able to sign that.

16 MR. NOYES: Excuse me, would you tell me
17 where it is or read it to me again?

18 DR. HALL: That's where Steve might be able to
19 help me but it's in Section 2 paragraph 2 where it says party's
20 relationship and it talks about the parts that we have trouble
21 with. It starts with the phrase that says, "to any other liability
22 which may exist under this agreement".

23 MR. STEPHENSON: This same clause appears
24 in all of the Commission's grant agreements and on occasions
25 when UVA or Tech or like institutions are asked to sign it, we

1 have routinely extracted this clause for those particular
2 institutions. That's a unique situation but we understand that
3 and can remove that.

4 MR. NOYES: I still don't follow you.

5 MR. STEPHENSON: The problem clause is on
6 page three about six lines down, "each party accepting such
7 work thereby indemnifies and holds the Commission, its
8 members, employees and agents and the grantee, harmless
9 against any and all such obligations." I know a university
10 can't hold us harmless, things happen and are prohibited from
11 doing that.

12 MR. NOYES: We've done many grants with
13 UVA and Tech and this has not been an impediment.

14 DR. HALL: The flexibility that you all
15 expressed here is the main thing we want to make sure that
16 we maintain that with the Commission staff to continue to
17 exercise that discretion where we can't comply.

18 MR. NOYES: It is the consensus of the
19 Committee that the staff can do this?

20 DELEGATE BYRON: We've been doing that.

21 MR. NOYES: Thank you.

22 DR. HALL: The second legal thing we cannot
23 do as a state agency is grant a security interest in any form of
24 intellectual or scientific or real property.

25 DELEGATE BYRON: Would you state that

1 again?

2 DR. HALL: As a state agency, we cannot grant
3 a security interest in our property of any kind whether it be
4 real or intellectual property. The thing that our general
5 counsel has been telling me is that we cannot go to the bank
6 and borrow to buy a vehicle. We cannot give a lien to a bank
7 as a state agency so we cannot give you a security interest in
8 any of the property that we get from this for the intellectual
9 property that we get from that. That's also a state law. It
10 hasn't been an issue before because the intellectual property
11 issue is a security interest in real property hasn't come up
12 that much. That is an impediment that may not be waived
13 with the indemnification clause.

14 MR. NOYES: In the past the language that has
15 been in our grant agreements that you hold assets in trust for
16 the Commission, have you been able to do that?

17 MR. STEPHENSON: That's ownership and not
18 a lien.

19 MR. CAPALDO: Good afternoon, I'm Steve
20 Capaldo, Associate General Counsel for Virginia Tech. In past
21 agreements we have, as you stated held property, intellectual
22 property in trust for the Tobacco Commission with Virginia
23 Tech having ownership of that IP to my recollection of that.
24 Virginia Tech does market and commercialize intellectual
25 property. We have an actual branch at the university that

1 engages in that full time.

2 MR. NOYES: You do that with something
3 you're holding in trust for the Tobacco Commission?

4 MR. CAPALDO: We have intellectual property,
5 that's been an obligation generated from Tobacco Commission
6 projects, those funded projects but we did not grant a security
7 interest in that IP.

8 MR. NOYES: How does the Commission
9 benefit from your commercialization of the IP that you hold in
10 trust?

11 MR. CAPALDO: It would be as referred to
12 earlier, the IP is being used in the Tobacco Commission
13 footprint in Southwest Virginia and the projects being
14 conducted are limited to Southwest Virginia. I believe Danville
15 is one of the prominent projects occurring in what is
16 anticipated with the current project at the institute with the
17 Commission.

18 SENATOR RUFF: Can you give us an example
19 of one of those?

20 MR. CAPALDO: It's a prospective situation.
21 This was something I was going to get to in a second. This is a
22 situation where the Commission would be a minority player in
23 an extreme case and this is why we feel like it's important to
24 maintain visibility that you have. We submitted a \$100
25 million plus grant to the Department of Energy to build a pilot

1 carbon sequestration project in the Southwest part of the
2 state. This agreement would have been contradictory to any
3 agreement we've signed with the Department of Energy. The
4 Department of Energy requires a 20 percent match and we
5 had gotten together various groups that put together the total
6 \$20 million that we required. To bring an agreement like this
7 to the table where the DOD grant intellectual property interest
8 as a federal agency, we would be hard pressed to make an
9 agreement like this to fit in with the agreement with the
10 Department of Energy. It's my understanding that it would be
11 large things that you would want to leverage that you saw was
12 your primary interest. That may have changed over the last
13 six months to a year. The agreement proffered would not
14 enable us to use the Tobacco Commission money for the DOD
15 grant.

16 MR. NOYES: Before you go on, what's your
17 cure for the second thing?

18 MR. CAPALDO: Traditionally Virginia Tech nor
19 other state agencies like VDOT cannot grant a security interest
20 in property. I think Dr. Hall indicated as far as intellectual
21 property or other property. We in the past have, at Virginia
22 Tech, have taken title to IP and allowed us to commercialize it
23 but we were given a non-exclusive license back to the sponsor
24 and that's how in many cases we've handled it. Where the
25 Tobacco Commission would also receive a license to use the

1 IP, not an exclusive license. I think Dr. Hall would be
2 agreeable to that.

3 MR. NOYES: What if we wanted an exclusive
4 right for the period of three years after the last disbursement
5 or something you couldn't go to commercialization say in West
6 Virginia?

7 MR. CAPALDO: That's a policy matter and I
8 would refer that to Dr. Hall but traditionally, Virginia Tech
9 would, exclusive licenses are without, there's a few times that
10 we would engage in exclusive license or IP they have, if the
11 market is there to sell the IP and there was a survey and
12 buyers and if there was an exclusive market.

13 MR. NOYES: What I need you to do is
14 determine how you all would compensate the Tobacco
15 Commission which is the investor that has produced the
16 thing. I think this is manageable if we can resolve the legal
17 problems, past the legal impediment and I haven't heard
18 solutions that I think would be acceptable for this Committee.

19 DR. HALL: I think we can definitely work
20 through that and once again that calls for flexibility for the
21 staff to be able to work with us and go through various
22 situations that we go through. We go through a very different
23 magnitude and we want to be a partner to the Commission.
24 The Commission needs to recognize the flexibility being a
25 university.

1 I am not an intellectual property expert. We
2 need to work with other people in our intellectual property
3 area to make sure everything is the way it should be.

4 MR. NOYES: It's clear to the university that
5 the interest of the Commission is that commercialization
6 occurs within the footprint for the benefit of our citizens.

7 DR. HALL: Absolutely, we believe that to be
8 what we want to happen. We don't disagree with you.

9 MR. NOYES: Your IP people want to make
10 money for the university, the licensing activity and your IP
11 people are not about commercialization for the benefit of the
12 Tobacco Commission citizens. I've dealt with your IP people
13 before and you can trust me. What we need to do is to give
14 some language to staff that satisfies the intent of the
15 Commission that commercialization occur for a period of time
16 within the Tobacco Commission footprint and not elsewhere
17 for the financial benefit of the university outside.

18 DR. HALL: As long as we can get around
19 through alternative mechanisms other than providing that
20 security agreement we have no problem.

21 MR. NOYES: Members of the Committee if
22 we're headed into what you expect, we will bring the new
23 language to the chair and vice chair is what Ned and I have
24 been doing and have a determination made whether or not it
25 satisfies the intent of the R & D program.

1 DR. HALL: It's certainly not our intention to
2 do anything other than to comply with desires of the
3 Commission and make sure that anything developed would be
4 done within the Tobacco Commission footprint.

5 MR. NOYES: I've worked with you on a
6 number of times. I absolutely believe that. Also, the IP people
7 have a completely different mission.

8 DR. HALL: We have a lot of experience
9 together. I guess the last thing I want to talk about, we don't
10 have as much concern about this from our own standpoint but
11 I just want to put in perspective your idea of the triple
12 damages. Not so much speaking to the triple damages as to
13 the denominator which you are going to apply the damages.
14 The experience I have with triple damages applied are in
15 criminal cases involving the Securities and Exchange
16 Commission where a person is engaged in inside trading. In
17 the case where triple damages are applied in that case it's
18 triple damages on the gains that a person makes. If you make
19 a half million dollars your triple damages would be a million
20 and a half. What you're asking is to take triple damages not
21 on the gains someone would make but on the original grant
22 amount. So you're asking someone actually for 30 times
23 damages. If they were to make \$500,000 on intellectual
24 property, you're asking for \$15 million. I'd ask you to compare
25 that to what applies to the insider trader which they would go

1 from \$5 million. You're saying a person would be penalized
2 the grant times three. I would ask you to consider the size of
3 that in the context with the denominator that you use.

4 SENATOR RUFF: Madam Chairman, could
5 they not pay off the amount and be out of the commitment
6 completely?

7 DELEGATE MARSHALL: We talked about
8 that.

9 SENATOR RUFF: If you use three times and
10 that would only kick in if the contract is still in force. If any
11 entity decided they were going to sell it outside the footprint,
12 could pay off the \$500,000, pay off whatever the grant amount
13 was and be gone and go wherever they wanted to with it.

14 DR. HALL: That's not how we do contracts.

15 DELEGATE BRYON: You mean the benefit of
16 paying it off?

17 DR. HALL: That's not really our concern. I
18 would like you to take that into consideration. It is extensive
19 damages compared to the amount of profit that you're talking
20 about. We do look forward to working with the staff and I
21 encourage you here to consider flexibility. It sounds like the
22 staff would continue to have working with a unique
23 opportunity to work with a large state agency, continue to let
24 your executive director make decision and continue our
25 relationship. Thank you.

1 DELEGATE BYRON: They were the only folks
2 that signed up to speak, anyone else from the public that
3 would like to make a comment?

4 CHARLES BOWMAN: I'm Charles Bowman,
5 President of ADNA Corporation and we have a proposal
6 submitted by the September 10th deadline. Our technology, I'll
7 give you a brief statement, the nuclear technology
8 development in Southside Virginia and employees in Southside
9 Virginia.

10 DELEGATE MARSHALL: Would you repeat
11 your name and your company?

12 MR. BOWMAN: Charles Bowman, B O W M A
13 N and its ADNA, A D N A Corporation. We think we're going to
14 work out a way to deal with the Commission. I just want to
15 emphasize that we have a proposal before you and it has to be
16 matched with funds from somewhere else so we're working on
17 finding those funds. The question then is, it's not going to be
18 a clear issue probably because of that requirement as to who
19 owns the IP but there's likely to be dual ownership. Of course,
20 that can be problematic for both owners. It's like two people
21 owning a house so that's one point.

22 Another point is that our technology could be
23 protected thoroughly by IP or we might choose not to do that.
24 Let me tell you about an experience we had at the last patent
25 we filed that was filed last October. We got a call on December

1 31 and the patent attorney said your application for your
2 patent is going to be published December 31st. I said what, we
3 don't want our application out there for the whole world to see
4 before we're even granted a patent. He said that's the way the
5 patent office works now. So what that meant was that that
6 application is now out there for everyone to see and has to be
7 written in such a way that people can duplicate and use the
8 technology and we don't even have a patent yet and people are
9 chiming in here and who knows what and reading our stuff.
10 So we talked about it and maybe we don't want to do that at
11 all. Maybe we want to hold our technology so this kind of
12 raises the issue why focus particularly on intellectual property
13 and there's some penalty if the grantee doesn't perform in the
14 way that you said. My only suggestion about this is if an
15 agreement is prepared and signed and I would think that
16 reading the description of the program that might not be
17 obligated to spend the money that it would be getting from the
18 state and Southside Virginia, Franklin County where it comes
19 from and is obligated to employ the technology, manufacture
20 the things that we could use in Southside Virginia and
21 Southwest Virginia. As long as we do those things and we're
22 consistent with the intent of what the Commission is. If we
23 don't, then the matter would be settled in court. Why focus on
24 intellectual property because it's very problematic in our view
25 from the discussions I heard earlier. So that's all the

1 comments I have right now. Thank you.

2 MR. VOGELAAR: Hello, my name is Bruce
3 Vogelaar. I work at Virginia Tech but I don't represent Virginia
4 Tech. Actually I had more of a question in procedure here.
5 After listening to the discussion that went on today and then I
6 asked if I could have a copy of the actual document that's
7 being discussed and provided a copy. I looked on the internet
8 about a previous meeting or the minutes of the meeting and I
9 noticed that the minutes while they had every word that was
10 said contained none of the documentation or the actual
11 material that was being discussed and referred to. I come
12 here today and there's very interesting issues that have been
13 brought up. I think there is actually some very significant
14 points I'd like to make about this but having just read it and
15 heard about them today, I was wondering if there's an
16 opportunity to provide more written comments to the
17 Commission. I'd make a request that you post your minutes
18 on the webpage. There are things that are potentially public
19 and available and post them there so you can actually read
20 them before you come to the meeting. I think that would
21 facilitate getting valuable feedback from the community.
22 Thank you.

23 DELEGATE BYRON: The minutes of our
24 meeting are on the website and your comments whether
25 they're oral or written are always welcome. Thank you. All

1 right, is there anyone else that would like to speak from the
2 public, any comments or questions? All right, well basically if
3 there's any other comments you want to add to our
4 discussion, we're here today to get some direction. I think
5 we've done that for the staff. I think everyone agrees with
6 that. Does anything else need clarifying Ned or Neal. I think
7 we thoroughly vented this.

8 SENATOR RUFF: Madam Chairman, Sara was
9 making a point earlier and I didn't follow what she was saying
10 to begin with. You need to look at page 2 and then look at
11 page 4 and put them in context. You're saying they're not, if
12 there's no commercialization within the development period,
13 not being any reimbursement of it. I'm not sure that we need
14 that term within the developmental period, it may be a little bit
15 longer time.

16 DELEGATE BYRON: You may be right and I'd
17 like to make sure we can clarify that and maybe I'm wrong.
18 What we're looking at two years from the date of the
19 agreement plus three and that's a five year total you would
20 make that determination or disbursement made within a year
21 that would be three years after that disbursement, four years.
22 I'm not sure what that timeframe would be. It seems like it's
23 all right in front. But I would think it would be at least four or
24 five years down the road, is that the wrong number?

25 SENATOR RUFF: You're saying if it was a

1 year, maybe over a longer period of time.

2 DELEGATE BYRON: Yes, three years after.

3 SENATOR RUFF: I'm wondering if we don't
4 need to clarify that language a little more exactly what we're
5 trying to accomplish.

6 DELEGATE BYRON: I think what you're trying
7 to accomplish is that development period and how long the
8 estimate might be.

9 MR. NOYES: Three years is just a suggestion,
10 three years is what we're used to as a Commission with
11 provisions with the other grants, you start within a year and
12 finish within a certain period of time. I guess we approached
13 it a little bit backwards. We said the development period
14 would be three years after such and such a point. If we
15 wanted to come up, too often historically things have been left
16 open ended and then we wind up with controversy, somebody
17 says you didn't give me enough time, somebody else says you
18 had all the time that we're going to give you. This is an
19 attempt. You can change it and you can say not to exceed five
20 years from the date of the award and that's up to the
21 Committee to instruct the staff, this is just what we came up
22 with, what Ned and I came up with.

23 DELEGATE BYRON: Has that been a point
24 with the applicants?

25 MR. STEPHENSON: It really has not Madam

1 Chair. I'm not sure I'm clear on what Frank is saying. Frank,
2 are you saying that you think we need to provide more time or
3 the timeframe we're providing is not clear? Because I think
4 what we're trying to say is that there has to be a time certain
5 by which performances were delivered and the lien was
6 released so it wouldn't be open ended. How much time is
7 entirely judgmental, three years or five years or whatever you
8 want to do. So are you suggesting maybe there needs to be
9 more time?

10 SENATOR RUFF: I'm not sure I'm saying you
11 need more time, I'm saying I would like for it to be fairly tight
12 and so there wouldn't be any questions later on as to whether
13 somebody will gain on us in anyway.

14 DELEGATE BYRON: The applicant date or the
15 disbursement date, that's what we're going by right now?

16 MR. STEPHENSON: Right, the contract date,
17 the final disbursement date and the clock starts on the earlier
18 of those two dates. Actually its two years after contract. It's a
19 matter of determining when the clock starts. It's a three year
20 clock.

21 SENATOR RUFF: I don't know what the date
22 or timeframe should be but it's something we can discuss –

23 DELEGATE BYRON: - Three years disbursal of
24 money and the maximum is going to be two years or an earlier
25 date, two years, disbursal of the money, two years disbursal of

1 the money.

2 MR. STEPHENSON: If it please the Chair, the
3 staff will read this under the microscope with Senator Ruff and
4 make sure that it is abundantly clear to him and the
5 applicants and it may need a little help just to make sure.

6 DELEGATE BYRON: This is for guidance so
7 everyone is comfortable with it.

8 MR. NOYES: I have a request before me in the
9 office and I think I know what your instructions will be and
10 this is from a grantee, somebody that has an approved project
11 but there is not yet a contract and they have not brought their
12 promise forward and executed the agreement. They would like
13 an advance disbursement so they can proceed with equipment
14 purchases. We don't have a signed agreement at this point so
15 does the Committee Chair wish to instruct staff?

16 DELEGATE BYRON: You want my answer?

17 DELEGATE MARSHALL: I wish I could get
18 something without signing anything.

19 MR. NOYES: Thank you and members of the
20 Committee, when I was asked yesterday, I said it just happens
21 the Committee is meeting tomorrow and I'll get back to you.

22 MR. STEPHENSON: Delegate Byron I think I
23 must say that the staff got considerable direction on some big
24 policy issues here today. I think it's important to note that the
25 contract remains an evolutionary process and I hope the

1 Committee would understand and expect that there might be
2 small changes made along the way that will accommodate
3 unique situations for clarity and document improvement and
4 this is not set in stone forevermore.

5 DELEGATE BYRON: Our purpose may have
6 seemed like we were considering the contract but our main
7 focus is Schedule A and what those deliverables are and what
8 the promises are. That's where those items really come into
9 play and that's what's been brought before us. We don't want
10 to get too hung up on the contract.

11 DELEGATE MARSHALL: My point is that like
12 the offer is another version, my versions are getting mixed up
13 and we get different numbers and so forth so we need to get
14 one so we know what version we're talking about. In the
15 future, could I have that version with the dates on the version
16 so we know what we're looking at?

17 MR. NOYES: Noted. I've got even more
18 versions than you do.

19 DELEGATE MARSHALL: If you did it with a
20 PDF line so each one of these pages would have a line number
21 and you can go to page two, it makes it a whole lot easier if
22 everybody is on the same page.

23 DELEGATE BYRON: All right. Is there any
24 further discussion. We have our next meeting on the 27th of
25 October. That will be before, the afternoon before our full

1 Commission meeting.

2 MR. NOYES: At that meeting you will hear the
3 staff or the results of the VEDP vetting process from those that
4 you asked to have vetted at the end of July. We'll try to get
5 that information to you a few days before.

6 DELEGATE BYRON: That's important so that
7 we can review those.

8 MR. NOYES: Staff recommendations that we
9 received from the last round.

10 DELEGATE MARSHALL: Two of them are the
11 same ones, they've been repeated.

12 MR. NOYES: We've got one from Campbell
13 County, an application from Campbell and an application from
14 Pittsylvania County, the same thing.

15 SENATOR RUFF: Do we have a time for the
16 Wednesday meeting?

17 MR. STEPHENSON: It's 3:00 o'clock.

18 MR. NOYES: The Committee members should
19 have a copy of the 10 projects the staff is reviewing now. I
20 hope to have that reviewed and completed by Friday. There's
21 10 applications for 9 projects.

22 DELEGATE BYRON: If you'll note in your
23 packet, you have some exhibits here that you can review and
24 get a feel for what we're talking about.

25 MR. NOYES: We're requesting that the

1 beneficiaries from this round and we hope to have them, if we
2 don't you'll know. You may defer action on it.

3 DELEGATE MARSHALL: You'll give them
4 some motivation right now and if we don't have the promise,
5 I'd like for the promises to be us a week before that and if
6 they're not here then we hold them until the next round.

7 MR. NOYES: At the discretion of your
8 Committee. We're expecting to have to go back and review the
9 rules and go back and review what they wrote in their
10 application and decide if they met –

11 DELEGATE MARSHALL: It should be a pretty
12 easy process.

13 DELEGATE BYRON: If there's nothing further
14 on the agenda, we're adjourned.

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16 PROCEEDINGS CONCLUDED

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