MODEL AGREEMENT BETWEEN GOVERNMENTAL ENTITY [STATE OR LOCAL GOVERNMENT] AND FINANCIAL INSTITUTION TO ESTABLISH A FINANCING PROGRAM (7/12/2010)

This Agreement ("Agreement" or "Contract") is made by and between the Designated Financial Institution]("Financing Entity") with offices located at _____ and the [state energy office, other state agency, local government]("Governmental Entity") as of the _____ date of _____, 2010. The Financing Entity and the Governmental Entity are the "Parties" herein, and are referred to individually as a "Party."

WHEREAS, the Governmental Entity is utilizing funds provided under the American Recovery and Reinvestment Act of 2009 ("ARRA") through the Energy Efficiency and Conservation Block Grant ("EECBG") and/or the State Energy Program ("SEP") to fund loan loss reserves, revolving loans, interest rate buy-downs, credit support or other financing mechanisms intended to leverage additional funds for energy projects; and

WHEREAS, the Governmental Entity, pursuant to its statutory authority, is vested with the power to expend or invest its funds [and to cooperate with any governmental unit in matters relating to its function, power or responsibility of local government]; provided, however, that state and local governments utilizing EECBG funds are only permitted to actually expend funds for projects within their respective jurisdictions [Energy Independence and Security Act of 2007, Section 542 [**NOTE**: The ability for local governments to work with each other and state governments, including beyond their state borders, is generally defined in state joint action agency/joint powers agency statutes, read in conjunction with local finance laws – as a general rule, eastern state statutes tend to be more limiting than western state statutes;] [compare UT and NY, see.e.g., NY General Municipal Law, Section 119o)]; and

WHEREAS, the Financing Entity is a bank which intends to provide financing for energy efficiency and renewable energy projects and has experience in energy projects;

NOW, THEREFORE, for good and valuable consideration and in exchange for the covenants contained herein and intending to be legally bound thereby, the Financing Entity and the Governmental Entity do hereby stipulate and agree as follows:

1. **Creation of the Fund/Purpose of the Fund/Responsibilities of the Parties**.

A. Creation of the Fund/Loan Loss Reserve

(1) The Governmental Entity shall fund a Loan Loss Reserve Account ("LLR Account") by placing no less than $_____ at the Financing Entity within 30 days of execution of this Agreement. A portion of the funds to be deposited in the LLR Account must come from EECBG, SEP, a similar ARRA funding source, or other appropriate sources of funding support for energy efficiency financing.

(2) The Financing Entity agrees [to serve as Escrow Agent and] to accept the funding of the LLR Account in 1 (A)(1) for the purpose of [holding in escrow the] creating a LLR Account and [for the further purpose of making loans] to make loans for the Energy Projects set forth in 1 (B). Notwithstanding the foregoing, the Financing Entity shall create the LLR Account no later than September 30, 2010.

(3) The Parties will cooperate to establish final loan underwriting standards, financial controls and other legal and operational requirements to permit full utilization of the LLR Account in support of financing for energy efficiency and renewable energy improvements, including, but not limited to, retail installment contracts or other financial products, as necessary.

(4) The Governmental Entity shall have no loan loss reserve obligations under this Agreement beyond the amount placed in the LLR Account and committed to the Program, as defined in 1 (B). The Financing Entity shall not have recourse to the Governmental Entity beyond the amount placed in the LLR Account in the event losses exceed the amount deposited in the LLR Account under the Program.

B. Purpose of the LLR Account. The LLR Account is intended to provide credit support to a Governmental Entity, or a financial institution in association with a Governmental Entity, that is originating loans in its jurisdiction, for the financing of energy efficiency and renewable energy improvements, or other energy-related improvements ("Energy Projects"), consistent with any applicable requirements of ARRA. The financing activities set forth in this Article and the Energy Projects implemented pursuant thereto constitute the "Program."

C. Additional Responsibilities of the Governmental Entity

(1) [The Governmental Entity agrees to pay to the Financing Entity a fee of ___ on deposits placed with the _____ [or___% of the interest earned in the LLR Account] on the purchase and sale of investment securities in the LLR Account. Payment shall be made by a monthly withdrawal from the investment earnings in the LLR Account.

(2) [For instances in which the governmental entity deposits funds for loan-loss purposes with a financial institution in anticipation of establishing an EE financing program and plans to use the PA Treasury warehouse program:] The Governmental Entity shall enter into negotiations in good faith with the PA Treasury to attempt to agree upon a program through which the Governmental Entity can transfer, or facilitate transferring, to the PA Treasury appropriate energy efficiency loans or other similar financial instruments, as well as other funds to enhance the creditworthiness of the transferred energy efficiency loans or other similar instrument in amounts as determined by the Parties.

D. Responsibilities of the Financing Entity

(1) The Financing Entity shall provide investment management of the Fund. In connection therewith, the Financing Entity shall provide investment research and supervision of the LLR Account and conduct a continuous program of investment, evaluation and when

appropriate, sale and reinvestment of the LLR Account, in whole or in part. Investment of the LLR Account shall be limited to only liquid investments of the type [listed in Exhibit ___] [attached hereto]. The Financing Entity shall coordinate with the Governmental Entity to ensure adequate liquidity for anticipated disbursements by the Governmental Entity on a quarterly basis.

(2) The Financing Entity shall place all orders for the purchase, sale, loan or exchange of the [or "purchase and sale of investment securities"] LLR Account with brokers or dealers approved by the Financing Entity and the Governmental Entity. In connection with the selection of such brokers and dealers and the placing of such orders, the Financing Entity shall seek the most favorable execution and price.

(3) The Financing Entity shall, to the best of its ability, take all reasonable steps to ensure that transactions made in the investment in the LLR Account shall be at fair market value. [Where applicable, the Financing Entity shall obtain a minimum of three bids or offers for each transaction]

(4) The Financing Entity shall invest the LLR Account in investment securities only if the interest rate on such investment securities is at a market value determined in accordance with regulations promulgated pursuant to the Internal Revenue Code.

(5) The Financing Entity shall provide the Governmental Entity with monthly account statements and quarterly and annual reports, and such other documentation to support each individual task performed by the Financing Entity under this Agreement.

(6) The Financing Entity shall exercise its responsibilities to the best of its ability hereunder and with the same degree of judgment, care, skill and prudence and diligence that it exercises in connection with other investments it makes.

(7) On a monthly basis, the Financing Entity shall pay investment earnings to the LLR Account as of the close of business on the last business day of the month. The payment shall be made by automatic reinvestment in the LLR Account, unless the Governmental Entity has otherwise directed its application in writing with proper authorization.

(8) The Financing Entity agrees to preserve all financial or accounting records pertaining to this Agreement during the Term and such other period specified by the Internal Revenue Code. During such period, the Governmental Entity, upon reasonable notice, shall have the right to audit such books and records to the extent authorized and permitted by law with reasonable prior notice. The Financing Entity shall have the right to preserve all records in original form or electronic form, so long as an off-site, duplicate record is preserved.

(9) The Financing Entity shall enter into negotiations in good faith with the Governmental Entity to attempt to agree upon a program through which the Governmental Entity can transfer, or facilitate transferring, to the Financing Entity appropriate energy efficiency loans or other similar financial instruments, the creditworthiness of which will be enhanced by the pledging of funds from the LLR Account established by the Governmental Entity under this Agreement, in amounts as determined by the Parties.

2. **Other Financial Transactions**.

(A) Interest Rate Buy-Downs - In addition to creating the LLR Account, the Governmental Entity and the Financing Entity have agreed to establish the following additional financial accounts, in which the Governmental Entity may place the following amounts ("Additional Accounts"):

(1) Interest Rate Buy-Down Account: $_____ and

(2) _____.

(B) Management of Other Additional Accounts - The Financing Entity shall hold and manage these Additional Accounts subject to the same terms and conditions as those that govern the LLR Account. The government entity can move funds from and between the LLR Account and the Interest Rate Buy-Down account and other accounts as it may require.

(C) Other Programs and Financial Instruments - The Parties acknowledge and agree that they may develop other loan programs, financial instruments or other mechanisms to promote Energy Projects and the Program, including, but not limited to, interest rate buy-downs, revolving loans, support for PACE activities and utility on-bill financing. The Parties shall utilize best efforts to develop such alternative measures, and, in the event either Party determines that such other financial instruments should be utilized, it shall provide written notice to the other Party and the Parties agree to meet within 20 days of such notice. In the event that the Parties do not agree on expansion of other financial instruments, either Party may utilize third parties to create such a program after having provided 30 days prior written notice.

3. **Financial Transactions**.

(A) ACH Transmission – The Governmental Entity may deposit funds with the Financing Entity by the method of automated clearing house ("ACH") transmission. The Financing Entity must be given notification by 1:50 p.m. one business day prior to the actual movement of funds in order to receive the next business day's earnings. ACH deposit instructions will be provided following proper execution of this Agreement.

(B) Check – The Governmental Entity may deposit funds by check or other negotiable bank draft payable to the order of the [Financing Entity]. If the check is received by the Financing Entity by 1:50 p.m. on a business day, the deposit will receive the next business day's interest.

(C) Withdrawals – The Governmental Entity may make withdrawals for the purposes set forth in this Agreement from funds remaining in the LLR Account only on those days that the Financing Entity is open for business. All written or federal wire transfer requests for same day withdrawal must be received by 1:50 p.m. Requests for withdrawal received after 1:50 p.m., will be processed on the following business day.

4. **Cooperation**. The Parties hereto agree to cooperate fully together and in good faith and to assist each other to the extent reasonable and practicable in order to accomplish their mutual duties hereunder.

5. **Hold Harmless/Indemnification/Limitation on Liability**.

The Financing Entity shall not be liable for compliance with Federal income tax arbitrage restrictions or rebate liability applicable to the Governmental Entity, and the Financing Entity shall not be responsible for determination of any arbitrage restriction or computation or payment of any rebate liability.

Notwithstanding the foregoing, the Financing Entity shall not have recourse to the Governmental Entity beyond the amount placed in the LLR Account established in Article 1 herein, in the event losses exceed the amount deposited in the LLR Account under the Program.

6. **Confidential Information**. Any information designated by either Party as "Confidential Information", including any documents and systems developed or delivered by either Party pursuant to this Agreement and designated as such shall be maintained as Confidential Information, and shall not be disclosed to third parties, except to the extent required under Applicable Law (as defined below), except where noted. "Confidential Information" as used herein may include information developed during and discoveries and contributions made by the respective Party in the performance of this Agreement. Notwithstanding the foregoing, the Parties shall be subject to the intellectual property and confidentiality requirements of the DOE Grant, which shall control in the event of a conflict. Notwithstanding the foregoing, the Governmental Entity is subject to the freedom of information requirements of the [correct title]("FOIA Statute"), the applicable state right to know law ("Applicable Law"). To the extent release of Confidential Information is deemed required by the interpretation of such FOIA Statute by the Governmental Entity, the Governmental Entity shall provide notice as soon as practicable to the Financing Entity.

7. **Assignment and Delegation**. Neither Party shall assign this Agreement or rights hereunder, or delegate any duties or obligations hereunder without the express written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed.

8. **Entire Agreement.** This Agreement represents the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior negotiations, representations or independent agreements, whether written or oral. This Agreement may be amended only by a writing signed by both Parties.

9. **Term**. This Agreement shall have a term of three years, beginning at the date of execution of the Agreement by the Parties, as indicated by the date of the final signature affixed to this Agreement ("Effective Date"), unless extended by written agreement of the Parties [or shall be renewed annually, unless 30 days prior written notice is provided to the non-terminating Party]. Either Party may terminate this Agreement for any reason upon 30 days prior written notice, provided, however, that any funds loaned shall be returned only upon payments of such loans

without any demand or requirement for acceleration. Upon termination, and in the event that funds were loaned consistent with this Agreement, then the portion of the LLR Account or any Additional Funds not previously transferred shall be returned to the Governmental Entity, to the extent consistent with law, regulation and third-party agreements. This Agreement shall also terminate when the LLR Account or other Additional Funds have been depleted. The provisions of Articles 5 and 6, shall survive termination or expiration hereof.

10. **Warranties and Representations**.

A. Each Party represents and warrants that:

(1) it has the power, authority and legal right to enter into and perform this Agreement and such Party's execution and delivery of, and its performance under, this Agreement will not violate its organizational documents or any judgment, order, law, rule or regulation;

(2) no consent, permission or approval that has not already been given is required for the valid execution and delivery by such Party of this Agreement or for such Party's execution and delivery of this Agreement [**NOTE** – Obviously, we seek to avoid an *ultra vires* act];

(3) this Agreement has been duly authorized, executed and delivered by such Party and constitutes a legal, valid and binding obligation of such Party, enforceable in accordance with its terms, except to the extent limited by bankruptcy or similar laws or by general equitable principles concerning remedies [**FOR LOCAL GOVERNMENTS**: and the authorizing resolution adopting this Agreement and indicating authority to enter into this Agreement is attached as Exhibit__];

(4) there is no litigation or proceeding pending or, to the knowledge of such Party, threatened against or affecting it that (i) seeks to enjoin the performance of its obligations under this Agreement or (ii) if adversely determined, would materially adversely affect its ability to perform such obligations;

(5) it has received, read and fully reviewed all the program material describing the LLR Account and the Energy Projects undertaken thereto, and each Party acknowledges and agrees that it has had full opportunity for review of this Agreement by independent or in-house legal counsel and is entering into this Agreement voluntarily and knowingly upon advice and concurrence with their respective counsel; and

B. Notwithstanding the foregoing, the Financing Entity shall exercise its responsibilities to the best of its ability hereunder and with the same degree of judgment, care, skill, prudence and diligence that it exercises with other investments it makes.

11. **Waiver.** No waiver shall be deemed to have been made by either Party unless expressly stated as a waiver in writing and signed by the waiving Party. The failure of either Party to insist, in any one or more instances, upon a strict performance of any of the terms or provisions

of this Agreement, or to exercise any option or election herein contained, shall not be construed as a waiver or relinquishment for the future of such terms, provisions, options or election, but such terms, provisions, options or elections shall continue and remain in full force and effect, and no waiver by either Party of any one or more of its rights or remedies under this Agreement shall be deemed to be a waiver of any prior or subsequent right or remedy available at law or equity.

12. **Notice**. In the event of any notice required pursuant to this Agreement, such notice shall be in writing and sent by e-mail or first-class mail to said recipient as follows (in the event of e-mail notice, additional copies shall be sent by first-class mail):

To [Governmental Entity]_____ Name
Title
Address
e-mail address

To [Financing Entity]_____ Name
Title
Address
e-mail address

Notice shall be effective upon receipt of mailed or e-mailed notice.

13. **Third Party Beneficiaries Excluded**. Except as otherwise provided explicitly herein with regard to the DOE Grant, this Agreement is intended solely for the benefit of the Parties hereto. Nothing in this Agreement shall be construed to create any duty to, or standard of care with reference to, or any liability to, or any benefit for, any person not a Party to this Agreement.

14. **Applicable Law**. This Agreement shall be governed by, and construed in accordance with the laws of [state of Governmental Entity], and in the event of any dispute hereunder, venue shall be in the courts of the [state of Governmental Entity], and the Parties shall not object to such venue.

15. **Special Provisions/Federal Law and American Recovery and Reinvestment Act**. The Parties shall both execute a Certification on Restrictions on Lobbying contained in Exhibit __ hereto, as imposed by 31 U.S.C. Section 1352, and the Parties shall also complete the Instructions for Completion of SF-111 Disclosure of Lobbying Activities, contained in Exhibit __, hereto. The Parties acknowledge that a new U.S. Environmental Protection Agency rule applying to lead removal was effective on April 22, 2010 (73 Fed. Reg. 21691)(April 22, 2008), and such rule may apply to energy efficiency building retrofits conducted utilizing the LLR Account. The LLR Account is capitalized, at least in part, with federal funds provided under ARRA. The Department of Energy's specific guidance governing ARRA funds shall apply, to the extent funding is provided from the respective source of funds, including EECBG Program Notice 09-002A and SEP Program Notice 09-____ ("DOE Guidelines"), and the terms of the applicable grant agreement ("DOE Grant"), and as any of the foregoing may be amended. The

Parties further acknowledge and agree that the National Environmental Policy Act ("NEPA") may require action under this Agreement, and, in addition, the following clauses under ARRA shall apply to this Agreement and are attached as Exhibit __ hereto:

(A) ARRA Section 1605 ("Buy-American)/Federal Acquisition Regulations ("FAR") Clauses 52.225-21, 52.225-22, 52.225-23 and 52.225-24;

(B) ARRA Section 1606 ("Davis-Bacon Act"), including DOE's contract language, as approved by the U.S. Department of Labor;

(C) ARRA Section 1512 (Reporting Requirements), including FAR Clause 52-204-11;

(D) ARRA Section 1552 (Whisteblower Protections), including FAR Clause 52.203-15; and

(E) ARRA Sections 902, 1514 and 1515 (General Accountability Office and Inspector General Audits and Access to Records), including FAR Clauses 52.212-5, 52.214-26 and 52.215-2.

16. **Special Provisions – State Law/Conflict of Laws.** The laws of the following state laws shall apply, as set forth in Exhibit __:

(A) Race and Gender Neutrality Policy Guidance and Implementation;

(B) Non-Collusion Certification;

(C) Responsibilities for Disadvantaged Business Enterprise Program Implementation;

17. **Counterparts**. This Agreement may be executed in any number of counterparts, which together shall constitute but one and the same instrument and each counterpart shall have the same force and effect as if they were one original.

18. **Conflicting Provisions**. To the extent any provision of this Agreement conflicts with the DOE Grant or any existing or future laws, statutes, codes, treaties, ordinances, judgments, decrees, injunctions, writs and orders, rules, regulations, interpretations, issuances, enactments, decisions, authorizations and directives of any governmental authority having jurisdiction over the matter in question with respect to the subject of this Agreement ("Applicable Law"), the Parties shall comply first with the requirements of Applicable Law, after which the DOE Grant shall govern.

19. **Severability**. If any term or provision of this Agreement or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the applications of such term or provision to persons or circumstances other than those to which it is held invalid or unenforceable shall not be affected thereby, and each term and

provision of this Agreement shall be valid and enforced to the fullest extent permitted by law. In such event, the Parties shall negotiate in good faith to amend this Agreement to restore the original intent of the Agreement to the extent practicable.

IN WITNESS WHEREOF, the Parties hereby execute this Agreement by their duly authorized representatives as of the date set forth in the preamble to this Agreement.

[Governmental Entity]	[Financing Entity]
By:_____	By:_____
_____	_____
Title:_____	Title:_____
Date:_____	Date:_____