

PART 1717 -- POST-LOAN POLICIES AND PROCEDURES COMMON TO  
INSURED AND GUARANTEED ELECTRIC LOANS

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Authority: 7 U.S.C. 901 - 950b; Pub. L. 103 - 354, 108 Stat. 3178 (7 U.S.C. 6941 et seq.), unless otherwise noted.

Source: 55 FR 38646, Sept. 19, 1990, unless otherwise noted.

Subparts A -- F [Reserved]

Subpart G -- Federal Pre-emption in Rate Making in Connection With Power Supply Borrowers

\_1717.300 Purpose.

This subpart contains regulations of the Rural Utilities Service (RUS) implementing provisions of Section 4 of the RE Act (7 U.S.C. 904) which authorize the Administrator to establish terms and conditions of loans and implementing provisions of the RUS wholesale power contracts and other RUS documents which

provide for the establishment of rates to be charged by power supply borrowers for the sale of electric power and energy. This subpart contains the general regulations of RUS for the pre-emption, under certain circumstances, which are not exclusive, of the regulation of a power supply borrower's rates by a state regulatory authority under state law and for the exercise of exclusive jurisdiction over rates by RUS pursuant to the RUS documents.

\_1717.301 Policy.

(a) RUS makes and guarantees loans to borrowers to bring electric service to persons in rural areas. RUS requires, as a condition to making or guaranteeing any loans to power supply borrowers, that the borrower enter into RUS wholesale power contracts with its several members and assign and pledge such contracts as security for the repayment of loans made or guaranteed by RUS and for other loans which, pursuant to the RE Act, RUS has permitted to be secured pursuant to the RUS mortgage. The RUS wholesale power contract requires, among other matters, that the rates charged for power and energy sold thereunder produce revenues sufficient to enable the power supply borrower to make payments on account of all indebtedness of the power supply borrower. The Administrator relies upon the RUS wholesale power contracts together with other RUS documents to find and certify, as required in section 4 of the RE Act (7 U.S.C. 904), that the security for the loan is reasonably adequate and the loan will be repaid within the time agreed.

(b) RUS requires power supply borrowers to take such actions as may be necessary to charge rates for the sale of electric power and energy which are sufficient to pay the principal and interest on loans made or guaranteed by RUS in a timely manner and to meet the requirements of the RUS wholesale power contract and other RUS documents.

(c) With respect to power supply borrowers which are not subject to rate regulation by a state regulatory authority, RUS requires that such borrowers establish rates and obtain RUS approval of such rates as required by the terms of the RUS wholesale power contract and other RUS documents.

(d) With respect to power supply borrowers which are subject to regulation by a state regulatory authority, RUS does not make or guarantee a loan for the construction, operation or enlargement of any generating plant or transmission facility unless the consent of the state regulatory authority having jurisdiction in the premises is first obtained.

(e) Pursuant to applicable provisions of state law state regulatory authorities regulate many aspects of a power supply borrowers business activities, including such matters as the setting of wholesale electric rates, the borrowing of money, and the mortgaging of property. A state regulatory authority's jurisdiction over the rates charged by a power supply borrower shall be pre-empted where the Administrator has

determined that such jurisdiction has compromised Federal interests, including without limitation, the ability of the borrower to repay its secured loans in accordance with the terms of the RUS documents. Thereupon, RUS shall, pursuant to the RUS documents, exercise exclusive jurisdiction over the rates charged by a power supply borrower.

[55 FR 38646, Sept. 19, 1990; 55 FR 53100, Dec. 26, 1990]

\_1717.302 Definitions and rules of construction.

(a) Definitions. For the purpose of this subpart, the following terms shall have the following meanings:

Administrator means the Administrator of RUS.

Borrower means any organization which has an outstanding loan made or guaranteed by RUS for rural electrification. Unless otherwise stated in the text, ``borrower" shall mean power supply borrower.

Loan contract means the agreement, as amended, supplemented, or restated from time to time, between a borrower and RUS providing for loans made or guaranteed pursuant to the RE Act.

Power supply borrower means any borrower engaged in the wholesale sale of electric power and energy to distribution members either directly or through other power supply borrowers pursuant to RUS wholesale power contracts.

RE Act means Rural Electrification Act of 1936, as amended (7 U.S.C. 901 et seq.).

REA means the Rural Electrification Administration formerly an agency of the United States Department of Agriculture and predecessor agency to RUS with respect to administering certain electric and telephone loan programs.

RUS means the Rural Utilities Service, an agency of the United States Department of Agriculture established pursuant to Section 232 of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Pub. L. 103 - 354, 108 Stat. 3178), successor to REA with respect to administering certain electric and telephone programs. See 7 CFR 1700.1.

RUS documents means the loan contract, mortgage and RUS wholesale power contract of a power supply borrower.

RUS mortgage means the mortgage and security agreement, as from time to time supplemented, amended and restated, made by and among the borrower, RUS, and, if a party thereto, third party lenders, or any other form of mortgage or security

instrument or indenture of mortgage and deed of trust, securing the payment of outstanding loans made or guaranteed by RUS and other lenders.

RUS wholesale power contract means the contract for the wholesale sale of electric power and energy between a power supply borrower and its member as approved by RUS.

Secured loans shall mean outstanding loans secured pursuant to the RUS mortgage.

State regulatory authority means any state board or local governing body having jurisdiction under state law to regulate, or in any way, approve the electric rates charged by a power supply borrower or electric distribution member of a power supply borrower.

(b) Rules of Construction. Unless the context shall otherwise indicate, the terms defined in \_1717.302(a) hereof include the plural as well as the singular, and the singular as well as the plural. The words ``herein," and ``hereunder", and words of similar import, refer to this subpart as a whole. ``Includes" and ``including" are not limiting and ``or" is not exclusive.

[55 FR 38646, Sept. 19, 1990, as amended at 59 FR 66440, Dec. 27, 1994]

### \_1717.303 Requirements of RUS documents.

(a) Pursuant to the terms of the RUS documents each power supply borrower shall establish and adjust rates for the sale of electric power and energy in such a manner as to assure that the borrower will be able to make required payments on secured loans.

(b) Pursuant to the terms of the RUS wholesale power contract, the Board of Directors or Board of Trustees of the power supply borrower shall review rates not less frequently than once each calendar year and revise its rates as therein set forth.\1\ (FOOTNOTE) The RUS wholesale power contract further provides that the borrower shall notify the Administrator not less than 30 nor more than 45 days prior to the effective date of any adjustment and shall set forth the basis upon which the rate is to be adjusted and established. The RUS wholesale power contract provides that no final revision in rates shall be effective unless approved in writing by the Administrator.

(FOOTNOTE) \1\The Wholesale Power Contract, with minor modifications which are approved by RUS on a case by case basis, provides that the rate charged for electric power and energy, shall produce revenues which shall be sufficient, but only sufficient, with the revenues of the Seller from all other sources, to meet the cost of the operation and maintenance (including without limitation, replacements, insurance, taxes and administrative and general overhead expenses) of the generating plant

transmission system and related facilities of the Seller, the cost of any power and energy purchased for resale hereunder by the Seller, the cost of transmission service, make payments on account of principal and interest on all indebtedness of the Seller, and to provide for the establishment and maintenance of reasonable reserves. (Section 4. Rates (b), RUS Form 444, ``Wholesale Power Contract -- Federated Cooperative"; Rev. 6 - 60.)

(c) Pursuant to the terms of the RUS mortgage, each power supply borrower must design its rates as therein set forth and must give 90 days prior notice to RUS of any proposed change in its general rate structure.

(Approved by the Office of Management and Budget under control number 0572 - 0089)

\_1717.304 State regulatory authority rate jurisdiction.

(a) In the event that rate revisions required by the terms of the RUS wholesale power contract or other RUS documents may be subject to the approval of a state regulatory authority, the power supply borrower shall seek such required approval in a timely manner.

(b) RUS recognizes the need of state regulatory authorities for documents, information and records for use in connection with an application for rate approval and will consider any reasonable request by a borrower or a state regulatory authority for such documents, information and records. The failure of RUS to provide requested documents, information or records shall not limit any rights of RUS including the right with respect to pre-emption of the state regulatory authority as provided in this subpart.

(c) In the event that the state regulatory authority shall fail to act favorably upon the borrower's application for rate increases required by terms of the RUS wholesale power contract or other RUS documents, the borrower shall pursue such legal and administrative appeals as may be available to it, unless RUS shall approve otherwise in writing.

\_1717.305 Pre-emption.

(a) Inadequate rates. State regulatory authority jurisdiction over a power supply borrower's rates shall be pre-empted by the RE Act if the Administrator shall have determined that the borrower's rates approved by the state regulatory authority are, after taking into account the borrower's costs and expenses, inadequate to produce revenues sufficient to permit the borrower to make required payments on its secured loans and the borrower has failed to make required payments on its secured loans.

(b) Public notice. The Administrator shall:

(1) Notify the borrower and the state regulatory authority in writing of the determination, indicating the jurisdiction of the state regulatory authority over the rates of the borrower has been pre-empted pursuant to this part and the borrower shall henceforth establish its rates in accordance with the term of the RUS documents.

(2) publish a notice in the Federal Register informing the public of the action.

[55 FR 38646, Sept. 19, 1990; 55 FR 53100, Dec. 26, 1990]

\_1717.306 RUS required rates.

(a) Upon the publication in the Federal Register of the notice of pre-emption of state regulatory authority as provided in this subpart, RUS will exercise exclusive jurisdiction over the rates of the borrower pursuant to the terms of the RUS documents. The borrower shall immediately establish rates with the approval of RUS that are sufficient to satisfy the requirements of the RUS wholesale power contract and other RUS documents described in \_1717.303 of this subpart. The borrower shall establish such rates notwithstanding provisions of state law, and rules, orders or other actions of state regulatory authorities, and notwithstanding any provision of the RUS documents referring to such laws, rules, orders or actions.

(b) So long as the state regulatory authority shall be pre-empted hereunder, RUS shall be considered the governmental regulatory body with jurisdiction over rates for the purposes of the RUS documents and for the purposes of section 1129(a)(6) of the Bankruptcy Code of 1978, as amended (11 U.S.C. 1129(a)(6)).

(c) If a borrower, which is subject to exclusive RUS rate jurisdiction, shall fail to establish rates in accordance with terms of the RUS wholesale power contract and other RUS documents in a timely fashion, RUS may proceed to exercise any and all rights and remedies available pursuant under the RUS documents or otherwise.

(d) The jurisdiction of the state regulatory authority over the rates of the borrower shall continue to be pre-empted hereunder until the Administrator shall in writing approve the resumption of jurisdiction by the state regulatory authority and publish in the Federal Register a notice to such effect. The Administrator shall approve resumption only after determining that such jurisdiction shall be exercised in a manner consistent with Federal interests.

[55 FR 38646, Sept. 19, 1990; 55 FR 53100, Dec. 26, 1990]

\_1717.307 Distribution members' rates.

A state regulatory authority which has been pre-empted as provided in this subpart may continue to exercise jurisdiction, pursuant to applicable provisions of state



law, over all other business affairs of the power supply borrower and over the rates of its distribution members: Provided, however, that the state regulatory authority shall treat any RUS approved rate for the power supply borrower as fair and reasonable and shall not in any manner, directly or indirectly, prevent or impede the distribution member from recovering the costs of paying the RUS approved rates to the power supply borrower.

\_1717.308 RUS approval of nonconforming rates.

Borrowers may request and RUS may approve rates which do not conform with the requirements of the RUS wholesale power contract and other RUS documents if RUS determines, in its sole discretion, that such approval is in the interests of RUS. If RUS approval is granted prior to pre-emption hereunder, and if the state regulatory authority shall have approved such rates, then, so long as RUS's approval of the nonconforming rates remains in effect, the jurisdiction of the state regulatory authority over the rates of the borrower shall not be pre-empted hereunder.

\_1717.309 Additional statutory pre-emption.

This subpart addresses pre-emption of state law and state regulatory authority in only those specific circumstances herein described. Nothing in this subpart waives, limits, or otherwise affects the explicit pre-emption or pre-emption, which is implicit and shall occur pursuant to the RE Act as a matter of law, of state law or action of a state regulatory authority where such state law or such action compromises Federal interests, including the ability of any borrower, including power supply borrowers, to repay loans made or guaranteed by RUS.

\_1717.310 -- 1717.349 [Reserved] \_

Subpart H -- Federal Pre-emption in Rate Making in Connection With RUS Electric Borrowers in Bankruptcy

Source: 55 FR 38653, Sept. 19, 1990, unless otherwise noted.

\_1717.350 Purpose.

This subpart contains regulations of the Rural Utilities Service (RUS) implementing provisions of section 4 of the RE Act (7 U.S.C. 904) which authorizes the Administrator to establish terms and conditions of loans, and provisions of the RUS documents which provide for the establishment of rates for electric service to be charged by RUS electric borrowers. This subpart contains the general regulations of RUS for the pre-emption of the regulation by a State Regulatory Authority under State law of an RUS borrower's rates and for the exercise by RUS, pursuant to the RUS documents, of exclusive jurisdiction over rates of a borrower by or against whom a case under the Bankruptcy Code of 1978, as amended, has commenced.

\_1717.351 Policy.

(a) RUS makes and guarantees loans to borrowers to bring electric service to persons in rural areas. To accomplish this objective, RUS normally requires, as a condition to making or guaranteeing any loans to an electric borrower, that the borrower execute and deliver the RUS documents in the form prescribed by RUS. The RUS mortgage secures repayment of the loans made or guaranteed by RUS and other loans which, pursuant to the RE Act, RUS has permitted to be secured pursuant to the RUS mortgage. The Administrator relies upon the RUS mortgage together with other RUS documents to find and certify, as required by section 4 of the RE Act (7 U.S.C. 904), that the security for the loan is reasonably adequate and the loan will be repaid within the time agreed.

(b) RUS requires borrowers to take such actions as may be necessary to establish rates for electric service which are sufficient to pay the principal of and interest on the loans made or guaranteed by RUS in a timely manner and to meet the requirements of the RUS documents.

(c) With respect to borrowers whose rates are not regulated by a State Regulatory Authority, RUS requires that such borrowers establish rates and to obtain RUS approval of such rates as required by the RUS documents.

(d) To protect Federal interests, including without limitation the ability of the borrower to repay RUS loans, RUS's policy is to exercise, pursuant to the RUS documents, exclusive jurisdiction over the rates for electric service charged by a borrower by or against whom a case under the Bankruptcy Code of 1978, as amended, has commenced.

\_1717.352 Definitions and rules of construction.

(a) Definitions. For the purpose of this subpart, the following terms shall have the following meanings:

Administrator means the Administrator of RUS.

Bankruptcy code of 1978, as amended, means the Bankruptcy Reform Act of 1978, as amended (11 U.S.C. 101 et seq.).

Borrower means any organization which has an outstanding loan made or guaranteed by RUS for rural electrification.

RE Act means Rural Electrification Act of 1936, as amended (7 U.S.C. 901 et seq.).

REA means the Rural Electrification Administration formerly an agency of the United States Department of Agriculture and predecessor agency to RUS with respect to administering certain electric and telephone loan programs.

RUS means the Rural Utilities Service, an agency of the United States Department of Agriculture established pursuant to Section 232 of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Pub. L. 103 - 354, 108 Stat. 3178), successor to REA with respect to administering certain electric and telephone programs. See 7 CFR 1700.1.

RUS documents means the RUS loan contract, RUS mortgage and, if the Borrower is engaged in the wholesale sale of electric power and energy to members pursuant to RUS Wholesale Power Contracts, the RUS Wholesale Power Contract.

RUS loan contract means the agreement, as amended, supplemented, or restated from time to time, between a borrower and RUS providing for loans made or guaranteed pursuant to the RE Act.

RUS mortgage means the mortgage and security agreement, as from time to time supplemented, amended and restated, made by and among the borrower, RUS, and, if a party thereto, third party lenders, or any other form of mortgage or security instrument or indenture of mortgage and deed of trust, securing the payment of outstanding loans made or guaranteed by RUS and other lenders.

RUS wholesale power contract means the contract for the wholesale sale of electric power and energy between a power supply borrower and its member as approved by RUS.

Secured loans shall mean outstanding loans secured pursuant to the RUS mortgage.

State regulatory authority means any state board or local governing body having jurisdiction under state law to regulate, or in any way, approve the electric rates charged by a borrower.

(b) Rules of construction.

Unless the context shall otherwise indicate, the terms defined in § 1717.352(a) hereof include the plural as well as the singular, and the singular as well as the plural. The words "herein," and "hereunder", and words of similar import, refer to this subpart as a whole. "Includes" and "including" are not limiting and "or" is not exclusive.

[55 FR 38653, Sept. 19, 1990, as amended at 59 FR 66440, Dec. 27, 1994]

\_1717.353 Requirements of RUS documents.

Each borrower shall establish and adjust rates for electric service as set forth in the RUS documents to assure that the borrower will be able to make required payments on secured loans and to otherwise meet the terms of the RUS documents.

\_1717.354 Pre-emption.

State Regulatory Authority jurisdiction over an RUS borrower's rates shall be pre-empted by the RE Act and RUS shall have exclusive jurisdiction over the borrower's rates:

(a) On October 19, 1990, with respect to any borrower by or against whom a case under the Bankruptcy Code of 1978, as amended, was commenced prior to and remains outstanding on October 19, 1990; and

(b) With respect to all other borrowers, upon the filing of a petition by or against the borrower commencing a case under the Bankruptcy Code of 1978, as amended.

\_1717.355 RUS required rates.

(a) Upon the pre-emption of State Regulatory Authority as provided in this subpart, RUS will exercise exclusive jurisdiction over the rates of the borrower pursuant to the terms of the RUS documents.

(b) So long as the State Regulatory Authority shall be pre-empted hereunder, RUS shall be considered the governmental regulatory body with jurisdiction over rates for all purposes, including for the purposes of the RUS documents and for the purposes of section 1129(a)(6) of the Bankruptcy Code of 1978, as amended (11 U.S.C. 1129(a)(6)).

(c) RUS shall, pursuant to the terms of the RUS documents, exercise exclusive jurisdiction over the rates of the borrower until the Administrator shall in writing approve the resumption of jurisdiction by the State Regulatory Authority. The Administrator shall approve resumption only after determining that such jurisdiction shall be exercised in a manner consistent with Federal interests.

\_1717.356 Additional statutory pre-emption.

This subpart addresses pre-emption of State law and State Regulatory Authority upon the filing of a petition by or against the borrower commencing a case under the Bankruptcy Code of 1978, as amended. Nothing in this subpart waives, limits, or otherwise affects the explicit pre-emption or pre-emption, which is implicit and shall occur pursuant to the RE Act as a matter of law, of State law or action of a State Regulatory Authority where such State law or such action compromises Federal

interests, including the ability of any borrower to repay loans made or guaranteed by RUS.

Subparts I -- L [Reserved]

Subpart M -- Operational Controls

Source: 60 FR 67405, Dec. 29, 1995, unless otherwise noted.

Effective Date Note: At 60 FR 67405, Dec. 29, 1995, \_\_1717.600 -- 1717.617 (Subpart M) were added to Part 1717, effective January 29, 1996.

\_1717.600 General.

(a) General. The loan contract and mortgage between the Rural Utilities Service (RUS) and electric borrowers imposes certain restrictions and controls on the borrowers and gives RUS (and other co-mortgagees in the case of the mortgage) the right to approve or disapprove certain actions contemplated by the borrowers. Certain of these controls and approval rights are referred to informally as "operational controls" because they pertain to decisions or actions with respect to the operation of the borrowers' electric systems. The approval authority granted to RUS by the loan contract or mortgage regarding each decision or action subject to controls is often stated in broad, unlimited terms. This subpart lists the main operational controls affecting borrowers and establishes for each area of control the circumstances under which RUS approval of a decision or action by a borrower is either required or not required. In some cases, only the general principles or general circumstances pertaining to RUS approval or control are presented in this subpart, while the details regarding the circumstances and requirements of RUS approval or control are set forth in other RUS regulations. Since this subpart addresses only the main operational controls, failure to address a control or approval right in this subpart in no way invalidates such controls or rights established by the loan contract, mortgage, other agreements between a borrower and RUS, and RUS regulations.

(b) Case by case amendments. Upon written notice to a borrower, RUS may amend or annul the approvals and exceptions to controls set forth in this subpart or other RUS regulations if the borrower is in violation of any provision of its loan documents or any other agreement with RUS, or if RUS determines that loan security and/or repayment is threatened. Such amendment or annulment will apply to decisions and actions of the borrower after said written notice has been provided by RUS.

(c) Generic notices. By written notice to all borrowers or a group of borrowers, RUS may grant or waive approval of decisions and actions by the borrowers that are controlled under the loan documents and RUS regulations. RUS may also by written notice withdraw or cut back its grant or waiver of approval of said decisions and actions made by previous written notice, but may not by such notice extend its

authority to approve decisions and actions by borrowers beyond the authority granted by the loan documents and RUS regulations.

1717.601 Applicability.

(a) The approvals and exceptions to controls conveyed by this subpart apply only to controls and approval rights normally included in RUS loan documents dated prior to January 29, 1996. They do not apply to special controls and approval requirements included in loan documents or other agreements executed between a borrower and RUS that relate to individual problems or circumstances specific to an individual borrower.

(b) The approvals and exceptions to controls granted by RUS in this subpart shall not in any way affect the rights of other co-mortgagees under the mortgage or their loan contracts.

1717.602 Definitions.

Terms used in this subpart that are not defined in this section have the meanings set forth in 7 CFR part 1710. In addition, for the purposes of this subpart:

Default means an event of default as defined in the borrower's loan documents or other agreement with RUS, and furthermore includes any event that has occurred and is continuing which, with notice or lapse of time and notice, would become an event of default.

Equity means the borrower's total margins and equities computed pursuant to RUS accounting requirements but excluding any regulatory created assets.

Financed or funded by RUS means financed or funded wholly or in part by a loan made or guaranteed by RUS, including concurrent supplemental loans required by 7 CFR 1710.110, loans to reimburse funds already expended by the borrower, and loans to replace interim financing.

Interchange agreement means a contractual arrangement that can include a variety of services utilities provide each other to increase reliability and efficiency, and to avoid duplicating expenses. Some examples are: transmission service (the use of transmission lines to move power and energy from one area to another); emergency service (an agreement by one utility to furnish another with power and energy to protect it in times of emergency, such as power plant outages); reserve sharing (contributions to a common pool of generating plant reserves so that each individual utility's reserves can be reduced); and economic exchanges (swapping power and energy from different plants to avoid running the most expensive units).

Interconnection agreement means a contract governing the terms for establishing or using one or more electrical connections between two or more electric systems permitting a flow of power and energy among the systems.

Loan documents means the mortgage (or other security instrument acceptable to RUS), the loan contract, and the promissory note entered into between the borrower and RUS.

Net utility plant means the amount constituting the total utility plant of the borrower, less depreciation, computed in accordance with RUS accounting requirements.

Pooling agreement means a contract among two or more interconnected electric systems to operate on a coordinated basis to achieve economies and/or enhance reliability in supplying their respective loads.

Power supply contract means any contract entered into by a borrower for the sale or purchase, at wholesale, of electric energy.

Regulatory created assets means the sum of any amounts properly recordable as unrecovered plant and regulatory study costs or as other regulatory assets, computed pursuant to RUS accounting requirements.

RUS accounting requirements means the system of accounts prescribed for electric borrowers by RUS regulations as such RUS accounting requirements exist at the date of applicability thereof.

RUS regulations mean regulations of general applicability published by RUS from time to time as they exist at the date of applicability thereof, and shall also include any regulations of other federal entities which RUS is required by law to implement.

Total assets means an amount constituting the total assets of the borrower as computed pursuant to RUS accounting requirements, but excluding any regulatory created assets.

Wheeling agreement means a contract providing for the use of the electric transmission facilities of one electric utility to transmit power and energy of another electric utility or other entity to a third party. Such transmission may be accomplished directly or by displacement.

\_1717.603 RUS approval of extensions and additions.

(a) Distribution borrowers. Prior written approval by RUS is required for a distribution borrower to extend or add to its electric system if the extension or addition

will be financed by RUS. For extensions and additions that will not be financed by RUS, approval is hereby given to distribution borrowers to make such extensions and additions to their electric systems, including the use of (or commitment to use) general funds of the borrower, except for the following:

(1) Construction, procurement, or leasing of generating facilities if the combined capacity of the facilities to be built, procured, or leased, including any future facilities included in the planned project, will exceed the lesser of 5 megawatts or 30 percent of the borrower's equity;

(2) Acquisition or leasing of existing electric facilities or systems in service whose purchase price, or capitalized value in the case of a lease, exceeds 10 percent of the borrower's net utility plant; and

(3) Construction, procurement, or leasing of electric facilities to serve a customer whose annual kWh purchases or maximum annual kW demand in the foreseeable future is projected to exceed 25 percent of the borrower's total kWh sales or maximum kW demand in the year immediately preceding the acquisition or start of construction.

(b) Power supply borrowers. Prior written approval by RUS is required for a power supply borrower to extend or add to its electric system if the extension or addition will be financed by RUS. Requirements for RUS approval of extensions and additions that will not be financed by RUS are set forth in other RUS regulations.

(c) Additional details. Additional details relating to RUS approval of extensions and additions of a borrower's electric system financed by RUS are set forth in other RUS regulations, e.g., in 7 CFR parts 1710 and 1726.

1717.604 Long-range engineering plans and construction work plans.

(a) All borrowers are required to maintain up-to-date long-range engineering plans and construction work plans (CWPs) in form and substance as set forth in 7 CFR part 1710, subpart F.

(b) Applications for financing from RUS must be supported by a long-range engineering plan and CWP approved by RUS.

(c) RUS approval is not required for long-range engineering plans and CWPs if the borrower does not intend to seek RUS financing for any of the facilities, equipment or other purposes included in those plans. However, if requested by RUS, a borrower must provide an informational copy of such plans to RUS.

1717.605 Design standards, plans and specifications, construction standards, and RUS accepted materials.



All borrowers, regardless of the source of funding, are required to comply with applicable RUS requirements with respect to system design, construction standards, and the use of RUS accepted materials. Borrowers must comply with applicable RUS requirements with respect to plans and specifications only if the construction or procurement will be financed by RUS. These requirements are set forth in other RUS regulations, especially in 7 CFR parts 1724 and 1728.

\_1717.606 Standard forms of construction contracts, and engineering and architectural services contracts.

All borrowers are encouraged to use the standard forms of contracts promulgated by RUS for construction, materials, equipment, engineering services, and architectural services, regardless of the source of funding for such construction and services. Borrowers are required to use these standard forms of contracts only if the construction, procurement or services are financed by RUS, and only to the extent required by RUS regulations. RUS requirements with respect to such standard forms of contract are set forth in 7 CFR part 1724 for architectural and engineering services, and in 7 CFR part 1726 for construction, materials, and equipment.

\_1717.607 Contract bidding requirements.

Borrowers must follow RUS requirements regarding bidding for contracts for construction, materials, and equipment only if financing of the construction or procurement will be provided by RUS. These requirements are set forth in 7 CFR part 1726.

\_1717.608 RUS approval of contracts.

(a) Construction contracts and architectural and engineering contracts. RUS approval of contracts for construction and procurement and for architectural and engineering services is required only when such construction, procurement or services are financed by RUS. Detailed requirements regarding RUS approval of such contracts are set forth in 7 CFR part 1724 for architectural and engineering services, and in 7 CFR part 1726 for construction and procurement.

(b) Large retail power contracts. RUS approval of contracts to sell electric power to retail customers is required only if the contract is for longer than 2 years and the kWh sales or kW demand for any year covered by the contract exceeds 25 percent of the borrower's total kWh sales or maximum kW demand for the year immediately preceding execution of the contract. This requirement applies regardless of the source of funding of any plant extensions, additions or improvements that may be involved in connection with the contract.

(c) Power supply arrangements. (1) Power supply contracts (including but not limited to economy energy sales and emergency power and energy sales),

interconnection agreements, interchange agreements, wheeling agreements, pooling agreements, and any other similar power supply arrangements subject to approval by RUS are deemed approved if they have a term of 2 years or less. Amendments to said power supply arrangements are also deemed approved provided that the amendment does not extend the term of the arrangement for more than 2 years beyond the date of the amendment.

(2) Any amendment to a schedule or exhibit contained in any power supply arrangement subject to RUS approval, which merely has the effect of either altering a list of interconnection or delivery points or changing the value of a variable term (but not the formula itself) contained in a formulary rate or charge is deemed approved.

(3) The provisions of this paragraph (c) apply regardless of whether the borrower is a seller or purchaser of the services furnished by the contracts or arrangements, and regardless of whether or not a Federal power marketing agency is a party to any of them.

(d) System management and maintenance contracts. RUS approval of contracts for the management and operation of a borrower's electric system or for the maintenance of the electric system is required only if such contracts cover all or substantially all of the electric system.

(e) Other contracts. [Reserved]

\_1717.609 RUS approval of general manager.

(a) If a borrower's mortgage or loan contract grants RUS the unconditioned right to approve the employment and/or the employment contract of the general manager of the borrower's system, such approval is hereby granted provided that the borrower is in compliance with all provisions of its loan documents and any other agreements with RUS.

(b) If a borrower is in default with respect to any provision of its loan documents or any other agreement with RUS:

(1) Such borrower, if directed in writing by RUS, shall replace its general manager within 30 days after the date of such written notice; and

(2) Such borrower shall not hire a general manager without prior written approval by RUS.

\_1717.610 RUS approval of compensation of the board of directors.

If a borrower's mortgage or loan contract requires the borrower to obtain approval from RUS for compensation provided to members of the borrower's board of directors, such requirement is hereby waived.

\_1717.611 RUS approval of expenditures for legal, accounting, engineering, and supervisory services.

(a) If a borrower's mortgage or loan contract requires the borrower to obtain approval from RUS before incurring expenses for legal, accounting, supervisory (other than for the management and operation of the borrower's electric system, see \_1717.608(d)), or other similar services, such approval is hereby granted. However, while expenditures for accounting do not require RUS approval, the selection of a certified public accountant by the borrower to prepare audited reports required by RUS remains subject to RUS approval.

(b) If a borrower's mortgage or loan contract requires the borrower to obtain approval from RUS before incurring expenses for engineering services, such approval is hereby granted if such services will not be financed by RUS. Approval requirements with respect to engineering services financed by RUS are set forth in other RUS regulations.

\_1717.612 RUS approval of borrower's bank or other depository.

If a borrower's mortgage or loan contract gives RUS the authority to approve the bank or other depositories used by the borrower, such approval is hereby granted. However, without the prior written approval of RUS, a borrower shall not deposit funds from loans made or guaranteed by RUS in any bank or other depository that is not insured by the Federal Deposit Insurance Corporation or other Federal agency acceptable to RUS, or in any account not so insured.

\_1717.613 RUS approval of data processing and system control equipment.

If a borrower's mortgage or loan contract requires the borrower to obtain approval from RUS before purchasing data processing equipment or system control equipment, such approval is hereby granted if the equipment will not be financed by RUS.

\_1717.614 Notification of rate changes.

If a distribution borrower is required by its loan documents to notify RUS in writing of proposed changes in electric rates more than 30 days prior to the effective date of such rates, the required notification period shall be 30 days. Moreover, such notification shall be required only upon the request of RUS.

\_1717.615 Consolidations and mergers.

A distribution or power supply borrower may without the prior approval of RUS, consolidate or merge with any other corporation or convey or transfer the mortgaged property substantially as an entirety if the following conditions are met:

(a) Such consolidation, merger, conveyance or transfer shall be on such terms as shall fully preserve the lien and security of the RUS mortgage and the rights and powers of the mortgagees;

(b) The entity formed by such consolidation or with which the borrower is merged or the corporation which acquires by conveyance or transfer the mortgaged property substantially as an entirety shall execute and deliver to the mortgagees a mortgage supplemental in recordable form and containing an assumption by such successor entity of the due and punctual payment of the principal of and interest on all of the outstanding notes and the performance and observance of every covenant and condition of the mortgage;

(c) Immediately after giving effect to such transaction, no default under the mortgage shall have occurred and be continuing;

(d) The borrower shall have delivered to the mortgagees a certificate of its general manager or other officer, in form and substance satisfactory to each of the mortgagees, which shall state that such consolidation, merger, conveyance or transfer and such supplemental mortgage comply with this section and that all conditions precedent herein provided for relating to such transaction have been complied with;

(e) The borrower shall have delivered to the mortgagees an opinion of counsel in form and substance satisfactory to each of the mortgagees; and

(f) The entity formed by such consolidation or with which the borrower is merged or the corporation which acquires by conveyance or transfer the mortgaged property substantially as an entirety shall be an entity having:

(1) Equity equal to at least 27% of its total assets on a pro forma basis after giving effect to such transaction;

(2) A pro forma TIER of not less than 1.50 and a pro forma DSC of not less than 1.25 for each of the two preceding calendar years; and

(3) Net utility plant equal to or greater than 1.0 times its total long-term debt on a pro forma basis.

\_1717.616 Sale, lease, or transfer of capital assets.

A distribution borrower may without the prior approval of RUS sell, lease, or transfer any capital asset if the following conditions are met:

(a) The borrower is not in default;

(b) In the most recent year for which data are available, the borrower achieved a TIER of at least 1.5, DSC of at least 1.25, OTIER of at least 1.1, and ODSC of at least 1.1, in each case based on the average or the best 2 out of the 3 most recent years;

(c) The sale, lease, or transfer of assets will not reduce the borrower's existing or future requirements for energy or capacity being furnished to the borrower under any wholesale power contract which has been pledged as security to the government;

(d) Fair market value is obtained for the assets;

(e) The aggregate value of assets sold, leased, or transferred in any 12-month period is less than 10 percent of the borrower's net utility plant prior to the transaction;

(f) The proceeds of such sale, lease, or transfer, less ordinary and reasonable expenses incident to such transaction, are immediately:

(1) Applied as a prepayment of all notes secured under the mortgage equally and ratably;

(2) In the case of dispositions of equipment, materials or scrap, applied to the purchase of other property useful in the borrower's utility business; or

(3) Applied to the acquisition of construction of utility plant.

1717.617 Limitations on distributions.

If a distribution or power supply borrower is required by its loan documents to obtain prior approval from RUS before declaring or paying any dividends, paying or determining to pay any patronage refunds, or retiring any patronage capital, or making any other cash distributions, such approval is hereby given if the following conditions are met:

(a) After giving effect to the distribution, the borrower's equity will be greater than or equal to 30 percent of its total assets;

(b) The borrower is current on all payments due on all notes secured under the mortgage;

(c) The borrower is not otherwise in default under its loan documents; and

(d) After giving effect to the distribution, the borrower's current and accrued assets will be not less than its current and accrued liabilities.

## Subpart N -- Investments, Loans, and Guarantees by Electric Borrowers

Authority: 7 U.S.C. 901 - 950b; Pub.L. 103 - 354, 108 Stat. 3178 (7 U.S.C. 6941 et seq.); Title I, Subtitle D, Pub.L. 100 - 203, 101 Stat. 1330.

Source: 60 FR 48877, Sept. 21, 1995, unless otherwise noted.

Editorial Note: Nomenclature changes to part 1717 appear at 55 FR 39397, Sept. 27, 1990.

### \_1717.650 Purpose.

This subpart sets forth general regulations for implementing and interpreting provisions of the RUS mortgage and loan contract regarding investments, loans, and guarantees made by electric borrowers, as well as the provisions of the Rural Electrification Act of 1936, as amended, including section 312 (7 U.S.C. 901 et seq.) (RE Act), permitting, in certain circumstances, that electric borrowers under the RE Act may, without restriction or prior approval of the Administrator of the Rural Utilities Service (RUS), invest their own funds and make loans or guarantees.

### \_1717.651 General.

(a) Policy. RUS electric borrowers are encouraged to utilize their own funds to participate in the economic development of rural areas, provided that such activity does not in any way put government funds at risk or impair a borrower's ability to repay its indebtedness to RUS and other lenders. In considering whether to make loans, investments, or guarantees, borrowers are expected to act in accordance with prudent business practices and in conformity with the laws of the jurisdictions in which they serve. RUS assumes that borrowers will use the latitude afforded them by section 312 of the RE Act primarily to make needed investments in rural community infrastructure projects (such as water and waste systems, garbage collection services, etc.) and in job creation activities (such as providing technical, financial, and managerial assistance) and other activities to promote business development and economic diversification in rural communities. Nonetheless, RUS believes that borrowers should continue to give primary consideration to safety and liquidity in the management of their funds.

(b) Applicability of this subpart. This subpart applies to all distribution and power supply borrowers regardless of when their loan contract or mortgage was executed.

### \_1717.652 Definitions.

As used in this subpart:

Borrower means any organization that has an outstanding loan made or guaranteed by RUS for rural electrification.

Cash-construction fund-trustee account means the account described in the Uniform System of Accounts as one to which funds are deposited for financing the construction or purchase of electric facilities.

Distribution borrower means a Distribution Borrower as defined in 7 CFR 1710.2.

Electric system means all of the borrower's interests in all electric production, transmission, distribution, conservation, load management, general plant and other related facilities, equipment or property and in any mine, well, pipeline, plant, structure or other facility for the development, production, manufacture, storage, fabrication or processing of fossil, nuclear, or other fuel or in any facility or rights with respect to the supply of water, in each case for use, in whole or in major part, in any of the borrower's generating plants, including any interest or participation of the borrower in any such facilities or any rights to the output or capacity thereof, together with all lands, easements, rights-of-way, other works, property, structures, contract rights and other tangible and intangible assets of the borrower in each case used or useful in such electric system.

Equity means the Margins and Equities of the borrower as defined in the Uniform System of Accounts, less regulatory created assets.

Guarantee means to undertake collaterally to answer for the payment of another's debt or the performance of another's duty, liability, or obligation, including, without limitation, the obligations of subsidiaries. Some examples of such guarantees include guarantees of payment or collection on a note or other debt instrument (assuring returns on investments); issuing performance bonds or completion bonds; or cosigning leases or other obligations of third parties.

Invest means to commit money in order to earn a financial return on assets, including, without limitation, all investments properly recorded on the borrower's books and records in investment accounts as those accounts are used in the Uniform System of Accounts for RUS Borrowers. Borrowers may submit any proposed transaction to RUS for an interpretation of whether the action is an investment for the purposes of this definition.

Make loans means to lend out money for temporary use on condition of repayment, usually with interest.

Mortgaged property means any asset of the borrower which is pledged in the RUS mortgage.

Natural gas distribution system means any system of community infrastructure that distributes natural gas and whose services are available by design to all or a substantial portion of the members of the community.

Operating DSC means Operating Debt Service Coverage (ODSC) of the borrower's electric system calculated as:

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where:

All amounts are for the same year and are based on the RUS system of accounts;

A=Depreciation and Amortization Expense of the electric system;

B=Interest on Long-term Debt of the electric system, except that Interest on Long-term Debt shall be increased by  $\frac{1}{3}$  of the amount, if any, by which the rentals of Restricted Property of the electric system exceed 2 percent of Total Margins and Equities;

C=Patronage Capital & Operating Margins of the electric system (distribution borrowers) or Operating Margins of the electric system (power supply borrowers); and

D=Debt Service Billed (RUS + other) which equals all interest and principal billed or billable during the calendar year for long-term debt of the electric system plus  $\frac{1}{3}$  of the amount, if any, by which the rentals of Restricted Property of the electric system exceed 2 percent of Total Margins and Equities. Unless otherwise indicated, all terms used in defining ODSC and OTIER are as defined in RUS Bulletin 1717B - 2 Instructions for the Preparation of the Financial and Statistical Report for Electric Distribution Borrowers, and RUS Bulletin 1717B - 3 Instructions for the Preparation of the Operating Report for Power Supply Borrowers and for Distribution Borrowers with Generating Facilities, or the successors to these bulletins.

Operating TIER means Operating Times Interest Earned Ratio (OTIER) of the borrower's electric system calculated as:

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where:

All amounts are for the same year and are based on the RUS system of accounts;

A=Interest on Long-term Debt of the electric system, except that Interest on Long-term Debt shall be increased by  $\frac{1}{3}$  of the amount, if any, by which the rentals of Restricted Property of the electric system exceed 2 percent of Total Margins and Equities; and



B=Patronage Capital & Operating Margins of the electric system (distribution borrowers) or Operating Margins of the electric system (power supply borrowers).

Own funds means money belonging to the borrower other than funds on deposit in the cash-construction fund-trustee account.

Power supply borrower means a Power Supply Borrower as defined in 7 CFR 1710.2.

Regulatory created assets means the sum of the amounts properly recordable in Account 182.2 Unrecovered Plant and Regulatory Study Costs, and Account 182.3 Other Regulatory Assets of the Uniform System of Accounts.

RUS means the Rural Utilities Service, an agency of the U.S. Department of Agriculture established pursuant to Section 232 of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Pub. L. 103 - 354, 108 Stat. 3178, 7 U.S.C. 6941 et seq.) and, for purposes of this subpart, includes its predecessor, the Rural Electrification Administration.

RUS loan contract means the loan contract between the borrower and RUS.

RUS mortgage means any and all instruments creating a lien on or security interest in the borrower's assets in connection with loans or guarantees under the RE Act.

Solid waste disposal system means any system of community infrastructure that provides collection and/or disposal of solid waste and whose services are available by design to all or a substantial portion of the members of the community.

Subsidiary means a company which is controlled by the borrower through ownership of voting stock, and is further defined in 7 CFR 1767.10.

Supplemental lender means a lender that has provided a supplemental source of financing that is secured by the RUS mortgage.

Telecommunication and other electronic communication system means any community infrastructure that provides telecommunication or other electronic communication services and whose services are available by design to all or a substantial portion of the members of the community.

Total assets means the total assets of the borrower as calculated according to the Uniform System of Accounts, less regulatory created assets.

Total utility plant means the sum of the borrower's Electric Plant Accounts and Construction Work in Progress -- Electric Accounts, as such terms are used in the Uniform System of Accounts.

Uniform System of Accounts means the system of accounts prescribed for RUS borrowers in 7 CFR part 1767.

Water and waste disposal system means any system of community infrastructure that supplies water and/or collects and treats waste water and whose services are available by design to all or a substantial portion of the members of the community.

1717.653 Borrowers in default.

Any borrower not in compliance with all provisions of its mortgage, loan contract, or any other agreements with RUS must, unless the borrower's mortgage, loan contract, or other agreement with RUS specifically provides otherwise with respect to such a borrower:

(a) Obtain prior written approval from the Administrator to invest its own funds or to make loans or guarantees regardless of the aggregate amount of such investments, loans, or guarantees; and

(b) If requested by the Administrator, restructure or reduce the amount of its investments, loans, and guarantees to a level determined by the Administrator, in his or her sole discretion, to be in the financial interest of the government with respect to loan security and/or repayment. If the borrower does not so restructure or reduce its portfolio within a reasonable period of time determined by the Administrator, which shall not exceed 12 months from the date the borrower was notified of the required action, then, upon written notice from RUS, the borrower shall be in default of its RUS loan contract and mortgage.

1717.654 Transactions below the 15 percent level.

(a) A borrower in compliance with all provisions of its RUS mortgage, RUS loan contract, and any other agreements with RUS may, without prior written approval of the Administrator, invest its own funds or make loans or guarantees not in excess of 15 percent of its total utility plant without regard to any provision contained in any RUS mortgage or RUS loan contract to the effect that the borrower must obtain prior approval from RUS, provided, however, that the borrower may not, without the prior written approval of the Administrator, make such investments, loans, and guarantees to extend, add to, or modify its electric system. Moreover, funds necessary to make timely payments of principal and interest on loans secured by the RUS mortgage remain subject to RUS controls on borrower investments, loans and guarantees.

(b) RUS will not consider requests from borrowers to exclude investments, loans, or guarantees made below the 15 percent level. (Categorical exclusions are set forth in \_1717.655.)

\_1717.655 Exclusion of certain investments, loans, and guarantees.

(a) In calculating the amount of investments, loans and guarantees permitted under this subpart, there is excluded from the computation any investment, loan or guarantee of the type which by the terms of the borrower's RUS mortgage or RUS loan contract the borrower may make in unlimited amounts without RUS approval.

(b) Furthermore, the borrower may make unlimited investments, without prior approval of the Administrator, in:

(1) Securities or deposits issued, guaranteed or fully insured as to payment by the United States Government or any agency thereof;

(2) Capital term certificates, bank stock, or other similar securities of the supplemental lender which have been purchased as a condition of membership in the supplemental lender, or as a condition of receiving financial assistance from such lender, as well as any other investment made in, or loans made to, the National Rural Utilities Cooperative Finance Corporation, the Saint Paul Bank for Cooperatives, and CoBank, ACB;

(3) Patronage capital allocated from an electric power supply cooperative of which the borrower is a member; and

(4) Patronage capital allocated from an electric distribution cooperative to a power supply borrower.

(c) Without prior approval of the Administrator, the borrower may also:

(1) Invest or lend funds derived directly from:

(i) Grants which the borrower is not obligated to repay, regardless of the source or purpose of the grant; and

(ii) Loans received from or guaranteed by any Federal, State or local government program designed to promote rural economic development, provided that the borrower uses the loan proceeds for such purpose;

(2) Make loans guaranteed by an agency of USDA, up to the amount of principal whose repayment, with interest, is fully guaranteed; and

(3) (i) Make unlimited investments in and unlimited loans to finance the following community infrastructure that serves primarily consumers located in rural areas as defined in 7 CFR 1710.2, and guarantee debt issued for the construction or acquisition of such infrastructure, up to an aggregate amount of such guarantees not to exceed 20 percent of the borrower's equity:

- (A) Water and waste disposal systems;
- (B) Solid waste disposal systems;
- (C) Telecommunication and other electronic communication systems; and
- (D) Natural gas distribution systems.

(ii) In each of the four cases in paragraph (c)(3)(i) of this section, if the system is a component of a larger organization other than the borrower itself (e.g., if it is a component of a subsidiary of the borrower or a corporation independent of the borrower), to be eligible for the exemption the borrower must certify annually that a majority of the gross revenues of the larger organization during the most recent fiscal year came from customers of said system who were located in a rural area.

(d) Also excluded from the calculation of investments, loans and guarantees made by the borrower are:

(1) Amounts properly recordable in Account 142 Customer Accounts Receivable, and Account 143 Other Accounts Receivable;

(2) Any investment, loan, or guarantee that the borrower is required to make by an agency of USDA, for example, as a condition of obtaining financial assistance for itself or any other person or organization;

(3) Investments included in an irrevocable trust for the purpose of funding post-retirement benefits of the borrower's employees;

(4) Reserves required by a reserve bond agreement or other agreement legally binding on the borrower, that are dedicated to making required payments on debt secured under the RUS mortgage, not to exceed the amount of reserves specifically required by such agreements; and

(5) Investments included in an irrevocable trust approved by RUS and dedicated to the payment of decommissioning costs of nuclear facilities of the borrower.

(e) Grandfathered exclusions. All amounts of individual investments, loans, and guarantees excluded by RUS as of February 16, 1995 shall remain excluded. Such exclusions must have been based on the RUS mortgage, RUS loan contract,

regulations, bulletins, memoranda, or other written notice from RUS. Profits, interest, and other returns earned (regardless of whether or not they are reinvested) on such investments, loans and guarantees after February 16, 1995 shall be excluded only if they are eligible for exclusion under paragraphs (a) through (d) of this section. Any new commitments of money to such investments, loans and guarantees shall likewise be excluded only if they are eligible under paragraphs (a) through (d) of this section.

(f) Any investment, loan or guarantee made by a borrower that is not excluded under this section or under 1717.657(d) shall be included in the aggregate amount of investments, loans and guarantees made by the borrower, regardless of whether RUS has specifically approved the investment, loan or guarantee under 1717.657(c), or has approved a related transaction (e.g., a lien accommodation).

1717.656 Exemption of certain borrowers from controls.

(a) Any distribution or power supply borrower that meets all of the following criteria is exempted from the provisions of the RUS mortgage and loan contract that require RUS approval of investments, loans, and guarantees, except investments, loans, and guarantees made to extend, add to, or modify the borrower's electric system:

(1) The borrower is in compliance with all provisions of its RUS mortgage, RUS loan contract, and any other agreements with RUS;

(2) The average revenue per kWh for residential service received by the borrower during the two most recent calendar years does not exceed 130 percent of the average revenue per kWh for residential service during the same period for all residential consumers located in the state or states served by the borrower. This criterion applies only to distribution borrowers and does not apply to power supply borrowers. If a borrower serves customers in more than one state, the state average revenue per kWh will be based on a weighted average using the kWh sales by the borrower in each state as the weight. The calculation will be based on the two most recent calendar years for which both borrower and state-wide data are available. If a borrower fails to qualify for an exemption based solely on its failure to meet this criterion on rate disparity, at the borrower's request the Administrator may, at his or her sole discretion, exempt the borrower if he or she finds that the borrower's strengths with respect to the other criteria are sufficient to offset any weakness due to rate disparity;

(3) In the most recent calendar year for which data are available, the borrower achieved an operating TIER of at least 1.0 and an operating DSC of at least 1.0, in each case based on the average of the two highest ratios achieved in the three most recent calendar years;

(4) The borrower's ratio of net utility plant to long-term debt is at least 1.1, based on year-end data for the most recent calendar year for which data are available; and

(5) The borrower's equity is equal to at least 27 percent of its total assets, based on year-end data for the most recent calendar year for which data are available.

(b) While borrowers meeting the criteria in paragraph (a) of this section are exempt from RUS approval of investments, loans and guarantees, they are nevertheless subject to the record-keeping, reporting, and other requirements of \_1717.658.

(c) Any borrower exempt under paragraph (a) of this section that ceases to meet the criteria for exemption shall, upon written notice from RUS, no longer be exempt and shall be subject to the provisions of this subpart applicable to non-exempt borrowers. A borrower may regain its exemption if it subsequently meets the criteria in paragraph (a) of this section, and is so notified in writing by RUS.

(d)(1) A borrower that loses its exemption and is not in compliance with all provisions of its mortgage, loan contract, or any other agreement with RUS may be required to restructure or reduce its portfolio of investments, loans and guarantees as provided in \_1717.653(b). If the borrower's portfolio exceeds the 15 percent level, the borrower will be required to restructure or reduce its portfolio to the 15 percent level or below. For example, if the borrower's mortgage or loan contract has an approval threshold, the borrower may be required to reduce its portfolio to that level, which in many cases is 3 percent of total utility plant.

(2) A borrower that loses its exemption but is in compliance with all provisions of its mortgage, loan contract, and any other agreements with RUS will be required, if its investments, loans and guarantees exceed the 15 percent level, to restructure or reduce its portfolio to the 15 percent level, unless the Administrator, in his or her sole discretion, determines that such action would not be in the financial interest of the government with respect to loan security and/or repayment. (Such borrower is eligible to ask RUS to exclude a portion of its investments under the conditions set forth in \_1717.657(d).)

(3) If a borrower required to reduce or restructure its portfolio does not fully comply within a reasonable period of time determined by the Administrator, which shall not exceed 12 months from the date the borrower was notified of its loss of exemption, then, upon written notice from RUS, the borrower shall be in default of its RUS loan contract and/or RUS mortgage.

(e) By no later than July 1 of each year, RUS will provide written notice to any borrowers whose exemption status has changed as a result of more recent data being available for the qualification criteria set forth in paragraph (a) of this section, or as a result of other reasons, such as corrections in the available data. An explanation of the reasons for any changes in exemption status will also be provided to the borrowers affected.

\_1717.657 Investments above the 15 percent level by certain borrowers not exempt under \_1717.656(a).

(a) General. (1) This section applies only to borrowers that are in compliance with all provisions of their mortgage, loan contract, and any other agreements with RUS and that do not qualify for an exemption from RUS investment controls under \_1717.656(a).

(2) Nothing in this section shall in any way affect the Administrator's authority to exercise approval rights over investments, loans, and guarantees made by a borrower that is not in compliance with all provisions of its mortgage, loan contract and any other agreements with RUS.

(b) Distribution borrowers. Distribution borrowers not exempt from RUS investment controls under \_1717.656(a) may not make investments, loans and guarantees in an aggregate amount in excess of 15 percent of total utility plant. Above the 15 percent level, such borrowers will be restricted to excluded investments, loans and guarantees as defined in \_1717.655. (However, they are eligible to ask RUS to exclude a portion of their investments under the conditions set forth in paragraph (d) of this section.)

(c) Power supply borrowers. (1) Power supply borrowers not exempt from RUS investment controls under \_1717.656(a) may request approval to exceed the 15 percent level if all of the following criteria are met:

(i) Satisfactory evidence has been provided that the borrower is in compliance with all provisions of its RUS mortgage, RUS loan contract, and any other agreements with RUS;

(ii) The borrower is not in financial workout and has not had its government debt restructured;

(iii) The borrower has equity equal to at least 5 percent of its total assets; and

(iv) After approval of the investment, loan or guarantee, the aggregate of the borrower's investments, loans and guarantees will not exceed 20 percent of the borrower's total utility plant.

(2) Borrower requests for approval to exceed the 15 percent level will be considered on a case by case basis. The requests must be made in writing.

(3) In considering borrower requests, the Administrator will take the following factors into consideration:

(i) The repayment of all loans secured under the RUS mortgage will continue to be assured, and loan security must continue to be reasonably adequate, even if the entire investment or loan is lost or the borrower is required to perform for the entire amount of the guarantee. These risks will be considered along with all other risks facing the borrower, whether or not related to the investment, loan or guarantee;

(ii) In the case of investments, the investment must be made in an entity separate from the borrower, such as a subsidiary, whereby the borrower is protected from any liabilities incurred by the separate entity, unless the borrower demonstrates to the satisfaction of the Administrator that making the investment directly rather than through a separate entity will present no substantial risk to the borrower in addition to the possibility of losing all or part of the original investment;

(iii) The borrower must be economically and financially sound as indicated by its costs of operation, competitiveness, operating TIER and operating DSC, physical condition of the plant, ratio of equity to total assets, ratio of net utility plant to long-term debt, and other factors; and

(iv) Other factors affecting the security and repayment of government debt, as determined by the Administrator on a case by case basis.

(4) If the Administrator approves an investment, loan or guarantee, such investment, loan or guarantee will continue to be included when calculating the borrower's ratio of aggregate investments, loans and guarantees to total utility plant.

(d) Distribution and power supply borrowers. If the aggregate of the investments, loans and guarantees of a distribution or power supply borrower exceeds 15 percent of the borrower's total utility plant as a result of the cumulative profits or margins, net of losses, earned on said transactions over the past 10 calendar years (i.e., the sum of all profits earned during the 10 years on all transactions -- including interest earned on cash accounts, loans, and similar transactions -- less the sum of all losses experienced on all transactions during the 10 years) then:

(1) The borrower will not be in default of the RUS loan contract or RUS mortgage with respect to required approval of investments, loans and guarantees, provided that the borrower had not made additional net investments, loans or guarantees without approval after reaching the 15 percent level; and

(2) At the request of the borrower, the Administrator in his or her sole discretion may decide to exclude up to the amount of net profits or margins earned on the borrower's investments, loans and guarantees during the past 10 calendar years, if the Administrator determines that such exclusion will not increase loan security risks. The borrower must provide documentation satisfactory to the Administrator as to the current status of its investments, loans and guarantees and the net profits earned during the past 10 years. Any exclusion approved by the Administrator may or may not



reduce the level of investments, loans and guarantees to or below the 15 percent level. If such exclusion does not reduce the level to or below the 15 percent level, RUS will notify the borrower in writing that it must reduce or restructure its investments, loans and guarantees to a level of not more than 15 percent of total utility plant. If the borrower does not come within the 15 percent level within a reasonable period of time determined by the Administrator, which shall not exceed 12 months from the date the borrower was notified of the required action, then, upon written notice from RUS, the borrower shall be in default of its RUS loan contract and mortgage.

1717.658 Records, reports and audits.

(a) Every borrower shall maintain accurate records concerning all investments, loans and guarantees made by it. Such records shall be kept in a manner that will enable RUS to readily determine:

(1) The nature and source of all income, expenses and losses generated from the borrower's loans, guarantees and investments;

(2) The location, identity and lien priority of any loan collateral resulting from activities permitted by this subpart; and

(3) The effects, if any, which such activities may have on the feasibility of loans made, guaranteed or lien accommodated by RUS.

(b) In determining the aggregate amount of investments, loans and guarantees made by a borrower, the borrower shall use the recorded value of each investment, loan or guarantee as reflected on its books and records for the next preceding end-of-month, except for the end-of-year report which shall be based on December 31 information. Every borrower shall also report annually to RUS, in the manner and on the form specified by the Administrator, the current status of each investment, outstanding loan and outstanding guarantee which it has made pursuant to this subpart.

(c) The records of borrowers shall be subject to the auditing procedures prescribed in part 1773 of this chapter. RUS reserves the right to review the financial records of any subsidiaries of the borrower to determine if the borrower is in compliance with this subpart, and to ascertain if the debts, guarantees (as defined in this subpart), or other obligations of the subsidiaries could adversely affect the ability of the borrower to repay its debts to the Government.

(d) RUS will monitor borrower compliance with this subpart based primarily on the annual financial and statistical report submitted by the borrower to RUS and the annual auditor's report on the borrower's operations. However, RUS may inspect the borrower's records at any time during the year to determine borrower compliance. If a borrower's most recent annual financial and statistical report shows the aggregate of the borrower's investments, loans and guarantees to be below the 15 percent level, that

in no way relieves the borrower of its obligation to comply with its RUS mortgage, RUS loan contract, and this subpart with respect to Administrator approval of any additional investment, loan or guarantee that would cause the aggregate to exceed the 15 percent level.

\_1717.659 Effect of this subpart on RUS loan contract and mortgage.

(a) Nothing in this subpart shall affect any provision, covenant, or requirement in the RUS mortgage, RUS loan contract, or any other agreement between a borrower and RUS with respect to any matter other than the prior approval by RUS of investments, loans, and guarantees by the borrower, such matters including, without limitation, extensions, additions, and modifications of the borrower's electric system. Also, nothing in this subpart shall affect any rights which supplemental lenders have under the RUS mortgage, or under their loan contracts or other agreements with their borrowers, to limit investments, loans and guarantees by their borrowers to levels below 15 percent of total utility plant.

(b) RUS will require that any electric loan made or guaranteed by RUS after October 23, 1995 shall be subject to a provision in the loan contract or mortgage restricting investments, loans and guarantees by the borrower substantially as follows: The borrower shall not make any loan or advance to, or make any investment in, or purchase or make any commitment to purchase any stock, bonds, notes or other securities of, or guaranty, assume or otherwise become obligated or liable with respect to the obligations of, any other person, firm or corporation, except as permitted by the RE Act and RUS regulations.

(c) RUS reserves the right to change the provisions of the RUS mortgage and loan contract relating to RUS approval of investments, loans and guarantees made by the borrower, on a case-by-case basis, in connection with providing additional financial assistance to a borrower after October 23, 1995. \_

Subpart O -- [Reserved]

\_1717.700 -- 1717.749 [Reserved]

Subpart P -- [Reserved]

\_\_1717.750 -- 1717.799 [Reserved]

Subpart Q -- [Reserved]

\_\_1717.800 -- 1717.849 [Reserved]

Subpart R -- Lien Accommodations and Subordinations for 100 Percent Private Financing

Source: 58 FR 53843, Oct. 19, 1993, unless otherwise noted.

\_1717.850 General.

(a) Scope and applicability. (1) This subpart R establishes policies and procedures for the accommodation, subordination or release of the Government's lien on borrower assets, including approvals of supporting documents and related loan security documents, in connection with 100 percent private sector financing of facilities and other purposes. Policies and procedures regarding lien accommodations for concurrent supplemental financing required in connection with an RUS insured loan are set forth in subpart S of this part.

(2) This subpart and subpart S of this part apply only to debt to be secured under the mortgage, the issuance of which is subject to the approval of the Rural Utilities Service (RUS) by the terms of the borrower's mortgage with respect to the issuance of additional debt or the refinancing or refunding of debt. If RUS approval is not required under such terms of the mortgage itself, a lien accommodation is not required. If the loan contract or other agreement between the borrower and RUS requires RUS approval with respect to the issuance of debt or making additions to or extensions of the borrower's system, such required approvals do not by themselves result in the need for a lien accommodation.

(b) Overall policy. (1) Consistent with prudent lending practices, the maintenance of adequate security for RUS's loans, and the objectives of the Rural Electrification Act (RE Act), it is the policy of RUS to provide effective and timely assistance to borrowers in obtaining financing from other lenders by sharing RUS's lien on a borrower's assets in order to finance electric facilities, equipment and systems, and certain other types of community infrastructure. In certain circumstances, RUS may facilitate the financing of such assets by subordinating its lien on specific assets financed by other lenders.

(2) It is also the policy of RUS to provide effective and timely assistance to borrowers in promoting rural development by subordinating RUS's lien for financially sound rural development investments under the conditions set forth in \_1717.858.

(c) Decision factors. In determining whether to accommodate, subordinate, or release its lien on property pledged by the borrower under the RUS mortgage, RUS will consider the effects of such action on the achievement of the purposes of the RE Act, the repayment and security of RUS loans secured by the mortgage, and other factors set forth in this subpart. The following factors will be considered in assessing the effects on the repayment and security of RUS loans:

(1) The value of the added assets compared with the amount of new debt to be secured;

(2) The value of the assets already pledged under the mortgage, and any effects of the proposed transaction on the value of those assets;

(3) The ratio of the total outstanding debt secured under the mortgage to the value of all assets pledged as security under the mortgage;

(4) The borrower's ability to repay debt owed to the Government, as indicated by the following factors:

(i) Revenues, costs (including interest, lease payments and other debt service costs), margins, Times Interest Earned Ratio (TIER), Debt Service Coverage (DSC), and other case-specific economic and financial factors;

(ii) The variability and uncertainty of future revenues, costs, margins, TIER, DSC, and other case-specific economic and financial factors;

(iii) Future capital needs and the ability of the borrower to meet those needs at reasonable cost;

(iv) The ability of the borrower's management to manage and control its system effectively and plan for future needs; and

(5) Other factors that may be relevant in individual cases, as determined by RUS.

(d) Environmental considerations. Under certain circumstances, such as when the project does not qualify for a categorical exclusion, the environmental requirements of 7 CFR part 1794 may apply to applications for lien accommodations, subordinations, and releases.

(e) Co-mortgagees. Other mortgagees under existing mortgages shared with RUS may have the right to approve requests for lien accommodations, subordinations and releases. In those cases, borrowers would have to obtain the approval of such mortgagees in order for the lien of the mortgage to be accommodated, subordinated or released. Any reference in this subpart to waiving by RUS of any of its rights under the mortgage shall apply only to the rights of RUS and shall not apply to the rights of any other co-mortgagee.

(f) Safety and performance standards. (1) To be eligible for a lien accommodation or subordination from RUS, a borrower must comply with RUS standards regarding facility and system planning and design, construction, procurement, and the use of materials accepted by RUS, as required by the borrower's mortgage, loan contract, or other agreement with RUS, and as further specified in RUS regulations.

(2) RUS "Buy American" requirements shall not apply.

(g) Advance of funds. (1) The advance of funds from 100 percent private loans lien accommodated or subordinated by RUS will not be subject to RUS approval. It is the private lender's responsibility to adopt reasonable measures to ensure that such loan funds are used for the purposes for which the loan was made and the lien accommodation or subordination granted. RUS encourages lenders to adopt the following measures:

(i) Remit loan advances to a separate subaccount of the Cash-Construction Fund-Trustee Account;

(ii) Obtain a certification from a registered professional engineer, for each year during which funds from the separate subaccount are utilized by the borrower, that all materials and equipment purchased and facilities constructed during the year from said funds comply with RUS safety and performance standards, as required by paragraph (f) of this section, and are included in an CWP or CWP amendment approved by the borrower's board of directors;

(iii) Obtain an auditor's certification from a Certified Public Accountant, for each year during which funds are advanced to or remitted from the separate subaccount, certifying:

(A) The amount of loan funds advanced to and remitted from the separate subaccount during the period of review;

(B) That based on the auditor's review of construction work orders and other records, all moneys disbursed from the separate subaccount during the period of review were used for purposes contemplated in the loan agreement and the lien accommodation; and

(iv) Immediately notify RUS in writing if the lender is unable to obtain the certifications cited in paragraphs (g)(1)(ii) and (g)(1)(iii) of this section.

(2) The measures listed in paragraph (g)(1) of this section will normally be sufficient to meet the lender's responsibility provided that additional measures are not reasonably required based on the particular circumstances of an individual case. Should a lender fail to carry out its responsibility in the manner described in this paragraph (g) or in another manner acceptable to RUS, RUS may disqualify such lender from participation in advance approval under \_\_\_1717.854 and 1717.857 and condition the lender's receipt of a lien accommodation or subordination upon the lender providing satisfactory evidence that it will fulfill its responsibility under this paragraph (g).

(h) Contracting and procurement procedures. (1) Facilities financed with debt obtained entirely from non-RUS sources, without an RUS loan guarantee, are not

subject to RUS post-loan requirements regarding contracting, procurement and bidding procedures; contract close-out procedures pertaining to project completion, final payment of contractor, and related matters; and standard forms of construction and procurement contracts listed in 7 CFR 1726.300.

(2) To the extent that provisions in a borrower's loan contract or mortgage in favor of RUS may be inconsistent with paragraphs (g)(1) and (h)(1) of this section, paragraphs (g)(1) and (h)(1) of this section are intended to constitute an approval or waiver under the terms of such instruments, and in any regulations implementing such instruments, with respect to facilities financed with debt obtained entirely from non-RUS sources without an RUS guarantee.

(i) Access of handicapped to buildings and seismic safety. A borrower must meet the following requirements to be eligible for a lien accommodation or subordination for 100 percent private financing of the construction of buildings:

(1) The borrower must provide RUS with a certification by the project architect that the buildings will be designed and constructed in compliance with Section 504 of the Rehabilitation Act of 1973 as amended (29 U.S.C. 794), as applicable under that Act, and that the facilities will be readily accessible to and usable by persons with handicaps in accordance with the Uniform Federal Accessibility Standards (UFAS), (Appendix A to 41 CFR part 101.19, subpart 101 - 19.6). The certification must be included in the borrower's application for a lien accommodation or subordination. In addition to these requirements, building construction may also be subject to requirements of The Americans with Disabilities Act (42 U.S.C. 12101 et seq.); and

(2) The borrower must comply with RUS's seismic safety requirements set forth in 7 CFR part 1792, subpart C.

(j) Breach of warranty. Any breach of any warranty or agreement or any material inaccuracy in any representation, warranty, certificate, document, or opinion submitted pursuant to this subpart, including, without limitation, any agreement or representation regarding the use of funds from loans lien accommodated or subordinated pursuant to this subpart, shall constitute a default by the borrower under the terms of its loan agreement with RUS.

(k) Guaranteed loans. The provisions of this subpart do not apply to lien accommodations or subordinations sought for loans guaranteed by RUS. Such lien accommodations and subordinations are governed by RUS regulations on guaranteed loans.

(l) Release of lien. To avoid repetition, release of lien is not mentioned in every instance where it may be an acceptable alternative to subordination of RUS's lien. Generally, lien subordination is favored over release of lien, and any decision to release RUS's lien is at the sole discretion of RUS.

(m) Waiver authority. Consistent with the RE Act and other applicable laws, any requirement, condition, or restriction imposed by this subpart, or subpart S of this part, on a borrower, private lender, or application for a lien accommodation or subordination may be waived or reduced by the Administrator, if the Administrator determines that said action is in the Government's financial interest with respect to ensuring repayment and reasonably adequate security for loans made or guaranteed by RUS.

(n) Liability. It is the intent of this subpart that any failure on the part of RUS to comply with any provisions hereof, including without limitation, those provisions setting forth specified timeframes for action by RUS on applications for lien accommodations or lien subordinations, shall not give rise to liability of any kind on the part of the Government or any employees of the Government including, without limitation, liability for damages, fees, expenses or costs incurred by or on behalf of a borrower, private lender or any other party.

[58 FR 53843, Oct. 19, 1993, as amended at 60 FR 67408, Dec. 29, 1995]

Effective Date Note: At 60 FR 67408, Dec. 29, 1995, \_1717.850 was amended by revising paragraphs (a), (b), (f), (g)(1)(ii), (h)(2), and (m), effective January 29, 1996. For the convenience of the reader, the superseded text is set forth below.

\_1717.850 General.

(a) Scope. This subpart R establishes policies and procedures for the accommodation, subordination or release of the Government's lien on borrower assets, including approvals of supporting documents and related loan security documents, in connection with 100 percent private sector financing of facilities and other purposes. Policies and procedures regarding lien accommodations for concurrent supplemental financing required in connection with an RUS insured loan are set forth in subpart S of this part.

(b) Overall policy. Consistent with prudent lending practices, the maintenance of adequate security for RUS's loans, and the objectives of the Rural Electrification Act (RE Act), it is the policy of RUS to provide effective and timely assistance to borrowers in obtaining financing from other lenders for electric facilities, equipment and systems by sharing RUS's lien on a borrower's assets, and in certain circumstances by subordinating RUS's lien on specific assets financed by other lenders. It is also the policy of RUS to provide effective and timely assistance to borrowers in promoting rural development by subordinating RUS's lien for financially sound rural development investments under the conditions set forth in \_ 1717.858.

\* \* \* \* \*

(f) Safety and performance standards. (1) In the case of distribution and transmission facilities financed by a loan that is lien accommodated or subordinated under this subpart, the borrower, through an authorized official, must provide RUS with a written agreement that it will:

(i) Comply with the National Electrical Safety Code, in accordance with 7 CFR 1724.41;

(ii) Use only materials for distribution and transmission facilities that have been determined by RUS to be acceptable, as required by 7 CFR 1728.70(a) and (b), or if such materials are not available, use materials approved by a registered professional engineer;

(iii) Comply with standards for construction established by RUS, such as those in 7 CFR 1728.97, except as otherwise provided in 7 CFR 1724.45;

(iv) Follow the RUS-approved Construction Work Plan (CWP) applicable to the loan and obtain prior written approval from RUS for any amendments to the CWP; and

(v) Within 90 days of completion of construction, provide to RUS a certification from a registered professional engineer that the facilities have been constructed pursuant to an RUS-approved CWP or RUS-approved CWP amendment and in conformance with RUS construction and materials standards, as required by paragraphs (f)(1)(i), (ii) and (iii) of this section. If all of the construction financed by the loan is covered by certifications provided to the private lender under paragraph (g)(1)(ii) of this section, a borrower may meet the requirements of this paragraph (f)(1)(v) by providing to RUS a copy of all such certifications.

(2) RUS "Buy American" requirements shall not apply.

\* \* \* \* \*

(g) \* \* \*

(1) \* \* \*

(ii) Obtain a certification from a registered professional engineer, for each year during which funds from the separate subaccount are utilized by the borrower, that all materials and equipment purchased and facilities constructed during the year from said funds comply with RUS safety and performance standards, as required by paragraph (f) of this section, and are included in an RUS-approved CWP or RUS-approved CWP amendment;

\* \* \* \* \*



(h) \* \* \*

(2) To the extent that provisions in a borrower's loan contract or mortgage in favor of RUS may be inconsistent with paragraphs (g)(1) and (h)(1) of this section, paragraphs (g)(1) and (h)(1) of this section are intended to constitute an approval or waiver under the terms of such instruments, and in any regulations implementing such instruments, with respect to facilities financed with debt obtained entirely from non-RUS sources without an RUS guarantee. Specifically, the following requirements customarily found in typical RUS loan instruments and in implementing regulations are deemed satisfied or not applicable:

(i) All provisions in Loan Contract Article II, entitled ``Advances and Disposition of Funds'';

(ii) Those provisions in Loan Contract Article III, entitled ``Construction," found in sections 1, 2 or 3 and respectively concerning limitations on the use of force account construction, requirements to use RUS approved construction contracts, or requirements to use competitive bidding;

(iii) Those provisions in Loan Contract Article IV, entitled ``Particular Covenants," found in sections 1, 2, 3, 9, 10, 14 or 16 and concerning the following matters: approval of depositories and engineers, plans and specifications, construction contracts, materials, and equipment and supplies contracts; delivery of contractor's and subcontractor's bonds; procedures for energizing the system; clauses for inclusion in contracts for federally assisted construction; or requirements for approval of evidence of the Borrower's right, title or interest in real property being acquired or improved by the Borrower; and

(iv) Those provisions in Mortgage Article II, entitled ``Particular Covenants of the Mortgagor," found in Section 10 thereof and concerning approval of extensions and improvements to the system, other than extensions or improvements related to serving any consumer having an anticipated demand in excess of 1,000 kilowatts, and provisions concerning approval of expenses for legal, engineering, supervisory, accounting or other similar expenses.

\* \* \* \* \*

(m) Waiver authority. Consistent with the RE Act and other applicable laws, any requirement or restriction imposed by this subpart, or subpart S of this part, on a borrower or private lender may be waived or reduced by the Administrator, if the Administrator determines that said action is in the Government's financial interest.

\* \* \* \* \*

\_1717.851 Definitions.

Terms used in this subpart have the meanings set forth in 7 CFR 1710.2. References to specific RUS forms and other RUS documents, and to specific sections or lines of such forms and documents, shall include the corresponding forms, documents, sections and lines in any subsequent revisions of these forms and documents. In addition to the terms defined in 7 CFR 1710.2, the following terms have the following meanings for the purposes of this subpart:

Borrower's financial and statistical report means RUS Form 7, Parts A through D, for distribution borrowers, and RUS Form 12a for power supply borrowers.

Calendar day means any day of the year, except a Federal holiday that falls on a work day.

Capital investment. For the purposes of § 1717.860, capital investment means an original investment in an asset that is intended for long-term continued use or possession and, for accounting purposes, is normally depreciated or depleted as it is used. For example, such assets may include land, facilities, equipment, buildings, mineral deposits, patents, trademarks, and franchises. Original investments do not include refinancings or refundings.

Current refunding means any refunding of debt where the proceeds of the new debt are applied to refund the old debt within 90 days of the issuance of the new debt.

Default under the RUS mortgage, loan contract, restructuring agreement, or any other agreement between the borrower and RUS means any event of default or any event which, with the giving of notice or lapse of time or both, would become an event of default.

Equity, less deferred expenses, means Line 33 of Part C of RUS Form 7 less assets properly recordable in Account 182.2, Unrecovered Plant and Regulatory Study Costs, and Account 182.3, Other Regulatory Assets.

Front-end costs means the reasonable cost of engineering, architectural, environmental and other studies and plans needed to support the construction of facilities and other investments eligible for a lien accommodation or subordination under this subpart.

Lien accommodation means the sharing of the Government's (RUS's) lien on property, usually all property, covered by the lien of the RUS mortgage.

Lien subordination means allowing another lender to take a first mortgage lien on certain property covered by the lien of the RUS mortgage, and the Government (RUS) taking a second lien on such property.

Natural gas distribution system means any system of community infrastructure whose primary function is the distribution of natural gas and whose services are available by design to all or a substantial portion of the members of the community.

Net utility plant means Part C, Line 5 of RUS Form 7 (distribution borrowers) or Section B, Line 5 of RUS Form 12a (power supply borrowers).

(TABLE START)

ODSC means Operating Debt Service Coverage calculated as:

@h1ODSC=  
@h1A+B+C@h2D

....

(TABLE END)

where:

A=Depreciation and Amortization Expense, which equals Part A, Line 12 of RUS Form 7;

B=Interest on Long-term Debt, which equals Part A, Line 15 of RUS Form 7, except that Interest on Long-term debt shall be increased by 1/3 of the amount, if any, by which the rentals of Restricted Property (Part M, Line 3 of RUS Form 7) exceeds 2 percent of Total Margins and Equities (Part C, Line 33 of RUS Form 7);

C=Patronage Capital & Operating Margins, which equals Part A, Line 20 of RUS Form 7; and

D=Debt Service Billed (RUS + other) which equals all interest and principal billed during the calendar year plus 1/3 of the amount, if any, by which the rentals of Restricted Property (Part M, Line 3 of RUS Form 7) exceeds 2 percent of Total Margins and Equities (Part C, Line 33 of RUS Form 7).

OTIER means Operating Times Interest Earned Ratio calculated

(TABLE START)as:

@h1OTIER =

@h1A+B@h2A

....

(TABLE END)

where:

A=Interest on Long-term Debt, which equals Part A, Line 15 of RUS Form 7, except that Interest on Long-term debt shall be increased by 1/3 of the amount, if any, by which the rentals of Restricted Property (Part M, Line 3 of RUS Form 7) exceeds 2 percent of Total Margins and Equities (Part C, Line 33 of RUS Form 7); and

B=Patronage Capital and Operating Margins, which equals Part A, Line 20 of RUS Form 7.

Power cost study means the study defined in 7 CFR 1710.303.

Solid waste disposal system means any system of community infrastructure whose primary function is the collection and/or disposal of solid waste and whose services are available by design to all or a substantial portion of the members of the community.

Telecommunication and other electronic communication system means any system of community infrastructure whose primary function is the provision of telecommunication or other electronic communication services and whose services are available by design to all or a substantial portion of the members of the community.

Total assets, less deferred expenses means Line 26 of Part C of RUS Form 7 less assets properly recordable in Account 182.2, Unrecovered Plant and Regulatory Study Costs, and Account 182.3, Other Regulatory Assets.

Total outstanding long-term debt means Part C, Line 38 of RUS Form 7.

Transaction costs means the reasonable cost of legal advice, accounting fees, filing fees, recording fees, call premiums and prepayment penalties, financing costs (including, for example, underwriting commissions, letter of credit fees and bond insurance), and printing associated with borrower financing.

Water and waste disposal system means any system of community infrastructure whose primary function is the supplying of water and/or the collection and treatment of waste water and whose services are available by design to all or a substantial portion of the members of the community.

Weighted average life of the loan means the average life of the loan based on the proportion of original loan principal paid during each year of the loan. It shall be determined by calculating the sum of all loan principal payments, expressed as a fraction of the original loan principal amount, times the number of years and fractions of years elapsed at the time of each payment since issuance of the loan. For example, given a \$5 million loan, with a maturity of 5 years and equal principal payments of \$1 million due on the anniversary date of the loan, the weighted average life would be:  $(.2)(1 \text{ year}) + (.2)(2 \text{ years}) + (.2)(3 \text{ years}) + (.2)(4 \text{ years}) + (.2)(5 \text{ years}) = .2 \text{ years} + .4 \text{ years} + .6 \text{ years} + .8 \text{ years} + 1.0 \text{ years} = 3.0 \text{ years}$ . If instead the loan had a balloon payment of \$5 million at the end of 5 years, the weighted average life would be:  $(\$5 \text{ million}/\$5 \text{ million})(5 \text{ years}) = 5 \text{ years}$ .

[58 FR 53843, Oct. 19, 1993, as amended at 59 FR 3986, Jan. 28, 1994; 60 FR 67409, Dec. 29, 1995]

Effective Date Note: At 60 FR 67409, Dec. 29, 1995, \_1717.851 was amended by removing the definitions for ``ODSC" and ``OTIER" and by adding definitions for ``Natural gas distribution system", ``Solid waste disposal system", ``Telecommunication and other electronic communication system", and ``Waste and waste disposal system", effective January 29, 1996.

\_1717.852 Financing purposes.

(a) Purposes eligible. The following financing purposes, except as excluded in paragraph (b) of this section, are eligible for a lien accommodation from RUS, or in certain circumstances a subordination of RUS's lien on specific assets, provided that all applicable provisions of this subpart are met:

(1) The acquisition, construction, improvement, modification, and replacement (less salvage value) of systems, equipment, and facilities, including real property, used to supply electric and/or steam power to:

(i) RE Act beneficiaries; and/or

(ii) End-user customers of the borrower who are not beneficiaries of the RE Act. Such systems, equipment, and facilities include those listed in 7 CFR 1710.251(c) and 1710.252(c), as well as others that are determined by RUS to be an integral component of the borrower's system of supplying electric and/or steam power to consumers, such as, for example, coal mines, coal handling facilities, railroads and other transportation systems that supply fuel for generation, programs of demand side management and energy conservation, and on-grid and off-grid renewable energy systems;

(2) The purchase, rehabilitation and integration of existing distribution facilities, equipment and systems, and associated service territory;

(3) The following types of community infrastructure substantially located within the electric service territory of the borrower: water and waste disposal systems, solid waste disposal systems, telecommunication and other electronic communications systems, and natural gas distribution systems;

(4) Front-end costs, when and as the borrower has obtained a binding commitment from the non-RUS lender for the financing required to complete the procurement or construction of the facilities;

(5) Transaction costs included as part of the cost of financing assets or refinancing existing debt, provided, however, that the amount of transaction costs eligible for lien accommodation or subordination normally shall not exceed 5 percent of the principal amount of financing or refinancing provided, net of all transaction costs;

(6) The refinancing of existing debt secured under the mortgage;

(7) Interest during construction of generation and transmission facilities if approved by RUS, case by case, depending on the financial condition of the borrower, the terms of the financing, the nature of the construction, the treatment of these costs by regulatory authorities having jurisdiction, and such other factors deemed appropriate by RUS; and

(8) Lien subordinations for certain rural development investments, as provided in \_1717.858.

(b) Purposes ineligible. The following financing purposes are not eligible for a lien accommodation or subordination from RUS:

(1) Working capital, including operating funds, unless in the judgment of RUS the working capital is required to ensure the repayment of RUS loans and/or other loans secured under the mortgage;

(2) Facilities, equipment, appliances, or wiring located inside the premises of the consumer, except:

(i) Certain load-management equipment (see 7 CFR 1710.251(c));

(ii) Renewable energy systems and RUS-approved programs of demand side management and energy conservation; and

(iii) As determined by RUS on a case by case basis, facilities included as part of certain cogeneration projects to furnish electric and/or steam power to end-user customers of the borrower;

(3) Investments in a lender required of the borrower as a condition for obtaining financing; and

(4) Debt incurred by a distribution or power supply borrower to finance facilities, equipment or other assets that are not part of the borrower's electric system or one of the four community infrastructure systems cited in paragraph (a)(3) of this section, except for certain rural development investments eligible for a lien subordination under 1717.858.

(c) Lien subordination for electric utility investments. RUS will consider subordinating its lien on specific electric utility assets financed by the lender, when the assets can be split off without materially reducing the stability, safety, reliability, operational efficiency, or liquidation value of the rest of the system.

[58 FR 53843, Oct. 19, 1993, as amended at 59 FR 3986, Jan. 28, 1994; 60 FR 67409, Dec. 29, 1995]

Effective Date Note: At 60 FR 67409, Dec. 29, 1995, in 1717.852, paragraphs (a)(1) introductory text and (a)(1)(ii) were amended by adding the words "and/or steam" before the word "power", paragraphs (a)(3) through (a)(7) and paragraph (b) were revised, and paragraph (a)(8) was added, effective January 29, 1996. For the convenience of the reader, the superseded text is set forth below.

1717.852 Financing purposes.

(a) \* \* \*

(3) Front-end costs, when and as the borrower has obtained a binding commitment from the non-RUS lender for the financing required to complete the procurement or construction of the facilities;

(4) Transaction costs included as part of the cost of financing assets or refinancing existing debt, provided, however, that the amount of transaction costs eligible for lien accommodation or subordination normally shall not exceed 3.5 percent of the principal amount of financing or refinancing provided, net of all transaction costs;

(5) The refinancing of existing debt secured under the mortgage;

(6) Interest during construction of generation and transmission facilities if approved by RUS, case by case, depending on the financial condition of the borrower, the terms of the financing, the nature of the construction, the treatment of these costs by regulatory authorities having jurisdiction, and such other factors deemed appropriate by RUS; and

(7) Lien subordinations for certain rural development investments, as provided in \_1717.858.

(b) Purposes ineligible. (1) Except as provided in paragraph (b)(2) of this section, the following financing purposes are not eligible for a lien accommodation or subordination from RUS:

(i) Working capital, including operating funds, unless in RUS's judgment the working capital is required to ensure the repayment of RUS loans and/or other loans secured under the mortgage;

(ii) Electric facilities, equipment, appliances, or wiring located inside the premises of the consumer, except:

(A) Renewable energy systems and RUS-approved programs of demand side management and energy conservation; and

(B) As determined by RUS on a case by case basis, electric facilities included as part of certain cogeneration projects to furnish electric power to end-user customers of the borrower;

(iii) Investments in a lender required of the borrower as a condition for obtaining financing; and

(iv) Debt incurred by a distribution or power supply borrower for investment in projects other than the borrower's primary business of supplying electric power to its members and consumers, except for certain rural development investments eligible for a lien subordination under \_1717.858.

(2) RUS may, at its sole discretion, grant an exception to any of the restrictions on accommodating or subordinating its lien on a borrower's property set forth in paragraphs (a) and (b)(1) of this section, if RUS determines that the accommodation or subordination will enhance the repayment and/or security of loans made by RUS to the borrower, or is otherwise in the financial interest of the Government.

\* \* \* \* \*

\_1717.853 Loan terms and conditions.

(a) Terms and conditions. A loan, bond or other financing instrument, for which a lien accommodation or subordination is requested from RUS, must comply with the following terms and conditions:



(1) The maturity of the loan or bond used to finance facilities or other capital assets must not exceed the weighted average of the expected remaining useful lives of the assets being financed;

(2) The loan or bond must have a maturity of not less than 5 years, except for loans or bonds used to refinance debt that has a remaining maturity of less than 5 years;

(3) The principal of the loan or bond must be amortized at a rate that will yield a weighted average life not greater than the weighted average life that would result from level payments of principal and interest; and

(4) The loan, or any portion of the loan, may bear either a variable (set annually or more frequently) or a fixed interest rate.

(b) RUS approval. Loan terms and conditions and the loan agreement between the borrower and the lender are subject to RUS approval. However, RUS will usually waive its right of approval for distribution borrowers that meet the conditions for advance approval of a lien accommodation or subordination set forth in 1717.854. RUS may also waive its right of approval in other cases. RUS's decision to waive its right of approval will depend on the adequacy of security for RUS's loans, the current and projected financial strength of the borrower and its ability to meet its financial obligations, RUS's familiarity with the lender and its lending practices, whether the transaction is ordinary or unusual, and the uncertainty and credit risks involved in the transaction.

1717.854 Advance approval -- 100 percent private financing of distribution, subtransmission and headquarters facilities, and certain other community infrastructure.

(a) Policy. Requests for a lien accommodation or subordination from distribution borrowers for 100 percent private financing of distribution, subtransmission and headquarters facilities, and for community infrastructure listed in 1717.852(a)(3), qualify for advance approval by RUS if they meet the conditions of this section and all other applicable provisions of this subpart. Advance approval means RUS will approve these requests once RUS is satisfied that the conditions of this section and all other applicable provisions of this subpart have been met.

(b) Eligible purposes. Lien accommodations or subordinations for the financing of distribution, subtransmission, and headquarters facilities and community infrastructure listed in 1717.852(a)(3) are eligible for advance approval, except those that involve the purchase of existing facilities and associated service territory.

(c) Qualification criteria. To qualify for advance approval, the following requirements, as well as all other applicable requirements of this subpart, must be met:

(1) The borrower has achieved a TIER of at least 1.5 and a DSC of at least 1.25 for each of 2 calendar years immediately preceding, or any 2 consecutive 12 month periods ending within 180 days immediately preceding, the issuance of the debt;

(2) The ratio of the borrower's equity, less deferred expenses, to total assets, less deferred expenses, is not less than 27 percent, after adding the principal amount of the proposed loan to the total assets of the borrower;

(3) The borrower's net utility plant as a ratio to its total outstanding long-term debt is not less than 1.0, after adding the principal amount of the proposed loan to the existing outstanding long-term debt of the borrower;

(4) There are no actions or proceedings against the borrower, pending or overtly threatened in writing before any court, governmental agency, or arbitrator that would materially adversely affect the borrower's operations and/or financial condition;

(5) The borrower is current on all debt payments and all other financial obligations, and is not in default under the RUS mortgage, the RUS loan contract, the borrower's wholesale power contract, any debt restructuring agreement, or any other agreement with RUS;

(6) The borrower has:

(i) Submitted the annual auditor's report, report on compliance, report on internal controls, and management letter in accordance with 7 CFR part 1773;

(ii) Received an unqualified opinion in the most recent auditor's report;

(iii) Resolved all material findings and recommendations made in the most recent Loan Fund and Accounting Review;

(iv) Resolved all material findings and recommendations made in the most recent financial statement audit, including those material findings and recommendations made in the report on internal control, report on compliance, and management letter;

(v) Resolved all outstanding material accounting issues with RUS; and

(vi) Resolved any significant irregularities to RUS's satisfaction; and

(7) If the borrower has a power supply contract with a power supply borrower, the power supply borrower is current on all debt payments and all other financial obligations, and is not in default under the RUS mortgage, the loan contract, any debt restructuring agreement, or any other agreement with RUS.

(d) Right of normal review reserved. RUS reserves the right to review any request for lien accommodation or subordination under its normal review process rather than under advance approval procedures if RUS, in its sole discretion, determines there is reasonable doubt as to whether the requirements of paragraphs (b) and (c) of this section have been or will be met, or whether the borrower will be able to meet all of its present and future financial obligations.

[58 FR 53843, Oct. 19, 1993, as amended at 60 FR 67410, Dec. 29, 1995]

Effective Date Note: At 60 FR 67410, Dec. 29, 1995, \_1717.854 was amended by revising the section heading and paragraphs (a), (b), (c)(1) and (c)(2), removing paragraph (c)(7), redesignating paragraphs (c)(3) through (c)(6) as paragraphs (c)(4) through (c)(7), adding a new paragraph (c)(3), adding ``and" at the end of newly designated paragraph (c)(6)(vi) and removing ``;and" at the end of newly designated paragraph (c)(7) and adding a period in its place, effective January 29, 1996. For the convenience of the reader, the superseded text is set forth below.

\_1717.854 Advance approval -- 100 percent private financing of distribution, subtransmission, and headquarters facilities.

\* \* \* \* \*

(a) Policy. All requests for a lien accommodation or subordination from distribution borrowers for 100 percent private financing of distribution, subtransmission, and headquarters facilities that meet the conditions of this section and all other applicable provisions of this subpart, qualify for advance approval by RUS. Advance approval means RUS will approve these requests once RUS is satisfied that the conditions of this section and all other applicable provisions of this subpart have been met.

(b) Eligible purposes. Lien accommodations or subordinations for the financing of distribution, subtransmission, and headquarters facilities, except the purchase of existing facilities and associated service territory, are eligible for advance approval.

(c) \* \* \*

(1) The borrower meets at least one of the following two criteria:

(i) The ratio of the borrower's equity, less deferred expenses, to total assets, less deferred expenses, is at least 40 percent at the time of the lien accommodation request, and is not less than 37 percent after taking into account the effect of the proposed loan, and the borrower has achieved a TIER of at least 1.5 and a DSC of at least 1.25 for each of the 2 calendar years immediately preceding, or any 2 consecutive 12 month periods ending within 180 days immediately preceding, the issuance of the debt; or

(ii) The ratio of the borrower's equity, less deferred expenses, to total assets, less deferred expenses, is at least 35 percent at the time of the lien accommodation request, and is not less than 32 percent after taking into account the effect of the proposed loan, and the borrower has achieved an operating TIER (OTIER) of at least 1.5 and an operating DSC (ODSC) of at least 1.25 for each of the 2 calendar years immediately preceding, or any 2 consecutive 12 month periods ending within 180 days immediately preceding, the issuance of the debt;

(2) The borrower's net utility plant as a ratio to total outstanding long-term debt, after taking into consideration the effect of the proposed loan and associated plant additions, is not less than 1.1;

\* \* \* \* \*

(7) The amount of outstanding debt having an effective variable interest rate (set annually or more frequently), taking into consideration the debt covered by the application for a lien accommodation or subordination, does not exceed 15 percent of all outstanding debt of the borrower.

\* \* \* \* \*

1717.855 Application contents: Advance approval -- 100 percent private financing of distribution, subtransmission and headquarters facilities, and certain other community infrastructure.

Applications for a lien accommodation or subordination that meet the requirements of 1717.854 must include the following information and documents:

(a) A certification by an authorized official of the borrower that the borrower and, as applicable, the loan are in compliance with all conditions set forth in 1717.854(c) and all applicable provisions of 1717.852 and 1717.853;

(b) A resolution of the borrower's board of directors requesting the lien accommodation or subordination and including the amount and maturity of the proposed loan, a general description of the facilities or other purposes to be financed, the name and address of the lender, and an attached term sheet summarizing the terms and conditions of the proposed loan;

(c) The borrower's financial and statistical report, the data in which shall not be more than 60 days old when the complete application is received by RUS;

(d) Draft copy of any new mortgage or mortgage amendment (supplement) required by RUS or the lender, unless RUS has notified the borrower that it wishes to prepare these documents itself;

(e) A copy of the loan agreement, loan note, bond or other financing instrument, unless RUS has notified the borrower that these documents need not be submitted;

(f) Borrower's environmental report and/or other environmental documentation, if required by 7 CFR part 1794;

(g) RUS Form 740c, Cost Estimates and Loan Budget for Electric Borrowers, and RUS Form 740g, Application for Headquarters Buildings;

(h) A CWP or CWP amendment covering the proposed project, in accordance with 7 CFR part 1710, subpart F, and subject to RUS approval, and a resolution of the borrower's board of directors adopting the CWP;

(i) The certification by the project architect for any buildings to be constructed, as required by 1717.850(i);

(j) A certification by an authorized official of the borrower that flood hazard insurance will be obtained for the full value of any buildings, or other facilities susceptible to damage if flooded, that will be located in a flood hazard area;

(k) Form AD-1047, Certification Regarding Debarment, Suspension, and Other Responsibility Matters -- Primary Covered Transactions, as required by 7 CFR part 3017;

(l) A report by the borrower stating whether or not it is delinquent on any Federal debt, and if delinquent, the amount and age of the delinquency and the reasons therefor; and a certification, if not previously provided, that the borrower has been informed of the Government's collection options;

(m) The written acknowledgement from a registered engineer or architect regarding compliance with seismic provisions of applicable model codes for any buildings to be constructed, as required by 7 CFR 1792.104; and

(n) Other information that RUS may require to determine whether all of the applicable provisions of this subpart have been met.

[58 FR 53843, Oct. 19, 1993, as amended at 60 FR 67410, Dec. 29, 1995]

Effective Date Note: At 60 FR 67410, Dec. 29, 1995, 1717.855 was amended by revising the section heading and paragraph (a), effective January 29, 1996. For the convenience of the reader, the superseded text is set forth below.

1717.855 Application contents: Advance approval -- 100 percent private financing of distribution, subtransmission, and headquarters facilities.

\* \* \* \* \*

(a) The agreement regarding safety and performance standards and adherence to an RUS-approved CWP required by \_1717.850(f), combined with a certification by an authorized official of the borrower that the borrower and, as applicable, the loan are in compliance with all conditions set forth in \_1717.854(c) and all applicable provisions of \_\_1717.852 and 1717.853;

\* \* \* \* \*

\_1717.856 Application contents: Normal review -- 100 percent private financing.

Applications for a lien accommodation or subordination for 100 percent private financing for eligible purposes that do not meet the requirements of \_1717.854 must include the following information and documents:

(a) A certification by an authorized official of the borrower that:

(1) The borrower and, as applicable, the loan are in compliance with all applicable provisions of \_\_1717.852 and 1717.853; and

(2) There are no actions or proceedings against the borrower, pending or overtly threatened in writing before any court, governmental agency, or arbitrator that would materially adversely affect the borrower's operations and/or financial condition. If this certification cannot be made, the application must include:

(i) An opinion of borrower's counsel regarding any actions or proceedings against the borrower, pending or overtly threatened in writing before any court, governmental agency, or arbitrator that would materially adversely affect the borrower's operations and/or financial condition. The opinion shall address the merits of the claims asserted in the actions or proceedings, and include, if appropriate, an estimate of the amount or range of any potential loss; and

(ii) A certification by an authorized official of the borrower as to the amount of any insurance coverage applicable to any loss that may result from the actions and proceedings addressed in the opinion of borrower's counsel;

(b) The information and documents set forth in \_1717.855 (b) through (n);

(c) A long-range financial forecast providing financial projections for at least 10 years, which demonstrates that the borrower's system is economically viable and that the proposed loan is financially feasible, and a resolution of the borrower's board of directors adopting the long-range financial forecast. The financial forecast must comply with the requirements of 7 CFR part 1710 subpart G. RUS may, in its sole

discretion, waive the requirement of this paragraph that a long range financial forecast be provided, if:

(1) The borrower is current on all of its financial obligations and is in compliance with all requirements of its mortgage and loan agreement with RUS;

(2) In RUS's judgment, granting a lien accommodation or subordination for the proposed loan will not adversely affect the repayment and security of outstanding debt of the borrower owed to or guaranteed by RUS;

(3) The borrower has achieved the TIER and DSC and any other coverage ratios required by its mortgage or loan contract in each of the two most recent calendar years; and

(4) The amount of the proposed loan does not exceed the lesser of \$10 million or 10 percent of the borrower's current net utility plant;

(d) [Reserved]

(e) As applicable to the type of facilities being financed, a CWP, related engineering and cost studies, a power cost study, and a resolution of the borrower's board of directors adopting these documents. These documents must meet the requirements of 7 CFR part 1710, subpart F and, as applicable, subpart G;

(f) Unless the requirement has been waived in writing by RUS, a current, RUS-approved power requirements study, which must meet the requirements of 7 CFR part 1710, subpart E, to the same extent as if the loan were being made by RUS, and a resolution of the borrower's board of directors adopting the study; and

(g) A discussion of the borrower's compliance with RUS requirements on accounting, financial reporting, record keeping, and irregularities (see 1717.854(c)(5)). RUS will review the case and determine the effect of any noncompliance on the feasibility and security of RUS's loans, and whether the requested lien accommodation or subordination can be approved.

[58 FR 53843, Oct. 19, 1993, as amended at 60 FR 3735, Jan. 19, 1995; 60 FR 67410, Dec. 29, 1995]

Effective Date Note: At 60 FR 67410, Dec. 29, 1995, 1717.856 was amended by revising the section heading, the introductory text, the introductory text of paragraph (a), and paragraph (c)(3), effective January 29, 1996. For the convenience of the reader, the superseded text is set forth below.

1717.856 Application contents: Normal review -- 100 percent private financing of distribution, transmission and/or generation facilities.

Applications for a lien accommodation or subordination for 100 percent financing of distribution, transmission, and/or generation facilities (including other eligible electric utility purposes) that do not meet the requirements of \_1717.854, must include the following information and documents:

(a) The certification regarding safety and performance standards required by \_1717.850(f) (if the financing is for distribution or transmission facilities), combined with a certification by an authorized official of the borrower that:

\* \* \* \* \*

(c) \* \* \*

(3) The borrower has achieved the TIER and DSC levels required by its mortgage in each of the two most recent calendar years; and

\* \* \* \* \*

\_1717.857 Refinancing of existing secured debt -- distribution and power supply borrowers.

(a) Advance approval. All applications for a lien accommodation or subordination for the refinancing of existing secured debt that meet the qualification criteria of this paragraph, except applications from borrowers in default under their mortgage or loan contract with RUS, are eligible for advance approval. Such lien accommodations and subordinations are deemed to be in the Government's interest, and RUS will approve them once RUS is satisfied that the requirements of this paragraph and paragraph (c) of this section have been met. The qualification criteria are as follows:

(1) The refinancing is a current refunding and does not involve interest rate swaps, forward delivery contracts, or similar features;

(2) The principal amount of the refinancing loan does not exceed the sum of the outstanding principal amount of the debt being refinanced plus the amount of transactions costs included in the refinancing loan that are eligible for lien accommodation or subordination under \_1717.852(a)(4);

(3) The weighted average life of the refinancing loan is not greater than the weighted average remaining life of the loan being refinanced; and

(4) The present value of the cost of the refinancing loan, including all transaction costs and any required investments in the lender, is less than the present value of the cost of the loan being refinanced, as determined by a method acceptable to RUS. The discount rate used in the present value analysis shall be equal to either:



(i) The current rate on Treasury securities having a maturity equal to the weighted average life of the refunding loan, plus one-eighth percent, or

(ii) A rate approved by RUS based on documentation provided by the borrower as to its marginal long-term borrowing cost.

(5) The amount of outstanding debt having an effective variable interest rate (set annually or more frequently), taking into consideration the debt covered by the application for a lien accommodation or subordination, does not exceed 15 percent of all outstanding debt of the borrower.

(b) Other applications. Applications for a lien accommodation or subordination for refinancing that do not meet the requirements of paragraph (a) of this section will be reviewed by RUS under normal review procedures for these applications. In the case of either advance approval or normal review, a lien subordination would be authorized only if the lien of the mortgage was subordinated with respect to the assets securing the loan being refinanced.

(c) Application contents -- advance approval of refinancing. Applications for a lien accommodation or subordination for refinancing of existing secured debt that meet the qualification criteria for advance approval set forth in paragraph (a) of this section, must include the following information and documents:

(1) A certification by an authorized official of the borrower that the application meets the requirements of paragraph (a) of this section and all applicable provisions of \_\_\_1717.852 and 1717.853;

(2) Documentation and analysis demonstrating that the application meets the qualification criteria set forth in paragraph (a) of this section;

(3) A resolution of the borrower's board of directors requesting the lien accommodation or subordination and including the amount and maturity of the proposed loan, a general description of the debt to be refinanced, the name and address of the lender, and an attached term sheet summarizing the terms and conditions of the proposed loan;

(4) The borrower's financial and statistical report, the data in which shall not be more than 60 days old when the complete application is received by RUS;

(5) Draft copy of any new mortgage or mortgage amendment (supplement) required by RUS or the lender, unless RUS has notified the borrower that it wishes to prepare these documents itself;

(6) A copy of the loan agreement, loan note, bond or other financing instrument, unless RUS has notified the borrower that these documents need not be submitted;

(7) Form AD-1047, Certification Regarding Debarment, Suspension, and Other Responsibility Matters -- Primary Covered Transactions, as required by 7 CFR part 3017;

(8) A report by the borrower stating whether or not it is delinquent on any Federal debt, and if delinquent, the amount and age of the delinquency and the reasons therefor; and a certification, if not previously provided, that the borrower has been informed of the Government's collection options; and

(9) Other information, documents and opinions that RUS may require to determine whether all of the applicable provisions of this subpart have been met.

(d) Application contents -- normal review of refinancing. Applications for a lien accommodation or subordination for refinancing of existing secured debt that do not meet the requirements for advance approval set forth in paragraph (a) of this section, must include the following information and documents:

(1) The information and documents set forth in paragraphs (c)(3) through (9) of this section;

(2) A complete description of the refinancing loan and the outstanding debt to be refinanced;

(3) An analysis comparing the refinancing loan with the loan being refinanced as to the weighted average life and the net present value of the costs of the two loans; and

(4) If the present value of the cost of the refinancing loan is greater than the present value of the cost of the debt being refinanced, financial forecasts for at least 5 years comparing the borrower's debt service and other costs, revenues, margins, cash flows, TIER, and DSC, with and without the proposed refinancing.

(e) Application process and timeframes. The application process and timeframes for RUS review and action for refinancings are set forth in 1717.859(d).

(f) Prepayments of concurrent RUS insured loans. If the loan being refinanced was made concurrently as supplemental financing required by RUS in connection with an RUS insured loan, the refinancing will not be considered a prepayment under the RUS mortgage, and no proportional prepayment of the concurrent RUS insured loan will be required, provided that the principal amount of the refinancing loan is not less than the amount of loan principal being refinanced, and the weighted average life of the refinancing loan is materially equal to the weighted average remaining life of the loan being refinanced. The refinancing loan shall be considered a concurrent loan.

[58 FR 53843, Oct. 19, 1993, as amended at 60 FR 67410, Dec. 29, 1995]

Effective Date Note: At 60 FR 67410, Dec. 29, 1995, \_1717.857 was amended by removing paragraph (a)(5), by adding ``and" at the end of paragraph (a)(3), and by removing ``;and" at the end of paragraph (a)(4)(ii), effective January 29, 1996.

\_1717.858 Lien subordination for rural development investments.

(a) Policy. RUS encourages borrowers to consider investing in financially sound projects that are likely to have a positive effect on economic development and employment in rural areas. In addition to the guidance set forth in \_1717.651, RUS recommends that such investments be made through a subsidiary of the borrower in order to clearly separate the financial risks and the revenues and costs of the rural development enterprise from those of the borrower's electric utility business. This should reduce credit risks to the borrower's primary business, and minimize the possibility of undisclosed cross subsidization of the rural development enterprise by electric rate payers.

(b) Lien subordination. RUS will consider subordinating or releasing its lien on the stock held by a borrower in a subsidiary whose primary business directly contributes to or supports economic development and employment in rural areas, as defined in section 13 of the RE Act, when requested by a lender to the subsidiary, other than the borrower. To be eligible for said lien subordination or release:

(1) The borrower must be current on all of its financial obligations and be in compliance with all provisions of its mortgage and loan agreement with RUS; and

(2) In the judgment of RUS, the borrower must be able to repay all of its outstanding debt, and the security for all outstanding loans made to the borrower by RUS, including loans guaranteed by RUS, must be adequate, after taking into account the proposed subordination or release of lien.

(c) Application contents. Applications for a lien subordination or release of lien for rural development investments must include the following information and documents:

(1) A resolution of the borrower's board of directors requesting the lien subordination or release of lien;

(2) A certification by an authorized official of the borrower that the borrower is current on all of its financial obligations and is in compliance with all provisions of its mortgage and loan agreement with RUS;

(3) A description of the facilities or other purposes to be financed and the projected effects on economic development and employment in rural areas;

(4) The borrower's financial and statistical report, the data in which shall not be more than 60 days old when the complete application is received by RUS;

(5) If requested by RUS, a long-range financial forecast providing financial projections for at least 10 years, in form and substance satisfactory to RUS, which demonstrates that the borrower's system is economically viable and that the borrower will be able to repay all of its outstanding debt and meet all other financial obligations;

(6) A discussion of the borrower's compliance with RUS requirements on accounting, financial reporting, record keeping, and irregularities (see 1717.854(c)(5)). RUS will review the case and determine the effect of any noncompliance on the feasibility and security of RUS's loans, and whether the requested lien subordination or release of lien can be approved;

(7) If any buildings are to be constructed with the proceeds of the loan to be made to the subsidiary:

(i) A certification by the project architect that the buildings will be designed and constructed in compliance with Section 504 of the Rehabilitation Act of 1973 as amended (29 U.S.C. 794), as applicable under that Act, and that the facilities will be readily accessible to and usable by persons with handicaps in accordance with the Uniform Federal Accessibility Standards; and

(ii) A written acknowledgement from a registered engineer or architect regarding compliance with seismic provisions of applicable model codes, as required by 7 CFR 1792.104;

(8) A certification by an authorized official of the borrower that flood hazard insurance will be obtained for the full value of any buildings, or other facilities susceptible to damage if flooded, that will be located in a flood hazard area;

(9) Form AD-1047, Certification Regarding Debarment, Suspension, and Other Responsibility Matters -- Primary Covered Transactions, as required by 7 CFR part 3017;

(10) A report by the borrower stating whether or not it is delinquent on any Federal debt, and if delinquent, the amount and age of the delinquency and the reasons therefor; and a certification, if not previously provided, that the borrower has been informed of the Government's collection options; and

(11) Other information that RUS may require to determine whether all of the applicable provisions of this subpart have been met.

\_1717.859 Application process and timeframes.

(a) General. (1) Borrowers are responsible for ensuring that their applications for a lien accommodation or subordination are complete and sound as to substance and form before they are submitted to RUS. RUS will not accept any application that, on its face, is incomplete or inadequate as to the substantive information required by this subpart. RUS will notify borrowers in writing when their applications are complete and in form and substance satisfactory to RUS. A copy of all notifications of borrowers cited in this section will also be sent to the private lender.

(2) It is recommended that borrowers consult with RUS staff before submitting their applications to determine whether they will likely qualify for advance approval or normal review, and to obtain answers to any questions about the information and documents required for the application.

(3) A borrower shall, after submitting an application, promptly notify RUS of any changes that materially affect the information contained in its application.

(4) After submitting an application and having been notified by RUS of additional information and documents and other changes needed to complete the application, if the required information and documents are not supplied to RUS within 30 calendar days of the borrower's receipt of the notice, RUS may return the application to the borrower. The borrower may resubmit the application when the required additional information and documents are available.

(5) Timeframes. The timeframes for review of applications set forth in this section are based on the following conditions:

(i) The types of lien accommodations or subordinations requested are of the "standard" types that RUS has approved previously, i.e., the so-called Type I, II and III lien accommodations. Future revisions of the RUS mortgage may result in other "standard" types of lien accommodations and lien subordinations acceptable to RUS. Requests for lien accommodations or subordinations that are substantially different than the "standard" types previously approved by RUS may require additional time for review and action;

(ii) The requested lien accommodation or subordination does not require the preparation of an environmental assessment or an Environmental Impact Statement. Preparation of these documents often will require additional time beyond the timeframes cited in this section; and

(iii) The timeframes set forth in this section, except for paragraph (b)(4) of this section, which deals only with approval of a new mortgage or mortgage amendment,

include RUS review and/or approval of a loan contract, if required as part of the application, and required supporting documents, such as a CWP.

(b) Advance approval -- 100 percent private financing of distribution, subtransmission, and headquarters facilities. (1) Applications that qualify under 1717.854 for advance approval of a lien accommodation or subordination for 100 percent private financing of distribution, subtransmission, and headquarters facilities are submitted to the general field representative (GFR). The GFR will work with the borrower to ensure that all components of the application are assembled. Once the application is satisfactory to the GFR, it will be sent promptly to the Washington office for further review and action. If a new mortgage or mortgage amendment is required, a draft of these documents must be included in the application, unless the borrower has been notified that RUS wishes to prepare the documents itself.

(2) If no additional or amended information is needed for RUS to complete its review of the application once it is received in the Washington Office, RUS will, within 45 calendar days of receiving the application in the Washington Office, either:

(i) Approve the lien accommodation or subordination if the borrower has demonstrated satisfactorily to RUS that all requirements of this subpart applicable to advance approval have been met, and send written notice to the borrower. RUS's approval, in this case and all other cases, will be conditioned upon execution and delivery by the borrower of a satisfactory security instrument, if required, and such additional information, documents, and opinions of counsel as RUS may require;

(ii) If all requirements have not been met, so notify the borrower in writing. The application will be returned to the borrower unless the borrower requests that it be reconsidered under the requirements and procedures for normal review set forth in paragraph (c) of this section and in 1717.856; or

(iii) Send written notice to the borrower explaining why a decision cannot be made at that time and giving the estimated date when a decision is expected.

(3) If additional or amended information is needed after the application is received in the Washington Office, RUS will so notify the borrower in writing within 15 calendar days of receiving the application in the Washington Office. If RUS subsequently becomes aware of other deficiencies in the application, additional written notice will be sent to the borrower. Within 30 calendar days of receiving all of the information required by RUS to complete its review, RUS will act on the application as described in paragraphs (b)(2)(i) through (b)(2)(iii) of this section.

(4) If a new mortgage or mortgage amendment is required, within 30 days of receiving such documents satisfactory to RUS, including required execution counterparts, RUS will execute the documents and send them to the borrower, along with instructions pertaining to recording of the mortgage, an opinion of borrower's

counsel, and other matters. RUS will promptly notify the borrower upon receiving satisfactory evidence that the borrower has complied with said instructions.

(c) Normal review -- 100 percent private financing of distribution, transmission, and/or generation facilities -- (1) Distribution borrowers. (i) Applications from distribution borrowers for a lien accommodation or subordination for 100 percent private financing of distribution, transmission, and/or generation facilities (including other eligible electric utility purposes) that do not meet the criteria for advance approval, are also submitted to the GFR. Procedures at this stage are the same as in paragraph (b)(1) of this section.

(ii) If no additional or amended information is needed for RUS to complete its review of the application once it is received in the Washington office, RUS will, within 90 calendar days of receiving the application in the Washington office, send written notice to the borrower either approving the request, disapproving the request, or explaining why a decision cannot be made at that time and giving the estimated date when a decision is expected.

(iii) If additional or amended information is needed after the application is received in the Washington Office, RUS will so notify the borrower in writing within 15 calendar days of receiving the application in the Washington Office. If RUS subsequently becomes aware of other deficiencies in the application, additional written notice will be sent to the borrower. Within 90 calendar days of receiving all of the information required by RUS to complete its review, RUS will act on the application as described in paragraph (c)(1)(ii) of this section.

(iv) If a new mortgage or mortgage amendment is required, the procedures and timeframes of paragraph (b)(4) of this section will apply.

(2) Power supply borrowers. (i) Applications from power supply borrowers for a lien accommodation or subordination for 100 percent private financing of distribution, transmission, and/or generation facilities, and other eligible electric utility purposes, are submitted to the RUS Power Supply Division, or its successor, in Washington, DC.

(ii) Within 30 calendar days of receiving the borrower's application containing the information and documents required by \_1717.856, RUS will send written notice to the borrower of any deficiencies in its application as to completeness and acceptable form and substance. Additional written notices may be sent to the borrower if RUS subsequently becomes aware of other deficiencies in the borrower's application.

(iii) Within 90 calendar days of receiving all of the information required by RUS to complete its review, RUS will act on the application as described in paragraph (c)(1)(ii) of this section.

(iv) If a new mortgage or mortgage amendment is required, these documents will be reviewed and executed pursuant to the procedures and timeframes of paragraph (b)(4) of this section.

(d) Refinancing of existing debt. All requests for a lien accommodation or subordination for refinancing are sent directly to the Washington office.

(1) Advance approval. (i) Within 15 calendar days of receiving the borrower's application containing the information and documents required by \_1717.857(c), RUS will send written notice to the borrower of any deficiencies in its application as to completeness and acceptable form and substance. Additional written notices may be sent to the borrower if RUS subsequently becomes aware of other deficiencies in the borrower's application.

(ii) Within 15 calendar days of receiving all of the required information and documents, in form and substance satisfactory to RUS, RUS will either:

(A) Approve the lien accommodation or subordination if the borrower has demonstrated satisfactorily to RUS that all requirements of \_1717.857(a) and (c) have been met, and send written notice to the borrower;

(B) If all requirements have not been met, so notify the borrower in writing. The application will be returned to the borrower unless the borrower requests that it be reconsidered under the requirements and procedures for normal review set forth in paragraph (d)(2) of this section and in \_1717.857; or

(C) Send written notice to the borrower explaining why a decision cannot be made at that time and giving the estimated date when a decision is expected.

(iii) If a new mortgage or mortgage amendment is required, these documents will be reviewed and executed pursuant to the procedures and timeframes of paragraph (b)(4) of this section.

(2) Normal review. (i) Within 20 calendar days of receiving the borrower's application containing the information and documents required by \_1717.857(d), RUS will send written notice to the borrower of any deficiencies in its application as to completeness and acceptable form and substance. Additional written notices may be sent to the borrower if RUS subsequently becomes aware of other deficiencies in the borrower's application.

(ii) Within 30 calendar days of receiving all of the required information and documents, in form and substance satisfactory to RUS, RUS will notify the borrower in writing either approving the request, disapproving the request, or explaining why a decision cannot be made at that time and giving the estimated date when a decision is expected. If the proposed refinancing involves complicated transactions such as



interest rate swaps or forward delivery contracts, additional time may be required for RUS review and final action.

(iii) If a new mortgage or mortgage amendment is required, these documents will be reviewed and executed pursuant to the procedures and timeframes of paragraph (b)(4) of this section.

(e) Rural development investments. (1) Applications for a lien subordination for rural development investments are submitted by distribution borrowers to the GFR and by power supply borrowers to the RUS Power Supply Division, or its successor, in Washington, DC.

(2) The GFR will work with the borrower to ensure that all components of the application are assembled. Once the application is satisfactory to the GFR, it will be sent promptly to the Washington Office for further review and action. After the application is received in the Washington Office, if additional or amended information is needed for RUS to complete its review, RUS will so notify the borrower in writing within 15 calendar days of receiving the application.

(3) Applications from power supply borrowers containing the information and documents required by 1717.858(c) will be reviewed in the Washington office and the borrower given written notice within 30 calendar days of receiving the application of any deficiencies as to completeness and acceptable form and substance. Additional written notices may be sent to the borrower if RUS subsequently becomes aware of other deficiencies in the borrower's application.

(4) Within 60 calendar days of receiving in the Washington office all of the required information and documents, in form and substance satisfactory to RUS, RUS will give written notice to the borrower either approving the request, disapproving the request, or explaining why a decision cannot be made at that time and giving the estimated date when a decision is expected.

(5) If a new mortgage or mortgage amendment is required, these documents will be reviewed and executed pursuant to the procedures and timeframes of paragraph (b)(4) of this section.

1717.860 Lien accommodations and subordinations under section 306E of the RE Act.

(a) General. Under section 306E of the RE Act, when requested by a private lender providing financing for capital investments by a borrower whose net worth exceeds 110 percent of the outstanding principal balance of all loans made or guaranteed to the borrower by RUS, the Administrator will, without delay, offer to share the government's lien on the borrower's system or subordinate the government's lien on the property financed by the private lender, provided that the security,

including the assurance of repayment, for loans made or guaranteed by RUS will remain reasonably adequate. To qualify for a lien accommodation or subordination under this section, the investment must be an original capital investment, i.e., not a refinancing or refunding. (See § 1717.851 for the definition of capital investment.)

(b) Determination of net worth to RUS debt ratio. (1) In the case of applications for a lien accommodation, a borrower's net worth will be based on the borrower's most recent financial and statistical report, the data in which shall not be more than 60 days old at the time the application is received by RUS, and the outstanding debt owed to or guaranteed by RUS will be based on latest RUS records available. The financial and statistical reports (Form 7 for distribution borrowers and Form 12a for power supply borrowers) are subject to RUS review and revision, and they must comply with RUS's system of accounts and accounting principles set forth in 7 CFR part 1767. Since sinking fund depreciation is not approved under part 1767, net worth for borrowers using sinking fund depreciation will be calculated as if the borrower had been using straight line depreciation.

(2) Net worth shall be calculated by taking total margins and equities (Line 33 of Part C of RUS Form 7 for distribution borrowers, or Line 34 of Section B of RUS Form 12a for power supply borrowers) and subtracting assets properly recordable in account 182.2, Unrecovered Plant and Regulatory Study Costs, and account 182.3, Other Regulatory Assets, as defined in 7 CFR part 1767.

(c) Application requirements and process. (1) If a borrower's net worth to RUS debt ratio exceeds 110 percent, as determined by RUS, and the borrower is in compliance with all requirements of its mortgage, loan agreement with RUS, and any other agreement with RUS that have not been exempted in writing by RUS, if requested RUS will expeditiously approve a lien accommodation or subordination for 100 percent private financing of capital investments, provided that the security, including the assurance of repayment, for loans made or guaranteed by RUS will remain reasonably adequate. RUS's approval will be conditioned upon execution and delivery by the borrower of a security instrument satisfactory to RUS, if required, and such additional information, documents, and opinions of counsel as RUS may require.

(2) The application must include the following:

(i) A resolution of the borrower's board of directors requesting the lien accommodation and including the amount and maturity of the proposed loan, a general description of the facilities or other purposes to be financed, the name and address of the lender, and an attached term sheet summarizing the terms and conditions of the proposed loan;

(ii) A certification by an authorized official of the borrower that the borrower is in compliance with all requirements of its mortgage, loan agreement with RUS, and any other agreement with RUS that have not been exempted in writing by RUS;

(iii) The borrower's financial and statistical report, the data in which shall not be more than 60 days old when the complete application is received by RUS;

(iv) Draft copy of any new mortgage or mortgage amendment (supplement) required by RUS or the lender, unless RUS has notified the borrower that it wishes to prepare these documents itself;

(v) A copy of the loan agreement, loan note, bond or other financing instrument, unless RUS has notified the borrower that these documents need not be submitted. These documents will not be subject to RUS approval, but may be reviewed to determine whether they contain any provisions that would result in the security, including assurance of repayment, for loans made or guaranteed by RUS no longer being reasonably adequate;

(vi) The following certifications and reports required by law:

(A) The certification by the project architect for any buildings to be constructed, as required by 7 CFR 1717.850(i);

(B) A certification by an authorized official of the borrower that flood hazard insurance will be obtained for the full value of any buildings, or other facilities susceptible to damage if flooded, that will be located in a flood hazard area;

(C) Form AD - 1047, Certification Regarding Debarment, Suspension, and Other Responsibility Matters -- Primary Covered Transactions, as required by 7 CFR part 3017;

(D) A report by the borrower stating whether or not it is delinquent on any Federal debt, and if delinquent, the amount and age of the delinquency and the reasons therefor; and a certification, if not previously provided, that the borrower has been informed of the Government's collection options; and

(E) The written acknowledgement from a registered engineer or architect regarding compliance with seismic provisions of applicable model codes for any buildings to be constructed, as required by 7 CFR 1792.104. All other elements of an application listed in \_1717.855, \_1717.856, and \_1717.858(c) not listed in this paragraph (c) are exempted.

(3) Applications from distribution borrowers are submitted to the general field representative (GFR), while applications from power supply borrowers are submitted to the RUS Power Supply Division, or its successor, in Washington, DC. When an application is satisfactory to the GFR, it will be sent promptly to the Washington office. If Washington office staff determine that an application is incomplete, the borrower will be promptly notified in writing about the deficiencies. When the

application is complete, and if the security, including assurance of repayment, of loans made or guaranteed by RUS will remain reasonably adequate after granting the lien accommodation or subordination, the borrower and the lender will be promptly notified in writing that the lien accommodation or subordination has been approved, subject to the conditions cited in paragraph (c)(1) of this section.

(d) Rural development and other non-electric utility investments. Although RUS recommends the use of separate subsidiaries as set forth in \_1717.858, if requested by a borrower that meets the 110 percent equity test and all other applicable requirements of this section, RUS will provide a lien subordination on the specific assets financed in the case of loans made directly to the borrower for rural development and other non-electric utility purposes, provided that the outstanding balance of all such loans lien subordinated under this paragraph (d), after taking into consideration the effect of the new loan, does not exceed 15 percent of the borrower's net worth and the security, including assurance of repayment, of loans made or guaranteed by RUS will remain reasonably adequate after granting the lien subordination. Investments lien subordinated under this paragraph shall be included among those investments subject to the 15 percent of total utility plant limitation set forth in 7 CFR 1717.654(b)(1), and granting of the lien subordination will not constitute approval of the investment under 7 CFR part 1717, subpart N.

(e) Requirements and controls not exempted. All requirements and limitations imposed with respect to lien accommodations and subordinations by this subpart R that are not specifically exempted by this section are not exempted and shall continue to apply according to their terms.

[59 FR 3986, Jan. 28, 1994, as amended at 60 FR 3735, Jan. 19, 1995; 60 FR 67410, Dec. 29, 1995]

Effective Date Note: At 60 FR 67410, Dec. 29, 1995, \_1717.860 was amended by redesignating paragraph (f) as paragraph (e), effective January 29, 1996.

\_1717.861 -- 1717.899 [Reserved]\_

Subpart S -- Lien Accommodations for Supplemental Financing Required by 7 CFR 1710.110

Source: 58 FR 53851, Oct. 19, 1993, unless otherwise noted.

\_1717.900 Qualification requirements.

Applications for a lien accommodation for supplemental financing required by 7 CFR 1710.110 must meet the same requirements as an RUS insured loan. The justification and documentation materials submitted as part of the borrower's application for an insured loan also serve as the justification and documentation of the

request for a lien accommodation for the required supplemental loan. Unless early approval under \_1717.901 is requested by a borrower, these applications will be processed during the same time as RUS's review of the borrower's application for the concurrent insured loan.

\_1717.901 Early approval.

(a) Conditions. If requested by a borrower in writing, RUS will review the application for a lien accommodation for required supplemental financing early in the process, before funding is available for the concurrent RUS insured loan, and approve the lien accommodation if the following conditions are met:

(1) The required supplemental loan meets the requirements for an insured loan, as set forth in 7 CFR part 1710, subparts A through G, and other RUS regulations pertaining to required supplemental loans;

(2) The borrower has demonstrated the ability to obtain the funds that would be needed to complete other portions of the project, if the portion to be constructed with private loan funds could not be used productively without completion of such other portions, in the event concurrent RUS insured loan funds are not forthcoming. Such evidence may include financial records demonstrating the availability of general funds, and/or a written commitment from the private lender to provide a loan for the remaining amount of financing required, with such commitment being conditioned upon the availability of a lien accommodation from RUS; and

(3) An authorized official of the borrower has requested early approval of the lien accommodation and explained the reasons therefor, and has certified that the funds are needed and will be drawn down before funds from the concurrent insured loan are expected to be available, assuming that the insured loan is approved.

(b) Timeframe for RUS action. (1) RUS will either approve or disapprove the lien accommodation within 90 days of receiving the borrower's request for early approval and the complete application for the concurrent RUS loan and required supplemental financing, in form and substance satisfactory to RUS, or notify the borrower in writing of the estimated date when a decision is expected. If an environmental assessment or an Environmental Impact Statement is required, additional time beyond the 90 days may be required to prepare these documents. RUS's approval of the lien accommodation will be conditioned upon execution and delivery by the borrower of a satisfactory security instrument, if required, and such additional information, documents, and opinions of counsel as RUS may require.

(2) If a mortgage or mortgage amendment is required, RUS will consult with the other mortgagees as to who will prepare the documents. Within 30 days of obtaining the documents satisfactory to RUS, including required execution counterparts, RUS will execute the documents and send them to the borrower, along with instructions

pertaining to recording of the mortgage, an opinion of borrower's counsel, and other matters. RUS will promptly notify the borrower upon receiving satisfactory evidence that the borrower has complied with said instructions.

(c) Approval of concurrent insured loan. Early approval of a lien accommodation for a required supplemental loan does not ensure that the concurrent RUS insured loan will be approved. The request for the concurrent insured loan will be reviewed when funds are available to make the loan. The borrower may be requested to update certain supporting information in the loan application if substantial time has elapsed since the lien accommodation or subordination was approved.

#### \_1717.902 Other RUS requirements.

Supplemental loans required by 7 CFR 1710.110 are subject to the same post-loan requirements as insured RUS loans regarding accepted materials, construction standards, contracting and procurement procedures, standard forms of contracts, RUS approval of the advance of loan funds, and other matters.

#### \_1717.903 Liability.

It is the intent of this subpart that any failure on the part of RUS to comply with any provisions of this subpart, including without limitation, those provisions setting forth specified timeframes for action by RUS on applications for lien accommodations or lien subordinations, shall not give rise to liability of any kind on the part of the Government or any employees of the Government including, without limitation, liability for damages, fees, expenses or costs incurred by or on behalf of a borrower, private lender or any other party.

#### \_1717.904 Exemptions pursuant to section 306E of the RE Act.

(a) General policy. If a borrower's net worth to RUS debt ratio exceeds 110 percent, as determined by RUS, and the borrower is in compliance with all requirements of its mortgage, loan agreement with RUS, and any other agreement with RUS that have not been exempted in writing by RUS, RUS will expeditiously approve a lien accommodation for a concurrent supplemental loan if requested in writing by the borrower, provided that the security, including assurance of repayment, of loans made or guaranteed by RUS will remain reasonably adequate. RUS's approval will be conditioned upon execution and delivery by the borrower of a security instrument satisfactory to RUS, if required, and such additional information, documents, and opinions of counsel as RUS may require.

(b) Determination of net worth to RUS debt ratio. A borrower's ratio of net worth to RUS debt will be determined as set forth in \_1717.860(b).

(c) Requirements and controls exempted. The applicable requirements and controls exempted by 7 CFR 1710.7(c) are also exempted with respect to concurrent supplemental loans.

(d) Requirements and controls not exempted. All requirements and controls applicable to concurrent supplemental financing set forth in this subpart and other RUS regulations that are not specifically exempted by 7 CFR 1710.7(c) are not exempted and shall continue to apply according to their terms. These include, but are not limited to:

(1) The applicable requirements listed in 7 CFR 1710.7(d); and

(2) The requirements set forth in \_1717.901(a) when a borrower requests early approval of a lien accommodation.

(e) Procedures. If a borrower meets the requirements of this section, upon receipt of a complete application RUS will promptly notify the borrower and lender in writing that the lien accommodation has been approved subject to the conditions set forth in paragraph (a) of this section.

[59 FR 3987, Jan. 28, 1994]

\_1717.905 -- 1717.949 [Reserved]\_