

**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 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

¹The 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.)

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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.

(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

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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

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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