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### **Title 7: Agriculture**

#### [PART 1724—ELECTRIC ENGINEERING, ARCHITECTURAL SERVICES AND DESIGN POLICIES AND PROCEDURES](#)

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#### **§ 1724.21 Architectural services contracts.**

The provisions of this section apply only to RUS financed electric system facilities.

(a) RUS Form 220, Architectural Services Contract, must be used by electric borrowers when obtaining architectural services.

(b) The borrower shall ensure that the architect furnishes or obtains all architectural services related to the design and construction management of the facilities.

(c) Reasonable modifications or additions to the terms and conditions in the RUS contract form may be made to define the exact services needed for a specific undertaking. Such modifications or additions shall not relieve the architect or the borrower of the basic responsibilities required by the RUS contract form, and shall not alter any terms and conditions required by law. All substantive changes must be approved by RUS prior to execution of the contract.

(d) Architectural services contracts are not subject to RUS approval and need not be submitted to RUS unless specifically requested by RUS on a case by case basis.

(e) *Closeout.* Upon completion of all services and obligations required under each architectural services contract, including, but not limited to, submission of final documents, the borrower must closeout that contract. The borrower shall obtain from the architect a final statement of cost, which must be supported by detailed information as appropriate. For example, out-of-pocket expense and per diem types of compensation should be listed separately with labor, transportation, etc., itemized for each service involving these types of compensation. RUS Form 284, Final Statement of Cost for Architectural Service, may be used. All computations of the compensation must be made in accordance with the terms of the architectural services contract. Closeout documents need not be submitted to RUS unless specifically requested by RUS on a case by case basis.

#### [PART 1724—ELECTRIC ENGINEERING, ARCHITECTURAL SERVICES AND DESIGN POLICIES AND PROCEDURES](#)

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#### **§ 1724.31 Engineering services contracts.**

The provisions of this section apply only to RUS financed electric system facilities.

(a) RUS contract forms for engineering services shall be used. Reasonable modifications or additions to the terms and conditions in the RUS contract form may be made to define the exact services needed for a specific undertaking. Any such modifications or additions shall not relieve the engineer or the borrower of the basic responsibilities required by the RUS contract form, and shall not alter any terms and conditions required by law. All substantive changes to the RUS contract form shall be approved by RUS prior to execution of the contract.

(b) RUS Form 236, Engineering Service Contract—Electric System Design and Construction, shall be used for all distribution, transmission, substation, and communications and control facilities. These contracts are not subject to RUS approval and need not be submitted to RUS unless specifically requested by RUS on a case by case basis.

(c) RUS Form 211, Engineering Service Contract for the Design and Construction of a Generating Plant, shall be used for all new generating units and repowering of existing units. These contracts require RUS approval.

(d) Any amendments to RUS approved engineering services contracts require RUS approval.

(e) *Closeout.* Upon completion of all services and obligations required under each engineering services contract, including, but not limited to, submission of final documents, the borrower must closeout the contract. The borrower shall obtain from the engineer a completed final statement of engineering fees, which must be supported by detailed information as appropriate. RUS Form 234, Final Statement of Engineering Fee, may be used. All computations of the compensation shall be made in accordance with the terms of the engineering services contract. Closeout documents need not be submitted to RUS unless specifically requested by RUS on a case by case basis.

## **Title 7: Agriculture**

### **PART 1738--RURAL BROADBAND ACCESS LOANS AND LOAN GUARANTEES**

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### **Subpart A—General**

#### **§ 1738.1 Overview.**

(a) The Rural Broadband Access Loan and Loan Guarantee Program furnishes loans and loan guarantees to provide funds for the costs of construction, improvement, or acquisition of facilities and equipment needed to provide service at the broadband lending speed in eligible rural areas. This part sets forth the general policies, eligibility requirements, types and terms of loans and loan guarantees, and program requirements under Public Law 107–171 and 7 U.S.C. 901 *et seq.*

(b) Additional information and application materials regarding the Rural Broadband Access Loan and Loan Guarantee Program can be found on the Rural Development Web site.

#### **§ 1738.2 Definitions.**

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(a) The following definitions apply to part 1738:

*Acquisition* means the purchase of assets by acquiring facilities, equipment, operations, licenses, or majority stock interest of one or more organizations. Stock acquisitions must be arms-length transactions.

*Administrator* means the Administrator of the Rural Utilities Service (RUS), or the Administrator's designee.

*Advance* means the transfer of loan funds from the Agency to the borrower.

*Affiliate or affiliated company* of any specified person or entity means any other person or entity directly or indirectly controlling of, controlled by, under direct or indirect common control with, or related to, such specified entity, or which exists for the sole purpose of providing any service to one company or exclusively to companies which otherwise meet the definition of affiliate. This definition includes Variable Interest Entities as described in Financial Accounting Standards Board Interpretation (FIN) No. 46(R), *Consolidation of Variable Interest Entities*. For the purpose of this definition, "control" means the possession directly or indirectly, of the power to direct or cause the direction of the management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with or pursuant to an agreement with, one or more other companies, and whether such power is established through a majority or minority ownership voting of securities, common directors, officers, or stockholders, voting trust, or holding trusts (other than money exchanged) for property or services.

*Agency* means the Rural Utilities Service, which administers the United States Department of Agriculture's (USDA's) Rural Development Utilities Programs, including the Rural Broadband Access Loan and Loan Guarantee Program.

*Applicant* means an entity requesting approval of a loan or loan guarantee under this part.

*Arm's-length transaction* means a transaction between two related or affiliated parties that is conducted as if they were unrelated, so that there is no question of conflict of interest, or a transaction between two otherwise unrelated or unaffiliated parties.

*Borrower* means any organization that has an outstanding broadband or telecommunications loan made or guaranteed by the Agency.

*Broadband borrower* means any organization that has an outstanding broadband loan made or guaranteed by the Agency.

*Broadband grant* means a Community Connect or Broadband Initiatives Program grant approved by the Agency.

*Broadband lending speed* means the minimum bandwidth requirement, as published by the Agency in its latest notice in the Federal Register that an applicant must propose to deliver to every customer in the proposed funded service area in order for the Agency to approve a broadband loan and may be different for fixed and mobile broadband service. Broadband lending speed may be different from the minimum rate of data transmission required to determine the availability of broadband service when qualifying a service area. If a new broadband lending speed is published in the Federal Register while an application is pending, the pending application may be returned unless the proposed broadband system can provide service at the new broadband lending speed. Returned applications will lose their place in the processing queue.

*Broadband loan* means any loan approved under Title VI of the Rural Electrification Act of 1936 (RE Act).

*Broadband service* means any technology identified by the Administrator as having the capacity to provide transmission facilities that enable the subscriber to the service to originate and receive high-quality voice, data, graphics, and video. The Agency will publish the minimum rate of data transmission that will qualify as broadband service in a notice in the Federal Register and this rate may be different for fixed and mobile broadband service. The minimum rate of data transmission that defines broadband service may be different than the broadband lending speed. If a new minimum rate of data transmission is published in the Federal Register while an application is pending, broadband service for the purpose of reviewing the application will be defined by the minimum rate of data transmission that was required at the time the application was received by the Agency.

*Build-out* means the construction, improvement, or acquisition of facilities and equipment.

*Competitive analysis* means a study that identifies service providers and products in the service area that will compete with the applicant's proposed project.

*Composite economic life* means the weighted (by dollar amount of each class of facility in the loan) average economic life as determined by the Agency of all classes of facilities financed by the loan.

*Cost share* means equity, as defined by generally accepted accounting principles (GAAP).

*Customer premises equipment (CPE)*, in the context of network services, means any network-related equipment ( e.g. routers, switches, modems, etc.) used by a customer to connect to a service provider's network.

*Derivative* means any right, interest, instrument or security issued or traded on the credit of the guaranteed loan or any guaranteed loan portion, including but not limited to any participation share of, or undivided ownership or other equity interest in, the guaranteed loan or any guaranteed loan portion; any note, bond or other debt instrument or obligation which is collateralized or otherwise secured by a pledge of, or security interest in, the guaranteed loan or any guaranteed loan portion; or any such interest in such an interest or any such instrument secured by such an instrument.

*Economic life* means the estimated useful service life of an asset financed by the loan, as determined by the Agency.

*Equity* means total assets minus total liabilities, as determined by GAAP and as classified according to the Agency's system of accounts and as used in this Part for purposes of section 306F of the RE Act includes the requirements of credit support and cost share in Title VI of the RE Act.

*Feasibility study* means the evaluation of the pro forma financial analysis prepared by the Agency, based on the financial projections supplied by the applicant and as found acceptable by the Agency, to determine the financial feasibility of a loan request. Financial feasibility will be based on the entire operation of the applicant and not limited to the funded project.

*Financial feasibility* means the applicant's ability to generate sufficient revenues to cover its expenses, sufficient cash flow to service its debts and obligations as they come due, and meet the minimum Times Interest Earned Ratio (TIER) requirement of 1.25 (see §1738.211(b)(2)(ii)) by the end of the forecast period, as evaluated by the Agency.

*Fiscal year* refers to the applicant or borrower's fiscal year, unless otherwise indicated.

*Forecast period* means the time period used in the feasibility study to determine if an application is financially feasible. Financial feasibility of a loan application is based on five-year projections.

*Funded service area* means the geographic area within which an applicant proposes to offer service at the broadband lending speed using loan funds. (See also "service area.")

*GAAP* means generally accepted accounting principles.

*Guaranteed-amount debt derivative* means any note, bond, or other debt instrument or obligation which is collateralized or otherwise secured by a pledge of, or security interest in, the guaranteed loan note or any guaranteed loan portion note or any derivative, as the case may be, which has an exclusive or preferred claim to the guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed-amount equivalent, as the case may be.

*Guaranteed-amount equity derivative* means any participation share of, or undivided ownership or other equity interest in, the guaranteed loan or any guaranteed loan portion or any derivative, as the case may be, which has an exclusive or preferred claim to the guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed-amount equivalent, as the case may be.

*Guaranteed-amount equivalent* means, with respect to any derivative which is equal in principal amount to the guaranteed loan or any guaranteed loan portion, that amount of payment on account of such derivative which is equal to the guaranteed loan amount or the respective guaranteed loan portion amount, as the case may be; or with respect to any derivative which in the aggregate are equal in principal amount to the guaranteed loan or any guaranteed loan portion, that amount of payment on account of such derivatives which is equal to the guaranteed loan amount or the respective guaranteed loan portion amount, as the case may be.

*Guaranteed loan amount* means the amount of the loan which is guaranteed by the Agency.

*Guaranteed loan note* means, collectively, the note or notes executed and delivered by the borrower to evidence the guaranteed loan.

*Guaranteed loan portion* means any portion of the guaranteed loan.

*Guaranteed loan portion amount* means that amount of payment on account of any guaranteed loan portion which is guaranteed under the terms of the guarantee.

*Guaranteed loan portion note* means any note executed and delivered by the borrower to evidence a guaranteed loan portion.

*Grantee* means any organization that has an outstanding broadband grant made by the Agency.

*Incumbent service provider* (i) Means a service provider that:

(A) Offers terrestrial broadband service in the proposed funded service area;

(B) Has not less than five percent of the households in an applicant's proposed funded service area subscribing to their broadband service at the time of application submission; and

(C) Provides this information to the Agency through a timely response to the public notice described in §1738.204.

(ii) Resellers are not considered incumbent service providers. If an applicant proposes an acquisition, the applicant will be considered a service provider for that area.

*Indefeasible right to use agreement* (IRU) means the effective long-term lease of the capacity, or a portion thereof, of a cable, specified in terms of a certain number of channels of a given bandwidth.

*Interim financing* means funds used for eligible loan purposes after the applicant is notified by the Agency that the application is complete. Such funds may be eligible for reimbursement from loan funds if a loan is made.

*Loan* means any loan made or guaranteed under this part by the Agency, unless otherwise noted.

*Loan contract* means the loan agreement between the Agency and the borrower, including all amendments thereto.

*Loan documents* means the loan agreement, note(s), and security instrument between the borrower and the Agency and any associated documents pertaining to the broadband loan.

*Loan guarantee* means a loan made by another lender, some portion of which is guaranteed by the Agency.

*Loan guarantee documents* means the guarantee agreement between RUS and the lender, the loan and security agreement(s) between the guaranteed lender and the borrower, the loan note guarantee made by RUS, the guaranteed loan note, and other security documents.

*Loan funds* means funds provided pursuant to a broadband loan made or guaranteed under this part by the Agency.

*Market survey* means the collection of information on the supply, demand, usage, and rates for proposed services to be offered by an applicant within each service area. It supports the applicant's financial projections.

*Pre-loan expense* means any expense associated with the preparation of a loan application. Pre-loan expenses may be reimbursed with loan funds, as approved by RUS.

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

*Reject* means that the Agency returns the application to the applicant and discontinues processing of the loan application because the application failed to meet the requirements set forth herein. If an application is rejected, the loan application loses its place in the application processing queue.

*Reseller* means, in the context of network services, a company that purchases network services from network service providers in bulk and resells them to commercial businesses and residential households. Resellers are not considered incumbent service providers.

*Rural area* means any area, as confirmed by the latest decennial census of the Bureau of the Census, which is not located within:

(i) A city, town, or incorporated area that has a population of greater than 20,000 inhabitants; or

(ii) An urbanized area contiguous and adjacent to a city or town that has a population of greater than 50,000 inhabitants. For purposes of the definition of rural area, an urbanized area means a densely populated territory as defined in the latest decennial census of the U.S. Census Bureau.

*Security documents* means any mortgage, deed of trust, security agreement, financing statement, or other document which grants to the Agency or perfects a security interest, including any amendments and supplements thereto.

*Service area* means the geographic area within which a service provider offers telecommunications service.

*Service level objectives (SLOs)* means the characteristics of the service to be delivered to the customer, for example the speed with which new service will be established, service availability, and response time for reports of system failure at a residence.

*Service provider* means an entity providing telecommunications service.

*Service territory* means "service area."

*Start-up* means a new business venture without operations or service delivery available.

*System of accounts* means the Agency's system of accounts for maintaining financial records as described in RUS Bulletin 1770B-1.

*Telecommunications* means electronic transmission and reception of voice, data, video, and graphical information using wireline and wireless transmission media.

*Telecommunications loan* means any telecommunication loan made or guaranteed under Title II, III, or IV of the RE Act.

*TIER* means times interest earned ratio. TIER is the ratio of an applicant's net income (after taxes) plus (adding back) interest expense, all divided by interest expense (existing and that required in the proposed loan), and with all financial terms defined by GAAP.

*Underserved household or Underserved area* means a household or an area that is not offered broadband service, or that is offered broadband service by only one incumbent service provider.



*Unguaranteed amount equivalent* means all amounts of payment on account of any derivative other than the respective guaranteed-amount equivalent.

*Unguaranteed loan amount* means all amounts of payment on account of the guaranteed loan other than the guaranteed amount.

*Unguaranteed loan portion amount* means all amounts of payment on account of any guaranteed loan portion other than the respective guaranteed loan portion amount.

(b) Accounting terms not otherwise defined in this part shall have the definition ascribed to them under GAAP and shall be recorded using the Agency's system of accounts.

### **§ 1738.3 Substantially underserved trust areas.**

(a) If the Administrator determines that a community in "trust land" (as defined in section 3765 of title 38, United States Code) has a high need for the benefits of the Broadband Loan Program, he/she may designate the community as a "substantially underserved trust area" (as defined in section 306F of the RE Act).

(b) In order to improve the availability of the Broadband Loan Program in communities in substantially underserved trust areas, the Administrator retains the discretion to

(1) Make available to qualified utilities or applicants, financing with an interest rate as low as 2 percent, and with extended repayment terms;

(2) Waive nonduplication restrictions, matching fund and equity requirements, or credit support requirements; and

(3) Give the highest funding priority to designated projects in substantially underserved trust areas.

(c) The Administrator will only make loans and loan guarantees that RUS finds are financially feasible and that provide eligible program benefits to substantially underserved trust areas.

(d) Applicants should notify the National Office before preparing their applications that they are planning to seek waivers or adjustments based on this section (see §1738.201).

### **§§ 1738.4--1738.50 [Reserved]**

## **Subpart B—Eligible and Ineligible Loan Purposes**

### **§ 1738.51 Eligible loan purposes.**

Loan funds may be used to pay for the following expenses:

(a) To fund the construction, improvement, or acquisition of all facilities required to provide service at the broadband lending speed to rural areas, including facilities required for providing other services over the same facilities.

(b) To fund the cost of leasing facilities required to provide service at the broadband lending speed if such lease qualifies as a capital lease under GAAP. Notwithstanding, loan funds can only be used to fund the cost of the capital lease for no more than the first three years of the loan amortization period.

(c) To fund an acquisition, provided that:

(1) The acquisition is necessary for furnishing or improving service at the broadband lending speed;

(2) The acquired service area, if any, meets the eligibility requirements set forth in §1738.102;

(3) The acquisition cost does not exceed 50 percent of the broadband loan amount; and

(4) For the acquisition of another entity, the purchase provides the applicant with a controlling majority interest in the entity acquired.

(d) To refinance an outstanding telecommunications loan made under the RE Act if refinancing the loan supports the construction, improvement, or acquisition of facilities and equipment for the provision of service at the broadband lending speed in rural areas provided that:

(1) No more than 40 percent of the broadband loan amount is used to refinance the outstanding telecommunications loan;

(2) The applicant is current with its payments on the telecommunication loan(s) to be refinanced; and

(3) The amortization period for that portion of the broadband loan that will be needed for refinancing will not exceed the remaining amortization period for the telecommunications loan(s) to be refinanced. If multiple notes are being refinanced, an average remaining amortization period will be calculated based on the weighted dollar average of the notes being refinanced.

(e) To fund pre-loan expenses in an amount not to exceed five percent of the broadband loan excluding amounts requested to refinance outstanding telecommunication loans. Pre-loan expenses may be reimbursed only if they are incurred prior to the date on which notification of a complete application is issued (see §1738.205).

#### **§ 1738.52 Ineligible loan purposes.**

Loan funds must not be used for any of the following purposes:

(a) To fund operating expenses of the applicant;

(b) To fund costs incurred prior to the date on which notification of a complete application is issued (see §1738.205), with the exception of eligible pre-loan expenses (see 1738.51(e)).

(c) To fund the acquisition of the stock of an affiliate.

(d) To fund the purchase or acquisition of any facilities or equipment of an affiliate, unless approved by the Agency in writing. The Agency may approve such a purchase or acquisition if the applicant demonstrates that the purchase or acquisition will involve an arms-length transaction and that the cost is advantageous for the applicant.

(e) To fund the purchase of CPE and the installation of associated inside wiring unless the CPE will be owned by the applicant throughout its economic life or

(1) The applicant pledges additional collateral that is not currently owned by the applicant, acceptable to the Agency. Such collateral must have a value at least equal to the purchase price of the CPE and cannot be purchased with loan funds; or

(2) The applicant establishes a revolving fund for the initial purchase of CPE to be sold, and as CPE is sold to the customer, at least the applicant's cost of such equipment is returned to the revolving fund and used to purchase additional CPE units.

(f) To fund the purchase or lease of any vehicle unless it is used primarily in construction or system improvements.

(g) To fund the cost of systems or facilities that have not been designed and constructed in accordance with the loan contract and other applicable requirements.

(h) To fund broadband facilities leased under the terms of an operating lease.

(i) To fund merger or consolidation of entities.

## **§§ 1738.53--1738.100 [Reserved]**

### **Subpart C—Eligibility Requirements**

#### **§ 1738.101 Eligible applicants.**

(a) To be eligible for a broadband loan, an applicant may be either a nonprofit or for-profit organization, and must take one of the following forms:

- (1) Corporation;
- (2) Limited liability company (LLC);
- (3) Cooperative or mutual organization;
- (4) Indian tribe or tribal organization as defined in 25 U.S.C. 450b; or
- (5) State or local government, including any agency, subdivision, or instrumentality thereof.

(b) To be eligible for a broadband loan, the applicant must:

- (1) Submit a loan application which meets the requirements set forth herein as well as any additional requirements published in the Federal Register ;
- (2) Agree to complete the build-out of the broadband system described in the loan application within three years from the day the applicant is notified that loan funds are available. The loan application must demonstrate that all proposed construction be completed within this three year period with the exception of CPE. CPE can be funded throughout the forecast period;
- (3) Demonstrate an ability to furnish, improve, or extend broadband facilities to provide service at the broadband lending speed in rural areas;
- (4) Demonstrate an equity position equal to at least 10 percent of the amount of the loan requested in the application (see §1738.207); and
- (5) Provide additional security if it is necessary to ensure financial feasibility (see §1738.208) as determined by the Administrator.

#### **§ 1738.102 Eligible service area.**

(a) A service area may be eligible for a broadband loan if all of the following are true:

- (1) The service area is completely contained within a rural area;
- (2) At least 25 percent of the households in the service area are underserved households;
- (3) No part of the service area has three or more incumbent service providers;
- (4) No part of the funded service area overlaps with the service area of current RUS borrowers and grantees;
- (5) No part of the funded service area is included in a pending application before RUS seeking funding to provide broadband service. If two or more applications are submitted for the same service area, a lending decision must be

made on the application that was submitted to the Agency first before a lending decision can be made on the other application(s).

(b) Multiple service areas may be included in a single broadband loan application. Non-contiguous areas are considered separate service areas and must be treated separately for the purpose of determining service area eligibility. If non-contiguous areas within an application are determined to be ineligible, the Agency may pursuant to this regulation consider the remaining areas in the application. If an applicant fails to respond to agency requests for additional information or modifications to remove ineligible areas, the application may be returned and the application will lose its place in the processing queue.

#### **§ 1738.103 Eligible service area exceptions for broadband facility upgrades.**

(a) Broadband borrowers that apply to upgrade existing broadband facilities in its existing service area are exempt from the requirement concerning the number of underserved households in §1738.102(b)(2).

(b) Incumbent service providers, including borrowers and grantees, which apply to upgrade existing broadband facilities in existing service territories are exempt from the requirement concerning the number of incumbent service providers in §1738.102(b)(3) unless they are eligible for funding under Titles II and III of the RE Act. Eligibility requirements for entities that would be eligible under Titles II and III can be found in 7 CFR part 1735.

(c) An applicant which is a borrower, grantee or incumbent service provider may submit one application to upgrade existing broadband facilities in existing service areas, which qualify for the exemptions specified in paragraphs (a) and (b) of this section, and to expand services at the broadband lending speed into new service areas, provided the upgrade area and the expansion area are proposed as two separate service areas even if the upgrade and expansion areas are contiguous.

(d) The applicant will be asked to remove areas determined to be ineligible from their funding request. The application will then be evaluated on the basis of what remains. The applicant may be requested to provide additional information to the agency relating to the ineligible areas. If the applicant fails to respond, the application will be returned and the application will lose its place in the processing queue.

#### **§ 1738.104 Preliminary assessment of service area eligibility.**

(a) The Agency will make information available to prospective applicants to allow a preliminary assessment of a proposed service area's eligibility. At a minimum, the prospective applicant will be able to determine:

(1) Whether the proposed service area is located in a rural area;

(2) Whether the proposed service area overlaps with any part of a borrower's or grantee's service area; and

(3) Whether the proposed service area overlaps with any part of a proposed service area in a pending application for a loan.

(b) A preliminary assessment of service area eligibility does not account for all eligibility factors, and the situation within a proposed service area may change between the preliminary assessment and application submission. A preliminary assessment indicating that a proposed service area may be eligible does not guarantee that the area will remain eligible at the time of application.

#### **§§ 1738.105-1738.150 [Reserved]**

### **Subpart D—Direct Loan Terms**

#### **§ 1738.151 General.**

(a) Direct loans shall be in the form of a cost-of-money loan, a 4-percent loan, or a combination of the two.

(b) The amount of funds available for each type of loan, as well as maximum and minimum loan amounts, will be published in the Federal Register .

(c) An applicant that provides telecommunications or broadband service to at least 20 percent of the households in the United States is limited to a loan amount that is no more than 15 percent of the funds available to the Broadband Loan Program for the Federal fiscal year.

#### **§ 1738.152 Interest rates.**

(a) Direct cost-of-money loans shall bear interest at a rate equal to the cost of borrowing to the Department of Treasury for obligations of comparable maturity. The applicable interest rate will be set at the time of each advance.

(b) [Reserved]

#### **§ 1738.153 Loan terms and conditions.**

Terms and conditions of loans are set forth in a mortgage, note, and loan contract. Samples of the mortgage, note, and loan contract can be found on the Agency's Web site.

(a) Unless requested to be shorter by the applicant, broadband loans must be repaid with interest within a period that, rounded to the nearest whole year, is equal to the expected composite economic life of the assets to be financed, as determined by the Agency based upon acceptable depreciation rates.

(b) Loan advances are made at the request of the borrower. Principal payments for each advance are amortized over the remaining term of the loan and are due monthly. Principal payments will be deferred until one year after the date of the first advance of loan funds. Interest begins accruing when the advance is made and interest payments are due monthly, with no deferral period.

(c) Borrowers are required to carry fidelity bond coverage. Generally this amount will be 15 percent of the loan amount, not to exceed \$5 million. The Agency may reduce the percentage required if it determines that the amount is not commensurate with the risk involved.

#### **§ 1738.154 Loan security.**

(a) The broadband loan must be secured by the assets purchased with the loan funds, as well as all other assets of the applicant and any other signer of the loan documents except as provided in §1738.155.

(b) The Agency must be given an exclusive first lien, in form and substance satisfactory to the Agency, on all of the applicant's property and revenues and such additional security as the Agency may require. The Agency may share its first lien position with another lender on a *pari passu*, prorated basis if security arrangements are acceptable to the Agency.

(c) Unless otherwise designated by the Agency, all property purchased with loan funds must be owned by the applicant.

(d) In the case of loans that include financing of facilities that do not constitute self-contained operating systems, the applicant shall furnish assurance, satisfactory to the Agency, that continuous and efficient service at the broadband lending speed will be rendered.

(e) The Agency will require financial, investment, operational, reporting, and managerial controls in the loan documents.

#### **§ 1738.155 Special terms and conditions.**

(a) The Agency may, when it is in the best interest of the Agency and its mission, the affected community, and the applicant, aid in achieving financial feasibility in an underserved area by taking the following steps:

(1) Extend the loan term up to 35 years, and

(2) Modify its security requirements.

(b) The Agency may reduce the security requirements discussed in §1738.154(a) to ensure that the security is commensurate with the risk involved.

### **§ 1738.156 Other Federal requirements.**

(a) To receive a broadband loan, the applicant must certify or agree in writing to comply with a variety of Federal regulations including, but not limited to:

(1) The nondiscrimination and equal employment opportunity requirements of Title VI of the Civil Rights Act of 1964, as amended (7 CFR part 15);

(2) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794 *et seq.* ; 7 CFR part 15b);

(3) The Age Discrimination Act of 1975, as amended (42 U.S.C. 6101 *et seq.* ; 45 CFR part 90);

(4) Executive Order 11375, amending Executive Order (E.O.) 11246, Relating to Equal Employment Opportunity (3 CFR, 1966–1970). See 7 CFR parts 15 and 15b and 45 CFR part 90, RUS Bulletin 1790–1 (“Nondiscrimination Among Beneficiaries of RUS Programs”), and RUS Bulletin 20–15:320–15 (“Equal Employment Opportunity in Construction Financed with RUS Loans”);

(5) The Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 *et seq.* );

(6) The Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR subpart 101–19.6);

(7) The requirements of the National Environmental Policy Act of 1969 (NEPA), as amended;

(8) The Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA and certain related Federal environmental laws, statutes, regulations, and Executive Orders found in 7 CFR part 1794;

(9) The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. 4601 *et seq.* , and with implementing Federal regulations in 49 CFR part 24 and 7 CFR part 21;

(10) The regulations implementing E.O. 12549, Debarment and Suspension, 7 CFR 3017.510, Participants’ Responsibilities;

(11) The requirements regarding Lobbying for Contracts, Grants, Loans, and Cooperative Agreements in 31 U.S.C. 1352;

(12) Certification regarding Flood Hazard Area Precautions;

(13) Certification regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions; and

(14) Certification that the borrower is not delinquent on any Federal debt and has been informed of the collection options the Federal Government may use to collect delinquent debt.

(b) Applicants must agree in writing to comply with all Federal, State and local laws, rules, regulations, ordinances, codes, and orders applicable to the project.

## **§§ 1738.157--1739.200 [Reserved]**

### **Subpart E—Application Review and Underwriting**

#### **§ 1738.201 Application submission.**

(a) Loan applications must be submitted directly to the Agency's National Office or to the General Field Representative (GFR) that is assigned to the area where the applicant's headquarters are located. A list of GFRs and the areas they are assigned can be found on the Agency's Web site. All applications must contain two hard copies and an electronic copy of the entire application. An application is considered received upon receipt of the hard and electronic copies by the National Office. The date and time of that receipt will establish the application's placement in the processing queue.

(b) The Agency may publish additional application submission requirements in the Federal Register.

#### **§ 1738.202 Elements of a complete application.**

An applicant must submit to the Agency a complete application in a format as required by the Agency in the Rural Broadband Access Loan and Loan Guarantee Program Application Guide (the Application Guide). To be considered complete, the application must contain at least the following items, each of which must be completed in a manner acceptable to the Agency:

(a) A completed RUS Form 532, including any additional items required by the form;

(b) Information required for the public notice to determine service area eligibility (see §1738.204);

(c) Documentation demonstrating how the applicant will meet the equity requirement (see §1738.207);

(d) A market survey, unless not required by §1738.209(b);

(e) A competitive analysis (see §1738.210);

(f) Required financial information (see §1738.211);

(g) A network design (see §1738.212);

(h) A legal opinion that addresses the applicant's ability to enter into a loan as requested in the loan application, to pledge security as required by the Agency, to describe all pending litigation matters, and such other requirements as are detailed in the Application Guide;

(i) All required licenses and regulatory approvals for the proposed operation or the status of obtaining these items; and

(j) Additional items that may be required by the Administrator through a notice in the Federal Register.

#### **§ 1738.203 Priority for processing loan applications.**

(a) Except as provided in Section 306F of the RE Act (SUTA) and section 1738.3 herein, in making or guaranteeing loans, the Agency shall give priority to applications in the following order:

(1) Applications in which no broadband service is available in any funded service area;

(2) Applications in which at least 75 percent of households in the funded service area have no incumbent service provider. For applications with multiple funded service areas, the 75 percent calculation is based on all funded service areas combined;

(3) Applications in which at least 50 percent of households in the funded service area have no incumbent service provider. For applications with multiple funded service areas, the 50 percent calculation is based on all funded service areas combined;

(4) Applications in which at least 25 percent of households in the funded service area have no incumbent service provider. For applications with multiple funded service areas, the 25 percent calculation is based on all funded service areas combined; and

(5) All other applications.

(b) Once applications have been prioritized according to the criteria listed in paragraph (a) of this section, the applications will be processed on a first-in, first-out basis within each priority category.

(c) The Agency shall establish the National and State reserve levels in accordance with Title VI of the RE Act. In instances when funds in a particular area are insufficient to cover a loan request, priority will be given to processing applications for which funding is available.

#### **§ 1738.204 Public notice.**

(a) The Agency will publish a public notice of each application. The application must provide a summary of the information required for such public notice including all of the following information:

(1) The identity of the applicant;

(2) A map of each service area showing the rural area boundaries and the underserved areas using the Agency's Mapping Tool;

(3) The estimated number of underserved households in each service area;

(4) The estimated number of households without terrestrial-based broadband service in each service area; and

(5) A description of all the types of services that the applicant proposes to offer in each service area.

(b) The Agency will publish the public notice on an Agency webpage after the application has been received in the Agency's National Office. The notice will remain on the webpage for a period of 30 calendar days. The notice will ask existing service providers to submit to the Agency, within this 30-day period, the following information:

(1) The number of residential and business customers within the applicant's service area that are currently offered broadband service by the existing service provider;

(2) The number of residential and business customers within the applicant's service area currently purchasing the existing service provider's broadband service, the rates of data transmission being offered, and the cost of each level of broadband service charged by the existing service provider;

(3) The number of residential and business customers within the applicant's service area receiving the existing service provider's non-broadband services and the associated rates for these other services; and

(4) A map showing where the existing service provider's services coincide with the applicant's service area using the Agency's Mapping Tool.

(5) Whether the existing service provider is an existing RUS borrower or grantee.

(c) The Agency will use the information submitted to determine if the existing service provider will be classified as an incumbent service provider. If an existing service provider does not submit a response within the timeframe specified in the public notice, it will not be considered an incumbent service provider. However, all existing service providers will be considered in the Agency's feasibility study and lending decision.



(d) The Agency will determine whether the service areas included in the application are eligible for funding based on the information provided during the public notice period, whether all portions of the service area qualify as rural areas, and the number of incumbent service providers servicing any portion of the service area. If the applicant's funded service area is ineligible, the Agency will contact the applicant and require that those ineligible areas be removed from the funded service area. If the ineligible service areas are not removed from the funding request, the Agency will reject the application and remove it from the processing queue. The applicant will be notified, in writing, and the application will be returned with an explanation of the reasons for the rejection.

(e) The information submitted by an existing service provider will be treated as proprietary and confidential to the extent permitted under applicable law.

#### **§ 1738.205 Notification of completeness.**

If all funded service areas are eligible, the Agency will review the application for completeness. The completeness review will include an assessment of whether all required documents and information have been submitted and whether the information provided is of adequate quality to allow further analysis.

(a) If the application contains all required documents and information and is of adequate quality, the Agency will notify the applicant, in writing, that the application is complete. The notification of completeness will mark the date as of which costs incurred for the eligible purposes listed in §1738.51(a) through (d) can be reimbursed with loan funds if the loan is ultimately made and proper procedures have been followed. A notification of completeness is not a commitment that the loan will be approved.

(b) If the application is of adequate quality but does not contain all required documents and information, the Agency will notify the applicant, in writing, that the application is incomplete. The notification of incompleteness will include a list of items that the applicant must address and will specify a date by which the applicant's additional information must be received.

(1) If the applicant fails to respond by the specified date, the application will be rejected.

(2) If the applicant responds by the specified date but does not satisfactorily address the issues identified, the Agency will assess the applicant's progress toward submission of a complete application. If the applicant has made progress acceptable to the Agency, a second notification of incompleteness will be provided. If the applicant's progress is not acceptable to the Agency, the application will be rejected.

(c) If the application is considered to be of inadequate quality, the Agency will notify the applicant, in writing, that the application has been rejected. The rejection letter will include an explanation of the reasons for the rejection and the application will be removed from the queue.

#### **§ 1738.206 Evaluation for feasibility.**

After an applicant is notified that the application is complete, the Agency will evaluate the application's financial and technical feasibility. The Agency will only make a broadband loan if the applicant's financial operations, taking into account the impact of the facilities financed with the proceeds of the loan and the associated debt, are financially and technically feasible, as determined by the Agency.

(a) The Agency will determine financial feasibility by evaluating the applicant's equity, market survey (if required), competitive analysis, financial information, and other relevant information in the application.

(b) The Agency will determine technical feasibility by evaluating the applicant's network design and other relevant information in the application.

#### **§ 1738.207 Equity requirement.**

(a) To be eligible for a loan, an applicant must demonstrate a minimum equity position equal to 10 percent of the requested loan amount at the time of application which must remain available at loan closing. In addition to this

minimum equity requirement, please refer to section §1738.208, Additional Cash Requirements which could cause the equity requirement to be higher than 10 percent.

(b) If the applicant does not have the required equity at the time the application is submitted, the applicant may satisfy the equity requirement at the time of application with an investor's unconditional legal commitment to cover the shortfall by providing additional equity. The additional equity must be transferred to the applicant prior to loan closing. If this option is elected, the applicant must provide evidence in the application that clearly identifies the investor's commitment to the applicant; the amount, terms, and conditions of the investment; and the investor's bank or financial statements that demonstrate its ability to fulfill its commitment. The terms and conditions of the investment must be acceptable to the Agency, which generally prohibits redemption of the investment until such time as stated requirements and financial thresholds are achieved by the applicant. The Agency will reject applications that do not provide evidence acceptable to the Agency regarding the investor's commitment.

(c) For State and local government applicants, the equity requirement can be satisfied with a general obligation bond, as long as the additional equity will be available to the applicant at closing. If the equity requirement is satisfied with a general obligation bond, the broadband loan cannot be subordinate to the bond. The applicant must submit an opinion from its legal counsel that the applicant has the authority to issue a general obligation bond in an amount sufficient to meet the minimum equity requirement. Revenue bonds supported by the operations to be funded cannot be used to satisfy the equity requirement.

### **§ 1738.208 Additional cash requirements.**

(a) If the Agency's financial analysis indicates that the applicant's entire operation (existing operations and new operations combined) will show a negative cash balance at the end of any year during the five-year forecast period, the Agency will require the applicant to obtain additional cash infusions necessary to maintain an appropriate cash balance throughout the five-year forecast period. This cash infusion would be in conjunction with the required 10 percent minimum equity position.

(1) The Agency will require the applicant and its investors to:

(i) Infuse additional cash to cover projected deficits for the first two years of operations at loan closing; and

(ii) Enter into legal arrangements that commit them to making additional cash infusions to ensure that the operation will sustain a positive cash position on a quarterly basis throughout the five-year forecast period.

(2) For purposes of identifying the additional cash requirement for a start-up operation or an operation that has not demonstrated positive cash flow for the two years prior to the submission date of the application, 50 percent of projected revenues for each year of the five-year forecast period will be considered to determine if an operation can sustain a positive cash position. In addition to the initial financial projections required to demonstrate financial feasibility, such applicants must complete adjusted financial projections using the reduced revenue projections in order to identify the amount of additional cash that will be required. Projections must be fully supported with assumptions acceptable to the Agency. The applicant may present evidence in its loan application that projected revenues or a portion of projected revenues are based on binding commitments and request that more than 50 percent of the projected revenues be considered for the purpose of identifying the additional cash requirement.

(3) For purposes of satisfying the additional cash requirements for an existing operation that has demonstrated a positive cash flow for the two fiscal years prior to the submission date of the application, 100 percent of the projected revenues for each year of the five-year forecast period will be used to determine if an operation can sustain a positive cash position, as long as these projections are fully supported with assumptions acceptable to the Agency.

(4) If debt is incurred to satisfy the additional cash requirement, this debt must take a subordinate lien position to the Agency debt and must be at terms acceptable to the Agency.

(b) An applicant may satisfy the additional cash requirement with an unconditional, irrevocable letter of credit (LOC) satisfactory to the Agency. The LOC must be issued from a financial institution acceptable to the Agency and must remain in effect throughout the forecast period. The applicant and the Agency must both be payees under the LOC. The LOC must have payment conditions acceptable to the Agency, and it must be in place prior to loan closing. The applicant cannot secure the LOC with its assets and cannot pay for any LOC charges or fees with its funds.

(c) If the Agency offers a loan to the applicant, the applicant must ensure that the additional cash infusion required in the first two years is deposited into its bank account within 120 days from the date the applicant signs the loan offer letter (see §1738.251) and must enter into any other legal arrangements necessary to cover further projected operating deficits (or in the case of the LOC, to provide an acceptable LOC to the Agency) prior to closing. If these requirements are not completed within this timeframe, the loan offer will be terminated, unless the applicant requests and the Agency approves an extension based on extenuating circumstances that the Agency was not aware of at the time the offer was made.

(d) The Administrator may modify the requirements of this section for loans in service areas that are underserved when it is in the best interests of the Agency.

#### **§ 1738.209 Market survey.**

(a) Except as provided in paragraph (b) of this section, the applicant must complete a separate market survey for each service area where the applicant proposes to provide service at the broadband lending speed. Each market survey must demonstrate the need for the service at the broadband lending speed, support the projected penetration rates and price points for the services to be offered, and support the feasibility analysis. The market survey must also address all other services that will be provided in connection with the broadband loan. Additional information on the requirements of the market survey can be found in the Application Guide.

(b) The applicant is not required to complete a market survey for any service offering for which the applicant is projecting less than a 20 percent penetration rate in each service area by the end of the five-year forecast period. For example, if the applicant is projecting a penetration rate of 30 percent for data services and 15 percent for video services, a market survey must be completed for the data services. The proposed prices for those services with a projected penetration rate less than 20 percent must be affordable, as determined by the Agency.

(c) For a market survey to be acceptable to the Agency, it must have been completed within six months of the application submission date. The Agency may reject any application in which the financial projections are not supported by the market survey. If the demographics of the proposed service area have significantly changed since the survey was completed, the Agency may require an updated market survey.

(d) The Administrator may modify the requirements of this section for loans in service areas that are underserved when it is in the best interests of the Agency.

#### **§ 1738.210 Competitive analysis.**

The applicant must submit a competitive market analysis for each service area regardless of projected penetration rates. Each analysis must identify all existing service providers and all resellers in each service area regardless of the provider's market share, for each type of service the applicant proposes to provide. This analysis must include each competitor's rate packages for all services offered, the area that is being covered, and to the extent possible, the quality of service being provided.

#### **§ 1738.211 Financial information.**

(a) The applicant must submit financial information acceptable to the Agency that demonstrates that the applicant has the financial capacity to fulfill the loan requirements and to successfully complete the proposed project.

(1) If the applicant is an existing company, it must provide complete copies of audited financial statements (opinion letter, balance sheet, income statement, statement of changes in financial position, and notes to the financial statement) for the three fiscal years preceding the application submission. If audited statements are not available, the applicant must submit unaudited financial statements and tax returns for those fiscal years. Applications from start-up entities must, at a minimum, provide an opening balance sheet dated within 30 days of the application submission date.

(2) If the applicant is a subsidiary operation, it must also provide complete copies of audited financial statements for the parent operation for the fiscal year preceding the application submission. If audited statements are not available, unaudited financial statements and tax returns for the previous year must be submitted.

(3) If the applicant relies on services provided by an affiliated operation, it must also provide complete copies of audited financial statements for any affiliate for the fiscal year preceding the application submission. If audited statements are not available, unaudited statements and tax returns for the previous year must be submitted.

(4) Applicants must provide a list of all its outstanding obligations. Copies of existing notes and loan and security agreements must be included in the application.

(5) Applicants must provide a detailed description of working capital requirements and the source of these funds.

(b) Applicants must submit the following documents that demonstrate the proposed project's financial viability and ability to repay the requested loan.

(1) Customer projections for the five-year forecast period that substantiate the projected revenues for each service that is to be provided. The projections must be provided on at least an annual basis and must be developed separately for each service area. These projections must be clearly supported by the information contained in the market survey, unless no market survey is required (see §1738.209(b)).

(2) Annual financial projections in the form of balance sheets, income statements, and cash flow statements for the five-year forecast period. Prior to the submission of an application, an applicant may request that alternative information related to financial viability be considered when the applicant can for good cause demonstrate why a full five-year forecast cannot be provided. If this request is approved by the Agency, then the applicant can submit the application using the alternative information that was approved.

(i) These projections must use a system of accounts acceptable to the Agency and be supported by a detailed narrative that fully explains the methodology and assumptions used to develop the projections.

(ii) The financial projections submitted by the applicant must demonstrate that their entire operation will be able to meet a minimum TIER requirement equal to 1.25 by the end of the five-year forecast period. Demonstrating that the operation can achieve a projected TIER of 1.25 does not ensure that the Agency will approve the loan.

(iii) If the financial analysis suggests that the operation will not be able to achieve the required TIER ratio, the Agency will not approve the loan without additional capital, additional cash, additional security, and/or a change in the loan terms.

(c) Based on the financial evaluation, the loan documents will specify TIER requirements that must be met throughout the amortization period.

### **§ 1738.212 Network design.**

(a) Applications must include a network design that demonstrates the project's technical feasibility. The network design must fully support the delivery of service at the broadband lending speed, together with any other services to be provided. In measuring speed, the Agency will take into account industry and regulatory standards. The design must demonstrate that the project will be complete within three years from the day the Agency notifies the applicant that loan funds are available and must include the following items:

(1) A detailed description of the proposed technology that will be used to provide service at the broadband lending speed. This description must clearly demonstrate that all households in the funded service area will be offered service at the broadband lending speed;

(2) A detailed description of the existing network. This description should provide a synopsis of the current network infrastructure;

(3) A detailed description of the proposed network. This description should provide a synopsis of the proposed network infrastructure;

(4) A description of measurable service metrics and target service level objectives (SLOs) that will be provided to the customer, and the methods that will be used to measure performance and respond to unmet SLOs;

(5) A description of the approach and methodology for monitoring ongoing service delivery and service quality for the services being deployed;

(6) Estimated project costs detailing all facilities that are required to complete the project. These estimated costs must be broken down to indicate costs associated with each proposed service area and must specify how Agency and non-Agency funds will be used to complete the project;

(7) A construction build-out schedule of the proposed facilities by service area on a quarterly basis. The build-out schedule must include:

(i) A description of the work force that will be required to complete the proposed construction;

(ii) A timeline demonstrating project completion within three years from the date the Agency notifies the applicant that loan funds are available;

(iii) Detailed information showing that all households within the funded service area will be offered service at the broadband lending speed when the system is complete; and

(iv) Detailed information showing that construction of the proposed facilities will start within six months from the date the Agency notifies the borrower that loan funds are available.

(8) A depreciation schedule for all facilities financed with loan and non-loan funds;

(9) An environmental report prepared in accordance with 7 CFR part 1794; and

(10) Any other system requirements required by the Administrator through a notice published in the Federal Register .

(b) The network design must be prepared by a registered Professional Engineer with telecommunications experience or by qualified personnel on the applicant's staff. If the network design is prepared by the applicant's staff, the application must clearly demonstrate the staff's qualifications, experience, and ability to complete the network design. To be considered qualified, staff must have at least three years of experience in designing the type of broadband system proposed in the application.

(c) The Administrator may modify the requirements of this section for loans in underserved service areas.

### **§ 1738.213 Loan determination.**

(a) If the application meets all statutory and regulatory requirements and the feasibility study demonstrates that the TIER requirement can be satisfied, the application will be submitted to the Agency's credit committees for consideration. Submission of the application to the Agency's credit committees does not guarantee that a loan will be approved. In making a loan determination, the Administrator shall consider the recommendations of the credit committees.

(b) The applicant will be notified of the Agency's decision in writing. If the Agency approves the loan, a loan offer will be extended. If the Agency does not approve the loan, a rejection letter will be sent to the applicant, and the application will be returned with an explanation of the reasons for the rejection.

### **§§ 1738.214--1738.250 [Reserved]**

## **Subpart F—Closing, Servicing, and Reporting**

### **§ 1738.251 Loan offer and loan closing.**

The Agency will notify the applicant of the loan offer, in writing, and the applicant will typically have 10 working days to accept the offer. If the applicant accepts the loan offer, a loan contract will be executed and sent to the applicant. The applicant must execute the loan contract and satisfy all conditions precedent to loan closing within the timeframe specified by the Agency which is typically 120 days from the date of the loan contract. If the conditions are not met within this timeframe, the loan offer will be terminated, unless the applicant requests and the Agency approves an extension. The Agency may approve such a request if the applicant has diligently sought to meet the conditions required for loan closing and has been unable to do so for reasons outside its control.

#### **§ 1738.252 Construction.**

(a) Construction paid for with broadband loan funds must comply with 7 CFR part 1788, 7 CFR part 1794, RUS Bulletin 1738–2 and any other guidance from the Agency.

(b) Upon notification by the Agency that an applicant has submitted all the required documentation and the application is considered complete for analysis (see §1738.205), the applicant, at its own risk, may enter into an interim financing agreement with a third-party lender or use its own funds to start construction that is included in the loan application. For this construction to be eligible for reimbursement with loan funds, all construction procedures contained herein must be followed. The Agency's determination that an application is complete is not a commitment that a loan will be approved.

(c) The borrower must begin construction within six months from the date the Agency notifies the applicant that loan funds are available. This is the final step in closing the loan with the applicant. If the borrower fails to begin construction, the Agency may cancel the loan.

(d) The build-out must be complete within three years from the day the Agency notifies the applicant that loan funds are available. Build-out is considered complete when the network design has been fully implemented, the service operations and management systems infrastructure is operational, and the borrower is ready to support the activation and commissioning of individual customers to the new system.

#### **§ 1738.253 Servicing.**

(a) Borrowers must make payments on the broadband loan as required in the note.

(b) Borrowers must comply with all terms, conditions, affirmative covenants, and negative covenants contained in the loan documents.

(c) In the event of default of any required payment or other term or condition:

(1) A late charge shall be charged on any payment not made in accordance with the terms of the note.

(2) The Agency may exercise the default remedies provided in the loan documents but is not required to do so.

(3) If the Agency chooses to not exercise its default remedies, it does not waive its right to do so in the future.

#### **§ 1738.254 Accounting, reporting, and monitoring requirements.**

(a) Borrowers must adopt a system of accounts for maintaining financial records acceptable to the Agency, as described in 7 CFR 1770, subpart B.

(b) Borrowers must submit annual audited financial statements along with a report on compliance and on internal control over financial reporting, and management letter in accordance with the requirements of 7 CFR part 1773. The Certified Public Accountant (CPA) conducting the annual audit is selected by the borrower and must be approved by RUS as set forth in 7 CFR 1773.4.

(c) Borrowers must comply with all reasonable Agency requests to support ongoing monitoring efforts. The Borrower shall afford RUS, through its representatives, reasonable opportunity, at all times during business hours and upon

prior notice, to have access to and the right to inspect the Broadband System, and any other property encumbered by the Mortgage, and any or all books, records, accounts, invoices, contracts, leases, payrolls, timesheets, cancelled checks, statements, and other documents, electronic or paper of every kind belonging to or in the possession of the Borrower or in anyway pertaining to its property or business, including its subsidiaries, if any, and to make copies or extracts therefore.

(d) Borrowers records shall be retained and preserved in accordance with the provisions of 7 CFR part 1770, subpart A.

## **§§ 1738.255--1738.300 [Reserved]**

### **Subpart G—Loan Guarantee**

#### **§ 1738.301 General.**

(a) Applicants wishing to obtain a loan guarantee for private financing are subject to the same requirements as direct loan borrowers with respect to:

- (1) Loan purposes as described in Subpart B;
- (2) Eligible borrowers and eligible areas as described in Subpart C;
- (3) The loan terms described in Subpart D, with the exception of the interest rates described in §1738.152; and
- (4) The application review and underwriting requirements in Subpart E.

(b) The Agency will publish a notice annually in the Federal Register indicating any additional requirements, as well as the amount of funds available, if any, for loan guarantees.

#### **§ 1738.302 Eligible guaranteed lenders.**

To be eligible for a loan guarantee, a guaranteed lender must be:

- (a) A financial institution in good standing that has been a concurrent lender with RUS; or
- (b) A legally organized lending institution, such as commercial bank, trust company, mortgage banking firm, insurance company, or any other institutional investor authorized by law to loan money, which must be subject to credit examination and supervision by a Federal or State agency, unless the Agency determines that alternative examination and supervisory mechanisms are adequate.

#### **§ 1738.303 Requirements for the loan guarantee.**

At the time of application, applicants must provide in form and substance acceptable to the Agency:

- (a) Evidence of the guaranteed lender's eligibility under §1738.302;
- (b) Evidence that the guaranteed lender has the demonstrated capacity to adequately service the guaranteed loan;
- (c) Evidence that the guaranteed lender is in good standing with its licensing authority and meets the loan making, loan servicing, and other requirements of the jurisdiction in which the lender makes loans;
- (d) Evidence satisfactory to the Agency of its qualification under this part, along with the name of the authority that supervises it;

(e) A commitment letter from the guaranteed lender that will be providing the funding, and the terms of such funding, all of which may be conditioned on final approval of the broadband loan guarantee by the Agency; and

(f) A description of any and all charges and fees for the loan, along with documentation that they are comparable to those normally charged other applicants for the same type of loan in the ordinary course of business. Such charges and fees will not be included within the Agency's loan guarantee.

#### **§ 1738.304 Terms for guarantee.**

Loan guarantees will only be given on the conditions that:

(a) The loan guarantee is no more than 80 percent of the principal amount, which shall exclude any and all charges and fees;

(b) The guarantee is limited to the outstanding loan repayment obligation of the borrower and does not extend to guaranteeing that the guaranteed lender will remit to a holder, loan payments made by the borrower;

(c) The interest rate must be fixed and must be the same or lesser for the guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed amount equivalent, as the case may be, and unguaranteed loan amount or the respective unguaranteed loan portion amount or the respective unguaranteed-amount equivalent, as the case may be;

(d) The entire loan will be secured by the same security with equal lien priority for the guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed-amount equivalent, as the case may be, and unguaranteed loan amount or the respective unguaranteed loan portion amount or the respective unguaranteed-amount equivalent, as the case may be;

(e) The unguaranteed loan amount or the respective unguaranteed loan portion amount or the respective unguaranteed-amount equivalent, as the case may be, will neither be paid first nor given any preference or priority over the guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed-amount equivalent, as the case may be;

(f) Prior written approval is obtained from the Agency for any assignment by the guaranteed lender. Any assignment shall entitle the holder to all of the guaranteed lender's rights but shall maintain the guaranteed lender responsible for servicing the entire loan;

(g) The borrower, its principal officers, members of the borrower's board of directors and members of the immediate families of said officials shall not be a holder of the guaranteed lender's loan;

(h) The Agency will not guarantee any loan under this subpart that provides for a balloon payment of principal or interest at the final maturity date of the loan or for the payment of interest on interest;

(i) All loan guarantee documents between the Agency and the guaranteed lender are prepared by the Agency; and

(j) The guaranteed loan agreement between the borrower and the lender shall be subject to Agency approval.

#### **§ 1738.305 Obligations of guaranteed lender.**

Once a loan guarantee has been approved, the guaranteed lender will be responsible for:

(a) Servicing the loan;

(b) Determining that all prerequisites to each advance of loan funds by the lender under the terms of the contract of guarantee, all financing documents, and all related security documents have been fulfilled;

(c) Obtaining approval from the Agency to advance funds prior to each advance;



(d) Billing and collecting loan payments from the borrower;

(e) Notifying the Administrator promptly of any default in the payment of principal and interest on the loan and submit a report no later than 30 days thereafter, setting forth the reasons for the default, how long it expects the borrower will be in default, and what corrective actions the borrower states that it is taking to achieve a current debt service position; and

(f) Notifying the Administrator of any known violations or defaults by the borrower under the lending agreement, contract of guarantee, or related security instruments or conditions of which the lender is aware which might lead to nonpayment, violation, or other default.

#### **§ 1738.306 Agency rights and remedies.**

(a) The guarantee must provide that upon notice to the lender, the Agency may assume loan servicing responsibilities for the loan or the guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed-amount equivalent, as the case may be, or require the lender to assign such responsibilities to a different entity, if the lender fails to perform its loan servicing responsibilities under the loan guarantee agreement, or if the lender becomes insolvent, makes an admission in writing of its inability to pay its debts generally as they become due, or becomes the subject of proceedings commenced under the Bankruptcy Reform Act of 1978 (11 U.S.C. 101 *et seq.* ) or any similar applicable Federal or State law, or is no longer in good standing with its licensing authority, or ceases to meet the eligibility requirements of this subpart. Such negligent servicing is defined as the failure to perform those services which a reasonable prudent lender would perform in servicing its own portfolio of loans that are not guaranteed and includes not only a failure to act but also not acting in a timely manner.

(b) The guarantee shall cease to be effective with respect to any guaranteed loan amount or any guaranteed loan portion amount or any guaranteed-amount equivalent to the extent that:

(1) The guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed amount equivalent, as the case may be, is separated at any time from the unguaranteed loan amount or the respective unguaranteed loan portion amount or the respective unguaranteed-amount equivalent, as the case may be, in any way, directly or through the issuance of any guaranteed-amount equity derivative or any guaranteed-amount debt derivative; or

(2) Any holder of the guaranteed loan note or any guaranteed loan portion note or any derivative, as the case may be, having a claim to payments on the guaranteed loan receives more than its pro-rata percentage of any payment due to such holder from payments made under the guarantee at any time during the term of the guaranteed loan.

#### **§ 1738.307 Additional policies.**

The Agency shall provide additional loan guarantee policies, consistent with OMB Circular A-129, in order to achieve its mission of promoting broadband in rural areas, which shall be published annually in the Federal Register .

#### **§ 1738.308 Full faith and credit of the United States.**

Loan guarantees made under this part are supported by the full faith and credit of the United States and are incontestable except for fraud or misrepresentation of which the holder had actual knowledge at the time it became a holder.

#### **§§ 1738.309--1738.349 [Reserved]**

#### **§ 1738.350 OMB control number.**