

Rural Utilities Service, USDA

§ 1744.21

Subpart B—Lien Accommodations and Subordination Policy

§ 1744.21 Definitions.

SOURCE: 51 FR 32430, Sept. 12, 1986, unless otherwise noted. Redesignated at 55 FR 39396, Sept. 27, 1990.

The following definitions apply to this subpart:

§ 1744.20 General.

*Administrator* means the Administrator of RUS and includes the Governor of the RTB.

(a) Recent changes in the telecommunications industry, including deregulation and technological developments, have caused Rural Utilities Service (RUS) borrowers and other organizations providing telecommunications services to consider undertaking projects that provide new telecommunications services and other telecommunications services not ordinarily financed by RUS. Although some of these services may not be eligible for financing under the Rural Electrification Act of 1936 (RE Act), these services may nevertheless advance RE Act objectives where the borrower obtains financing from private lenders. The borrower's financial strength and the assurance of repayment of outstanding Government debt may be improved as a result of providing such telecommunications services.

*Advance* means transferring funds from RUS, RTB, or a lender guaranteed by RUS to the borrower's construction fund.

*After-acquired property* means property which is to be acquired by the borrower and which would be subject to the lien of the Government mortgage when acquired.

*Amortization expense* means the sum of the balances of the following accounts of the borrower:

Account names	Number
(1) Amortization expense .....	6560.2
(2) Amortization expense—tangible .....	6563
(3) Amortization expense—intangible .....	6564
(4) Amortization expense—other .....	6565

NOTE: All references to account numbers are to the Uniform System of Accounts (7 CFR part 1770, subpart B).

*Asset* means a future economic benefit obtained or controlled by the borrower as a result of past transactions or events.

(b) To facilitate the financing of new services and other services not ordinarily financed by RUS, RUS is willing to consider accommodating the Government's lien on telecommunications borrowers' systems or accommodating or subordinating the Government's lien on after-acquired property of telecommunications borrowers. To expedite this process, requests for lien accommodations meeting the requirements of § 1744.30 will receive automatic approval from RUS.

*Automatic lien accommodation* means the approval, by RUS, of a request to share the Government's lien on a pari passu or pro-rata basis with a private lender in accordance with the provisions of § 1744.30.

*Borrower* means any organization that has an outstanding telecommunications loan made or guaranteed by RUS, or that is seeking such financing. See 7 CFR part 1735.

*Construction Fund* means the RUS Construction Fund Account into which all advances of loan funds are deposited pursuant to the provisions of the loan documents.

(c) This subpart establishes RUS policy with respect to all requests for lien accommodations and subordinations for loans from private lenders. For borrowers that do not qualify for automatic lien accommodations in accordance with § 1744.30, RUS will consider lien accommodations for RE Act purposes under § 1744.40 and non-Act purposes under § 1744.50.

*Debt Service Coverage (DSC) ratio* means the ratio of the sum of the borrower's net income, depreciation and amortization expense, and interest expense, all divided by the sum of all payments of principal and interest required to be paid by the borrower during the year on all its debt from any source with a maturity greater than 1 year and capital lease obligations.

[66 FR 41758, Aug. 9, 2001]

§ 1744.21

7 CFR Ch. XVII (1-1-16 Edition)

*Default* means any event or occurrence which, unless corrected, will, with the passage of time and the giving of proper notices, give rise to remedies under one or more of the loan documents.

*Depreciation expense* means the sum of the balances of the following accounts of the borrower:

Account names	Number
(1) Depreciation expense .....	6560.1
(2) Depreciation expense—telecommunications plant in service .....	6561
(3) Depreciation expense—property held for future telecommunications use .....	6562

NOTE: All references to account numbers are to the Uniform System of Accounts (7 CFR part 1770, subpart B).

*Disbursement* means a transfer of money by the borrower out of the construction fund in accordance with the provisions of the fund.

*Equity percentage* means the total equity or net worth of the borrower expressed as a percentage of the borrower's total assets.

*FFB* means the Federal Financing Bank.

*Financial Requirement Statement (FRS)* means RUS Form 481 (OMB—No. 0572-0023). (This RUS Form is available from RUS, Program Development and Regulatory Analysis, Washington, DC 20250-1522).

*Government mortgage* means any instrument to which the Government, acting through the Administrator, is a party and which creates a lien or security interest in the borrower's property in connection with a loan made or guaranteed by RUS whether the Government is the sole mortgagee or is a co-mortgagee with a private lender.

*Hardship loan* means a loan made by RUS under section 305(d)(1) of the RE Act.

*Interim construction* means the purchase of equipment or the conduct of construction under an RUS-approved plan of interim financing. See 7 CFR part 1737.

*Interest expense* means the sum of the balances of the following accounts of the borrower:

Account names	Number
(1) Interest and related items .....	7500
(2) Interest on funded debt .....	7510

Account names	Number
(3) Interest expense—capital leases .....	7520
(4) Amortization of debt issuance expense .....	7530
(5) Less Allowance for funds used during construction .....	7340/ 7300.4
(6) Other interest deductions .....	7540

NOTE: All references to account numbers are to the Uniform System of Accounts (7 CFR part 1770, subpart B).

*Interim financing* means funding for a project which RUS has acknowledged may be included in a loan, should said loan be approved, but for which RUS loan funds have not yet been made available.

*Lien accommodation* means sharing the Government's lien on a pari passu or pro-rata basis with a private lender.

*Loan* means any loan made or guaranteed by RUS.

*Loan documents* means the loan contract, note and mortgage between the borrower and RUS and any associated document pertinent to a loan.

*Loan funds* means the proceeds of a loan made or guaranteed by RUS.

*Material and supplies* means any of the items properly recordable in the following account of the borrower:

Account names	Number
(1) Material and Supplies .....	1220.1

NOTE: All references to account numbers are to the Uniform System of Accounts (7 CFR part 1770, subpart B).

*Net income/Net margins* means the sum of the balances of the following accounts of the borrower:

Account names	Number
(1) Local Network Services Revenues ..	5000 through 5069
(2) Network Access Services Revenues	5080 through 5084
(3) Long Distance Network Services Revenues.	5100 through 5169
(4) Miscellaneous Revenues .....	5200 through 5270
(5) Nonregulated Revenues .....	5280
(6) Less Uncollectible Revenues .....	5200 through 5302
(7) Less Plant Specific Operations Expense.	6110 through 6441
(8) Less Plant Nonspecific Operations Expense.	6510 through 6565
(9) Less Customer Operations Expense	6610 through 6623
(10) Less Corporate Operations Expense.	6710 through 6790
(11) Other Operating Income and Expense.	7100 through 7160
(12) Less Operating Taxes .....	7200 through 7250/ 7200.5
(13) Nonoperating Income and Expense	7300 through 7370
(14) Less Nonoperating Taxes .....	7400 through 7450/ 7400.5

**Rural Utilities Service, USDA**

**§ 1744.21**

Account names	Number
(15) Less Interest and Related Items ....	7500 through 7540
(16) Extraordinary Items .....	7600 through 7640/ 7600.4
(17) Jurisdictional Differences and Non-regulated Income Items.	7910 through 7990

NOTE: All references to account numbers are to the Uniform System of Accounts (7 CFR part 1770, subpart B).

*Net plant* means the sum of the balances of the following accounts of the borrower:

Account names	Number
(1) Property, Plant and Equipment .....	2001 through 2007
(2) Less Depreciation and Amortization	3100 through 3600

NOTE: All references to account numbers are to the Uniform System of Accounts (7 CFR part 1770, subpart B).

*Notes* means evidence of indebtedness secured by or to be secured by the Government mortgage.

*Pari Passu* means equably; ratably; without preference or precedence.

*Plant* means any of the items properly recordable in the following accounts of the borrower:

Account names	Number
(1) Property, Plant and Equipment .....	2001 through 2007

NOTE: All references to account numbers are to the Uniform System of Accounts (7 CFR part 1770, subpart B).

*Private lender* means any lender other than the RUS or the lender of a loan guaranteed by RUS.

*Private lender notes* means the notes evidencing a private loan.

*Private loan* means any loan made by a private lender.

*RE Act (Act)* means the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) RTB means the Rural Telephone Bank.

*RUS* means the Rural Utilities Service, and includes its predecessor, the Rural Electrification Administration. The term also includes the RTB, unless otherwise indicated.

*RUS cost-of-money loan* means a loan made under section 305(d)(2) of the RE Act.

*Subordination* means allowing a private lender to have a lien on specific property which will have priority over the Government's lien on such property.

*Tangible plant* means any of the items properly recordable in the following accounts of the borrower:

Account names	Number
(1) Telecommunications Plant in Service—General Support Assets.	2110 through 2124
(2) Telecommunications Plant in Service—Central Office Assets.	2210 through 2232
(3) Telecommunications Plant in Service—Information Origination/Termination Assets.	2310 through 2362
(4) Telecommunications Plant in Service—Cable and Wire Facilities Assets.	2410 through 2441
(5) Amortizable Tangible Assets .....	2680 through 2682
(6) Nonoperating Plant .....	2006

NOTE: All references to account numbers are to the Uniform System of Accounts (7 CFR part 1770, subpart B).

*Telecommunication services* means any service for the transmission, emission, or reception of signals, sounds, information, images, or intelligence of any nature by optical waveguide, wire, radio, or other electromagnetic systems and shall include all facilities used in providing such service as well as the development, manufacture, sale, and distribution of such facilities.

*Times interest earned ratio (TIER)* means the ratio of the borrower's net income or net margins plus interest expense, divided by said interest expense.

*Total assets* means the sum of the balances of the following accounts of the borrower:

Account names	Number
(1) Current Assets .....	1100s through 1300s
(2) Noncurrent Assets .....	1400s through 1500s
(3) Total telecommunications plant .....	2001 through 2007
(4) Less accumulated depreciation .....	3100 through 3300s
(5) Less accumulated amortization .....	3400 through 3600s

NOTE: All references to account numbers are to the Uniform System of Accounts (7 CFR part 1770, subpart B).

*Total equity or net worth* means the excess of a borrower's total assets over its total liabilities.

*Total liabilities* means the sum of the balances of the following accounts of the borrower:

Account names	Number
(1) Current Liabilities .....	4010 through 4130.2
(2) Long-Term Debt .....	4210 through 4270.3

§§ 1744.22-1744.29

Account names	Number
(3) Other Liabilities and Deferred Credits.	4310 through 4370

NOTE: All references to account numbers are to the Uniform System of Accounts (7 CFR part 1770, subpart B).

*Total long-term debt* means the sum of the balances of the following accounts of the borrower:

Account names	Number
(1) Long-Term Debt .....	4210 through 4270.3

NOTE: All references to account numbers are to the Uniform System of Accounts (7 CFR part 1770, subpart B).

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

*Weighted-average remaining life of the loans or notes* means the remaining average life of the loans or notes based on the proportion of remaining loan or note principal expressed in years remaining to maturity of the loans or notes. It shall be determined by calculating the sum of the remaining principal payments of each loan or note expressed as a fraction of the total remaining loan or note amounts times the number of years and fraction of years remaining until maturity of the loan or note.

*Weighted-average remaining useful life of the assets* means the estimated origi-

7 CFR Ch. XVII (1-1-16 Edition)

nal average life of the assets to be acquired with the proceeds of the private lender notes expressed in years based on depreciation rates less the number of years those assets have been in service (or have been depreciated). It shall be determined by calculating the sum of each asset's remaining value expressed as a fraction of the total remaining value of the assets, times the estimated number of years and fraction of years remaining until the assets are fully depreciated.

*Wholly-owned subsidiary* means a corporation owned 100 percent by the borrower.

[66 FR 41758, Aug. 9, 2001]

§§ 1744.22-1744.29 [Reserved]

§ 1744.30 Automatic lien accommodations.

(a) *Purposes and requirements for approval.* Automatic lien accommodations are available only for refinancing and refunding of notes secured by the borrower's existing Government mortgage; financing assets, to be owned by the borrower, to provide telecommunications services; or financing assets, to be owned by a wholly-owned subsidiary of the borrower, to provide telecommunications services in accordance with the procedures set forth in this section.

(b) *Private lender responsibility.* The private lender is responsible for ensuring that its notes, for which an automatic lien accommodation has been approved as set forth in this section, are secured under the mortgage. The private lender is responsible for ensuring that the supplemental mortgage is a valid and binding instrument enforceable in accordance with its terms, and recorded and filed in accordance with applicable law. If the private lender determines that additional documents are required or that RUS must take additional actions to secure the notes under the mortgage, the private lender shall follow the procedures set forth in § 1744.40 or § 1744.50, as appropriate.

(c) *Refinancing and refunding.* The Administrator will automatically approve a borrower's execution of private lender notes and the securing of such notes on a *pari passu* or *pro-rata* basis with

all other notes secured under the Government mortgage, when such private lender notes are issued for the purpose of refinancing or refunding any notes secured under the Government mortgage, provided that all of the following conditions are met:

(1) No default has occurred and is continuing under the Government mortgage;

(2) The borrower has delivered to the Administrator, at least 10 business days before the private lender notes are to be executed, a certification and agreement executed by the President of the borrower's Board of Directors, such certification and agreement to be substantially in the form set forth in Appendix A of this subpart, providing that:

(i) No default has occurred and is continuing under the Government mortgage;

(ii) The principal amount of such refinancing or refunding notes will not be greater than 112 percent of the then outstanding principal balance of the notes being refinanced or refunded;

(iii) The weighted-average life of the private loan evidenced by the private lender notes will not exceed the weighted-average remaining life of the notes being refinanced or refunded;

(iv) The private lender notes will provide for substantially level debt service or level principal amortization over a period not less than the original remaining years to maturity;

(v) Except as provided in the Government mortgage, the borrower has not agreed to any restrictions or limitations on future loans from RUS; and

(vi) If the private lender determines that a supplemental mortgage is necessary, the borrower will comply with those procedures contained in paragraph (h) of this section for the preparation, execution, and delivery of a supplemental mortgage and take such additional action as may be required to secure the notes under the Government mortgage.

(d) *Financing assets to be owned directly by a borrower.* The Administrator will automatically approve a borrower's execution of private lender notes and the securing of such notes on a pari passu or pro-rata basis with all other notes secured under the Govern-

ment mortgage, when such private lender notes are issued for the purpose of financing the purchase or construction of plant and material and supplies to provide telecommunication services and when such assets are to be owned and the telecommunications services are to be offered by the borrower, provided that all of the following conditions are met:

(1) The borrower has achieved a TIER of not less than 1.5 and a DSC of not less than 1.25 for each of the borrower's two fiscal years immediately preceding the issuance of the private lender notes;

(2) The ratio of the borrower's net plant to its total long-term debt at the end of any calendar month ending not more than 90 days prior to execution of the private lender notes is not less than 1.2, on a pro-forma basis, after taking into account the effect of the private lender notes and additional plant on the total long-term debt of the borrower;

(3) The borrower's equity percentage, as of the most recent fiscal year-end, was not less than 25 percent;

(4) No default has occurred and is continuing under the Government mortgage;

(5) The borrower has delivered to the Administrator, at least 10 business days before the private lender notes are to be executed, a certification by an independent certified public accountant that the borrower has met each of the requirements in paragraphs (d)(1) and (d)(3) of this section, such certification to be substantially in the form in appendix B of this subpart; and

(6) The borrower has delivered to the Administrator, at least 10 business days before the private lender notes are to be executed, a certification and agreement executed by the President of the borrower's Board of Directors, such certification and agreement to be substantially in the form in appendix C of this subpart; provided, that:

(i) The borrower has met each of the requirements in paragraphs (d)(2) and (d)(4) of this section;

(ii) The proceeds of the private lender notes are to be used for the construction or purchase of the plant and materials and supplies to provide telecommunications services in accordance

§ 1744.30

7 CFR Ch. XVII (1-1-16 Edition)

with this section and such construction or purchase is expected to be completed not later than 4 years after execution of such notes;

(iii) The weighted-average life of the private loan evidenced by the private lender notes does not exceed the weighted-average remaining useful life of the assets being financed;

(iv) The private lender notes will provide for substantially level debt service or level principal amortization over a period not less than the original remaining years to maturity;

(v) All of the assets financed by the private loans will be purchased or otherwise procured in bona fide arm's length transactions;

(vi) The financing agreement with the private lender will provide that the private lender shall cease the advance of funds upon receipt of written notification from RUS that the borrower is in default under the RUS loan documents;

(vii) Except as provided in the Government mortgage, the borrower has not agreed to any restrictions or limitations on future loans from RUS; and

(viii) If the private lender determines that a supplemental mortgage is necessary, the borrower will comply with those procedures set forth in paragraph (h) of this section for the preparation, execution, and delivery of a supplemental mortgage and take such additional action as may be required to secure the notes under the Government mortgage.

(e) *Financing assets to be owned by a wholly-owned subsidiary of the borrower.* The Administrator will automatically approve a borrower's execution of private lender notes and the securing of such notes on a pari passu or pro-rata basis with all other notes secured under the Government mortgage, when such private lender notes are issued for the purpose of financing the purchase or construction of tangible plant and material and supplies to provide telecommunication services and when such services are to be offered and the associated tangible assets are to be owned by a wholly-owned subsidiary of the borrower, provided that all of the following conditions are met:

(1) The borrower has achieved a TIER of not less than 2.5 and a DSC of not

less than 1.5 for each of the borrower's two fiscal years immediately preceding the issuance of the private lender notes;

(2) The ratio of the borrower's net plant to its total long-term debt at the end of any calendar month ending not more than 90 days prior to execution of the private lender notes is not less than 1.6, on a pro-forma basis, after taking into account the effect of the private lender notes and additional plant on the total long-term debt of the borrower;

(3) The borrower's equity percentage, as of the most recent fiscal year-end, was not less than 45 percent;

(4) No default has occurred and is continuing under the Government mortgage;

(5) The borrower has delivered to the Administrator, at least 10 business days before the private lender notes are to be executed, a certification by an independent certified public accountant that the borrower has met each of the requirements in paragraphs (e)(1) and (e)(3) of this section, such certification to be substantially in the form in appendix D of this subpart; and

(6) The borrower has delivered to the Administrator, at least 10 business days before the private lender notes are to be executed, a certification and agreement executed by the President of the borrower's Board of Directors, such certification and agreement to be substantially in the form in appendix E of this subpart; providing that:

(i) The borrower has met each of the requirements in paragraphs (e)(2) and (e)(4) of this section;

(ii) The proceeds of the private lender notes are to be used for the construction or purchase of the tangible plant and materials and supplies to provide telecommunications services in accordance with this section and such construction or purchase is expected to be completed not later than 4 years after execution of such notes;

(iii) The weighted-average life of the private loan evidenced by the private lender notes does not exceed the weighted-average remaining useful life of the assets being financed;

(iv) The private lender notes will provide for substantially level debt service or level principal amortization over a

Rural Utilities Service, USDA

§ 1744.30

period not less than the original remaining years to maturity;

(v) All of the assets financed by the private loans will be purchased or otherwise procured in bona fide arm's length transactions;

(vi) The proceeds of the private lender notes will be lent to a wholly-owned subsidiary of the borrower pursuant to terms and conditions agreed upon by the borrower and subsidiary;

(vii) The borrower will, whenever requested by RUS, provide RUS with a copy of the financing or guarantee agreement between the borrower and the subsidiary or any similar or related material including security instruments, loan contracts, or notes issued by the subsidiary to the borrower;

(viii) The borrower will promptly report to the Administrator any default by the subsidiary or other actions that impair or may impair the subsidiary's ability to repay its loans;

(ix) The financing agreement with the private lender will provide that the private lender shall cease the advance of funds upon receipt of written notification from RUS that the borrower is in default under the RUS loan documents;

(x) Except as provided in the Government mortgage, the borrower has not agreed to any restrictions or limitations on future loans from RUS; and

(xi) If the private lender determines that a supplemental mortgage is necessary, the borrower will comply with those procedures contained in paragraph (h) of this section for the preparation, execution, and delivery of a supplemental mortgage and take such additional action as may be required to secure the notes under the Government mortgage.

(f) *Borrower notification.* The borrower shall notify RUS of its intention to obtain an automatic lien accommodation under §1744.30 by providing the following:

(1) The board resolution cited in §1744.55(b)(1) and the opinion of counsel cited in §1744.55(b)(2);

(2) The applicable certification or certifications required by paragraph (c)(2); paragraphs (d)(5) and (d)(6); or paragraphs (e)(5) and (e)(6), respectively, of this section, in substantially

the form contained in the applicable appendices to this subpart.

(g) *RUS acknowledgment.* Within 5 business days of receipt of the completed certifications and any other information required under this section, RUS will review the information and provide written acknowledgment to the borrower and the private lender of its qualification for an automatic lien accommodation. Upon receipt of the acknowledgment, the borrower may execute the private lender notes.

(h) *Supplemental mortgage.* If the private lender determines that a supplemental mortgage is required to secure the private lender notes on a pari passu or pro-rata basis with all other notes secured under the Government mortgage, the private lender may prepare the supplemental mortgage using the form attached as appendix F to this subpart or the borrower may request RUS to prepare such supplemental mortgage in accordance with the following procedures:

(1) The private lender preparing the supplemental mortgage shall execute and forward the completed document to RUS. Upon ascertaining the correctness of the form and the information concerning RUS, RUS will execute and forward the supplemental mortgage to the borrower.

(2) When requested by the borrower, RUS will expeditiously prepare the supplemental mortgage, using the form in appendix F to this subpart, upon submission by the private lender of:

(i) The name of the private lender;

(ii) The Property Schedule for inclusion as supplemental mortgage Schedule B, containing legally sufficient description of all real property owned by the borrower; and

(iii) The amount of the private lender note.

(3) The government is not responsible for ensuring that the supplemental mortgage has been executed by all parties and is a valid and binding instrument enforceable in accordance with its terms, and recorded and filed in accordance with applicable law. If the private lender determines that additional security instruments or other documents are required or that RUS must take additional actions to secure the private lender notes under the

## § 1744.40

mortgage, the private lender shall follow the procedures established in §§ 1744.40 or 1744.50, as appropriate. Except for the actions of the government expressly established in § 1744.40, the government undertakes no obligation to effectuate an automatic lien accommodation. When processing of the supplemental mortgage has been completed to the satisfaction of the private lender, the borrower shall provide RUS with the following:

(i) A fully executed counterpart of the supplemental mortgage, including all signatures, seals, and acknowledgements; and

(ii) Copies of all opinions rendered by borrower's counsel to the private lender.

(i) *Other approvals.* (1) The borrower is responsible for meeting all requirements necessary to issue private lender notes and to accommodate the lien of the Government mortgage to secure the private lender notes including, but not limited to, those of the private lender, of any other mortgagees secured under the existing RUS mortgage, and of any governmental entities with jurisdiction over the issuance of notes or the execution and delivery of the supplemental mortgage.

(2) To the extent that the borrower's existing mortgage requires RUS approval before the borrower can make an investment in an affiliated company, approval is hereby given for all investments made in affiliated companies with the proceeds of private lender notes qualifying for an automatic lien accommodation under paragraph (e) of this section. Any reference to an approval by RUS under the mortgage shall apply only to the rights of RUS and not to any other party.

[66 FR 41760, Aug. 9, 2001]

## § 1744.40 Act purposes.

(a) Borrowers are encouraged to submit requests for accommodation of the Government's lien on the borrower's system in order to facilitate obtaining financing from private lenders for purposes provided in the RE Act.

(b) The Administrator will consider requests for the subordination of the Government's lien on after-acquired property which will enable borrowers to obtain financing from private lend-

## 7 CFR Ch. XVII (1-1-16 Edition)

ers for purposes provided in the Act: Provided, however, that property integral to the operation of projects financed with loans made or guaranteed by RUS shall be financed with funds obtained through lien accommodations instead of lien subordinations, unless the Administrator determines that it is in the Government's interest to do otherwise.

[51 FR 32430, Sept. 12, 1986. Redesignated at 55 FR 39396, Sept. 27, 1990, and further redesignated at 66 FR 41760, Aug. 9, 2001]

## §§ 1744.41-1744.49 [Reserved]

## § 1744.50 Non-Act purposes.

(a) The Administrator will consider requests for the accommodation of the Government's lien on the borrower's system or the subordination of the Government's lien on after-acquired property which will enable the borrowers to obtain financing from private lenders for the purpose of providing new telecommunication services which may not be eligible for financing under the Act if the Administrator is satisfied that:

(1) The borrower will have the ability to repay its existing and proposed indebtedness;

(2) The security for outstanding Government loans and guarantees is reasonably adequate and will not be adversely affected by the accommodation or subordination; and

(3) Approval of the request is in the interests of the Government with respect to the financial soundness of the borrower and other matters, such as assuring that the borrower's system is constructed cost-effectively using sound engineering practices.

(b) In determining that the security for outstanding Government loans and guarantees is reasonably adequate and will not be adversely affected by the accommodation or subordination the Administrator will consider, among other matters, when applicable, the following:

(1) Market forecasts for the project;

(2) Projected revenues, expenses and net income of the borrower's existing system and the project;

(3) Maximum debt service on indebtedness of both the borrower's system and the project;



**Rural Utilities Service, USDA**

**§§ 1744.56-1744.59**

(4) Projected rate of return on the borrower's investment in the project;

(5) Fair market value of property acquired by the borrower as part of the project;

(6) Impact of the project on the ratio of the borrower's secured debt to assets;

(7) Projected growth in borrower's system and project equity; and

(8) Amount of funds available for plant additions, replacements and other similar costs of the system and the project.

(c) In determining whether the accommodation or subordination is in the interests of the Government, the Administrator may consider, among other matters, whether the project will improve the borrower's financial strength and the assurance of repayment of Government debt.

[51 FR 32430, Sept. 12, 1986. Redesignated at 55 FR 39396, Sept. 27, 1990, as amended at 59 FR 43716, Aug. 25, 1994. Redesignated at 66 FR 41760, Aug. 9, 2001, as amended at 66 FR 41763, Aug. 9, 2001]

**§§ 1744.51-1744.54 [Reserved]**

**§ 1744.55 Application procedures.**

(a) Requests for information regarding applications for lien accommodations or subordination under this part should be addressed to the Assistant Administrator, Telecommunications Program, Rural Utilities Service, Washington, DC 20250-1590.

(b) An application for a lien accommodation or subordination shall in-

clude the following supporting information:

(1) A board Resolution from the applicant requesting the lien accommodation or subordination and stating the general purpose for which the funds from the private lender will be used, the proposed amount of the loan, and the proposed terms and conditions of the loan;

(2) An opinion from counsel representing the applicant that the applicant has the authority under its articles of incorporation, bylaws, and under applicable state law to undertake the project;

(3) Engineering and pertinent studies related to the projects or purposes to be financed, when applicable;

(4) Feasibility studies with pro forma financial statements showing the ability to repay the loan and provide an appropriate margin or net income;

(5) Any other information or documentation deemed pertinent by the borrower or the Administrator in support of the application.

(c) When the Administrator makes a determination that an application for an accommodation or subordination will not be approved the Administrator shall set forth the reasons therefor in writing and furnish such determination and reasons to the borrower within 30 days of the determination.

[51 FR 32430, Sept. 12, 1986. Redesignated at 55 FR 39396, Sept. 27, 1990, and further redesignated at 66 FR 41760, Aug. 9, 2001, as amended at 66 FR 41763, Aug. 9, 2001]

**§§ 1744.56-1744.59 [Reserved]**

APPENDIX A TO SUBPART B OF PART 1744—STATEMENT, CERTIFICATION, AND AGREEMENT OF BORROWER'S PRESIDENT OF BOARD OF DIRECTORS REGARDING REFINANCING AND REFUNDING NOTES PURSUANT TO 7 CFR 1744.30(c)

I \_\_\_\_\_ (Name of President) \_\_\_\_\_, am President of \_\_\_\_\_ (Name of Borrower) \_\_\_\_\_ (the "borrower"). The borrower proposes to issue notes (the "private lender notes"), to be dated on or about \_\_\_\_\_ and delivered to \_\_\_\_\_ (Name of Private Lender) \_\_\_\_\_ (the "private lender"). I am duly authorized to make and enter into the following statements, certifications, and agreements for the purpose of inducing the United States of America (the "government"), to give automatic approval to the issuance of the private lender notes pursuant to 7 CFR 1744.30(c).

- (a) The private lender:
  - \_\_\_ is a mortgagee under the existing mortgage securing the government's loan to the borrower (the "government mortgage"); or
  - \_\_\_ is not a mortgagee under the government mortgage and the borrower has executed the attached form of supplemental mortgage as provided in 7 CFR 1744.30(h).
- (b) I hereby certify that all other requirements of 7 CFR 1744.30(c) are met; said requirements being as follows:
  - (1) No default has occurred and is continuing under the government mortgage;
  - (2) The principal amount of such refinancing or refunding notes, which is \_\_\_\_\_ dollars, will not be greater than 112 percent of the then outstanding principal balance of the notes being refinanced or refunded; such outstanding principal balance being \_\_\_\_\_ dollars;
  - (3) The weighted-average life of the private loan evidenced by the private lender notes, which is \_\_\_\_\_ years, will not exceed the weighted-average remaining life of the notes being refinanced or refunded, which is \_\_\_\_\_ years;
  - (4) Except as provided in the government mortgage, the borrower has not agreed to any restrictions or limitations on future loans from the Rural Utilities Service (RUS); and
  - (5) This certificate is being delivered to RUS at least 10 business days before the private lender notes are to be executed.
- (c) The borrower agrees that the private lender notes will provide for substantially level debt service or level principal amortization.
- (d) All terms not defined herein shall have the meaning set forth in 7 CFR 1744, subpart B.

\_\_\_\_\_  
Signed  
  
\_\_\_\_\_  
Name

\_\_\_\_\_  
Date

Name and Address of Borrower:

[66 FR 41763, Aug. 9, 2001]

Rural Utilities Service, USDA

Pt. 1744, Subpt. B, App. B

APPENDIX B TO SUBPART B OF PART 1744—CERTIFICATION OF INDEPENDENT CERTIFIED PUBLIC ACCOUNTANT REGARDING NOTES TO BE ISSUED PURSUANT TO 7 CFR 1744.30(C)

I/We, (Name of Independent Certified Public Accountant), hereby certify the following with respect to the note or notes (the "private lender notes") to be issued by (Name of Borrower) ("the borrower") on or about (Date private lender notes are to be Signed), evidencing a total loan principal of \_\_\_\_\_ dollars:

(a) The borrower has achieved a TIER of not less than 1.5 and a DSC of not less than 1.25 for each of the borrower's 2 fiscal years immediately preceding the issuance of the private lender notes. The TIER and DSC ratios achieved are as follows:

<u>Year</u>	<u>TIER</u>	<u>DSC</u>
_____	_____	_____
_____	_____	_____

(b) The borrower's equity percentage, as of the most recent fiscal year-end, was not less than 25 percent:

<u>Year</u>	<u>Total Equity</u>
_____	_____

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Date

Name and address of CPA Firm:

All terms not defined herein shall have the meaning set forth in 7 CFR 1744, Subpart B.

[66 FR 41763, Aug. 9, 2001]

APPENDIX C TO SUBPART B OF PART 1744—STATEMENT, CERTIFICATION, AND AGREEMENT OF BORROWER'S PRESIDENT OF BOARD OF DIRECTORS REGARDING NOTES TO BE ISSUED PURSUANT TO 7 CFR 1744.30(d)

I \_\_\_\_\_ (Name of President), am President of \_\_\_\_\_ (Name of Borrower) (the "borrower"). The borrower proposes to issue notes (the "private lender notes"), to be dated on or about \_\_\_\_\_ and delivered to \_\_\_\_\_ (Name of Private Lender) (the "private lender"). I am duly authorized to make and enter into the following statements, certifications, and agreements for the purpose of inducing the United States of America (the "government"), to give automatic approval to the issuance of the private lender notes pursuant to 7 CFR 1744.30(d).

- (a) The private lender:
- \_\_\_\_\_ is a mortgagee under the existing mortgage securing the government's loan to the borrower (the "government mortgage"); or
  - \_\_\_\_\_ is not a mortgagee under the government mortgage and the borrower has executed the attached form of supplemental mortgage as provided in 7 CFR 1744.30(h).
- (b) I have reviewed the certificate of the independent certified public accountant also being delivered to the government in connection with the private lender notes to be issued pursuant to 7 CFR 1744.30(d) and concur with the conclusions expressed therein.
- (c) I hereby certify that all other requirements of 7 CFR 1744.30(d) are met as follows:
- (1) The ratio of the borrower's net plant to its total long-term debt at the end of any calendar month ending not more than 90 days prior to execution of the private lender notes is \_\_\_\_\_, which is not less than 1.2, on a pro-forma basis, after taking into account the effect of the private lender notes on the total long-term debt of the borrower;
  - (2) No default has occurred and is continuing under the government mortgage;
  - (3) The weighted-average life of the private loan evidenced by the private lender notes, which is \_\_\_\_\_ years, does not exceed the weighted-average remaining useful lives of the assets being financed, which is \_\_\_\_\_ years;
  - (4) Except as provided in the Government mortgage, the borrower has not agreed to any restrictions or limitations on future loans from the Rural Utilities Service (RUS); and
  - (5) This certificate is being delivered to RUS at least 10 business days before the private lender notes are to be executed.
- (d) The borrower agrees that:
- (1) The proceeds of the private lender notes are to be used for the construction or purchase of the plant and materials and supplies to provide telecommunications services in accordance with 7 CFR 1744.30 and such construction or purchase is expected to be completed not later than 4 years after execution of such notes;
  - (2) The private lender notes will provide for substantially level debt service or level principal amortization;
  - (3) All of the assets financed by the private lender notes will be purchased or otherwise procured in bona fide arm's length transactions; and
  - (4) The financing agreement with the private lender will provide that the private lender shall cease the advance of funds upon receipt of written notification from RUS that the borrower is in default under the RUS loan documents.
- (e) All terms not defined herein shall have the meaning set forth in 7 CFR 1744, Subpart B.

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name

Name and Address of Borrower:

[66 FR 41763, Aug. 9, 2001]



APPENDIX E TO SUBPART B OF PART 1744—STATEMENT, CERTIFICATION, AND AGREEMENT OF BORROWER'S PRESIDENT OF BOARD OF DIRECTORS REGARDING NOTES TO BE ISSUED PURSUANT TO 7 CFR 1744.30(e)

I \_\_\_\_\_ (Name of President), am President of \_\_\_\_\_ (Name of Borrower) (the "borrower"). The borrower proposes to issue notes (the "private lender notes"), to be dated on or about \_\_\_\_\_ and delivered to \_\_\_\_\_ (Name of Private Lender) (the "private lender"). I am duly authorized to make and enter into the following statements, certifications, and agreements for the purpose of inducing the United States of America (the "government"), to give automatic approval to the issuance of the private lender notes pursuant to 7 CFR 1744.30(e).

(a) The private lender:

- \_\_\_\_\_ is a mortgagee under the existing mortgage securing the government's loan to the borrower (the "government mortgage"); or  
 \_\_\_\_\_ is not a mortgagee under the government mortgage and the borrower has executed the attached form of supplemental mortgage as provided in 7 CFR 1744.30(h).

(b) I have reviewed the certificate of the independent certified public accountant also being delivered to the government in connection with private lender notes to be issued pursuant to said § 1744.30(e) and concur with the conclusions expressed therein.

(c) I hereby certify that all other requirements of 7 CFR 1744.30(e) are met; said requirements being as follows:

- (1) The ratio of the borrower's net plant to its total long-term debt at the end of any calendar month ending not more than 90 days prior to execution of the private lender notes is \_\_\_\_\_, which is not less than 1.6, on a pro-forma basis, after taking into account the effect of the private lender notes on the total long-term debt of the borrower;
- (2) No default has occurred and is continuing under the government mortgage;
- (3) The weighted-average life of the private loan evidenced by the private lender notes, which is \_\_\_\_\_ years, does not exceed the weighted-average remaining useful lives of the assets being financed, which is \_\_\_\_\_ years;
- (4) Except as provided in the government mortgage, the borrower has not agreed to any restrictions or limitations on future loans from the Rural Utilities Service "RUS"; and
- (5) This certificate is being delivered to RUS at least 10 business days before the private lender note or notes are to be executed.

(d) The borrower agrees that:

- (1) The proceeds of the private lender notes are to be used for the construction or purchase of the tangible plant and materials and supplies to provide telecommunications services in accordance with 7 CFR 1744.30 and such construction or purchase is expected to be completed not later than 4 years after execution of such notes;
- (2) The private lender notes will provide for substantially level debt service or level principal amortization;

- (3) All of the assets financed by the private lender notes will be purchased or otherwise procured in bona fide arm's length transactions;
  - (4) The proceeds of the private lender notes will be lent to, (Name of Subsidiary), a wholly-owned subsidiary of the borrower pursuant to terms and conditions agreed upon by the borrower and subsidiary;
  - (5) The borrower will, whenever requested by RUS, provide RUS with a copy of the financing or guarantee agreement between the borrower and the subsidiary or any similar or related material including security instruments, loan contracts, or notes issued by the subsidiary to the borrower;
  - (6) The borrower will promptly report to RUS any default by the subsidiary or other actions that impair or may impair the subsidiary's ability to repay its private loans; and
  - (7) The financing agreement with the private lender will provide that the private lender shall cease the advance of funds upon receipt of written notification from RUS that the borrower is in default under the RUS loan documents.
- (e) All terms not defined herein shall have the meaning set forth in 7 CFR 1744, Subpart B.

\_\_\_\_\_  
Signed  
\_\_\_\_\_  
Name

\_\_\_\_\_  
Date  
Name and Address of Borrower:

[66 FR 41763, Aug. 9, 2001]

## APPENDIX F TO SUBPART B OF PART 1744—FORM OF SUPPLEMENTAL MORTGAGE

Supplemental Mortgage and Security Agreement, dated as of \_\_\_\_\_, (hereinafter sometimes called this "Supplemental Mortgage") is made by and among \_\_\_\_\_ (hereinafter called the "Mortgagor"), a corporation existing under the laws of the State of \_\_\_\_\_, and the UNITED STATES OF AMERICA acting by and through the Administrator of the Rural Utilities Service (hereinafter called the "Government"<sup>1</sup>), \_\_\_\_\_ (Supplemental Lender<sup>2</sup>) (hereinafter called \_\_\_\_\_), a \_\_\_\_\_ existing under the laws of \_\_\_\_\_, and is intend to confer rights and benefits on both the Government and \_\_\_\_\_ and \_\_\_\_\_ in accordance with this Supplemental Mortgage and the Original Mortgage (hereinafter defined) (the Government and the Supplemental Lenders being hereinafter sometimes collectively referred to as the "Mortgagees").

**Recitals**

Whereas, the Mortgagor, the Government and \_\_\_\_\_ are parties to that certain Restated Mortgage (the "Original Mortgage" as identified in Schedule "A" of this Supplemental Mortgage) originally entered into between the Mortgagor, the Government acting by and through the Administrator of the Rural Utilities Service (hereinafter called "RUS"), and \_\_\_\_\_; and

Whereas, the Original Mortgage as the same may have been previously supplemented, amended or restated is hereinafter referred to as the "Existing Mortgage"; and

Whereas, the Mortgagor deems it necessary to borrow money for its corporate purposes and to issue its promissory notes and other debt obligations therefor, and to mortgage and pledge its property hereinafter described or mentioned to secure the payment of the same, and to enter into this Supplemental Mortgage pursuant to which all secured debt of the Mortgagor hereunder shall be secured on parity, and to add \_\_\_\_\_ as a Mortgagee and secured party hereunder and under the Existing Mortgage (the Supplemental Mortgage and the Existing Mortgage, hereinafter sometimes collectively referred to the "Mortgage"); and

Whereas, all of the Mortgagor's Outstanding Notes listed in Schedule "A" hereto is secured pari passu by the Existing Mortgage for the benefit of all of the Mortgagees under the Existing Mortgage; and

Whereas, by their execution and delivery of this Supplemental Mortgage the parties hereto do hereby secure the Additional Notes listed in Schedule "A" (hereinafter called the Supplemental Lender Notes<sup>3</sup>) pari passu with the Outstanding Notes under the Existing Mortgage (and do hereby add \_\_\_\_\_ as a Mortgagee and a secured party under the Existing Mortgage); and

1 If the Rural Telephone Bank is a party to the original Mortgage, then "Rural Telephone Bank (herein after called the "Bank")" should be added here and the words "and the Bank" should be added after each reference to the Government.

2 If the Existing Mortgage already defines a Supplemental Lender, then the supplemental lender in the present transaction is to be called the "Second Supplemental Lender" and the supplemental mortgage should refer to both the supplemental lender and the second supplemental lender.

3 If the Second Supplemental Lender is being added to the mortgage, the reference here should be to the "Second Supplemental Lender's Notes."



Whereas, all acts necessary to make this Supplemental Mortgage a valid and binding legal instrument for the security of such notes and related obligations under the terms of the Mortgage, have been in all respects duly authorized:

Now, Therefore, This Supplemental Mortgage Witnesseth: That to secure the payment of the principal of (and premium, if any) and interest on all Notes issued hereunder according to their tenor and effect, and the performance of all provisions therein and herein contained, and in consideration of the covenants herein contained and the purchase or guarantee of Notes by the guarantors or holders thereof, the Mortgagor has mortgaged, pledged and granted a continuing security interest in, and by these presents does hereby grant, bargain, sell, alienate, remise, release, convey, assign, transfer, hypothecate, pledge, set over and confirm, pledge and grant to the Mortgagees, for the purposes hereinafter expressed, a continuing security interest in all property, rights, privileges and franchises of the Mortgagor of every kind and description, real, personal or mixed, tangible and intangible, of the kind or nature specifically mentioned herein or any other kind or nature, in accordance with the Existing Mortgage owned or hereafter acquired by the Mortgagor (by purchase, consolidation, merger, donation, construction, erection or in any other way) wherever located, including (without limitation) all and singular the following:

- A. all of those fee and leasehold interests in real property set forth in Schedule "B" hereto, subject in each case to those matters set forth in such Schedule; and
- B. all of those fee and leasehold interests in real property set forth in \_\_\_\_\_ the Existing Mortgage or in any restatement, amendment or supplement thereto, \_\_\_\_\_; and
- C. all of the kinds, types or items of property, now owned or hereafter acquired, described as Mortgaged Property in the Existing Mortgage or in any restatement, amendment to supplement thereto as Mortgaged Property.

It is Further Agreed and Covenanted That the Original Mortgage, as previously restated, amended or supplemented, and this Supplement shall constitute one agreement and the parties hereto shall be bound by all of the terms thereof and, without limiting the foregoing:

- 1. All terms not defined herein shall have the meaning given in the Existing Mortgage.
- 2. The Supplemental Lender Notes are "notes" and "Additional Notes" under the terms of the Existing Mortgage and the Supplemental Mortgage is a supplemental mortgage under the terms of the Existing Mortgage.
- 3. The holders of the Supplemental Lenders Notes shall be considered as a class, so that in those instances where the Existing Mortgage provides that the holders of majority of the notes issued to other Mortgagees, voting as a class, may approve certain actions or make certain demands, so shall the holders of the Supplemental Lender Notes be considered to be a class with rights and authority equal to those of the holders of notes issued to such other Mortgagees.
- 4. The Maximum Debt Limit for the Existing Mortgage shall be as set forth in Schedule "A" hereto.
- 5. The [Second] Supplemental Lender shall immediately cease transfer of funds covered by the Supplemental Lender Notes if it receives notice that RUS has determined that the borrower's financial condition has deteriorated to a level that impairs the security or feasibility of the government's loans to the borrower.

In Witness Whereof, \_\_\_\_\_ as  
Mortgagor<sup>4</sup>

<sup>4</sup> Spaces are to be provided for the execution by all other parties, together with the printed name and office of the executing individual and the name of the organization represented. Each execution must be acknowledged.

**Supplemental Mortgage Schedule A**  
**Maximum Debt Limit and Other Information**

1. The Maximum Debt Limit is \$ \_\_\_\_\_.
2. The Original Mortgage as referred to in the first WHEREAS clause above is more particularly described as follows: \_\_\_\_\_.
3. The Outstanding Notes referred to in the fourth WHEREAS clause above are more particularly described as follows:
4. The Additional Notes described in the fifth WHEREAS clause above are more particularly described as follows:

**Supplemental Mortgage Schedule B**

**Property Schedule**

The fee and leasehold interests in real property referred to in clause A of the granting clause are more particularly described as follows:

[66 FR 41763, Aug. 9, 2001]

**Subpart C—Advance and Disbursement of Funds**

SOURCE: 54 FR 12186, Mar. 24, 1989, unless otherwise noted. Redesignated at 55 FR 39396, Sept. 27, 1990.

**§ 1744.60 General.**

(a) The standard loan documents (as defined in 7 CFR part 1758) contain provisions regarding advances and disbursements of loan funds by telephone borrowers. This part implements certain of the provisions by setting forth requirements and procedures to be followed by borrowers in obtaining advances and making disbursements of loan and nonloan funds.

(b) This part supersedes any sections of RUS Bulletins with which it is in conflict.

**§ 1744.61 [Reserved]**

**§ 1744.62 Introduction.**

RUS is under no obligation to make or approve advances of loan funds unless the borrower is in compliance with all terms and conditions of the loan documents. The borrower shall use funds in its construction fund only to make disbursements approved by RUS.

**§ 1744.63 The telephone loan budget.**

When the loan is made, RUS provides the borrower a Telephone Loan Budget, RUS Form 493. This budget divides the loan into budget accounts such as "Engineering." When a contract or other document is approved by RUS, funds are encumbered from the appropriate budget account. See 7 CFR part 1753.