

Rural Utilities Service, USDA

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§§ 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 Ap-

pendix 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 Government 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

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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 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 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 instru-

ments, 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

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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 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 lenders 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, unless otherwise noted. Redesignated at 55 FR 39396, Sept. 27, 1990. And further redesignated at 66 FR 41760, Aug. 9, 2001]