

§§ 1717.800–1717.849 [Reserved]

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

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

§ 1717.850 General.

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

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

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

such assets by subordinating its lien on specific assets financed by other lenders.

(2) It is also the policy of RUS to provide effective and timely assistance to borrowers in promoting rural development by subordinating RUS's lien for financially sound rural development investments under the conditions set forth in § 1717.858.

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

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

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

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

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

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

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

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

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

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

(d) *Environmental considerations.* Under certain circumstances, such as

when the project does not qualify for a categorical exclusion, the environmental requirements of 7 CFR part 1794 may apply to applications for lien accommodations, subordinations, and releases.

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

(f) *Safety and performance standards.*

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

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

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

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

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

ment approved by the borrower's board of directors;

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

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

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

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

(2) The measures listed in paragraph (g)(1) of this section will normally be sufficient to meet the lender's responsibility provided that additional measures are not reasonably required based on the particular circumstances of an individual case. Should a lender fail to carry out its responsibility in the manner described in this paragraph (g) or in another manner acceptable to RUS, RUS may disqualify such lender from participation in advance approval under §§1717.854 and 1717.857 and condition the lender's receipt of a lien accommodation or subordination upon the lender providing satisfactory evidence that it will fulfill its responsibility under this paragraph (g).

(h) *Contracting and procurement procedures.* (1) Facilities financed with debt obtained entirely from non-RUS sources, without an RUS loan guarantee, are not subject to RUS post-loan requirements regarding contracting, procurement and bidding procedures; contract close-out procedures pertaining to project completion, final payment of contractor, and related matters; and standard forms of construction and procurement contracts listed in 7 CFR 1726.300.

(2) To the extent that provisions in a borrower's loan contract or mortgage in favor of RUS may be inconsistent with paragraphs (g)(1) and (h)(1) of this section, paragraphs (g)(1) and (h)(1) of this section are intended to constitute

an approval or waiver under the terms of such instruments, and in any regulations implementing such instruments, with respect to facilities financed with debt obtained entirely from non-RUS sources without an RUS guarantee.

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

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

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

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

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

(l) *Release of lien.* To avoid repetition, release of lien is not mentioned in every instance where it may be an ac-

ceptable alternative to subordination of RUS's lien. Generally, lien subordination is favored over release of lien, and any decision to release RUS's lien is at the sole discretion of RUS.

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

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

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

§ 1717.851 Definitions.

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

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

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