



**KANSAS**

CORPORATION COMMISSION

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MEMORANDUM

**To:** Solix and Commission Staff

**From:** Eva Powers & Colleen Harrell, Assistant General Counsel

**Date:** May 1, 2007, Revised

**Re:** Handling bankruptcies and the KUSF

The purpose of this memorandum is to set out and clarify procedures to be followed by the KUSF Administrator and the KCC when a KUSF contributor declares bankruptcy. A carrier's bankruptcy notice may either arrive at the Administrator's or the KCC, but rarely both. It is important for the Administrator and the KCC Staff or attorneys to communicate timely about newly received bankruptcy notices for several reasons.

A carrier may file for bankruptcy under either Chapter 7 or Chapter 11 of the US bankruptcy code. Chapter 7 filings are liquidation filings; the carrier is liquidating all debts and is going out of business and there is typically no money in the estate from which to pay creditors - and no proof of claim is ever filed. Chapter 11 filings are reorganization filings in which the carrier continues in business and debts are reorganized. It is these filing with which we are most concerned, since there is money to pay creditors.

If a carrier has collected its KUSF assessments from its customers that it SHOULD have forwarded to the Administrator and the KUSF, but did not – the collected assessments are not a “debt” in that it is not money the carrier “owes” to any creditor. The KUSF assessments collected from the carrier's customers are simply a “pass through.” The KUSF Administrator should make every effort to collect such monies from companies. A proof of claim can be filed with the bankruptcy court, but should contain notice that the money is not considered a debt. It is a statutory assessment on the carrier that the carrier has elected to collect it from its customers; therefore, it is a pass-through assessment and not a debt owed by the carrier.

If a carrier has NOT collected its KUSF assessments from its customers, the assessments the carrier owes the KUSF is a debt. If the Administrator knows, without a doubt, that a carrier is

not collecting its KUSF assessment from its customers, but is instead paying its KUSF assessment out of its own monies, then the KUSF assessment owed to the KUSF is a debt and a proof of claim should be filed with the bankruptcy court attempts. Attempts to collect the money should not be made for money owed pre-petition.

If the Administrator is uncertain as to whether the carrier has collected its KUSF assessments from its customers, every attempt to collect the money should be made. A proof of claim, accompanied by a notice that the money is not considered a debt since the carrier is authorized to collect its KUSF assessment from the company's customers, and then is passed-through to the KUSF. Thus, it is not a debt owed by the carrier.

In all cases, it should be the carrier's responsibility to show whether it collected its KUSF assessments from customers or not.

The following scenarios may occur after receipt of a Bankruptcy Notice of a carrier – and it is a Chapter 11 filing:

1. The Administrator KNOWS that the carrier's KUSF assessment is passed through and collected from the carrier's customers. The Administrator should continue to attempt to collect any past due amounts – including current assessments due. A proof of claim should be filed, with notification that the money is considered a pass-through and not a debt; and therefore, not subject to bankruptcy proceedings.
2. The Administrator DOES NOT KNOW if the carrier's KUSF assessment is passed through and collected from the carrier's customers or paid out of its own pocket and there are past due amounts. The Administrator should continue to attempt to collect any amounts. A proof of claim should be filed, with notification that the money is considered a pass-through and not subject to bankruptcy proceedings.
3. The Administrator KNOWS that the carrier pays its KUSF assessment out of its own pocket and does not pass through or collect the assessment to its customers. The Administrator must immediately stop trying to collect any amounts that accrued prior to the date the carrier filed for bankruptcy. This is now a debt owed by the carrier and a proof of claim should be filed.

In all cases (if it was a Chapter 11 filing and the carrier intends to continue doing business while reorganizing its debts) the carrier must continue to pay its KUSF assessments as a requirement to do business.

#### **KCC Receives Bankruptcy Notice:**

When the KCC receives notices of a bankruptcy, the KCC Legal division will inform Staff of the bankruptcy. Staff should check with the Administrator to monitor the carrier's status with respect to KUSF monies owed (and from what periods those monies are owed) and to let the Administrator know that the carrier has filed for bankruptcy. At that point, the Administrator should file a proof of claim, and if under scenario 3, cease attempting to collect KUSF assessments owed up to the date the carrier filed for bankruptcy, and continue to attempt to

collect KUSF assessments owed to the KUSF for periods after the date the carrier actually filed for bankruptcy. If the carrier or its representative is able to provide sufficient evidence that the carrier did not pass its KUSF assessment through to customers, as per scenario 3, the Administrator should not attempt to collect the delinquent assessments from the carrier for periods prior to the date the carrier actually filed for bankruptcy.

Upon a bankruptcy filing, the bankruptcy court enters an “automatic stay”, which bars creditors from attempting to collect on a pre-petition debt. The Administrator should inform the **KCC of the amounts owed, and upon approval, the KCC will authorize the Administrator to write-off the outstanding balance of all pre-petition KUSF assessment debt not recovered via a pass through of the assessment to customers after the bankruptcy is concluded and all proofs of claims are paid, if any money is available to pay creditors.** The carrier must continue to report and remit assessments to the KUSF for post-bankruptcy periods. For all carriers, the Administrator should attempt to collect all post-petition assessments, regardless of the how the money is collected.

#### **Administrator Receives Bankruptcy Notice:**

If the Administrator receives notice of a carrier filing for bankruptcy (whether Chapter 7 or 11), it should forward a copy of the notice to the managing auditor overseeing the KUSF or the appropriate attorney, along with a statement of assessments owed by the carrier and the applicable periods. Again, the time period in which the monies owed accrued is very important. The KUSF Administrator will provide the KCC with copies of the initial notice of bankruptcy filing for all carriers it receives. In case of Chapter 11 cases, proof of claim forms will also be provided. In a Chapter 7 bankruptcy filing, a copy of the notice that there may be funds to pay claims should be provided.

The Administrator should file proofs of claims for monies owed to the KUSF, along with notification set forth in Scenarios 1-2 above. The Administrator is to copy the KCC on all filings or correspondence

If the bankruptcy trustee appointed to oversee the case (not the carrier) requests that monies paid to the KUSF be returned to the carrier due to bankruptcy, the KUSF Administrator will notify the KCC Staff and legal division. Any payments on a debt made to a creditor in the 90 days preceding the filing of the petition for bankruptcy are known as “preferential transfers” and are normally to be returned to the bankruptcy trustee. However, if the carrier has collected the money from its customers, then it is our position that it is not a “debt.” Even if a carrier has paid the KUSF assessment out of its own pocket, paying the assessments is a requirement for doing business as a carrier in the state of Kansas and, as a result, the monies do not have to be returned.

In the event that stock certificates are offered as part of a bankruptcy settlement, the KUSF Administrator will notify the KCC Staff and legal division to address how such issue will be addressed. In the event that dividend checks are provided in the bankruptcy settlement, such monies will be treated as assessments paid by the company, and appropriately reflected in the carrier’s files. Such monies will also be reflected in the monthly KUSF reports.