

Objection Deadline: October 7, 2004 at 4:00 p.m.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	:	Chapter 11
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RCN CORPORATION, <u>et al.</u> ,	:	Case No. 04-13638 (RDD)
	:	
Debtors.	:	(Jointly Administered)
	:	
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DEBTORS' APPLICATION FOR AN ORDER UNDER 11 U.S.C. §§ 327(e), 328 AND 329, AND FED. R. BANKR. P. 2014 AND 2016 AUTHORIZING THE RETENTION OF KASOWITZ, BENSON, TORRES & FRIEDMAN LLP AS SPECIAL CONFLICTS COUNSEL TO THE DEBTORS

RCN Corporation ("RCN") and certain of its direct and indirect subsidiaries, debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors"), hereby apply for entry of an order under 11 U.S.C. §§ 327(e), 328 and 329 and Fed. R. Bankr. P. 2014 and 2016 authorizing the retention of Kasowitz, Benson, Torres & Friedman LLP ("KBT&F"), effective as of September 15, 2004, as

special conflicts counsel to the Debtors. In support of this application, the Debtors rely, inter alia, on the Declaration of Aaron H. Marks in Support of the Debtors' Application for an Order Under 11 U.S.C. §§ 327(e), 328 and 329 and Fed. R. Bankr. P. 2014 and 2016 Authorizing the Retention of Kasowitz, Benson, Torres & Friedman LLP as Special Conflicts Counsel to the Debtors (the "Marks Declaration").¹ In further support of this application, the Debtors respectfully represent as follows:

BACKGROUND

1. On May 27, 2004 (the "Petition Date"), RCN, TEC Air, Inc., RLH Property Corporation, RCN Finance, LLC and Hot Spots Productions, Inc., the debtors and debtors-in-possession in case number 04-13638 (RDD) (collectively, the "Initial Debtors"), filed voluntary petitions in this Court for reorganization relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). On August 5, 2004, RCN Cable TV of Chicago, Inc., the debtor and debtor-in-possession in case number 04-15120 (RDD), filed a voluntary petition in this Court for reorganization relief under the Bankruptcy Code. On August 20, 2004, 21st Century Telecom Services, Inc., RCN Telecom Services of Virginia, Inc., RCN Entertainment, Inc. and ON TV, Inc. (collectively with RCN Cable TV of Chicago, Inc., the "Affiliate Debtors"), the debtors and debtors-in-possession in case numbers

¹ The Debtors incorporate by reference the facts set forth in the Marks Declaration.

04-15505 (RDD) through 04-15508 (RDD), filed voluntary petitions in this Court for reorganization relief under the Bankruptcy Code. The bankruptcy cases of the Initial Debtors and the Affiliate Debtors are jointly administered under case number 04-13638 (RDD). The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to Bankruptcy Code sections 1107 and 1108.

2. On June 10, 2004 the Official Committee of Unsecured Creditors (the "Creditors' Committee") was appointed by the United States Trustee for the Southern District of New York (the "United States Trustee") for the Initial Debtors. No trustee, examiner or official committee has been appointed in the Affiliate Debtors' chapter 11 cases.

3. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. Venue is proper under 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b)(2).

4. The statutory predicates for the relief requested herein are Bankruptcy Code sections 327(e), 328, 329 and Rules 2014 and 2016 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

RELIEF REQUESTED

5. By this Application, the Debtors seek to retain KBT&F, as of September 15, 2004, as special conflicts counsel in these chapter 11 cases, pursuant to the terms and provisions of the Engagement Letter (as defined in the Marks Declaration),

this application, the Marks Declaration, and the proposed order submitted herewith. Accordingly, the Debtors respectfully request entry of an order under Bankruptcy Code sections 327(e), 328 and 329, authorizing them to retain KBT&F as the Debtors' special conflicts counsel to perform services that will be necessary during these cases, as more fully described herein.

6. The Debtors propose to have KBT&F provide legal representation on any matter that would ordinarily be handled by Skadden, Arps, as the Debtors' primary bankruptcy counsel, but with respect to which Skadden, Arps cannot provide representation because of a conflict, adverse interest, or other connection between Skadden, Arps and such matter. Additionally, KBT&F in particular is being retained in connection with a significant claim asserted against the estates as to which KBT&F has particular expertise.

BASIS FOR RELIEF

7. Pursuant to the Engagement Letter, the Debtors wish to engage KBT&F as special conflicts counsel to the Debtors. The terms of employment and compensation set forth in the Engagement Letter and below are consistent with employment and compensation arrangements typically entered into by KBT&F and other firms for the performance of similar services.

8. KBT&F is a law firm of more than 160 attorneys, which maintains its principal offices at 1633 Broadway, New York, New York 10019 with offices also in

San Francisco, California, Houston, Texas, Atlanta, Georgia, and Newark, New Jersey. The Debtors believe KBT&F is well-qualified to serve as their special conflicts counsel in these cases. KBT&F has been actively involved in numerous major chapter 11 cases, including in connection with litigation of the sort contemplated herein.

9. The Debtors submit that the retention of KBT&F on the terms described in the Engagement Letter and herein is necessary and appropriate under sections 327(e), 328 and 329 of the Bankruptcy Code. With the Court's approval, a debtor-in-possession has the power to employ attorneys as special counsel pursuant to section 327(e) of the Bankruptcy Code, which provides:

The [debtor], with the Court's approval, may employ, for a specified special purpose, other than to represent the [debtor] in conducting the case, an attorney that has represented the [debtor], if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtors or the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 327(e). See, e.g., DeVlieg-Bullard, Inc. v. Natale, 174 B.R. 497 (N.D. Ill. 1994); Meespierson Inc. v. Strategic Telecom, Inc., 202 B.R. 845, 847-48 (Bankr. D. Del. 1996); In re Leisure Dynamics, 32 B.R. 753, 754 n.2 (Bankr. D. Minn. 1983), aff'd, 33 B.R. 121 (D. Minn. 1983) (noting that court had approved debtor's retention of corporate counsel under section 327(e)).

10. Simply put, section 327(e) authorizes the retention of an attorney as special counsel, provided that: (a) such retention is for a special purpose; (b) the purpose of the retention is not to conduct the cases; (c) the retention is in the best interests of the estates; and (d) the attorney does not hold any interest adverse to the debtor respecting the subject of its retention. As detailed below, the Debtors' proposed retention of KBT&F as special conflicts counsel falls squarely within the scope of and purpose for which Congress enacted section 327(e).

SPECIAL PURPOSE

11. KBT&F's proposed retention pursuant to section 327(e) of the Bankruptcy Code is for the limited purpose of representing the Debtors in matters where Skadden Arps, the Debtors' primary bankruptcy counsel, would be unable to provide such representation due to any conflict, adverse interest or other connection, including the claims litigation referenced above. The Debtors expect that KBT&F will provide only such representation to the Debtors, and that otherwise Skadden, Arps and other professionals will represent the Debtors with respect to all other aspects of these chapter 11 cases.

CONDUCT OF THE CASES

12. KBT&F's proposed retention is for the discrete matters referenced above, and KBT&F will not be rendering services typically performed by a debtor's bankruptcy counsel. Among other things, KBT&F ordinarily will not be involved in

interfacing with this Court or be primarily responsible for the Debtors' general restructuring efforts, such as interfacing with this Court to the extent necessary to assist the Debtors in situations where Skadden, Arps is unable to provide such representation. By outlining KBT&F's role as set forth in the Engagement Letter and herein, the Debtors have ensured there will be no duplication of services.

BEST INTERESTS OF THE ESTATES

13. KBT&F's retention is in the best interests of the Debtors, their estates and creditors. The Debtors selected KBT&F as conflicts counsel to the Debtors because of KBT&F's extensive general experience and knowledge, and, in particular, its recognized expertise in litigation and bankruptcy matters of the sort contemplated hereby. Courts have recognized the benefits of retaining special conflicts counsel under such conditions. See In re Sharon Steel Corp., 156 B.R. 14, 16 (W.D. Pa. 1993). As such, KBT&F should be retained as the Debtors' special conflicts counsel.

NO ADVERSE INTEREST

14. To the best of the Debtors' knowledge, KBT&F does not have any connection with the Debtors, their creditors or any other party in interest, or their respective attorneys, except to the extent set forth in the Marks Declaration. KBT&F has informed the Debtors that it represents no interest adverse to the Debtors' estates respecting the matters on which it is to be retained.

15. Where, as here, there is no conflict concerning the subject matter of the proposed special engagement, an application to employ special counsel should be granted. As recognized in In re Carla Leather, Inc., 44 B.R. 457, 474 (Bankr. S.D.N.Y. 1984), aff'd, 50 B.R. 764 (S.D.N.Y. 1985), "[section] 327(e) bars engagement of special counsel only in the presence of an actual conflict of interest concerning the subject matter of the engagement." (citations omitted).

COMPENSATION

16. Section 328(a) of the Bankruptcy Code authorizes the employment of a professional person "on any reasonable terms and conditions of employment." 11 U.S.C. § 328(a). As KBT&F is likely to render significant legal services as special conflicts counsel, the cost of which cannot be estimated with certainty, it is necessary and essential that the Debtors, as debtors-in-possession, employ KBT&F to render the services described herein.

17. The Debtors understand that KBT&F will apply to the Court for allowance of compensation for professional services rendered and reimbursement of charges and disbursements incurred in these chapter 11 cases in accordance with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules for the Southern District of New York, the United States Trustee Fee Guidelines and the orders of this Court. The Debtors understand that such applications will constitute a request for interim payment against KBT&F's reason-

able fees to be determined at the conclusion of the cases. Subject to Court approval, the Debtors understand that compensation will be payable to KBT&F on an hourly basis, plus reimbursement of actual and necessary expenses incurred by KBT&F.

18. The Debtors anticipate that KBT&F will perform services on behalf of both the Debtors and the Debtors' affiliates that are not chapter 11 debtors (the "Non-Debtor Affiliates"). Services performed exclusively for the Debtors will be reflected in fee applications filed with the Court. Services performed exclusively for Non-Debtor Affiliates will be billed directly to such Non-Debtor Affiliates, will not be billed to the estates, and therefore will not be reflected in fee applications filed with the Court. In circumstances where services are rendered to both Debtors and Non-Debtor Affiliates which are for the benefit of both, KBT&F has advised the Debtors that it will allocate a proportional amount of its fees and expenses for such services to such Non-Debtor Affiliates, and will only seek payment from the estates of that portion allocated to the Debtors.

19. The Debtors submit that no new or novel issue of law is presented with respect to the matters contained herein. Because the relevant authorities in support of the requested relief are cited in this application, the Debtors request that the requirement of the service and filing of a separate memorandum of law under Local Bankr. R. 9013-1(b) be deemed satisfied.

WHEREFORE, the Debtors respectfully request that the Court enter an order (i) authorizing the Debtors to retain KBT&F as their special conflicts counsel, as of September 15, 2004, to perform the services described herein and (ii) granting the Debtors such other and further relief as is just and proper.

Dated: New York, New York
September 22, 2004

RCN Corporation, on behalf of itself
and the other Debtors, as Debtors and
Debtors-in-Possession

/s/ Deborah M. Royster

By: Deborah M. Royster
Title: Senior Vice President, General
Counsel and Corporate Secretary