

Objection Deadline: October 8, 2004 at 4:00 p.m.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036-6522
(212) 735-3000
D. J. Baker (DB 0085)
(A Member of the Firm)
Frederick D. Morris (FM 6564)

Attorneys for Debtors and Debtors-in-Possession

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 DECHERT 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 Dechert LLP ("Dechert"), nunc pro tunc to September 14, 2004, as special conflicts counsel to the

Debtors. In support of this application, the Debtors rely on the Affidavit of Martin J. Black 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 Dechert LLP as Special Conflicts Counsel to the Debtors (the "Black Affidavit").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 04-15505 (RDD) through 04-15508 (RDD), filed voluntary petitions in this Court for

¹ The Debtors incorporate by reference the facts set forth in the Black Affidavit.

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, and 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 Dechert, nunc pro tunc to September 14, 2004, as special conflicts counsel in these chapter 11 cases, pursuant to the terms and provisions of the Engagement Letter (as defined in the Black Affidavit), this application, the Black Affidavit, 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 Dechert 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 Dechert provide legal representation on matters 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, including (1) the resolution of certain patent infringement claims (the "Claims") asserted against them and (2) any other matters specifically requested by the Debtors and agreed to by Dechert, to the extent Dechert does not represent or hold any interest adverse to the Debtors or their estates with respect to such matters.

BASIS FOR RELIEF

7. Pursuant to the Engagement Letter, the Debtors wish to engage Dechert as their special conflicts counsel. 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 Dechert and other firms for the performance of similar services. The Debtors believe Dechert is well-qualified to

provide the representation described herein, especially since it has significant familiarity with the Claims.

8. The Debtors submit that the retention of Dechert 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)).

9. 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 Dechert as special conflicts counsel falls squarely within the scope of and purpose for which Congress enacted section 327(e).

SPECIAL PURPOSE

10. Dechert'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 resolution of the Claims and any other limited matters specifically requested by the Debtors and agreed to by Dechert, to the extent such representation does not create any interest adverse to the Debtors or their estates with respect to such matters. The Debtors expect that otherwise Skadden, Arps will represent the Debtors with respect to the conduct of these chapter 11 cases.

CONDUCT OF THE CASES

11. Dechert's proposed retention is for the discrete matters referenced above, and Dechert will not be rendering services typically performed by a debtor's general bankruptcy counsel. Among other things, Dechert will not be responsible for the Debtors' general restructuring efforts. Although Dechert may, for instance, be before this Court to the extent necessary to assist the Debtors in resolving the Claims

or other matters for which Dechert has been retained by the Debtors, by outlining Dechert'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

12. Dechert's retention is in the best interests of the Debtors, their estates, and their creditors. The Debtors selected Dechert as their special conflicts counsel because of Dechert's extensive general experience and knowledge with respect to the Claims, among other reasons.

13. Courts have recognized the benefits of retaining special counsel under such conditions. See In re Sharon Steel Corp., 156 B.R. 14, 16 (W.D. Pa. 1993) (noting that appointment of special counsel will "eliminate the possibility of derailing reorganization because the expertise and knowledge of pre-petition counsel in the areas of their prior service will be maintained" and "result in significant cost savings"). Dechert is well-suited to serve as special conflicts counsel and to ensure that the Claims are resolved and these cases proceed in an efficient and successful manner. As such, Dechert should be retained as the Debtors' special conflicts counsel.

NO ADVERSE INTEREST

14. To the best of the Debtors' knowledge, the members of Dechert do not have any connection with the Debtors, their creditors, or any other parties in interest,

except to the extent set forth in the Black Affidavit. Dechert has represented that it neither holds nor represents any interest adverse to the Debtors or their estates with respect to the Claims or any other matter related to these cases, except as disclosed and described in the Black Affidavit.

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 the costs of the services Dechert would render to the Debtors cannot be estimated with certainty, it is necessary and essential that the Debtors, as debtors-in-possession, employ Dechert to render the services described herein.

17. The Debtors anticipate that Dechert may 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 any of the Non-Debtor Affiliates would be billed directly to such Non-Debtor Affiliates and would not be

billed to the Debtors' estates. To the extent Dechert performs services on behalf of both the Debtors and the Non-Debtor Affiliates for the benefit of both, Dechert would allocate a proportional amount of its fees and expenses for such services to such non-debtor entities, and it would only seek payment from the estates of that portion allocated to the Debtors.

18. As set forth in the Engagement Letter, with respect to services rendered on behalf of the Debtors, Dechert may provide monthly statements and would file fee applications pursuant to Bankruptcy Code sections 330 or 331, the Local Bankruptcy Rules for the Southern District of New York, the Fee Guidelines promulgated by the Executive Office of the United States Trustee, the order establishing procedures for interim compensation and reimbursement of expenses of professionals, entered by this Court on June 22, 2004, and any other order of this Court.

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 Dechert as their special conflicts counsel, nunc pro tunc to September 14, 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 23, 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