

**Hearing Date: November 23, 2004 at 10:00 a.m. (Eastern)**  
**Responses Due: November 19, 2004 at 4:00 p.m. (Eastern)**

DECHERT LLP  
David C. McGrail (DM 3904)  
30 Rockefeller Plaza  
New York, NY 10112  
(212) 698-3500

Martin J. Black  
4000 Bell Atlantic Tower  
1717 Arch Street  
Philadelphia, PA 19103  
(215) 994-4000

Special Conflicts Counsel for the Debtors and  
Debtors-in-Possession

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
In re : Chapter 11  
: :  
RCN CORPORATION, et al., : Case No. 04-13638 (RDD)  
: :  
Debtors. : (Jointly Administered)  
: :  
----- X

**NOTICE OF DEBTORS' MOTION  
FOR AN ORDER UNDER BANKRUPTCY  
CODE SECTIONS 105(a) AND 502(c) ESTIMATING,  
FOR PURPOSES OF ALLOWANCE, THE CLAIMS OF  
INTERNATIONAL BUSINESS MACHINES**

PLEASE TAKE NOTICE that on October 29, 2004, RCN Corporation and certain of its direct and indirect subsidiaries, debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors"), filed their motion (the "Motion") under Bankruptcy Code sections 105(a) and 502(c) for an order estimating, for purposes of allowance, the claims of International Business Machines Corporation.

PLEASE TAKE FURTHER NOTICE that responses to the Motion, if any, must be in writing, must conform to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Southern District of New York, and must be (i) filed with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") in accordance with General Order M-242 (as amended) - registered users of the Bankruptcy Court's case filing system must file electronically, and all other parties in interest must file on a 3.5 inch disk (preferably in Portable Document Format (PDF)), WordPerfect or any other Windows-based word processing format); submitted in hard-copy form directly to the chambers of the Honorable Robert D. Drain, United States Bankruptcy Judge; and served upon (i) RCN Corporation, 105 Carnegie Center, Princeton, NJ 08540, Attention: General Counsel; (ii) Dechert LLP, 30 Rockefeller Plaza, New York, NY 10112, Attention: David C. McGrail, Esq., and 4000 Bell Atlantic Tower, 1717 Arch Street, Philadelphia, PA 19103, Attention: Martin J. Black, Esq.; (iii) Skadden, Arps, Slate, Meagher & Flom LLP, counsel to the Debtors, 4 Times Square, New York, NY, 10036-6522, Attention: D.J. Baker, Esq., and Frederick D. Morris, Esq.; (iv) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, NY 10004, Attention: Paul K. Schwartzberg, Esq.; (v) Milbank, Tweed, Hadley & McCloy, counsel to the Official Committee of Unsecured Creditors, 1 Chase 2 Manhattan Plaza, New York, NY 10005, Attention: Dennis F. Dunne, Esq., and Susheel Kirpalani, Esq.; (v) Simpson Thacher & Bartlett, counsel to the agent for the Debtors' prepetition credit facility, 425 Lexington Avenue, New York, NY 10017-3954, Attention: Peter V. Pantaleo, Esq.; and (vi) HSBC Bank USA, the indenture trustee for the Debtors' outstanding debt securities, 452 Fifth Avenue, New York, NY 10001, Attention: Issuer Services, in each case so as to be **received no**

**later than 4:00 p.m. prevailing Eastern time on November 19, 2004** (the “Response Deadline”).

PLEASE TAKE FURTHER NOTICE that a hearing on the Motion (the “Hearing”) will be held before the Honorable Robert D. Drain, United States Bankruptcy Judge, in the United States Bankruptcy Court for the Southern District of New York, Alexander Hamilton Custom House, One Bowling Green, New York, NY 10004 on **November 23, 2004 at 10:00 a.m. prevailing Eastern time.**

PLEASE TAKE FURTHER NOTICE that only those responses made in writing and timely filed and received by the Response Deadline will be considered by the Bankruptcy Court at the Hearing and that if no responses to the Motion are timely filed and served in accordance with the procedures set forth herein, the Bankruptcy Court may enter an order granting the relief requested in the Motion **without further notice.**

PLEASE TAKE FURTHER NOTICE that, notwithstanding Local Bankruptcy Rule 9014-2, the Hearing shall be an evidentiary hearing at which witnesses may testify.

DATED: October 29, 2004  
New York New York

/s/ David C. McGrail  
David C. McGrail (DM 3904)  
Dechert LLP  
30 Rockefeller Plaza  
New York, New York 10112  
(212) 698-3500

Martin J. Black  
4000 Bell Atlantic Tower  
1717 Arch Street  
Philadelphia, PA 19103  
(215) 994-4000

Special Conflicts Counsel for the  
Debtors and Debtors-in-Possession

**Hearing Date: November 23, 2004 at 10:00 a.m. (Eastern)**  
**Responses Due: November 19, 2004 at 4:00 p.m. (Eastern)**

DECHERT LLP  
David C. McGrail (DM 3904)  
30 Rockefeller Plaza  
New York, NY 10112  
(212) 698-3500

Martin J. Black  
4000 Bell Atlantic Tower  
1717 Arch Street  
Philadelphia, PA 19103  
(215) 994-4000

Special Conflicts Counsel for the Debtors and  
Debtors-in-Possession

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
In re : Chapter 11  
: :  
RCN CORPORATION, et al., : Case No. 04-13638 (RDD)  
: :  
Debtors. : (Jointly Administered)  
: :  
----- X

**MOTION FOR AN ORDER UNDER  
BANKRUPTCY CODE SECTIONS 105(a) AND 502(c)  
ESTIMATING THE CLAIMS, FOR PURPOSES OF ALLOWANCE,  
OF INTERNATIONAL BUSINESS MACHINES CORPORATION**

RCN Corporation (“RCN Corp.”) and certain of its direct and indirect subsidiaries (the “Subsidiary Debtors” and, together with RCN Corp., the “Debtors”), debtors and debtors-in-possession in the above-captioned cases, hereby file this motion (the “Motion”) under Bankruptcy Code sections 105(a) and 502(c) for an order estimating (1) the claim (the “RCN Claim”) asserted by International Business Machines Corporation (“IBM”) against RCN Corp. in proof of claim number 1424 and (2) the claims (the “Subsidiary Claims” and, together with the

RCN Claim, the “IBM Claims”) asserted by IBM against the Subsidiary Debtors in proof of claim numbers 1420 through and including 1423 and 2041 through and including 2045, and in support thereof respectfully represent as follows:

### **PRELIMINARY STATEMENT**

1. Under Bankruptcy Code section 502(c), the Court is required to estimate the IBM Claims, for purposes of allowance, to prevent undue delay in the confirmation and implementation of the Debtors’ Joint Plan of Reorganization of RCN Corporation and Certain Subsidiaries, dated October 12, 2004 (the “Plan”). See 11 U.S.C. § 502(c). Estimation of the RCN Claim is necessary to avoid delaying the distributions to which the Debtors’ creditors would be entitled under the Plan. In addition, estimation of the Subsidiary Claims is necessary, among other reasons, because it is a condition to the Plan going effective that the total claims against those entities not exceed \$500,000 without the consent of the Official Committee of Unsecured Creditors (the “Committee”). See Plan, Art. X.B.6. Because there is no basis for any of those claims, each of IBM’s claim should be estimated at \$0.

### **FACTUAL BACKGROUND**

#### **Introduction**

2. On May 27, 2004, debtors RCN Corp., TEC Air, Inc., RLH Property Corporation, RCN Finance, LLC, and Hot Spots Productions, Inc., filed voluntary petitions in this Court for chapter 11 protection under the Bankruptcy Code.

3. Debtor RCN Cable TV of Chicago commenced its chapter 11 case on August 5, 2004. Debtors RCN Telecom Services of Virginia, Inc., RCN Entertainment, Inc., 21<sup>st</sup> Century Telecom Services, Inc., and ON TV, Inc. commenced their chapter 11 cases on August 20, 2004.

4. The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to Bankruptcy Code sections 1107 and 1108.

5. No trustee or examiner has been appointed in these cases. On June 10, 2004, the Committee was appointed by the United States Trustee for the Southern District of New York (the “United States Trustee”).

6. On October 20, 2004, the Bankruptcy Court entered an order authorizing the retention of Dechert LLP as special conflicts counsel for the Debtors under Bankruptcy Code section 327(e).

7. 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).

8. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105 and 502(c).

#### **The April 1999 Letter and IBM’s License Offer**

9. On April 26, 1999, IBM sent a letter (the “April 1999 Letter”) to David C. McCourt of RCN Corp. asserting that IBM had completed an analysis of RCN Corp.’s Internet Service Provider (“ISP”) business and that RCN Corp. required a license to several IBM patents. RCN Corp. indicated that it disagreed with IBM’s assertions. Notably, the April 1999 Letter did not allege patent infringement by any of the Subsidiary Debtors.

10. In September 2000, IBM offered to license the allegedly infringing technology to RCN Corp. for five years at \$700,000 a year, with credits available on equipment sales. RCN Corp. rejected this offer.

#### **The IBM Claims and the Debtors’ Objection Thereto**

11. On or about August 11, 2004, IBM asserted the RCN Claim in the amount of \$37,600,000. It did not attach to its proof of claim *any* of the documentation necessary to support a claim of patent infringement, such as a claims chart or an identification of which

claims of which patents have allegedly been infringed. Nor did it indicate how it calculated the amount of the claim, which vastly exceeds the \$700,000 per year offer made by IBM.

12. On or about September 24, 2004, IBM asserted the Subsidiary Claims in unliquidated amounts. IBM did not provide any indication of why it believes it has claims against the Subsidiary Debtors or how its alleged claims would be calculated.

13. Instead, the sum total of IBM's "proofs of claim" was one vague allegation of the "infringement of many of IBM's patents, including U.S. patent numbers 4,805,135, 5,319,542, 5,442,771, 5,758,072, 5,347,632, and 5,796,967" by Erols Internet, Inc. ("Erol"), the Debtors' purported predecessor-in-interest.

14. The Debtors filed an objection (the "Objection") to the IBM Claims on October 7, 2004. In the Objection, the Debtors argue that the IBM Claims (i) are not supported by sufficient evidence, (ii) are without merit, as IBM's patents have not been infringed and/or are invalid, (iii) are barred by the laches, estoppel, or 35 U.S.C. § 286, (iv) are barred by IBM's patent misuse and other conduct in violation of the antitrust laws, (v) are barred by IBM's prior licenses, (vi) are barred by IBM's failure to comply with 35 U.S.C. § 287, and (vii) are duplicative.

15. A copy of the Objection is attached hereto as Exhibit A and is incorporated herein by reference, and the Debtors repeat and reallege each and every argument and objection set forth therein as though fully set forth herein.

16. On October 28, 2004, IBM filed a response (the "Response") to the Objection.

### **The Debtors' Joint Plan of Reorganization**

17. On October 12, 2004, the Debtors filed the Plan<sup>1</sup> and corresponding disclosure statement (the "Disclosure Statement"). On October 13, 2004, the Court entered an order

---

<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Plan.

approving the Disclosure Statement and an order (the “Procedures Order”), among other things, setting December 8, 2004 as the date of the confirmation hearing (the “Confirmation Hearing”) on the Plan.

18. The Procedures Order also provides, among other things, that:

any Claim (or portion thereof) to which an objection has been filed prior to the Confirmation Hearing shall neither be entitled to vote on the Plan nor shall it be counted in determining whether the requirements of Bankruptcy Code section 1126(c) have been met with respect to the Plan, unless (i) the Claim has been temporarily allowed for voting purposes pursuant to Bankruptcy Rule 3018(a) or (ii) the objection to such Claim has been resolved in favor of the creditor asserting the Claim.

Procedures Order, ¶ 11.

19. Under the Plan, at their option, holders of allowed claims against RCN Corp. would receive common stock of reorganized RCN Corp. or cash equal to 25% of the amount of their allowed claims. See Plan Art. III.C.5.b. Holders electing to receive cash, however, would be required to accept stock to the extent the aggregate amount of cash elections would require cash distributions to exceed \$12,500,000. See id. The initial distribution to holders of allowed claims against RCN Corp. would be made on or as soon as practicable after the Effective Date. See id.

20. The RCN Claim for \$37,600,000 million is substantial, even in cases of this magnitude, and the Debtors believe that the failure to resolve or estimate it promptly could have a material adverse effect on and/or delay the implementation of the Plan and, in particular, (1) the amount and form (stock or cash) of initial distributions to holders of allowed claims against RCN Corp. under Plan Article III.C.5.b, (2) the amount of stock and cash the Debtors are required to withhold in the Distribution Reserve pursuant to Plan Article VI.C, and (3) the amount and timing of any final distribution of stock or cash remaining in the Distribution



Reserve pursuant to Plan Article VI.D. Put simply, distributions to the Debtors' legitimate creditors should not be held hostage due to IBM's decision to file an unsupported litigation claim of this magnitude.

21. The Debtors further believe that, although the RCN Claim is without merit and will eventually be disallowed and expunged in its entirety, it might not be resolved through the Objection until after the Confirmation Hearing and perhaps even after the Effective Date.

22. In addition, Plan Article III.C.6 establishes Class 6, "Subsidiary General Unsecured Claims," which consists of all unsecured claims against each of the Subsidiary Debtors. See Plan Art. III.C.6.a. The Plan provides that all claims in Class 6 will be paid in full or will pass through the bankruptcy unaffected. See Plan Art. III.C.6.b. In the event the total of all claims under Class 6 exceeds \$500,000, however, the Committee can require the Debtors to withdraw the Plan with respect to, or to modify it to impair the claims against, any Subsidiary Debtor. See id. Indeed, it is a condition to the Plan going effective that the total claims against the Subsidiary Debtors not exceed \$500,000 without the Committee's consent. See Plan, Art. X.B.6.

23. Because the Plan provides for payment of claims against the Subsidiary Debtors in full in cash, these Plan provisions were heavily negotiated between the Debtors and the Committee, and the Debtors believe that there is a strong likelihood that their Plan process will be significantly delayed, and possibly completely derailed, if the total of all claims under Class 6 exceeds \$500,000 or is left undetermined as of the Confirmation Hearing.

24. Although the Debtors believe that the Subsidiary Claims are without merit and will eventually be disallowed and expunged in their entirety, they are unlikely to be resolved through the Objection until after the Confirmation Hearing. Until the Subsidiary Claims are

resolved or estimated, the total of all claims under Class 6 could exceed \$500,000 and/or the Debtors could risk triggering Plan section III.C.6.b, significantly delaying and disrupting the Plan confirmation process.

### **RELIEF REQUESTED**

25. By this Motion, the Debtors seek the entry of an order estimating, for purposes of allowance, each of the IBM Claims at \$0, including, without limitation, for determining the feasibility of, and distributions under, the Plan.

### **BASIS FOR RELIEF REQUESTED**

26. Under Bankruptcy Code section 502(c), this Court must estimate for purposes of allowance any contingent or unliquidated claim, “the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case.” 11 U.S.C. § 502(c)(1). The purpose of the claims estimation process is to estimate claims in a shorter timeframe than that required for full litigation through the claims objection process. See, e.g., In re Windsor Plumbing Supply Co., Inc., 170 B.R. 503, 520-21 (Bankr. E.D.N.Y. 1994).

27. The IBM Claims are unliquidated<sup>2</sup> because their value is not “easily ascertainable” or “readily determinable.” See In re Mazzeo, 131 F.2d 295, 304 (2d. Cir. 1997) (claim is liquidated if “the value of the claim is easily ascertainable” and unliquidated if that value depends “on a future exercise of discretion, not restricted by specific criteria”) (citation omitted); In re Nicholes, 184 B.R. 82, 91 (B.A.P. 9<sup>th</sup> Cir. 1995) (“[I]f the dispute itself makes the claim difficult to ascertain or prevents the ready determination of the amount due, the debt is unliquidated.”). At their core, the IBM Claims are speculative litigation claims that are not easily calculated, such as by reference to a contract or other documentary evidence. Such claims

---

<sup>2</sup> Each of the IBM Claims may also be a “contingent claim,” as such term is used in Bankruptcy Code section 502(c).

are precisely what Congress envisioned as being within the ambit of the Bankruptcy Code section 502(c).

28. Bankruptcy Code section 502(c) requires the estimation of the IBM Claims for allowance purposes, including, without limitation, for purposes of distributions and feasibility at confirmation. See Maxwell v. Seaman Furniture Company, Inc. (In re Seaman Furniture Co. of Union Square, Inc.), 160 B.R. 40, 42 (S.D.N.Y. 1993) (“Estimation is an expedient method for setting the amount of a claim that may receive a distributive share from the estate.”); In re Thomson McKinnon Securities, Inc., 143 B.R. 612, 619 (Bankr. S.D.N.Y. 1992) (same); In re Mirant Corp., Case No. 03-46590, Memorandum Order (D.I. #5998), p. 7-8 (Oct. 21, 2004) (DML) (“substantial support” for estimating claims for distribution purposes);<sup>3</sup> In re Interco Inc., 211 B.R. 667, 683 (Bankr. E.D. Mo. 1997) (estimating claims for purposes of allowance and distribution); In re C.F. Smith & Assoc., Inc., 235 B.R. 153, 159 (estimation of claims is often employed to determine feasibility of plan); In re Claypool, 122 B.R. 371, 372 (Bankr. W.D. Mo. 1991) (“[I]n order to support the feasibility of such Plan, it may be necessary for the Court to estimate the unliquidated unsecured claim of the Bank pursuant to 11 U.S.C. § 502(c).”).

29. This Court should estimate the RCN Claim to avoid delaying or otherwise adversely affecting the implementation of the Plan, including the initial and subsequent distributions to holders of allowed claims against RCN Corp. See In re Mirant Corp., Memorandum Order at p. 6 (deferral of distribution is justification for estimation); In re Teigen, 228 B.R. 720, 723 (Bankr. D.S.D. 1998) (estimation of claims appropriate to avoid delay in distribution to creditors); Carlson v. U.S. (In re Carlson), 126 F.3d 915, 926 (7<sup>th</sup> Cir. 1997) (estimation of claim is required when necessary to prevent delay in closing of bankruptcy estate).

---

<sup>3</sup> A copy of this memorandum order is attached hereto as Exhibit B and is incorporated herein by reference.

30. Specifically, among other things, unless and until the RCN Claim is estimated, the Debtors will not be able to determine whether the aggregate amount of cash to be distributed to holders of allowed claims against RCN Corp. that elect to receive cash would exceed \$12,500,000 and will not be able to make the full amount of stock distributions promised to such holders.

31. In addition, this Court should estimate the Subsidiary Claims to allow the Debtors and the Committee to determine whether the total of all claims under Class 6 exceeds \$500,000 for Plan purposes. If these claims are not estimated prior to the Confirmation Hearing, the Debtors may be required to withdraw or materially modify the Plan pursuant to Plan Article III.C.6.b, and the confirmation process may be significantly and unnecessarily delayed. Moreover, without the Committee's consent, the Plan cannot go effective if the total claims against the Subsidiary Debtors exceed \$500,000. See In re MacDonald, 128 B.R. 161, 165 (Bankr. W.D. Tex. 1991) (estimation of claims appropriate when necessary to avoid delay in administration of case, particularly in plan confirmation process).

32. This Court has broad latitude in the manner in which it estimates the IBM Claims. See Robbins v. Thomson McKinnon Securities, Inc., 1997 WL 811534, \*2 (Bankr. S.D.N.Y. July 11, 1997) ("Courts, however, have continuously stated that bankruptcy judges have wide discretion when choosing among the different options available [to estimate claims].") (citation omitted); In re Seaman Furniture, 160 B.R. at 42 ("In estimating the claim, the bankruptcy court may use whatever method is best suited to the circumstances.") (citation omitted); Bittner v. Borne Chem. Co., Inc., 691 F.2d 134, 135 (3d Cir. 1982) ("Neither the Code nor the Rules prescribe any method for estimating a claim, and it is therefore committed to the reasonable discretion of the court . . . which should employ whatever method is best suited to the

circumstances of the case.”).

33. One method of estimation is the “merits test,” whereby a zero value is assigned to any claim that the court believes lacks merit. See Bittner, 691 F.2d at 136 (holding that the bankruptcy court properly exercised its discretion in estimating claims according to “the ultimate merits”). Another method is the “present probability test,” whereby the court takes the face value of the claim and discounts it based on the probability that it will succeed. See In re Thomson McKinnon Securities, Inc., 191 B.R. 976, 990 (Bankr. S.D.N.Y. 1996) (“[T]he Court opts for an approach which anticipates possible jury awards. . . . Based on the range of possible award set out below, and the probability of each occurrence. . . .”).

34. This Court should estimate each of the IBM Claims at \$0 regardless of which estimation “test” it employs: the IBM Claims completely lack merit and have no probability of success. See In re Enron Corp., 2002 WL 32155473, \*6 (Bankr. S.D.N.Y. October 4, 2002) (estimating certain claims at \$0); Bittner, 691 F.2d at 136 (bankruptcy court properly exercised its discretion in estimating claims at \$0 “according to ultimate merits”); In re Kaplan, 186 B.R. 871, 874 (Bankr. D.N.J. 1995) (“court must determine the value of the claim according to its best estimate of the claimant's chances of ultimately succeeding”) (citation omitted); cf. In re Baldwin-United Corp., 55 B.R. 885, 898 (Bank. S.D. Ohio 1985) (estimation “does not require that a bankruptcy judge be clairvoyant”).

35. As set forth above and in detail in the Objection, the IBM Claims (i) are not supported by sufficient evidence, (ii) are without merit, as IBM’s patents have not been infringed and/or are invalid, (iii) are barred by the laches, estoppel, or 35 U.S.C. § 286, (iv) are barred by IBM’s patent misuse and other conduct in violation of the antitrust laws, (v) are barred by IBM’s prior licenses, (vi) are barred by IBM’s failure to comply with 35 U.S.C. § 287, and (vii) are

duplicative.

36. IBM's attempt to refute these arguments in the Response is unavailing. While IBM belatedly filed numerous exhibits purporting to demonstrate that Erol's Internet Service infringes several IBM patents, IBM has yet to provide any evidence that RCN Corp., a holding company, or any of the Subsidiary Debtors have infringed any of IBM's patents or, for that matter, that any of them even have an ISP business.

37. Moreover, the manner in which IBM calculates its \$37.6 million claim against RCN Corp., including its assumed 5% reasonable royalty rate, is fanciful, and IBM's assertion that it licenses the allegedly patented technology at that rate is false. See Response, ¶ 29. IBM has filed with the Court numerous documents from the licensing negotiations between the parties, but failed to apprise the Court that IBM's opening offer for a license in September 2000 was for a five year license at \$700,000 per year. IBM also offered credits on equipment sales as further consideration, reducing the value of the license. IBM cannot credibly assert that it has a standard licensing rate which would generate a royalty of \$37.6 million, when it offered to license the technology to RCN Corp. for less than one-tenth of that amount.

38. Finally, IBM asserts that the Debtors are somehow responsible for IBM's inability to quantify the Subsidiary Claims, but this turns the law on its head. It is IBM's responsibility to conduct an investigation before filing a claim against a debtor, something IBM *admits* that it has not done. See Response, ¶¶ 30, 43; See also In re MacDonald, 128 B.R. at 166 (“[T]he party with the strongest vested interest in an accurate estimate of such a claim is the claimant, so that party must bear the primary responsibility for furnishing the court with the kind of information needed to make an accurate estimate -- and must suffer the consequences if the estimate proves

to be less than accurate.”). Accordingly, the IBM Claims should be estimated at \$0.<sup>4</sup>

### **HEARING PROCEDURES**

39. The Debtors submit that, at the hearing on the Motion, they and, to the extent it seeks to be heard, the Committee, on the one hand, and IBM, on the other, should be given an opportunity to introduce limited evidence to substantiate their respective positions. Consistent with the spirit of estimation under Bankruptcy Code section 502(c), in order to minimize the delay that a full trial could entail, such evidence should be in the form of proffers of testimony or affidavits (provided that no more than two witnesses are available in court for cross-examination or were otherwise made available for deposition in lieu of a court appearance through agreement of the parties), documentary exhibits (as long as such documents are provided to the other side no later than three business days prior to the hearing), and oral argument. The Debtors will consult with IBM’s counsel regarding these proposed procedures and will apprise the Court of the results of those discussions. The Debtors intend to make a representative available at the hearing and to proffer his or her testimony. The Debtors reserve the right to request that the Court permit the submission of post-hearing briefs, based on the record of the hearing and applicable case law, to the extent the Court deems it helpful to its decision.

### **NOTICE AND WAIVER OF MEMORANDUM REQUIREMENT**

40. Notice of this Motion has been given to the United States Trustee, IBM’s counsel, counsel to the Committee, counsel to the agent for the Debtors’ prepetition credit facility, the indenture trustee for the Debtors’ outstanding debt securities, and those persons who filed notices of appearance in this case. The Debtors respectfully submit that such notice is sufficient under

---

<sup>4</sup> At most, the RCN Claim should be estimated based on the \$700,000 license offer that IBM made to RCN Corp. in September 2000.

the circumstances and request that the Court find that no further notice of the relief requested herein is required.

41. The Debtors submit that no new or novel issue of law is presented with respect to the matters contained herein, and respectfully request that, because of the relevant statutory authority and case law cited herein, the requirement of a separate memorandum of law under Local Bankruptcy Rule 9013-1(b) be waived.

### **CONCLUSION**

WHEREFORE, the Debtors respectfully request that the Bankruptcy Court enter an order, substantially in the form attached hereto as Exhibit C, (i) estimating the IBM Claims at \$0 and (ii) granting the Debtors such other and further relief as is just and proper under the circumstances.

DATED: October 29, 2004  
New York New York

/s/ David C. McGrail  
David C. McGrail (DM 3904)  
Dechert LLP  
30 Rockefeller Plaza  
New York, New York 10112  
(212) 698-3500

Martin J. Black  
Bell Atlantic Tower  
1717 Arch Street  
Philadelphia, PA 19103  
(215) 994-4000

Special Conflicts Counsel for the  
Debtors and Debtors-in-Possession



**EXHIBIT A**

**EXHIBIT B**

**EXHIBIT C**

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----	X	
	:	
In re	:	Chapter 11
	:	
RCN CORPORATION, <u>et al.</u> ,	:	Case No. 04-13638 (RDD)
	:	
Debtors.	:	(Jointly Administered)
	:	
-----	X	

**ORDER UNDER BANKRUPTCY  
CODE SECTIONS 105(a) AND 502(c) ESTIMATING  
THE CLAIMS, FOR PURPOSES OF ALLOWANCE, OF  
INTERNATIONAL BUSINESS MACHINES CORPORATION**

Upon the motion (the “Motion”), dated October 29, 2004, of RCN Corporation and certain of its direct and indirect subsidiaries, debtors and debtors-in-possession in the above-captioned cases (collectively, the “Debtors”), for an order estimating the claims of International Business Machines Corporation (“IBM”) pursuant to Bankruptcy Code sections 105 and 502(c); and after due deliberation thereon; and based upon the record in these cases; and proper and adequate notice of the Motion having been given; and no other or further notice being necessary; and the Court having considered the Motion and the responses, if any, to the Motion; and the responses, if any, to the Motion having been resolved or overruled; and after due deliberation thereon; and good cause appearing therefore; it is hereby

FOUND THAT:

- A. IBM was properly and timely served with a copy of the Motion and the notice of the response deadline thereto; and
- B. The Motion is a core proceeding under 28 U.S.C. § 157(b)(2); and
- C. The relief requested in the Motion is in the best interests of the Debtors, the Debtors’ estates, and their creditors.

NOW, THEREFORE, IT IS ORDERED, DECREED, AND ADJUDGED THAT:

1. The Motion is granted.
2. Each of the IBM claims is estimated at \$0 for purposes of allowance, including for feasibility and distribution purposes under the Debtors' Joint Plan of Reorganization of RCN Corporation and Certain Subsidiaries, dated October 12, 2004.
3. The Bankruptcy Court shall retain jurisdiction over the Debtors and IBM with respect to any matters relating to or arising from the Motion or the implementation of this Order.
4. The requirement of Local Bankr. R. 9013-1(b) that any motion filed shall be accompanied by a separate memorandum of law is satisfied by the Motion.

Dated: New York, New York  
November \_\_, 2004

---

Honorable Robert D. Drain  
United States Bankruptcy Judge