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Hearing Date: Nov. 18, 2004 at 10:00 a.m.

Counsel for Official Committee of
Unsecured Creditors of RCN Corp., et al.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re: : Chapter 11
: :
: : Case No. 04-13638 (RDD)
RCN CORPORATION, et al., : : Jointly Administered
: :
: :
Debtors. :
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**RESPONSE OF OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF RCN CORPORATION, ET AL. TO FIRST INTERIM
APPLICATION OF SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP FOR INTERIM COMPENSATION AND
REIMBURSEMENT OF EXPENSES**

TO THE HONORABLE ROBERT D. DRAIN,
UNITED STATES BANKRUPTCY JUDGE:

The Official Committee of Unsecured Creditors (the "Committee") of RCN Corporation ("RCN Corp." or the "Company") and its affiliated debtors and debtors-in-possession in the above-captioned cases (together with RCN Corp., "RCN" or the "Debtors"), hereby submits this response (the "Response") to the First Interim Application of Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") Seeking Allowance Of Fees For Professional Services Rendered And Disbursements Incurred As Counsel For The Debtors For The Period From May 27, 2004 Through August 31, 2004, dated October 25, 2004 (Docket No. 316) (the "Fee Application") and in support thereof, respectfully represents as follows:

I. FACTUAL BACKGROUND

1. **Commencement Of Cases.** On May 27, 2004, RCN Corporation; TEC Air, Inc.; RLH Property Corporation; RCN Finance LLC; and Hot Spot Productions filed for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330 (as amended, the "Bankruptcy Code"). Certain affiliates of the RCN Debtors, specifically (a) RCN Cable TV of Chicago and (b) RCN Telecom Services of Virginia, Inc.; RCN Entertainment, Inc.; 21st Century Telecom Services, Inc.; and ON TV, Inc. commenced their chapter 11 cases on (x) August 5, 2004 and (y) August 20, 2004, respectively. The United States Trustee appointed the Creditors' Committee on June 14, 2004. (See Docket No. 48).

2. **Non-Debtor Subsidiaries.** The Company is the parent company for 15 other direct or indirect subsidiaries which are not debtors in these chapter 11 cases (each referred to herein as a "Non-Debtor Subsidiary" and collectively referred to herein as the "Non-Debtor Subsidiaries").

3. **Skadden Retention.** On June 22, 2004, Skadden was retained as primary counsel to the Debtors, as of May 27, 2004, pursuant to the Final Order Under 11 U.S.C. §§ 327(a) And 329 And Fed. R. Bankr. P. 2014 And 2016 Authorizing Retention Of Skadden, Arps, Slate Meagher & Flom LLP As Attorneys For Debtors, dated June 22, 2004 (Docket No. 70) (the "Retention Order"). In connection with its retention, Skadden disclosed that it may perform services for the Non-Debtor Subsidiaries and other RCN affiliates. The application filed in support of Skadden's retention stated as follows:

Skadden, Arps anticipates performing services on behalf of both the Debtors and their 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 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-debtors which are for the benefit of both (e.g., services in respect of restructuring the senior secured credit facility), ***Skadden, Arps will allocate a proportional amount of its fees and expenses for such***

services to such non-debtor entities, and will only seek payment from the estates of that portion allocated to the Debtors.

Debtors' Application for an Order Under 11 U.S.C. sections 327(a) and 329 and Fe, R. Bankr. P. 2014 and 2016 (A) Authorizing Retention of Skadden, Arps, Slate, Meahger and Flom LLP as Attorneys for the Debtors and (B) Scheduling Final Hearing Thereon, at ¶ 39 (emphasis added) (Case No. 04-13637, Docket No. 10).

4. **Fee Application.** The Fee Application contained no information regarding the amount of services rendered or compensation received (or promised) from the Non-Debtor Subsidiaries. The Committee, through its counsel, requested supplemental information from Skadden regarding the fees and expenses charged to the Non-Debtor Subsidiaries, and Skadden has recently provided such information to the Committee in summary form. Skadden has agreed to provide additional details (*i.e.*, invoices) but has not yet provided such information.

5. **Status of Reorganization Plan.** The Disclosure Statement was approved by order dated October 13, 2004 and the confirmation hearing for the Debtors' plan of reorganization is scheduled for December 8, 2004.

II. **RESPONSE**

A. **Details of Non-Debtor Invoices Required to Assess Reasonableness**

6. The Committee acknowledges that, as a technical matter, fees that are not charged to or paid by a "debtor," but to an affiliate of the debtor, may not be expressly contemplated by the text of sections 330 or 331 of the Bankruptcy Code. As a condition to retention, however, Rule 2014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") expressly requires disclosure of "all connections with the debtor." In addition, Bankruptcy Rule 2016 requires abundant disclosure in connection with requests for compensation or reimbursement. Taken together, these Bankruptcy Rules ensure that professionals retained and paid by the estate disclose the entire picture in connection with requests for compensation or reimbursement. Accordingly, the Committee believes Skadden

should be required to disclose the fees and expenses charged to the Non-Debtor Subsidiaries and any other RCN affiliate in connection with the Fee Application, and subsequent applications.

7. In addition, putting substance over form, the Non-Debtor Subsidiaries represent substantial value to the Company. Any assets not utilized to pay liabilities would inevitably inure to the benefit of the Company's bankruptcy estate for the benefit of the Debtors' creditors. As such, the Committee believes that the reasonableness of any fees and expenses sought by the Fee Application must be evaluated in connection with the global picture of fees and expenses paid by the Company and its affiliates (including the Non-Debtor Subsidiaries). Although Skadden has agreed to provide such information to the Committee, the Committee has not received such information as of the objection deadline for the Fee Application.

The standard for an award of fees and reimbursement of expenses, even on an interim basis, is set forth in section 330 of the Bankruptcy Code, the relevant language of which is as follows: "After notice . . . and a hearing, . . . the court may award . . . to a professional person employed under section 327 or 1103 . . . reasonable compensation for actual, necessary services rendered . . ." 11 U.S.C. § 330(a); see also id. § 331 (interim compensation permitted in accordance with section 330's standard). The burden of proof lies with the professional seeking an award. In re JLM, Inc., 210 BR. 19, 24 (B.A.P. 2d Cir. 1997) ("An applicant bears the burden of proving the reasonableness of compensation from a bankruptcy estate."); In re Angelika Films 57th Inc., 227 B.R. 29, 41 (Bankr. S.D.N.Y. 1998) ("The fee applicant bears the burden of proving the reasonableness of compensation.")

B. Reservation of Rights

8. Following disclosure of the supplemental information requested, the

Committee expressly reserves the right to (i) object to the Fee Application when Skadden submits its final application for payment of fees in these cases to the Court, (ii) amend or supplement this Response; (iii) oppose any subsequent requests for compensation, (iii) seek additional information, and (iv) seek any alternative or incremental relief.

III. CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court enter an order preserving the Committee's rights and granting such other relief as it deems just and proper.

Dated: New York, New York
November 15, 2004

MILBANK, TWEED, HADLEY & M^CCLOY LLP

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