

**Hearing Date: December 2, 2004 at 10:00 a.m. (Eastern)**  
**Objections Due: November 30, 2004 at 4:00 p.m. (Eastern)**

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP  
D. J. Baker (JB 0085)  
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(212) 735-3000

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

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In re	: Chapter 11
	:
RCN CORPORATION, <u>et al.</u> ,	: Case No. 04-13638 (RDD)
	:
Debtors.	: (Jointly Administered)
	:
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RCN CORPORATION and	:
RCN CABLE TV OF CHICAGO, INC.,	:
	:
Plaintiffs	:
	:
v.	: Adv. No. 04-03666 (RDD)
	:
CITY OF CHICAGO,	:
	:
Defendant.	:
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**NOTICE OF MOTION OF DEBTORS FOR APPROVAL OF SETTLEMENT  
AGREEMENT BETWEEN RCN CORPORATION, RCN CABLE TV OF  
CHICAGO, INC., AND THE CITY OF CHICAGO**

PLEASE TAKE NOTICE that on November 19, 2004, the above-captioned debtors and debtors-in-possession (the "Debtors"), filed the **Debtors' Motion for Approval of Settlement Agreement between RCN Corporation, RCN Cable TV of Chicago, Inc., and the City of Chicago** (the "Motion").

PLEASE TAKE FURTHER NOTICE that objections, if any, to the Motion or the relief requested therein must be made 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 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 (ii) served upon (a) RCN-Chicago, 105 Carnegie Center, Princeton, New Jersey 08540, Attention: General Counsel; (b) Skadden, Arps, Slate, Meagher & Flom LLP, counsel to RCN and RCN-Chicago, 4 Times Square, New York, New York, 10036-6522, Attention: Jay M. Goffman, Esq.; (c) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21<sup>st</sup> Floor, New York, New York 10004, Attention: Paul K. Schwartzberg, Esq.; (d) Milbank, Tweed, Hadley & McCloy, counsel to the official

committee of unsecured creditors, 1 Chase Manhattan Plaza, New York, New York 10005, Attention: Dennis Dunne, Esq., Deirdre A. Sullivan, Esq.; (e) Simpson Thacher & Bartlett, counsel to the agent for the Debtors' prepetition credit facility, 425 Lexington Avenue, New York, New York 10017-3955, Attention: Peter V. Pantaleo, Esq.; and (vi) HSBC Bank USA, the indenture trustee for the Debtors' outstanding debt securities, 452 Fifth Avenue, New York, New York 10001, Attention: Issuer Services (collectively, the "Notice Parties") no later than **4:00 p.m. prevailing Eastern time on November 30, 2004.**

PLEASE TAKE FURTHER NOTICE that if an objection is properly filed and received in accordance with the above procedures, a hearing on the Motion will be held before the Honorable Robert D. Drain, in the United States Bankruptcy Court for the Southern District of New York, Alexander Hamilton Custom House, One Bowling Green, New York, New York 10004 on **December 2, 2004 at 10:00 a.m. prevailing Eastern time.** Only objections made in writing and timely filed and received by the Notice Parties will be considered by the Bankruptcy Court at such hearing.

**IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS  
NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE  
MOTION WITHOUT FURTHER NOTICE OR HEARING.**

Dated: New York, New York  
November 19, 2004

SKADDEN, ARPS, SLATE, MEAGHER  
& FLOM LLP

/s/ D. J. Baker

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**Hrg. Date: December 2, 2004 at 10:00 a.m. (Eastern)**  
**Obj. Due: November 30, 2004 at 4:00 p.m. (Eastern)**

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RCN CORPORATION and	:
RCN CABLE TV OF CHICAGO, INC.,	:
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Plaintiffs	:
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v.	: Adv. No. 04-03666 (RDD)
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CITY OF CHICAGO,	:
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Defendant.	:
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**MOTION OF DEBTORS FOR APPROVAL OF SETTLEMENT  
AGREEMENT BETWEEN RCN CORPORATION, RCN CABLE TV OF  
CHICAGO, INC., AND THE CITY OF CHICAGO**

Pursuant to sections 105, 363 and 365 of 11 U.S.C. §§ 101-1330, as amended (the "Bankruptcy Code") and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the above-captioned debtors and debtors-in-possession (the "Debtors") hereby move (the "Motion") for entry of an order approving a settlement agreement (the "Agreement")<sup>1</sup> between RCN Corporation ("RCN"), RCN Cable TV of Chicago, Inc. ("RCN-Chicago"), and the City of Chicago (the "City," and with RCN and RCN-Chicago, collectively, the "Parties"). The Agreement, as set forth more fully herein, resolves any and all claims and disputes between the Debtors, including but not limited to RCN and RCN-Chicago, on the one hand, and the City, on the other hand, with respect to the Franchise Agreements (as defined herein). In support of the Motion, the Debtors state as follows:

#### **PRELIMINARY STATEMENT**

1. On August 5, 2004, RCN-Chicago filed a voluntary petition with this Court. RCN and RCN-Chicago also sought relief, including injunctive relief, from this Court with respect to certain actions taken by the City, including draws on certain letters of credit, demands on certain surety bonds, the imposition of fines and penalties, and the denial by the City of a modification petition filed pursuant to section 635 of the Communications Act of 1934. At RCN-Chicago's

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

first-day hearing before this Court, the City, RCN and RCN-Chicago agreed to a standstill with respect to certain bonds pending a hearing on the request for injunctive relief.

2. Since then, the Parties have engaged in extensive, arm's-length negotiations to resolve their various claims and disputes. On Friday, November 12, 2004, the Parties finally settled all of the issues and executed the Agreement. Described more fully below, the Agreement allows RCN-Chicago to continue to operate in Chicago under improved economic terms. Accordingly, the Agreement creates substantial value for the Debtors and their estates. In exchange, the City will receive a lump sum payment for agreeing to modify one of the franchise agreements and the right to use certain "dark" fibers. The Debtors believe that the Agreement is fair and equitable, avoids the risks of continued litigation with the City and is in the best interests of their estates. For these reasons, the Debtors believe that this Court should approve the Agreement.

### **BACKGROUND**

3. On May 27, 2004 (the "Initial Petition Date"), certain of the Debtors<sup>2</sup> filed voluntary petitions in this Court for reorganization relief under chapter 11 of title 11 of the United States Code, as amended (the "Bankruptcy Code"). As

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<sup>2</sup> These are RCN Corporation, TEC Air, Inc., RLH Property Corporation, RCN Finance, LLC and Hot Spots Productions, Inc. (collectively, the "Initial Debtors").

noted above, RCN-Chicago commenced its chapter 11 case on August 5, 2004. Certain other affiliated Debtors commenced their chapter 11 cases on August 20, 2004.<sup>3</sup> The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to Bankruptcy Code sections 1107 and 1108.

4. No trustee or examiner has been appointed in these chapter 11 cases. On June 10, 2004, the 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"). No other official committees have been appointed or designated in these chapter 11 cases.

#### **JURISDICTION AND VENUE**

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

6. The statutory predicates for the relief requested herein are sections 105, 363 and 365 of the Bankruptcy Code and Bankruptcy Rule 9019.

#### **RELIEF REQUESTED**

7. By this Motion, the Debtors seek entry of an order, under sections 105, 363 and 365 of the Bankruptcy Code and Bankruptcy Rule 9019,

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<sup>3</sup> These are RCN Telecom Services of Virginia, Inc., RCN Entertainment, Inc., 21<sup>st</sup> Century Telecom Services, Inc., and ON TV, Inc.



authorizing RCN and RCN-Chicago to enter into, and perform under, the Agreement, substantially in the form annexed as Exhibit A to the proposed form of order (attached hereto).

8. As more fully described below, the Agreement, among other things, (i) resolves all present and future disputes between the Parties with respect to the Areas 3 and 4 Franchise Agreements (as defined herein); (ii) resolves all current disputes between the Parties with respect to the Area 2 Franchise Agreement (as defined herein); (iii) directs RCN to make certain payments to the City; (iv) sets forth certain requirements in connection with ongoing operations in Franchise Area 2 (as defined herein); (v) provides for the assumption of the Areas 1 and 2 Franchise Agreements (as defined herein and as modified pursuant to the Agreement); (vi) provides for the termination and rejection of the Areas 3 and 4 Franchise Agreements (as defined herein); and (vii) provides for mutual releases between the Debtors and the City. As explained below, the Debtors believe that the Agreement is fair and equitable and in the best interests of their estates and, therefore, should be approved.

## **BASIS FOR RELIEF**

### **A. The Franchise Agreements**

9. RCN-Chicago entered into four, separate non-exclusive franchise agreements (collectively, the "Franchise Agreements") with the City, under which RCN-Chicago was authorized to construct, install, maintain and operate a

cable television system in Areas 1, 2, 3 and 4 (the "Franchise Areas") of Chicago. Under the Franchise Agreements, RCN-Chicago was required to submit construction schedules for Areas 2, 3 and 4 and make certain fixed capital cost payments to the Chicago Access Corporation (the "CAC"). In addition, RCN-Chicago was required to post Surety Bonds (\$3,000,000 for each of Franchise Areas 2, 3 and 4 and \$1,000,000 for Franchise Area 1, or \$10,000,000 in all) and Letters of Credit (\$350,000 for each Franchise Area, or \$1,400,000 in all) as security for its performance under the Franchise Agreements.

**B. The Modification Petition**

10. Under the Franchise Agreements, RCN-Chicago was to construct cable systems in the respective Franchise Areas in accordance with construction schedules to be submitted and periodically updated. However, in light of the financial difficulties facing RCN-Chicago, on November 12, 2002, the City approved a significantly reduced construction schedule for Franchise Area 2 for 2003. On December 10, 2002, RCN-Chicago and the City entered into an agreement to amend the Franchise Agreements (the "Amendment"), which deferred RCN-Chicago's construction schedule obligations. On October 3, 2003, RCN-Chicago filed a proposed construction schedule and map for Franchise Area 2 for 2004.

11. When the telecommunications industry collapsed, RCN-Chicago was unable to obtain sufficient financing to maintain its operations, much less

increase the scope of such operations. Among other things RCN-Chicago estimated that the cost of completing the build-out requirements for Areas 2, 3 and 4 would exceed \$350,000,000. Therefore, on December 12, 2003, RCN-Chicago filed a petition (the "Modification Petition") with the Chicago Cable Commission (the "Commission") pursuant to 47 U.S.C. § 545 seeking certain changes to the Franchise Agreements because they were commercially impracticable. The Modification Petition sought to eliminate any additional construction or build out requirements, reduce the Surety Bond requirements and certain PEG capital cost payments to the CAC for Franchise Area 2 and eliminate the construction requirements and all related obligations for Franchise Areas 3 and 4.

**C. RCN's Continuing Financial Difficulties and Responses by the City**

12. Following the filing of the Modification Petition, the financial condition of RCN-Chicago and its parent RCN continued to worsen. At the same time, the City passed resolutions urging RCN-Chicago to comply with the Franchise Agreements, even though RCN-Chicago's financial condition made that impracticable. Ultimately, despite the pending Modification Petition, the City purported to impose multi-million dollar fines on RCN-Chicago for its alleged non-compliance with the very provisions of the Franchise Agreements it sought to have modified through the Modification Petition.

13. On Saturday, February 21, 2004, the City sent demand letters to Travelers Casualty & Surety Company of America ("Travelers") for payment under the Surety Bonds for Franchise Areas 2, 3 and 4. On Monday, February 23, 2004, the City drew down the Letters of Credit for Franchise Areas 2, 3 and 4. On April 9, 2004, almost two months after the City declared RCN-Chicago in violation of the Franchise Agreements and began imposing multi-million dollar fines, the City issued its decision denying the Modification Petition and the relief requested therein.

**D. The Bankruptcy Filings and the Adversary Proceeding**

14. Following the initial RCN bankruptcy filings, RCN and RCN-Chicago continued for several months to negotiate with the City in an effort to resolve their disputes concerning the Franchise Agreements without further litigation. Concerned that the City would continue to pursue a recovery for its purported damages and other fines and fees assessed against RCN and/or RCN-Chicago, RCN-Chicago filed its bankruptcy petition on August 5, 2004.

15. At the same time, RCN and RCN-Chicago filed an adversary complaint against the City seeking (i) injunctive relief preventing the City from taking any further actions to collect from or assess against RCN and/or RCN-Chicago any amounts in connection with the Franchise Agreements, (ii) approval of the Modification Petition, and (iii) damages for the City's alleged violations of federal law, including but not limited to section 525 of the Bankruptcy Code. In

addition, RCN and RCN-Chicago filed a motion for temporary restraining order (the "TRO Motion").

16. On August 6, 2004, this Court held an initial hearing with respect to the TRO Motion. At that hearing, counsel for the City consented to a standstill until the request of RCN and RCN-Chicago for a preliminary injunction could be heard and determined. Following arm's-length negotiations, the City, RCN and RCN-Chicago submitted the Stipulation and Order for Standstill Pending Hearing on Preliminary Injunction to this Court, and the Court entered it as an order (Docket No. 10) (the "Standstill Order") on August 11, 2004. Pursuant to the Standstill Order, the City was prohibited from taking any action to collect any fines, damages or penalties by drawing on the Surety Bonds and had until September 13, 2004 to respond to the Complaint and preliminary injunction application, and RCN and RCN-Chicago had until September 20, 2004 to reply.

17. The Parties subsequently exchanged discovery requests and scheduled depositions. In order to facilitate settlement discussions, the Parties agreed to further extensions of the Standstill Order that were approved by the Court. Pursuant to the latest extension, the City had until November 15, 2004 to file responsive pleadings to the TRO Motion and the preliminary injunction hearing was scheduled for December 2, 2004.

18. On August 31, 2004 the Debtors filed their Disclosure Statement (the "Initial Disclosure Statement") with Respect to the Joint Plan of Reorganization of RCN Corporation and Certain of its Subsidiaries (Docket No. 190). Subsequently, on or about October 12, 2004, the Debtors revised the Initial Disclosure Statement and filed their revised Disclosure Statement (the "Revised Disclosure Statement") with Respect to the Joint Plan of Reorganization (the "Plan") of RCN Corporation and Certain Subsidiaries (Docket No. 300). This Court held a hearing on the Revised Disclosure Statement on October 12, 2004, following which the Court entered an order (the "Solicitation Procedures Order") (Docket No. 297) that, among other things, set December 8, 2004 as the date for the hearing (the "Confirmation Hearing") on confirmation of the Plan.

19. On October 4, 2004, RCN and RCN-Chicago filed a complaint in the United States District Court for the Northern District of Illinois seeking declaratory and injunctive relief against the City. That complaint was filed to preserve the statute of limitations set forth in 47 U.S.C. § 555(a), as extended by 11 U.S.C. § 108(b), until this Court could resolve certain jurisdictional issues that might have been raised by the City in the adversary proceeding.

20. On November 12, 2004, the Parties entered into the Agreement to compromise, settle and release all disputes between them, subject to this Court's approval.

## THE SETTLEMENT AGREEMENT

21. The following are the most significant terms and conditions of the Agreement:<sup>4</sup>

- Payment. In consideration of the modification of the Area 2 Franchise (as set forth herein and in the Agreement), the City shall retain all amounts previously drawn by the City from the Letters of Credit. In addition, two days after the Effective Date of the Agreement, RCN will pay the City \$3,450,000.00.
- Cancellation of Certain Franchise Agreements. The Areas 3 and 4 Franchise Agreements shall be rejected and all of the rights and obligations of RCN-Chicago under such agreements shall be extinguished. In addition, the Surety Bonds with respect to the Areas 3 and 4 Franchise Agreements shall be released to RCN.
- Assumption of Certain Franchise Agreements. The Areas 1 and 2 Franchise Agreements shall be assumed by RCN-Chicago. The Area 2 Franchise Agreement shall be assumed, however, as modified by the Agreement. Specifically, with respect to Area 2, the Franchise Agreement shall be modified such that RCN-Chicago shall only be required and/or allowed to offer cable television services to the homes and businesses that can be served by laterals from existing network facilities as of the Effective Date. Accordingly, all current and future build-out obligations set forth in the Area 2 Franchise Agreement will be terminated. Moreover, RCN-Chicago shall have the right to terminate the Area 2 Franchise Agreement without penalty in the event that RCN-Chicago determines in the future not to continue to provide cable television services in Area 2.
- City's Access to Certain RCN Fibers. RCN shall provide the City access to four dedicated dark fiber strands on certain parts of the RCN Network and six dedicated dark fiber strands in certain other parts of the RCN Network. The provision of these fibers, as set forth in the Dark Fiber IRU (the "Dark Fiber Agreement"), in substantially the form annexed as Exhibit B to the proposed form of order (at-

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<sup>4</sup> The following summary descriptions are intended solely to highlight for the Court and interested parties the most significant terms of the Agreement. All parties are directed to the Agreement for the complete and controlling terms. In the event there are any inconsistencies between the Agreement and the summary set forth herein, the terms of the Agreement control.

tached hereto) shall be in exchange for the City's agreement to modify the Area 2 Franchise Agreement.

- Settlement and Mutual Releases. RCN will withdraw the Modification Petition and related litigation. In addition, mutual releases will be granted by RCN and the City with respect to the Franchise Agreements.

- Conditions to Effectiveness. Prior to the Effective Date, the following events must occur:

- (1) the City shall have completed its review and analysis of financial information provided by RCN regarding RCN's financial ability to meet the construction build-out requirements set forth in the Areas 2, 3 and 4 Franchise Agreements (which review and analysis has, as of the date of the Motion, already been completed);
- (2) the City and RCN shall have executed the Dark Fiber Agreement to govern the City's use of certain RCN fibers;
- (4) the Debtors shall have resolved their disputes with CAC (which resolution must occur no later than November 30, 2004, unless extended by the Parties), and obtained Court approval of any such settlement; and
- (5) both the City and the Debtors shall have obtained all necessary approvals for entering into the Agreement and the Dark Fiber Agreement.

- Extension of Bar Date for Filing Proofs of Claim. The bar date for the City to file a proof of claim in the RCN-Chicago bankruptcy case shall be through and including March 31, 2005.

- Effective Date. Provided that the above conditions to effectiveness have been met, the Effective Date of the Agreement shall be the later of (i) receipt of a final order from the Court approving the Agreement or (ii) receipt of final City Approvals of the Agreement.



### **APPLICABLE AUTHORITY**

22. By this Motion, RCN and RCN-Chicago seek an order pursuant to Bankruptcy Rule 9019 and sections 105, 363 and 365 of the Bankruptcy Code approving the agreement. While RCN and RCN-Chicago are prepared to vigorously prosecute the litigation, in light of the uncertainty inherent in any litigation and the enormous expense that the Debtors and their estates would incur in connection with the litigation, the Debtors believe that the Agreement is fair and reasonable and that approval of the Agreement is in the best interests of their estates and creditors. Moreover, the Creditors' Committee, an intervening party in the adversary proceeding, concurs in the judgment of the Debtors and would likewise urge this Court to approve the Agreement.

**A. Approval of the Agreement is Proper under Bankruptcy Rule 9019.**

23. Bankruptcy Rule 9019 provides, in pertinent part, as follows:

Compromise. On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019(a).

24. Settlements and compromises are "a normal part of the process of reorganization," Protective Comm. for Independent Stockholders of TMT Trailer

Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968). Moreover, in bankruptcy cases, settlements are strongly favored over litigation:

[P]ublic policy strongly favors pretrial settlement in all types of litigation because such cases, depending on their complexity, "can occupy a court's docket for years on end, depleting the resources of parties and taxpayers while rendering meaningful relief increasingly elusive." . . . Second, litigation costs are particularly burdensome on a bankrupt estate given the financial instability of the estate.

Shearson Lehman Bros., Inc. v. Munford, Inc. (In re Munford, Inc.), 97 F.3d 449, 455 (11<sup>th</sup> Cir. 1996) (quoting United States Oil & Gas v. Wolfson, 967 F.2d 489, 493 (11<sup>th</sup> Cir. 1992)).

25. Debtors-in-possession may, in the exercise of their business judgment, enter into settlements. See In re Dow Corning Corp., 198 B.R. 214, 222 n.7 (Bankr. E.D. Mich. 1996); In re Sanner Contracting Corp., 181 B.R. 465, 470 (Bankr. D. Ariz. 1995) (court has wide discretion to approve settlements between trustees and creditors). Importantly, in evaluating such settlements, the Court should not substitute its judgment for that of the Parties. See Hicks, Muse & Co. v. Brandt (In re Healthco Int'l, Inc.), 136 F.3d 45, 50 n.5 (1<sup>st</sup> Cir. 1998) (bankruptcy court should not substitute its business judgment for that of trustee).

26. In order to obtain court approval of a settlement under Bankruptcy Rule 9019(a), a debtor must demonstrate that it is fair and equitable, reasonable and in the best interests of the debtor's estate. See, e.g., In re Ionosphere Clubs, Inc., 156 B.R. 414, 426 (S.D.N.Y. 1993), aff'd, 17 F.3d 600 (2d Cir. 1994). The

decision to approve a particular settlement then lies within the sound discretion of the Court. See Nellis v. Shugrue, 165 B.R. 115, 123 (S.D.N.Y. 1994). In exercising its discretion, the Court makes an independent determination that the settlement is fair and reasonable, but it can and should consider the determination by the debtor-in-possession that the settlement is fair and reasonable. Id. at 122; In re Purofied Down Prods. Corp., 150 B.R. 519, 522 (S.D.N.Y. 1993); In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 759 (Bankr. S.D.N.Y. 1992) ("A [c]ourt may properly give weight to the debtor's informed judgment that a settlement is fair and reasonable and consider the competency of the counsel who favor the compromise"). In addition, the Court exercises its discretion giving consideration, as noted above, to "the general public policy favoring settlements." In re Hibbard Brown & Co., Inc., 217 B.R. 41, 46 (Bankr. S.D.N.Y. 1998) ; see also Nellis v. Shugrue, 165 B.R. 115, 123 (S.D.N.Y. 1994) ("the general rule [is] that settlements are favored and, in fact, encouraged . . .").

27. A settlement should be approved unless it "fall[s] below the lowest point in the range of reasonableness." In re Teltronics Servs., Inc., 762 F.2d 185, 189 (2d Cir. 1985); see also Cosoff v. Rodman (In re W.T. Grant Co.), 699 F.2d 599, 608 (2d Cir. 1983). Moreover, the Court need not decide the numerous questions of law and fact raised by a settlement but, rather, should "canvass the issues" so that the reasonableness of the settlement may be evaluated. Id.; In re Purofied Down

Prods. Corp., 150 B.R. 519, 522 (S.D.N.Y. 1993); In re Hermitage Inn, Inc., 66 B.R. 71, 72 (Bankr. D. Colo. 1986) ("the court's assessment does not require resolution of the issues, but only their identification"). Specifically, in determining whether to approve a settlement, courts generally consider "(1) the probability of success . . .; (2) the difficulties that may be encountered in collection; (3) the complexity of the litigation and the attendant expense, inconvenience, and delay; and (4) the paramount interest of the creditors." Prudential Lines, Inc. v. American Steamship Owners Mutual Protection and Indemnity Assoc., Inc. (In re Prudential Lines, Inc.), 170 B.R. 222, 247 (S.D.N.Y. 1994); In re Purofied Down Products Corp., 150 B.R. 519, 522 (S.D.N.Y. 1993).

28. The Debtors believe that the settlement falls well within the range of reasonableness. First, while the Debtors, through the litigation, might ultimately obtain relief similar to or better than the modifications provided in the Agreement, the success of such litigation, like any litigation, is uncertain. The Debtors would face considerable legal and evidentiary hurdles and any such litigation would likely remain unresolved for a substantial period of time.

29. Moreover, if this Court (or the Illinois federal court) were to decide against RCN and/or RCN-Chicago, the results for RCN-Chicago could be disastrous. As noted above, the City has purported to impose fines totaling millions of dollars against RCN-Chicago. If enforceable, such fines likely would transform

the RCN-Chicago bankruptcy case from a reorganization to a liquidation. In addition, the City already has drawn down on the Letters of Credit and has attempted to collect on the Surety Bonds. Any draw on the Surety Bonds, which are fully collateralized with assets of the estates of RCN and RCN-Chicago, would result in a decrease in funds available to the creditors of such estates. Finally, if the Franchise Agreements were not modified, RCN-Chicago would likely have to either assume the onerous build-out obligations set forth above or liquidate its estate and reject one or more of the Franchise Agreements.

30. Accordingly, notwithstanding the Debtors' belief in the merits of their litigation, the probability of success and the attendant potentially disastrous consequences in the event that RCN and RCN-Chicago did not succeed in such litigation, favor approving the Agreement.

31. Additionally, the litigation would be very complex. RCN and RCN-Chicago seek, among other things, a declaration that the Franchise Agreements should be modified because they are commercially impracticable in light of the almost complete collapse of the telecommunications industry and the attendant severe restriction in financing available to telecommunications companies, like RCN-Chicago, for expanding cable systems. To prove their case, RCN and RCN-Chicago likely would be required to obtain testimony from one or more experts about the current state of the telecommunications industry, the history of the collapse of the

telecommunications industry and the ability of telecommunications companies in general and the Debtors in particular to finance expansions of cable networks in light of the current market conditions. Moreover, trying the case would require extensive discovery and, importantly, significant trial time from the Court.

32. RCN and RCN-Chicago also have asserted claims against the City for its alleged violations of federal law, including section 525 of the Bankruptcy Code prohibiting discriminatory treatment against debtors on the basis of their bankruptcy filing and/or financial condition. In order to meet their burden on these claims, RCN and RCN-Chicago anticipated calling several fact witnesses, including current and former employees of RCN and the City. Prior to agreeing to a standstill, the Parties had noticed numerous deposition of witnesses with knowledge on those issues.

33. Any litigation with the City also would lead to delay and additional expense for the Debtors and their estates. Discovery alone would have caused significant delay and expense for the Debtors and their estates, and a trial of the adversary proceeding would have required significant time from the Court. The Court also likely would have to conduct a hearing on the request of RCN and RCN-Chicago for a preliminary injunction and determine certain jurisdictional issues that the City would undoubtedly raise.

34. The litigation also would likely lead to extensive delay and unnecessary expense in connection with the Debtors' bankruptcy cases. A hearing on the confirmation of the Plan has been scheduled for December 8, 2004. The Plan is a joint plan involving all of the Debtors, including RCN and RCN-Chicago. Given the potential liabilities faced by RCN-Chicago, it would be difficult at best to confirm any plan for RCN-Chicago absent a resolution of the dispute with the City. Accordingly, unless the litigation with the City is resolved prior to the hearing on confirmation of the Plan, the Debtors likely would have to either delay the confirmation of the Plan with respect to RCN-Chicago or withdraw the Plan with respect to RCN-Chicago.

35. Considering these factors, the Debtors have determined that approval of the Agreement is in the best interests of their estates and their creditors. The Agreement is a reasonable settlement of the disputes between the City and the Debtors, allowing RCN-Chicago to continue doing business in an area that is important to the future of RCN and RCN-Chicago. Accordingly, the Court should, in the sound exercise of its discretion, approve the Agreement.

**B. Approval of the Agreement is Proper under Sections 363 and 105 of the Bankruptcy Code.**

36. Entry into the Agreement, and the accompanying termination of the Areas 3 and 4 Franchise Agreements and modification of the Area 2 Franchise Agreement, to the extent it is not an ordinary course transaction, is also a reasonable

exercise of the Debtors' business judgement. Accordingly, the Court should approve the Agreement under sections 105 and 363 of the Bankruptcy Code.

37. Section 105(a) of the Bankruptcy Code provides that the Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). As set forth above, approval of the Agreement is necessary to resolve the disputes with the City and allow the implementation of the Plan with respect to RCN-Chicago.

38. Furthermore, section 363(b) provides that a debtor "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." *Id.* § 363(b). In this instance, the Debtors believe that the entry into the Agreement and the corresponding modification of the Franchise Agreement for Area 2 and termination of the Franchise Agreements for Areas 3 and 4, is an ordinary course transaction. However, to the extent that the entry into the Agreement is "other than in the ordinary course of business," the Court should approve the Agreement under section 363(b) of the Bankruptcy Code.

39. The use of assets outside the ordinary course by a debtor, including the decision to enter into, modify or terminate an agreement, will be approved if such use has a sound business justification. See e.g. Committee of Equity Sec. Holders v. Lionel Corp (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983) (bankruptcy court may only authorize expenditure of funds under section



363(b) of the Bankruptcy Code if it finds a "good business reason" for the expenditure). The business judgment rule shields a debtor's management from judicial second-guessing and affirms the general principal that a debtor-in-possession, not a court, should manage such debtor's ongoing business operations. See In re Johns-Manville Corp., 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) ("the Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a Debtor's management decisions"). Once the debtor articulates a valid business justification, "[t]he business judgment rule 'is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.'" In re Integrated Resources, Inc., 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting Smith v. Van Gorkom, 488 A. 2d 858, 872 (Del. 1985)).

40. As discussed above, the Agreement has a sound business justification. Through the Agreement, the Debtors will obtain beneficial modifications to the Franchise Agreements. Specifically, the Debtors will be able to continue operating in Areas 1 and 2, and will no longer face the daunting build-out requirements in Area 2. In addition, the franchises for Areas 3 and 4, locations where RCN-Chicago had completed no construction, would be terminated.

41. Moreover, the Agreement was reached only after extended arms' length negotiations between the Parties. During these negotiations, the Debtors

considered, among other things, (i) the relative strengths of the Parties' legal positions, (ii) the costs and uncertainties of continuing to operate under the Franchise Agreements (if such operation were even possible, in light of the City's actions) and (iii) the costs and risks associated with the litigation. As a result of these negotiations, the Debtors concluded that a consensual resolution was preferable to continuing time-consuming and expensive litigation.

42. The Debtors have demonstrated a sound business justification for entry into the Agreement. In their business judgment, the Debtors have concluded that the Agreement is in the best interests of the estates of RCN and RCN-Chicago. Accordingly, the Court should enter an order approving the Agreement.

**C. Assumption of the Areas 1 and 2 Franchise Agreements, as set forth in the Agreement, Rejection of the Areas 3 and 4 Franchise Agreements and Entry into the Dark Fiber Agreement are Sound Exercises of RCN-Chicago's Business Judgment and Should, Therefore, be Approved.**

43. Through the Agreement and the proposed form of order accompanying this Motion, RCN-Chicago seeks to assume the Area 1 Franchise Agreement and the Area 2 Franchise Agreement, as modified by the Agreement. In addition, RCN-Chicago seeks authority to reject the Areas 3 and 4 Franchise Agreement. The assumption of the Area 1 Franchise Agreement and the Area 2 Franchise Agreement, as modified by the Agreement, is a reasonable exercise of the business judgment of RCN-Chicago. Similarly, the rejection of the Areas 3 and 4 Franchise Agreements is a reasonable exercise of the business judgment of RCN-Chicago. Finally, entry into

the Dark Fiber Agreement is a critical part of the Agreement. Accordingly, this Court should enter an order, substantially in the form annexed hereto, approving the Agreement, authorizing the contract assumptions and rejections set forth therein, and permitting the Debtors to enter into the Dark Fiber Agreement with the City.

44. Section 365(a) of the Bankruptcy Code provides that a debtor, "subject to the court's approval, may assume or reject an executory contract or an unexpired lease." 11 U.S.C. § 365(a). In determining whether to approve a debtor's decision to assume or reject an executory contract, a court looks to whether the debtor demonstrated a sound business purpose for such assumption or rejection. See, e.g., In re Gucci, 193 B.R. 411, 415 (S.D.N.Y. 1996); In re Federated Dept. Stores, 131 B.R. 808, 811 (S.D. Ohio 1991). Specifically, a debtor must demonstrate that such rejection or assumption will benefit the debtor's estate. See In re Riodizio, 204 B.R. 417, 424 (Bankr. S.D.N.Y. 1997); see also Commercial Fin., Ltd. v. Hawaii Dimensions, Inc. (In re Hawaii Dimensions, Inc.), 47 B.R. 425, 427 (D. Haw. 1985) ("Under the business judgment test, a court should approve a debtor's proposed rejection if such rejection will be benefit the estate").

45. The business judgment standard, as noted above, shields a debtor's management from judicial second-guessing and affirms the general principal that a debtor-in-possession, not a court, should manage such debtor's ongoing business operations. See In re Johns-Manville Corp., 60 B.R. at 615-16.

46. When applying the "business judgment" rule in the context of the assumption or rejection of executory contracts under section 365 of the Bankruptcy Code, courts show great deference to a debtor's decision. See, e.g., National Labor Relations Board v. Bildisco & Bildisco, 465 U.S. 513, 523 (1984); In re Trans World Airlines, 261 B.R. 103, 120-21 (Bankr. D. Del. 2001) (debtor's decision to reject an executory contract should be upheld "unless it is the product of 'bad faith, or whim or caprice'"); Summit Land Co. v. Allen (In re Summit Land Co.), 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary circumstances, court approval of a debtor's decision to assume an executory contract "should be granted as a matter of course").

47. In this instance, the assumption of the Areas 1 and 2 Franchise Agreements and the rejection of the Areas 3 and 4 Franchise Agreements, on the terms and conditions set forth in the Agreement, will provide tremendous benefits to the Debtors and their estates. RCN-Chicago has already built out Area 1 in accordance with the Area 1 Franchise Agreement and the Debtors believe that RCN-Chicago can operate a profitable enterprise in this area of the City of Chicago. In addition, if the Area 2 Franchise Agreement is modified (as set forth in the Agreement) to remove the onerous build out requirements, and if RCN-Chicago is permitted to operate in the much smaller region it has already built out, the Debtors believe that providing cable services in this area will likewise be a profitable enterprise.

48. In contrast, the Debtors do not believe that providing cable services in Areas 3 and 4 would be profitable. Indeed, given the current financial climate, the Debtors do not believe it would be possible to obtain sufficient financing to undertake and complete the build out requirements set forth in the Areas 3 and 4 Franchise Agreements. In the exercise of its business judgment, therefore, RCN-Chicago has decided to reject the Areas 3 and 4 Franchise Agreements and assume, as modified, the Areas 1 and 2 Franchise Agreements.

49. Likewise, entry into the Dark Fiber Agreement with the City is in the best interests of the Debtors and their estates. Specifically, unless RCN-Chicago enters into the Dark Fiber Agreement, the City will not agree to settle the litigation. Even considering the expense that will be incurred by RCN-Chicago in connection with implementing and complying with the Dark Fiber Agreement, the Debtors believe that entry into this agreement is in the best interests of the Debtors and their estates because this agreement allows for the settlement of the litigation as set forth herein. Accordingly, in an exercise of its business judgment, RCN-Chicago has decided to enter into the Dark Fiber Agreement.

50. The entire Agreement, including the Dark Fiber Agreement, is, therefore, in the best interests of the Debtors and their estates and should be approved by the Court. As set forth above, the settlement of the litigation is a reasonable exercise of the Debtors' business judgment. If the litigation is not resolved, the

Debtors will incur additional administrative expenses, including attorneys' fees and other costs. Moreover, although the Debtors believe that they would ultimately succeed in their litigation, there is risk inherent in any litigation. In the event that the Debtors were ultimately unsuccessful in their litigation, certain of the Debtors would face multi-million dollar fines. In all likelihood, RCN-Chicago would be compelled to liquidate its estate and potentially reject all of the Franchise Agreements, to the detriment of the estates of RCN-Chicago and the other Debtors.

51. In sum, the Debtors have satisfied the requisite standards for (i) approval of a compromise, (ii) the assumption and/or rejection of contracts, and (iii) the entry into new agreements. Accordingly, the Court should approve the Agreement.

52. 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 Motion, 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 authorizing the Debtors to (i) enter into the Agreement and the Dark Fiber Agreement, (ii) reject the Areas 3 and 4 Franchise Agreement and (iii) assume the

Areas 1 and 2 Franchise Agreements, as modified; and granting the Debtors such other and further relief as is just.

Dated: New York, New York  
November 19, 2004

SKADDEN, ARPS, SLATE, MEAGHER  
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/s/ D. J. Baker

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

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	:
In re	: Chapter 11
	:
RCN CORPORATION, <u>et al.</u> ,	: Case No. 04-13638 (RDD)
	:
Debtors.	: (Jointly Administered)
	:
-----	X
	:
RCN CORPORATION and	:
RCN CABLE TV OF CHICAGO, INC.,	:
	:
Plaintiffs	:
	:
v.	: Adv. No. 04-03666 (RDD)
	:
CITY OF CHICAGO,	:
	:
Defendant.	:
-----	X

**ORDER AUTHORIZING SETTLEMENT AGREEMENT  
BETWEEN RCN CORPORATION, RCN CABLE TV  
OF CHICAGO, INC. AND THE CITY OF CHICAGO**

Upon the motion, dated November 19, 2004 (the "Motion"), of the above-captioned debtors and debtors-in-possession (the "Debtors") for an order approving the Release and Settlement Agreement, dated November 12, 2004 (the "Agreement"), between RCN Cable TV of Chicago, Inc. ("RCN-Chicago"), RCN Corporation ("RCN") and the City of Chicago (the "City") with respect to claims for fees, damages and penalties in connection with the Franchise Agreements for Areas



2, 3 and 4 between the parties, substantially in the form of that annexed as Exhibit A hereto, as well as the Dark Fiber IRU Agreement (the "Dark Fiber Agreement"), substantially in the form of that annexed as Exhibit B hereto; and upon the record herein; and after due deliberation thereon; and good and sufficient cause appearing therefor, it is hereby:

FOUND that:<sup>1</sup>

A. The Court has jurisdiction over the Motion under 28 U.S.C. §§ 157 and 1334, and this matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A). Venue in this district is proper under 28 U.S.C. §§ 1408 and 1409.

B. Due and proper notice of the Motion has been given and no other or further notice is required;

C. RCN and RCN-Chicago have exercised sound business judgment in deciding to enter into the Agreement;

D. The Agreement is fair, reasonable and in the best interests of RCN, RCN-Chicago, their estates, creditors and other parties-in-interest and is appropriate in light of the relevant factors;

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<sup>1</sup> Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. See Fed. R. Bankr. P. 7052.

E. RCN and RCN-Chicago have exercised sound business judgment in deciding to enter into the Dark Fiber Agreement;

F. The Dark Fiber Agreement is fair, reasonable and in the best interests of RCN, RCN-Chicago, their estates, creditors and other parties-in-interest and is appropriate in light of the relevant factors;

G. RCN-Chicago has exercised sound business judgment and has satisfied the requirements of 11 U.S.C. § 365 in deciding to (i) assume the Areas 1 and 2 Franchise Agreements as modified by the Agreement and (ii) reject the Areas 3 and 4 Franchise Agreements; and

H. It is in the best interests of RCN-Chicago, its estate, creditors and other parties-in-interest to (i) assume the Areas 1 and 2 Franchise Agreements as modified by the Agreement and (ii) reject the Areas 3 and 4 Franchise Agreements; and it is therefore,

ORDERED, ADJUDGED and DECREED that:

1. The Motion is GRANTED as set forth herein and the Agreement and Dark Fiber Agreement are hereby approved.

2. All objections to the Motion or the relief requested therein that have not been withdrawn, waived or settled, and all reservations of rights included therein, are overruled on the merits.

3. RCN and RCN-Chicago are authorized and directed to enter into and perform under the Agreement and the Dark Fiber Agreement, in substantially the forms attached hereto as Exhibits A and B, respectively, the terms and conditions of which are hereby approved.

4. The Debtors and each of their officers, directors, employees and agents, are authorized to take any actions and execute any documents necessary to consummate the Agreement and the Dark Fiber Agreement.

5. The terms and provisions of the Agreement, the Dark Fiber Agreement and this Order shall be binding in all respects upon, and shall inure to the benefit of RCN, RCN-Chicago, the RCN Released Entities (as defined in the Agreement) and each of their estates and creditors, and the City and the City of Chicago Released Entities (as defined in the Agreement), and shall be binding in all respects upon any affected third parties including, but not limited to, any trustee(s) or similar party under any Chapter of the Bankruptcy Code, responsible person, estate administrator, representative or similar person subsequently appointed for or in connection with the Debtors' estates or affairs in these cases or in any subsequent case(s) under the Bankruptcy Code involving the RCN Released Entities, RCN and/or RCN-Chicago.

6. The Area 1 Franchise Agreement is hereby assumed by RCN-Chicago.

7. The Area 2 Franchise Agreement, as modified by the Agreement, is hereby assumed by RCN-Chicago and any and all cure costs associated with such assumption have been satisfied by RCN-Chicago.

8. As more fully set forth in the Agreement, the Areas 3 and 4 Franchise Agreements are rejected pursuant to the terms and conditions of the Agreement.

9. The deadline for the City to file a proof of claim in the RCN-Chicago Bankruptcy (Case No. 04-15120) is through and including March 31, 2005.

10. Notwithstanding Bankruptcy Rule 6004(g), this Order shall take effect immediately upon entry.

11. This Court shall retain jurisdiction to decide any disputes arising between any of the Debtors and the City with respect to the Order, the Agreement, the Dark Fiber Agreement, the assumption of the Areas 1 and 2 Franchise Agreements as modified by the Agreement, and the rejection of the Areas 3 and 4 Franchise Agreements.

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

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Honorable Robert D. Drain  
UNITED STATES BANKRUPTCY JUDGE

**EXHIBIT A**  
**Release and Settlement**  
**Agreement**

## **RELEASE AND SETTLEMENT AGREEMENT**

This Release and Settlement Agreement ("Agreement") is entered into by RCN Cable TV of Chicago, Inc. ("RCN-Chicago"), RCN Corporation ("RCN Corp." and, collectively with RCN-Chicago, "RCN"), and the City of Chicago, Illinois ("City"). RCN-Chicago, RCN Corp. and the City are hereinafter referred to as the "Parties" and each as a "Party."

### **RECITALS**

**WHEREAS** RCN-Chicago is a Delaware corporation with its principal place of business at 350 North Orleans Street, Chicago, Illinois.

**WHEREAS** RCN Corp. is a Delaware corporation with its principal place of business at 105 Carnegie Center, Princeton, New Jersey.

**WHEREAS** the City is a municipality located in the State of Illinois with its principal offices at 121 N. LaSalle Street, Chicago, Illinois.

**WHEREAS** RCN-Chicago submitted a Petition for Modification to the City on December 12, 2003 pursuant to §625 of the Communications Act, 47 U.S.C. §545 seeking to modify certain network build-out and related provisions of the Areas 2, 3 and 4 Franchises on the grounds of commercial impracticability (the "Modification Petition").

**WHEREAS** the Chicago Cable Commission adopted three resolutions on February 21, 2004 finding that RCN-Chicago was in breach of certain of its network build-out and related obligations with respect to Franchise Areas 2, 3 and 4 and assessed certain liquidated damages and fines for such violations. ("Chicago Cable Commission February 21 Resolutions").

**WHEREAS** RCN Corp. filed a petition for relief under Chapter 11 on May 27, 2004 ("RCN Bankruptcy").

**WHEREAS** RCN-Chicago filed a petition for relief under Chapter 11 on August 5, 2004 ("RCN-Chicago Bankruptcy"), and concurrently RCN-Chicago filed an adversary complaint in the Bankruptcy Court seeking modification of the Areas 2, 3 and 4 Franchise Agreements as set forth in the Modification Petition and other declaratory, injunctive and equitable relief pursuant to the Bankruptcy Code.

**WHEREAS** pursuant to negotiations between the City and RCN-Chicago, the Parties have agreed to compromise, settle and release all RCN Claims and City Claims (as defined herein) upon the terms and conditions hereinafter set forth in this Agreement.

### **AGREEMENT**

**NOW, THEREFORE**, for good and valuable consideration set forth herein, the sufficiency and receipt of which are hereby acknowledged, and in consideration of and subject to the performances, conditions and promises contained in this Agreement, the City and RCN agree as follows:

**SECTION 1: RECITALS.** The foregoing Recitals are true and correct and shall be incorporated herein as in integral part of this Agreement.

**SECTION 2: DEFINITIONS.** The following definitions apply to this Agreement:

A. "Area 2 Franchise," "Area 3 Franchise," and "Area 4 Franchise" mean the three separate Cable Television Franchise Agreements for Franchise Areas 2, 3, and 4 of the City executed on December 7, 2000 by RCN-Chicago and the City.

B. "Area 1 Franchise" means the Cable Television Agreement for Franchise Area 1 of the City that was effective as of June 24, 1996 and was acquired by RCN-Chicago as a result of its acquisition of 21<sup>st</sup> Century Cable TV of Chicago, Inc. on April 28, 2000.

C. "Bankruptcy Court" means the United States Bankruptcy Court for the Southern District of New York that is presiding over the Chapter 11 filings of RCN Corp. and RCN-Chicago.

D. "CAC" means the Chicago Access Corporation.

E. "Corporate Surety Bonds" means those three (3) performance bonds filed by RCN-Chicago with the City as required by Section 5.3 of the Areas 2, 3 and 4 Franchises and consisting of Bond Nos. 103344480, 103344479, and 103344476, dated December 7, 2000 and issued by Travelers Casualty & Surety Company of America ("Travelers"), each in the amount of Three Million Dollars (\$3,000,000).

F. "Letters of Credit" means those three (3) unconditional and Irrevocable Standby Letters of Credit deposited by RCN-Chicago with the City, as required by Section 6 of the Areas 2, 3 and 4 Franchises and consisting of (i) Irrevocable Standby Letter of Credit No. 629, dated September 3, 2003, issued by Lakeside Bank in favor of the City in the amount of Three Hundred and Fifty Thousand Dollars (\$350,000), and (ii) Irrevocable Standby Letters of Credit Nos. S231702PHL and S235870PHL, dated January 11, 2001, issued by PNC Bank, each in the amount of Three Hundred and Fifty Thousand Dollars (\$350,000).

G. "Litigation" means Adversary Proceeding No. 04-03666 filed in the Bankruptcy Court and all related and pending litigation that seeks adjudication of the RCN Claims and the City Claims.

H. "RCN Released Entities" means RCN-Chicago, RCN Corp., and any and all of their current, former and future parent companies, affiliates, subsidiaries, owners, partners, executives, administrators, officers, directors, employees, shareholders, agents, attorneys, insurers, representatives, heirs, successors and assigns.

I. "City of Chicago Released Entities" means the City, and any and all of its current, former and future elected and appointed officials, executives, administrators, officers, directors, employees, agents, attorneys, insurers, representatives, heirs, successors, assigns, political subdivisions, agencies and any instrumentalities thereof.

J. "RCN Claims" means any and all claims, controversies, liabilities, suits, actions, causes of action, demands, obligations, damages, judgments, costs, expenses and attorneys' fees, known or unknown, vested or contingent, direct or indirect, whether in tort, contract, statutory or otherwise (collectively, the "Claims"), that RCN Released Entities may have had or may now have against the City of Chicago Released Entities arising out of and relating to disputes raised by the Modification Petition and related bankruptcy court proceedings, all other court proceedings filed by RCN-Chicago, the Resolution adopted on February 11, 2004 by the Chicago City Council, the Chicago Cable Commission February 21 Resolutions, and, with respect to the Areas 3 and 4 Franchises, any and all other Claims that RCN Released Entities may have had or may now have against the City of Chicago Released Entities arising out of, relating to, or pursuant to RCN-Chicago's compliance with the Areas 3 and 4 Franchises and its obligations under the Chicago Cable Ordinance with respect to Franchise Areas 3 and 4.

K. "City Claims" means any and all Claims that the City of Chicago Released Entities may have had or may now have against the RCN Released Entities arising out of and relating to those disputes raised by the Modification Petition and related bankruptcy court proceedings filed by RCN-Chicago, the Resolution adopted on February 11, 2004 by the Chicago City Council, the Chicago Cable Commission February 21 Resolutions, and, with respect to the Areas 3 and 4 Franchises, any and all other Claims that the City of Chicago Released Entities may have had or may now have against the RCN Released Entities arising out of, relating to, or pursuant to RCN-Chicago's compliance with the Areas 3 and 4 Franchises and its obligations under the Chicago Cable Ordinance with respect to Franchise Areas 3 and 4.

### **SECTION 3: EFFECTIVE DATE.**

A. Except as provided herein and with respect to the mutual releases contained in Section 3, this Agreement shall be effective upon the later to occur of (i) receipt of a final and non-appealable order from the Bankruptcy Court approving this Agreement and the Dark Fiber IRU Agreement dated November 12, 2004 (the "IRU Agreement"), such order providing, among other things, that the terms and provisions of this Agreement shall be binding in all respects upon, and shall inure to the benefit of, the RCN Released Entities, their estates, and their creditors, and the City of Chicago Released Entities, and shall be binding in all respects upon any affected third parties, notwithstanding any subsequent appointment of any trustee(s) or similar party under any Chapter of the Bankruptcy Code, as to which trustee(s) or similar party such terms and provisions likewise shall be binding and such order approving, and (ii) receipt of final City Approvals (as defined below) of this Agreement (the "Effective Date"); provided, however, that all of the following conditions have been met prior to such time:

i. The City shall certify that it has completed its review of the financial information provided by RCN regarding RCN's financial ability to meet the construction build-out requirements set forth in the Areas 2, 3 and 4 Franchises.

ii. RCN and CAC shall have settled their disputes with respect to current and future payments due from RCN-Chicago no later than November 30, 2004, and within five (5) business days following execution of the settlement with CAC, RCN shall have filed a motion at the Bankruptcy Court seeking to have such settlement approved, and a final order approving such settlement shall have been issued by the Bankruptcy Court.



iii. RCN and the City shall have executed the IRU Agreement.

iv. No later than five (5) business days following execution of this Agreement by both Parties, RCN shall have filed a motion with the Bankruptcy Court seeking to have (a) this Agreement approved; (b) the IRU Agreement approved; (c) the Area 1 Franchise; and the Area 2 Franchise, as amended herein, assumed; and (d) the Area 3 and 4 Franchises rejected. The Parties agree that the IRU Agreement contains highly sensitive and confidential information, the release of which would be detrimental to both RCN and to the City, that it shall therefore be submitted to the Bankruptcy Court under seal and/or with appropriate and necessary redactions of the confidential information, and that both Parties will support the need for confidentiality. To the extent that RCN requests redaction of material that the City deems unnecessary, the provisions with respect to confidentiality contained in Paragraph 28 of the IRU Agreement shall control.

v. No later than five (5) business days following execution of this Agreement, the City shall have initiated the necessary procedures for approval of the Agreement by any person or entity whose approval is necessary in order for the Agreement to become effective, including but not limited to approval by the City Council of the City of Chicago ("City Approvals").

B. This Agreement is subject to each of the conditions set forth in this Section 3 and in the event that any or all of the conditions set forth in this Section 3 are not met, this Agreement shall be null, void and of no further force and effect and the Parties shall be entitled to assert the positions they have taken with respect to their claims and disputes prior to reaching this Agreement.

#### **SECTION 4: TERMINATION AND MODIFICATION OF FRANCHISES.**

A. Termination of the Areas 3 and 4 Franchises. As of the Effective Date of this Agreement, RCN-Chicago agrees to reject, pursuant to 11 U.S.C. §365, the Areas 3 and 4 Franchises, and the City agrees that such rejection is a voluntary termination by the City without any penalty or payment from RCN-Chicago or on RCN-Chicago's behalf. The City further agrees that it will not file any proof of claim seeking damages for the rejection of the Areas 3 and 4 Franchises. Upon such rejection, all of RCN-Chicago's rights and obligations pursuant to the Areas 3 and 4 Franchises shall be extinguished. As such, all rights of RCN-Chicago to use the streets and public ways of the City in Franchise Areas 3 and 4 for purposes of construction and operation of a cable television system will be terminated and the City will release, acquit and forever discharge RCN-Chicago from any and all current and future obligations set forth in the Areas 3 and 4 Franchises.

B. Modification of the Area 2 Franchise. As of the Effective Date of this Agreement, the Area 2 Franchise shall be modified as follows and assumed by RCN-Chicago pursuant to 11 U.S.C. section 365 as follows:

i. The geographic area in which RCN-Chicago shall be entitled to offer cable television services pursuant to the Area 2 Franchise shall be limited to the homes and businesses that can be served by lateral connections to RCN-Chicago's existing network

facilities in Area 2 as of the Effective Date of this Agreement. Other than the homes and businesses in Area 2 that can be served by laterals from existing network facilities, the right of RCN-Chicago to use the streets and public ways of the City in Area 2 for purposes of construction and operation of a cable television system is terminated and the City will release, acquit and forever discharge RCN-Chicago from any and all current and future network build-out obligations set forth in the Area 2 Franchise as amended herein; provided, however, that all other terms and conditions of the Franchise Agreement for Area 2 shall remain in full force and effect for so long as RCN-Chicago provides cable television service pursuant to the Area 2 Franchise, including but not limited to the requirements of Section 12 of the Area 2 Franchise as to any maintenance or repair work conducted by RCN-Chicago with respect to existing network facilities, which requirements shall also apply to any new laterals constructed by RCN-Chicago in the public rights-of-way, and Section 5 as to Insurance, Letter of Credit and Bond obligations; and provided further that the Letter of Credit required by the Area 2 Franchise shall be replenished by RCN within ten (10) days of the Effective Date of this Agreement.

ii. This Agreement is intended to and does settle all existing and future claims with respect to RCN-Chicago's construction build-out obligations in Area 2, and in the event that RCN-Chicago may in the future determine that it will not continue to provide cable television services in Area 2 pursuant to the Area 2 Franchise, as modified by this Agreement, RCN-Chicago shall be entitled to terminate the Area 2 Franchise and cease providing service to affected subscribers without penalty; provided, however, that RCN-Chicago shall not cease providing cable services in Area 2 until cable television service from an alternate cable service provider is available to affected cable television service subscribers or for six (6) months from the date of such notice, whichever is sooner; and provided further that RCN-Chicago's right to terminate the Area 2 Franchise Agreement without penalty and cease providing service in Area 2 shall not vest until at least one hundred and twenty (120) days following the Effective Date.

C. Within two (2) business days following receipt of the Payment set forth (and as defined) in Section 5 of this Agreement, the City shall certify to RCN in writing ("City Certification") that it has received the Payment and that it thereby releases any and all claim to the Corporate Surety Bonds for the Areas 3 and 4 Franchises.

D. In the event the Payment is not made, RCN-Chicago agrees that the City shall have the right on the third day after the Effective Date of the Agreement to request and receive payment from the Corporate Surety Bonds as liquidated damages. RCN-Chicago additionally agrees that it will certify to Travelers that, if the City makes such a request on the third day after the Effective Date, the City is entitled to payment of \$3,450,000 from the Corporate Surety Bonds and that none of RCN-Chicago, its parent or affiliates, successors, assigns, or agents, including any trustee in this bankruptcy case, shall assert any defense or objection to payment to the City of the \$3,450,000 from the Corporate Surety Bonds. Upon receipt of the Corporate Surety Bond payment, the Payment shall be deemed satisfied.

## **SECTION 5: PAYMENT.**

In consideration of the modification of the Area 2 Franchise as set forth in Section 4.B of this Agreement only, (i) RCN shall pay to the City the amount of Four Million Five Hundred Thousand Dollars (\$4,500,000) ("Payment"), and (ii) RCN and the City shall enter into the IRU Agreement. The Payment shall be made as follows:

A. The City shall retain One Million Fifty Thousand Dollars (\$1,050,000) previously drawn down by the City from the Letters of Credit on February 23, 2004; and

B. RCN will pay to the City the amount of Three Million, Four Hundred and Fifty Thousand Dollars (\$3,450,000) in immediately available funds by wire transfer to the following City bank account no later than two (2) business days after the Effective Date of this Agreement:

Bank One City Main Account  
Account #: 1105825  
Routing #: 071000013  
Attention: Mark Mitrovich

## **SECTION 6: REPRESENTATIONS AND WARRANTIES.**

A. Subject to the terms of this Agreement, the City and RCN each represent and warrant as follows:

i. Except as authorized by this Agreement, each Party promises not to bring any additional claims, actions, suits or proceedings against any other Party, directly or indirectly, regarding or relating in any manner to the City Claims and RCN Claims, as appropriate, and each Party further covenants and agrees that this Agreement is a bar to any such claim, action, suit or proceeding including, but not limited to any preference action by RCN or any trustee appointed in the RCN Bankruptcy or the RCN-Chicago Bankruptcy;

ii. Each Party represents and warrants that it is the sole and lawful owner of all right, title and interest in all City Claims and RCN Claims, as appropriate, and that it has not heretofore assigned or transferred, or purported to assign or transfer, to any person or entity, any City Claims or RCN Claims. Each Party to this Agreement shall indemnify the other, shall defend the other, and shall hold the other harmless from and against any claims based upon or arising in connection with any such prior assignment, transfer, lien and/or right, or any such purported assignment, transfer, lien and/or right;

iii. The undersigned represent and warrant to each other that they are duly authorized to execute this Agreement on behalf of the applicable Party hereto;

iv. The Parties represent and warrant that they have read and understand this Agreement, that they intend to be legally bound by it, and that its terms, provisions and conditions have been fully explained to them by their attorneys; and

v. Each Party represents and warrants that, subject to the approvals set forth in Section 3 of this Agreement, it is authorized to perform its obligations in accordance with the terms of this Agreement.

B. RCN represents and warrants that it will use its best efforts to obtain all necessary approvals, including Bankruptcy Court approval, for this Agreement.

C. The City represents and warrants that it will use its best efforts to obtain all necessary City Approvals for this Agreement.

D. The warranties and representations of this Agreement are deemed to survive the Effective Date of this Agreement.

#### **SECTION 7: PENDING LITIGATION.**

Within five (5) business days following the receipt of the City Certification set forth in Section 4A(i) of this Agreement, RCN shall withdraw its Petition for Modification and take such actions as necessary to dismiss all Litigation with prejudice.

#### **SECTION 8: MUTUAL RELEASES.**

A. Upon the Effective Date of this Agreement, and subject to the City's receipt of the Payments set forth in Section 5 herein, the dismissal of the Litigation set forth in Section 7 herein, and the other conditions set forth in this Agreement, including but not limited to the execution of the Dark Fiber IRU Agreement, the City of Chicago Released Entities do hereby release the RCN Released Entities, and does forever discharge the City Claims as hereinabove defined in Section 2, including, but not limited to, any and all liquidated damages, penalties and/or fines assessed against RCN-Chicago by the City in the Chicago Cable Commission February 21 Resolutions (the "Release of RCN").

B. Upon the Effective Date of this Agreement and subject to the dismissal of the pending litigations set forth in Section 7 herein, the issuance by the City of the City Certification and the other conditions set forth in this Agreement, the RCN Released Entities do hereby release and forever discharge the City of Chicago Released Entities from all RCN Claims against the City of Chicago Released Entities (the "Release of the City").

C. This Agreement is intended to and does settle all RCN Claims and City Claims, and nothing contained herein shall constitute an admission by any Party as to the merits of any claims, positions or arguments that they have or might assert with respect to the disputes settled by this Agreement, and nothing in this Agreement shall be construed as an admission by any Party of any liability of any kind to any other Party.

D. Subject to the City's right to enforce the Area 2 Franchise as modified herein and the Dark Fiber IRU Agreement, the Parties agree that any and all claims and disputes settled pursuant to this Agreement shall be forever extinguished and as such shall not in any manner be used by any Party in connection with any future matters or course of dealing between the Parties,

including but not limited to the renewal, extension, amendment, assignment, transfer or other modification of existing or future cable franchise or other right-of-way use agreements.

E. These releases shall not be construed to release either the City or RCN from the terms of this Agreement.

## **SECTION 9: GENERAL PROVISIONS.**

A. Governing Law. This Agreement shall be governed by, and enforced in accordance with the laws of the State of Illinois.

B. Benefit and Burden. The covenants, conditions, agreements, terms and provisions herein contained shall be binding upon, and shall inure to the benefit of, the parties hereto and each of their respective heirs, executors, administrators, personal representatives, successors and assigns.

C. Time of the Essence. Time is of the essence in the performance of all terms and provisions of this Agreement.

D. Compromise of Disputed Claims. Each of the Parties understands and agrees that this Agreement is in the nature of a settlement and compromise of RCN Claims and City Claims. Both the City and RCN intend to settle and satisfy all claims, judgments and controversies encompassed by the City Claims and RCN Claims to avoid further litigation.

E. Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto and supercedes any and all prior agreements and negotiations between the Parties, whether written or oral, relating to the subject matter of this Agreement.

F. Interpretation. This Agreement shall be construed without regard to the identity of the Party who drafted the various provisions of this Agreement. Moreover, each and every provision of this Agreement shall be construed as though all Parties to this Agreement participated equally in the drafting of this Agreement. As a result of the foregoing, any rule or construction that a document is to be construed against the drafting Party shall not be applicable to this Agreement.

G. Amendments and Modifications. No amendment to or modification of this Agreement shall be effective until it is reduced to writing and approved and executed by all Parties to this Agreement and approved in accordance with all applicable statutory and judicial rules and procedures.

H. No Third Party Beneficiaries. No claim as a third Party beneficiary under this Agreement by any person shall be made, or be valid, against the City or RCN.

I. Additional Documents. The City and RCN agree to cooperate fully and execute all supplemental documents, and to take all additional actions that may be necessary to give full force and effect to the basic terms and intent of this Agreement.

J. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed to constitute an original.

K. Attorneys' Fees and Other Costs. The Parties shall each bear and be solely responsible for their respective costs and expenses in connection with this Agreement, including but not limited to their respective attorneys' fees and other costs generated in connection with the disputes giving rise to this Agreement, and in securing any and all required approvals of this Agreement.

L. Proof of Claim Deadline. RCN shall extend the deadline for the City to file a proof of claim in the RCN-Chicago Bankruptcy through and including March 31, 2005.

*[this page intentionally left blank]*

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

RCN CABLE TV OF CHICAGO, INC.

CITY OF CHICAGO

By: \_\_\_\_\_

By: \_\_\_\_\_

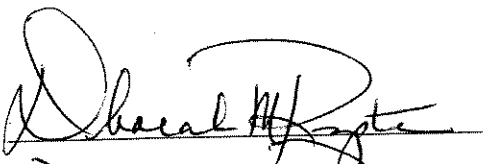
Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

RCN CORPORATION

By:  \_\_\_\_\_

Name: Deborah M. Royster

Title: Sr. VP, Gen Counsel + Corp. Sec.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed this 12<sup>th</sup> day of November, 2004.

RCN CABLE TV OF CHICAGO, INC.

CITY OF CHICAGO

By: Thomas M McKay  
Name: Thomas M McKay  
VP / General Manager

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

RCN CORPORATION

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_



IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed this 12<sup>th</sup> day of November, 2004.

RCN CABLE TV OF CHICAGO, INC.

CITY OF CHICAGO

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

By:  \_\_\_\_\_

Name: JACK A. PACE

Title: Assistant Corporation Counsel

RCN CORPORATION

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**EXHIBIT B**  
**Dark Fiber Agreement**

**TO BE FILED UNDER  
SEAL**