

**Hearing Date: January 5, 2005 at 10:00 a.m.**  
**Objection Deadline: December 31, 2004 at 4:00 p.m.**

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Attorneys for Debtors and  
Debtors-in-Possession

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re : Chapter 11  
: RCN CORPORATION., et al., : Case No. 04-13638 (RDD)  
: Debtors. : (Jointly Administered)  
: :  
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**NOTICE OF MOTION FOR ORDER UNDER 11 U.S.C. §§ 105(a), 363(b) AND  
365 AUTHORIZING AND APPROVING (A) THE ASSUMPTION OF  
CERTAIN EXECUTORY CONTRACTS AND (B) THE RENEWAL OF  
INSURANCE PROGRAMS**

PLEASE TAKE NOTICE that on November 30, 2004, RCN Corporation ("RCN"), and certain of its subsidiaries, debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors"), filed the Motion for Order Under 11 U.S.C. §§ 105(a), 363(b) and 365 Authorizing and Approving (A) the Assumption

of Certain Executory Contracts and (B) the Renewal of Certain Insurance Programs (the "Motion").

PLEASE TAKE FURTHER NOTICE that on **January 5, 2005 at 10:00 a.m.**, the Bankruptcy Court will hold a hearing to consider granting the relief requested in the Motion (the "Hearing"). Objections 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 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) Skadden, Arps, Slate, Meagher & Flom LLP, counsel to the Debtors, 4 Times Square, New York, NY, 10036-6522, Attention: D. J. Baker, Esq.; (iii) 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.; (iv) Milbank, Tweed, Hadley & McCloy, counsel to the unofficial committee of noteholders, 1 Chase Manhattan Plaza, New York, NY 10005, Attention: Dennis

Dunne, Esq.; (v) counsel to any other statutory committee(s) appointed in these cases; (vi) 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 (vii) 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. Eastern time on **December 31, 2004** (the "Objection Deadline").

PLEASE TAKE FURTHER NOTICE that only those objections made in writing and timely filed and received by the Objection Deadline will be considered by the Bankruptcy Court at the Hearing, and that if no objections 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 Motion **without further notice**.

Dated: New York, New York  
November 30, 2004

SKADDEN, ARPS, SLATE, MEAGHER  
& FLOM LLP

/s/ D.J. Baker  
D. J. Baker (JB 0085)  
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UNITED STATES BANKRUPTCY COURT  
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In re : Chapter 11  
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RCN CORPORATION, et al., : Case No. 04-13638 (RDD)  
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Debtors. : (Jointly Administered)  
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**MOTION FOR ORDER UNDER 11 U.S.C. §§ 105(a), 363(b) AND 365  
AUTHORIZING AND APPROVING (A) THE ASSUMPTION OF  
CERTAIN EXECUTORY CONTRACTS AND (B) THE RENEWAL OF  
INSURANCE PROGRAMS**

RCN Corporation ("RCN") and certain of its direct and indirect subsidiaries, debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors") hereby move for an Order Under 11 U.S.C. §§ 105(a), 363(b) and 365 Authorizing and Approving (A) the Assumption of Certain Executory

Contracts and (B) the Renewal of Certain Insurance Programs. In support of this motion, the Debtors respectfully represent as follows:

### **BACKGROUND**

1. On May 27, 2004 (the "Petition Date"), RCN and certain other Debtors filed voluntary petitions in this Court for reorganization relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").<sup>1</sup> RCN Cable TV of Chicago, Inc., an affiliate of RCN, commenced its chapter 11 case on August 5, 2004. Certain additional Debtors commenced their chapter 11 cases on August 20, 2004.<sup>2</sup>

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

3. No trustee or examiner has been appointed in these chapter 11 cases. On June 10, 2004, the United States Trustee for the Southern District of New York appointed the Committee of Unsecured Creditors (the "Committee"). No other official committees have been appointed or designated in these chapter 11 cases.

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<sup>1</sup> In addition to RCN, TEC Air, Inc., RLH Property Corporation, RCN Finance, LLC and Hot Spots Productions, Inc., all affiliates of RCN, commenced their chapter 11 cases on May 27, 2004.

<sup>2</sup> RCN Telecom Services of Virginia, Inc., RCN Entertainment, Inc., 21st Century Telecom Services, Inc. and ON TV, Inc., all affiliates of RCN, commenced their chapter 11 cases on August 20, 2004.

4. 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).

5. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105, 363 and 365.

### **RELIEF REQUESTED**

6. The Debtors respectfully request entry of an order authorizing and approving the assumption of the executory contracts (the "Contracts") listed on Exhibits A through C attached to the proposed order.<sup>3</sup> The Debtors also seek authority, to the extent required, to renew their existing insurance programs (or to enter into similar insurance programs with other insurance carriers) upon terms reasonably similar to those currently in existence.

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<sup>3</sup> The Debtors do not concede that the Contracts are necessarily "executory," and reserve the right to assert that any Contract is not an executory contract under Bankruptcy Code section 365. The Debtors reserve the right to amend the list of Contracts on the exhibits attached to the proposed order.

## **BASIS FOR RELIEF**

7. The Debtors are parties to numerous insurance policies listed on Exhibit A attached to the proposed order. The Debtors' insurance policies provide the Debtors and their affiliates with necessary, and in some cases statutorily required, insurance coverage, including workers' compensation, general liability, general automobile, director and officer and other types of insurance coverage. The Debtors and their affiliates require the continuation of these policies to comply with certain state laws mandating insurance coverage, preserve their current insurance scheme, and manage their risk. The Debtors also need to renew their existing insurance programs, upon similar terms, to maintain such coverage going forward.

8. The Debtors are party to the equipment lease guaranty agreement listed on Exhibit B attached to the proposed order, pursuant to which the Debtors have guaranteed certain obligations of RCN Telecom Services, Inc. ("RCN Telecom"), a non-Debtor subsidiary of RCN. The Debtors wish to assume this agreement to ensure that RCN Telecom remains in compliance with the underlying lease agreement.

9. The Debtors RCN Entertainment, Inc. ("RCN Entertainment") and ON TV, Inc. ("ON TV") are parties to agreements relating to the production of certain television programming. RCN Entertainment and ON TV create, develop, produce and distribute family programming. Prior to the Petition Date, the Debtors



and their affiliates (collectively, the "RCN Companies") executed separation agreements (the "Separation Agreements") with two of RCN Entertainment's then principals, one of whom continues to be employed by a non-Debtor affiliate of RCN. Pursuant to these Separation Agreements, the RCN Companies assigned to these principals substantially all of the RCN Companies' interest in their intellectual property related to certain television programming, including Miracle's Boys and Zack Files. One of the principals is also the principal of On Screen Entertainment LLC ("On Screen"). On Screen subsequently executed a production services agreement (the "On Screen Production Services Agreement") with RCN Entertainment whereby RCN Entertainment agreed to produce certain Miracle's Boys programming. Under the On Screen Production Services Agreement, RCN Entertainment receives milestone payments upon the occurrence of certain events, including a final payment upon delivery of the finished programming product to On Screen. RCN Entertainment also executed a production services agreement with Great Plains Instructional TV Library to produce certain episodes of Reading Rainbow. Both of the Miracle's Boys and Reading Rainbow productions are nearing completion.

10. In connection with producing certain programming, including Miracle's Boys and Reading Rainbow, RCN Entertainment and ON TV executed various agreements related to the production of such programming. These agreements include collective bargaining agreements with various industry guilds, location

agreements, music agreements, appearance releases and other production related agreements (the "Production Related Agreements"). It is typical in the television and motion picture industry to keep such agreements in full force and effect pending completion of a production, and then deliver such Production Related Agreements to the ultimate purchaser of the property upon completion. In connection with the completion of Miracle's Boys and Reading Rainbow, the Debtors seek to assume the Production Related Agreements listed on Exhibit C to the proposed order to complete their production responsibilities, deliver such agreements to the ultimate purchaser of the productions, and receive future milestone payments. Such expected future payments aggregate to approximately \$600,000.

11. Some or all of the Contracts, including the insurance policies, may not be "executory contracts" under Bankruptcy Code section 365. The Debtors' proposed plan of reorganization provides that all executory contracts not expressly assumed or subject to a motion to assume shall be rejected. The Debtors are therefore, out of an abundance of caution, listing any agreements beneficial to the estates that are arguably executory as Contracts to be assumed, without conceding that such agreements are executory.

## **APPLICABLE AUTHORITY**

### **A. Assumption of the Assumed Contracts**

12. Under Bankruptcy Code section 365(a), a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Bankruptcy Code section 365(b)(1), in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor. This subsection provides:

- (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee-
  - (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
  - (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
  - (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

13. The Debtors submit that the statutory requirements of section 365(b)(1) of the Bankruptcy Code have been satisfied because there are no monetary defaults existing under the Contracts to be assumed other than as listed on the exhibits to the order. Any cure amounts listed on such exhibits will be paid promptly

upon assumption, thereby satisfying the requirements of Bankruptcy Code section 365(b).

14. The standard applied to determine whether the assumption of an executory contract should be approved is the "business judgment" test, which is based on the debtor's business judgment that the assumption is in its best interests. See Orion Pictures Corp. v. Showtime Networks, Inc., 4 F.3d 1095, 1098 (2d Cir. 1993), cert. dismissed, 511 U.S. 1024 (1994); see also In re Child World, Inc., 142 B.R. 87, 89 (Bankr. S.D.N.Y. 1992) (stating that a debtor may assume or reject an unexpired lease under § 365(a) in the exercise of its "business judgment"); In re Roman Crest Fruit, Inc., 35 B.R. 939, 949 (S.D.N.Y. 1983); Control Data Corp. v. Zelman, 602 F.2d 38, 42 (2d Cir.1979).

15. As noted by this Court, the business judgment standard under Bankruptcy Code section 363(b), at least in the Second Circuit, differs slightly from the standard in other contexts because "it is the bankruptcy judge's business judgment that is supposed to be applied." In re RCN Corp., Case No. 04-13638 (RDD), June 22, 2004 Hr'g Tr. ¶¶ 50:24–50:2, at 46. But this Court also noted that in certain circumstances, the bankruptcy judge will give significant deference to a debtor's business judgment:

[B]ankruptcy judges and district judges in this district have been quick to, in the proper circumstances, defer in large part to the debtors' business judgment, particularly where the creditors' committee and the majority

of the parties in interest support that judgment . . . particularly . . . where the action that's being proposed to be taken by the debtor was the result of a competitive market-driven bidding process.

In re RCN Corp., June 22, 2004 Hr'g Tr. ¶¶ 51:3–12, at 46.

16. Assumption of the Contracts represents a sound exercise of business judgment. Certain of the Contracts are necessary for the continuing business operations of the Debtors, including the preservation of necessary insurance programs. Failure to maintain such insurance programs may actually place the Debtors in violation of certain statutory requirements. The guaranty agreement with General Electric Capital Corporation, if not assumed, may cause the non-Debtor, RCN Telecom, to be in default of the underlying lease, which could adversely affect RCN Telecom and the Debtors. Finally, other Contracts relate to TV productions that are nearing completion, and are necessary to finalizing such productions and receiving final milestone payments.

**B. Renewal of Insurance Programs**

17. Bankruptcy Code section 363 authorizes a debtor-in-possession to dispose of property of the estate in the ordinary course of business without court approval. Bankruptcy Code section 363(b) permits a debtor-in-possession to dispose of property of the estate "other than in the ordinary course of business" after notice and a hearing.

18. Courts in this district and elsewhere consistently have held that transactions pursuant to section 363(b) should be approved if the debtor demonstrates a sound business justification for implementing it. See In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983); In re Delaware Hudson Ry. Co., 124 B.R. 169, 179 (Bankr. D. Del. 1991).

19. 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 taken 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)).

20. At the request of one of the Debtors' insurance carriers, the Debtors seek authority, to the extent required, to renew their existing insurance programs (or to enter into similar insurance programs with other insurance carriers) upon terms reasonably similar to those currently in existence. The Debtors believe that such transactions may be in the ordinary course of business. The Debtors are seeking such authority, however, out of an abundance of caution. The Debtors believe that renewing their existing insurance programs upon terms similar to those currently in place is not only desirable, but in some cases, statutorily required.

Accordingly, the Debtors assert that the renewal of their existing insurance programs is a sound exercise of their business judgment.

### **PROPOSED CURE PROCEDURES**

21. The Debtors assert that no monetary cure is due in respect of any of the Contracts other than as set forth on the exhibits attached to the order. The Debtors propose that any non-Debtor party to a Contract that disputes the Debtors' assertion that the Debtors are authorized to assume the Contracts without the payment of a monetary cure, shall comply with the procedures set forth herein.

22. Specifically, the Debtors propose that any non-Debtor party to a Contract shall have until December 31, 2004 (the "Objection Deadline") to file with the Bankruptcy Court and serve on counsel to the Debtors and Committee an objection to the assumption of its respective agreement or the proposed cure amount with respect thereto, and must state in its objection (each, an "Assumption Objection") with specificity what cure amount, if any, it asserts is required (with appropriate documentation in support thereof). If no Assumption Objection is timely filed and received from any such party, the applicable Contract will be assumed, without the need to pay a monetary cure, notwithstanding anything to the contrary in any Contract or any other document.

23. Any non-Debtor party that fails to file and serve timely an Assumption Objection will be: (i) deemed to have waived and released any right to

assert an objection to the proposed assumption of any Contract, and to have otherwise consented to the assumption of the Contract; (ii) deemed to have waived and released any right to assert a cure amount (in excess of any amounts listed on the exhibits attached hereto), and (iii) forever barred, permanently enjoined and estopped from asserting or claiming any other or further claims against the Debtors, their respective successors and assigns, or the property or assets of any or all such parties, as to such Contract or on grounds that any additional amounts are due or defaults exist, or conditions to assignment must be satisfied, under such Contract.

24. A properly filed and served Assumption Objection to the cure amount only shall reserve such objecting party's rights against the Debtors with respect to the relevant cure obligation, shall not constitute an objection to the remaining relief requested in this Motion and will not be considered at the hearing on this Motion. Objections to cure amount only will be considered at such other date as the parties or the Court may designate.

25. The Debtors submit that no new or novel issue of law is presented with respect to the matters contained herein, and respectfully request that the requirement of a memorandum of law, pursuant to Local Bankruptcy Rule 9013-1(b), be deemed satisfied by the motion.



WHEREFORE the Debtors respectfully request that this Court enter an order (i) authorizing and approving (A) the assumption of the Contracts and, (B) the renewal of the Debtors' existing insurance programs (or to enter into similar insurance programs with other insurance carriers) upon terms reasonably similar to those currently in existence; and (ii) granting such other and further relief as is just and proper.

Dated: New York, New York  
November 30, 2004

SKADDEN, ARPS, SLATE, MEAGHER  
& FLOM LLP

/s/ D.J. Baker

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(Member of the Firm)  
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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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: In re : Chapter 11  
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: RCN CORPORATION, et al., : Case No. 04-13638 (RDD)  
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: Debtors. : (Jointly Administered)  
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**ORDER UNDER 11 U.S.C. §§ 105(a), 363(b) AND 365  
AUTHORIZING AND APPROVING (A) THE ASSUMPTION OF  
CERTAIN EXECUTORY CONTRACTS AND (B) THE RENEWAL OF  
INSURANCE PROGRAMS**

Upon the motion (the "Motion")<sup>1</sup> of the Debtors for entry of an Order Under 11 U.S.C. §§ 105(a), 363(b) and 365 Authorizing and Approving (A) the Assumption of Certain Executory Contracts and (B) the Renewal of Certain Insurance Programs; and the Court having reviewed the Motion; and the Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors and other parties in interest; and it appearing that notice of the Motion was good and sufficient under the particular circumstances and that no other and further notice be given; and upon the record herein; and after due deliberation thereon; and good and sufficient cause appearing therefor, it is

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<sup>1</sup> Unless otherwise defined herein, capitalized terms used herein shall have the meanings ascribed to them in the Motion.

hereby:

FOUND AND DETERMINED THAT:

A. The Debtors have demonstrated that assuming the Contracts is an exercise of their sound business judgment, and that such assumption is in the best interests of the Debtors' estates;

B. None of the Contracts are of the type specified in section 365(c) of the Bankruptcy Code which would prevent the Debtors from assuming such Contracts. To the extent consent is required for the assumption of a Contract, each non-Debtor party to such Contract is deemed to have consented to such assumption;

C. The Debtors have, to the extent necessary, satisfied the requirements of Bankruptcy Code section 365(b)(1) in connection with the assumption of the Contracts; and

D. The Debtors' renewal of any of their existing insurance policies and programs on terms similar to the terms in the existing insurance policies is an exercise of their sound business judgment and such renewals are in the best interests of the Debtors' estates.

ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is GRANTED.
2. Pursuant to Bankruptcy Code section 365(a), the Contracts listed on Exhibits A through C hereto are hereby assumed.

3. The requirements of section 365(b)(1) of the Bankruptcy Code are hereby deemed satisfied with respect to the Contracts (subject to the "cure amount" procedures set forth herein).

4. All liquidated monetary defaults, claims or other obligations of the Debtors arising or accruing under each Contract prior to the assumption of such Contract (without giving effect to any acceleration clauses or any default provisions of the kind specified in Bankruptcy Code section 365(b)(2)), as listed on the attached exhibits, shall be promptly paid by the Debtors upon assumption as provided in Bankruptcy Code section 365(b)(1).

5. With respect to any Assumption Objections based solely on the Debtors' proposed cure amount (a "Cure Amount Objection"), the Debtors and the non-Debtor party may resolve such dispute by agreement, in this Court, or any other forum of competent jurisdiction. If consensual resolution of the Cure Amount Objection cannot be reached, the Debtors shall (i) pay in full the undisputed portion of such cure amount on or shortly after the assumption of the Contract and (ii) pay any such additional cure amounts upon resolution of the Cure Amount Objection by this Court, a forum of competent jurisdiction, or by mutual agreement of the parties.

6. Any non-Debtor party to a Contract that fails to file timely an Assumption Objection shall be: (i) deemed to have waived and released any right to assert an objection to the proposed assumption of any Contract, and to have other-

wise consented to the assumption of the Contract; (ii) deemed to have waived and released any right to assert a cure amount (in excess of any amounts listed on the exhibits attached hereto), and (iii) forever barred, permanently enjoined and estopped from asserting or claiming any other or further claims against the Debtors, their respective successors and assigns, or the property or assets of any or all such parties, as to such Contract or on grounds that any additional amounts are due or defaults exist, or conditions to assignment must be satisfied, under such Contract.

7. Pursuant to Bankruptcy Code section 363(b), the Debtors are authorized to renew their existing insurance programs (or to enter into similar insurance programs with other insurance carriers) upon terms reasonably similar to those currently in existence. The Debtors are authorized and agree to execute all documentation necessary to assume or renew their insurance programs.

8. This Order shall bind the Debtors, their successors in interest and assigns, including limitation, any trustee in bankruptcy.

9. The requirement of Local Bankr. R. 9013-1(b) that any motion filed shall be accompanied by a separate memorandum of law is deemed satisfied by the Motion.

Dated: New York, New York  
, 2004

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UNITED STATES BANKRUPTCY JUDGE