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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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	:	Chapter 11
In re	:	
	:	Case No. 03-13057 (RDD)
ALLEGIANCE TELECOM, INC., <u>et al.</u> ,	:	
	:	(Jointly Administered)
Debtors.	:	
	:	
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**KMC’S REPLY TO THE JOINT OBJECTION OF THE DEBTORS AND THE
OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE MOTION OF
KMC TELECOM XI LLC FOR AN ORDER DETERMINING THAT
THE INFRASTRUCTURE INTERCONNECTION AGREEMENT BETWEEN
KMC AND ALLEGIANCE TELECOM COMPANY WORLDWIDE IS
INTEGRATED WITH THE PRIMARY RATE INTERFACE SERVICES
AGREEMENT AND WAS ASSUMED BY ORDER ENTERED APRIL 6, 2004**

KMC Telecom XI LLC (“KMC”), hereby replies to the Joint Objection (the
“Objection”) of the Debtors and the Official Committee of Unsecured Creditors (the
“Committee”) (collectively, the “Objectors”) to the Motion of KMC Telecom XI LLC for an
Order Determining that the Infrastructure Interconnection Agreement Between KMC and

Allegiance Telecom Company Worldwide is Integrated with the Primary Rate Interface Services Agreement and was Assumed by Order Entered April 6, 2004 (the “Motion”).¹

As this Court is aware, this Motion is the last chapter of the disposition by the Debtors of their managed modem business to Level 3, in exchange for \$52 million. As part of that transaction, the Debtors assigned the PRI Agreement (by which KMC supplied managed modem services) to Level 3. Initially, KMC objected on the ground that the PRI agreement could not be assumed and assigned unless the Collocation Agreement was assumed as well. KMC ultimately agreed to defer that issue, based on a provision in the April 6 Order (at 3, 6) that to the extent the two agreements should be treated as a single agreement under applicable law, the Debtors would be deemed to have assumed the Collocation Agreement as well. That is the issue presently before the Court.

The Objectors now assert that the PRI Agreement and Collocation Agreement are distinct agreements. As noted below, it simply boggles the mind that Allegiance would give KMC free collocation space were that truly a standalone agreement, and the Objectors have presented no evidence that KMC’s potential right to use the collocation space and equipment for third parties – for which it bargained as part of the overall economic arrangements whereby it acceded to the Debtors’ PRI pricing request – suddenly separates agreements which were negotiated and signed as part of a single package. Not only is the Objectors’ position refuted by the facts and the law set forth in the Motion and the arguments set forth below, but it is expressly contradicted by an internal May 2002 e-mail (Exhibit A hereto) by John Nishimoto, one of the Allegiance negotiators of the two agreements, which explicitly stated that the Collocation

¹ Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the Motion.

Agreement was “part of the overall network services contract.” For the reasons set forth herein, this Court should reach the same conclusion.

In response to the Objection, and in further support of its Motion, KMC respectfully represents as follows:

I. The Objection Ignores the Totality of the Facts and Circumstances of this Case

As this Court may have noted, the Motion and the Objection take a radically different view of the considerations that this Court should take into account when deciding whether the PRI Agreement and the Collocation Agreement were intended to comprise a single transaction or two separate contracts. KMC’s Motion addresses the totality of the circumstances of the two agreements; it seeks to tell the whole story of how the Collocation Agreement came to be – how it was meant to function in support of, and to facilitate the pricing under, the proposed PRI Agreement. This accords with the legal standard for such determinations. In re T&H Diner, Inc., 108 B.R. 448, 453-54 (D.N.J. 1989) (finding that the determination of whether a transaction constitutes one or several contracts is primarily based on the intentions of the parties which can “be gathered from all the circumstances surrounding the agreement and from the face of the contract, if [it is] in writing”). By contrast, the Objection eschews any review or analysis of the totality of the circumstances, but instead, in an exercise that smacks more of wordplay than the requisite focus on the parties’ intent and economic realities, adopts an isolated focus on a few of the many non-dispositive factors that courts have sometimes mentioned in discussing determining the integrated contract/severability issue.

The three principal factors which the Objectors cite are (a) the alleged absence of an “integration clause;” (b) the absence of cross-defaults; and (c) the possibility that the two agreements would terminate at different times – but their position is incorrect as both a factual and legal matter. Most important, not a single one of the cases they cite suggests that in the

absence of these factors, two agreements necessarily are to be regarded as separate. Rather, at most, some cases finding a single agreement cite these factors among others as supporting that conclusion – which hardly contradicts KMC’s view that none of these factors is a litmus test, but rather these factors, as well as others, are to be considered part of a totality of circumstances test.

For example, the Objectors discuss at length the alleged absence of an integration clause, which they interpret to mean a statement in each agreement that the provisions of one contract are incorporated wholesale into the other. Although, as Objectors note (see Objection, at ¶ 12), an explicit statement that “these two pieces of paper are really one contract” might be determinative of the issue, numerous cases find a single agreement to exist without reference to any such integration clause. See, e.g., Commander Oil Corp. v. Advance Food Serv. Equip., 991 F.2d 49, 52-53 (2d Cir. 1993); Pieco, Inc. v. Atlantic Computer Sys. (In re Atlantic Computer Sys., Inc.), 173 B.R. 844, 850-52 (S.D.N.Y. 1994); In re Karfakis, 162 B.R. 719, 725 (Bankr. E.D. Pa. 1993).² And in any event, to the extent this “integration clause” is intended as evidence that the two agreements are linked, there can hardly be clearer integration clauses than the statement contained in the Collocation Agreement preamble that its purpose was to enable KMC “to provide certain telecommunications service pursuant to the [PRI Agreement]” (Collocation

² The other cases cited by Objectors in ¶12 also do not support their conclusion. Pollock v. Moore (In re Pollock), 139 B.R. 938, 941-42 (B.A.P. 9th Cir. 1992) involved a determination that where a sublease was nonexecutory (because the separate sublease consideration had been fully paid) and was assigned as collateral, the purchase agreement and sublease would be treated as a promissory note secured by a deed of trust rather than a nonseverable contract. See also In re Plitt Amusement Co. of Washington, Inc., 233 B.R. 837, 839, 845 (Bankr. C.D. Cal. 1999) (finding that in a transaction involving a purchase agreement for the business of three theaters, a promissory note to pay the balance of the purchase price over ten years, a security agreement to secure the note by equipment in the theaters, and three theater leases with twenty-year terms, each of three leases was supported by its own consideration, and would continue to exist for decades after the completion of payment for the purchase; opining that the “purpose of an integration clause of this type is to prevent the introduction of parol evidence of other agreements not contained in a particular instrument ...[which is] a wholly separate issue from whether the various instruments constitute a single agreement for the purposes of assumption or rejection.”); Eisenmann Corp. v. General Motors Corp., C.A. No. 99C-07-260-WTQ, 2000 Del. Super. LEXIS 25, at *68 (Del. Super. Jan. 28, 2000) (opining that if the agreements in question had “contained a tightly-worded integration clause,” the result may have been different).

Agreement, at 1), or the provision of § 17 of the Collocation Agreement which refers to the PRI Agreement and provides that the latter controls in the event of any conflict.³

The cross-default point is equally irrelevant. Not only is the existence of a cross-default provision no assurance of a single contract, see In re Plitt Amusement Co. of Washington, Inc., 233 B.R. at 847 (holding that cross-default provisions must be disregarded in the bankruptcy law analysis of whether contracts are integrated or severable, because such provisions are impermissible restrictions on assumption and assignment), but in the context of these agreements, the cross-default provision would not have served any real purpose. For example, had Allegiance defaulted under the Collocation Agreement, KMC would have had both a damage claim and, based on the principle that a party cannot claim a breach caused by its own conduct, a complete defense if, in turn, it could not perform under the PRI Agreement. Similarly, if KMC had breached the PRI Agreement, Allegiance would have recovered its damages for that breach, and would neither have had or needed any additional claim on a Collocation Agreement for which it was providing services for free.

Finally, the Objectors' "time of termination" point has no merit either. Notably, the termination provisions of the two agreements – such as the filing of a voluntary or involuntary petition in bankruptcy, non-payment of undisputed amounts, insolvency and like provisions – are remarkably similar (compare PRI Agreement, § 14 with Collocation Agreement, § 5), so there was no reason to make termination of one agreement an event of termination for

³ There is also some fair amount of confusion in the Objectors' pleadings with respect to what is commonly considered an "integration clause," which is a provision that is typically interpreted to bar parol evidence where an agreement is otherwise clear. Here, the conventional integration clause of each agreement only restricts other agreements "with respect to the subject matter hereof," and there is no inconsistency between finding that each agreement has its own specific "subject matter" – services in one case, and collocation in the other – but that the two subject matters are part of a single contract. (Notably, too, the integration clause in the PRI Agreement, at § 21.2, only restricts reference to prior agreements, and not contemporaneous agreements like the Collocation Agreement).

the other.⁴ It is true that the Collocation Agreement could continue after the PRI Agreement ceased – but that was simply a consequence of the fact that KMC bargained for the right potentially to use its equipment for third party service, and it was simply untenable, as a commercial matter, for KMC to enter into commercial contracts with others unless it had the assurance that it could remain in the collocation space for some reasonable duration. See Collocation Agreement, at § 1(b) (term of the later of (i) five years after the Effective Date and (ii) the date of expiration or other termination of the PRI Agreement).

Thus, the contractual nits upon which Objectors rest their case are simply unavailing, either on their own merits or especially when considered in light of the real test for such issues, which requires examination of the contracts and surrounding circumstances as a whole.

This discussion, accordingly, brings us to one central and indisputable point. Try as they might, the Objectors simply cannot ignore the pink elephant in the middle of the room – the economics of the PRI Agreement and the Collocation Agreement. As discussed in the Motion, and as each and every KMC witness testified in their depositions, the pricing of the PRI Agreement was such that, without the accompanying Collocation Agreement, it would not have made any sense whatsoever for KMC to enter into the transaction on the terms to which they agreed. See, e.g., Young Tr. at 19:2 – 21:6;⁵ Bittner Tr. at 18:25 – 20:18. Nor would it have made any sense for Allegiance to have entered into the Collocation Agreement, with its free service, or highly discounted third party service, absent the PRI Agreement – and one of the

⁴ The Objectors have also suggested in depositions that the fact that the PRI, by its terms, might be assigned without assignment of the Collocation Agreement suggests that the agreements are separate. However, because the PRI Agreement could not be assigned without KMC's consent (see PRI Agreement, at § 21.7), there was no risk that KMC might be left high and dry as to collocation.

⁵ Transcripts of the depositions of Kevin Bittner, Anne Falvey, Constance Loosemore and Roscoe Young are attached to the Objection as Exhibits A through D, respectively, and will not be separately attached hereto.

principal Allegiance employees responsible for the KMC transaction, John Dumbleton,⁶ Senior Vice President for Wholesale Services so testified:

Q: Would you have approved the provision of collocation space at no cost to KMC if KMC had not executed the PRI Agreement with Allegiance?

A: I would not have.

Dumbleton Tr., at 30:20-23.

A: ...from my perspective if somebody came to me with a deal that was only collocation there was no other benefit there was no other business associated with that entity, someone came to me and said, I want two racks ... for free, the answer would be no. It should be no, and it certainly wouldn't be profitable.

Dumbleton Tr., at 31:16-23 (objections omitted). See also Exhibit E hereto (statement by Mr. Nishimoto of Allegiance forwarding non-standard form of draft collocation agreement as “in support of services we are (hopefully) buying from you”);

Given the free pricing under the Collocation Agreement, the fact that it was – as Mr. Nishimoto admitted (see Exhibit A hereto) – “part of the overall network services contract” should be obvious as a matter of common sense. It is also dispositive as a matter of law. See Pieco, Inc. v. Atlantic Computer Sys. (In re Atlantic Computer Sys.), 173 B.R. 844, 850, 855 (S.D.N.Y. 1994) (finding that the lack of economic sense in an agreement, if deemed to be standalone, is a basis for concluding that the agreements should be viewed as an integrated whole).

⁶ KMC took the depositions of three Allegiance employees: (i) Mark Tresnowski, General Counsel; (ii) John Dumbleton, Senior Vice President for Wholesale Services, and (iii) John Nishimoto, Senior Director for Wholesale Services. KMC attempted to secure the deposition of Karen O'Connor, Esq., outside counsel to Allegiance in the negotiations surrounding the PRI Agreement and the Collocation Agreement, but Ms. O'Connor refused to submit to deposition. For the Court's convenience, copies of the deposition transcripts have been filed contemporaneously with this Reply as Exhibits B, C and D, and are offered by KMC solely as to the party admissions contained therein, and will be referred to herein and cited as “[Surname of Deponent] Tr., at ____.”

Still, it is comforting to know that even the Objectors admit that KMC's undertakings under the PRI Agreement were the consideration for the Collocation Agreement:

Notwithstanding the fact that under certain conditions the collocation space is provided to KMC at no charge ... the Debtors, contrary to KMC's assertions in the Motion, did not enter into the Collocation Agreement out of any great sense of charity. Rather, in exchange for the collocation racks provided to KMC, the debtors received (i) services under the PRI Agreement, and (ii) the opportunity to generate revenue from KMC's provision of services to third party customers.

Objection, at ¶ 27 (emphasis supplied). Under these circumstances, there is no basis for treating the PRI Agreement and the Collocation Agreement as separate, because one was consideration for the other, and neither would have been done without the other. See also Exhibit F hereto (statement from KMC counsel Vitenson that form of Collocation Agreement was finalized and "ready for execution pending resolution of the PRI Services Agreement"). Stated differently, when Allegiance assumed the PRI Agreement, it obligated itself as a matter of executory contract law to give KMC the benefit of its bargain as to that PRI Agreement, and that included giving KMC all of the consideration which induced it to enter the PRI Agreement in the first place. The Collocation Agreement was a key part of the benefit of that bargain. Accordingly, the Collocation Agreement should be deemed to have been assumed both as a matter of fairness, as well as under the terms of the April 6 Order.

Although this conclusion should be inescapable, the Objectors seek to muddy the waters. For example, the Objectors intimate that the two agreements were not signed at the same time. See Objection, at ¶ 22. As examination of the times of the fax stamps on the signatures show (see Exhibits G, H and I hereto), this simply is not true. Apart from the time of signature, moreover, the parties were explicit that neither document would be deemed binding unless the other was in force. See Exhibit H hereto (February 11, 2002 e-mail from Allegiance counsel O'Connor referring to the required signature on both documents with signatures then to be

exchanged); Exhibit G hereto (statement by KMC counsel Vitenson together with signature pages that “The effectiveness of the attached signatures is contingent on our receipt of the corresponding counterparts from Allegiance”); Exhibit I hereto (transmittal of Allegiance signature pages by Ms. O’Connor stating that “The effectiveness of Allegiance’s signature on these agreements is contingent upon our receipt of the corresponding KMC signature pages.”). See also, Exhibit J hereto (reference to statement by KMC counsel to Ms. O’Connor, Allegiance’s counsel, that KMC would not sign the PRI Agreement until the Collocation Agreement was complete). Indeed, under the terms of the Collocation Agreement itself (at § 1), it was not effective unless the PRI Agreement came into effect. Thus, the fact that these two agreements were signed on the same day was not happenstance,⁷ but further indisputable evidence that they were a *quid pro quo* for one another, and therefore properly regarded as a single agreement.⁸

II. The Objectors’ Reliance on the Parol Evidence Rule Clearly is Misplaced

Given the overwhelming extrinsic evidence that the PRI and Collocation Agreement should be viewed as a single contract, it is not surprising that the Objectors seek to

⁷ The Objectors suggest (see Objection, at ¶ 15) that simultaneous execution of multiple contracts is not dispositive. Here, the execution was not only simultaneous, but consciously interdependent.

⁸ Because each case is controlled by its facts, there is little need to seek to distinguish the cases cited by the Objectors. (Notably, the Objectors did not feel the need to discuss, let alone explain away, the cases cited in the Motion.) However, a brief review of some of the Objectors’ cases, not otherwise discussed herein, is instructive. For example, In re Royster Co., 137 B.R. 530, 532 (Bankr. M.D. Fla. 1992) (see Objection, at ¶ 10), involved riders executed long subsequent to the subject car service contract, in some cases on the order of two and three years later, constituted separate and distinct contracts, and thus has nothing to do with these agreements, executed simultaneously. Similarly, In re Integrated Heath Servs., Inc., Case Nos. 00-389 (MFW) through 00-825 (MFW), 2000 Bankr. LEXIS 1310, at *10 (Bankr. D. Del. July 7, 2000) (see Objection, at ¶15) found leases separate from non-competition agreement because they were supported by separate consideration, covered different subject matter, involved different parties and, taken together, the object of the agreements was different, again factors not present here. Nor is In re Plitt Amusement Co. of Washington, Inc., 233 B.R. 837, 839, 845 (Bankr. C.D. Cal. 1999) on point, because (among other things) there, a trustee sought to reject a lease which was at market rates (see id. at 840), so that the lease properly could be deemed to stand on its own, while here, the Collocation Agreement is by definition well below market and therefore would not have been entered into absent the PRI Agreement of which it was a part. Finally, because the issue is severability, and not whether certain terms provisions are incorporated into an agreement, the “expressio unius” principle addressed in paragraph 11 of the Objection is irrelevant.

exclude that evidence and invite the Court to examine only the four corners of the documents themselves. See Objection, at ¶ 10. This approach is misplaced for two reasons. First, even if one limits evidence to the documents alone, their clear language demonstrate that the two agreements are indeed intertwined and should be regarded as one. At a minimum, however, a fair interpretation of the agreements, particularly under the law allowing “surrounding circumstances” to be taken into account, creates a more than ample predicate for considering extrinsic evidence to explain and give context to the contract provisions.

As KMC has stated in the Motion and as reiterated herein, KMC believes that even if the Court were to rule based solely on the words and economic terms contained in the PRI Agreement and the Collocation Agreement, it should find that the documents comprise a single, integrated transaction, mandating the conclusion that the Collocation Agreement was assumed by operation of the April 6 Order. Among other things:

- The preamble to the Collocation Agreement is explicit that it was entered into precisely to enable KMC to perform under the PRI Agreement;
- The Collocation Agreement expressly states (at § 17) that in the event of a conflict between it and the PRI Agreement, the PRI Agreement controls, demonstrating that the Collocation Agreement was intended to support, and flow with – rather than undermine – the PRI Agreement;
- The effective date of the Collocation Agreement is defined (at § 1) as the date on which the PRI Agreement becomes effective;
- Specific provisions of the PRI which are pertinent to the Collocation Agreement are incorporated by reference (at § 18);⁹ and
- Perhaps most important, Allegiance is offering the vast bulk of its collocation service for free, which makes absolutely no sense as part of a standalone, separate collocation agreement.

⁹ As discussed above, the Objectors’ “integration clause” argument makes the assumption that unless every single provision of another agreement is incorporated by reference, the two agreements must be deemed independent. Although one admires the Objectors’ effort to make a silk purse from a sow’s ear, there is no basis for such a conclusion.

To the extent that these provisions are not dispositive of the issue in KMC's favor, it is at a minimum true that the fact that the Objectors (albeit erroneously, in KMC's view) and KMC interpret the same two documents to lead to precisely the opposite conclusion illustrates the lack of clarity of the agreements, and provides the predicate for the Court to allow and consider evidence outside the four corners of the agreements.

The Objectors' own cited cases buttress this conclusion. Quoting True North Communications, Inc. v. Publicis S.A., 711 A.2d 34, 38 (Del. Ch. 1998), the Objectors assert that "[i]n interpreting contracts under Delaware law, a court must first determine whether the 'contractual language in question is ambiguous.'" Objection, at ¶ 10. However, the True North Court further opined that if "the contract language in question is reasonably subject to more than one interpretation, the Court will consider parol evidence in order to ascertain the parties' intentions." 711 A.2d at 39. Notably, despite finding "that the words in controversy cannot be read reasonably in the manner suggested" by one of the litigants, the True North Court nonetheless "admitted all of the extrinsic evidence offered by the parties in order to ascertain the parties' intentions" in recognition of the fact that the parties therein had "advanced completely inconsistent interpretations of the contract language in question." Id. (considering affidavits and documents regarding the negotiating history of the disputed language under a pooling agreement, as well as live testimony by witnesses directly involved in the contract negotiations).

In addition, determining whether two documents comprise a single agreement necessary contemplates introduction of evidence to create context and meaning as to the contractual provisions. This is again supported by cases upon which Objectors rely. For example, the Objection (at ¶ 10) quotes City Investing Company Liquidating Trust v. Continental Casualty Co., 64 A.2d 1191, 1198 (Del. 1993), as standing for the proposition that "[i]f a writing is plain and clear on its face, i.e., its language conveys an unmistakable meaning,

the writing itself is the sole source for gaining an understanding of the intent.” Although the Objectors quote the case accurately, they ignore the very next sentence penned by the Delaware Supreme Court: “[h]owever, if the words of the agreement can only be known through an appreciation of the context and circumstances in which they were used[,] a court is not free to disregard the extrinsic evidence of what the parties intended.” City Investing Co., 624 A.2d at 1198 (internal quotation omitted). That is exactly the point.

Finally, the Objectors (see Objection, at ¶10) cite Atlantic Mutual Ins. Co. v. Balfour MacLaine Int’l Ltd. (In re Balfour MacLaine Int’l Ltd.), 85 F.3d 68 (2d Cir. 1996) for the proposition that the intent of the parties is ascertained by reference to the text of the subject matter. However, the Balfour Court went on to say that “the severability of a contract is a question of intent to be determined from the language employed by the parties, viewed in light of the circumstances surrounding them at the time they contracted.” 85 F.3d at 81 (construing New York law). For all these reasons, Objectors’ reliance on the parol evidence rule as supporting a judgment in their favor is misplaced.¹⁰

III. The Third Party Red Herrings

Under the Collocation Agreement, KMC was enabled to render service to third parties by using the equipment which it was using for Allegiance, or other equipment that it would place in the collocation space. The Objectors argue (¶¶ 3, 31-32) that KMC’s ability to provide such service gave it advantages which preclude a finding that there is a single contract here, and further argue (¶¶ 6, 33-36) that KMC’s alleged failure to notify Allegiance of such

¹⁰ Interestingly, the Objection itself is rife with arguments based on extrinsic evidence, as well as citations to deposition testimony. See, e.g., Objection, at ¶¶ 31-32 (discussing settlement negotiations in respect of a potential buyout by Level 3 of the PRI Agreement); ¶¶ 6, 33-36 (discussing KMC’s arrangements subsequent to entry into the PRI Agreement and the Collocation Agreement to service third-party customers from Allegiance Space, as permitted under the Collocation Agreement). Although KMC believes that for reasons more fully discussed in Sections III and IV, infra, these arguments are unavailing and not relevant to the issue of the parties’ intent at the time of contract formation, the Objectors’ own use of extrinsic evidence it is at least probative of the fact that the Court

third party service or pay for it constitutes “unclean hands” which should cause KMC to be denied any relief. There is no factual or legal basis for either of these contentions.

First, the fact that KMC was able to use the collocation space for third parties was part and parcel of the consideration for the business arrangement which was reflected in the PRI/Collocation Agreement deal. KMC will show at trial that during the initial negotiations, it resisted locating its equipment in Allegiance’s collocation space, and preferred to lease its own collocation space and pass the costs to Allegiance as part of an overall PRI charge. Ultimately, KMC agreed to use Allegiance’s collocation space, and as negotiations continued, the pricing for that space was reduced to zero in order to induce KMC to agree to the PRI pricing which Allegiance had sought. But KMC would not agree to invest some \$15 million for equipment to service the Allegiance business unless it could also use that equipment to seek business from third party customers.¹¹ Thus, part and parcel of the consideration for the PRI Agreement was the right of KMC, under the terms of the Collocation Agreement, and at favorable prices, to service third parties from the collocation space under the terms set forth in the Collocation Agreement. None of this, therefore, is a basis for treating the two agreements as separate. To the contrary, it merely illustrates the intimate connection between the PRI Agreement and the Collocation Agreement that supports treating them as a single agreement.

The Objectors’ “unclean hands” point is even more baseless. Incredibly, Objectors state that “the Debtors have not received a single payment from KMC” and that “KMC never notified the Debtors that it was providing service to third parties from the collocation

(continued...)

cannot base a decision in Objectors’ favor solely on the four corners of the contract.

¹¹ The Objectors (see Objection, at ¶ 27) confusingly describe this as “access to Tier 1 markets.” In fact, although the collocation sites are physically located in some of the large cities which are known as “Tier 1 markets,” that fact alone does not enable KMC to serve Tier 1 markets. Even if it did, moreover, that was part of the parties’ overall bargain.

space.” (Objection, ¶ 34 & n. 10). To the extent that Objectors’ position had any credibility, it is shattered by the falsity of these statements. As a technical matter, as the Debtors well know, it was not possible for KMC to have connected third parties to its equipment unless that connection was performed by Allegiance. Attached hereto as Exhibit K are an illustrative example of a connection service order issued by KMC to Allegiance and a confirmatory e-mail from Allegiance acknowledging the order. The fact that it is an Allegiance technician who makes the physical connection to a third party was acknowledged by Allegiance’s Senior Vice President for Wholesale Services during his deposition:

Q: Physically, would something have to be done to the equipment to allow KMC to provide the service to a third party?

A: Two things would need to happen. The first thing is the equipment would need to be configured to offer, in this case, I believe it’s 2A (ph) PRI services. Second thing is the third party customer would need to somehow connect to that equipment, you know, logically through an IP connection that exists today or physically through a cross-connect.

...

Q: This cross connect, is that something that someone at the Allegiance switch site would physically have to do?

A: Yes, physical cross-connect it.

Q: Would that be done by someone at Allegiance?

A: That would be done by an Allegiance technician.

Q: And how would the technician know how to do that?

A: An order would be placed for a physical cross-connect. An order would be placed in the system.

Dumbleton Tr., at 33:14-25, 34:13-25. Apart from this theoretical knowledge, Mr. Dumbleton’s testimony further confirmed that he knew since at least as early as mid-to-late 2003 – shortly after KMC brought its first third-party customer on line – that KMC was providing service to third-party customers out of the collocation space:

Q Have you had any discussions with anyone with respect to whether or not KMC provides service to third parties from that collocation space?

A: I've asked that question of my people.

Q: And what was the substance of those conversations?

A: The substance of the conversation was that we believed they are.

Q: And when were those discussions?

A: Mid to late '03.

Dumbleton Tr., at 32:15-24.

Had Allegiance checked its records before making its severe allegations in court pleadings, it would have also learned that in fact, KMC paid all amounts which were billed by Allegiance for third party services. See Exhibit L hereto. Although the Debtors may dispute the interpretation advanced by KMC's witnesses as to what amounts are payable (see Objection, ¶ 34), it is noteworthy that the amounts billed by Allegiance under the Collocation Agreement – consisting only of connection charges and not monthly rentals – comports with KMC's interpretation. Thus, it is simply false that Allegiance would have the right to terminate the Collocation Agreement under Section 5(a)(i) because of a KMC payment breach, as Objectors allege (see Objection, at ¶ 35). Termination can occur only if after 30 days notice, KMC fails to pay “any undisputed amount owed to Allegiance as required by this Agreement,” which at a minimum requires (per the Collocation Agreement, at § 4) that Allegiance render a bill for the monthly rentals it appears to allege are due – which Allegiance has yet to do.

This Court need not now resolve how much, if anything, KMC may owe Allegiance under the Collocation Agreement. Once it is deemed that the Collocation Agreement has been assumed under the April 6 Order, the parties can resolve that issue using whatever forums (including, if appropriate, the bankruptcy court) and people necessary for resolving such

factual disputes, subject to the dispute resolution procedures set forth in § 22 of the PRI Agreement and incorporated into the Collocation Agreement at § 18. None of that, however, has anything to do with the issues now before the Court.¹²

IV. The December 2003 Settlement Negotiations

In apparent violation of Rule 408 of the Federal Rules of Evidence, the Objectors ask this Court to consider KMC's December 2003 settlement negotiations with Allegiance and Level 3 that involved the potential termination of the PRI Agreement. According to the Objectors, KMC wanted to assure that it could stay in the collocation space even if it was no longer providing service to Level 3.

So what?

As noted above, KMC's ability to use the equipment to serve third parties was an integral part of the deal by which it bought \$15 million of equipment and agreed to install it in Allegiance's collocation space. It was natural, accordingly, that KMC would seek to keep that collocation space (and indeed, even to extend the period of use) as part of overall settlement negotiations. Contrary to the Objectors' position (see Objection, at ¶ 32), the relevant issue is not whether KMC received benefits from the Collocation Agreement "other than pricing considerations regarding the PRI Agreement," but whether the two agreements were part of the same deal or separate deals. On that subject, KMC suggests that there can be only one conclusion – that the Collocation Agreement is "part of the overall network services contract." See Exhibit A.

¹² There is even an argument that Objectors' raising the issue at this time is itself a breach of the dispute resolution procedures – but again, this Court need not occupy itself with such matters now.

V. Conclusion

For the reasons set forth herein and in the Motion, and based on the evidence which KMC will introduce at trial, KMC urges that this Court overrule the Objection and determine, in accordance with the Level 3 Order, that the Collocation Agreement has been assumed by the Debtors.

Dated: New York, New York
May 19, 2004

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- and -

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Counsel to KMC Telecom XI LLC

EXHIBIT A

we used this as the basis of the collocation portion of the contract.

-----Original Message-----

From: Blusiewicz, Andrew
Sent: Wednesday, May 08, 2002 4:42 PM
To: Nishimoto, John; Swenson, Peter
Subject: RE: Blank Customer collocation form

It's not a show stopper for me, but I'm getting requests to have copies sent to the cities.

This is the form I was told is needed on site. Is this the same as what you are talking about?

< File: blank collo form_.doc >>

Thanks,
Andy Blusiewicz
Sr. Systems Engineer
Central Office Engineering
Allegiancetelecom
andrew.blusiewicz@algx.com <mailto:andrew.blusiewicz@algx.com>
(work) 469-259-2576
(cell) 469-259-9071

Nothing would ever be attempted,
all possible objections must first
be overcome."

-----Original Message-----

From: Nishimoto, John
Sent: Wednesday, May 08, 2002 16:29
To: Swenson, Peter; Blusiewicz, Andrew
Subject: RE: Blank Customer collocation form

As we have a collocation contract as part of the overall network services contract. This was based on the standard terms and conditions that Allegiance includes in all of its collocation contracts.

This is a contract and not necessarily a customer agreement form, so this must be treated as Confidential information. So I am very reluctant to send out a copy of the contract to the site, just so they can have it on file.

Is this really a show stopper?

-----Original Message-----

From: Swenson, Peter
Sent: Wednesday, May 08, 2002 4:15 PM
To: Blusiewicz, Andrew
Cc: Nishimoto, John

Exhibit B

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

ALLEGIANCE TELECOM, INC., et al.,

Debtors.

Chapter 11 Case No. 03-13057 (RDD)

Deposition of MARK TRESNOWSKI, ESQ. held
at the offices of Sidley Austin Brown & Wood
LLP, 787 Seventh Avenue, New York, New York,
on Tuesday, May 18, 2004, commencing at
9:13 a.m., before James W. Johnson, Registered
Professional Reporter and a Notary Public of
the State of New York.

1
2
3 APPEARANCES:

4
5 AKIN GUMP STRAUSS HAUER & FELD LLP
6 Attorneys for the Official Committee
7 of Unsecured Creditors

8 590 Madison Avenue
9 New York, New York 10022-2524

10 BY: COLIN M. ADAMS, ESQ.
11 BLOSSOM KAN, ESQ.

12
13 SIDLEY AUSTIN BROWN & WOOD LLP
14 Attorneys for KMC Telecom

15 787 Seventh Avenue
16 New York, New York 10019

17 BY: KIMBERLY A. JOHNS, ESQ.

18
19 TOGUT SEGAL & SEGAL LLP
20 Attorneys for the Debtor

21 One Penn Plaza
22 New York, New York 10119

23 BY: GERARD DI CONZA, ESQ.
24 JONATHAN HOOK, ESQ.
25

1
2
3 IT IS HEREBY STIPULATED AND AGREED by
4 and between the attorneys for the respective
5 parties herein, that the filing and sealing of
6 the within deposition be waived.

7 IT IS FURTHER STIPULATED AND AGREED that
8 all objections, except as to the form of the
9 question, shall be reserved to the time of the
10 trial.

11 IT IS FURTHER STIPULATED AND AGREED that
12 the within deposition may be sworn to and
13 signed before any officer authorized to
14 administer an oath with the same force and
15 effect as if signed and sworn to before the
16 Court.

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1 Tresnowski

2 MARK TRESNOWSKI, called as a
3 witness, having been first duly sworn by a
4 Notary Public, was examined and testified
5 under oath as follows:

6 EXAMINATION BY MS. JOHNS:

7 Q. Mr. Tresnowski, did you do anything to
8 prepare for today's deposition?

9 A. I reviewed some, but not all, of the
10 e-mails that were produced, and I've had several
11 conversations with my attorney, Mr. DiConza.

12 Q. The e-mails that you reviewed, were they
13 produced by Allegiance?

14 A. Yes.

15 Q. Did you review any documents produced by
16 the KMC estate?

17 A. I don't believe so.

18 Q. Did any of the e-mails you reviewed
19 refresh your memory?

20 A. Yes.

21 Q. Which ones?

22 A. The, there were several aspects of this
23 transaction that I was involved in, and I didn't,
24 reviewing the e-mails didn't, didn't recall the
25 details of those involvements, but after looking at

1 Tresnowski

2 the e-mails I was able to recall what my specific
3 role in the issues that I was focusing on was.

4 Q. What were those aspects?

5 A. One was, at the time we entered into a
6 transaction that their, KMC wanted to have us
7 contract with a company that they were just
8 forming.

9 I think it was a limited liability
10 company, and we had a lot of concerns about the
11 wherewithal of that company to perform and where it
12 fit into the KMC capital structure, and so that's
13 something I specifically got involved in and dealt
14 with.

15 Bill Stewart, who I believe was the
16 chief financial officer, and Roscoe Young and Ann
17 Falvey, who at the time was, I think she may have
18 been a college grad at that time, but I looked at
19 that issue. I reviewed their credit agreement to
20 determine whether there really was a necessity to
21 structure it that way.

22 So I was involved on that issue, and
23 then really the other, probably, primary
24 involvement I had in this arrangement was way after
25 the fact, when KMC was negotiating with Level 3 to

Page 6

1 Tresnowski

2 have Level 3 essentially buy out and terminate what

3 we called the PRI agreement.

4 And the entire KMC team asked me to look

5 at their term sheet, send me a copy of their term

6 sheet, and then there were subsequent e-mails and

7 discussions with Roscoe Young specifically about

8 their, their need to continue the collocation

9 agreement after the PRI agreement was terminated.

10 I talked to Roscoe about that several

11 times, and there were e-mails that I looked at that

12 refreshed my recollection of that series of

13 discussions.

14 **Q. You said you spoke to Mr. Young about**

15 **the need to continue the collocation.**

16 **When were those conversations?**

17 A. They were probably in the December

18 timeframe, to the best of my recollection.

19 **Q. Of what year?**

20 A. I'm sorry, December of 2003.

21 **Q. And what was the substance of those**

22 **conversations?**

23 A. Roscoe was very, very concerned about

24 the possibility that the collocation agreement

25 wouldn't continue after the PRI agreement was

Page 8

1 Tresnowski

2 then, to the best of my recollection, it kind of

3 died out.

4 My impression was that their discussions

5 with Level 3 about a buyout, just, they couldn't

6 close the gap on valuation, so I don't have

7 firsthand knowledge of that, but my impression is

8 that that avenue of solving their problem wasn't

9 going to work, so the discussion stopped.

10 **Q. Did you ever discuss with Mr. Young**

11 **whether or not the PRI agreement and collocation**

12 **agreement were integrated contracts?**

13 A. No.

14 **Q. Did you ever discuss that with anyone**

15 **else?**

16 MR. DI CONZA: I'm going to caution the

17 witness not to divulge discussions with other

18 employees at Allegiance if Mr. Tresnowski was

19 acting as general counsel.

20 A. Up until this became an issue, I don't

21 think we ever considered that there was any

22 possibility they were one contract.

23 **Q. Would you please describe for me your**

24 **education and subsequent training.**

25 A. I went to the University of Illinois in

Page 7

1 Tresnowski

2 terminated.

3 He -- I specifically recall, just

4 because it impressed me at the time that he was

5 willing to fly to Chicago just to meet with me on

6 that one topic, and I was impressed that the

7 president of the company was so concerned about it

8 that he'd want to make a special trip, and I told

9 him that that wasn't necessary.

10 He talked to our chairman, Royce

11 Holland, and that was basically it. I just knew

12 that, for whatever reason, the continuation of the

13 collocation agreement after the termination of the

14 PRI agreement was critically important to KMC.

15 **Q. What did you tell Mr. Young in these**

16 **conversations?**

17 A. You know, I don't have a specific

18 recollection. I know that my concern was that he

19 wanted to extend the term of the -- beyond its

20 current term, and he, you know, we talked about the

21 pricing of, what they would pay us for the

22 collocation space, and I don't think the

23 discussions went very far.

24 I mean, I, as I recall, he said we would

25 pay current market rate for, for that space, and

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1 Tresnowski

2 Champaign-Urbana, got a bachelor of arts in

3 psychology and also got a CPA at the same time, and

4 then went to the University of Virginia Law School

5 in Charlottesville, graduated law school in 1986,

6 and that was the end of my formal education.

7 **Q. And how were you employed subsequent to**

8 **graduating from law school?**

9 A. I went directly to Kirkland & Ellis in

10 Chicago in 1986, and became a partner there in

11 1992. I think I became a share partner in 1995,

12 which is a real partner, if they publicly say that,

13 but -- and in February of 1999 I left Kirkland and

14 joined Allegiance Telecom full-time as general

15 counsel.

16 **Q. While you were at Kirkland & Ellis what**

17 **was your area of practice?**

18 A. I would say it was corporate finance,

19 mergers and acquisitions, corporate governance and

20 private equity.

21 **Q. As general counsel of Allegiance what**

22 **were your responsibilities?**

23 MR. DI CONZA: And, again, I'm going to

24 caution the witness not to divulge any

25 attorney/client privileged communications.

Tresnowski

A. The, the, my role at Allegiance was to, on the management side, to manage the legal function, the regulatory function and the human resources function, and for a period of time I also managed the real estate function.

Q. What do you mean by "manage the legal function?"

A. Well, I was, I was in charge of the law department so we had, you know, at various times -- it started out, we always had myself and another lawyer who was nonregulatory.

There were also regulatory lawyers, and then over time we added, I think, up to three more lawyers, up to four lawyers, a couple of legal assistants, and I tended to focus primarily on the areas of expertise, when it came to legal issues, that I had developed at Kirkland, so the corporate governance issues, did all the acquisition work, all the financing work.

I was less involved in the commercial, what I would call commercial transactions then, unless for some reason they were critical to the company.

Q. In the period of 2001 to 2002 who at

Tresnowski

Allegiance was involved in the commercial transaction aspect of the legal department?

A. The -- what we would typically do, if it was a complex commercial arrangement I'd actually use outside counsel.

There was a group that Brown and Rudnick -- I'm sorry, Piper Rudnick, different law firm, Piper Rudnick Chicago, that had developed, really, a kind of a unique expertise in telecommunications commercial transactions.

Karen O'Connor was the partner that I worked with, so I would bring Karen in on complex commercial arrangements that were, you know, particularly important to the company, and then if I had a routine-type commercial arrangement I'd generally have one of the attorneys in Dallas, like Randall Hand.

Randall's a, kind of a general commercial lawyer who's done a lot of, you know, off-the-shelf type things, and my recollection of this particular case is what I did was Karen handled the PRI agreement and Randall had separately handled the collocation agreement, because that was more of a, first of all, it was a

Tresnowski

different project.

I considered it a different project and considered it to be a routine kind of, you know, collocation is just stuff we sell. It's just kind of commodity, and Randall may have been involved in some aspects of the PRI agreement. I don't, I don't know, but I know Karen was going to run that project.

Q. So you're typically not involved in collocation agreements?

A. No. Not at this stage of the company. When I started I was involved in everything.

Q. Who did you report to at Allegiance?

A. Royce Holland, the chairman and chief executive officer.

Q. Did you report to anyone else?

A. No.

Q. In 2001/2002 what was the business of Allegiance?

A. The business was, I suppose it was probably best divided into three kind of components. One, the largest components, was providing a full suite of communication services. By that I mean local, long distance, Internet

Tresnowski

access, web hosting to small and medium enterprises, just to businesses not to residences, and not to really large corporations, generally. That was the one of the core focuses.

One of the others was what we call the wholesale business, and it really was founded on the core business.

Once you build a network throughout the major cities of America, you know, one of the things you want to do is use it as much as you can, because you've invested that capital, and so we looked for opportunities to use that network, and at the time Genuity, which was a major provider for America On Line, what Genuity did was -- American On Line doesn't own their own networks.

At least I don't think they do, so what they do is they contract out with companies so that when you dial up on AOL, you know, there's a whole system of networks that are involved in that.

Genuity handled both what we call the long-haul piece of that, but Genuity didn't have any local network, so they had to go out to people like Allegiance, companies that operated local networks, and we provided, actually, the banks of

Tresnowski

modems so that, for example, in -- I think this is a fairly accurate statistic at the time -- if you were in New York City or Chicago and you dialed an AOL number, there's a one in four chance you would dial into an Allegiance switch and an Allegiance modem and then it would hand it off to Genuity.

So that became a relatively significant part of our business. We had other wholesale customers, much smaller ones than that, where we provided services to, basically, other carriers who had a different focus in the marketplace.

And then our third business was web hosting, where we, it, essentially there's three ways to provide those type of services. One is, you have what's called a shared hosting, where several customers will share a server that's in our facilities.

The other service -- and these kind of go, you know, in order of more involvement, more expensive. The other would be dedicated hosting, where the customer would have their own server, and then finally we had what we called collocation, which is really dedicated hosting, where the customer had access and the customer would, would

Tresnowski

kind of manage the equipment on our premises, or we might manage some of the forum, but it was much more of an ownership-type arrangement.

And that -- I want to distinguish -- that's not necessarily the same collocation we're talking about with KMC. That's a word that's used a lot in the industry and can mean just, you know, people have equipment on your premises, they'll call it collocation.

When I'm using it there, I'm specifically talking about web hosting, where you're hosting a web site, so those were, those were our key businesses at that, at that time.

Q. Are you familiar with KMC?

A. Yes.

Q. When did you first become familiar with KMC?

A. I had a general notion that they were another CLIC out there in the market, and my first real involvement with them was this transaction.

Q. When did you first become involved in the transaction?

A. I don't recall the specific date, but I do recall there was a meeting in Dallas with

Tresnowski

Roscoe, and I recall it was the first time I'd met Roscoe and Kevin Bittner. I believe Royce was, he may have been there for part of the meeting. I'm not sure, and, to be honest with you, I don't, I don't recall who else was in the meeting from Allegiance.

Q. Do you remember approximately when this meeting occurred?

A. Yeah, I'm sorry, I just, I don't. It was at the beginning of the process. It was -- the -- the rough agenda of the meeting was, you know, we had, we were entering into an amended agreement Level 3 that I was very involved in and that was going to significantly expand the number of markets and the extent in the markets that we provided service to Genuity.

I said Level 3; I meant Genuity, that We were going to expand the Genuity contract, and part of the expanse was to go into, have service in some of the markets where we didn't have a network, so we, we had a need for either getting a subcontractor or building a network in those markets.

And we were, we had, someone approached

Tresnowski

KMC. I'm not sure if they approached us or we approached them, but we were talking to them about whether there was a mutually beneficial way in which they could provide that service, so it was one of those kind of high-level, you know, "does this make sense" type meetings.

Q. What was the result of this meeting?

A. I think there was, I think there was no conclusion. I think it was, my recollection is that there was, there was --

MR. DI CONZA: I don't want the witness to speculate here. Only if you know.

A. I know, I mean, I know the focus of the meeting was on the economics of the transaction, and by that I mean the pricing of the PRI services and whether, you know, whether we could make money and they could make money and whether those numbers were the same, and I don't think there was a conclusion at that meeting.

Q. What were the pricing, what pricing was discussed?

A. The -- I recall that the pricing discussions were really focused on, on one, one thing, because it's a very, it's a very simple

1 Tresnowski
2 business arrangement.
3 We get paid a certain amount per modem
4 by Genuity, and then, you know, KMC would charge us
5 a certain amount, so you had to have a sufficient
6 margin in there to make it worth your while, and
7 KMC had to have a sufficient margin in there to
8 make it worth their while.
9 And I think that was, I specifically
10 recall the time is, depending on where that number
11 came out, we said maybe we should build our own
12 networks or maybe we should have these guys do it,
13 so it was all focused on the modem pricing. That's
14 my recollection.
15 I mean, I, I'm not a technology expert,
16 so I may, I may have misunderstood what they were
17 talking about, but that's my recollection.
18 **Q. Do you recall what the specific prices**
19 **that were discussed were?**
20 A. No.
21 **Q. What was the sufficient margins that**
22 **Allegiance needed to make it worthwhile?**
23 A. Yeah, I don't know exactly what it was,
24 but I do know that that was the issue, because,
25 again, I specifically remember talking -- this was

1 Tresnowski
2 I know Karen O'Connor was involved,
3 because I would -- at that point I really kind of
4 just focused on other things and got reinvolved
5 when this issue came up about, you know, the
6 special entity they were setting up, but really
7 relied on Karen to manage the legal aspects of the
8 deal.
9 **Q. Any particular reason why you became**
10 **less involved?**
11 A. I'd have to see what's was going on, but
12 it's, it was, it was probably just a time
13 management issue.
14 In other words, the, the things I tended
15 to not delegate at all were issues like
16 acquisitions, and we did a lot of acquisitions. We
17 did, I think, 13 of them, and so I was very focused
18 on that, very focused on all the SEC obligations
19 and filings, financings, and so I don't recall
20 there being any reason, other than just it was in
21 good hands.
22 I was going to focus on some other
23 things. Karen is a lawyer I think very highly of,
24 so I tended to, if I was going to -- I don't want
25 to offend any of my colleagues in private practice,

1 Tresnowski
2 not a legal issue -- just talking about at what
3 point are you not making enough money so that it
4 would actually make sense to raise the capital and
5 actually build those networks yourself.
6 **Q. And you said that there were discussions**
7 **that KMC needed to make a sufficient margin on the**
8 **transaction as well?**
9 A. I don't know if there were specific
10 discussions on that. I mean, I think that was just
11 my recollection of, the nature of the meeting was
12 basically one of those meetings where Roscoe, I
13 think, you know, was kind of, the message was, hey,
14 if this makes sense, if we can both make money,
15 we'll do a deal; if we can't, we won't do a deal.
16 **Q. Did KMC and Allegiance continue to**
17 **discuss a possible business relationship after this**
18 **meeting?**
19 A. Yes, they did.
20 **Q. Who was involved in those discussions?**
21 A. I'll answer in the negative. I became
22 less involved, and I don't have a real clear
23 recollection, other than reading the e-mails that
24 indicate that John Nishimoto was involved. Jeff
25 Feinberg was involved.

1 Tresnowski
2 but if I was going to spend the money I was going
3 to just rely on her, and it didn't make any sense
4 for me to spend my time when I had to hire someone
5 from the outside come in and take over.
6 **Q. At this meeting in Dallas that you**
7 **mentioned, did the topic of co-location space come**
8 **up?**
9 A. I don't recall that it came up. And let
10 me be specific about that. I recall the meeting,
11 and I don't recall that being discussed. It's not
12 that I don't recall what was discussed, but, to my
13 knowledge, that never was discussed.
14 **Q. When was the subject of collocation**
15 **space provided by Allegiance first discussed**
16 **between the parties?**
17 A. I don't know.
18 **Q. Were you involved in any discussions**
19 **regarding co-location?**
20 A. I don't recall any. Not during the
21 documentation of the transactions; just subsequent
22 to them, as I said, like December of 2003.
23 **Q. Were you involved in any discussions**
24 **regarding the pricing of collocation space?**
25 A. Not to my recollection.

Page 22

1 Tresnowski

2 **Q. Who is Peter Swenson?**

3 A. I don't know.

4 **Q. Prior to the execution of the**

5 **collocation agreement did you review that**

6 **agreement?**

7 A. I don't recall reviewing it, and it

8 would have been unusual for me to review an

9 agreement like that, I think, just because it was a

10 routine agreement.

11 **Q. Did you have any discussions regarding**

12 **Allegiance's provision of collocation space to KMC**

13 **at no cost?**

14 MR. DI CONZA: I'm going to just caution

15 the witness not to divulge any attorney/

16 client communications.

17 A. Again, I -- the, at the -- if we could

18 bifurcate time into after this dispute arose and

19 before this dispute arose, before this dispute

20 arose I don't recall having any discussion with

21 them. After that I did, but I think those are

22 probably all privileged.

23 **Q. Whose responsibility is it to set**

24 **collocation prices?**

25 A. The -- a lot of people actually are

Page 24

1 Tresnowski

2 MR. DI CONZA: I don't want the witness

3 to speculate here.

4 A. I don't know. I don't know.

5 **Q. Other than KMC, has Allegiance ever**

6 **entered into a collocation agreement where it**

7 **agreed to provide collocation space for free?**

8 MR. DI CONZA: Objection to form.

9 A. I, I don't know.

10 (KMC Exhibit 1, Primary Rate Interface

11 Services Agreement between Allegiance Telecom

12 Company Worldwide and KMC Telecom XI, LLC,

13 marked for identification.)

14 **Q. The court reporter has handed you what's**

15 **been marked as KMC Exhibit 1. Could you take a**

16 **moment --**

17 A. Sure.

18 **Q. -- and look at it, and tell me if you're**

19 **familiar with this document.**

20 A. Yes, I'm familiar with this document.

21 **Q. And what is this document?**

22 A. This is what we refer to as the PRI

23 agreement with KMC Telecom.

24 **Q. Are you familiar with the terms of this**

25 **agreement?**

Page 23

1 Tresnowski

2 involved in pricing decisions at the company, at

3 the -- but it's a very informal process as well, so

4 the people working on the transaction, like a Jeff

5 Feinberg or John Dumbleton or John Nishimoto would

6 have some degree of authority to set a price like

7 that.

8 I think that, you know, there are

9 general, general notions about what were the right

10 levels at which to sell, you know, again,

11 commodity-type services. You know, we're going to

12 sell long distance service.

13 Here's what we charge if someone wants

14 to collocate some equipment, and so we charge this

15 much for power and that much for the space and this

16 much for various services we can provide them, and

17 those are those were kind of my impression,

18 although I don't get, really, direct involvement.

19 My impression is that those are kind of,

20 you know, like you've got your list of rates that

21 you charge, but there's some discretion that the

22 salespeople can use.

23 **Q. Would Mr. Feinberg, Mr. Dumbleton and**

24 **Mr. Nishimoto have to seek approval from anyone for**

25 **prices they would set?**

Page 25

1 Tresnowski

2 A. I would, I would say at a fairly high

3 level, yes.

4 **Q. Have you ever read this agreement**

5 **before?**

6 A. I, I am -- I'll tell you what I recall

7 specifically and what I don't recall.

8 I know I was given every single draft of

9 this agreement, because that's the way Karen and I

10 worked together, but I -- and, and I would review

11 them, you know, when I thought that, you know, that

12 this was close to final or final. I don't know

13 whether I read the entire document before it got

14 signed.

15 **Q. Were you involved in the negotiation of**

16 **any of the terms of this agreement?**

17 A. I don't, I don't believe so.

18 **Q. Were you involved in the revision of any**

19 **of the terms of this agreement?**

20 A. I don't believe so.

21 **Q. Who executed this document on behalf of**

22 **Allegiance?**

23 A. Jeff Feinberg.

24 **Q. And what was his position as of**

25 **February 11, 2002?**

Page 26

1 **Tresnowski**
2 A. I don't recall his specific title. I
3 think he was vice president, but Jeff was, Jeff was
4 the lead negotiator for Genuity, before we hired
5 him, for all of their outsourcing of network
6 contracts, and he was a very competent, very
7 impressive, and capable negotiator and someone that
8 really understood this part of the business, and we
9 had an opportunity to hire him and bring him over.
10 I don't recall exactly when, but, but
11 he, he negotiated, he was among the people who
12 negotiated this.
13 **Q. Did he have authority to the execute**
14 **this agreement on behalf of Allegiance?**
15 A. Yeah, I believe so.
16 **Q. Who drafted this agreement?**
17 A. I don't, I don't really know.
18 **Q. I, my, the --**
19 MR. DI CONZA: To the extent you don't
20 know, you don't have to answer.
21 A. Yeah, the -- okay, yeah, I just don't
22 recall.
23 (KMC Exhibit 2, E-Mail dated
24 November 28, 2001 from Mikhael Vitenson to
25 Randall Hand and Anne Falvey, with

Page 28

1 **Tresnowski**
2 was doing the drafting, but they -- other than to
3 say that I know that there was there were a lot of
4 drafts kind of going back and forth, so --
5 **Q. What was the purpose of the PRI**
6 **agreement?**
7 A. The -- my, my general understanding is
8 that we had to provide service to these markets,
9 these smaller markets that KMC operated in which we
10 didn't operate in, under the overall Genuity
11 contract.
12 And, again, I'm not a technology expert,
13 but my understanding is that they would essentially
14 deliver traffic from those markets back to an
15 Allegiance market through the PRIs, which are just
16 basically broadband connections where you could
17 send a lot of traffic.
18 So my, my understanding is that you had
19 KMC routing all this traffic to and from its
20 markets to our markets via these PRI connections,
21 but I'm sure there's a lot more involved in it than
22 that.
23 (KMC Exhibit 3, Infrastructure
24 Interconnection Agreement, marked for
25 identification.)

Page 27

1 **Tresnowski**
2 Attachments, Bates Stamped KMC 000519-580,
3 marked for identification.)
4 **Q. The court reporter has handed you what's**
5 **been marked as KMC Exhibit 2.**
6 **Have you seen this e-mail before?**
7 A. I believe so.
8 **Q. And the second e-mail address in the**
9 **"to" line, is that your e-mail address?**
10 A. No, if it was sent that way it wouldn't
11 have gotten to me, because you have to have a dot
12 between the "K" and the "T."
13 **Q. Would you just take a moment to read the**
14 **text of the e-mail.**
15 A. Sure. Okay.
16 **Q. Mr. Vitenson wrote, "Please find a**
17 **markup of the KMC/Allegiance agreement that was**
18 **originally forwarded to KMC by Allegiance."**
19 **Does this refresh your recollection that**
20 **Allegiance drafted the PRI agreement?**
21 MR. DI CONZA: Objection to form.
22 A. It -- you know, I don't have a
23 recollection of who was drafting. What I mean, I
24 know what the words mean here, but -- and what they
25 imply, but I just don't have a recollection of who

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1 **Tresnowski**
2 **Q. The court reporter has handed you KMC**
3 **Exhibit 3. If you can, take a moment and look at**
4 **it and tell me what that document is.**
5 A. This document is the, what we've been
6 referring to as the collocation agreement.
7 **Q. Are you familiar with the terms of this**
8 **agreement?**
9 A. Yes, I am.
10 **Q. What was the purpose of the collocation**
11 **agreement?**
12 A. Let me just say, I have no recollection
13 of this agreement until the dispute arose, so I
14 don't, I don't recall this agreement the way I
15 recall getting drafts of the PRI agreement. I may
16 have, but I have no recollection of that, so I have
17 reviewed this in the context of this dispute.
18 **Q. And when you say, "until the dispute**
19 **arose," when are you referring to?**
20 A. I'm specifically referring to
21 preparation for the hearing of the assignment of
22 the PRI agreement, the Level 3, when KMC said, made
23 the claim that this agreement was actually part of
24 the PRI agreement.
25 **Q. And you don't recall reviewing this**

1 **Tresnowski**
2 **agreement prior to that time?**
3 A. I don't recall it, no.
4 **Q. I take it, then, you were not involved**
5 **in the negotiation --**
6 A. No.
7 **Q. -- of this document?**
8 A. Not to my knowledge.
9 **Q. And you were not involved in the**
10 **revision of this document?**
11 MR. DI CONZA: Objection to form.
12 A. Not to my knowledge.
13 **Q. Who executed the collocation agreement**
14 **on behalf of Allegiance?**
15 A. Jeff Feinberg.
16 **Q. Did he have authority to execute the**
17 **collocation agreement on behalf of Allegiance?**
18 A. Yes, I believe he did.
19 **Q. Who drafted the collocation agreement?**
20 A. Again, I don't have a specific
21 recollection.
22 **Q. Do you have a general recollection?**
23 MR. DI CONZA: Objection. I don't want
24 the witness to speculate here.
25 A. I have a general recollection only,

1 **Tresnowski**
2 based on looking at e-mails in preparation for the
3 deposition, but even that's fairly general. I
4 mean, it seems like there were comments and drafts
5 going back and forth.
6 **Q. Did those e-mails refresh your**
7 **recollection as to who drafted the collocation**
8 **agreement?**
9 A. No, not really.
10 **Q. Does Allegiance have standard**
11 **collocation agreements?**
12 A. We have -- yes, we have, we have
13 standard collocation agreements.
14 **Q. Did those standard agreements differ,**
15 **based on who the counterparty is?**
16 A. They're generally negotiated, yes.
17 **Q. Is KMC Exhibit 3 based on a standard**
18 **Allegiance collocation agreement?**
19 A. I don't know.
20 **Q. Does Allegiance have standard**
21 **collocation agreements for counterparties who are**
22 **vendors to Allegiance?**
23 A. I don't, I don't know if we have
24 different standards for vendors versus others.
25 **Q. What was the purpose of the collocation**

1 **Tresnowski**
2 **agreement?**
3 A. It appears to be to provide space for
4 KMC to collocate equipment from which it can
5 provide services.
6 **Q. And what were those services?**
7 A. It can provide services to Allegiance,
8 and, and it can provide services to other parties,
9 but I don't know the specific nature of the
10 services.
11 **Q. Were you aware that KMC would not**
12 **execute the PRI agreement without execution of the**
13 **co-lo agreement?**
14 A. I have no knowledge of that.
15 **Q. Did KMC ever tell you that it would only**
16 **execute both documents at the same time?**
17 A. The only thing KMC ever told me was that
18 they needed a co-location agreement to survive the
19 termination of the PRI agreement.
20 **Q. Who told you that?**
21 A. Roscoe did.
22 **Q. Did he tell you why?**
23 A. He didn't.
24 **Q. When did he tell you this?**
25 A. Well, he, he, we had conversation again

1 **Tresnowski**
2 in the December 2003 timeframe, and, and, actually,
3 it was more than just Roscoe, because I got this
4 term sheet that explicitly said, you know, we're
5 going to, our proposal for Level 3 is we'll
6 terminate the PRI agreement, you'll pay us the
7 money and Allegiance will continue to honor the
8 collocation agreement and actually expand the term
9 of it.
10 And so there was, it was in there, and
11 then there were subsequent conversations where
12 Roscoe said that that was really important that
13 they would be able to do that.
14 **Q. When were the PRI and collocation**
15 **agreements signed?**
16 A. I, I don't know.
17 **Q. Did you receive the PRI agreement and**
18 **the collocation agreement after they were executed?**
19 A. I recall receiving the PRI agreement. I
20 don't, I don't have a recollection of the
21 collocation agreement.
22 **Q. Did you receive signature pages for the**
23 **PRI agreement and collocation agreement?**
24 A. I, I don't have a recollection.
25 (KMC Exhibit 4, E-Mail dated

1 Tresnowski
 2 February 11, 2002 from Karen J. O'Connor to
 3 Anne Falvey and Mikhael Vitenson, Bates
 4 Stamped KMC 000010-14, marked for
 5 identification.)
 6 **Q. If you can, take a look at KMC Exhibit 4**
 7 **and tell me if you recognize that document.**
 8 A. I don't recognize it from any prior -- I
 9 recognize what it is, but I don't have any prior
 10 recollection of it.
 11 **Q. And is that your e-mail address in the**
 12 **"cc" line?**
 13 A. Yes, that is my correct e-mail address.
 14 **Q. And the date of this e-mail?**
 15 A. February 11th, 2002.
 16 **Q. And what are the attachments to this**
 17 **e-mail?**
 18 A. I believe it is a personal note. My
 19 guess is that it's probably Jeff Feinberg's
 20 writing, thanking Karen, and then it looks like
 21 there are two signature pages to two separate
 22 agreements.
 23 **Q. Are those the signature pages to the PRI**
 24 **and collocation agreements?**
 25 A. I would expect they are, but I'd have to

1 Tresnowski
 2 to third parties we get paid for that, and if
 3 you're providing service to us we may not get paid
 4 for it, but we'd get some benefit, because we're
 5 the ones who are getting service.
 6 So yeah, I mean, I think it would be, it
 7 could be profitable, and, again, I, the other way
 8 that it could be profitable is that it's my
 9 understanding that it's not unusual to have
 10 collocation sold at, if you will, very deep
 11 discounts, because, again, it's just, getting a
 12 customer in your services can lead to a lot of
 13 other profitable business.
 14 **Q. Was KMC required to use the Allegiance**
 15 **collocation space to service those parties?**
 16 A. No, they're not required to.
 17 **Q. At the time the document was signed, did**
 18 **KMC have any third parties that it intended to**
 19 **service as third-party agents for collocation**
 20 **space?**
 21 A. I have no knowledge of that.
 22 **Q. If KMC had no third parties, would the**
 23 **collocation agreement without the PRI agreement**
 24 **have been profitable for Allegiance?**
 25 MR. DI CONZA: Objection, calls for

1 Tresnowski
 2 look at the documents to know.
 3 **Q. Would Allegiance have entered into the**
 4 **collocation agreement with KMC without the PRI**
 5 **agreement?**
 6 A. I suppose it's conceivable.
 7 **Q. Under what circumstances would you**
 8 **conceive of that?**
 9 A. Well, we sell, we sell collocation
 10 services, so, you know, it's a generally, my
 11 understanding is it's a, it's a good service,
 12 because it tends to lead to other services.
 13 You know, when someone collocated in
 14 your facility they tend to need connectivity to the
 15 Internet and maintenance and lots of other things,
 16 so it is a, my general impression is it's a good
 17 product to sell.
 18 **Q. Would the collocation agreement without**
 19 **the PRI agreement have been profitable for**
 20 **Allegiance?**
 21 A. Could have been.
 22 **Q. How could it have been profitable for**
 23 **Allegiance?**
 24 A. Well, what the agreement pretty clearly,
 25 what it require is that if you're providing service

1 Tresnowski
 2 speculation.
 3 A. I, I don't, I don't know. Again, I, my
 4 understanding is that, that if it leads to enough
 5 other services, depending on what those are priced
 6 at, it can make sense, but that's just not my area
 7 of expertise.
 8 **Q. Can you turn to Exhibit C to KMC**
 9 **Exhibit 3. Are you familiar with Exhibit C?**
 10 A. Generally, yes.
 11 **Q. What is Exhibit C?**
 12 A. It sets forth the pricing for the
 13 collocation and related services.
 14 **Q. How were the prices on Exhibit C**
 15 **determined?**
 16 A. I don't know.
 17 **Q. How do the prices in the chart under**
 18 **paragraph two compare to Allegiance's standard**
 19 **rates?**
 20 A. I don't, I don't know that you could say
 21 we have standards rates, because if someone had one
 22 collocation they would get a rate; if someone had
 23 like, I guess we're going to be at 14 sites or
 24 something, you'd get a different rate, so I think
 25 these rates are highly negotiated.

Tresnowski

Q. Has Allegiance ever sent its invoice to KMC under the collocation agreement with respect to third parties?

A. I don't know if we have. I know that my understanding is that we have no way of knowing if they're using it for third parties, so I don't know how we could send an invoice. My understanding is that KMC is obligated to pay us and notify us that they're using it for third parties.

Q. What is your understanding as to where the obligation to notify Allegiance comes from?

A. Well, when we got into this and KMC, my understanding, KMC told XO that they were using it for third parties, and my understanding is that was news to us, because they had never paid us for that.

So I, I actually, I was on the road somewhere, went back to Chicago, where I worked, and I went down to our switch site and talked to the manager of their Chicago switch, and I said, can you show me the KMC collocation boxes.

So he walked me back there and showed me them, so I said something to the effect of, is there any way to tell how KMC is using those, in

Tresnowski

terms of whether they're servicing us or third parties.

And he said no, there's no way you'd be able to tell, and then, you know, it seems pretty clear to me that it is not permissible under the agreement to provide service to third parties where only you would know whether you were doing it or not, and just not pay for it, when the agreement explicitly says you can't do that.

Q. Going back to the obligation to notify, where do you have --

A. There's an obligation.

Q. -- that obligation?

MR. DI CONZA: I think that's been asked and answered.

A. Yeah, there's an obligation that's crystal clear in the agreement to not use it for third parties unless you're paying, so forget about notifying. That's the obligation. If you use it for third parties you're in breach. That's very clear.

Q. What was the name of the, I think you said, manager at the switch site in Chicago?

A. I believe his name is Jennings,

Tresnowski

something like that, and I don't know if, as I think about it, he may have, he may have referred me, he let me into the switch site. He may have given me someone who had more specific knowledge about the collocation box.

As a matter of fact, now I recall it, that there was a, a guy whose job it was to kind of monitor things like that, so I think he's the gentleman. I don't know his name, who showed me the facilities.

Q. How --

A. Jensen (ph), I'm sorry, Jensen is his name, the manager of the switch site.

Q. How would KMC use equipment in Allegiance's collocation space to provide services to their third parties?

A. I don't know. I mean, that was, that was, in, to a great extent, that was my question. I mean, I was curious, and that's why I wanted to actually physically see the box and see, hook up a different pipe, see, you know, does a different light go off when a third party uses it, because I just didn't know, flat out.

The answer is, according to this

Tresnowski

gentleman, we wouldn't know.

Q. But you don't know his name?

A. I don't know. I'm sure I could find out.

Q. Do you know what his position was?

A. I don't know.

Q. Did you ask anyone else whether or not Allegiance had been notified about KMC's use of equipment for third party services?

A. I think I had asked, I know I asked John Nishimoto and John Dumbleton.

Q. When did you ask them?

A. I believe it was just in the context of, of -- when this dispute arose, when we were talking to, I was talking to Anne Falvey and I was talking to the people at XO, trying to find some way to get XO to come in and provide collocation services, it just came up in that context, so I asked John and John separately whether they knew if KMC was servicing third parties.

Q. And what did they tell you?

A. My recollection is that they both said that they didn't --

MR. DI CONZA: To the extent that this

1 Tresnowski
2 is not privileged --
3 THE WITNESS: Yes.
4 A. My recollection is that both said they
5 didn't know, I mean, that, I think it was that KMC
6 could very well be doing that, but they didn't
7 know.
8 **Q. Are you familiar with KMC's motion for**
9 **an order to determine the infrastructure**
10 **interconnection agreement is integrated with the**
11 **primary rate interface services agreement?**
12 A. Yes, I am.
13 **Q. Have you read that motion?**
14 A. I believe so.
15 **Q. Have you read Constance Loosemore's**
16 **affidavit submitted in connection with that motion?**
17 A. No. I mean, I was sent her affidavit.
18 I'm sorry, I thought you meant deposition. Yes, I
19 read her affidavit.
20 **Q. And you've read the objection of**
21 **Allegiance and the creditors' committee in response**
22 **to that motion?**
23 A. Yes, I have.
24 **Q. You mentioned deposition transcripts.**
25 **Have you reviewed any deposition**

1 Tresnowski
2 **transcripts?**
3 A. Yes, I just -- that's what I thought you
4 had referred to. I, I received the transcripts. I
5 didn't really, I think I glanced at them, but I
6 didn't really, didn't really read them.
7 **Q. Was there anything in Ms. Loosemore's**
8 **affidavit that you disagreed with?**
9 A. There was. And, you know, I, I have one
10 specific recollection.
11 I'm sure if I read it I'd have more, but
12 there was a, there was an argument, I believe, that
13 the, that the PRI pricing, I know the PRI price --
14 the pricing on the PRI agreement was somehow
15 influenced by the pricing of the collocation
16 agreement, the fact that there was no charge for
17 collocation services and somehow that affected the
18 PRI pricing, I just don't believe that to be true.
19 **Q. Why don't you believe that to be true?**
20 A. Again, I think that the, the -- my
21 impression -- and, again, I'm not an expert here,
22 but my impression is that collocation services are
23 not a, you know, you can buy it from anybody, and
24 it's not a -- the way they're sold is different.
25 For example, I was just talking to John

1 Tresnowski
2 Ryan at Level 3 -- he's their assistant general
3 counsel -- in connection with this dispute.
4 I think he said something like, you
5 know, we'd give them collocation space, it's, it's
6 not, you know, you know, it's not, you've got the
7 space, it's a fixed cost, you've got the power,
8 and, you know, you -- and I asked him, I said, why
9 would you give the space away.
10 And I think he said that, you know, you
11 get other stuff from them. You get, they buy
12 transport from you, and sometimes, you know, if you
13 have a business relationship with them you just
14 feel more comfortable that they're, they're
15 providing services, if they're providing services,
16 that they're providing services out of their
17 facilities, because we know how our facilities are
18 run.
19 You know, we take great pains to make
20 sure that they're fireproof, heatproof, all that
21 kind of stuff, and I just think there's a level of
22 comfort going that they're run that way.
23 So I just, I don't think that the --
24 there's, in the Loosemore affidavit there's kind of
25 an implication that there was some really

1 Tresnowski
2 calculated interplay between the pricing
3 structures, and I just don't think that's true.
4 **Q. Were you involved in the negotiation of**
5 **the pricing under the PRI agreement?**
6 MR. DI CONZA: I believe that was asked
7 and answered.
8 A. I -- no. Other than, again, I had
9 mentioned the meeting with Roscoe and people early
10 on, and there was a, my impression again, there was
11 a, the pricing of the PRI was, it was all relative
12 to the pricing of the Genuity contract, and it all
13 kind of flowed down from there, which was relevant
14 to the pricing of the AOL contract.
15 And it, you know, that's why that kind
16 of informs my opinion that I find it hard to
17 believe that the collocation agreement has any real
18 impact on that, I'm sorry, the PRI -- the pricing.
19 **Q. Does Allegiance have a document**
20 **retention policy?**
21 A. Not my knowledge. I mean, we have, we
22 have policies that impact document retention, but I
23 don't believe we have a comprehensive retention
24 policy.
25 One of the things we do is we don't save

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1 Tresnowski
2 e-mails very long, unless the individual user takes
3 steps to save them, and that was driven by a,
4 there's actually a cost concern, because to save
5 e-mails is, is -- actually, I was impressed by the
6 fact that it's several hundred thousand dollars for
7 storage space.
8 So several, you know, maybe three or
9 four years back, I don't recall when, but at some
10 point we just said, I think the general rules are
11 to wipe out the e-mails after 90 days or something
12 like that.
13 (Discussion off the record.)
14 (Recess taken.)
15 **Q. I just have a couple more questions.**
16 A. Okay.
17 **Q. Other than the first meeting that we**
18 **discussed earlier, did you attend any other**
19 **meetings regarding the transaction?**
20 A. I don't believe so.
21 **Q. Was there anything in the objection of**
22 **Allegiance and the creditors' committee that you**
23 **disagreed with?**
24 A. No.
25 MS. JOHNS: That's all I have.

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1
2 C E R T I F I C A T E
3
4 STATE OF NEW YORK)
5 ss
6 COUNTY OF NEW YORK)
7
8 I, JAMES W. JOHNSON, a Registered
9 Professional Reporter and Notary Public within
10 and for the State of New York, do hereby
11 certify:
12 That MARK TRESNOWSKI, the witness whose
13 deposition is hereinbefore set forth, was duly
14 sworn by me and that such deposition is a true
15 record of the testimony given by such witness.
16 I further certify that I am not related
17 to any of the parties to this action by blood
18 or marriage and that I am in no way interested
19 in the outcome of this matter.
20 IN WITNESS WHEREOF I have hereunto set
21 my hand this 18th day of May 2004.
22
23
24 JAMES W. JOHNSON
25 Registration #01J05000925
 Commission Expires 9/4/2006

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1 Tresnowski
2 MR. DI CONZA: Okay. You're done.
3 (Time noted: 10:42 a.m.)
4
5
6 MARK TRESNOWSKI
7
8 Sworn and subscribed to
9 before me this ____ day
10 of _____ 2004.
11
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13 NOTARY PUBLIC
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11 Agreement 24
12 2 E-Mail dated Nov 28, 2001 from
13 Mikhael Vitenson, KMC 000519-580 26
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15 Agreement 28
16 4 E-Mail dated Feb 11, 2002 from Karen
17 O'Connor to Anne Falvey and Mikhael
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Exhibit C

1

2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4

5 In re:

6 ALLEGIANCE TELECOM, INC., et al.,

7

Debtors.

8 Chapter 11 Case No. 03-13057 (RDD)

9

10 Deposition of JOHN DUMBLETON held at the
11 offices of Sidley Austin Brown & Wood LLP, 787
12 Seventh Avenue, New York, New York, on
13 Tuesday, May 18, 2004, commencing at
14 10:58 a.m., before James W. Johnson,
15 Registered Professional Reporter and a Notary
16 Public of the State of New York.

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Page 2

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2
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21 New York, New York 10119
22 BY: GERARD DI CONZA, ESQ.
23 JONATHAN HOOK, ESQ.
24
25

Page 3

1
2
3 IT IS HEREBY STIPULATED AND AGREED by
4 and between the attorneys for the respective
5 parties herein, that the filing and sealing of
6 the within deposition be waived.
7 IT IS FURTHER STIPULATED AND AGREED that
8 all objections, except as to the form of the
9 question, shall be reserved to the time of the
10 trial.
11 IT IS FURTHER STIPULATED AND AGREED that
12 the within deposition may be sworn to and
13 signed before any officer authorized to
14 administer an oath with the same force and
15 effect as if signed and sworn to before the
16 Court.
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Page 4

1 Dumbleton
2 JOHN DUMBLETON, called as a
3 witness, having been first duly sworn by a
4 Notary Public, was examined and testified
5 under oath as follows:
6 EXAMINATION BY MS. JOHNS:
7 Q. Mr. Dumbleton, did you do anything to
8 prepare for your deposition today?
9 MR. DI CONZA: Without disclosing any
10 attorney/client privileged communications.
11 A. I guess I had dinner last night.
12 Q. You met with your attorneys?
13 A. Yes, for a couple of minutes.
14 Q. Did you review any documents?
15 A. Did not.
16 Q. Did you review any deposition
17 transcripts?
18 A. I did not.
19 Q. Please describe your education, starting
20 after high school.
21 A. After high school? I went to Virginia
22 Tech, was an engineer, graduated in industrial
23 engineering operations research, went back and got
24 a MBA from Virginia Tech, six months after
25 graduating, undergraduate, so is that '89? '90?

Page 5

1 Dumbleton
2 Undergraduate. '92, graduate school, in terms of
3 when I finished.
4 Q. How were you employed subsequent to
5 receiving your MBA?
6 A. This is like a job interview. I went to
7 work for MCI Communications.
8 Q. What was your position?
9 A. Started off as a national account
10 executive and left there in '98 as a senior
11 national account manager. I was the sales, sales
12 or sales manager.
13 Q. What type of sales?
14 A. What types of sales? It was selling to
15 large federal agencies and international carriers,
16 a full suite of telecommunications services.
17 Q. Where did you go after MCI?
18 A. I left MCI to join Allegiance Telecom.
19 Q. And when was that?
20 A. It May of '98.
21 Q. And what position did you take at
22 Allegiance?
23 A. At Allegiance? I took regional sales
24 manager when I joined Allegiance.
25 Q. And what were your responsibilities as

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1 **Dumbleton**
2 **regional sales manager?**
3 A. The responsibilities were to sell a set
4 of wholesale products, create and sell. It was in
5 the early days of Allegiance. There was about
6 three of us.
7 **Q. What types of products?**
8 A. PRI, collocation, managed modem were the
9 first sets of products we sold.
10 **Q. How long were you regional sales**
11 **manager?**
12 A. You're going to test me here. Probably
13 no more than a year. Then I got promoted.
14 **Q. What was your position next?**
15 A. Director of wholesale services.
16 **Q. And what were your responsibilities in**
17 **that position?**
18 A. I ran the wholesale sales team a year to
19 18 months, something like that, after I was
20 employed. I'm just trying to get the dates down
21 right.
22 **Q. And what products were involved?**
23 A. At that time, the same set of products.
24 **Q. How long were you director of wholesale**
25 **services?**

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1 **Dumbleton**
2 A. I should let you get it. Senior vice
3 president for wholesale services and alternate
4 channels.
5 **Q. When did you take this position?**
6 A. That one I can -- I can remember that
7 one. That was June of 2003 of, give or take a
8 month.
9 **Q. And what are your responsibilities in**
10 **that position?**
11 A. The same set of responsibilities, just
12 now in terms of functional responsibilities, but
13 more areas than wholesale services. It's resale
14 services, and it's indirect, we call it agency or
15 alternate channel services, and the product set
16 expands through all the wholesale services, through
17 all of the retail products.
18 **Q. In --**
19 A. Do I get the job? Sorry.
20 **Q. We'll find out. In 2001/2002 who did**
21 **you report to?**
22 A. Chris Malinowski.
23 **Q. What was his position?**
24 A. He was the senior vice president and
25 then president of -- I forget the exact title --

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1 **Dumbleton**
2 A. For probably about another year, and
3 then I was promoted again.
4 **Q. What was your title then?**
5 A. VP of wholesale services.
6 **Q. And what were your responsibilities?**
7 A. Ran the wholesale sales channel.
8 **Q. What was included in running that?**
9 A. Hiring sales managers and then having
10 the sales managers hire reps. And also looking at
11 the company's assets and trying to build additional
12 products that complemented the base business, the
13 staffing of product dev, sales, sales support,
14 sales engineering, all those responsibilities.
15 **Q. And what types of products?**
16 A. The same set, plus some dedicated loop
17 products and some IP MTLs products and some IP
18 transit services.
19 **Q. And approximately when did you become VP**
20 **wholesale services?**
21 A. Probably in the mid-2000, mid-2000, 2001
22 timeframe. You're challenging me on the dates. I
23 have to check with HR.
24 **Q. That's okay. What is your current**
25 **position?**

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1 **Dumbleton**
2 data services or broadband services.
3 **Q. Did you report to anyone else at that**
4 **time?**
5 A. No.
6 **Q. In 2001/2002 who reported directly to**
7 **you?**
8 A. Doug Holcroft (ph). John Nishimoto.
9 Dan Cobb, Mark McGuinness. I think that's
10 accurate.
11 **Q. And what was Mr. Nishimoto's position at**
12 **that time?**
13 A. At that time John had two functions. He
14 was running a regional group of sales people. Make
15 sure my timeframe's accurate here. And then I put
16 John in charge of running the Genuity line of
17 business.
18 Understand, that's a pretty big window
19 there. Dan Cobb came in there also in the middle
20 of that, and Dan McGuinness left maybe in the
21 middle of that. I think those timeframes are
22 accurate. I may be spilling onto 2002 as well.
23 **Q. In this 2001/2002 timeframe what was the**
24 **business of Allegiance?**
25 A. Can you kind of, actually, give a little

1 Dumbleton
 2 more detail on that question.
 3 **Q. Just in general, what did Allegiance do?**
 4 A. What did Allegiance do as a company?
 5 **Q. As a company.**
 6 A. We sold services, primarily sold
 7 services to medium and small enterprise customers
 8 through a direct sales channel in 36 markets.
 9 **Q. Are you familiar with KMC?**
 10 A. I am familiar with KMC.
 11 **Q. When did you first become familiar with**
 12 **KMC?**
 13 A. I first became familiar with KMC
 14 probably in the mid-2001 timeframe, early 2001. I
 15 think that's right.
 16 **Q. How did you become familiar with them?**
 17 A. Well, I knew who KMC was in the
 18 marketplace. I had heard of them through past
 19 experiences with MCI, but I became familiar with
 20 them in terms of a little more familiar with them
 21 because of their interactions with Qwest. We were
 22 speaking with Qwest about some business
 23 opportunities.
 24 KMC was a big provider for Qwest. The
 25 industry is small, so we all kind of know who, we

1 Dumbleton
 2 services." I can almost quote that. Something
 3 along those lines.
 4 **Q. What was your response?**
 5 A. Initial response was no.
 6 **Q. Did that response change?**
 7 A. That response did change.
 8 **Q. When did it change?**
 9 A. You're once again challenging me on the
 10 specific month. It changed when my discussions,
 11 the company's discussions with Genuity expanded to
 12 Genuity and Allegiance were in discussions on some
 13 additional services, and that's what I meant
 14 changed.
 15 **Q. Did you then contact Chris Menier?**
 16 A. Chris continued to contact me. He was
 17 the tenacious sales guy, but, yeah, we at some
 18 point in time did do this, said, you know what?
 19 There may be an opportunity.
 20 **Q. Were you involved in negotiation of the**
 21 **transaction between KMC and Allegiance?**
 22 A. Define "transaction."
 23 **Q. Well, after you spoke to Chris and said**
 24 **there may be a need here, what happened?**
 25 A. We fleshed out the requirement. I was

1 Dumbleton
 2 all know one another.
 3 **Q. In 2001 did KMC and Allegiance begin**
 4 **discussions regarding a potential business**
 5 **relationship?**
 6 A. Yes, it was, I think it was '01.
 7 **Q. What was the subject of those**
 8 **discussions?**
 9 A. Was circulated around selling us PRI
 10 services.
 11 **Q. When did those discussions begin?**
 12 A. I don't recall the exact month. Again,
 13 I'm, I believe it was in the '01 timeframe,
 14 mid-'01.
 15 **Q. Who initiated the discussion?**
 16 A. KMC.
 17 **Q. Do you know who specifically?**
 18 A. Chris Menier, M-E-N-I-E-R.
 19 **Q. Who did he contact at Allegiance?**
 20 A. Well, he ended up contacting me. I
 21 don't know if he had contacted anybody prior. He
 22 may have contacted me in early '01.
 23 **Q. What did he say to you in that first**
 24 **contact?**
 25 A. "Do you have a need for our PRI

1 Dumbleton
 2 involved in it, basically what it is that I needed
 3 from KMC.
 4 **Q. What did you tell KMC that you needed?**
 5 A. We needed PRI services for inbound ISP
 6 traffic.
 7 **Q. Did you discuss pricing requirements for**
 8 **Allegiance with respect to the PRI services?**
 9 MR. DI CONZA: Allegiance.
 10 A. Well, clarify that question.
 11 **Q. Did you discuss pricing needs of**
 12 **Allegiance with respect to the PRI services with**
 13 **anyone at KMC?**
 14 A. In terms of what I needed to buy at?
 15 **Q. Yes.**
 16 A. Yes.
 17 **Q. And what prices did you discuss?**
 18 A. I, I gave them a target per DS0 rate in
 19 order for my larger deal to work.
 20 **Q. And what was that rate?**
 21 MR. DI CONZA: If you recall.
 22 A. I mean, I don't recall specifically.
 23 I'm sure I was low at first.
 24 **Q. Did the target that you told KMC change**
 25 **during the course of the negotiations?**

1 Dumbleton

2 A. Did my target change? I, I don't recall
3 whether it changed or not.

4 Q. Did, would this target per-DS0 rate be
5 expressed in terms of per port?

6 A. Per DS0 and per port are synonymous.

7 Q. Did you initially tell KMC that you
8 needed a per-port rate of \$17?

9 A. I'm sure I said probably something lower
10 than that, but I can't recall, because I, I can
11 assure you that my initial response was probably
12 lower than that. My initial request.

13 Q. Who else from Allegiance was involved in
14 discussions with KMC with respect to PRI services?

15 A. What specific nature of the PRI
16 services?

17 Q. Anybody from Allegiance who worked on
18 discussions with KMC with respect to the PRI
19 services.

20 A. John Nishimoto basically was running the
21 project for me. Jeff Feinberg was running the
22 implementation effort. Peter Swenson was managing,
23 kind of project managing. He would be reviewing
24 the technical design. Those are probably the folks
25 that had the direct involvement with KMC. There

1 Dumbleton

2 were several other folks involved in the larger
3 project.

4 Q. Who from KMC was involved in the
5 discussions with Allegiance regarding the PRI
6 services?

7 A. Chris Menier, Kevin Bittner, and then
8 there was two outside counsel and an operations
9 person. I think that I attended -- I'm not sure if
10 I attended all of the negotiation efforts,
11 discussions, and then there was probably another
12 layer of sales management in there as well.

13 Q. How many in-person meetings between KMC
14 and Allegiance were there?

15 A. No clue. I can't give you a total
16 number.

17 Q. What was the purpose of the PRI services
18 transaction for Allegiance?

19 A. The purpose of the -- the purpose was to
20 obtain PSTN connectivity in markets, I think
21 markets like, cities that Allegiance did not serve
22 with its own facilities-based infrastructure.

23 Q. Was it specifically in connection with
24 Allegiance's relationship with Genuity?

25 A. Absolutely.

1 Dumbleton

2 Q. When did the subject of collocation
3 product by Allegiance first, when was that subject
4 first discussed between the parties?

5 A. I can't tell you when it was first
6 discussed. Probably in an engineering discussion.
7 It's only speculation.

8 Q. Were you involved in negotiations
9 regarding the provision of collocation space?

10 A. I was not.

11 Q. You mentioned Peter Swenson.
12 What was his position?

13 A. Sales engineer.

14 Q. Did he have authority to propose
15 collocation prices to KMC?

16 A. Peter? No.

17 Q. Who would have authority to offer
18 collocation prices?

19 A. Probably Jeff or John.

20 Q. Would they need approval from you
21 regarding such pricing?

22 A. Jeff wouldn't, no.

23 Q. Would John?

24 A. John would probably have come to me, but
25 I don't recall him coming to me.

1 Dumbleton

2 Q. Do you recall anyone coming to you
3 regarding collocation prices being offered to KMC?

4 A. No.

5 Q. Do you know what the actual pricing on
6 the collocation space provided by Allegiance was?

7 A. Did I know?

8 Q. Yes.

9 A. I did not know when it was originally
10 done. I, I now know.

11 Q. Are you usually involved in the
12 negotiation of collocation agreements?

13 A. With a -- no.

14 Q. When would you be?

15 A. Quite honestly, I mean, I would get
16 involved, typically, in customer-related
17 negotiations that were of significant size. The
18 key word there is "customer."

19 Q. What do you mean by "The key word there
20 is 'customer'?"

21 A. I mean, from my perspective, KMC was a
22 vendor to us. That's how I viewed them. My
23 customer in this transaction was Genuity. I can
24 give you that from my perspective.

25 Q. Does Allegiance typically have

1 **Dumbleton**
 2 **collocation agreements with vendors?**
 3 A. I believe they do, yes, in some
 4 instances.
 5 Q. **Who is in charge of such arrangements?**
 6 A. It would be carrier relations.
 7 Q. **I'm sorry, what did you say?**
 8 A. Carrier relations.
 9 Q. **Who heads that up?**
 10 A. The gentleman who heads it up? I don't
 11 know who runs carrier relations. Sorry.
 12 Q. **Was anyone from carrier relations**
 13 **involved in the discussions with KMC?**
 14 A. I don't -- no clue.
 15 Q. **John Nishimoto is not in carrier**
 16 **relations, correct?**
 17 A. No.
 18 Q. **And Jeff Feinberg was not in carrier**
 19 **relations, correct?**
 20 A. Jeff was not.
 21 Q. **And Peter Swenson was not in carrier**
 22 **relations?**
 23 A. Peter was not.
 24 Q. **Did there come a point in time in the**
 25 **discussions regarding the PRI services where**

1 **Dumbleton**
 2 **collocation space at no charge?**
 3 MR. DI CONZA: To the extent you know.
 4 A. Not from my perspective. Not that I'm
 5 aware of.
 6 Q. **I'm going to hand you what's been marked**
 7 **as KMC Exhibit 1. Take a moment and look at that.**
 8 **If you can, tell me what that is.**
 9 A. This appears to be the PRI agreement.
 10 Q. **Are you familiar with the terms of the**
 11 **agreement?**
 12 A. The PRI agreement? Generally.
 13 Q. **Have you read it before?**
 14 A. Cover to cover? No.
 15 Q. **Were you involved in the negotiation of**
 16 **the document?**
 17 A. I participated for one day, which is
 18 really the kickoff, but, again, after that our team
 19 negotiated.
 20 Q. **What was this one-day kickoff?**
 21 A. The first time that Allegiance and KMC
 22 sat down to negotiate, to start discussing a
 23 written document, I participated probably for the
 24 first three or four hours.
 25 Q. **And when was that?**

1 **Dumbleton**
 2 **Allegiance asked for a new design?**
 3 A. New design? I think initially we went
 4 through multiple iterations of a design. Very
 5 early on.
 6 Q. **Were there any design changes near the**
 7 **end of the process, say in February of 2002?**
 8 A. I don't know. I wasn't involved there.
 9 The design that I was most -- my only requirement
 10 was the hubbing architecture, which markets came to
 11 which hub.
 12 Q. **And you said you weren't involved there**
 13 **in February 2002.**
 14 **Had you stepped away from the**
 15 **negotiation process?**
 16 A. Absolutely.
 17 Q. **Why?**
 18 A. Again, my role was managing the revenues
 19 of the customers. Genuity was my customer, so we
 20 had people on board that were managing the vendor,
 21 on a day-to-day perspective, managing vendors.
 22 Q. **And who was in charge of managing KMC?**
 23 A. Jeff Feinberg. John Nishimoto.
 24 Q. **Has Allegiance ever entered into a**
 25 **collocation agreement where it agreed to provide**

1 **Dumbleton**
 2 A. End of 2001.
 3 Q. **Where did that meeting take place?**
 4 A. Dallas.
 5 Q. **Who else was present at the meeting?**
 6 A. Myself, John Nishimoto, Jeff Feinberg,
 7 Randall Hand, Karen O'Connor, and then Kevin
 8 Bittner, Chris Menier, an operations guy, a guy
 9 whose name I can't recall and two folks from our
 10 outside counsel, Mikhael, who may be employed there
 11 now, and I forget the other person's name.
 12 Q. **Were there discussions regarding a**
 13 **collocation agreement at that meeting?**
 14 A. No, there were not. Not when I was
 15 there.
 16 Q. **At that time what was the price per port**
 17 **going to be under the PRI?**
 18 A. I don't recall the specific number.
 19 Q. **Do you remember generally?**
 20 A. I think it generally it was in the
 21 15-to-17 range.
 22 Q. **Were you involved in any revisions to**
 23 **this document?**
 24 A. No, after getting the parties together,
 25 giving them the handshake, telling them what I

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1 Dumbleton

2 needed, PRIs, I really didn't have a whole lot of

3 interaction after that in terms of producing the

4 document.

5 **Q. Who drafted the PRI agreement?**

6 A. I forgot who took ownership. I don't

7 know which, which side took drafting ownership.

8 **Q. What was the purpose of the PRI**

9 **agreement?**

10 A. To buy PRIs from KMC and support my

11 relationship with Genuity.

12 **Q. Did Allegiance have a target profit**

13 **margin that it was seeking with respect to the**

14 **Genuity agreement?**

15 A. There was no set target, no. You're

16 asking me for a specific number? No.

17 **Q. Did you have a ballpark number?**

18 A. We certainly had a threshold on any deal

19 we did.

20 **Q. What was the threshold?**

21 A. Individual case basis.

22 **Q. What was the threshold with respect to**

23 **the Genuity contract?**

24 A. I don't recall the specific threshold,

25 but, again, it's about -- a really large deal,

Page 24

1 Dumbleton

2 **\$17 per port?**

3 A. I just want to confirm the question,

4 yeah. Yeah, I mean, if we, we probably would have

5 looked to other, other vendors if we couldn't get

6 into the price range we needed to get into.

7 **Q. When did Allegiance's obligations to**

8 **Genuity begin?**

9 A. Which obligations?

10 **Q. The obligations that required the PRI**

11 **services that Allegiance was in the discussions**

12 **with KMC over.**

13 A. When I believe we signed that contract

14 at the end of 2001 or the beginning of 2002.

15 **Q. And Allegiance's obligations to Genuity**

16 **started at that time?**

17 MR. DI CONZA: To the extent you know.

18 A. Yes, I mean, we sent the contract and

19 said, here's what we're going to, we'll build for

20 you.

21 **Q. I'd like to hand you what's been marked**

22 **as KMC Exhibit 3. Take a moment and look at that.**

23 **Are you familiar with this document?**

24 A. Yes, I know what it is.

25 **Q. And what is it?**

Page 23

1 Dumbleton

2 something that's got maybe 5% lower gross margin

3 than a small deal, there's a lot of gross margin

4 dollars there, so we looked at it on an each-

5 individual-case basis when they were that size,

6 that sort of thing.

7 **Q. Did you run any analysis as to what your**

8 **price per port would have to be with KMC in order**

9 **to meet your threshold under the Genuity contract?**

10 A. We did run some basic analysis.

11 **Q. And what was the price per port that you**

12 **needed in order to hit that threshold?**

13 A. Again, the 15-to-17 range was about

14 where we had to be.

15 **Q. Would you have been able to do the PRI**

16 **agreement with the KMC agreement if they were**

17 **unable to get a \$15 to \$17 per port range?**

18 A. Would we have been unable to do it? Can

19 you kind of --

20 **Q. Well, you said that the PRI agreement**

21 **with KMC was necessary to do your deal with**

22 **Genuity, right?**

23 A. Yes.

24 **Q. In order to hit your threshold for**

25 **profit margin under Genuity, you needed a \$15 to**

Page 25

1 Dumbleton

2 A. It is the interconnection agreement

3 between Allegiance and KMC.

4 **Q. That's generally referred to as the**

5 **collocation agreement?**

6 A. This one appears to be a collocation

7 agreement.

8 **Q. Are you familiar with the terms of this**

9 **particular agreement?**

10 A. Yes (that I am, yes).

11 **Q. When did you become familiar with the**

12 **terms?**

13 A. Quite honestly, probably in the past

14 three to six months, maybe a year, right around the

15 bankruptcy timeframe. When was that, February,

16 April? Probably February of '03 timeframe.

17 **Q. Had you reviewed this document prior to**

18 **the bankruptcy?**

19 A. If I'd seen it prior, I, I don't recall

20 seeing it. I mean, my focus really wasn't on the

21 contracts we had with our vendors, but on the

22 contract I had with my customer.

23 **Q. Did you review this agreement before it**

24 **was executed?**

25 A. No.

<p style="text-align: right;">Page 26</p> <p>Dumbleton</p> <p>Q. Were you involved in the negotiation of the document?</p> <p>A. No.</p> <p>Q. Were you involved in the revision of the document?</p> <p>A. No.</p> <p>Q. Does Allegiance have standard collocation agreements?</p> <p>A. We do have a standard master services agreement, and which includes terms and conditions for all of our products and services. We do now, and if we did in -- in '01/'02? I'm sure we had some standard agreement at that point.</p> <p>Q. Was there different types of standard services agreements based on who the counterparty was?</p> <p>A. Different types of agreements depending on who the party was? We had a standard document. Typically that standard document would get negotiated from. That would be the base document, and you'd work from that.</p> <p>Q. For example, was there a standard services agreement for vendors versus a standard agreement for customers?</p>	<p style="text-align: right;">Page 27</p> <p>Dumbleton</p> <p>A. I can't speak to the vendor side of the equation. The customer side, yes, we would, had a standard document we would work from.</p> <p>Q. Did Allegiance have standard pricing for collocation?</p> <p>A. Yes. We did.</p> <p>Q. How was that standard pricing derived?</p> <p>A. How was it derived?</p> <p>Q. Yes.</p> <p>MR. DI CONZA: If you know,</p> <p>A. I know this one. The truth is that the standard pricing was derived by Chris Malinowski back in 1998.</p> <p>Q. Why did Chris Malinowski come up with standard pricing?</p> <p>A. He ran the business.</p> <p>Q. Did variations to the standard pricing have to be approved by Chris Malinowski?</p> <p>A. No.</p> <p>Q. Did they have to be approved by anyone?</p> <p>A. Yes.</p> <p>Q. Who did they have to be approved by?</p> <p>A. Business analysis, myself. I mean, we're talking about -- yeah.</p>
<p style="text-align: right;">Page 28</p> <p>Dumbleton</p> <p>Q. Business analysis?</p> <p>A. Business analysis, business development.</p> <p>Q. Who was that?</p> <p>A. Tae Kim, Steve Hwang.</p> <p>Q. Was approval from business analysis and you required?</p> <p>A. From a control perspective, if it was a nominal discount, \$50 discount, and we looked at the larger deal and said, fine, these are on customer contracts -- I can only speak to customer relationships, not to vendor relationships -- I would go ahead and approve it and get on with it.</p> <p>If it was something that I wanted to have analyzed, I might send it over to Steve and to Tae, primarily Steve.</p> <p>Q. When would you want to have it analyzed?</p> <p>A. Looking at a large deal. I just wanted to look at the financial performance of the deal.</p> <p>Q. Have you ever approved a 50% discount off of standard pricing?</p> <p>A. I have not.</p> <p>Q. Have you ever approved providing services for free?</p> <p>A. I have not.</p>	<p style="text-align: right;">Page 29</p> <p>Dumbleton</p> <p>Q. What was the purpose of the collocation agreement which is KMC Exhibit 3?</p> <p>A. The purpose of it? I, I can't answer that for you.</p> <p>Q. Were you aware that KMC would not execute the PRI agreement without the collocation agreement?</p> <p>A. I was not aware of that.</p> <p>Q. Were you aware that the PRI agreement and the collocation agreement were signed on the same day?</p> <p>A. No.</p> <p>Q. Did you receive copies of the executed PRI agreement and collocation agreement?</p> <p>A. Not that I recall, but -- I believe I got an executed copy of the PRI agreement in the binder. I can't tell you if the collocation agreement was in there or not.</p> <p>Q. Who did you receive that from?</p> <p>A. Probably Melissa Broadway.</p> <p>Q. Who is Melissa Broadway?</p> <p>A. She's my admin.</p> <p>Q. Would Allegiance have entered into the collocation agreement with KMC without the PRI</p>

8 (Pages 26 to 29)

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1 **Dumbleton**
2 **agreement?**
3 A. I don't know how I can answer that. I
4 can't answer that.
5 **Q. Would you approve the execution of a**
6 **co-lo agreement providing services for free**
7 **without --**
8 MR. DI CONZA: Objection to the form.
9 **Q. -- the PRI agreement?**
10 MR. DI CONZA: Objection to form. Don't
11 speculate.
12 A. Re -- could you guys re-ask the question
13 there.
14 **Q. Sure. You're aware that under the terms**
15 **of the collocation agreement Allegiance agreed to**
16 **provide collocation space to KMC at no cost,**
17 **correct?**
18 A. I believe we agreed to provide two racks
19 at no cost, based on this agreement.
20 **Q. Would you have approved the provision of**
21 **collocation space at no cost to KMC if KMC had not**
22 **executed the PRI agreement with Allegiance?**
23 A. I would not have.
24 **Q. Under a collocation agreement where**
25 **Allegiance provides collocation space at no cost,**

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1 **Dumbleton**
2 **third parties?**
3 A. Not -- I'm not sure I can answer that.
4 I don't run billing, so I don't know.
5 **Q. Are you aware that KMC provides service**
6 **to third parties from equipment in Allegiance**
7 **collocation space?**
8 A. I am not, I have no direct knowledge of
9 that.
10 **Q. What knowledge do you have?**
11 A. I believe, based on some dialogue with
12 KMC, that they would want to sell voiceover
13 IP-related services out of that infrastructure.
14 That was their desire.
15 **Q. Have you had any discussions with anyone**
16 **with respect to whether or not KMC provides service**
17 **to third parties from that collocation space?**
18 A. I've asked that question of my people.
19 **Q. And what was the substance of those**
20 **conversations?**
21 A. The substance of the conversation was
22 that we believed they are.
23 **Q. And when were those discussions?**
24 A. Mid to late '03.
25 **Q. And who did you have the discussions**

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1 **Dumbleton**
2 **would that agreement be profitable to Allegiance?**
3 MR. DI CONZA: Objection to form.
4 THE WITNESS: When you say that?
5 MR. DI CONZA: You can respond. Only if
6 you know.
7 A. Answer the question again.
8 (Record read.)
9 A. I will tell you I can't answer that,
10 because it depends on the specific circumstances
11 and the other business that's involved.
12 **Q. What circumstances and other business?**
13 THE WITNESS: I mean, I'll answer it.
14 A. The answer is --
15 MR. DI CONZA: Only if you know.
16 A. Yeah, I'll tell you from my perspective,
17 if somebody came to me with a deal that was only
18 collocation, there was no other benefit, there was
19 no other business associated with that entity,
20 someone came to me and said, I want two racks and I
21 want it for free, the answer would be no. It
22 should be no, and it certainly wouldn't be
23 profitable.
24 **Q. Has Allegiance ever sent an invoice to**
25 **KMC under the collocation agreement with respect to**

Page 33

1 **Dumbleton**
2 **with?**
3 A. I asked John Nishimoto.
4 **Q. Anyone else?**
5 A. No.
6 **Q. How would KMC use equipment in**
7 **Allegiance's collocation space to provide service**
8 **to third parties?**
9 A. How would they use the equipment at the
10 co -- much the same way they're selling me PRIs,
11 they could sell PRIs to other third-party customers
12 using that same equipment. Technically that's
13 possible.
14 **Q. Physically would something have to be**
15 **done to the equipment to allow KMC to provide the**
16 **service to a third party?**
17 A. Two things would need to happen. The
18 first thing is the equipment would need to be
19 configured to offer, in this case, I believe it's
20 2A (ph) PRI services.
21 The second thing is the third-party
22 customer would need to somehow connect to that
23 equipment, you know, logically through an IP
24 connection that exists today or physically through
25 some cross-connect.

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2 **Q. What is a cross-connect?**

3 A. A cross-connect? A cross-connect is a

4 connection that runs from -- I don't know how to

5 describe what a cross-connect is. It's basically a

6 piece of wire that comes from, say, an entrance

7 facility into our switch site to a customer's

8 collocation cabinet. Probably the best -- in this

9 context it would be the best way to describe it.

10 MS. JOHNS: Sorry, can you read that

11 answer for me.

12 (Record read.)

13 **Q. This cross-connect, is that something**

14 **that someone at the Allegiance switch site would**

15 **physically have to do?**

16 A. Yes, physically cross-connect it.

17 **Q. Would that be done by someone at**

18 **Allegiance?**

19 A. That would be done by an Allegiance

20 technician.

21 **Q. And how would the technician know to do**

22 **that?**

23 A. An order would be placed for a physical

24 cross-connect. An order would be placed in the

25 system.

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2 MR. DI CONZA: Sure.

3 (Recess taken.)

4 MS. JOHNS: I have no further questions.

5 THE WITNESS: We're done?

6 MR. DI CONZA: You're done.

7 (Time noted: 12:14 p.m.)

8

9

10 _____
 JOHN DUMBLETON

11

12 Sworn and subscribed to

13 before me this ____ day

14 of _____ 2004.

15

16 _____
 NOTARY PUBLIC

17

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2 **Q. Are you familiar with KMC's motion for**

3 **an order determining that the infrastructure**

4 **interconnection agreement is integrated with the**

5 **primary rate interface services agreement?**

6 A. I am aware.

7 **Q. Have you read that motion?**

8 A. I have not read the motion in its

9 entirety. I looked at it quickly.

10 **Q. Did you read Constance Loosemore's**

11 **affidavit that was submitted in connection with**

12 **that motion?**

13 A. I did not read that affidavit.

14 **Q. Did you read the objection of Allegiance**

15 **and the creditors' committee in opposition to that**

16 **motion?**

17 A. Again, I looked at it briefly, but I

18 haven't read the whole thing.

19 **Q. Was there anything that you saw in the**

20 **objection of Allegiance and the creditors'**

21 **committee that you disagreed with?**

22 A. No, not that I saw.

23 MS. JOHNS: Do you want to take a break

24 for a few minutes, and I'll see if I have

25 anything else.

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1

2 C E R T I F I C A T E

3

4 STATE OF NEW YORK)

5 ss

6 COUNTY OF NEW YORK)

7

8 I, JAMES W. JOHNSON, a Registered

9 Professional Reporter and Notary Public within

10 and for the State of New York, do hereby

11 certify:

12 That JOHN DUMBLETON, the witness whose

13 deposition is hereinbefore set forth, was duly

14 sworn by me and that such deposition is a true

15 record of the testimony given by such witness.

16 I further certify that I am not related

17 to any of the parties to this action by blood

18 or marriage and that I am in no way interested

19 in the outcome of this matter.

20 IN WITNESS WHEREOF I have hereunto set

21 my hand this 18th day of May 2004.

22

23

24 _____
 JAMES W. JOHNSON
Registration #01J05000925
Commission Expires 9/4/2006

25

<p>A</p> <p>able 23:15 about 6:5 7:2 10:22 22:25 23:13 27:25 Absolutely 15:25 19:16 account 5:9,11 accurate 9:10,15,22 action 37:17 actual 17:5 actually 9:25 ADAMS 2:10 additional 7:11 12:13 admin 29:23 administer 3:14 affidavit 35:11,13 after 4:20,21,24 5:17 6:19 12:23 20:18 21:24 22:3 again 7:3 11:12 12:9 19:18 20:18 22:25 23:13 31:7 35:17 agencies 5:15 agency 8:14 agreed 3:3,7,11 19:25 30:15,18 agreement 19:25 20:9 20:11,12 21:13 22:5 22:9,14 23:16,16,20 25:2,5,7,9,23 26:11 26:14,24,25 29:3,7 29:8,10,11,15,17 29:19,25 30:2,6,9 30:15,19,22,24 31:2 31:25 35:4,5 agreements 17:12 18:2 26:9,16,18 ahead 28:13 AKIN 2:5 al 1:6 Allegiance 1:6 5:18 5:22,23,24 6:5 9:24 10:3,4 11:3,19 12:12,21 13:8,9,12 14:13,17 15:5,14,18 15:21 16:3 17:6,25 19:2,24 20:21 22:12 24:11 25:3 26:8 27:5 29:24 30:15,22 30:25 31:2,24 32:6 34:14,18,19 35:14 35:20 Allegiance's 15:24 24:7,15 33:7 allow 33:15 almost 12:2 along 12:3 alternate 8:3,15 analysis 23:7,10 27:24 28:2,3,6</p>	<p>analyzed 28:15,17 another 7:2 11:2 15:11 answer 29:4 30:3,4 31:7,9,13,14,21 32:3 34:11 anybody 11:21 14:17 anyone 9:3 13:13 17:2 18:12 27:21 32:15 33:4 anything 4:7 35:19,25 appears 20:9 25:6 approval 16:20 28:6 approve 28:13 30:5 approved 27:19,21,23 28:20,23 30:20 approximately 7:19 April 25:16 architecture 19:10 areas 8:13 around 11:9 25:14 arrangements 18:5 asked 19:2 32:18 33:3 asking 22:16 assets 7:11 associated 31:19 assure 14:11 attended 15:9,10 attorneys 2:6,13,19 3:4 4:12 attorney/client 4:10 Austin 1:11 2:12 authority 16:14,17 authorized 3:13 Avenue 1:12 2:8,14 aware 20:5 29:6,9,10 30:14 32:5 35:6 away 19:14 a.m. 1:14</p> <p>B</p> <p>B 4:2 back 4:23 27:14 ballpark 22:17 bankruptcy 25:15,18 base 7:12 26:21 based 26:16 30:19 32:11 basic 23:10 basically 13:2 14:20 34:5 basis 22:21 23:5 became 10:13,19 become 7:19 10:11,16 25:11 before 1:14 3:13,15 20:13 25:23 36:13 begin 11:3,11 24:8 beginning 24:14 being 17:3</p>	<p>believe 11:13 18:3 24:13 29:16 30:18 32:11 33:19 believed 32:22 benefit 31:18 best 34:8,9 between 3:4 12:21 15:13 16:4 25:3 big 9:18 10:24 billing 32:4 binder 29:18 Blittner 15:7 21:8 blood 37:17 board 19:20 break 35:23 briefly 35:17 broadband 9:2 Broadway 29:21,22 Brown 1:11 2:12 build 7:11 24:19 business 7:12 9:17,24 10:22 11:4 27:17,24 28:2,3,6 31:11,12 31:19 buy 13:14 22:10</p> <p>C</p> <p>C 2:3 37:2,2 cabinet 34:8 call 8:14 called 4:2 came 9:19 19:10 31:17,20 carrier 18:6,8,11,12 18:15,18,21 carriers 5:15 case 1:8 22:21 33:19 certainly 22:18 31:22 certify 37:11,16 challenging 7:22 12:9 change 12:6,7,8 13:24 14:2 changed 12:10,14 14:3 changes 19:6 channel 7:7 8:15 10:8 channels 8:4 Chapter 1:8 charge 9:16 18:5 19:22 20:2 check 7:23 Chris 8:22 11:18 12:15,16,23 15:7 21:8 27:13,15,19 circulated 11:9 circumstances 31:10 31:12 cities 15:21 clarify 13:10 clue 15:15 18:14</p>	<p>co 33:10 Cobb 9:9,19 COLIN 2:10 collocation 6:8 16:2,9 16:15,18 17:3,6,12 18:2 19:25 20:2 21:13 25:5,6 26:9 27:6 29:2,7,11,15 29:18,25 30:15,16 30:21,24,25 31:18 31:25 32:7,17 33:7 34:8 come 16:24 18:24 27:15 comes 34:6 coming 16:25 17:2 commencing 1:13 Commission 37:24 committee 2:6 35:15 35:21 communications 4:10 5:7 company 10:4,5 company's 7:11 12:11 complemented 7:12 conditions 26:11 configured 33:19 confirm 24:3 connect 33:22 connection 15:23 33:24 34:4 35:11 connectivity 15:20 Constance 35:10 contact 11:19,24 12:15,16 contacted 11:21,22 contacting 11:20 context 34:9 continued 12:16 contract 22:23 23:9 24:13,18 25:22 contracts 25:21 28:11 control 28:8 conversation 32:21 conversations 32:20 CONZA 2:22 4:9 13:9 13:21 20:3 24:17 27:11 30:8,10 31:3 31:5,15 36:2,6 copies 29:14 copy 29:17 correct 18:16,19 30:17 cost 30:16,19,21,25 counsel 15:8 21:10 counterparty 26:16 COUNTY 37:6 couple 4:13 course 13:25 Court 1:2 3:16</p>	<p>cover 20:14,14 co-lo 30:6 create 6:4 creditors 2:7 35:15,20 cross-connect 33:25 34:2,3,3,5,13,16,24 current 7:24 customer 17:18,20,23 19:19 25:22 27:3 28:11,11 33:22 customers 10:7 19:19 26:25 33:11 customer's 34:7 customer-related 17:16</p> <p>D</p> <p>D 4:2 Dallas 21:4 Dan 9:9,19,20 data 9:2 dates 6:20 7:22 day 20:17 29:12 36:13 37:21 days 6:5 day-to-day 19:21 deal 13:19 22:18,25 23:3,21 28:10,18,19 31:17 Debtor 2:19 Debtors 1:7 dedicated 7:16 Define 12:22 depending 26:18 depends 31:10 deposition 1:10 3:6,12 4:8,16 37:13,14 derived 27:8,9,13 describe 4:19 34:5,9 design 14:24 19:2,3,4 19:6,9 desire 32:14 detail 10:2 determining 35:3 dev 7:13 development 28:3 DI 2:22 4:9 13:9,21 20:3 24:17 27:11 30:8,10 31:3,5,15 36:2,6 dialogue 32:11 different 26:15,18 dinner 4:11 direct 10:8 14:25 32:8 directly 9:6 director 6:15,24 disagreed 35:21 disclosing 4:9 discount 28:9,9,20 discuss 13:7,11,17</p>
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Exhibit D

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK
4

5 In re:)
6)
7)

6 ALLEGIANCE TELECOM, INC., et al.,)
7)

7 Debtors.)
8)

8 Chapter 11 Case No. 03-13057 (RDD))
9)

9
10 Deposition of JOHN NISHIMOTO held at the
11 offices of Sidley Austin Brown & Wood LLP, 787
12 Seventh Avenue, New York, New York, on
13 Tuesday, May 18, 2004, commencing at
14 12:56 p.m., before James W. Johnson,
15 Registered Professional Reporter and a Notary
16 Public of the State of New York.
17
18
19
20
21
22
23
24
25

Page 2

1
2
3 **A P P E A R A N C E S :**
4
5 **AKIN GUMP STRAUSS HAUER & FELD LLP**
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7 **of Unsecured Creditors**
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23 **New York, New York 10119**
24 **BY: GERARD DI CONZA, ESQ.**
25 **JONATHAN HOOK, ESQ.**

Page 4

1 **Nishimoto**
2 **JOHN NISHIMOTO, called as a**
3 **witness, having been first duly sworn by a**
4 **Notary Public, was examined and testified**
5 **under oath as follows:**
6 **EXAMINATION BY MS. JOHNS:**
7 **Q. Mr. Nishimoto, did you do anything to**
8 **prepare for today's deposition?**
9 **A. No.**
10 **Q. Did you meet with your attorneys?**
11 **A. Yes.**
12 **Q. Did you review any documents?**
13 **A. No. Oh, by myself? Or with --**
14 **Q. By yourself.**
15 **A. Yes.**
16 **Q. What documents did you review?**
17 **A. Just some old e-mails.**
18 **Q. Did any of those e-mails refresh your**
19 **memory?**
20 **A. No, not really.**
21 **Q. What were those old e-mails with regard**
22 **to?**
23 **A. The contracts, the PRI and the**
24 **collocation contract with KMC.**
25 **Q. Did you review any deposition**

Page 3

1
2
3 **IT IS HEREBY STIPULATED AND AGREED by**
4 **and between the attorneys for the respective**
5 **parties herein, that the filing and sealing of**
6 **the within deposition be waived.**
7 **IT IS FURTHER STIPULATED AND AGREED that**
8 **all objections, except as to the form of the**
9 **question, shall be reserved to the time of the**
10 **trial.**
11 **IT IS FURTHER STIPULATED AND AGREED that**
12 **the within deposition may be sworn to and**
13 **signed before any officer authorized to**
14 **administer an oath with the same force and**
15 **effect as if signed and sworn to before the**
16 **Court.**
17
18
19
20
21
22
23 **- oOo -**
24
25

Page 5

1 **Nishimoto**
2 **transcripts?**
3 **A. No.**
4 **Q. Would you please describe your education**
5 **starting after high school.**
6 **A. BSEE, electric science engineering. The**
7 **school too?**
8 **Q. Yes.**
9 **A. University of Virginia, and MBA from**
10 **Georgetown.**
11 **Q. And what year did you receive your MBA**
12 **from Georgetown?**
13 **A. '99.**
14 **Q. And your BSEE?**
15 **A. '85.**
16 **Q. When did you begin working at**
17 **Allegiance?**
18 **A. November 1999.**
19 **Q. What was your position?**
20 **A. In the carrier, in the wholesale group,**
21 **sales manager.**
22 **Q. What were your responsibilities as**
23 **wholesale sales manager?**
24 **A. To lead the regional sales team for**
25 **sales for carriers.**

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1 Nishimoto

2 **Q. What types of products were involved?**

3 A. Primarily -- let's see, manage modem

4 dial Internet services, PRI, collocation. It's

5 primarily the major ones that --

6 **Q. Did your position at Allegiance change?**

7 A. Yes.

8 **Q. When did it change?**

9 A. In -- let's see, it probably changed

10 from regional sales manager to director -- this is

11 a guess -- in fall of 2000, and then in, at the end

12 of last year, 2003, to senior director.

13 **Q. What were your responsibilities as**

14 **director?**

15 A. Very similar to regional sales director,

16 it was leading the sales teams.

17 **Q. During the period of 2001 to 2002 who**

18 **did you report to?**

19 A. John Dumbleton.

20 **Q. Anyone else?**

21 A. I directly reported to John Dumbleton.

22 I worked with other folks, other people, but he was

23 my direct supervisor.

24 **Q. In the same timeframe, 2001 to 2002, who**

25 **directly reported to you?**

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1 Nishimoto

2 A. CLIC, global exchange carrier.

3 **Q. And what does that mean?**

4 A. Local services, local dial services.

5 **Q. Are you familiar with KMC?**

6 A. Yes.

7 **Q. When did you first become familiar with**

8 **them?**

9 A. Probably August 2001.

10 **Q. And how did you become familiar with**

11 **them?**

12 A. I don't remember how I was introduced to

13 them, but it was within the context of being a

14 supplier for the Genuity opportunity.

15 **Q. What was the Genuity opportunity?**

16 A. To provide managed modem support

17 services.

18 **Q. In 2001 did KMC and Allegiance begin**

19 **discussions regarding a potential business**

20 **relationship?**

21 A. Yes.

22 **Q. And what was the subject of those**

23 **discussions? What was the nature of the business**

24 **relationship?**

25 A. Oh. As a supplier. KMC would be a

Page 7

1 Nishimoto

2 A. Let's see. William Henderson, sales

3 engineer; Rick Williams, sales account manager;

4 Paul Connolly, account manager; Michelle Mason,

5 sales account manager; and Frank Caligiuri and

6 Cheryl Jones. Cheryl Jones is a program manager.

7 **Q. During this 2001/2002 time period did**

8 **Peter Swenson report to you?**

9 A. He, he didn't report under me, but I

10 directed his activities.

11 **Q. Did Jeff Feinberg report to you at the**

12 **time?**

13 A. No.

14 **Q. Did you report to him at all?**

15 A. I, it's kind of like my relationship

16 with Peter. He helped, he directed a lot of my

17 daily activities, but I did, I still was under John

18 Dumbleton's group.

19 **Q. What daily activities did Jeff Feinberg**

20 **direct?**

21 A. During that time period it was mainly

22 the installation activities. We managed the

23 Genuity/KMC installations.

24 **Q. In 2001 to 2002 what was the business of**

25 **Allegiance?**

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1 Nishimoto

2 supplier to Allegiance.

3 **Q. A supplier of what?**

4 A. Primarily PRI services.

5 **Q. When did those discussions begin?**

6 A. Either in September or October of 2001,

7 I think.

8 **Q. Who initiated the discussions?**

9 A. Who specifically at KMC? Or who --

10 **Q. Yes, who specifically initiated?**

11 A. Chris Menier. I believe he contacted

12 Allegiance on a sales call.

13 **Q. Who at Allegiance did Chris Menier**

14 **contact?**

15 A. I believe initially it was John

16 Dumbleton.

17 **Q. What was your involvement in the**

18 **discussions with KMC?**

19 A. I was primarily, I was involved in the

20 negotiating team primarily from a technical and

21 operational viewpoint.

22 **Q. Who else from Allegiance was involved in**

23 **the negotiations?**

24 A. John. Jeff Feinberg. Those are the

25 primary ones.

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1 Nishimoto
 2 MR. DI CONZA: I'm going to ask the
 3 witness not to speculate. If you don't
 4 recall --
 5 A. That's the three that I can recall, John
 6 myself and Jeff.
 7 Q. Who from KMC was involved in
 8 negotiations?
 9 A. Kevin Bittner, Chris Menier, Constance
 10 Loosemore, Ken Jones, and their outside counsel.
 11 Q. Why was Allegiance in discussions with
 12 KMC for a potential business relationship?
 13 A. To provide services --
 14 MR. DI CONZA: Objection to the form.
 15 You can answer.
 16 THE WITNESS: I'm sorry?
 17 MR. DI CONZA: You can answer that if
 18 you know.
 19 A. To provide services where we didn't.
 20 Q. I'm sorry, can you read that one again.
 21 A. To provide services where we don't
 22 cover.
 23 Q. Were the discussions with KMC a direct
 24 result of Allegiance's business relationship with
 25 Genuity?

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1 Nishimoto
 2 determining what initial pricing to request?
 3 A. It was more reactive.
 4 Q. Could you describe for me how the price
 5 term under the PRI agreement changed during the
 6 negotiations with KMC.
 7 A. I really wasn't involved too much in the
 8 price negotiations.
 9 Q. Who handles the price negotiations?
 10 A. Jeff Feinberg.
 11 Q. Were you aware of a price per port
 12 threshold that Allegiance needed to meet?
 13 When was the subject of collocation
 14 first discussed between Allegiance and KMC?
 15 A. I can't recall exactly when it was -- it
 16 became part of the negotiations and I can't
 17 remember exactly.
 18 Q. At what price did Allegiance initially
 19 propose providing collocation space to KMC?
 20 A. I don't remember what the pricing
 21 proposal was for collocation.
 22 Q. Does Allegiance have standard
 23 collocation pricing?
 24 A. Yes.
 25 Q. What is that standard pricing?

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1 Nishimoto
 2 A. Yes.
 3 Q. Who was in charge of the Allegiance
 4 relationship with Genuity?
 5 A. I don't think it would be one person.
 6 MR. DI CONZA: To the extent you don't
 7 know --
 8 Q. What was your involvement in the
 9 Allegiance relationship with Genuity?
 10 A. Coordinating the technical and
 11 operational aspects of network buildout.
 12 Q. What were the initial terms of the PRI
 13 services that were discussed between Allegiance and
 14 KMC?
 15 A. What do you mean by "initial terms?"
 16 Q. At the onset of discussions regarding
 17 PRI services, did Allegiance request certain
 18 pricing from KMC?
 19 A. Yes.
 20 Q. And what was that initial pricing?
 21 A. I don't remember.
 22 Q. Who was responsible for determining that
 23 initial pricing?
 24 A. KMC.
 25 Q. Who was responsible at Allegiance for

Page 13

1 Nishimoto
 2 A. I don't -- actually, I don't know what
 3 the rate is.
 4 Q. During the 2001/2002 time period did
 5 Peter Swenson have authority to offer collocation
 6 prices?
 7 A. I don't know.
 8 Q. During this time period did you need to
 9 approve collocation pricing?
 10 A. No.
 11 MS. KAN: Can the witness just speak up
 12 a little bit.
 13 THE WITNESS: Sure.
 14 Q. During that time period did anyone need
 15 to approve collocation pricing?
 16 A. I don't know what that process was.
 17 Q. Were you involved in the negotiation of
 18 collocation pricing with KMC?
 19 A. I was in attendance. I wouldn't say I
 20 was involved.
 21 Q. What do you mean you were in attendance?
 22 A. I didn't drive the pricing part; I drove
 23 more the technical, operational pieces.
 24 Q. Who drove the pricing part?
 25 A. That would have been Jeff.

Nishimoto

Q. Were you a part of in-person meetings where collocation pricing was negotiated?

A. Yes.

Q. What was the substance of those discussions relating to collocation pricing?

A. What the ultimate price would be for the services.

Q. And what was the ultimate price?

A. It was, ended up being split for Genuity-related services and non-Genuity-related services.

Q. What was it for non-Genuity?

A. I don't remember the exact dollar figure.

Q. How did the non-Genuity prices relate to Allegiance's standard co-lo prices?

A. I believe it was kind of based on the five-year term.

Q. So you think it was the same as Allegiance's standard pricing for five-year?

A. That would be a guess. I don't know. It would be a guess. I couldn't say definitely. It would be equal to five-year pricing.

Q. And what was the pricing for Genuity-

Nishimoto

related services?

A. For the cabinets they were zero dollars.

Q. Were these prices the collocation prices that were initially discussed between the parties?

A. No.

Q. How did they compare to the prices that were initially discussed?

A. I don't remember the, the dollar figure, but there was a charge for Genuity-related collocation services.

Q. When did the price for Genuity-related services change?

A. I don't remember exactly. I couldn't tell you.

Q. Do you remember Generally when they were?

A. Towards the end of the negotiations.

Q. Why did it change to nothing for the Genuity-related services?

A. I don't know.

Q. Did you ever discuss with anyone from Allegiance why KMC was to be charged nothing for space related to Genuity services?

A. Yes, with Jeff Feinberg.

Nishimoto

Q. What was the substance of that discussion?

A. What was, you know, what was the actual price to KMC for the services. He said it would be zero.

Q. Did you ask him why?

A. Yes.

Q. And what did he say?

A. I don't remember.

MR. DI CONZA: To the extent you don't recall, if you don't recall you don't have to answer.

A. Yeah, I don't remember exactly what he said.

Q. What did he say in substance?

A. I'd be guessing. I think -- I really don't remember.

Q. Did he tell you it related to pricing on the PRI agreement?

A. I'm sorry?

Q. Did he tell you that it related to pricing under the PRI agreement?

A. Not that I recall. I don't remember a direct --

Nishimoto

Q. Was there anyone else present when you had this conversation with Jeff Feinberg?

A. No.

Q. Where did this discussion take place?

A. I don't remember where we were at the time.

Q. Was it in person?

A. Yes.

(Telephone interruption.)

(Mr. Schulten entered the room.)

(Record read.)

Q. Approximately when did this discussion take place?

MR. DI CONZA: I believe that was asked and answered.

A. It's toward the end of the negotiations.

Q. Did you have any discussions with anyone else at Allegiance about the fact that KMC was to be provided collocation space for free with respect to Genuity-related services?

A. Probably not. I was really concentrating more on the technical aspects, less so the business aspects.

Q. Did Allegiance ask for a new design with

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1 Nishimoto
 2 respect to PRI services in February of 2002?
 3 A. A new design?
 4 Q. Was there anything about the PRI
 5 services that Allegiance required from KMC that
 6 changed in February of 2002?
 7 A. Nothing about the design itself of
 8 services. Schedule of implementation was
 9 discussed.
 10 Q. What changed with respect to the
 11 schedule of implementation?
 12 MR. DI CONZA: Objection to form. I
 13 don't believe he testified that there was a
 14 change in the schedule.
 15 THE WITNESS: No.
 16 Q. What about the schedule of
 17 implementation did you discuss?
 18 A. When to deliver certain markets.
 19 Q. Would this schedule of implementation
 20 increase costs to KMC?
 21 A. Only for their network expense that
 22 would be used earlier than later.
 23 Q. Did you have any discussions with KMC in
 24 February 2002 relating to increased capital
 25 expenses?

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1 Nishimoto
 2 the terms of the document?
 3 A. Yes.
 4 Q. What was your involvement?
 5 A. Concentrating on the technical and
 6 operational aspects.
 7 Q. Were you involved in the revisions of
 8 this document?
 9 A. Yes.
 10 Q. What revisions were you involved in?
 11 A. All of them.
 12 Q. Are there -- let me start over.
 13 Did you provide comments on any
 14 provision of this document?
 15 A. Yes.
 16 Q. What provisions did you provide comments
 17 on?
 18 A. Typically it would be the, anything to
 19 do with a technical aspect or an operational aspect
 20 of service.
 21 Q. Who drafted the PRI agreement?
 22 A. A committee.
 23 MR. DI CONZA: To the extent you recall.
 24 A. I'm trying to remember where initially
 25 it came from. I know that Allegiance and our team

Page 19

1 Nishimoto
 2 A. No, not that I can remember.
 3 Q. Did you have any conversations with KMC
 4 in February 2002 regarding extra cross-connects
 5 that would be required under the PRI?
 6 A. Yes.
 7 Q. What did you discuss?
 8 A. Their requirements for cross-connects
 9 and estimated quantity.
 10 Q. And was the number of cross-connects
 11 increased?
 12 A. No, it correlates to the services they
 13 provide.
 14 Q. I'm going to show you what's been marked
 15 KMC 1. You can take a look at that document and
 16 tell me what it is.
 17 A. The PRI interface services agreement.
 18 Q. Are you familiar with the terms of that
 19 agreement?
 20 A. Yes.
 21 Q. Have you read that agreement before?
 22 A. Yes.
 23 Q. When did you read it?
 24 A. During the negotiations.
 25 Q. Were you involved in the negotiation of

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1 Nishimoto
 2 had, I believe, created the framework for us.
 3 Q. Do you recall anyone in particular?
 4 A. It would be myself, Randall Hand, Jeff
 5 Feinberg, John Dumbleton, our outside counsel and
 6 Mark Trebnowski.
 7 Q. What was the purpose of the PRI
 8 agreement?
 9 A. To provide PRI services for KMC to
 10 provide PRI services.
 11 Q. I'm going to hand you what's been marked
 12 KMC Exhibit 3.
 13 A. Okay.
 14 Q. If you can, take a look at that and tell
 15 me what that is.
 16 A. The collocation agreement.
 17 Q. Are you familiar with the terms of this
 18 agreement?
 19 A. Yes.
 20 Q. Have you read this agreement before?
 21 A. Yes.
 22 Q. When have you read it?
 23 A. Definitely during the negotiations.
 24 Q. Were you involved in the negotiation of
 25 the terms of the document?

Page 22

1 Nishimoto

2 A. Yes.

3 Q. What was your involvement?

4 A. Primarily the technical and operational

5 aspects of the service.

6 Q. Were you involved in the revision of the

7 document?

8 A. Yes.

9 Q. What, what provisions of the document

10 did you provide comments to, if any?

11 A. Anything to do with operational part of

12 the agreement.

13 Q. Who drafted the co-lo agreement?

14 A. This is based on a standard Allegiance

15 agreement, so I don't know who drafted it.

16 Q. Did Allegiance have more than one type

17 of standard collocation agreement?

18 A. Not that I'm aware of.

19 (KMC Exhibit 5, E-Mail dated January 22,

20 2002 from John Nishimoto to Christopher

21 Menier, with Attachments, Bates Stamped KMC

22 000768-771, marked for identification.)

23 Q. Do you recognize KMC Exhibit 5?

24 A. Yes.

25 Q. And is this an e-mail that you sent to

Page 24

1 Nishimoto

2 A. She would have. I think this is this

3 one.

4 (KMC Exhibit 6, E-Mail dated January 22,

5 2002 from John Nishimoto to Kate Demro and

6 Randall Hand, with Attachments, marked for

7 identification.)

8 Q. If you can, tell me if you recognize KMC

9 Exhibit 6.

10 A. Yes, I do.

11 Q. And what is that?

12 A. It's an e-mail, e-mail correspondence.

13 Q. And by the top e-mail you request Kaete

14 to send you a copy of the standard co-lo agreement

15 because KMC is a vendor?

16 A. I'm sorry?

17 MS. JOHNS: Could you read the question.

18 (Record read.)

19 MR. DI CONZA: Objection as to the form

20 of that question.

21 Q. Do you understand the question?

22 MR. DI CONZA: Do you understand the

23 question?

24 THE WITNESS: No.

25 A. Can you rephrase it.

Page 23

1 Nishimoto

2 Chris Menier of KMC?

3 A. Yes. Yes.

4 Q. And the attachment to the e-mail?

5 A. Mm hmm.

6 Q. Was this the first draft of the

7 collocation agreement that was sent to KMC?

8 A. I'm trying to remember if, if we had a

9 different agreement or not before this, because it

10 says, "We've really simplified this agreement."

11 MR. DI CONZA: To the extent you recall.

12 I don't want the witness to be speculating.

13 THE WITNESS: Okay.

14 A. I don't know if this was the first

15 draft.

16 Q. The attachment to the e-mail is based on

17 a standard agreement of Allegiance's?

18 A. Yes.

19 Q. I'm probably going to pronounce this

20 name incorrectly, so I apologize now. Kaete Demro?

21 A. Kaete Demro, yes.

22 Q. Who is Kaete Demro?

23 A. She works in our legal department.

24 Q. Did she provide you with a standard

25 collocation agreement to be provided to KMC?

Page 25

1 Nishimoto

2 Q. In the second e-mail Kaete asks you if

3 the co-lo arrangement is being done because KMC is

4 a vendor?

5 A. Yes.

6 Q. And "It will be easier for us to order

7 services for them if they're collocated with us,"

8 correct?

9 A. Yes.

10 Q. And in your response you say yes,

11 correct?

12 A. Yes. That's correct.

13 Q. And you also ask her to forward to you

14 the alternate agreement, correct?

15 A. Yes.

16 Q. That alternate agreement being the

17 Allegiance standard co-lo agreement, correct?

18 A. Yes.

19 Q. Going back to KMC Exhibit 3, the co-lo

20 agreement.

21 A. Mm hmm?

22 Q. What was the purpose of this agreement?

23 A. Allegiance would be providing

24 collocation space to KMC.

25 Q. Why was Allegiance going to provide

1 Nishimoto

2 collocation space to KMC?

3 A. So that KMC could locate their
4 equipment, collocate their equipment in our
5 facilities.

6 Q. Why was it necessary for KMC to
7 collocate in Allegiance's facilities?

8 A. Initially to provide services to
9 Genuity, for us to provide services to Genuity.

10 Q. Were you aware that KMC would not
11 execute the PRI agreement without a collocation
12 agreement?

13 A. I don't remember that specifically.

14 Q. Did anyone from KMC ever tell you that
15 KMC would only execute both documents at the same
16 time?

17 MR. DI CONZA: Counsel, that's been
18 asked and answered. He doesn't remember.

19 A. I don't remember specifically, no.

20 Q. What do you remember generally?

21 A. I don't remember those conversations.

22 (Recess taken.)

23 (KMC Exhibit 7, E-Mail dated May 28,
24 2003 from John Nishimoto to Kaete Demro and
25 Randall Hand, with Attachments, marked for

1 Nishimoto

2 identification.)

3 Q. If you can, take a look at that document
4 and tell me if you recognize it.

5 A. Yes.

6 Q. And what is it?

7 A. It looks like an e-mail distributing the
8 final, final copies of the collocation agreement.

9 Q. And you received this e-mail?

10 A. Apparently so, yes.

11 Q. If you'll read the last sentence of the
12 e-mail from Mikhael Vitenson.

13 A. Okay.

14 Q. Does reading this e-mail refresh your
15 recollection that KMC told you that they would not
16 execute the PRI agreement without the co-lo
17 agreement?

18 A. No, not really. I mean, I see what it
19 says, but at the time I don't recall it being an
20 issue.

21 (KMC Exhibit 8, E-Mail dated February 7,
22 2002 from Mikhael Vitenson, with Attachments,
23 Bates Stamped KMC 000339-340, marked for
24 identification.)

25 Q. After you've had a chance to look at KMC

1 Nishimoto

2 Exhibit 8, if you will, tell me what that is.

3 A. This is an e-mail correspondence from
4 KMC, Allegiance and Piper Rudnick.

5 Q. And did you receive this e-mail?

6 A. I'm on here, so yes.

7 Q. If you'll read the last sentence of the
8 e-mail from Mikhael Vitenson.

9 A. "We should be ready to execute both the
10 service agreement and the collocation agreement at
11 the same time."

12 Q. Does this e-mail refresh your
13 recollection that KMC told you that it would not
14 execute the PRI agreement without the collocation
15 agreement?

16 MR. DI CONZA: Objection to form.

17 A. Yeah, just like the other one, I, I
18 don't remember it being an issue.

19 Q. Would Allegiance have entered into the
20 collocation agreement with KMC without the PRI
21 agreement?

22 MR. DI CONZA: Objection. It calls for
23 speculation.

24 Q. You can answer the question.

25 MR. DI CONZA: To the best of your

1 Nishimoto

2 knowledge.

3 A. Would we have entered into, would we
4 have entered into a collocation agreement with them
5 without the PRI? Yes, that's -- it would be
6 basically hypothetical, depending on what else they
7 would want to do.

8 Q. Would Allegiance have entered into the
9 collocation agreement with KMC without any other
10 business with KMC?

11 MR. DI CONZA: Objection. Again calls
12 for speculation.

13 A. Typically we don't enter into
14 collocation agreements without other telecom
15 services.

16 Q. Would the collocation agreement without
17 the PRI agreement have been profitable for
18 Allegiance?

19 A. Yes.

20 Q. How?

21 A. If they had purchased other services
22 from us in addition to the collocation they would
23 be paying for.

24 Q. Would the collocation agreement without
25 the PRI agreement have been profitable for

1 Nishimoto
 2 Allegiance if KMC had not purchased other services?
 3 A. If they would pay for the collocation
 4 services, then yes.
 5 Q. Under the collocation agreement
 6 Allegiance was to provide collocation space to KMC
 7 at no cost, correct?
 8 A. For Genuity-related services only, but
 9 for all others they were paid.
 10 Q. Was KMC required to use Allegiance
 11 collocation space to service third parties?
 12 A. Required? No.
 13 Q. If you'll turn to Exhibit A to the
 14 collocation agreement.
 15 A. Mm hmm?
 16 Q. Are you familiar with this exhibit?
 17 A. Yes.
 18 Q. Earlier we talked about pricing under
 19 the collocation agreement for services to not -
 20 non-Genuity services.
 21 A. Mm hmm.
 22 Q. Are those prices reflected in the chart
 23 underneath paragraph two?
 24 A. Yes.
 25 Q. How did these prices compare to

1 Nishimoto
 2 let me read through it. Okay.
 3 Q. Is this an e-mail that you sent to Chris
 4 Menier?
 5 A. Apparently so, yes.
 6 Q. And the pricing that you refer to in
 7 that e-mail, is that the pricing in Exhibit C to
 8 the collocation agreement?
 9 A. Yes, for the racks, yes.
 10 Q. And you refer to that pricing in your
 11 e-mail is better than 50%?
 12 A. If so, the pricing in the addendum is
 13 better than 50%, yes.
 14 Q. Has Allegiance ever sent an invoice to
 15 KMC under the collocation agreement with respect to
 16 third parties?
 17 A. I don't know.
 18 Q. Are you aware if KMC provides service to
 19 third parties from equipment in Allegiance
 20 collocation space?
 21 A. I could only assume so. I don't know.
 22 Q. Have you had any discussions with anyone
 23 at Allegiance regarding whether or not KMC uses
 24 Allegiance collocation space to service third
 25 parties?

1 Nishimoto
 2 Allegiance's standard co-lo pricing?
 3 A. I believe the power and the cross-
 4 connects are standard, are the standard pricing.
 5 Q. How about the monthly recurring charges?
 6 A. That depends on the deal, and, and
 7 there's a pretty wide range of what the monthly
 8 recurring costs, charges for collocation would be
 9 for any particular customer.
 10 (Record read.)
 11 Q. Are these monthly recurring charges 50%
 12 of Allegiance's standard collocation pricing?
 13 A. I don't know what the standard is. It
 14 would be a guess.
 15 Q. Have you ever told anyone that the
 16 prices reflected in the chart on Exhibit C was 50%?
 17 A. Possibly. I don't, I don't remember.
 18 (KMC Exhibit 9, E-Mail dated January 30,
 19 2002 from John Nishimoto to Christopher
 20 Menier, with Attachments, Bates Stamped KMC
 21 006128-131, marked for identification.)
 22 A. Okay.
 23 Q. If you'll look at KMC Exhibit 9, tell me
 24 if you recognize this document.
 25 A. I don't remember it specifically, but

1 Nishimoto
 2 A. Yes.
 3 Q. Who have you had conversations with?
 4 A. John Dumbleton, Mark Trebnowski. John
 5 Lafleur, operations.
 6 Q. Anyone else?
 7 A. Not that I can recall.
 8 Q. What did you discuss with Mr. Dumbleton?
 9 A. Wondering if they did in fact, were in
 10 fact using the space for other non-Genuity
 11 business.
 12 Q. When did you have that conversation?
 13 A. Fall of last year, summer of last year,
 14 fall of last year.
 15 Q. What prompted that conversation?
 16 A. John asked me if I knew.
 17 Q. Who is John Lafleur?
 18 A. He's in operations. Director of
 19 operations quality, I think, is his title.
 20 Q. What conversations did you have with
 21 him?
 22 A. Asked him if he knew if they were using
 23 the space for other non-Genuity services.
 24 Q. What did he say?
 25 A. We don't have any visibility into their

<p style="text-align: right;">Page 34</p> <p>1 Nishimoto</p> <p>2 network, so we can't, we can't tell.</p> <p>3 Q. When did you have this conversation with</p> <p>4 him?</p> <p>5 A. It was the same time period John asked</p> <p>6 me, so then I asked -- John Dumbleton asked me, so</p> <p>7 then I asked John Lafleur, and then I'm sure I</p> <p>8 replied back to Dumbleton with what Lafleur had</p> <p>9 said.</p> <p>10 Q. Did you have any conversations with</p> <p>11 anyone outside of Allegiance?</p> <p>12 A. Yeah, I've asked folks at KMC, and they</p> <p>13 basically said they'll get back to me.</p> <p>14 Q. Has Allegiance ever entered into a</p> <p>15 collocation agreement where it agreed to provide</p> <p>16 collocation space at no cost?</p> <p>17 A. I don't know.</p> <p>18 Q. Have you ever referred to the</p> <p>19 collocation contract as part of the overall network</p> <p>20 services contract with KMC?</p> <p>21 A. I don't -- no, I don't think so. I</p> <p>22 don't know.</p> <p>23 (KMC Exhibit 10, E-Mails, marked for</p> <p>24 identification.)</p> <p>25 Q. At the beginning of the deposition you</p>	<p style="text-align: right;">Page 35</p> <p>1 Nishimoto</p> <p>2 mentioned that you reviewed some old e-mails that</p> <p>3 you forwarded?</p> <p>4 A. Yes.</p> <p>5 Q. Are these those e-mails?</p> <p>6 A. Not all of these, no.</p> <p>7 Q. These are some of the e-mails you</p> <p>8 forwarded?</p> <p>9 A. I don't think so, actually. I don't</p> <p>10 think I had these still saved. I think these must</p> <p>11 have come from somebody else. I recognize this, I</p> <p>12 think, on the -- gosh, I don't know what page it</p> <p>13 is. It's, the e-mail is between Robert Williams, a</p> <p>14 copy to Gary Kemp and Andy Blusiewicz. These are</p> <p>15 all the operations guys. I do recognize this one.</p> <p>16 Q. If you'd go to what is the 13th page in</p> <p>17 from the front.</p> <p>18 A. Yes. Okay.</p> <p>19 Q. Near the, just below halfway down the</p> <p>20 page, an e-mail from you to Peter Swenson and</p> <p>21 Andrew Blusiewicz.</p> <p>22 A. Okay.</p> <p>23 Q. Where you wrote, "We have a collocation</p> <p>24 contract as part of the overall network services</p> <p>25 contract," do you see that?</p>
<p style="text-align: right;">Page 36</p> <p>1 Nishimoto</p> <p>2 A. Mm hmm. Mm hmm.</p> <p>3 Q. Is that an e-mail you wrote?</p> <p>4 A. Apparently so, yes. It's contradicted</p> <p>5 here or else, let's see, "If you recall, the KMC</p> <p>6 collocation contract is separate from the Services</p> <p>7 Contract," so -- the one to the operations guys is</p> <p>8 really from an operational point of view.</p> <p>9 Q. Are you familiar with KMC's motion for</p> <p>10 an order determining that the infrastructure</p> <p>11 interconnection agreement is integrated with the</p> <p>12 primary rate interface services agreement?</p> <p>13 A. I'm not familiar with it, but I've heard</p> <p>14 it exists.</p> <p>15 Q. Have you read it?</p> <p>16 A. No.</p> <p>17 Q. Have you read the affidavit of Constance</p> <p>18 Loosemore submitted in connection with that motion?</p> <p>19 A. No.</p> <p>20 Q. Have you read the objection of</p> <p>21 Allegiance and the creditors' committee in</p> <p>22 opposition to that motion?</p> <p>23 A. No.</p> <p>24 (Discussion off the record.)</p> <p>25 MS. JOHNS: I have no further questions.</p>	<p style="text-align: right;">Page 37</p> <p>1 Nishimoto</p> <p>2 MR. DI CONZA: Great.</p> <p>3 (Time noted: 3:17 p.m.)</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

1
2 CERTIFICATE
3

4 STATE OF NEW YORK)
5 ss
6 COUNTY OF NEW YORK)
7

8 I, JAMES W. JOHNSON, a Registered
9 Professional Reporter and Notary Public within
10 and for the State of New York, do hereby
11 certify:

12 That JOHN NISHIMOTO, the witness whose
13 deposition is hereinbefore set forth, was duly
14 sworn by me and that such deposition is a true
15 record of the testimony given by such witness.

16 I further certify that I am not related
17 to any of the parties to this action by blood
18 or marriage and that I am in no way interested
19 in the outcome of this matter.

20 IN WITNESS WHEREOF I have hereunto set
21 my hand this 18th day of May 2004.
22
23

24 JAMES W. JOHNSON
25 Registration #01J05000925
Commission Expires 9/4/2006

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<p>says 23:10 27:19 schedule 18:8,11,14 18:16,19 school 5:5,7 Schulten 2:12 17:11 science 5:6 sealing 3:5 second 25:2 see 6:3,9 7:2 27:18 35:25 36:5 SEGAL 2:20,20 send 24:14 senior 6:12 sent 22:25 23:7 32:3 32:14 sentence 27:11 28:7 separate 36:6 September 9:6 service 20:20 22:5 28:10 30:11 32:18 32:24 services 6:4 8:4,4,17 9:4 10:13,19,21 11:13,17 14:8,11,12 15:2,11,13,20,24 16:5 17:21 18:2,5,8 19:12,17 21:9,10 25:7 26:8,9 29:15 29:21 30:2,4,8,19 30:20 33:23 34:20 35:24 36:6,12 set 38:13,20 Seventh 1:12 2:16 show 19:14 Sidley 1:11 2:14 signed 3:13,15 similar 6:15 simplified 23:10 some 4:17 35:2,7 somebody 35:11 sorry 10:16,20 16:21 24:16 SOUTHERN 1:3 space 12:19 15:24 17:20 25:24 26:2 30:6,11 32:20,24 33:10,23 34:16 speak 13:11 specifically 9:9,10 26:13,19 31:25 speculate 10:3 speculating 23:12 speculation 28:23 29:12 split 14:10 ss 38:5 Stamped 22:21 27:23 31:20 standard 12:22,25 14:17,21 22:14,17</p>	<p>23:17,24 24:14 25:17 31:2,4,4,12 31:13 start 20:12 starting 5:5 State 1:16 38:4,10 STATES 1:2 still 7:17 35:10 STIPULATED 3:3,7 3:11 STRAUSS 2:5 subject 8:22 12:13 submitted 36:18 subscribed 37:8 substance 14:5 16:2 16:16 summer 33:13 supervisor 6:23 supplier 8:14,25 9:2,3 support 8:16 sure 13:13 34:7 Swenson 7:8 13:5 35:20 sworn 3:12,15 4:3 37:8 38:14</p> <p>T T 2:12 4:2 38:2,2 take 17:5,14 19:15 21:14 27:3 taken 26:22 talked 30:18 team 5:24 9:20 20:25 teams 6:16 technical 9:20 11:10 13:23 17:23 20:5,19 22:4 telecom 1:6 2:15 29:14 Telephone 17:10 tell 15:15 16:19,22 19:16 21:14 24:8 26:14 27:4 28:2 31:23 34:2 term 12:5 14:19 terms 11:12,15 19:18 20:2 21:17,25 testified 4:4 18:13 testimony 38:15 their 10:10 18:21 19:8 26:3,4 33:25 think 9:7 11:5 14:20 16:17 24:2 33:19 34:21 35:9,10,10,12 third 30:11 32:16,19 32:24 three 10:5 threshold 12:12 through 32:2 time 3:9 7:7,12,21</p>	<p>13:4,8,14 17:7 26:16 27:19 28:11 34:5 37:3 timeframe 6:24 title 33:19 today's 4:8 TOGUT 2:20 told 27:15 28:13 31:15 top 24:13 toward 17:17 Towards 15:18 transcripts 5:2 Trebnowski 21:6 33:4 trial 3:10 true 38:14 trying 20:24 23:8 Tuesday 1:13 turn 30:13 two 30:23 type 22:16 types 6:2 Typically 20:18 29:13</p> <p>U ultimate 14:7,9 under 4:5 7:9,17 12:5 16:23 19:5 30:5,18 32:15 underneath 30:23 understand 24:21,22 UNITED 1:2 University 5:9 Unsecured 2:7 use 30:10 used 18:22 uses 32:23 using 33:10,22</p> <p>V vendor 24:15 25:4 Very 6:15 view 36:8 viewpoint 9:21 Virginia 5:9 visibility 33:25 Vitenson 27:12,22 28:8 39:20</p> <p>W W 1:14 38:8,23 waived 3:6 want 23:12 29:7 wasn't 12:7 way 38:18 were 4:21 5:22 6:2,13 10:23 11:12,13 12:11 13:17,21 14:2 15:3,4,5,8,17 17:6 19:25 20:7,10 21:24</p>	<p>22:6 26:10 30:9 33:9,22 We've 23:10 WHEREOF 38:20 wholesale 5:20,23 wide 31:7 William 7:2 Williams 7:3 35:13 witness 4:3 10:3,16 13:11,13 18:15 23:12,13 24:24 38:12,15,20 39:4 Wondering 33:9 Wood 1:11 2:14 worked 6:22 working 5:16 works 23:23 wouldn't 13:19 wrote 35:23 36:3</p> <p>X X 39:3</p> <p>Y Yeah 16:14 28:17 34:12 year 5:11 6:12 33:13 33:13,14 York 1:3,12,12,16 2:9 2:9,17,17,23,23 38:4,6,10</p> <p>Z zero 15:3 16:6</p> <p># #01J05000925 38:24</p> <p>0 000339-340 27:23 000768-771 22:22 39:12 006128-131 31:21 39:23 03-13057 1:8</p> <p>1 1 19:15 10 34:23 39:24 10019 2:17 10022-2524 2:9 10119 2:23 11 1:8 12:56 1:14 13th 35:16 18 1:13 18th 38:21 1999 5:18</p> <p>2</p>	<p>2000 6:11 2001 6:17,24 7:24 8:9 8:18 9:6 2001/2002 7:7 13:4 2002 6:17,24 7:24 18:2,6,24 19:4 22:20 24:5 27:22 31:19 39:10,13,19 39:21 2003 6:12 26:24 39:16 2004 1:13 37:10 38:21 22 22:19 24:4 39:10 39:12,13 24 39:15 26 39:18 27 39:20 28 26:23 39:16</p> <p>3 3 21:12 25:19 3:17 37:3 30 31:18 39:21 31 39:23 34 39:24</p> <p>4 4 39:5</p> <p>5 5 22:19,23 39:10 50% 31:11,16 32:11 32:13 590 2:8</p> <p>6 6 24:4,9 39:13</p> <p>7 7 26:23 27:21 39:16 39:19 787 1:11 2:16</p> <p>8 8 27:21 28:2 39:19 85 5:15</p> <p>9 9 31:18,23 39:21 9/4/2006 38:24 99 5:13</p>
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EXHIBIT E

Kane, Dana P.

From: Nishimoto, John [John.Nishimoto@allegiancetelecom.com]
Sent: Tuesday, January 22, 2002 4:57 PM
To: Menier, Christopher
Subject: RE: colo agreement

Chris,

We've really simplified this agreement... it's actually not our entire MSA since this is in support of services we are (hopefully) buying from you... I need Justen to answer some questions (Peter Swenson's driving this) before I can provide you detailed pricing.

Anyway, take a look at the agreement, and I'll follow up with the pricing addendum.

John

<<KMC_Algr Infrastructure Agreement v1.doc>>

> -----Original Message-----

> From: Menier, Christopher [SMTP:Christopher.Menier@KMCTELECOM.COM]

> Sent: Monday, January 21, 2002 3:15 PM

> To: John Nishimoto (E-mail)

> Subject: colo agreement

>

> John,

>

> Can you please send over the colo agreement ASAP? We would like to start

> reviewing so it can be executed as well.

>

> Thank you,

>

> Chris Menier

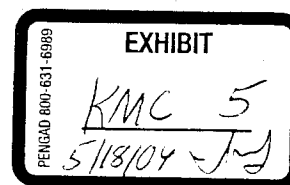
> Director of National Markets

> KMC Telecom, Inc.

> 301-429-9702 office

> 301-429-5830 fax

> 202-549-9100 cell



5/11/2004

KMC 000768



allegiancetelecom, inc.

INFRASTRUCTURE INTERCONNECTION AGREEMENT

This Infrastructure Interconnection Agreement (the "Agreement") is made by and between Allegiance Telecom Company Worldwide, a Delaware corporation with offices at 9201 Central Expressway, Dallas, TX 75231 ("Allegiance") and a corporation with offices at ("Colocator/Service Provider")(collectively, the "Parties").

In order to provide certain telecom services that Allegiance may request from Colocator/Service Provider, the Parties have determined that it is necessary to locate certain equipment owned or leased by Colocator/Service Provider in the space owned or leased by Allegiance (the "Space", as more fully described on Exhibit A hereto) upon the terms and conditions set forth in this Agreement.

1. **Term:** This Agreement shall begin on the effective date of that certain [name of agreement with Service Provider to provide services], dated as of (the "Service Agreement") and shall continue for the same term as the term under the Service Agreement (for example, if the term of the Service Agreement ends on June 30, 2002, for whatever reason, this Agreement also terminates on that date). Thereafter, this Agreement will automatically continue on a month-to-month basis until terminated by either Party upon thirty (30) days prior written notice to the other. In addition, Allegiance shall have the right to terminate this Agreement upon advance written notice. Colocator/Service Provider shall work with Allegiance to find alternative space and to install the Equipment at such new space, if reasonably requested by Allegiance. The term of this Agreement is referred to herein as the "Term."
2. **Ownership and Removal of Equipment:** Colocator/Service Provider represents and warrants that the equipment listed and identified on Exhibit A to this Agreement (as such equipment listed on Exhibit A is updated from time to time, the "Equipment") is owned by Colocator/Service Provider (or if not owned, is leased from the party identified on Exhibit A). If Colocator/Service Provider does not remove its Equipment from the Space within thirty (30) days after the end of the Term, at the option of Allegiance, it will be conclusively presumed that Colocator/Service Provider abandoned its Equipment under this Agreement, and Allegiance may sell or keep such Equipment. Any damage caused to the Space by Colocator/Service Provider's employees, agents or representatives during the removal of such property shall be promptly repaired by Colocator/Service Provider at its expense.
3. **Access to Space:** Colocator/Service Provider shall be permitted reasonable access to the space. Access requests are initiated by calling Allegiance's NOCC at 1-800-459-8496.
4. **Permitted Use of the Space:** Colocator/Service Provider shall be permitted to use the Space only for placement and maintenance of the Equipment for the benefit of Allegiance. Colocator/Service Provider shall abide by any and all rules, regulations, laws and access requirements governing the Equipment, use of the Equipment and access to such Equipment and Space. Colocator/Service Provider will affix a plaque or other identification (in a form approved by Allegiance) to the Equipment reasonably necessary to identify such Equipment and which shall include a list of Colocator/Service Provider emergency contacts with telephone numbers.
5. **Responsibilities:** Colocator/Service Provider will design, test, maintain and repair the Equipment in the Space. Colocator/Service Provider shall maintain the Space in an orderly and safe condition, and shall return the Space to Allegiance at the conclusion of the Term in the same condition (reasonable wear and tear excepted) as when such Space was provided to Colocator/Service Provider. Colocator/Service Provider shall be responsible for all costs and expenses associated with any installation, maintenance, adds, moves or changes to the Equipment. Colocator/Service Provider shall be responsible for any costs, liabilities, damages or claims caused by the Equipment or agents, employees or representatives of Colocator/Service Provider and Colocator/Service Provider shall indemnify Allegiance for the same.
6. **Insurance:** Colocator/Service Provider shall, at its sole cost and expense, procure, maintain, and keep in force insurance with coverage limits not less than those set forth below:
 - A. Worker's compensation insurance as required by law.

B. Employer's liability insurance, for bodily injuries and deaths, with limits of \$500,000 per occurrence.

C. Commercial general liability insurance, covering claims for bodily injury, death and property damage, including comprehensive form, premises and operations, independent contractors, products and completed operations, personal injury, contractual, and broad form property damage liability coverage, with limits of \$1,000,000 per occurrence and general aggregate of \$2,000,000 or an equivalent limit provided by an "umbrella" insurance policy.

All such policies of insurance shall provide that the same shall not be canceled nor the coverage modified nor the limits changed without first giving thirty (30) days prior written notice to Allegiance. No such cancellation, modification or change shall affect Colocator/Service Provider's obligation to maintain the insurance coverage required by this Agreement.

7. **No liens:** If any mechanics lien or other liens shall be filed against the property of Allegiance, the Space or the facilities in which the Space is located, Colocator/Service Provider shall, within fifteen (15) days after receipt of written notice from Allegiance, either pay such lien or cause the same to be bonded off Allegiance's property in the manner reasonably requested by Allegiance. Colocator/Service Provider shall also defend on behalf of Allegiance, at Colocator/Service Provider's sole cost and expense, any action, suit or proceeding which may be brought for the enforcement of such liens and Colocator/Service Provider shall pay any damage and discharge any judgment entered thereon.
8. **General Provisions:** Allegiance does not make any representations or warranties hereunder. This Agreement shall be governed by the domestic law of the State of Illinois without regard to its choice of law principles. This Agreement (including Exhibit A attached hereto) is the complete agreement of the Parties and supersedes any prior or contemporaneous agreements or representations, whether oral or written, with respect to the subject matter hereof. If any paragraph or clause of this Agreement shall be held to be invalid or unenforceable by any body or entity of competent jurisdiction, then the remainder of the Agreement shall remain in full force and effect. No amendment to this Agreement will be valid unless each such amendment is accepted in writing by an authorized representative of both Parties. No waiver of any of the provisions of this Agreement shall be binding unless it is in writing and signed by the Party making the waiver. No waiver shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, and no waiver shall be deemed, or shall constitute, a continuing waiver.

In Witness Whereof, the Parties have signed this Agreement and the individuals signing below represent that they have the full legal authority to enter into this Agreement for and on behalf of the respective Parties.

COLOCATOR/SERVICE PROVIDER:

By: _____
Name: _____
Its: _____

ALLEGIANCE TELECOM COMPANY WORLDWIDE:

By: _____
Name: _____
Its: _____

EXHIBIT A TO
INFRASTRUCTURE INTERCONNECTION AGREEMENT
DESCRIPTION OF COLOCATOR/SERVICE PROVIDER'S EQUIPMENT

Equipment Type	Serial Number	Owned by Colocator/Service Provider, unless leased by the party identified below (with address and phone information)

DESCRIPTION OF SPACE:

The initial Space where the Equipment is located:

EXHIBIT F

From: Nishimoto, John
Sent: Wednesday, May 28, 2003 1:31 PM
To: Demro, Kaete; Hand, Randall
Subject: FW: KMC/Allegiance; Infrastructure Interconnection Agreement (Collo)

-----Original Message-----

From: Vitenson, Mikhael [SMTP:mvitenson@kelleydrye.com]
Sent: Friday, February 08, 2002 5:38 PM
To: 'Nishimoto, John'; 'Hand, Randall'
Cc: 'Christopher Menier [Christopher.Menier@KMCTELECOM.COM] (E-mail)'; 'Jones, Ken'; 'Davis, Justen J.'
Subject: KMC/Allegiance; Infrastructure Interconnection Agreement (Collo)

All:

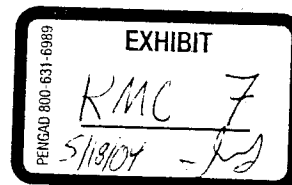
Attached please find the final Execution Copy of the above captioned agreement. We are enclosing both a clean copy and a copy to mark the changes made from the draft we circulated yesterday (for technical reasons, only the clean version includes the diagram set forth in Exhibit A). As discussed, we made the change requested by Allegiance in Section 3(a). In addition, we made several non-substantive clean-up changes. It is our understanding that there are no further open issues between KMC and Allegiance regarding the above captioned Agreement and that it is ready for execution pending resolution of the PRI Services Agreement.

<<Clean Version>> <<Blacklined Version>>
Regards,

Mikhael Vitenson, Esq.
Kelley Drye & Warren LLP
101 Park Ave.
New York, NY 10178
Tel: (212) 808-7845
Fax: (212) 808-7897

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Sent: Wednesday, May 28, 2003 1:31 PM
To: Demro, Kaete; Hand, Randall
Subject: FW: KMC/Allegiance; Infrastructure Interconnection Agreement (Collo)

-----Original Message-----

From: Vitenson, Mikhael [SMTP:mvitenson@kelleydrye.com]
Sent: Friday, February 08, 2002 5:38 PM
To: 'Nishimoto, John'; 'Hand, Randall'
Cc: 'Christopher Menier [Christopher.Menier@KMCTELECOM.COM] (E-mail)'; 'Jones, Ken'; 'Davis, Justen J.'
Subject: KMC/Allegiance; Infrastructure Interconnection Agreement (Collo)

All:

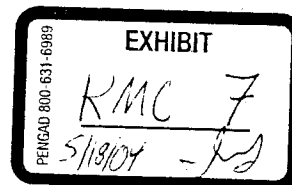
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<<Clean Version>> <<Blacklined Version>>
Regards,

Mikhael Vitenson, Esq.
Kelley Drye & Warren LLP
101 Park Ave.
New York, NY 10178
Tel: (212) 808-7845
Fax: (212) 808-7897

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damage arising in any way from its use.

EXHIBIT G

From: Vitenson, Mikhael
Sent: Monday, February 11, 2002 7:35 PM
To: 'karen.o'connor@piperrudnick.com'
Subject: EXECUTION COPY of Allegiance/KMC PRI Services Agreement
Attach: eff1DB4.tif

Karen:

Per our telephone conversation, attached please find a faxed copy of the executed signature pages of the PRI Services Agreement and of the Infrastructure Interconnection Agreement between KMC Telecom XI, LLC and Allegiance Telecom Company Worldwide. It is our understanding that you are in possession of the counterpart signature pages of the above mentioned agreements executed by Allegiance and that you will forward such counterparts to us shortly. The effectiveness of the attached signatures is contingent upon our receipt of the corresponding counterparts from Allegiance.

Should you have any questions, please do not hesitate to call me.

Regards,

Mikhael Vitenson, Esq.
Kelley Drye & Warren LLP
101 Park Ave.
New York, NY 10178
Tel: (212) 808-7845
Fax: (212) 808-7897

-----Original Message-----

From: Fax Gateway
Sent: Monday, February 11, 2002 7:13 PM
To: ViteM
Subject: Inbound Fax

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Pages: 3

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KMC 006736

KMC Telecom

Corporate Office
1545 Route 206, Suite 300
Bedminster, New Jersey 07921

Fax: 908-719-9775
Tel: 908-470-3650

Fax Transmittal Form

TO: Mikhael Vitenson
COMPANY: Anne Falvey
FROM: KDW
SUBJECT: loosemore

DATE:

FAX NO.:

No. OF
PAGES:

212-808-7897

3, including cover

Comments:**Notice:**

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KMC 006737

any action, suit or proceeding which may be brought for the enforcement of such liens and KMC shall pay any damage and discharge any judgment entered thereon.

(b) **KMC Property.** Allegiance shall not, nor shall Allegiance allow any person or entity to, file or otherwise obtain any lien, security interest, claim, attachment, levy or other similar encumbrance or right of others against any of the Equipment. Allegiance shall indemnify and hold the KMC harmless from and against any damages, costs or expenses (including attorneys' fees) associated with or resulting from any such lien or other right being filed or otherwise obtained against any of the Equipment.

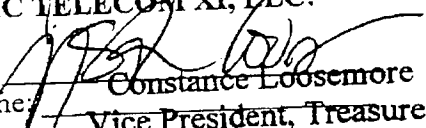
16. General Provisions: This Agreement (including Exhibits A, B and C attached hereto) is the complete agreement of the Parties and supersedes any prior or contemporaneous agreements or representations, whether oral or written, with respect to the subject matter hereof. If any paragraph or clause of this Agreement shall be held to be invalid or unenforceable by any body or entity of competent jurisdiction, then the remainder of the Agreement shall remain in full force and effect. No amendment to this Agreement will be valid unless each such amendment is accepted in writing by an authorized representative of both Parties. No waiver of any of the provisions of this Agreement shall be binding unless it is in writing and signed by the Party making the waiver. No waiver shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, and no waiver shall be deemed, or shall constitute, a continuing waiver.

17. Conflicts: In the event of a conflict between the provisions of this Agreement and the provision of the Service Agreement, the terms and conditions of the Service Agreement shall control.

18. Incorporation by Reference: The following sections of the Service Agreement are hereby incorporated herein by reference and shall be deemed a part of this Agreement: Section 16 (Liability Limitations) Section 21.6 (Governing Law), Section 21.7 (Assignment), Section 21.8 (Notices), Section 22 (Dispute Resolution)

In Witness Whereof, the Parties have signed this Agreement and the individuals signing below represent that they have the full legal authority to enter into this Agreement for and on behalf of the respective Parties.

KMC TELECOM XI, LLC:

By: 
Name: Constance Loosemore
Its: Vice President, Treasurer

ALLEGIANCE TELECOM COMPANY WORLDWIDE:

By: _____
Name: _____
Its: _____

22.4 If the Senior Executive Officers are unable to resolve any such Dispute within such thirty (30)-day period, then the Parties may seek any and all remedies available at law or equity.

22.5 During the course of such negotiations, all reasonable requests made by one Party to the other for non-privileged information reasonably related to this Agreement, will be honored in order that each Party may be fully advised of the other Party's position. If the Parties reach an impasse in negotiations during any of the steps described in Sections 22.2, 22.3 and/or 22.4, the Parties shall not be required to wait for the applicable thirty (30)-day period to expire before proceeding to the next phase of the dispute resolution procedures.

22.6 During attempted resolution of any Dispute in accordance with Sections 22.1, 22.2 and 22.3, both Parties shall continue to perform their respective obligations under this Agreement.

22.7 No offers of settlement or other admissions made by a Party in an effort to resolve the Dispute shall in any way be admissible in any judicial proceeding.

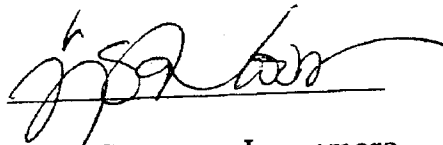
IN WITNESS WHEREOF, the Parties have executed this Agreement on the date first above written.

KMC Telecom XI, LLC

By: _____

Name: _____

Title: _____



Constance Loosemore
Vice President, Treasurer

Allegiance Telecom Company Worldwide

By: _____

Name: _____

Title: _____

EXHIBIT H

From: O'Connor, Karen J. - CHI
Sent: Monday, February 11, 2002 7:47 PM
To: Bittner, Kevin; Menier, Christopher; Loosemore, Constance; 'afalvey@kelleydrye.com'; 'mvitenson@kelleydrye.com'
Cc: 'jeff.feinberg@algx.com'; 'jfeinberg2@aol.com'; 'john.nishimoto@algx.com'; 'mark.tresnowski@algx.com'; 'randall.hand@algx.com'; Webster, Megan - CHI
Subject: EXECUTION COPY of Allegiance/KMC PRI Services Agreement
Attach: AllegianceKMC PRI Services Agreement.DOC

All: Attached is the final, executable copy of the Allegiance/KMC PRI Services Agreement. Please sign both the attached agreement and the interconnection agreement and send the signed pages to me via fax (or by email, with an electronic fax attached) tonight. I likewise will have Allegiance sign the documents and then send the signed pages to Anne via email with an electronic fax attached tonight.

I understand that the parties will execute full copies of these agreements later this week so that each party will have five originals for their records. Thanks, and please call me if you have any questions. Karen

<<AllegianceKMC PRI Services Agreement.DOC>>

Karen J. O'Connor
Piper Marbury Rudnick & Wolfe
203 N. LaSalle Street, Suite 1800
Chicago, Illinois 60601
Tel: 312.368.3434
Fax: 312.630.7406
Email: karen.oconnor@piperrudnick.com

The information contained in this communication may be confidential, is intended only for the use of the recipient named above, and may be legally privileged. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication, or any of its contents, is strictly prohibited. If you have received this communication in error, please re-send this communication to the sender and delete the original message and any copy of it from your computer system.
Thank you.

For more information about Piper Marbury Rudnick & Wolfe, please visit us at <http://www.piperrudnick.com>

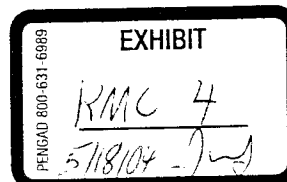
EXHIBIT I

Katzap, Arik

From: O'Connor, Karen J. - CHI [karen.o'connor@piperrudnick.com]
Sent: Monday, February 11, 2002 7:30 PM
To: Falvey, Anne; Vitenson, Mikhael
Cc: 'jeff.feinberg@algx.com'; 'john.nishimoto@algx.com'; 'mark.tresnowski@algx.com';
'randall.hand@algx.com'
Subject: Allegiance Signature Pages
Importance: High



efc1331.tif



Anne/Mikhael: Attached are the signature pages from the PRI Services Agreement and the interconnection agreement, each of which has been signed by Allegiance. The effectiveness of Allegiance's signature on these agreements is contingent upon our receipt of the corresponding KMC signature pages.

Thanks, and please call me if you have any questions. Karen

Karen J. O'Connor
Piper Marbury Rudnick & Wolfe
203 N. LaSalle Street, Suite 1800
Chicago, Illinois 60601
Tel: 312.368.3434
Fax: 312.630.7406
Email: karen.oconnor@piperrudnick.com

> -----Original Message-----

> From: Fax monitor
> Sent: Monday, February 11, 2002 5:59 PM
> To: O'Connor, Karen J. - CHI
> Subject: Fax Receipt (FROM: 978 657 0331)

> *****
> INBOUND FAX NOTIFICATION
> *****

> You have received an inbound fax.

> Date: 2/11/02
> Time: 17:58:00

> Routed by: 978 657 0331
> Pages rcvd: 3

> *****

> Please do not reply to this message. This message was
> automatically generated from a LegalFax system that does
> not process e-mail reply messages. Any e-mail reply sent
> to this address will be automatically deleted.

> ***** <<efc1331.tif>>

>
>
>
The information contained in this communication may be confidential, is intended only for the use of the recipient named above, and may be legally privileged. If the reader of this message is not the intended recipient,

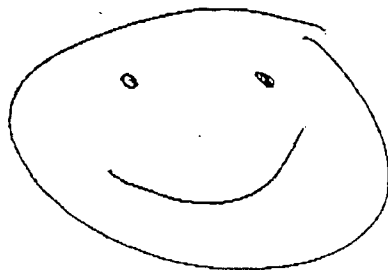
you are hereby notified that any dissemination, distribution, or copying of this communication, or any of its contents, is strictly prohibited. If you have received this communication in error, please re-send this communication to the sender and delete the original message and any copy of it from your computer system.

Thank you.

For more information about Piper Marbury Rudnick & Wolfe, please visit us at <http://www.piperrudnick.com>

Karen O'Conner

Thanks for all the help



Call my cell phone to confirm
you got this

22.4 If the Senior Executive Officers are unable to resolve any such Dispute within such thirty (30)-day period, then the Parties may seek any and all remedies available at law or equity.

22.5 During the course of such negotiations, all reasonable requests made by one Party to the other for non-privileged information reasonably related to this Agreement, will be honored in order that each Party may be fully advised of the other Party's position. If the Parties reach an impasse in negotiations during any of the steps described in Sections 22.2, 22.3 and/or 22.4, the Parties shall not be required to wait for the applicable thirty (30)-day period to expire before proceeding to the next phase of the dispute resolution procedures.

22.6 During attempted resolution of any Dispute in accordance with Sections 22.1, 22.2 and 22.3, both Parties shall continue to perform their respective obligations under this Agreement.

22.7 No offers of settlement or other admissions made by a Party in an effort to resolve the Dispute shall in any way be admissible in any judicial proceeding.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date first above written.

KMC Telecom XI, LLC

By: _____
Name: _____
Title: _____

Allegiance Telecom Company Worldwide

By: Jeffrey Feinberg
Name: Jeffrey Feinberg
Title: Vice President & General Manager LG

any action, suit or proceeding which may be brought for the enforcement of such liens and KMC shall pay any damage and discharge any judgment entered thereon.

(b) **KMC Property.** Allegiance shall not, nor shall Allegiance allow any person or entity to, file or otherwise obtain any lien, security interest, claim, attachment, levy or other similar encumbrance or right of others against any of the Equipment. Allegiance shall indemnify and hold the KMC harmless from and against any damages, costs or expenses (including attorneys' fees) associated with or resulting from any such lien or other right being filed or otherwise obtained against any of the Equipment.

16. General Provisions: This Agreement (including Exhibits A, B and C attached hereto) is the complete agreement of the Parties and supersedes any prior or contemporaneous agreements or representations, whether oral or written, with respect to the subject matter hereof. If any paragraph or clause of this Agreement shall be held to be invalid or unenforceable by any body or entity of competent jurisdiction, then the remainder of the Agreement shall remain in full force and effect. No amendment to this Agreement will be valid unless each such amendment is accepted in writing by an authorized representative of both Parties. No waiver of any of the provisions of this Agreement shall be binding unless it is in writing and signed by the Party making the waiver. No waiver shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, and no waiver shall be deemed, or shall constitute, a continuing waiver.

17. Conflicts: In the event of a conflict between the provisions of this Agreement and the provision of the Service Agreement, the terms and conditions of the Service Agreement shall control.

18. Incorporation by Reference: The following sections of the Service Agreement are hereby incorporated herein by reference and shall be deemed a part of this Agreement: Section 16 (Liability Limitations), Section 21.6 (Governing Law), Section 21.7 (Assignment), Section 21.8 (Notices), Section 22 (Dispute Resolution)

In Witness Whereof, the Parties have signed this Agreement and the individuals signing below represent that they have the full legal authority to enter into this Agreement for and on behalf of the respective Parties.

KMC TELECOM XI, LLC:

By: _____
Name: _____
Its: _____

ALLEGIANCE TELECOM COMPANY WORLDWIDE:

By: Jeffrey Feinberg
Name: Jeffrey Feinberg
Its: Vice President & General Manager LGX

EXHIBIT J

From: Menier, Christopher
Sent: Thursday, January 31, 2002 5:52 PM
To: Bittner, Kevin
Subject: issues closed

Kevin,

We have closed all of the issues.

- 1) Call Blocking - our 30 day waiver starts when our truncks reach 80% capacity.
- 2) Multiple Competitive Offers - we added the 12 months back in the contract.
- 3) Submission of Service Orders - we state that all Service Orders must comply with Section 3.5.1
- 4) \$609,820 - they will pay us that money for the initial Volume Commitment of 200,000 ports. For Additional Services, they will pay any incremental expense caused by their special grooming needs.
- ***5) Collocation Agreement - Mikhael told Karen that we would not sign the document until the colo agreement is complete. Jeff expressed that this would cause a week delay in us getting the orders. Jeff and I discussed adding something to the letter stating we would get a mutually agreeable colo agreement executed within 30 days. I told him I could not commit to that and that I would have to check with the team. Your thoughts?

They are sending us the tasking tonight, even before we execute the letter/agreement.

Thank you,

Chris Menier
Director of National Markets
KMC Telecom, Inc.
301-429-9702 office
301-429-5830 fax
202-549-9100 cell

EXHIBIT K



allegiancetelecom, inc.
One source for business telecom.

STRATEGIC SALES

Wholesale Broadband Sales

CUSTOMER ORDER

Customer Care 877-620-3303

CUSTOMER PROFILE

COMPANY NAME KMC Telecom		ORDERED BY Michael Pfister		BILLING CONTACT Ramona Bermudez	
BILLING ADDRESS 1755 North Brown Road			CITY Lawrenceville	STATE GA	ZIP 30043
PHONE 678-985-6883		FAX		TERM <input checked="" type="checkbox"/> 1 YEAR <input type="checkbox"/> 2 YEAR <input type="checkbox"/> 3 YEAR	
SERVICE LOCATION ADDRESS 140 S. Dearborn, Suite 220			CITY Chicago	STATE IL	ZIP 60603
SERVICE LOCATION CONTACT Thomas Searles		PHONE 678-985-6786		FAX	
MARKET	COLLOCATION (CILLI) CHCHILLEDSD2	<input type="checkbox"/> NEW <input checked="" type="checkbox"/> ADDITIONAL <input type="checkbox"/> CHANGE	ORDER DATE 10/15/03	DESIRED DUE DATE 10/29/03	
BILLING ACCOUNT NO.	MSA APPROVAL NO. SMSAGen073102-1	CREDIT APPROVAL NO.	ICB / PROMO APPROVAL NO*		
SALES PERSON John Nishimoto		PHONE NUMBER 240-616-2537		FAX NUMBER 301-215-5991	
SALES ENGINEER Garrett Toomey		PHONE NUMBER 469-259-4775		FAX NUMBER 208.361.5628	
BROADBAND PROGRAM MANAGER Val Cowan		PHONE NUMBER 469-259-2183		FAX NUMBER 214-853-4466	
TECHNICAL CONTACT Garrett Toomey		E-MAIL garret.toomey@algx.com			
PHONE		FAX		PAGER	
				MOBILE	

DESCRIPTION OF SERVICE

	QTY	Monthly Fee*	Set-Up Fee	Monthly Total	Set-Up Total
<input type="checkbox"/> ISDN/PRI	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> Dedicated Internet T1	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> DS1 Special Access	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> DS3 Special Access	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> OC3 Special Access	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> Ethernet Connection	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> DSO Cross Connect	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> DS1 Cross Connect	0	\$ -	\$ -	\$ -	\$ -
<input checked="" type="checkbox"/> DS3 Cross Connect	3	\$ 125.00	\$ 125.00	\$ 375.00	\$ 375.00
<input type="checkbox"/> OC3 Cross Connect	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> WDIA with Loop	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> WDIA without Loop	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> Collocation	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> Analog/POTS*	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> Power -Additional	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> Hub DS1 End Link	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> Hub DS3 Multiplexer**	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> Hub DS3 ICB	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> Hub DS3 X-Connect	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> IP DS1 Endlink	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> IP DS1 Endlink W/Transport	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> IP DS3 Aggregation***	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> IP DS3 ICB	0	\$ -	\$ -	\$ -	\$ -
<input type="checkbox"/> IP DS3 X-Connect	0	\$ -	\$ -	\$ -	\$ -

* Not including End User Common Line and FCC Port Charges.

** Must be purchased with each Hub DS3 Multiplexer

*** Must be purchased with each IP DS3

Monthly Set-Up

ORDER TOTAL \$ 375.00 \$ 375.00

COMMENTS

Please cross-connect three (3) DSX-3 for DS3 connectivity to the KMC Telica switch. KMC PON NDS30334805MD
KMC DSX3 TDI: TRR 205.02 PNL 5 JK 1,2,3 IOM 4 Port 1,2,3.
Incoming LGN TDI: TRR0202.16 PNL 19 JK 19,20,21 CKT ID LG/DS3X/CHCGILLE/CHCGILFR/0001 to /0003
LGN DLR attached. CKT ID: MC/HIMT/CH/004001/KMMT, MC/HIMT/CH/004002/KMMT, MC/HIMT/CH/004003/KMMT

CUSTOMER ACCEPTANCE

CUSTOMER'S SIGNATURE TO THIS CUSTOMER ORDER CONSTITUTES A REQUEST FOR SERVICE PURSUANT TO THE ALLEGIANCE TELECOM MASTER SERVICE AGREEMENT BETWEEN ALLEGIANCE TELECOM AND CUSTOMER, WHICH IS INCORPORATED AS IF FULLY STATED HEREIN. BY SIGNING BELOW, CUSTOMER HEREBY ACKNOWLEDGES THE FOLLOWING: (1) THAT CUSTOMER IS A PARTY TO THE MASTER SERVICE AGREEMENT DESCRIBED ABOVE; (2) THAT CUSTOMER HAS READ AND UNDERSTANDS THAT SUCH MASTER SERVICE AGREEMENT (INCLUDING THE LIMITATIONS OF LIABILITY SET FORTH IN THAT AGREEMENT) GOVERNS THE SERVICES ORDERED HEREUNDER; (3) THAT CUSTOMER HAS COMPLETE AND UNCONDITIONAL AUTHORITY TO ENTER INTO THIS CUSTOMER ORDER; AND (4) THAT CUSTOMER AGREES TO BE BOUND BY THIS CUSTOMER ORDER AND BY THE MASTER SERVICE AGREEMENT.

CUSTOMER SIGNATURE Michael G. Pfister	DATE 10/13/2003
CUSTOMER NAME (PRINTED) Michael G. Pfister	TITLE (PRINTED) Network Design Engineer
AUTHORIZED ALLEGIANCE REPRESENTATIVE SIGNATURE	DATE
ALLEGIANCE REPRESENTATIVE NAME (PRINTED)	TITLE (PRINTED)

Winter, Catherine B.

From: Cowan, Val [Val.Cowan@allegiancetelecom.com]
Sent: Monday, October 27, 2003 3:30 PM
To: Pfister, Michael
Subject: Chicago MDAN

Mike,

I am pleased to inform you that your requested DS3 xcon's for Chicago have been completed by Chicago Operations.

ALGX PSR 2382586

CKT id CH/HF-X/300057//AFYT; CH/HF-X/300058//AFYT &
CH/HF-X/300059//AFYT

KMC Ckt id AD/HIMT/CH/004001/KMMT; AD/HIMT/CH/004002/KMMT &
AD/HIMT/CH/004003/KMMT

Please have your NOC reply to this email with acceptance of service so that I can close my order.

Thanks.

Valdyne Cowan
Program Manager
Wholesale Accounts
ofc - 469-259-2183
fax - 214-853-4466

5/19/2004

EXHIBIT L

Vendor	Name	Amount	Check #	Ck Date	Voucher	Group	Invoice	Inv Date	Long Descr
0000008690	ALLEGIANCE TELECOM INC	50.00	160472	2003-06-11	00264438	006985	5358775	2003-04-01	Transaction ID: 45992BAN: 2462266
0000008690	ALLEGIANCE TELECOM INC	50.00	160472	2003-06-11	00264439	006985	5358791	2003-04-01	Transaction ID: 45993BAN: 2462282
0000008690	ALLEGIANCE TELECOM INC	50.00	160472	2003-06-11	00264440	006985	5358795	2003-04-01	Transaction ID: 45994BAN: 2462296
0000008690	ALLEGIANCE TELECOM INC	50.00	160472	2003-06-11	00264562	006991	5358783	2003-04-01	Transaction ID: 45996BAN: 2462333
0000008690	ALLEGIANCE TELECOM INC	50.00	160472	2003-06-11	00264563	006991	5358787	2003-04-01	Transaction ID: 45998BAN: 2462368
0000008690	ALLEGIANCE TELECOM INC	50.00	160472	2003-06-11	00264564	006991	5358799	2003-04-01	Transaction ID: 46010BAN: 2506829
0000008690	ALLEGIANCE TELECOM INC	50.00	160472	2003-06-11	00264572	006991	5358771	2003-04-01	Transaction ID: 46019BAN: 2462255
0000008690	ALLEGIANCE TELECOM INC	50.00	160472	2003-06-11	00267066	007042	5549403	2003-05-01	Transaction ID: 47483BAN: 2462266
0000008690	ALLEGIANCE TELECOM INC	50.00	160472	2003-06-11	00267067	007042	5549419	2003-05-01	Transaction ID: 47484BAN: 2462282
0000008690	ALLEGIANCE TELECOM INC	50.00	160472	2003-06-11	00267068	007042	5549423	2003-05-01	Transaction ID: 47485BAN: 2462296
0000008690	ALLEGIANCE TELECOM INC	50.00	160472	2003-06-11	00267069	007042	5549411	2003-05-01	Transaction ID: 47486BAN: 2462333
0000008690	ALLEGIANCE TELECOM INC	50.00	160472	2003-06-11	00267070	007042	5549415	2003-05-01	Transaction ID: 47487BAN: 2462368
0000008690	ALLEGIANCE TELECOM INC	50.00	160473	2003-06-11	00267072	007042	5549427	2003-05-01	Transaction ID: 47489BAN: 2506829
0000008690	ALLEGIANCE TELECOM INC	75.00	160473	2003-06-11	00267076	006991	5358819	2003-04-01	Transaction ID: 46012BAN: 2509443
0000008690	ALLEGIANCE TELECOM INC	2,991.22	160473	2003-06-11	00267085	007042	5549447	2003-05-01	Transaction ID: 47493BAN: 2509443
0000008690	ALLEGIANCE TELECOM INC	7,040.77	160473	2003-06-11	00267085	007042	5549397	2003-05-01	Transaction ID: 47482BAN: 2462254
0000008690	ALLEGIANCE TELECOM INC	3,785.39	162561	2003-07-17	00271468	006991	53558769	2003-04-01	Transaction ID: 45991BAN: 2462254
0000008690	ALLEGIANCE TELECOM INC	5,287.62	163623	2003-08-05	00275288	007136	5858299	2003-06-01	Transaction ID: 49940BAN: 2462254
0000008690	ALLEGIANCE TELECOM INC	5,049.22	166288	2003-09-18	00277322	007210	6101149	2003-07-01	Transaction ID: 52152BAN: 2462254
0000008690	ALLEGIANCE TELECOM INC	4,318.47	168698	2003-11-03	00283181	007244	6251428	2003-08-01	Transaction ID: 53458BAN: 2462254
0000008690	ALLEGIANCE TELECOM INC	8,684.09	169069	2003-11-06	00286935	007358	6534130	2003-09-01	Transaction ID: 56780BAN: 2462254
0000008690	ALLEGIANCE TELECOM INC	194.01	169071	2003-11-06	00287762	007440	6726378	2003-10-01	Transaction ID: 59180BAN: 2462254
0000008690	ALLEGIANCE TELECOM INC	7,186.85	170846	2003-12-09	00290423	ADJUSTMENTS		2003-11-06	
0000008690	ALLEGIANCE TELECOM INC	16,369.09	173985	2004-02-09	00296403	007508	6985763	2003-11-01	Transaction ID: 61363BAN: 2462254
0000008690	ALLEGIANCE TELECOM INC	30,105.24	175210	2004-02-26	00300288	007636	7389495	2003-12-01	Transaction ID: 64950BAN: 2462254
0000008690	ALLEGIANCE TELECOM INC	17,413.02	178033	2004-04-14	00303218	007710	7710827	2004-01-01	Transaction ID: 67412BAN: 2462254
0000008690	ALLEGIANCE TELECOM INC	17,108.04	178373	2004-04-19	00303327	007762	8144140	2004-02-01	Transaction ID: 69512BAN: 2462254
0000008690	ALLEGIANCE TELECOM INC					007762	8615542	2004-03-01	Transaction ID: 69656BAN: 2462254