

5/14/2004 Bittner, Kevin

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In Re:

ALLEGIANCE TELECOM, INC., et al.,

Debtors,

Chapter 11

Case No.

03-13057 (RDD)

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11:50 a.m.

May 14, 2004

One Penn Plaza

New York, New York

DEPOSITION of KEVIN BITTNER, a Witness in  
the above entitled matter, taken pursuant to  
Notice, before Stephen J. Moore, a Registered  
Professional Reporter, Certified Realtime  
Reporter, and Notary Public of the State of New  
York.

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KEVIN BITTNER

A P P E A R A N C E S:

TOGUT, SEGAL & SEGAL, LLP

Attorneys for Debtors

One Penn Plaza

New York, New York 10119

BY: GERARD DiCONZA, ESQ.

- and -

JONATHAN HOOK, ESQ.

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BY: COLIN M. ADAMS, ESQ.

- and -

BLOSSOM KAN, ESQ.

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Attorneys for KMC

787 Seventh Avenue

New York, New York 10019

BY: KIMBERLY A. JOHNS, ESQ.

1 KEVIN BITTNER

2 KEVIN BITTNER, called as a  
3 witness, having been first duly sworn by  
4 the Notary Public, was examined and  
5 testified as follows:

6

7 EXAMINATION BY MR. DiCONZA:

8

9 Q What is your full name?

10 A Kevin Bittner.

11 Q Good morning, Kevin, my name is  
12 Gerard DiConza, I am from the law firm of Togut,  
13 Segal & Segal.

14 Seated next to me is my colleague,  
15 Jonathan Hook, he's with the law firm as well, we  
16 are co-bankruptcy counsel for Allegiance Telecom  
17 and its subsidiaries who are Chapter 11 Debtors.

18 Seated at the table to my far right  
19 are counsel for the Creditors Committee, they will  
20 sit in in the deposition and may ask you questions  
21 after I am done as well.

22 Let's get some background  
23 information out of the way.

24 Have you ever been deposed before?

25 A No, I have not.

1 KEVIN BITTNER

2 Q This is your first time?

3 A Yes.

4 Q Are you familiar with the way  
5 depositions operate?

6 A Yes.

7 Q I will ask you a series of  
8 questions, the court reporter will jot down my  
9 questions and will also jot down your answers.

10 If you don't understand my  
11 question, please ask me to clarify, and when you  
12 do respond to my questions, please respond  
13 verbally so that the court reporter can take down  
14 your answers.

15 Do you know of any reason why you  
16 may not be able to testify truthfully today?

17 A No.

18 Q Have you done anything to prepare  
19 for today's deposition?

20 A No. I have sent the documentation  
21 up to our legal, that's about it it, when I was  
22 asked to.

23 Q Have you spoken with counsel about  
24 this deposition?

25 MS. JOHNS: I will just caution the

1 KEVIN BITTNER

2 witness not to divulge any content of the  
3 communications; you can answer yes or no.

4 A Yes.

5 Q Have you reviewed any documents?

6 A No.

7 Q Do you know that KMC Telecom has  
8 filed a motion in the bankruptcy court where  
9 Allegiance's Chapter 11 case is pending seeking to  
10 have a determination to the PRI agreement and the  
11 colocation agreement should be integrated  
12 agreements?

13 A I am aware that there is a filing,  
14 I am not aware of the entire content.

15 Q But you are aware that a motion was  
16 filed in early May of this year?

17 A I am now aware.

18 Q Can you give me the name of your  
19 current employer?

20 A KMC Telecom Holdings.

21 Q What is your position at KMC  
22 Telecom Holdings?

23 A I am the Senior Vice President of  
24 Wholesale Services.

25 Q What are your duties as the Senior

1 KEVIN BITTNER

2 Vice President of Wholesale Services?

3 A I am responsible for the wholesale  
4 division of the company, responsible for acquiring  
5 new customers, sales installation and revenue, as  
6 well as maintaining our existing customer base.

7 Q Do you have any direct supervisors?

8 A Roscoe Young is my boss.

9 Q Roscoe Young?

10 A Yes.

11 Q And Roscoe Young is?

12 A CEO of KMC Telecom.

13 Q When did you start at KMC?

14 A Started May 25 of 1998.

15 Q Where were you before that?

16 A I worked for originally McCall  
17 Cellular Communications and then through the  
18 acquisitions it became CMT Partnership.

19 Q What did you start out as at KMC  
20 Telecom?

21 A At KMC I started as a City Director  
22 in Topeka, Kansas.

23 Q How many years did it take for you  
24 to become -- to go to the position that you are  
25 currently in now?

1 KEVIN BITTNER

2 A I went from City Director to Vice  
3 President of National Accounts, which was a new  
4 division of the company we started about a year  
5 later, and then about another year after that I  
6 moved to the Senior V.P. of wholesale for KMC;  
7 those are rough dates.

8 Q Prior to McCall Cellular, where  
9 were you?

10 A I went to school at Washburn  
11 University in Topeka.

12 Q When did you graduate?

13 A I graduated in May of 1988.

14 Q In 1988, and what degree did you  
15 graduate with?

16 A With a Bachelor of Business  
17 Administration.

18 Q Did you attend any graduate  
19 schools?

20 A I have not.

21 Q When you graduated from college you  
22 went directly to McCall Cellular?

23 A Graduated in May, started with  
24 McCall in October.

25 Q And your duties at McCall were?

1 KEVIN BITTNER

2 A Started out as account executive,  
3 moved into a senior account executive role, from  
4 there to major accounts then to numerous  
5 supervisory positions in sales.

6 Q Can you describe generally what  
7 your current duties are now at KMC?

8 A As Senior Vice President of  
9 wholesale, I own the sales team that solicits  
10 business from the large wholesale customers, the  
11 interexchange carriers, the power companies, the  
12 wireless companies and the various data companies  
13 out there across the U.S.

14 Responsible for acquiring new  
15 business, as I said earlier, maintaining the  
16 revenue stream that we have built and growing the  
17 revenue stream as well as keeping the customers  
18 satisfied with our service at KMC.

19 Q Do you have any employees who  
20 respond or that are underneath you?

21 Are you in control of any employees  
22 at KMC?

23 A I do have a reporting structure in  
24 wholesale.

25 Q How many employees are below you?

1 KEVIN BITTNER

2 A Roughly 23 to 25 at this point.

3 Q Can you explain to me the corporate  
4 structure at KMC?

5 You have from what I understand two  
6 CEOs, Mr. Roscoe Young and who is the other CEO?

7 A Bill Lenahan.

8 Q Underneath the CEOs?

9 A With Roscoe's reporting structure  
10 we have myself who runs wholesale, we have Kim  
11 Stanley who runs the retail, so we have the sales  
12 pieces broken up into two legs.

13 Roscoe also has reporting to him  
14 IT, operations and network, that's his primary  
15 reporting structure at this point.

16 Q Do you know Ms. Constance  
17 Loosemore?

18 A Yes, I do.

19 Q What is her position?

20 A I believe it's Vice  
21 President/Treasurer for the company.

22 Q Do you report to Ms. Loosemore?

23 A No.

24 Q Are you considered on the same  
25 level with Ms. Loosemore?

1 KEVIN BITTNER

2 A She reports into Bill Stewart's  
3 organization, and I am not aware if she's a direct  
4 report or has somebody she reports to.

5 Q And Bill Stewart is?

6 A Is our CFO.

7 Q Are you familiar with Allegiance  
8 Telecom and the relationship that KMC has with  
9 Allegiance Telecom?

10 A Yes.

11 Q When did you first get to know  
12 Allegiance Telecom, the company?

13 A We first started talking with them  
14 about potential business in mid-June to July of  
15 2001.

16 Q When you say we?

17 A Chris Manier is one of my sales  
18 directors, at that time he's now Vice President of  
19 wholesale working for me.

20 He had a lead which began the  
21 conversations with Allegiance for the PRI business  
22 we ended up soliciting or securing with them.

23 Q Did you know that the CEO, Mr.  
24 Roscoe Young, had a relationship with Allegiance?

25 A Not at that time.

1 KEVIN BITTNER

2 As we furthered the relationship, I  
3 was aware that there was a past working  
4 relationship that Roscoe had with the CEO of  
5 Allegiance.

6 Q You mentioned the PRI agreement  
7 which is the subject of the motion as well.

8 Take a look at it, it has been  
9 marked as Exhibit number 1 with the First  
10 Amendment, is that the PRI agreement from your  
11 understanding?

12 A Are both of these document 1? Just  
13 referring to this one?

14 Q That there.

15 A It appears to be.

16 Q Now, prior to entering into the PRI  
17 agreement with Allegiance, were there any business  
18 transactions between Allegiance and KMC?

19 A Not that my team was directly  
20 involved with.

21 One of our cities had some local  
22 transport circuits, I believe in Minneapolis, that  
23 we had sold to them, but that was one of our local  
24 city operations.

25 Q I believe you testified that in

1 KEVIN BITTNER

2 July of 2001 there were discussions between your  
3 sales department and people at Allegiance  
4 regarding a possible business transaction?

5 A Yes.

6 Q Do you recall who initiated those  
7 conversations?

8 A Chris Manier had received a lead,  
9 and I am not sure exactly where that came from,  
10 but he had placed calls to Allegiance as a cold  
11 call and ended up working with folks on their  
12 network side, is my understanding.

13 Q From your understanding, what was  
14 the basis, what was the need at Allegiance to  
15 enter into the PRI agreement?

16 A Allegiance was a tier 1  
17 telecommunications provider, so they served the  
18 large networks across the United States.

19 KMC's niche play had been in the  
20 tier 2 and tier 3 marketplace.

21 As such, for Allegiance to win the  
22 business as we understood that they had on the  
23 table, they needed someone who specialized in  
24 those smaller markets; KMC fit the need that they  
25 had at that time.

1 KEVIN BITTNER

2 Q Do you know in particular what that  
3 need was?

4 A It was shared with us that  
5 Allegiance was already serving a large customer  
6 PRI circuits and they had an opportunity to bid on  
7 additional circuits that were coming available.

8 So the need was outside of their  
9 footprint, Allegiance's footprint, an opportunity  
10 for KMC to serve those circuits.

11 Q And KMC had the ability to serve  
12 those needs and did you say Chris --

13 A Chris Manier.

14 Q (Continuing) -- Chris Manier made  
15 that known to Allegiance, and was there an  
16 agreement in principle struck prior to the  
17 drafting of the agreements?

18 A We had received the data on the  
19 circuits that Allegiance was attempting to secure.

20 So it was more modeling of the  
21 business opportunity than it was an agreement in  
22 principle.

23 It was looking at the circuits that  
24 were available and KMC's ability to deliver those  
25 circuits.

1 KEVIN BITTNER

2 Q You initially met in July of 2001,  
3 where did those discussions go to?

4 Did you speak to Royce eventually  
5 about the discussions?

6 A Long process from July and more of  
7 it was e-mail and telephone conversations than it  
8 was meetings in person at that time.

9 It was probably two to three months  
10 after that that the first sit down meeting took  
11 place.

12 Q This sit down meeting occurred at  
13 KMC's offices?

14 A I believe it was in Dallas.

15 Q At Allegiance's offices?

16 A Correct.

17 Q Who went down to Dallas?

18 A Chris Manier, Justin Davis and  
19 myself.

20 Q How many times did you go to  
21 Dallas?

22 A Two to three times, I believe.

23 Q This was in between July of 2001  
24 and February of 2002?

25 A Correct.

1 KEVIN BITTNER

2 Q So ultimately what was agreed upon  
3 is what is in front of you as far as Exhibit 1,  
4 the PRI agreement?

5 A Correct.

6 Q When you were going to Dallas, the  
7 discussions and the negotiations were regarding  
8 the terms of the PRI agreement?

9 A The business principles, correct.

10 Q Do you recall who drafted the  
11 agreement initially?

12 A I do not recall.

13 Q Based on your understanding, your  
14 business understanding, what is the purpose behind  
15 the PRI agreement?

16 A With a business transaction there  
17 has to be a framework around that transaction that  
18 sets up responsibilities of both parties.

19 The agreement was set up to  
20 frame -- provide the framework for the  
21 responsibilities of both parties.

22 Q What were the responsibilities of  
23 the parties?

24 A Can you clarify that question?

25 A Why did Allegiance need to enter

1 KEVIN BITTNER

2 into the PRI agreement?

3 A As I said earlier, their footprint  
4 was in the tier 1 marketplace, without an  
5 agreement in place they did not have a way to  
6 deliver the circuits they were seeking to secure  
7 from their customer at that time.

8 The agreement allowed for a vendor,  
9 KMC, to provide that service to them.

10 Q As consideration for the agreement  
11 Allegiance agreed to pay KMC for the services to  
12 be provided under the PRI agreement?

13 A Yes.

14 Q Do you believe that the  
15 consideration that Allegiance agreed to pay was  
16 fair --

17 A Yes.

18 Q (Continuing) -- Under the PRI  
19 agreement?

20 A The PRI agreement is a piece of the  
21 overall deal with Allegiance, yes.

22 Q Now, when the initial drafts of the  
23 PRI agreement were circulated, were you involved  
24 in those discussions, did you review any of the  
25 initial drafts?

1 KEVIN BITTNER

2 A Yes.

3 Q You and how many other people at  
4 KMC, to the best of your knowledge?

5 A We typically have the functional  
6 heads of the departments who would be touching it,  
7 sales, operations, finance, so I would say three  
8 to four others at KMC, departments and probably  
9 two people in each department.

10 Q In-house counsel, outside counsel?

11 A Correct.

12 Q Do you know when outside counsel  
13 was retained?

14 A I do not recall.

15 Q Were you heavily involved in the  
16 specific terms of the PRI agreement?

17 A I was involved with the general  
18 business principles, the detail and the specific  
19 language was better left to counsel at KMC.

20 Q Now, the specific business terms  
21 you were involved in, what were they, pricing I am  
22 assuming is one of the business terms?

23 A Yes.

24 Q Any of the other?

25 A Term and volume, which drove to the

1 KEVIN BITTNER

2 profitability of the deal were the primary pieces  
3 I was involved with, as well as the delivery time  
4 frames and the commitments.

5 Q Do you recall what was important to  
6 you and to KMC as far as the term and volume with  
7 respect to the PRI agreement?

8 A The profitability of the overall  
9 deal was the key driver for KMC.

10 That was what we expressed  
11 throughout the negotiations in the overall dealing  
12 with Allegiance in the negotiations.

13 Q Let me introduce to you a copy of  
14 what has been marked as Exhibit number 2,  
15 Allegiance exhibit number 2.

16 Do you recall that agreement?

17 A It appears to be the colocation  
18 agreement.

19 Q And that's the agreement that KMC  
20 is now seeking to have determined to be integrated  
21 with the PRI agreement, from your understanding?

22 A Yes.

23 Q What was the purpose of the  
24 colocation agreement?

25 A In our negotiations with

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KEVIN BITTNER

Allegiance, Allegiance was planning to supply for KMC the transport within the super node cities, they were a tier 1 telecommunications provider, they were to supply the transport from the interexchange carriers to the colocation site, wherever KMC was going to have their equipment in those super node cities.

The discussion with John Nishimoto and John Dumbledon were that Allegiance would have an opportunity to get some revenue from the deal as well.

What we had discussed with them was the industry pricing in the neighborhood of \$350 or less.

They had a product that they were planning to introduce, or they had shared with us that they had a product they were planning to produce that would enable them to handle those circuits on that, in our negotiations and in our pricing models that was built into the pricing we were giving to them, \$350 for our transport DS3s.

When we were in Chicago with their counsel again discussing the PRI agreement, they shared with us that they were not going to be

1 KEVIN BITTNER

2 introducing that service.

3 We let them know at that time that  
4 had serious economic disadvantage for us in the  
5 pricing we had supplied, and we were going to have  
6 to go back and recalculate our pricing.

7 They then came back and said well,  
8 what if we supplied free colocation? Does that  
9 help you maintain your financials and is the  
10 pricing on the table going to work for you?

11 What we had to do then is go back  
12 and do a quick calculation, and it appeared to  
13 take care of a part of the gap.

14 So the free colocation, the  
15 colocation was definitely a part of the  
16 negotiations that we had with Allegiance, and it  
17 was a key factor in the pricing we were in the end  
18 able to offer them.

19 Q Was there any reason why that was  
20 broken off into a separate agreement and put into  
21 a separate agreement?

22 A I do not recall.

23 Q When you initiated the discussions  
24 and negotiations with Allegiance, was there going  
25 to be one agreement that took into account the PRI

1 KEVIN BITTNER

2 agreement as well as the colocation?

3 A I do not recall.

4 Q So, you don't recall when a  
5 determination was made to split the two agreements  
6 into a PRI agreement and the colocation agreement?

7 A No.

8 Q Are there any other reasons why the  
9 colocation agreement was entered into?

10 A The only business KMC had on the  
11 table was the business with Allegiance at that  
12 time, which was the only reason for the colocation  
13 agreement.

14 Q Does KMC provide services to  
15 Allegiance and to other customers?

16 A Yes.

17 Q Does KMC need colocation space to  
18 provide the services to Allegiance and to these  
19 other customers?

20 A If KMC is going to utilize the same  
21 equipment, that answer would be yes.

22 Q Well, what if it were to utilize  
23 any colocation space, does it have third-party  
24 customers that it needs colocation space for?

25 A Yes.

1 KEVIN BITTNER

2 Q If you read the preamble of the  
3 colocation agreement, it says that in order to  
4 provide certain telecommunication services to  
5 KMC -- by KMC to Allegiance, pursuant to that  
6 certain primary rate interface service agreement,  
7 that's the PRI agreement, and to other customers  
8 of KMC.

9 Now, is your understanding that the  
10 colocation agreement was entered into so that KMC  
11 could provide services to Allegiance and to  
12 certain other third parties, customers?

13 A The only customer we had at that  
14 time was Allegiance, we wanted to reserve the  
15 right for future business to supply it to other  
16 customers, so that is correct.

17 Q So, at that time Allegiance was  
18 your only customer, but there was hope at KMC that  
19 you would have other customers and therefore you  
20 would need colocation space to service those other  
21 customers?

22 A Correct.

23 Q And so you entered into this  
24 agreement which would allow you to service those  
25 other customers?

1 KEVIN BITTNER

2 A Yes.

3 Q Did you review any portion of the  
4 colocation agreement prior to it being executed?

5 A As I mentioned earlier, I was  
6 involved with the business principles, which I did  
7 review, entire detail I was not involved with.

8 Q The business principles for the  
9 colocation space, what were the important business  
10 principles?

11 A The important business principal  
12 was it would be available to meet the delivery  
13 time frame and that it would be free as Allegiance  
14 had offered KMC in order for us to meet the  
15 economics that made the primary rate interface  
16 economics work for both companies.

17 Q Is there any way for Allegiance to  
18 make any profit off of the colocation space?

19 A I don't want to assume Allegiance's  
20 financials, but they had to have understood the  
21 economics of the deal they were entering with KMC  
22 with the economics of the deal they had on the  
23 table with their customer.

24 So, I don't know how I should  
25 answer that question.

1 KEVIN BITTNER

2 Q Well, from your understanding, was  
3 it possible for Allegiance to make any money off  
4 of the colocation space that it gave to KMC?

5 A Allegiance would have calculated  
6 their return on their -- the deal they struck with  
7 their customer, would be my understanding, so --

8 Q And KMC would be the customer?

9 A Their customer was not KMC, we were  
10 a supplier to them.

11 Q But under the colocation agreement  
12 you were using Allegiance's space?

13 A Correct.

14 Q And you were not being charged for  
15 the use of that space, is that correct?

16 A We did not increase our price to  
17 Allegiance for the PRIs in order to subsidize the  
18 space, so if that's what you are asking, that's  
19 correct.

20 Q Now, is there any way for  
21 Allegiance to charge KMC for the use of that  
22 colocation space?

23 A I do not know.

24 Q Did you read the colocation  
25 agreement prior to it being signed?

1 KEVIN BITTNER

2 A As I said, I went through the  
3 general business terms.

4 Q Can we look at Exhibit C to the  
5 colocation agreement.

6 Have you ever seen that exhibit  
7 before?

8 A Yes.

9 Q From your understanding, what is  
10 the pricing structure under the colocation  
11 agreement?

12 A It appears to be monthly recurring  
13 charges, charges for power, charges for cross  
14 connects.

15 Q Does KMC have to pay those charges  
16 to Allegiance?

17 A I do not know.

18 Q Can you read the first -- can you  
19 read paragraph 2, "If KMC wants?"

20 A Based on this one sentence or  
21 paragraph, that appears to be the case.

22 Q So, if KMC wants to provide  
23 services to its customers other than Allegiance,  
24 then it would have to incur these charges in this  
25 chart?

1 KEVIN BITTNER

2 A My understanding of the business  
3 principles as they were discussed was that they  
4 were to be supplied two racks, if that met the  
5 Allegiance requirement, KMC would be able to  
6 utilize those racks.

7 If our business with Allegiance  
8 grew beyond that, they would supply the additional  
9 as they call it footprint for additional space.

10 So, based on KMC staying within  
11 those two racks of space, it was a no charge for  
12 KMC.

13 Q So, your reading of the agreement  
14 then is if you go beyond the two racks then these  
15 charges would be payable?

16 A Yes.

17 Q Do you know if these charges that  
18 are reflected in Exhibit C number 2 if they are  
19 market rate charges, if they are favorable  
20 charges?

21 A I do not.

22 Q Now, when you were in negotiations  
23 over the PRI and the use of colocation space and a  
24 determination was made to draft two separate  
25 agreements, did you have any qualms about that,

1 KEVIN BITTNER

2 did you understand why they were going to be two  
3 separate agreements?

4 A I was not involved in the decision  
5 at that point.

6 Q Did you question it?

7 A No.

8 Q Were you worried that if the  
9 colocation agreement was ever terminated that the  
10 PRI agreement would then become an unfavorable  
11 account for KMC?

12 A No.

13 Q If the colocation agreement is  
14 terminated, would the PRI agreement have been  
15 unfavorable?

16 A Yes.

17 Q Why?

18 A The economics.

19 Q Because KMC would have to go get  
20 colocation space elsewhere?

21 A Can I side bar?

22 Q Do you understand the question?

23 MS. JOHNS: Do you need the  
24 question rephrased?

25 A Yes, if you could.

1 KEVIN BITTNER

2 Q If the colocation agreement is not  
3 in effect, if KMC cannot obtain the colocation  
4 space from Allegiance, would the PRI agreement on  
5 its own be detrimental, not favorable to KMC?

6 A The economics would have been  
7 unfavorable to KMC.

8 Q And why is that?

9 A The space that we received in  
10 exchange for the circuits that Allegiance was  
11 going to provide, fed into the economic model for  
12 KMC.

13 If that space were then charged  
14 for, it would definitely deteriorate the economics  
15 KMC had built into our equation.

16 Q Is there any ability for KMC to go  
17 get that colocation space from other providers of  
18 colocation space?

19 A Colocation in tier 1 markets is  
20 usually available.

21 Q Usually available, it's more  
22 expensive than what Allegiance was charging KMC,  
23 but it is available?

24 A That's my understanding.

25 Q Yet KMC had no problem entering

1 KEVIN BITTNER  
2 into the PRI agreement and colocation agreement  
3 separately?

4 MS. JOHNS: I object to the form.

5 Q Were you worried that the  
6 colocation agreement could be terminated on its  
7 own? It was a separate document.

8 A The understanding of the companies  
9 were they were jointly associated.

10 So was I worried? Business  
11 principles that were discussed was that the  
12 agreements were one and the same.

13 Q Was that ever put into any of the  
14 agreements?

15 A I do not know.

16 Q Would that have been important to  
17 put in there?

18 A I do not know.

19 Q Do you know if there is a provision  
20 in the PRI agreement that says unless the  
21 colocation space agreement is executed and entered  
22 into, then we will not sign the PRI agreement?

23 A I'm not aware.

24 Q Wouldn't you be surprised if I said  
25 there isn't such an agreement?

1 KEVIN BITTNER

2 MS. JOHNS: I object to the form.

3 Q You can answer.

4 A I am not aware of the discussions  
5 that would have been in place at that time.

6 Q If I am a business person at KMC  
7 back then and the colocation space is that  
8 essential to this deal, I would ask my attorneys  
9 to make sure that they are part of a single  
10 agreement.

11 Why wasn't that asked, why wasn't  
12 that demanded?

13 MS. JOHNS: Objection.

14 Q Do you know why that wasn't  
15 demanded?

16 A No, I do not.

17 Q Do you know that if the PRI  
18 agreement is deemed terminated, do you know if the  
19 colocation agreement can exist independently of  
20 that?

21 A I do not.

22 Q Do you know if the PRI agreement  
23 has been assigned to any party?

24 A I am not aware.

25 Q Do you know what the April 6th

1 KEVIN BITTNER

2 order is?

3 A No, I do not.

4 Q When KMC filed its motion a couple  
5 of weeks ago on May, I believe May 3rd, it sought  
6 an order deeming the PRI agreement and the  
7 colocation agreement to be integrated and the  
8 colocation agreement to be assumed in accordance  
9 with the April 6th order.

10 The April 6th order approved the  
11 assumption and assignment of the PRI agreement to  
12 Level III, did you know that?

13 A I did not.

14 Q So, you don't know that currently  
15 the PRI agreement is between KMC and Level III?

16 A I knew there were negotiations, I  
17 was not aware of anything beyond that.

18 Q No one advised you that your  
19 services under the PRI are to Level III right now?

20 A No.

21 Q Has Level III been paying KMC for  
22 those services?

23 A I do not know.

24 Q Assume that Allegiance or now Level  
25 III which is the party to this PRI agreement no

1 KEVIN BITTNER

2 longer needed the PRI agreement and wanted to  
3 structure a termination of the PRI agreement or  
4 buyout of the PRI agreement.

5 Do you think KMC would be  
6 interested in such a possible transaction?

7 A Can you repeat the question?

8 Q Assume that Allegiance or now Level  
9 III no longer wanted the PRI agreement and was  
10 interested in terminating it, buying out KMC.

11 Do you think that KMC may have any  
12 interest in such a potential transaction?

13 MS. JOHNS: I am going to object to  
14 the extent it's asking the witness for a  
15 hypothetical situation. He doesn't know  
16 all the information about.

17 Q Well, to the best of your  
18 knowledge, is the PRI agreement currently a  
19 favorable contract for KMC?

20 A Yes.

21 Q Would there be any situations where  
22 KMC may want to get out of the PRI agreement?

23 A I am not involved in the financial.

24 Q To the best of your knowledge.

25 A I do not know.

1 KEVIN BITTNER

2 Q If Level III offered KMC to buy  
3 out, do you think there would be any interest in  
4 that if the buyout amount is sufficient?

5 A Economics usually drive deals.

6 So my answer would be if the right  
7 economics were on the table, there would probably  
8 be interest by KMC.

9 Q Let's assume for a moment that KMC  
10 decided to enter into a buyout type transaction  
11 with Level III so that the PRI agreement is  
12 eliminated and terminated.

13 Would KMC still need the colocation  
14 agreement?

15 A KMC would need colocation space.

16 Q The colocation space that is  
17 provided under the colocation agreement as it  
18 currently stands would be sufficient for KMC's  
19 needs?

20 A That would be my understanding.

21 Q Why would KMC need the colocation  
22 space if the PRI agreement is terminated?

23 A KMC invested in installing the  
24 equipment in the space where it's now located.  
25 For KMC to move our equipment is an economic

1 KEVIN BITTNER

2 burden, fairly expensive for the company.

3 So for us to move that equipment  
4 would be an economic burden on KMC.

5 Q Are there any other reasons?

6 A Customers, if we had any others on  
7 that equipment, we would put their service at  
8 risk, and timing, considerable expense in moving  
9 our interconnection agreements, taking down  
10 transport circuits, turning up new transport  
11 circuits.

12 So it's a severe factor if we have  
13 to move our equipment to a different location.

14 Q Are you telling me there aren't any  
15 current customers that KMC is servicing through  
16 this colocation space under the colocation  
17 agreement?

18 A Could you repeat the question?

19 Q Are there any current customers  
20 that KMC is servicing under the colocation  
21 agreement?

22 A KMC does have other customers on  
23 the platform.

24 Q How many?

25 A I'm not aware.

1 KEVIN BITTNER

2 Q More than five?

3 A I would say five or less.

4 Q What type of customers are these?

5 A Similar in business, much smaller  
6 in scale, one way inbound, IR circuits, similar to  
7 what we are serving on Allegiance.

8 Q These customers need your services  
9 to provide services to others?

10 A We sell wholesale, so they are not  
11 the end customer, they supply to customers.

12 Q When you said that KMC has invested  
13 in this equipment that's located at the colocation  
14 sites, how much money are we talking about?

15 A I'm not aware of the total dollars  
16 spent.

17 Q Are we talking millions?

18 A Yes.

19 Q \$10 million, more than \$10 million?

20 A I would say more than \$10 million.

21 Q More than \$50 million?

22 A I wouldn't be able to speculate.

23 Q Do you know if there have been any  
24 discussions with Level III to terminate the PRI  
25 agreement?

1 KEVIN BITTNER

2 A I have not been involved in any  
3 discussions.

4 Q But do you know if there were any  
5 discussions?

6 A I am not aware.

7 Q Do you know who Anne Falvey is?

8 A Yes.

9 Q Who is Anne Falvey?

10 A She was our outside counsel that  
11 helped KMC in negotiating this agreement.

12 MR. DiCONZA: I am going to ask the  
13 court reporter to put in another exhibit,  
14 Exhibit 6.

15 (The above described document was  
16 marked Allegiance Exhibit 6 for  
17 identification as of this date.)

18 Q Mr. Bittner, can you take a look at  
19 what has been marked as exhibit number 6, please.

20 Have you ever seen that e-mail  
21 before?

22 A Yes.

23 Q Who is it from?

24 A From Anne Falvey.

25 Q Who is it addressed to, do you

1 KEVIN BITTNER

2 recognize those names?

3 A Mark Tresnowski and Royce Holland  
4 of Allegiance.

5 Q Were you cc'd on that e-mail?

6 A Yes, I was.

7 Q Who else was cc'd on the e-mail?

8 A Hal Kamin, Bill Stewart, Roscoe  
9 Young, myself and Alan Epstein.

10 Q Ms. Falvey is sending to you a  
11 draft proposed term sheet for settlement amongst  
12 Allegiance, KMC and Level III.

13 Did you ever review the draft  
14 proposed term sheet?

15 A Yes.

16 Q What was the date of this?

17 A December 11th, 2003.

18 Q What is your understanding of the  
19 term sheet?

20 MS. JOHNS: Counsel, I am going to  
21 object. As I read this, this is something  
22 that was prepared as a settlement proposal  
23 and if you are going to go into any detail  
24 of it, I think it's inappropriate for this  
25 deposition.

1 KEVIN BITTNER

2 MR. DiCONZA: We will agree to keep  
3 this portion confidential.

4 MS. JOHNS: This is not just an  
5 issue of confidentiality, I mean as you  
6 know, settlement proposals can't be used  
7 under the Rules of Evidence, except in  
8 limited circumstances, so I am a little  
9 concerned about your asking questions  
10 relating to a settlement proposal.

11 MR. DiCONZA: I am just asking  
12 questions about his understanding of this  
13 settlement proposal, I am not asking him  
14 questions about the proposal.

15 MS. JOHNS: His understanding of a  
16 settlement proposal goes to what the  
17 settlement proposal is.

18 MR. DiCONZA: I just want to know  
19 if he knows what the settlement proposal  
20 was.

21 If there was a settlement proposal.  
22 I am not asking him for the specifics.

23 MS. JOHNS: If we limit it to that,  
24 I will allow to you answer that question.

25 A Okay.

1 KEVIN BITTNER

2 Q Did you ever see this draft term  
3 sheet?

4 A Yes, I did.

5 Q Do you know what it's about?

6 A My involvement with this was,  
7 again, looking at the business terms, and when I  
8 say business terms, the ongoing needs that KMC  
9 would have for our equipment in the markets.

10 I was not involved in the financial  
11 discussions.

12 Q Well, outside of the financials, we  
13 don't want to know what the financials were, but  
14 what was Level III proposing?

15 A Other than seeing the document, I  
16 was not involved in those discussions.

17 Q But you did receive the document?

18 A Yes.

19 Q And you have read the document when  
20 you received it?

21 A Yes.

22 Q I previously asked you if you knew  
23 whether or not Level III was interested in  
24 terminating or buying out the PRI agreement.

25 A My understanding was that these

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KEVIN BITTNER

discussions and our proposal were not acceptable, so my answer was correct, in that I was not aware that they continued those discussions with KMC based on this agreement or this proposed agreement at that time.

Q But you were aware that there was interest from Level III?

A As Level III has expressed interest to many in this space; yes, that's correct.

Q Many in this space, Level III was interested in buying out the PRI agreement and terminating that agreement?

A Again, my only interaction was the business points for ongoing business, so I was not involved with that.

Q But you knew that Level III had an interest?

A Yes.

Q Would it be fair to assume that the other parties who received this e-mail read the e-mail as well?

A I can't --

MS. JOHNS: Objection, calls for speculation.

1 KEVIN BITTNER

2 Q Did you ever have discussions with  
3 anybody at KMC regarding this e-mail?

4 A I will restate it again, the limit  
5 to my participation was reviewing the business  
6 points as it tied to ongoing business for KMC.

7 Q Did you ever have discussions with  
8 anybody at KMC regarding Level III's interest in  
9 buying out the PRI agreement?

10 A Not that I am aware.

11 Q Did you ever speak with Mr. Roscoe  
12 Young, who is also a recipient of this e-mail,  
13 about Level III's interest?

14 A I do not recall.

15 Q Now, assuming that a deal could  
16 have been struck if the terms were acceptable to  
17 KMC and there was a buyout of the PRI agreement,  
18 KMC would have wanted the colocation space to  
19 remain in effect and the colocation agreement to  
20 remain in effect, is that true?

21 MS. JOHNS: Can you read that one  
22 back.

23 MR. DiCONZA: I can repeat it.

24 Q Assuming that a deal was struck  
25 with Level III and the PRI agreement was

1 KEVIN BITTNER

2 terminated or bought out and KMC would have wanted  
3 the colocation agreement to remain in effect to  
4 service it's other customers, is that true?

5 A KMC would have the need for  
6 colocation space.

7 Q From your understanding of the  
8 colocation agreement, the terms thereunder are  
9 very favorable to KMC?

10 A As I said earlier, the economics of  
11 the overall deal were what went into the PRI  
12 agreement.

13 Q As you testified earlier, you were  
14 involved in the business discussions over the PRI  
15 agreement and the colocation agreement.

16 From your general business  
17 background, do you think it would be reasonable  
18 for the two agreements to contain cross-references  
19 referencing to each other if they were integrated  
20 agreements?

21 A The discussions between our  
22 companies tied the two together as far as the  
23 delivery time frame, the content, the economics.

24 I can't make assumptions as to  
25 whether that would be reasonable, I am not an

1 KEVIN BITTNER

2 attorney who would know what to put into an  
3 agreement.

4 Q Would you be surprised if I were to  
5 tell you that there are no cross-references?

6 MS. JOHNS: I object to the form.

7 Q Well, if I were to tell you there  
8 were no cross-references, would you be surprised?

9 MS. JOHNS: Objection, assumes  
10 incorrectly.

11 Q Assuming there are no  
12 cross-references, would you be surprised?

13 MS. JOHNS: I am going to object,  
14 still. You can answer.

15 Q You can answer.

16 A Not having read through every  
17 detail of these agreements, I am not aware that  
18 there are not any cross-references.

19 Q But if there weren't, you would be  
20 surprised?

21 MS. JOHNS: Objection.

22 A The negotiation of the two  
23 agreements was ongoing, continuing at the same  
24 time. Both were assumed in completing the  
25 financial and deal transaction with Allegiance.

1 KEVIN BITTNER

2 Q Now, you said that you were  
3 involved in the negotiations of terms and business  
4 deals.

5 Do you know what the terms of the  
6 agreements are, what the length of time?

7 A My understanding of the PRI deal  
8 was it was a five year deal, three year with two  
9 options that tied it out to a five year.

10 I think it was -- I am not entirely  
11 aware, but my best recollection is a five year  
12 deal.

13 Q And what is your understanding of  
14 the term of the colocation agreement?

15 A I am not aware.

16 Q Can we take a look at paragraph 1  
17 of the colocation agreement.

18 From your reading of that  
19 provision, is it the same term as the term under  
20 the PRI agreement?

21 A I would have to look at the PRI  
22 agreement.

23 Q Section 2.2.

24 A My reading is they are consistent.

25 Q What do you mean by consistent?

1 KEVIN BITTNER

2 A The colocation agreement is a five  
3 year term, the PRI agreement is a 48 month term  
4 with a one year renewal option.

5 Q So, a 48 month term is the same as  
6 a five year term?

7 A 48 month term plus a one year  
8 renewal option would be a five year term.

9 Q In Section 2.2 of the PRI it says  
10 it shall continue until December 31, 2006, is that  
11 the end of the term?

12 A It also states that the service  
13 term shall renew for a successive 12 month term,  
14 it's the stated renewal term. As I read those two  
15 together it would be a five year term.

16 Q From December 31, 2006 for another  
17 12 months goes to where?

18 A 2007.

19 Q And then the term under the  
20 colocation agreement is five years?

21 A Correct.

22 Q So, December 31, 2006 plus another  
23 year under the PRI gives you December of 2007 for  
24 the PRI, and when does the term expire under the  
25 colocation agreement?

1 KEVIN BITTNER

2 If you go five years from February  
3 2002?

4 A It would be February of 2007.

5 Q And those are still consistent?

6 A The terms for the circuits were  
7 from the point that they were installed for five  
8 years.

9 So at the point they were put into  
10 service they had a five year term.

11 So, what we based it on was the  
12 time of the last circuit being installed going for  
13 a five year term beyond that, which would be  
14 consistent.

15 Q So the terms could be different,  
16 though?

17 The contracts could end on  
18 different terms?

19 Do you agree with me that one  
20 contract could end in December 2007 and the other  
21 contract could end in February 2007?

22 A I am not aware of how the agreement  
23 was put together.

24 Q Now, what are the renewal terms?

25 A I am not aware of what I read here

1 KEVIN BITTNER

2 is one year renewal term.

3 Q What is the renewal term under the  
4 colocation agreement?

5 A Can you repeat the question?

6 Q What is the renewal term under the  
7 colocation agreement?

8 A I am not aware.

9 Q Would it be inconsistent if they  
10 were different renewal terms?

11 MS. JOHNS: Inconsistent with what?

12 Q In connection with the agreements  
13 being integrated?

14 A I am not aware.

15 Q Would it make sense to have  
16 different renewal terms if the agreements were an  
17 integrated contract?

18 A I am not aware.

19 Q Do you know if there are any  
20 provisions in the contract that say if one of the  
21 agreements is terminated then the other agreement  
22 shall terminate as well?

23 A I am not aware.

24 Q Would it make sense for there to be  
25 such a provision?

1 KEVIN BITTNER

2 A I am not aware.

3 Q Would you be surprised if I were to  
4 tell you that there are no such cross-default  
5 provisions in the agreements?

6 MS. JOHNS: I object to the form.

7 You can answer the question.

8 A As I stated earlier in the  
9 negotiation of the agreements, the timing and the  
10 requirement was that they both be in place in  
11 order for us to supply the service to Allegiance.

12 In our negotiations with Allegiance  
13 that was fact as we went through the discussions.

14 Q And that was so that KMC could  
15 provide services under the PRI in a cost effective  
16 manner and make money under the PRI?

17 A That's correct.

18 Q But there was also another purpose  
19 there, wasn't there?

20 Did KMC need the colocation  
21 agreement to provide services to other parties?

22 A The only customer we had at the  
23 time of the negotiation was Allegiance. To supply  
24 service to Allegiance the colocation was required.

25 Q So, then, why did the colocation

1 KEVIN BITTNER

2 agreement allow KMC to use the colocation space  
3 for other customers?

4 A KMC did have the desire to be able  
5 to use the space for additional customers as they  
6 were solicited and won by KMC.

7 Allegiance also expressed an  
8 interest, should they have additional customers  
9 who wished to use the platform, that they be able  
10 to send that business to KMC as well.

11 Q For free?

12 A KMC had a price per port that was  
13 offered to Allegiance for the specific circuits  
14 that we had identified in this agreement.

15 Any additional circuits were to be  
16 handled on an individual case basis and would be  
17 priced appropriately.

18 Q Getting back to payment terms for  
19 third-party customers, I understand from your  
20 testimony that at the time the colocation  
21 agreement was entered into there were no  
22 third-party customers, but KMC has third-party  
23 customers now and it is servicing them under this  
24 colocation space?

25 A Can you repeat the question?

1 KEVIN BITTNER

2 Q From my understanding KMC now has  
3 third-party customers that it is providing service  
4 to under the colocation agreement?

5 A KMC has third-party customers.

6 Q And do you know if any payments  
7 have been made to Allegiance for use of that space  
8 to provide service?

9 A I am not aware.

10 Q You are not aware of any payments.

11 Your understanding of the  
12 colocation agreement, does KMC have to pay  
13 Allegiance for such use?

14 A I do not know.

15 The agreement stated that we  
16 would -- our understanding of the agreement was  
17 that we had two racks of space available to KMC to  
18 support Allegiance.

19 If we grew beyond those two racks,  
20 my understanding is we would then have to pay  
21 Allegiance under the terms.

22 Q Do you know who Ken Jones is?

23 A Ken Jones is in operations for KMC.

24 Q Is he a superior of yours?

25 A No.

1 KEVIN BITTNER

2 Q Does he have any knowledge of the  
3 KMC Allegiance colocation agreement?

4 A Yes.

5 Q Would you consider him  
6 knowledgeable?

7 A Ken is a network person for our  
8 company that installs equipment, selects equipment  
9 and --

10 Q Is he a bright guy?

11 MS. JOHNS: Objection.

12 Q Is he bright?

13 A Ken performs the duties he's  
14 required to at KMC.

15 Q I am going to introduce to you  
16 exhibit number 5 marked previously, take a look at  
17 that.

18 Have you ever seen that e-mail from  
19 Mr. Ken Jones?

20 A I do not recall reading through it.

21 Q Did he send it to you?

22 A I was carbon copied.

23 Q So at one point you received this  
24 e-mail. You don't recall the e-mail?

25 A Correct.

1 KEVIN BITTNER

2 Q Can you read the second paragraph,  
3 Allegiance will?

4 A "Allegiance will provide KMC  
5 colocation space and power in their  
6 colocation facilities at no cost; provided  
7 KMC is only serving Allegiance in that  
8 given colocation space. If KMC provides  
9 services to non-Allegiance customers using  
10 the equipment in that space, KMC will pay  
11 a fee for colocation space and power which  
12 is listed below."

13 Q Now, when you received that e-mail,  
14 did you send back an e-mail to everybody who was  
15 addressed and notified everybody that that's not  
16 what you believed the agreement to say?

17 A I do not recall.

18 Q You don't recall?

19 Did you agree with his e-mail when  
20 you received it?

21 A I do not recall.

22 Q Well, if you didn't agree with it,  
23 wouldn't it be fair for you to have sent an e-mail  
24 back to everybody and say this is not what we  
25 agreed to?

1 KEVIN BITTNER

2 MS. JOHNS: Objection. He just  
3 told you he doesn't recall if he did.

4 Q Wouldn't it be reasonable for  
5 someone to send an e-mail back and saying that we  
6 don't agree to this?

7 A I was carbon copied on the e-mail,  
8 it was not sent directly to me; and I do receive a  
9 number of e-mails every day; I do not recall.

10 MR. DiCONZA: Maybe we should take  
11 a break now, we have lunch available and  
12 we can resume after lunch.

13 (At this point in the proceedings  
14 there was a luncheon recess, after which  
15 the deposition continued as follows:)

16 MR. DiCONZA: Back on the record.

17 Q Mr. Bittner, can you take a look at  
18 the PRI agreement, take a look at Section 12.2 of  
19 that agreement, please.

20 Do you recall this section?

21 A I do not recall in detail. I do  
22 recall that we had discussed access to facilities.

23 Q These facilities being, from your  
24 recollection?

25 A Where our equipment would be

1 KEVIN BITTNER

2 located if it was on Allegiance premises.

3 Q Pursuant to Section 12.2 KMC was  
4 given access to Allegiance's facilities under this  
5 section?

6 A That's my understanding.

7 Q Can you read the second  
8 parenthetical four lines, starting five lines from  
9 the end of that page?

10 A "Excluding access to Allegiance's  
11 colocation space, which shall be addressed in a  
12 separate agreement."

13 Q Do you recall seeing that  
14 parenthetical?

15 A I do not.

16 Q Do you know what agreement it is  
17 referring to when it says "addressed in a separate  
18 agreement?"

19 A I do not recall.

20 Q When you said you were involved in  
21 the discussions and negotiations over this  
22 agreement and the colocation agreement, did you  
23 have discussions with counsel?

24 MS. JOHNS: I will just caution the  
25 witness not to divulge the content of any

1 KEVIN BITTNER  
2 of those discussions with counsel.

3 THE WITNESS: Yes.

4 A Yes.

5 Q Was it in-house counsel?

6 A No.

7 Q Who was counsel?

8 A It was external and it was at that  
9 point I believe Kelley, Drye & Warren.

10 Q They were counsel for KMC at that  
11 point?

12 A Correct.

13 Q Do you recall who was leading the  
14 negotiations?

15 A We had two attorneys, Anne Falvey  
16 and Michael Vitenson.

17 Q Were you in communications with  
18 Anne Falvey and Michael Vitenson over the terms of  
19 the agreement?

20 MS. JOHNS: Same caution as before.

21 A Yes.

22 Q Did you discuss particulars of the  
23 agreement or was it general business type terms?

24 Q I am not asking you what you  
25 discussed, but if they were particular or general.

1 KEVIN BITTNER

2 MS. JOHNS: I think that goes to  
3 the content of the conversations.

4 MR. DiCONZA: I am not asking for  
5 any content.

6 Q Did you have discussions over a  
7 particular section?

8 A I can say our discussions with  
9 counsel were relevant to the business terms as my  
10 involvement.

11 Q Do you recall any particular  
12 business terms that you wanted in these two  
13 agreements?

14 MS. JOHNS: Are you talking  
15 separate and apart from conversations with  
16 counsel?

17 Q That you conveyed to counsel.

18 MS. JOHNS: Then I will instruct  
19 you not to answer, because that's asking  
20 for conversations you had with counsel.

21 MR. DiCONZA: I am done. Thank  
22 you, Mr. Bittner.

23 THE WITNESS: Thank you.

24

25 EXAMINATION BY MR. ADAMS:

1 KEVIN BITTNER

2

3 Q Good afternoon, Mr. Bittner, my  
4 name is Colin Adams, I am with the law firm of  
5 Akin, Gump, Strauss, Hauer & Feld, LLP, we are  
6 here today in connection with the motion filed by  
7 KMC Telecom XI with respect to integration of two  
8 agreements that we have previously discussed with  
9 Mr. DiConza today, the PRI agreement and the  
10 colocation agreement.

11 I am going to ask you a few  
12 questions on behalf of my clients, the Official  
13 Committee of unsecured creditors of the Allegiance  
14 Telecom estates.

15 The same rules would apply to  
16 questions asked by Mr. DiConza, please answer  
17 questions audibly, if you don't understand a  
18 question, please ask me to repeat it and I will do  
19 my best to get you a question you need to  
20 understand.

21 Before we start, I remind you you  
22 remain under oath for this period of questioning.

23 So with that having been said, we  
24 can start with the questions.

25 I wanted to start first by asking

1 KEVIN BITTNER

2 you your involvement in the drafting of both the  
3 PRI agreement and the colocation agreement.

4 It's my understanding that you were  
5 involved in the drafting of these agreements?

6 A I was involved with determining  
7 what the business terms were; and making sure that  
8 the business terms were relayed into the text of  
9 the document.

10 Q How long did your involvement last?

11 A The business terms were discussed  
12 at various points during the negotiations, and I  
13 would say up until the completion of the document,  
14 I was brought back to make sure the business terms  
15 were still met within the agreement terms that  
16 were relayed in the document.

17 Q So, how long a period of time was  
18 it from the time you got started until the time  
19 the document was executed?

20 A I would say it was over probably a  
21 60 day period.

22 Q So two months?

23 A Yes.

24 Q So, during that two month period  
25 did you receive drafts of the PRI agreement?

1 KEVIN BITTNER

2 A Yes.

3 Q Did you receive drafts of the  
4 colocation agreement?

5 A Yes.

6 Q The first draft that you received,  
7 was it a draft of the PRI agreement or the  
8 colocation agreement?

9 A The PRI agreement.

10 Q During that 60 day, two month  
11 period that we just described, how far into that  
12 period were you before you received the first  
13 draft of the colocation agreement?

14 A I do not recall.

15 Q Was it ten days?

16 A I do not recall.

17 Q 30 days?

18 MS. JOHNS: Objection, asked and  
19 answered. He has told you he doesn't  
20 know.

21 Q 30 days?

22 A I do not recall.

23 Q The drafts that you received, did  
24 you review those drafts?

25 A My particular interest was

1 KEVIN BITTNER  
2 reviewing the business points, which were often  
3 summarized and shared with me.

4 I reviewed the relevant sections  
5 that tied to those business points.

6 Q Did you ever comment on the actual  
7 draft documents themselves?

8 A Yes. When the business points had  
9 gaps between our needs and the agreement.

10 Q Were your comments accepted?

11 A I do not recall.

12 Q Did your comments make their way  
13 into the document?

14 A The final document as it was  
15 completed maintained or contained the business  
16 points as we needed them represented.

17 So, I would say that answer would  
18 be in some cases, yes.

19 Q At any time did you ever make the  
20 comment that we shouldn't have two separate  
21 agreements, we should have one agreement?

22 A I do not recall.

23 Q During the negotiations with  
24 respect to the contracts, the 60 day period we  
25 have talked about, you were represented by

1 KEVIN BITTNER

2 counsel?

3 A Yes.

4 Q Both in-house and outside counsel?

5 A I do not believe KMC had in-house  
6 counsel, I am not aware.

7 Q So you had outside counsel?

8 A Correct.

9 Q Did you provide direction to your  
10 outside counsel?

11 MS. JOHNS: Objection.

12 Q I am not asking for the substance  
13 of the direction, just whether or not you provided  
14 the direction.

15 A I relayed the business points --

16 MS. JOHNS: I will just caution the  
17 witness not to divulge any contents of any  
18 communications you had with counsel.

19 And I think you need to rephrase  
20 your question, because asking him to give  
21 directions is going to the content of the  
22 conversations.

23 Q It's a simple yes or no question so  
24 we can avoid content, did you provide direction to  
25 your counsel?

1 KEVIN BITTNER

2 A Yes.

3 Q So you have testified previously  
4 that you basically dealt with the general business  
5 principles in the contract.

6 Can you tell me in your own words  
7 what you mean by that?

8 A With a customer transaction we need  
9 a profitable business outcome for KMC.

10 In order for a profitable business  
11 outcome, it's typically term, volume, making sure  
12 we have the right protections in the agreement, as  
13 I look to give my input it was making sure that we  
14 met the general standards of a favorable agreement  
15 that met the customer's needs and allowing KMC to  
16 remain profitable and to continue providing the  
17 service for our customer.

18 And for KMC to have a favorable  
19 agreement that allowed us to make the right  
20 returns to remain viable in the agreement as well.

21 Q During the period, this two month  
22 period that you were involved in the negotiations  
23 over the actual contract itself, did you ever  
24 discuss the terms of the contract with Roscoe  
25 Young?

1 KEVIN BITTNER

2 A My discussions with Roscoe were  
3 general, they were not specific, more appointed to  
4 we are getting there, or we have got some work to  
5 do.

6 So, it wasn't as much the specific  
7 terms, it was more general direction of the  
8 agreement; where we were and timing for us to  
9 complete the agreement.

10 Q Anything else you discussed with  
11 Roscoe with respect to the agreements?

12 A I do not recall.

13 Q Did you ever provide Mr. Young with  
14 drafts of either the PRI or colocation agreements?

15 A I do not recall.

16 Q To the best of your knowledge, did  
17 Mr. Young ever comment or provide you comments  
18 with drafts on the PRI or colocation agreement?

19 A I do not recall.

20 Q I suppose it's sort of skipping  
21 forward a little bit in your testimony, I wanted  
22 to get a better understanding of KMC's business  
23 operations.

24 You had testified earlier about  
25 something you had called super node cities. I

1 KEVIN BITTNER

2 have to be honest with you, I have done some  
3 telecom cases but I wasn't sure what that was, can  
4 you explain to me what a super node city is?

5 A KMC in designing our data  
6 infrastructure takes a grouping of cities and  
7 brings them back to a single site. Where we have  
8 a soft switch located we call that soft switch a  
9 super node side site.

10 An example would be what we call  
11 our super node in Chicago may serve 10 to 15  
12 cities outside of Chicago, but all the traffic is  
13 brought back via long haul infrastructure to that  
14 site.

15 Q The colocation boxes that are  
16 located in Allegiance's space pursuant to the  
17 colocation agreement, do those constitute super  
18 nodes?

19 A The site would be an aggregation  
20 site which we would call a super node.

21 So the equipment there is a conduit  
22 for all those remote cities to have their traffic  
23 brought back and then handed off to our customer.

24 Q So if for some reason the  
25 colocation agreement were to terminate, would you

1 KEVIN BITTNER

2 then lose that super node?

3 A Yes.

4 Q You had testified previously as  
5 well, I think that the reason that KMC and  
6 Allegiance had initially made this deal together  
7 was that Allegiance was a tier 1 kind of carrier  
8 and KMC was a tier 2 and 3 kind of carrier and  
9 again, I just don't really know what you meant by  
10 that.

11 So if you could explain tiers 1, 2  
12 and 3 to me, it would be helpful?

13 A Absolutely, it's common in telecom,  
14 tier 1 markets are usually referred to as the NFL  
15 markets. NFL being cities which would typically  
16 have an NFL football franchise, large baseball  
17 team.

18 Tier 2 and tier 3 cities, KMC's  
19 business strategy was tier 3 cities which was  
20 population 750,000 or less.

21 The tier 2 markets are in between  
22 the NFL cities and the population of 750,000 or  
23 less.

24 Q Let me see if I understand this,  
25 prior to the execution of the PRI agreement, did

1 KEVIN BITTNER

2 KMC have a presence in tier 1 markets?

3 A KMC did not serve local service via  
4 the soft switch architecture in tier 1 markets.

5 Q And then after the execution of the  
6 PRI agreement, just the PRI agreement, did KMC  
7 have a presence in tier 1 markets then?

8 A KMC's equipment was located in tier  
9 1 markets, but we still did not serve those tier 1  
10 markets.

11 Our market was -- markets served  
12 were the tier 2 and tier 3 marketplace.

13 Q The presence that you just referred  
14 to, that was a presence under the PRI agreement?

15 A As I mentioned earlier, the  
16 agreements were tied together, without the  
17 colocation agreement we would not have had our  
18 equipment in those sites.

19 Q But to your knowledge is there  
20 anything in the PRI agreement that gives you a  
21 right to presence in a tier 1 market?

22 A KMC's infrastructure is such that  
23 we are serving the tier 2 and tier 3 markets,  
24 where our equipment was located was specifically  
25 tied to serving the circuits for Allegiance, their

1 KEVIN BITTNER  
2 equipment was in the tier 1 marketplace so our  
3 hand off point had to be in their tier 1  
4 marketplace.

5 So the reason for our equipment to  
6 be located there was specifically tied to our  
7 requirement to hand off the traffic to Allegiance  
8 in those locations.

9 Q And to your knowledge, just the PRI  
10 agreement, does that agreement provide you with  
11 the ability to do that, to have that hand off  
12 there?

13 A I do not know.

14 Q Let me ask about this again.

15 With the tier 1/tier 2 distinction,  
16 prior to the execution of the colocation agreement  
17 did KMC have any service in the tier 1 markets?

18 A Not on our soft switch platform.

19 Q Then once you executed the  
20 colocation agreement, did you then have presence?

21 A We had a presence, but we did not  
22 supply service in the tier 1 marketplace.

23 Q To your knowledge, in the  
24 colocation agreement is there a section or a part  
25 of the colocation agreement that gives you that

1 KEVIN BITTNER

2 presence in the tier 1 market?

3 A Can you clarify the question  
4 presence, services is what I am trying to  
5 understand the difference between as you relay it.

6 Q Maybe I am not being clear. We  
7 will have to take a step back.

8 Prior to your execution of the  
9 colocation agreement, you were not -- you didn't  
10 have a soft switch, you didn't have a super node  
11 in a tier 1 market and then you execute the  
12 colocation agreement and now you have a soft  
13 switch, correct?

14 A Correct.

15 Q What is it about the colocation  
16 agreement, to your knowledge, can you point to in  
17 the colocation agreement that says "this is what  
18 allows me to have that soft switch?"

19 A The colocation agreement allowed  
20 KMC to place our equipment in the space in the  
21 tier 1 marketplace.

22 Q And the colocation agreement  
23 specifically provides for that?

24 A I do not know.

25 Q Let me ask you this, if the PRI

1 KEVIN BITTNER

2 agreement, as you understand it, were terminated  
3 tomorrow, would you have soft switch capacity in  
4 the tier 1 markets?

5 A Can you repeat the question?

6 Q Maybe I will try and rephrase, we  
7 will go through it again.

8 My understanding is that you  
9 executed two agreements, I understand you believe  
10 that they are one, but two agreements and after  
11 that execution you then had a soft switch presence  
12 in tier 1 markets that you didn't have before you  
13 executed the agreements, is that correct?

14 A After KMC installed the equipment  
15 that would be correct.

16 Q So if the PRI agreement, now just  
17 the PRI agreement, were terminated, would you  
18 still have that soft switch presence in the tier 1  
19 markets?

20 A Yes.

21 Q And if the colocation agreement  
22 were terminated, would you still have that soft  
23 switch presence in the tier 1 markets?

24 A No.

25 Q Can you tell me what the KMC

1 KEVIN BITTNER

2 network roll out strategy is or was?

3 A I'm not sure what you are referring  
4 to.

5 Q I will ask it a different way.

6 At the time of the negotiation and  
7 subsequent entry into these two agreements, did  
8 KMC have a corporate strategy to attempt to  
9 increase the size of its network?

10 A The agreement that we struck with  
11 Allegiance was specifically tied to the business  
12 that was made available to us.

13 Q Was it part of KMC's strategy to  
14 seek that kind of business to begin to move out of  
15 tier 2 and 3 into tier 1?

16 A Again, I would have to state we had  
17 a customer opportunity and it was tied to the  
18 customer opportunity that allowed KMC that build  
19 opportunity to service a customer.

20 Q So, in your view this was more  
21 opportunistic than a planned strategy?

22 A I could not answer the overall  
23 strategy of the company question.

24 Q Let me ask you now about  
25 third-party customers, I want to make sure I

1 KEVIN BITTNER

2 characterize this properly.

3 Your prior testimony today with  
4 Mr. DiConza was that KMC is now providing services  
5 to third parties other than Allegiance Telecom on  
6 these soft switches that we have discussed which  
7 are in the colo facilities pursuant to the  
8 colocation agreement, is that correct?

9 A Yes.

10 Q Can you tell me who these  
11 third-party customers are?

12 MS. JOHNS: Do you want general  
13 terms or are you asking for specific  
14 names?

15 Q Let's start generally, can you tell  
16 me generally who they are?

17 A The type of service we supply is  
18 data one way inbound services.

19 So, a number of customers out there  
20 that fit that description.

21 So similar in nature to the service  
22 we provide to Allegiance today.

23 Q Can you give me the names of these  
24 customers?

25 MS. JOHNS: As was mentioned in the

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2 deposition yesterday, there are and may be  
3 confidentiality agreements in place as to  
4 customers, and given that the witness is  
5 not at liberty to answer that question.

6 MR. ADAMS: We would be happy to  
7 seal this portion of the transcript.

8 MS. JOHNS: Again, I don't know  
9 that marking this portion of the  
10 transcript as confidential would be  
11 sufficient to meet obligations under the  
12 confidentiality agreements.

13 MR. ADAMS: I would like to note  
14 for the record that for the second time in  
15 as many days we have requested the names  
16 of these third-party customers, have been  
17 instructed by counsel for KMC that these  
18 names may be confidential, that we have  
19 indicated our willingness to seal any  
20 portion of these deposition transcripts  
21 related to the identities of these  
22 customers, and that that offer has been  
23 refused and that counsel is instructing  
24 her client not to answer our question.

25 Q I guess we will have to do this

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2 generally.

3 How many of these customers are  
4 there?

5 A I believe I answered that earlier,  
6 my estimate would be 5 or less.

7 Q I don't know if we do this sort of  
8 1, 2, 3, 4 and 5 or A, B, C, D but kind of  
9 customer number 1, when did they become a  
10 customer?

11 A I do not recall the time.

12 Q Customer number 2?

13 A I do not recall.

14 Q For any of the five customers you  
15 you don't know?

16 A I haven't reviewed for this  
17 exercise the timing of our customers coming on  
18 board.

19 Q In the aggregate how much revenue  
20 do these customers generate for KMC?

21 A I do not know.

22 Q Can you tell me in the aggregate  
23 what the margin is for the customers we are  
24 discussing for KMC?

25 A I would need to review and answer

1 KEVIN BITTNER

2 that. I do not know.

3 Q I want to understand a little  
4 better about your position within KMC.

5 I don't want to paraphrase, can you  
6 tell me what your position is? I know you have  
7 already answered?

8 A I run the wholesale division of the  
9 company. I run the sales, installation and  
10 responsible for revenue across both our data  
11 platform and across our tier 3 marketplace.

12 Q In layman's terms, if I were to say  
13 you were the head of sales, is that pretty  
14 accurate?

15 A For the wholesale division of the  
16 company.

17 Q As the head of sales, when a new  
18 customer is brought into KMC are you made aware of  
19 when that new customer becomes a customer?

20 A Yes.

21 Q You know the name of the customer?

22 A Typically, yes.

23 Q You know the credit terms that  
24 would be extended to that customer?

25 A General business terms, yes.

1 KEVIN BITTNER

2 Q You would know what you are  
3 charging them, you know what services you are  
4 providing them?

5 A In general terms.

6 Q As head of sales do you meet with  
7 your sales team on a regular basis?

8 A I meet with the heads of my legs of  
9 the sales team.

10 Q How often do you meet with them?

11 A Monthly.

12 Q Do they produce reports for you?

13 A They do not, we have a finance  
14 person that reports into me.

15 Q How often do you get those reports  
16 from the finance person?

17 A Typically monthly.

18 Q So you get monthly reports from the  
19 finance person.

20 A Correct.

21 Q Are those broken down by customer?

22 A I look at the top line, typically,  
23 my understanding is that they do break it down by  
24 individual customer, though.

25 Q So you have a report every month

1 KEVIN BITTNER

2 that's broken down by individual customer, I  
3 assume on a revenue and location basis?

4 A I do look at the top line revenue,  
5 I do not examine the detail, typically.

6 Q Now, those reports, do they go to  
7 anyone besides you in the KMC organization?

8 A I am not aware.

9 Q Now, you as the head of sales, you  
10 report up?

11 A Correct.

12 Q To whom do you report?

13 A To Roscoe Young.

14 Q How often do you meet with Roscoe  
15 Young?

16 A Formally Roscoe usually has a staff  
17 meeting quarterly.

18 Q At that quarterly staff meeting do  
19 you provide any written materials?

20 A I have a read out of wholesale, so  
21 yes.

22 Q Does that read out include a  
23 breakdown of revenue, margin, by customer?

24 A It's typically a top line revenue  
25 against budgets and quotas.

1 KEVIN BITTNER

2 Q So there is no granularity in terms  
3 of customers?

4 A Typically none.

5 Q Have you ever discussed, and I'm  
6 sorry I don't have the names, but have you ever  
7 discussed KMC's relationship with customers 1  
8 through 5 with Mr. Young?

9 A Yes.

10 Q So, Mr. Young is aware that  
11 customers 1 through 5 are receiving services on  
12 the soft switches that are colocated in the  
13 Allegiance facilities?

14 A As I mentioned earlier, my division  
15 that I run serves both the data platform and the  
16 tier 3 marketplace, so our reports are typically  
17 run across both platforms, so it's not  
18 specifically broken down by the data and by the  
19 ACS as we call it, advanced communications service  
20 markets.

21 It's usually top line revenue that  
22 I report to Roscoe.

23 Q When you have discussed customers 1  
24 through 5 with Mr. Young, what have you discussed?

25 A Typically the total revenue

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2 opportunity.

3 Q Mr. Young has never asked you where  
4 are these customers located? Where do we service  
5 these customers?

6 A I do not recall.

7 Q Have you ever discussed with  
8 Mr. Young the fact that there are third-party  
9 customers utilizing the soft switches colocated in  
10 the Allegiance facilities?

11 A I do not recall that that was  
12 specifically discussed.

13 Q Do you know when the customers 1  
14 through 5, when they began generating revenue for  
15 KMC on the soft switches at the Allegiance  
16 facilities?

17 A As I stated earlier, I'm not sure  
18 of the exact time.

19 Q Can you give me an approximate  
20 range?

21 A Approximate range would be within  
22 the last year.

23 Q In the last year, so sometime in  
24 2003?

25 A Without having specific data, that

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2 would be my estimate.

3 Q Have you ever received a bill or an  
4 invoice from Allegiance Telecom for the services  
5 that you are providing to these third parties?

6 A I do not believe I have.

7 Q To your knowledge, has anyone else  
8 at KMC ever received such a bill or invoice?

9 A I am not aware.

10 Q Have you ever had any internal  
11 discussions with anyone at KMC regarding fees that  
12 might be payable or owing to Allegiance with  
13 regard to these third-party customers?

14 A I have not.

15 Q Have you ever had any conversations  
16 with anyone at Allegiance with respect to the fact  
17 that monies may be owing to Allegiance from KMC  
18 for these third-party customers?

19 A Not to my recollection.

20 Q How often do you communicate with  
21 people at Allegiance Telecom?

22 A I would say I receive a call from  
23 Allegiance monthly, or every other month.

24 Q With whom do you speak at  
25 Allegiance?

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2 A The most common are John Dumbledon  
3 and John Nishimoto.

4 Q Anyone else?

5 A Typically not.

6 Q All of your calls with  
7 Mr. Dumbledon and Mr. Nishimoto, they have never  
8 mentioned these third-party customers?

9 A I believe third-party customers  
10 have been discussed.

11 Q What did you talk about?

12 A Is that a question, general terms?

13 Q When you had the discussions with  
14 Mr. Dumbledon or Nishimoto regarding the  
15 third-party customers, what was discussed?

16 A General, we had been looking for  
17 them to turn up, KMC was asking at one point for  
18 them to sell additional colocation space to a  
19 customer who needed to locate their equipment and  
20 we had been working with John Nishimoto to help  
21 try to produce revenue for Allegiance in allowing  
22 them to colocate their equipment within their  
23 space.

24 That's one conversation.

25 The rest have been general in

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2 nature, John informing me of the bankruptcy, that  
3 they were going down the path of liquidating or  
4 selling to other parties.

5 Most of the agreements -- most of  
6 the discussions were not around third-party  
7 service, most of it was around what was happening  
8 at Allegiance and how they would need to interact  
9 with KMC.

10 Additionally we had some upgrades  
11 we needed to do to our equipment that was located  
12 in their space and they did not wish for us to do  
13 that because of maintenance windows that they had  
14 not secured with their customer.

15 Most of it was in relation to  
16 providing service.

17 Q Never talked about billing, monies  
18 owed, anything like that?

19 A I do not recall.

20 I do not recall a conversation of  
21 fees due for colocation.

22 Q How does KMC know how much to  
23 charge its clients for their use, the third-party  
24 clients for their use of the soft switches?

25 A Each customer opportunity would

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2 require a business case to be run and the  
3 economics would prove itself out as we did with  
4 the Allegiance add --

5 Q Let me rephrase that, do you charge  
6 these third parties on a per minute basis, on a  
7 calls placed basis?

8 How does the fee arrangement work,  
9 I guess, is what I am asking?

10 A With most customers it's similar to  
11 the Allegiance agreement, in which there is a fee  
12 per PRI supplied to them.

13 Q So, when you say similar, similar  
14 to like Exhibit C in the colocation agreement?

15 A Yes.

16 Q Which we have looked at before  
17 today?

18 A Exhibit C is the colocation space,  
19 I am referring to the PRI agreement where it's a  
20 fee per port.

21 Q So, you want three ports, this is  
22 the fee per port per month, per quarter?

23 A Typically monthly.

24 Q I want to turn your attention back  
25 now, if I could, to -- let's turn back to

1 KEVIN BITTNER

2 Allegiance Exhibit 6.

3 Take a moment to look it over, if  
4 you need to refresh your recollection of Exhibit  
5 6.

6 Again, I realize that you have  
7 answered this already, but I just want to lay the  
8 foundation, you had previously testified that this  
9 was an e-mail that was sent by Anne Falvey who is  
10 an attorney at Sidley & Austin, is that correct?

11 A Correct.

12 Q You had previously testified that  
13 you were carbon copied on this e-mail, is that  
14 correct?

15 A That is correct.

16 Q And your e-mail is the  
17 KBITTN@KMCtelecom.com, is that correct?

18 A That's correct.

19 Q You also testified in addition to  
20 reading the e-mail that you had, in fact, read and  
21 reviewed the draft proposed term sheet, is that  
22 correct?

23 A Yes.

24 Q Did you review any prior drafts of  
25 this proposed term sheet?

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2 A I do not recall.

3 Q When you reviewed this term sheet,  
4 what was the primary of your review?

5 A The primary purpose of my review  
6 was understanding the business points, making sure  
7 that it allowed us to continue to provide service  
8 and satisfy the customer needs that we had.

9 Q Now, when you say continue to  
10 provide service, what do you mean by that?

11 A Can you repeat the question?

12 MR. ADAMS: Would you read that  
13 back.

14 (The question requested was read  
15 back by the reporter.)

16 A When I looked in the agreement to  
17 make sure it contained was the business points  
18 that allowed us to sustain the business that we  
19 had on our soft switches.

20 Q By the business you had on your  
21 soft switches, you mean the business to the third  
22 parties?

23 A With any service platform, it is  
24 not an overnight cut of service, so what we have  
25 to make sure in the business points is that we are

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2 able to fill the requirements in our agreements to  
3 our customers.

4 So what I wanted to make sure of in  
5 my review was we were able to meet the obligations  
6 we had under our agreements.

7 Q Let's go and take a look at the  
8 draft term sheet then.

9 MS. JOHNS: Counsel, if you intend  
10 to go into the specifics --

11 MR. ADAMS: I do.

12 MS. JOHNS: Then I am going to  
13 object.

14 This draft term sheet is clearly  
15 labeled as a settlement proposal, and it  
16 is not admissible as evidence, and any  
17 questions that you would ask him about  
18 that would not be admissible, either.

19 MR. ADAMS: Counsel, we are not  
20 asking him to settle the agreements  
21 pursuant to these terms, nor are we  
22 attempting to enforce this settlement  
23 agreement, we are merely asking about this  
24 as a truth that -- a fact that these  
25 discussions took place.

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2 It's not to the veracity of the  
3 discussions, it's that they took place.

4 We will note your objection for the  
5 record, to the extent that you wish to  
6 pursue it in front of Judge Drain we are  
7 happy to have it at that time.

8 I don't think now is the  
9 appropriate time for you and I engage in  
10 an exagesisa as to whether 408 applies or  
11 doesn't apply.

12 MS. JOHNS: I will continue to  
13 object to this line of questioning; it is  
14 inappropriate, it is clearly labeled a  
15 settlement proposal, I am sure you are  
16 aware of the Federal Rules of Evidence  
17 precluding admissibility of any settlement  
18 talks or proposals.

19 Any questions that you would ask in  
20 this deposition regarding the terms of  
21 those settlement talks is inadmissible,  
22 it's an inappropriate line of questions.

23 Q We will proceed with this and at  
24 some point the lawyers and the judge will have to  
25 determine whether or not this ever makes it into

1 KEVIN BITTNER

2 the record.

3 So for the time being let's take a

4 look at paragraph 1.

5 Take your time, give it some

6 review.

7 What do you understand paragraph 1

8 to mean?

9 A I was not involved in this

10 discussion. Again, as I mentioned, I was brought

11 in to make sure that any agreement that was struck

12 allowed us to meet the business requirements we

13 had to our customers.

14 Q You read this when it came out on

15 December 11th, correct?

16 A I was carbon copied on this when it

17 came out on December 11th.

18 Q Did you read the term sheet?

19 A I read through the term sheet.

20 Q And you have been given an

21 opportunity to read it now, is that correct?

22 A Yes.

23 Q Can you tell me given your reading

24 of paragraph 1 what that means?

25 A I was not involved in the

1 KEVIN BITTNER

2 settlement discussions, so I cannot make an  
3 assumption as to what it means.

4 Q When it says in the first sentence,  
5 "Level III will purchase the Allegiance  
6 KMC contract from KMC for \$25 million in  
7 cash, plus any direct or indirect  
8 third-party termination costs of servicing  
9 the Allegiance contract, eg. transport."

10 Does that mean, sir, that Level III  
11 was going to purchase the PRI agreement  
12 for \$25 million in cash?

13 A I do not know.

14 MS. JOHNS: Objection, the document  
15 says what the document says.

16 MR. ADAMS: I am asking for the  
17 witness' interpretation, counsel.

18 MS. JOHNS: The witness is not here  
19 to interpret a document he did not write  
20 for you.

21 Q Let's look at Paragraph number 3.  
22 Can you tell me what Paragraph  
23 number 3 means?

24 MS. JOHNS: Same objections.

25 A As I stated, I was not a party to

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2 the discussions I supplied my input, but I was not  
3 a party to constructing or understanding what the  
4 individual terms were drawn up to satisfy.

5 Q If a third party were to purchase  
6 the PRI agreement, would there be ongoing service  
7 concerns for KMC with respect to the PRI  
8 agreement?

9 A Service supplied business terms  
10 usually extend beyond termination of a portion.  
11 There are a number of factors that come into play  
12 which may require us to continue servicing  
13 circuits, I could not make a decision.

14 Q What's your understanding of the  
15 general terms of this term sheet, what was it  
16 designed to do?

17 A As I said, I was not a party to the  
18 discussions.

19 Q But you were cc'd on this e-mail,  
20 correct?

21 A Correct.

22 Q So, what do you understand it to  
23 mean?

24 A I do not know the intent.

25 Q I am not asking for the intent, I

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2 just want to know at the time when you received  
3 the e-mail, what did you understand it to mean?

4 A I understood this exercise to be an  
5 expressed interest by a third-party to purchase  
6 some contract or circuits KMC had in one of our  
7 agreements.

8 Q Which contract?

9 A My understanding was the Allegiance  
10 agreement.

11 Q The colocation agreement or the PRI  
12 agreement?

13 A I was not a party to separating  
14 which agreement was discussed in our opinion, one  
15 was there to satisfy the needs of the other.

16 Q Did you ever discuss this draft  
17 proposed term sheet with Mr. Young?

18 A I do not recall.

19 Q You testified earlier that you had  
20 reviewed this with respect to the ongoing business  
21 issues, correct.

22 After you completed your review,  
23 what did you then do with that information?

24 A My input was to our counsel who was  
25 drafting --

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2 MS. JOHNS: I will just caution the  
3 witness not to divulge any content of  
4 communications with counsel.

5 A My review was for the business  
6 points which I sent up to our counsel.

7 Q Did you ever have any internal  
8 meetings at KMC, either in person -- I take it  
9 back.

10 Did you ever have any in person  
11 meetings at KMC with respect to this term sheet?

12 A I do not recall.

13 Q Did you ever have any telephonic  
14 meetings at KMC with respect to this term sheet,  
15 conference call?

16 A I do not recall.

17 Q How did you transmit your comments  
18 to your counsel?

19 A The input we -- the input supplied  
20 was the business points required to satisfy our  
21 customers which I believe were supplied by -- I  
22 don't know if it was myself or one of my sales  
23 directors at the time for what we needed for the  
24 ongoing business, I do not recall.

25 Q When you say the input we supplied,

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2 who else is included in we besides yourself?

3 A We, I would mean wholesale  
4 services, the requirements we have for supplying  
5 service to customers. And I represent our group  
6 when I say we.

7 Q Did you ever discuss the terms of  
8 this draft proposed term sheet with anyone outside  
9 of the sales division?

10 A I do not recall.

11 Q There appear to be 4 KMC employees  
12 copied on this e-mail, and you never spoke with  
13 any of the employees copied on this e-mail about  
14 the substance of this e-mail?

15 MS. JOHNS: Objection, misstates  
16 the witness' testimony.

17 A I do not recall.

18 MR. ADAMS: I will rephrase given  
19 your objection.

20 Q Did you ever speak to Mr. Kamin  
21 regarding the substance of this e-mail?

22 A I do not believe I did.

23 Q Did you ever speak to Mr. Stewart  
24 regarding the substance of this e-mail?

25 A I do not recall discussing with

1 KEVIN BITTNER

2 Bill Stewart.

3 Q Did you ever discuss with Mr. Young  
4 the substance of this e-mail?

5 A I do not recall.

6 Q Did you ever discuss with Alan  
7 Epstein the substance of this e-mail?

8 A I do not believe I did.

9 Q Who is Alan Epstein, by the way?

10 A KMC's chief counsel.

11 Q Prior to this e-mail being sent to  
12 the people at Allegiance, did you ever see a draft  
13 of this term sheet?

14 A I do not believe I did.

15 Q Did you ever discuss a draft of  
16 this term sheet with any of the people we have  
17 just walked through that are cc'd on this e-mail?

18 A Again, my input was the business  
19 points that I supplied as we looked at the need to  
20 supply service to our customer base.

21 So I do not recall.

22 Q Who asked you to give your input?

23 A I do not remember.

24 Q So, of your own initiative did you  
25 decided to provide input?

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2 A No, I just do not remember who  
3 asked.

4 Q Who do you typically take  
5 instructions from within KMC?

6 A For what type matters? I report to  
7 Roscoe Young.

8 I do not recall that he asked for  
9 the input on this agreement or the proposed  
10 settlement, I do not recall.

11 Q Did you ever have any conversations  
12 with anyone at KMC regarding the proposed  
13 settlement?

14 A I do not recall.

15 Q Did you ever have any conversations  
16 with anybody at Level III regarding the proposed  
17 settlement?

18 A I do not recall, Level III is a  
19 potential customer, but I do not recall discussing  
20 a settlement agreement with them.

21 Q To your knowledge, did anyone else  
22 at KMC have conversations with Level III about the  
23 proposed settlement?

24 A I was not involved and I do not  
25 know who else would have discussed it or who may

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2 have discussed it, so I do not know.

3 Q Is Level III currently a customer  
4 of KMC?

5 A They have acquired other customers,  
6 such as I think Genuity who had service with KMC,  
7 so they are purchasing transport services across a  
8 few of our markets.

9 Q Did you ever have any discussions  
10 with anyone at Allegiance regarding the terms of  
11 the proposed settlement?

12 A I do not believe so.

13 Q To the best of your knowledge, did  
14 anyone else at KMC ever have conversations with  
15 the people at Allegiance regarding the terms a  
16 proposed settlement?

17 A I do not know.

18 Q With respect to the PRI agreement,  
19 can you tell me your understanding of the  
20 responsibilities of the parties to the PRI  
21 agreement?

22 A Is there a specific section you are  
23 asking me to review?

24 Q Just generally, what's your  
25 understanding of the responsibilities of KMC on

1 KEVIN BITTNER

2 the one hand and Allegiance Telecom on the other?

3 A KMC was to supply circuits in  
4 identified cities with identified quantities to  
5 Allegiance, delivered at a hand off point for  
6 which Allegiance gave KMC compensation for  
7 delivery of such service.

8 Q And that's it as far as the  
9 responsibilities under the PRI; anything else?

10 A You asked for general, I mean  
11 that's at a general level.

12 We had services that they  
13 contracted with us to provide them and we hand off  
14 to Allegiance and they take that circuit and they  
15 hand off to their customer.

16 For that KMC was compensated.

17 Q Did Allegiance have any other  
18 responsibilities under the PRI?

19 A I'm not sure what their contract is  
20 with their customer, but for us they had to  
21 supply, as was discussed already, the colocation  
22 space, they had to supply accession to the  
23 colocation space as we needed to work on our  
24 equipment to access our equipment.

25 The other general terms, you know,

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2 primarily they have to make sure the check is  
3 written to KMC on a monthly basis.

4 Q What's your basis for saying that  
5 KMC has to supply colocation space to KMC under  
6 the PRI agreement?

7 MS. JOHNS: Would you repeat that?

8 Q What's your basis for saying that  
9 Allegiance has to supply to KMC colocation space  
10 under the PRI agreement?

11 A My basis was the discussion that we  
12 had in Chicago which was later then put into our  
13 overall agreement with Allegiance that the  
14 colocation space would be provided to KMC at no  
15 fee.

16 I understand that the way it is  
17 presented here it's in two separate documents, but  
18 in the overall deal that was consummated with  
19 Allegiance that was their requirement or their  
20 obligation that KMC was to provide colocation  
21 space.

22 Q So, you don't have any basis in the  
23 PRI agreement for making the statement that  
24 Allegiance was to provide KMC with colocation  
25 space?

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2 A I do not know.

3 Q So, your basis for making that  
4 statement that Allegiance was to supply colocation  
5 space to KMC is the colocation agreement?

6 A It's the business terms that we  
7 negotiated with Allegiance that were put into the  
8 final documents.

9 Q In which of the two documents is  
10 that business understanding reflected with respect  
11 to the colocation space?

12 A I believe it's noted in the PRI  
13 agreement that there was a colocation document.  
14 The colocation document then outlined the  
15 agreement terms with KMC.

16 Q Can you show me where it's noted in  
17 the PRI agreement?

18 A My reference is 12.2 which  
19 specifically states excluding access to  
20 Allegiance's colocation space, so it clearly  
21 states there was the awareness of a document which  
22 covered this when it further stated which shall be  
23 addressed in a separate agreement.

24 So the awareness that that was a  
25 requirement was covered and it was referenced here

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2 when it states there was another agreement that  
3 was going to cover that specifically.

4 Q Would you do me a favor, would you  
5 read the last two words of what you just read to  
6 me?

7 A In a separate agreement.

8 Q A separate agreement, correct?

9 A Correct.

10 Q Let me ask you, we will go back to  
11 where we started.

12 There was a two month period during  
13 which drafts of these agreements were flying  
14 around between the business people and the  
15 lawyers, correct?

16 A I would say --

17 Q Approximately?

18 A I would say that's approximately  
19 correct.

20 Q You got the PRI agreement first,  
21 the draft of the PRI agreement came first,  
22 correct?

23 A I'm not aware of the specific  
24 timing, as I stated earlier.

25 I believe the timing was that we

1 KEVIN BITTNER  
2 started the PRI agreement and the colocation  
3 agreement came after the discussion at the meeting  
4 in Chicago in which it was offered up by  
5 Allegiance in order to make KMC's financials work  
6 for the transaction whole or at least closer to  
7 whole, that they would allow KMC to collocate at no  
8 charge in their space.

9 Q Who made the decision to negotiate  
10 two separate documents?

11 A I do not know.

12 MR. ADAMS: Take a quick recess and  
13 we will be back.

14 (At this point in the proceedings  
15 there was a recess, after which the  
16 deposition continued as follows:)

17 Q I think just one last question for  
18 you.

19 In addition to your prior  
20 testimony, do you have any other bases for  
21 believing that the PRI agreement and the  
22 colocation agreement are one agreement?

23 A The additional basis I would have  
24 would be the discussions post the Chicago meeting  
25 with Allegiance in which they assured us that the

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colocation would be supplied to KMC and that we would negotiate to complete an agreement that would enable us to be in that space.

So that would be the only addition I would have.

Q And just refresh my memory, who took part in those discussions?

A The individuals that we spoke with at that time were Jeff Feinbeg, John Nishimoto, I believe it was -- I cannot recall if John Dumbledon was there at the time, Chris Manier and myself were the ones who discussed it in Chicago and I think subsequent discussions were between those parties and possibly Ken Jones and Jeff Feinbeg as well.

(Continued on following page.)

1 KEVIN BITTNER

2 Q Any other bases that we should know  
3 about?

4 A I am not aware at this time.

5 MR. ADAMS: Thank you very much for  
6 your testimony today.

7

8

9

\_\_\_\_\_

10 KEVIN BITTNER

11 Subscribed and sworn

12 to before me this \_\_\_\_\_

13 day of \_\_\_\_\_, 2004.

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15 Notary Public

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1 KEVIN BITTNER

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1 KEVIN BITTNER

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

4  
5 I, STEPHEN J. MOORE, a Shorthand  
6 Reporter and Notary Public of the State of New  
7 York, do hereby certify:

8  
9 That, KEVIN BITTNER, the witness  
10 whose deposition is hereinbefore set forth was  
11 duly sworn, and that such deposition is a true  
12 record of the testimony given by such witness.

13  
14 I further certify that I am not  
15 related to any of the parties to this action by  
16 blood or marriage; and that I am in no way  
17 interested in the outcome of this matter.

18  
19 \_\_\_\_\_  
20 Stephen J. Moore, RPR, CRR

1 KEVIN BITTNER

2 ERRATA SHEET

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