

1 BEFORE:

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4 JUDGE STEPHEN SCHWEBEL, IRP Chairman

5 JAN PAULSSON

6 JUDGE DICKRAN TEVRIZIAN

7

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1	C O N T E N T S				
2	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
3	ALEJANDRO PISANTY	807			
4	PAUL TWOMEY	834	907	988	
5	DAVID CARON	992			
6	J. BECKWITH BURR	1032	1054	1066	

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1 P R O C E E D I N G S

2 JUDGE SCHWEBEL: Good morning. I think
3 we're ready to begin.

4 MR. LEVEE: We are. Thank you. ICANN
5 calls as its next witness, Alejandro Pisanty.

6 THE WITNESS: Good morning.

7 JUDGE SCHWEBEL: Good morning.

8 MR. ENSON: Good morning.

9 JUDGE SCHWEBEL: Good morning.

10 DIRECT EXAMINATION

11 BY MR. ENSON:

12 Q. Good morning, Dr. Pisanty.

13 A. Good morning. Is this on okay?

14 Q. Yes, it sounds great. If you just speak
15 into the microphone, everyone will be able to hear.
16 Dr. Pisanty, would you please state your full name
17 for the record?

18 A. My full name as it stands in my passport
19 is Alejandro Pisanty Baruch. The legal system in
20 Mexico has us have our father and mother family names
21 and Alejandro Pisanty regular.

22 Q. Where are you currently employed,

1 Dr. Pisanty?

2 A. I am a full professor at the National
3 Autonomous University of Mexico. I am on a
4 sabbatical leave. My academic position is in the
5 school of chemistry in the department of theoretical
6 chemistry and physics and, as I said, I'm on
7 sabbatical leave.

8 Q. Great. How long have you been with the
9 University of Mexico?

10 A. I started to be employed by the University
11 of Mexico in October 1st, 1974, so that will be close
12 to 35 years now.

13 Q. And would you please describe for us your
14 involvement with ICANN?

15 A. At the time that the effort to build ICANN
16 was started, I was chair of the Internet site of
17 Mexico, chapter of ISOC or Internet site in Mexico.
18 And there was great interest by my predecessor and
19 some of our members in the evolution of the domain
20 name system. At that time -- I just want to verify,
21 am I coming through well?

22 JUDGE SCHWEBEL: Yes, you are. Thank you.

1 THE WITNESS: At the time, there was the
2 gTLD MOU. These are initials for changes that were
3 being started to -- in discussion about the
4 management of the domain name system. I attended
5 some of the Internet society meetings in which some
6 of this stuff was discussed in San Jose, California.
7 And I later joined, in its very early stages, the
8 noncommercial constituency at the time. It was
9 called the noncommercial domain name holders
10 constituency, and it was made up of representations
11 of organizations like universities, nongovernmental
12 organizations, churches, charities, all the
13 noncommercial uses of the domain name system. I took
14 part in drafting the initial bylaws and calling on
15 some organizations to become members of their own
16 commercial constituency. That was my first
17 involvement.

18 Later on, not much later on, I was
19 selected by the domain name supporting organization,
20 the predecessor to today's generic names supporting
21 organization. I was selected by its council to be a
22 member of the board, a director of ICANN. And I was

1 a director of ICANN from the period of between '99
2 and 2007. I was vice chair of the board for almost
3 all of that period.

4 BY MR. ENSON:

5 Q. Dr. Pisanty, you submitted a written
6 witness statement in this matter, correct?

7 A. That's correct.

8 Q. And to your knowledge, was your witness
9 statement true and accurate at the time you signed
10 it?

11 A. As much as I can.

12 Q. And to your knowledge, is your witness
13 statement true and correct today?

14 A. It still is.

15 Q. Dr. Pisanty, as an ICANN board member, you
16 were chairman of the committee on ICANN evolution and
17 reform, correct?

18 A. That is correct, yes.

19 Q. When was this committee created?

20 A. This was created in the -- shortly after
21 the second president of ICANN, Stuart Lynn, started
22 office. He made a diagnosis of what he thought were

1 the main problems with ICANN, made it public. The
2 board had its lengthy discussions about it and the
3 need to restructure and change some of the
4 functioning of ICANN to adjust to its recent birth,
5 and that's when the board decided to create this
6 committee.

7 Q. Would you turn to Exhibit AC in the binder
8 that we're going to get to you in one minute?

9 A. I am unbound for now. That was what?

10 Q. Exhibit AC, apple, cat.

11 A. Apple, Charlie. There we are.

12 Q. Is this a copy of a report that your
13 committee produced?

14 A. Yes, it is.

15 Q. And what is this report?

16 A. This report is called ICANN: A Blueprint
17 for Reform. It's from June -- it was posted publicly
18 on June 2002. It brings together the results of the
19 first rounds of discussions that were held in this
20 process of revising and reviewing the structure and
21 functioning of ICANN, and it sets -- it was meant to
22 set up global picture, a rough picture, and details

1 were needed of where the committee and the board
2 would try to drive change in ICANN.

3 It was extensive. It was meant to cover
4 all significant aspects of organization and
5 functioning and it was meant to spark discussions in
6 the community. As you know, the ICANN community is
7 very contentious, very active, contains many
8 different communities, and it was meant to spark
9 these discussions and drive the works, convergence
10 once a consensus was established of how to change
11 the --

12 Q. If you would turn to page 11 of Exhibit
13 AC, you'll find a section there entitled
14 accountability.

15 A. That is correct.

16 Q. And if you turn to the next page, there is
17 a heading bylaw amendments and alleged infringements.

18 A. That's correct.

19 Q. It states there in the second sentence,
20 "The board should create a process to require
21 nonbinding arbitration by an international
22 arbitration body to review any allegation that the

1 board has acted in conflict with ICANN's bylaws." Is
2 this statement in Exhibit AC consistent with your
3 understanding as to whether or not IRP decisions
4 would ultimately be binding on the ICANN board?

5 A. It's totally consistent.

6 Q. And why did the committee recommend a
7 nonbinding process?

8 A. Well, the committee, first of all, was
9 very interested in establishing a process that would
10 allow for possible errors, mistakes, deviations,
11 interpretations by the board. There was strong
12 pressure from the community or discussions that are
13 still on record that were very active of a need for
14 establishing a mechanism that would call on high
15 authority to possibly appeal and eventually make
16 findings about the board's decisions.

17 It was decided to make this arbitration
18 nonbinding in the thought that the liabilities and
19 responsibilities for anything that's done should lie
20 on the board. The board prefers to have a
21 composition that was broadly representative of the
22 community, that is built up from the edge inwards,

1 from the bottom up, to represent geographic
2 diversity, to represent technical and knowledge
3 diversity. That's the board.

4 Making the review panel's recommendations
5 or conclusions or findings binding would create an
6 authority that would be higher than the board, that
7 would need to be composed in a way that maybe would
8 dilute its expertise by the representativeness and
9 would not necessarily have access to the same pool of
10 technical knowledge and taking care that decisions
11 will not break the technical elements and components
12 of the system.

13 Q. And Dr. Pisanty, did you say earlier that
14 Exhibit AC, the Blueprint for Reform, was publicly
15 posted on ICANN's website?

16 A. Yes, it was. It was posted publicly with
17 the intent -- and it sure did have this effect -- of
18 being discussed broadly, intensely. The reform
19 process was in cycles of perfecting the documents and
20 then doing some of the -- doing them field by field
21 so that all had lengthy cycles of very active and
22 broad participation.

1 Q. Would you turn to Exhibit AE in your
2 binder, please?

3 A. Yes.

4 Q. Do you recognize this document?

5 A. Yes. It's another document later that
6 year. The first one was June. This one was of
7 October 2002 which is called final implementation
8 report and recommendations from the same committee.

9 Q. So to make sure I understand, this is the
10 final report that your committee produced in
11 connection with its remand, correct?

12 A. Yes.

13 Q. And if you would turn to page 11, please.

14 A. Yes, I am.

15 Q. Under the heading alleged infringements of
16 bylaws and articles of incorporation, in the first
17 full paragraph there, your committee states that the
18 IRP process recommended in the new bylaws should not
19 be a Supreme Court of ICANN. Why was your committee
20 opposed to the creation of a Supreme Court of ICANN?

21 A. I would first be very wary that the
22 concept of Supreme Court has its variations worldwide

1 so it's a very generic type of language here. As
2 explained earlier in my previous intervention and in
3 the documents, the complexity of making this process
4 have a higher authority than the board would
5 create -- let's say it would necessitate establishing
6 much more complex structures for the process itself
7 and for the panels in charge of it.

8 It would have, as I said, put the panel
9 itself in jeopardy, in the risk of incurring
10 liabilities that should only accrue to the board.
11 And as I said, when do you stop establishing a higher
12 level that still needs coordination. The intention
13 of the whole process was to make ICANN effective,
14 representative, but able to act in a single and less
15 expensive way than otherwise.

16 Q. Dr. Pisanty, was Exhibit AE publicly
17 posted on ICANN's website?

18 A. Yes, with call for comments.

19 Q. And would you turn to Exhibit AH in your
20 binder?

21 A. Yes.

22 Q. Do you recognize this document?

1 A. It sure looks like the minutes of the
2 meeting of the board of 31 October 2002.

3 Q. And did the board consider the amended
4 bylaws with the new IRP process during this meeting?

5 A. Yes.

6 Q. And if you would turn to page 2 of this
7 exhibit, please, you'll see a paragraph entitled
8 proposed Article IV, section 3, independent review.
9 It states there that the word decision was replaced
10 with declaration, in several places to make the
11 language more precise.

12 A. Yes.

13 Q. These words decisions and declarations,
14 are they referring to the ultimate pronouncement that
15 an IRP panel would produce?

16 A. Yes.

17 Q. And how did replacing the word decision
18 with declaration make the text more precise?

19 A. ICANN is a complex organization. It has
20 many levels of which its components or the bodies
21 that come together to arrive at conclusions that are
22 actionable have different degrees of recommendation

1 power. Decisions were left in our language mostly to
2 the board. And even there, the board's decisions
3 become instructions to staff.

4 So we were wary of creating parallel or
5 intertwining bodies with extreme complexity. We left
6 the decision mostly for the board and let's say
7 supporting organizations' counsel's would mostly come
8 up with recommendations. And declaration was found
9 at that time to be the optimal way to represent the
10 conclusions and findings and, as you said, the
11 ultimate statement of the review panels.

12 Q. After these changes were made in Exhibit
13 AH, did the board adopt the IRP process that your
14 committee had recommended?

15 A. Yes.

16 Q. And have the IRP provisions been amended
17 since they were adopted?

18 A. Not to the best of my knowledge.

19 Q. Dr. Pisanty, you participated in the
20 board's June 1st, 2005 meeting, correct?

21 A. That's correct.

22 Q. Did the ICANN board consider ICM's

1 application for the .XXX sTLD at this meeting?

2 A. Yes, it did.

3 Q. Would you please turn to Exhibit 120 in
4 your binder?

5 A. Yes, I have it.

6 Q. I believe this represents an accurate copy
7 of the minutes from the June 1st, 2005 meeting,
8 correct?

9 A. Yes.

10 Q. It's been argued that the resolutions
11 passed during this meeting with respect to ICM's
12 application reflect a board decision that ICM has
13 satisfied the RFP selection criteria.

14 A. That is in no way the case.

15 Q. Would you explain that for me, please?

16 A. As must be evident for everyone who has
17 been studying these documents and hearing the
18 arguments, the .XXX proposal had the -- was
19 challenged in the satisfaction of one of the criteria
20 within the request for proposals which was the
21 sponsorship criteria. The sponsorship criterion is
22 the criterion that there must be a well-defined

1 community that is backing this proposal and that will
2 have delegated policy authority for registration
3 within this TLD.

4 To clarify this in a few more words,
5 completely open generic top-level domain like .com
6 would allow for anyone to register any name, any
7 sequence of characters, and it may actually be
8 identifiable as a name of someone. The sponsor of
9 TLDs would have policy authority that would restrict
10 the registrations possibly. They would restrict, for
11 example, registrants to members of a given community.
12 A prime example here is .aero or .museum, where you
13 can verify specifically -- the policy authority
14 requires to verify that people are active registered
15 members of something. Museums organized by ICANN,
16 .aero and airports and their recommended suppliers.

17 So that's the sponsorship criteria that's
18 claimed again. And it was found repeatedly by
19 members of the -- board members that it was not well
20 satisfied in the case of .XXX. So that's the
21 sponsorship criterion, and that's the grounds for
22 moving forward as very clearly my opinion, I

1 explained the resolution of the board.

2 The resolution of the board is let's move
3 to contract language, let's move to contract
4 negotiations to see if, when trying to put together
5 the entire structure that to give this delegation of
6 policy authority over .XXX, we can effectively verify
7 that there is or is not a way to satisfy the
8 sponsorship criterion.

9 The finding was -- in this sense, the
10 resolution allowed for further testing of this
11 concept instead of locked in in a discussion
12 whether -- or just relying on a vote, which can be
13 seen approximately as a third against two-thirds of
14 the vote.

15 Q. And Dr. Pisanty, did you believe that ICM
16 would be able to cure what you describe as the
17 sponsorship shortcomings through contract
18 negotiations?

19 A. I was skeptical. I was skeptical about
20 the possibility and, to the best of my understanding,
21 skeptical is good in work. It's a habit from my
22 working in academia. Because I think there is a

1 circular logic in defining this particular sponsoring
2 committee. The definition of this particular
3 sponsoring community, the one for .XXX, relies on an
4 objective which is responsible, and it's very hard
5 and one of the concerns some of us directors of ICANN
6 have had during our period here is the scaling of
7 these concepts globally.

8 I would contend it's already a definition
9 that varies a lot across borders and across
10 jurisdictions and across cultures. Responsible adult
11 content providers is an extremely open concept. And
12 by the way it is set up in the application, the ICM
13 application, it's not only people can apply, but it's
14 the community itself defines itself whether it's
15 responsible. There is no test by a third party that
16 scales globally that can tell you whether there is or
17 is not -- whether a party is or is not reliably a
18 member of that sponsoring community. However, being
19 skeptical, I will remain open and fair and clear to
20 see if this can be remedied further down the road.

21 Q. And Dr. Pisanty, let's move forward in
22 time. Did you participate in the board's March 30th,

1 2007 meeting in Lisbon?

2 A. Yes.

3 Q. ICM's application was considered at this
4 meeting, correct?

5 A. That is correct.

6 Q. What happened at this meeting with respect
7 to ICM's application?

8 A. It was decided not to go forward with it,
9 not to delegate to ICM the .XXX policy authority.

10 Q. And what was your vote on that issue?

11 A. My vote was not to delegate.

12 Q. And did you vote no -- let me just ask
13 you, why did you vote no?

14 A. The resolution at the meeting explains a
15 lot of this. My basic reason to vote no was that I
16 considered that this sponsorship criterion within the
17 RFP was not satisfied.

18 JUDGE TEVRIZIAN: Let me interrupt you.
19 When you say did he vote no, he voted in favor of the
20 resolution, but the resolution was to deny the
21 application.

22 MR. ENSON: You're correct, Your Honor.

1 Thank you very much.

2 THE WITNESS: Thank you. And yes, that's
3 why I try consistently to say I voted to not
4 delegate.

5 MR. ENSON: Thank you both. I appreciate
6 that.

7 BY MR. ENSON:

8 Q. There have been some suggestions in this
9 hearing that you voted against ICM's application out
10 of morality concerns.

11 A. No.

12 Q. I'm sorry?

13 A. No, I did not.

14 Q. Did you feel that the board's decision on
15 March 30, 2007 was improperly influenced in any way
16 by governments?

17 A. No, there was no improper influence by
18 governments.

19 Q. And how would you describe or characterize
20 ICANN's treatment of ICM throughout this process?

21 A. Well, I think this treatment of .XXX was,
22 if anything, particularly careful, responsible, open

1 and attentive to the many opposing forces and ideas
2 that are on .XXX. It was particularly careful, if
3 anything.

4 MR. ENSON: Thank you very much,
5 Dr. Pisanty.

6 JUDGE SCHWEBEL: Thank you.

7 MR. ALI: Let me just take one minute.
8 Judge Schwebel, we have no questions for Dr. Pisanty.
9 Thank you.

10 JUDGE SCHWEBEL: I do have a question.
11 Dr. Pisanty, at the 1 June 2005 meeting, when the
12 resolution introduced by Vinton Cerf was adopted, did
13 you regard the question of sponsorship settled or
14 not?

15 THE WITNESS: Not.

16 JUDGE SCHWEBEL: No? Why not?

17 THE WITNESS: As I said, first, it was
18 based on a circular logic, on a flawed logic and it
19 was very hard to define this sponsorship community.
20 This was not only a question of whether there were
21 enough people backing it, backing the proposal or
22 ready to operate, but the fact that over time --

1 well, even at the time, the definition of responsible
2 adult provider would be a .XXX registry, it was
3 impossible to verify against any third party. There
4 is no database. There is no registry as you have in
5 the museums, cooperatives and all other sponsored
6 communities that lists adult content providers and
7 qualifies them as responsible.

8 JUDGE SCHWEBEL: That's an explanation of
9 why you didn't favor adoption of the resolution, but
10 do you regard the adoption of the resolution by the
11 majority as settling the question of sponsorship or
12 was it still an open question?

13 THE WITNESS: It was still an open
14 question because there were a large fraction of the
15 directors that didn't find complete satisfaction in
16 this criteria. And the decision then was to test it
17 further. Instead of continuing with this discussion
18 of there is or there isn't a sponsoring community,
19 can be or not can be sustainable no longer, to test
20 it further by allowing the contract negotiations to
21 go on. So to build the whole structure that would be
22 proposed by ICM, at least at the contract language

1 level, and find then whether these arguments could be
2 settled in favor of ICM.

3 JUDGE SCHWEBEL: And is there any
4 contemporaneous evidence of which you are aware that
5 shows that that was the intention of the board when
6 it adopted the resolution?

7 THE WITNESS: Well, it's very much in the
8 language itself. I wouldn't know of records, of
9 public records of these decisions at this moment, but
10 certainly I believe that language in the resolution
11 was constructed with extreme care in order not to
12 consider that point as satisfied, but that's to be
13 further tested.

14 JUDGE SCHWEBEL: If one looks at the
15 resolution -- and we have it before us. If you turn
16 back to 120, you'll see the resolution which has been
17 highlighted.

18 THE WITNESS: Yes.

19 JUDGE SCHWEBEL: And it's very short. The
20 first paragraph authorizes the president and general
21 counsel to enter into negotiations relating to
22 proposed commercial and technical terms for the XXX

1 sponsored top-level domain. What do you think the
2 specification of proposed commercial and technical
3 terms imports?

4 THE WITNESS: I think it implies a whole
5 set of the TLD, of the registry, its operations and
6 how it's going to create and affect its policy
7 authority. And that includes, of course, the setup
8 as proposed in the representations of ICM of IFFOR, a
9 foundation, an organization that would have the
10 responsibility to define these issues and to police
11 the content of websites and other Internet traffic or
12 Internet resources. That would be under this
13 authority to make sure that they were not violating
14 this concept of responsible adult content. That
15 would mean the whole -- converting into a contract
16 the whole proposition put forward by ICM in response
17 to the RFP.

18 JUDGE SCHWEBEL: That was your
19 understanding at the time when the resolution was
20 adopted?

21 THE WITNESS: Yes.

22 JUDGE SCHWEBEL: And is it your belief

1 that that was the understanding of your colleagues or
2 was that your particular view?

3 THE WITNESS: I think it was the view of a
4 majority of my colleagues for sure.

5 JUDGE SCHWEBEL: And did a minority have a
6 different view on that point?

7 THE WITNESS: It seems so by the votes.

8 JUDGE SCHWEBEL: That I don't follow.

9 THE WITNESS: A number of the directors
10 did consider that the sponsorship criterion was
11 satisfied, since there was a debate about it. I
12 think that represents the collective agreement is go
13 forward, test and go to the next paragraph of the
14 resolution which starts with an "if."

15 JUDGE SCHWEBEL: Let's look at the next
16 paragraph for a moment. When you say that the issue
17 was still open, are you referring in particular to
18 the last phrase of the highlighted portion of the
19 second paragraph, "For approval and authorization,"
20 et cetera?

21 THE WITNESS: That is correct.

22 JUDGE SCHWEBEL: I'm a little puzzled by

1 the import of our exchange a moment ago on what was
2 the understanding of the board in adopting this
3 resolution. If I understood you correctly, a
4 minority of the board believed that the question of
5 sponsorship had not been settled for the reasons that
6 you stated. Does that mean the majority thought it
7 was settled?

8 THE WITNESS: No, a minority believed that
9 it was satisfied. To the best of my recollection, it
10 was the minority that believed it was satisfied. The
11 majority that either believed it was not or was --

12 JUDGE SCHWEBEL: I see. And you base that
13 conclusion on what?

14 THE WITNESS: Sir, these were extremely
15 intense and continuing discussions among the members
16 of the board, many of them, as is in the record, from
17 the public. The doubts and the uncertainties were
18 repeatedly expressed as the situation evolved, to the
19 best of my recollection.

20 JUDGE SCHWEBEL: Thank you so much,
21 Dr. Pisanty. My colleague, Mr. Paulsson, would like
22 to ask a question.

1 MR. PAULSSON: In the course of this
2 meeting which was by teleconference, if you had
3 concerns about what you have several times described
4 as the problem of the circularity of the self
5 defining membership of this community, did you
6 express those views in the course of the meeting?

7 THE WITNESS: I would think, yes.

8 MR. PAULSSON: And you don't remember?

9 THE WITNESS: I don't remember precisely
10 what the criteria were expressed during that
11 teleconference. This was a concern from very early
12 on and it appears on the record as shared by many
13 other directors later on.

14 MR. PAULSSON: I see. So the reason you
15 don't remember if you spoke of it during this
16 telephone conference was that it was generally
17 canvassed at this time and people knew that this was
18 an issue?

19 THE WITNESS: I think so.

20 MR. PAULSSON: And so therefore, even
21 though -- well, if you know, then, even though this
22 matter was canvassed and widely known, in your view,

1 to be a problem in the minds of some, what should one
2 conclude by the fact that Dr. Cerf and Mr. Twomey
3 voted in favor of the proposal to have this matter go
4 forward? Were they concerned about this or not?

5 THE WITNESS: To the best of my
6 understanding of other people's actions, I'm very
7 wary, very careful not to put words in other people's
8 mouths. To the best of my understanding, this was
9 within the realm of reasonable doubt. If there is
10 opposing criteria by reasonable people, a chairman of
11 the board and the CEO would be acting responsibly in
12 letting the matter be tested further if there is a
13 way to test it, and this was the way to test it.

14 MR. PAULSSON: So your concerns caused you
15 to cast -- to be negative but they, you say, were
16 concerned and nevertheless were positive?

17 THE WITNESS: That's what the evidence
18 tells us, sir.

19 MR. PAULSSON: And what, in your
20 understanding, is the point of negotiating commercial
21 and technical terms if an issue of principle has not
22 been resolved yet? Why waste the time?

1 THE WITNESS: Reasonable doubt, sir.
2 Reasonable people may differ. For me, it's better to
3 test it thoroughly than to dismiss it without the
4 test, if you have the opportunity to test it.

5 MR. PAULSSON: But why not test that? If
6 there is an issue of principle going into the matter,
7 why not test that as a principle before you negotiate
8 technical and commercial terms?

9 THE WITNESS: Sir, that would be my
10 personal preference, and I would be one of a number
11 of people voting and trying to establish a collective
12 mind on the collective course of action for ICANN.

13 MR. PAULSSON: I see the logic of what
14 you're saying.

15 JUDGE SCHWEBEL: Well, then, Dr. Pisanty,
16 it remains for us. Thank you so much for your
17 testimony. I appreciate it.

18 THE WITNESS: Thank you.

19 MR. LEVEE: If the panel would give me
20 three minutes, I'll go get Dr. Twomey.

21 (Recess.)

22 MR. ALI: With respect to Dr. Pisanty, I

1 understand that his testimony was effectively under
2 the general umbrella of the oath that you asked the
3 other witnesses to agree to, and I ask that with
4 respect to Mr. Twomey, that you administer the oath.
5 Thank you.

6 DR. PISANTY: May I specifically say that,
7 yes, I have provided the best of my knowledge.

8 JUDGE SCHWEBEL: Dr. Twomey, do you affirm
9 that you are going to speak the truth, the whole
10 truth and nothing but the truth?

11 THE WITNESS: I do.

12 JUDGE SCHWEBEL: Thank you.

13 DIRECT EXAMINATION

14 BY MR. LEVEE:

15 Q. Good morning, Dr. Twomey.

16 A. Good morning.

17 Q. Could I ask you to state your full name
18 for the record and, as you see, there is a microphone
19 in front of you. If you could speak directly into
20 it, we'll all be able to hear you better.

21 A. My full name is Paul Dominic Twomey.

22 Q. And what is your current position with

1 ICANN?

2 A. I am senior president.

3 Q. When did you become senior president?

4 A. Senior president as of the 1st of July
5 this year.

6 Q. And immediately prior to being senior
7 president, what was your title?

8 A. President and chief executive officer.

9 Q. As president and chief executive officer,
10 were you also a voting member of the board of
11 directors?

12 A. I was.

13 Q. And what was the period of time that you
14 were president and chief executive officer?

15 A. I think it's the 23rd of March 2003 until
16 the 30th of June 2009.

17 Q. Prior to becoming the president and CEO of
18 ICANN, what did you do?

19 A. I had a -- that's two questions. I was
20 also the chair of the ICANN governmental advisory
21 committee for four years from 1999 to 2003, 2002.

22 Q. And then prior to the formation of ICANN,

1 had you served in government at all?

2 A. Prior to the formation of ICANN, I had
3 served in the Australian government in two positions.
4 The particular relevant one I suspect is that I was
5 the chief executive of an agency called the National
6 Office for Information Economy that was the
7 coordination agency in the Australian government for
8 information economy issues in the latter part of the
9 1990s.

10 Q. And was that an elected position?

11 A. Not at all. The Australian system is the
12 Westminster system of government and that has quite a
13 few distinctions between the U.S. system of
14 government. I was a civil servant. We're appointed
15 at the government's will. We serve the minister and
16 the parliament, but quite clearly our roles are not
17 political and are tasked to give frank and fearless
18 advice to the minister or the ministers on the
19 issues.

20 Q. Earlier this week, Dr. Twomey, Ms. Burr
21 testified that because you might be interested in one
22 day returning to government in Australia, you were

1 somehow influenced to reject ICM's application
2 because the Australian communications minister,
3 Ms. Coonan, had voiced concerns about the sponsored
4 top-level domain. Could I ask you to respond to
5 that?

6 A. That's amusing. No. That's very funny,
7 for two, I think, quite clear reasons. First of all,
8 I have no intention of returning to a political
9 position within Australia. Secondly, if you know the
10 Westminster system, if I wanted to have a position of
11 influence in the Australian government, I would be on
12 the back benches for many years before I was made a
13 junior minister or a minister. Thirdly, this was
14 just not an issue that crossed my mind. I think I've
15 only met Helen Coonan twice in my life, so to think
16 that somehow or other keeping Helen Coonan -- was it
17 satisfied or something -- was relevant -- would never
18 cross my mind.

19 Q. Did you submit a witness statement in this
20 proceeding?

21 A. I did.

22 Q. And was it true and accurate when you

1 signed it?

2 A. It was.

3 Q. Does it remain true and accurate today?

4 A. It does.

5 Q. Let's turn to the sponsored top-level
6 domain issues. We've already heard testimony, and so
7 I'm not going to repeat, about how the board decided
8 to have top-level domains and particular sponsored
9 top-level domains. Were you involved in the issuance
10 of the RFP for the new sponsored top-level domains?

11 A. Yes, I was.

12 Q. And we've heard some testimony this week
13 about evaluation teams. Could you explain to the
14 panel what those teams were and what they were
15 intended to do?

16 A. The panels were intended to actually
17 evaluate, to bring nonstaff members of the ICANN
18 community or experts together to provide an
19 evaluation against three sets of criteria, business
20 capability, technical capacity and then particularly
21 the sponsorship criteria which was a unique aspect,
22 if you like, of this round of introducing new TLDs.

1 We went through a process of asking for people who
2 are interested, and then we selected panels and put
3 them in a role in the process of making these
4 evaluations.

5 Q. Now, if any of the evaluation teams
6 responded negatively to an evaluation, was that a
7 basis on which to reject the application?

8 A. The bylaws are very clear in ICANN that
9 the decision-making power sits with the board. So
10 there certainly would be evidence, but we're always
11 very clear, the RFP was written very specifically to
12 reflect the fact that the final decision-making power
13 of the organization sits at the board.

14 Q. And in fact, did the sponsorship
15 evaluation committee team reject many of the sTLD
16 applications?

17 A. It rejected, from my memory, 8 out of 10.

18 Q. Did the board elect to proceed with most
19 or all of those applications?

20 A. Yes. You must see this in a context
21 where, in -- to go back to the end of 2003, the ICANN
22 board had quite a discussion at one of its meetings

1 in Carthage, Tunisia, one of our big international
2 meetings, where they thought it was important to try
3 to move forward on having more competition and choice
4 for top-level domains.

5 In that discussion, it was considered from
6 the first round that we had received that one of the
7 relatively easy groups that we had seen had been the
8 sponsored top-level domains. We knew there were big
9 issues that would still need to be worked through in
10 policy terms for just overall opening to anybody,
11 what we call just generic top-level domains.

12 So the board made a two-track decision.
13 It said, let's move forward with what we think we can
14 move forward with now, which is sponsored top-level
15 domains, and the examples we had that we seemed to
16 think were quite successful were, for example, .co-op
17 for the cooperative movement or .museum for the
18 museums of the world, which had been very well
19 defined associations of communities who had very
20 clear memberships, who wanted this for their own
21 sense of identity and were clearly sponsors of this
22 top-level domain. And they had been seen in the

1 first round in 2000-2001 as being relatively
2 successful, easy to implement.

3 The second type of top-level domains would
4 have a lot of other policy issues involved, if we
5 just have it more openly. Just to give a small
6 example, what do you do with geographic terms? You
7 know, if somebody applies for dot -- if I can use
8 just Australia as an example -- .australia, when you
9 already have a country code for Australia, .au. So
10 there are obviously going to be policy issues there.

11 So the board said, let's split this in two
12 parts. We'll have a long policy process, we'll have
13 a policy process about how to implement the generic
14 top-level domains and what issues may be involved and
15 then we'll -- because we do want to move forward, we
16 will have a round of sponsored top-level domains with
17 the expectation that we would receive applications
18 from those sorts of communities like the museums.

19 And as a consequence, we received 10
20 applications. I think there was some surprise about
21 what people had defined as being sponsorship, and
22 then I expect there was probably at the board level

1 some surprise when the sponsorship evaluation
2 committee said no to 8 out of the 10. That surprise
3 was more, I think, focused about here was the board
4 trying to move forward on opening up and letting more
5 TLDs, and we suddenly had a process which was closing
6 off what we thought was the quick way of doing
7 things.

8 Q. Was there a time where the board heard
9 directly from ICM with respect to its application?

10 A. There were many times when the board heard
11 from them. Quite specifically, after the process
12 of -- after the receipt of the evaluation committee's
13 report saying that they, in their view, thought there
14 was not a sponsorship, the board gave applicants an
15 opportunity to make a presentation to the board to
16 make the case as to whether they thought they would
17 indeed fit within that criteria. And the board gave
18 that opportunity to ICM certainly in a meeting that
19 took place in Mara del Plata, I think in April 2005.

20 Q. And were you in attendance?

21 A. No, I was ill, so I was not in attendance
22 at that meeting.

1 Q. Did you subsequently participate in the
2 board's June 1, 2005 telephonic conference?

3 A. I did.

4 Q. We've already heard testimony on that
5 issue this morning, so I'm going to try to focus my
6 questions as clearly as I can. We've looked at
7 resolutions and the panel has just asked questions
8 about the resolution, but let's give Dr. Twomey a
9 copy of Exhibit 120, so that he also has a copy of
10 the resolution. Do you recognize Exhibit 120,
11 Dr. Twomey?

12 A. I do.

13 Q. Tell us, if you can recall, the amount of
14 discussion on the phone that day regarding the .XXX
15 application.

16 A. There was a lot of discussion on the phone
17 call. I was particularly interested because I had
18 not participated in the April meeting. So there was
19 an interesting discussion of members of the board who
20 had been at the April meeting interpreting what they
21 heard in April. So I was interested to hear that.
22 There were members of the board who continued to

1 express quite specific concerns about sponsorship and
2 other aspects of this. Actually, there were members
3 of the board who I think in every meeting of the
4 board raised sponsorship whenever we discussed XXX.

5 The others were saying, well, they seemed
6 to have a plan, they have a plan for going forward
7 with how they could show there could be a sponsorship
8 community here. I think it was Raimundo Beca who
9 was one of our board members who consistently kept
10 saying in this meeting, it's self-defined. How do we
11 know who the sponsored group is if it's
12 self-defining? If I join on this, I'm part of the
13 sponsorship group, and he had a lot of problems with
14 that.

15 I think one of the things that took place
16 in this telephone call which was interesting was
17 there was also consciousness that six members of the
18 board were not on the call. So my recollection of
19 what was quite a long discussion was, you know, we
20 sort of haven't got to make this decision now. We
21 can move forward, we can ask the staff to move
22 forward on looking at the contract. And as we go

1 forward with that, it gives the opportunity for us to
2 give great clarity about what is the nature of the
3 sponsorship community.

4 Q. And so there was a resolution that
5 proposed and passed, actually two resolutions and
6 I'll have Kate highlight them, but I won't ask you to
7 read them because we've looked at them already this
8 morning just within the last 20 minutes. How did you
9 vote?

10 A. I voted in favor.

11 Q. And tell the panel what your vote meant.

12 A. Well, I voted in favor of moving forward
13 with negotiations and allowing more time for us to
14 see whether these issues being raised would be
15 addressed to the minds of the board. I think we had
16 a very long discussion about this on the phone call.
17 We were concerned that we had -- there were a lot of
18 other issues facing us at the time. We had the .net
19 renegotiations, we had the World Summit on the
20 Information Society. It was a very complex time for
21 the board.

22 So we were conscious we had already taken

1 a large amount of the board time on this issue. Six
2 members of the board weren't on the call. And I
3 voted in favor because I thought what was best for us
4 was to go forward with the applicant for the
5 negotiation terms, talk about the contract and give
6 us more time to actually satisfy, see if we could
7 satisfy the concerns around sponsorship. So that's
8 my view of it.

9 Q. As you were voting in favor of the
10 resolutions, was it your intent that the issue of
11 sponsorship was now resolved and would not be
12 discussed further?

13 A. No. I knew it was not resolved. I
14 certainly knew it was going to be discussed further.
15 You only have to know the personalities of some of my
16 board members to know they were going to keep raising
17 this issue. This resolution said quite clearly that
18 the president shall present such proposed terms of
19 the board for approval and authorization to enter
20 into an agreement and enter into delegations.

21 Now, my reading is that's the final board
22 decision. This was not yet finalized. And the way

1 in which we actually make delegations into the group,
2 we actually make decisions about changing streams in
3 the very top of the root in all sorts of TLDs,
4 country code TLDs and other TLDs, nothing is
5 finalized until the board makes a formal vote that we
6 can actually put that into the root. So it's part of
7 our quite clear culture. Nothing is finalized until
8 the board goes to final vote.

9 Q. Dr. Pisanty was asked a question, I
10 believe by Mr. Paulsson 15 minutes ago. Why
11 didn't -- I'm sorry if I don't get the question
12 right, but I'm going to try.

13 MR. PAULSSON: Sure you will.

14 BY MR. LEVEE:

15 Q. Why didn't the board simply defer or hold
16 in abeyance and continue to look at the issue of
17 sponsorship at subsequent meetings as opposed to
18 going into contract negotiations?

19 A. Well, I think we saw a contract, I think
20 the other members of the board saw contract
21 negotiations as a mechanism where they could find
22 more information about the sponsorship process and

1 allow the applicant to give us more information on
2 the sponsorship related issues.

3 I think we also saw it as there was a
4 desire to be seen to be moving forward. And if we
5 could parallel track issues, that would be a valuable
6 thing. We thought the applicant would find that
7 valuable. We thought we would find that valuable.
8 Quite a number of the issues were more prosaic issues
9 in terms of TLD administration.

10 Q. And in fact, at every subsequent board
11 meeting at which the .XXX top-level domain was
12 addressed, was sponsorship raised as one of the
13 issues?

14 A. It was always raised as an issue. Again,
15 you just have to know the personalities of some of my
16 board members. And I referred, for instance, to
17 Raimundo Beca, but other board members who consistently
18 voted against this application and on every
19 opportunity when it was raised, always raised their
20 concerns around sponsorship.

21 JUDGE SCHWEBEL: May I ask a question
22 about this one piece? To your knowledge, Mr. Twomey,

1 was sponsorship an issue in the exchanges between
2 counsel for .XXX and the staff of ICANN, or did they
3 concentrate only on other matters?

4 THE WITNESS: This issue was raised with
5 staff discussions. After talking a bit later, Your
6 Honor, I can recall meetings with the counsel and
7 proponents of ICM and ICANN staff as late as, say,
8 December 2006 in regular conversations where we kept
9 raising with -- in one particular meeting in December
10 2006, where we raised again with the applicants
11 directly that sponsorship remained an issue. They
12 addressed it. They actually raised issue with us in
13 those discussions.

14 There was quite a lot of -- we were pretty
15 clear in communicating that obviously sponsorship was
16 coming up, that there were issues being raised with
17 us by -- for instance, I had received a letter
18 early -- there had been a letter in the early part of
19 this process from a Mr. Larry Flynt who is a
20 well-known character in this industry who supposedly
21 supported it. I received a very strongly worded
22 letter from Mr. Flynt opposing it.

1 There were meetings at various conferences
2 where people mobilized against this application from
3 that industry. And this was made known to the board
4 and staff by participants in those industries. And
5 the questions -- the board members kept raising this
6 issue in discussions, so we raised it with counsel
7 and with the proponents, ICM, on a pretty regular
8 basis.

9 Indeed, proponents and counsel for the
10 proponents went out of their way to ask if they could
11 address the board members in early 2007 quite
12 specifically on sponsorship. They asked if they
13 could actually do a teleconference directly on one of
14 the issues they raised in those discussions with the
15 board members was trying to address issues around
16 sponsorship. So it was always my view that they
17 understood that there was an ongoing question about
18 sponsorship.

19 There was a constant discussion about --
20 there is an organization they put forward as part of
21 their proposal -- IFFOR, this group of what was
22 supposed to be the advisory people on child

1 protection, et cetera, and we kept saying, who are
2 these people? And they kept saying, well, you
3 release the TLD and we'll tell you who they are. And
4 we said, that's not feasible. You know, who are the
5 people behind your application? We're putting
6 forward a community. Who are these people?

7 And basically, it seemed to be the people
8 weren't willing to self-identify until the TLD had
9 been approved. So we had this sort of funny loop
10 going on where we were saying, who are the people,
11 you have to come out and say all of these good people
12 you claim you have. And they were saying, no, we
13 can't do that until you give us the TLD. It was kind
14 of like trust us and we'll show you the community.
15 That was the loop that was going on in these
16 discussions.

17 JUDGE SCHWEBEL: Thank you.

18 BY MR. LEVEE:

19 Q. Was ICM the only applicant allowed to
20 proceed to contract negotiations despite open issues
21 regarding sponsorship?

22 A. No.

1 Q. And do you recall in particular
2 applications that were allowed to proceed other than
3 ICM's?

4 A. Quite a number of other applications.

5 Q. After the board's June 1, 2005 vote, I
6 won't characterize what happened, but they passed the
7 resolution. We'll go from there. Did you receive
8 any communications from any governments regarding
9 .XXX?

10 A. I'm sorry, Mr. LeVee, can you remind me
11 which vote again?

12 Q. Yes, the June 2005 that we just looked at.
13 Did you receive any communications from governments
14 regarding the .XXX proposal?

15 A. We received communications at a time when
16 we had posted an upcoming board meeting that we were
17 looking at, looking at the contract itself.

18 Q. Did you also receive any telephone calls?

19 A. Yes, I did. I'm just -- this was in 2005,
20 August 2005.

21 Q. Yes.

22 A. We put up -- when we have a telephonic

1 board meeting or any board meeting, we post our
2 agenda publicly one week before the board meeting.
3 We received -- we put up a follow-up to this June
4 resolution, the first feedback from the board, from
5 the staff to the board, in August 2005's board
6 meeting.

7 And when we posted it, we said -- I think
8 it said something along the lines of contract for XXX
9 to be affirmed. I've forgotten the exact wording,
10 but it sort of had -- it looked like the contract was
11 going to be signed or it was going to be up before
12 the board for vote. That's probably an error on our
13 part in description because the board always
14 discusses issues several times. We knew the board
15 wasn't going to vote that time, but we always vote --
16 discuss the issue several times before we decide.

17 I received -- I had actually flown for one
18 day to Washington, D.C. to meet with a board member.
19 I received a telephone call from a number of people,
20 in particular Mike Gallagher who was the Assistant
21 Secretary of Commerce, and also from Sharil Tarmizi
22 who was the chair of the GAC. Indeed I received a

1 phone call from Sharil Tarmizi saying to me that he
2 had received communications from the U.S. government
3 and a member of the GAC that they had concerns about
4 this posting, and they thought we were rushing ahead,
5 they were sort of wondering what was happening, that
6 he also had other members of his committee who had
7 been suddenly raising the question. There was a
8 sense that they thought they had been taken by
9 surprise apparently.

10 After his telephone call, my phone began
11 to beep and I had a phone call from Mr. Gallagher, so
12 I had both of them on the phone. So I told
13 Mr. Tarmizi I would call him back and I spoke to
14 Mr. Gallagher. He basically said, what's going on?
15 You're posting this now. I've got a -- what's
16 happening?

17 And I said, well, it's up for discussion.
18 He said, well, I've got a lot of people here who are
19 concerned, that have been taken by surprise. I have
20 a new Deputy Secretary. He doesn't understand these
21 things yet, but he's asking why are we doing this and
22 what's happening. And I said, well, we're not voting

1 on this yet, you know, I'm sorry it sounds like that,
2 but this is part of the process. And he said, we've
3 got concerns about what's going on and press issues.
4 And I was quite clear to him. I said, that's fine, I
5 understand that, but you're going to need to
6 communicate what those issues are.

7 He was quite explicit with me that while
8 there was certainly discussions in parts of his
9 administration internally, there were certainly
10 concerns about the general content, this is about
11 XXX, this is about pornography, that he didn't care
12 about that, that wasn't his concern. His concern was
13 this was a process issue, that this seemed to have
14 gone very quickly.

15 My concern when talking to him and also
16 talking to Mr. Tarmizi was just that this was
17 communicated in an appropriate way through ICANN
18 processes, and that was a general concern of mine.
19 At the time, we were dealing with a lot of issues,
20 the World Summit for Information Society. That was
21 my great concern, was to keep reinforcing the ICANN
22 processes and the ICANN institution that it works on.

1 So my statement to him was, you know,
2 that's fine, I understand he's not going to have the
3 same view. And I said, that's fine, you can do it in
4 the context of the GAC or a member of the GAC.
5 Public policy was something that we're required to
6 take advice from him as the GAC. Please, by all
7 means.

8 I then rang Mr. Tarmizi back because I cut
9 him off halfway into the conversation. I briefly
10 described the phone conversation Mike Gallagher and I
11 had, and I said to him that, you know, described it.
12 And he said, I've got other GAC members who can raise
13 this issue. We had a public meeting in Luxembourg
14 prior to that, where I knew that the Danish
15 government and others had raised issues. So I said
16 to him, well, you best also communicate in writing.
17 That's the process you have under the bylaws. So he
18 actually sent a -- they both sent a letter on the
19 same day to us.

20 It's an interesting point. I travel
21 across the Pacific a lot. The letters when they're
22 posted, one says the 11th and one -- well, one is

1 dated the 11th and one is dated the 12th, but of
2 course that's the same time. If you're in Malaysia,
3 the 12th is the 11th in Washington.

4 Q. Let's get you copies of those letters.
5 The first is Exhibit 162 and why don't we just
6 provide them at the same time. The other is 163.

7 JUDGE TEVRIZIAN: For over 50 years, I
8 belonged to an organization called the XXX
9 fraternity. The organization was devoted to
10 charitable philanthropic purposes. So if you go on
11 and Google and it says XXX fraternity, you'll know
12 what it means.

13 THE WITNESS: I hope you haven't had the
14 problem we had, which was a lot of corporate filters,
15 web filters specifically cut out that three letters,
16 and so when we had board discussions in e-mails, we
17 had to find alternative ways because people would
18 say, I didn't get your e-mail. That's because the
19 corporate filter had cut it out.

20 BY MR. LEVEE:

21 Q. Let's take a look at Exhibit 162 first.
22 Is this the letter from Mr. Gallagher?

1 A. Yes, it is.

2 Q. And what was he asking you to do, if
3 anything?

4 A. Well, he was essentially asking two
5 things, to ensure that the concerns of all members in
6 the community on this issue had been adequately
7 heard, and that I think was a reasonable request
8 because they were receiving, you know, feedback from
9 members, particularly in the United States of people
10 who were concerned.

11 And the second thing he was asking, that
12 we just basically give additional time for these
13 concerns to be voiced and addressed before any
14 additional action takes place. So that was
15 basically -- was fairly consistent with his own --
16 with the telephone call he had made which was, we're
17 receiving, you know, communications about this, we're
18 surprised. And I think the surprise came from the
19 wording of the posting of the agenda. They thought
20 we were moving very quickly, which was not what we
21 were going to be doing. And he was saying, please
22 delay.

1 Q. And then let's look at Exhibit 163. Now,
2 this is from Mr. Tarmizi. Is it an official
3 statement by the GAC?

4 A. It's a personal statement from the chair
5 of the GAC. You'll see that it concludes at the end,
6 I believe that the board should allow time for
7 government and public policy concerns to be
8 expressed. It was consistent with what the board
9 members had heard during the meeting in Luxembourg
10 some six, eight weeks beforehand when we met with the
11 GAC members, where some GAC members specifically
12 raised the concerns with us.

13 Q. I'm going to show you the Luxembourg
14 minutes in a minute. I just want to close the loop
15 on this. During Ms. Burr's testimony -- first of
16 all, she said she and you had a conversation about
17 these letters. Is that correct?

18 A. That's right.

19 Q. Why were you telling Ms. Burr about these
20 letters?

21 A. I told Ms. Burr about these letters
22 because -- and about the telephone conversations

1 because I wanted to be as open with the applicant as
2 possible, that we had been working together to try to
3 see if we could, you know, work up this in the
4 contract discussions. So it was a good faith
5 discussion to share as much as I did. Ms. Burr and I
6 have known each other for a long time and she
7 obviously familiar with the context, so I thought it
8 was best to share with her.

9 Q. I think it would be fair to say that
10 Ms. Burr suggested or testified that you had told her
11 that you had solicited Mr. Tarmizi's letter as cover
12 of some sort for the fact that the U.S. Government
13 was going to be sending the letter. Did you do that?

14 A. No. That would be, I think, a
15 misinterpretation of what I would have said. You
16 know, I described before, I was on the phone call to
17 Sharil who was actually saying I've got members of my
18 GAC who are unhappy, particularly the United States
19 has gotten in contact with me. I had to break the call
20 because I had received a call from Mr. Gallagher. I
21 went back on the call to Mr. Tarmizi who is saying,
22 I've got these, you know, these concerns.

1 Mr. Tarmizi was my vice chair when I was
2 the chair of the Government Advisory Committee and it
3 was not unusual for him to call me partly to sort of
4 get advice from the previous chair of the GAC, how
5 did you handle these things when you were there. And
6 so we had a bit of a conversation on what's the best
7 way to go forward, briefly, which I think I pointed
8 out to him the provisions in the bylaws say that GAC
9 can directly communicate with the board.

10 And I said, well, if you've got these
11 concerns, rather than you raising them with me, you
12 probably need to write a letter so that it was
13 communicated to the board. So I think we had a
14 comment and I think I should have shared it with
15 Ms. Burr that evening. It certainly was not a
16 question of asking for cover. My concern -- I'm
17 quite open about it -- was that people followed the
18 process. It was the process steps that obviously
19 concerned me, that this was an issue related to a TLD
20 application, it should go through the GAC process.

21 Q. The panel has heard a lot about the GAC
22 and I won't ask a lot of questions on that subject,

1 but what was your understanding as to the board's
2 obligations when or if the GAC communicated with the
3 board on matters of public policy?

4 A. There is two aspects of the board
5 obligations. First of all, article 1 of the bylaws,
6 which outlines what we do and what we don't do,
7 implicitly what we don't do, also has a set of values
8 laid out as to how we're to interpret those. The
9 final one which quite explicitly says that even
10 though it's a private sector-led organization, that
11 governments have the role of public policy and people
12 should give us advice on public policy issues.

13 The second aspect is that there is
14 specific provisions in the bylaws for the board --
15 for the GAC to give advice to the board on public
16 policy issues. If the board were not to follow that
17 advice, that it would have to write back to the GAC
18 and explain in detail why it did not follow that
19 advice. It's not a provision which requires the
20 board of ICANN to do what the GAC says. That's very
21 important. It is a mechanism which basically is
22 there to say, take this seriously. This is the

1 advice we're giving you. Please take it seriously.
2 If you do not follow it, please write us in detail as
3 to why you did not follow it.

4 Q. You said you attended the GAC meeting in
5 Luxembourg in July 2005?

6 A. (Witness nodding.)

7 Q. Let me show you the minutes of that
8 meeting which the panel has seen already several
9 times, but it's Exhibit 159.

10 MR. LEVEE: And members of the panel, I am
11 trying not to be redundant and I apologize to some
12 degree. I have to because of the way things are
13 going.

14 BY MR. LEVEE:

15 Q. Do you recognize Exhibit 159?

16 A. This is the communique of the GAC. This
17 is not -- did you refer to the minutes?

18 Q. You are correct. I misnumbered. Kate, do
19 you have the actual minutes? I apologize,
20 Dr. Twomey. I will come back to those once we find
21 them.

22 JUDGE TEVRIZIAN: I believe it's 140.

1 MS. WALLACE: It's 139, I believe.

2 JUDGE TEVRIZIAN: It's 140 on mine.

3 THE WITNESS: The one on line is the
4 minutes.

5 MR. LEVEE: Exhibit 139, Judge Tevrizian,
6 do you have that?

7 JUDGE TEVRIZIAN: Yes, I have that. I
8 have 139 and 140.

9 BY MR. LEVEE:

10 Q. Do you see that on the screen, Dr. Twomey?

11 A. I do.

12 Q. Let me ask Kate to go to the fifth page
13 and blow up as much as you can beginning where it
14 says, "Mr. Twomey," down to -- yes, right about
15 there. Thank you. Do you recall, Dr. Twomey, that
16 there was discussion at the GAC meeting regarding the
17 .XXX application?

18 A. I do. I do.

19 Q. And who prepares the minutes of these
20 meetings?

21 A. The secretary of the Governmental Advisory
22 Committee.

1 Q. There is a statement attributed to
2 Dr. Cerf that's in the second paragraph and it says,
3 "The proposal this time met the three main criteria,
4 financial, technical, sponsorship. There were doubts
5 expressed about the last criteria which were
6 discussed extensively and the board reached a
7 positive decision considering that ICANN should not
8 be involved in content matters." Do you recall
9 Dr. Cerf saying at the meeting that the issues of
10 sponsorship had, in fact, been resolved?

11 A. From my recollection, he tried to give us
12 the sense that the sense of the board was, after the
13 discussion in Mar del Plata, that it was sufficient
14 to move forward, that on the three criteria, it was
15 sufficient for us to keep moving forward.

16 Q. And did that mean that the issue -- that
17 the board would never go back on the issue or it just
18 means that you would continue to --

19 A. I think we were quite clear that this
20 issue wasn't finalized. I think I say later in this
21 discussion quite specifically we were still looking
22 for -- there was still an open item in front of the

1 board.

2 Q. So why don't you look farther down. There
3 is a remark from France, and there is a remark from
4 Chile, Denmark, Brazil, and then Kate, if you can go
5 a little later on the screen, and then there is a
6 remark from you. I don't want to characterize it.
7 What was the import of what was happening in the
8 discussion and what you were proposing?

9 A. I think the main import, as I said, was we
10 were actually having -- we had had a sort of more
11 general discussion, to my recollection, about the
12 whole TLD round and that we were moving forward on a
13 number of these areas.

14 And when people raised -- when members of
15 the GAC raised some concerns, it was according to the
16 bylaws as I described it before. I said quite
17 clearly, you know, if you have input, you need to do
18 that and we're open to it. I think about input, we
19 had two layers of input. One is that individual
20 governments can, just like any other interested
21 stakeholder, respond to public consultation
22 mechanisms, be a part of that consultation process.

1 Above the role of just individual government
2 participating as a stakeholder, they also had to make
3 them available in the GAC quite specifically under
4 the bylaws, if they thought this was a public issue
5 that they could give us advice to that purpose.

6 JUDGE TEVRIZIAN: The reason I was a
7 little confused here, Exhibit 139 is dated November
8 23rd, 2005, which refers to the Luxembourg meeting of
9 July 11th and 12th, 2005. Exhibit 140 is a public
10 forum also dealing with the Luxembourg meeting and
11 that was July 14th, 2005. This all took place from
12 July 11th through July 14th, 2005?

13 THE WITNESS: Your Honor, I have sympathy
14 for you. Yes, it did. ICANN meetings, our public
15 international meetings, last now up to 10 days and
16 they're a little like a conference where you have
17 different subgroups who meet for various periods of
18 it. So I notice this one has the Governmental
19 Advisory Committee meeting on the 11th and 12th of
20 July. My recollection is that is the weekend leading
21 up to this weekend. So the 14th is the second half
22 of the overall meeting. People participate in

1 different fora, if you like.

2 BY MR. LEVEE:

3 Q. Dr. Twomey, let me just ask you one more
4 question about Mr. Gallagher. During Ms. Burr's
5 presentation, she said that Mr. Gallagher had
6 threatened not to put .XXX in the root if the board
7 passed it. Do you recall that Mr. Gallagher ever
8 said words to that effect?

9 A. He didn't say that explicitly. He didn't
10 say that exactly. What Mike said was, in the phone
11 call -- I don't know if exactly in these words, but
12 he said something like, all hell's broken out here.
13 You know, I've got all this tension inside. He
14 particularly referred to this new Deputy Secretary
15 who he said quite clearly he doesn't understand any
16 of this yet.

17 So he understood that he had a Deputy
18 Secretary who didn't understand the ICANN issues yet
19 and that he said to me, you know, I've even got --
20 I've forgotten the man's name. He was even talking
21 about, well, we just won't put this on the Internet,
22 I think was the phrase that he is reported as saying.

1 And I think Mike said something like, we
2 can't go there. Mike was reflecting a reality. I
3 never took that statement -- I mean, I think I did
4 pass that on to Becky in an attempt of telling the
5 full story of the conversation, but I never took it
6 as sort of any sort of explicit or implicit threat
7 from Mike Gallagher to me that we won't put this in
8 the root. And let me partly share why I never took
9 any of those threats, any discussion about the U.S.
10 not putting anything in the root seriously.

11 You must remember that during this
12 process, we were also engaged in a very big U.N.
13 conference about how basically was the Internet going
14 to be coordinated, and there were concerns being
15 expressed by countries like Brazil, China, Russia,
16 Saudi Arabia and many others, India, about that it
17 was not fair, was not equitable that the
18 United States should have any particular role when it
19 comes to the coordination of the Internet,
20 particularly the domain name system. So forget about
21 the historical reality. They were just saying, this
22 is not fair. And so they were putting a lot of

1 pressure upon the U.S. Government relationship with
2 ICANN and asking questions.

3 The people who were defending the present
4 regime or supporting were basically parts of
5 Asia-Pacific and many of the OECD countries, the
6 Europeans. And so we were having quite -- this was a
7 big discussion going on for several years. It was a
8 major issue. I was heavily involved in it. And I
9 had long conversations with senior members of the
10 British government, for instance, about their
11 position, which had been quite supportive of the
12 Americans.

13 But the British position was quite
14 sophisticated. Their position was, the whole thing's
15 okay because the U.S. can't do anything. The
16 United States cannot not refuse to do anything. They
17 can only be a good player. The first time they try
18 to take something out of the root, the first time it
19 looks like they brought their domestic politics or
20 their foreign policy into this role, we're all going
21 elsewhere. So if you like, the United States sat
22 under this sword of Democles, so you could not not be

1 a good player.

2 So any discussion of we may not put
3 something into the root, I never took seriously. I
4 don't think Mike ever meant it seriously because the
5 realities are, they never had that power. They could
6 not ever threaten to intervene in the operation of
7 the Internet's root service system in such a way
8 because the rest of the world would say, you can't be
9 trusted and the whole system would shift very
10 quickly.

11 So I understood potentially that Mike
12 might have had internal pressures on it and that
13 these issues might have been raised. He sort of gave
14 it as an example of how they had internal problems.
15 But I never took the sort of -- this has any sort of
16 threat or any real threat that they could do
17 anything.

18 Q. So after you got the letter from
19 Mr. Gallagher and Mr. Tarmizi, did ICANN's board in
20 August vote with respect to the draft registry
21 agreement?

22 A. We did. You have to remind me, there are

1 so many board meetings related to this issue, I
2 forget about the exact dates.

3 Q. That's okay. The draft had been posted,
4 you got a letter from Mr. Gallagher and you got a
5 letter from Mr. Tarmizi. Was there a vote in August?

6 A. There was not a vote on the agreement, no.

7 Q. And why was that?

8 A. To take the opportunity, we thought it
9 was -- in many instances, and the way in which we
10 operate, where we receive communication from the
11 community requesting us to take longer in
12 consultation then we often do so. In the present
13 process we're going through on new gTLDs, we've done
14 it many times where even though we've had it posted
15 for board considerations and we've received feedback
16 from the community asking for more time, we have
17 delayed that to allow the community the chance to
18 express it.

19 Q. Let me ask you to look at Exhibit S, as in
20 Sam. Do you recognize Exhibit S?

21 A. Yes, I do.

22 Q. And did you have an understanding of what

1 the Free Speech Coalition was?

2 A. My understanding was that it was an
3 industry association or interest group lobbying group
4 quite specifically for members of the adult
5 entertainment sector in the United States.

6 Q. And during the course of 2005, 2006 and
7 2007, did ICANN receive correspondence from them?

8 A. Yes, we did.

9 Q. And did they support ICM's application?

10 A. No. They were consistently opposing the
11 application.

12 Q. Let me now ask you to look at Exhibit 169.
13 Do you recognize Exhibit 169?

14 A. I do.

15 Q. What is the document?

16 A. This is a communication from a member of
17 the Governmental Advisory Committee to the board of
18 directors stating that they -- again, asking for more
19 time to be allowed for the consideration of the
20 application.

21 Q. And I'm sorry, which government?

22 A. This was what was then referred to as the

1 government of Taiwan, and what is now referred to in
2 ICANN as Chinese Taipei. I'm having to be very
3 careful in that description.

4 Q. I won't get into the political issues.

5 MR. LEVEE: Judge Schwebel, this is
6 normally our time for our morning break, which I am
7 happy to take. I am doing my best to consolidate and
8 I will continue to do so. If you want me to keep
9 going, I'm also happy to do that.

10 JUDGE SCHWEBEL: Let's take a 10-minute
11 break, if that's agreeable.

12 (Recess.)

13 BY MR. LEVEE:

14 Q. Dr. Twomey, we've handed you Exhibit 181
15 so I'm skipping ahead to the Wellington meeting in
16 March of 2006 and, in particular, the GAC communique.
17 Do you have that in front of you?

18 A. I do.

19 Q. And first of all, let me ask, Dr. Twomey,
20 if you recognize Exhibit 181.

21 A. I do.

22 Q. What is the document?

1 A. The document is a communique of the
2 Governmental Advisory Committee to explain to members
3 of the panel the GAC meets for some periods of time.
4 They discuss issues. It's a general horseshoe shape
5 room. There might be 40 or 50 different
6 people/government officials in a room. They keep
7 minutes of those conversations. So as we always do,
8 the chair, the board and the president, minutes are
9 kept.

10 But towards the end of the meeting, they
11 all work together on a single statement, a fairly
12 traditional diplomatic mechanism. And so these
13 communiques are the drafted outcomes of a GAC
14 meeting. And there is lots of -- the words are, as
15 always, carefully crafted.

16 Q. On page 3 of the communique, there is
17 discussion of the .XXX application and it continues
18 on to page 4. I'm not going to ask you to read it at
19 least yet. My first question is, what took the GAC
20 so long to express views on the .XXX application?

21 A. I think there are several aspects to that
22 that you need to understand. First of all, members

1 of the GAC do not just do ICANN issues in their home
2 governments. Many of them have responsibilities
3 broadly in the information communications technology
4 areas and, hence, between public meetings of ICANN,
5 they tend to be spending their time looking at other
6 things of more domestic focus, if you like.

7 Secondly, there's the natural tendency of
8 the governments in any international arena that I've
9 been involved in in my career, particularly inside
10 ICANN, to not really get activated or focused on a
11 particular issue until it comes close to its
12 fruition. As has been said to me many times, we're
13 not going to comment on any document until it becomes
14 the final document. That's not just a statement of
15 sort of hubris because many of these government
16 officials actually have to coordinate domestically
17 before they take a final position.

18 In a lot of the Commonwealth countries, I
19 know that GAC officials actually take the final
20 positions to ministers for approval before they come
21 to the meetings. It actually is part of their
22 accountability to the ministers. The ministers are

1 accountable to the parliament. In almost every
2 country, there is some interdepartmental grouping
3 that they have to consult with. It's very common in
4 New York law -- in Washington, that's a very common
5 expression.

6 Hence, on every issue, the GAC is, in
7 terms of other people -- but it is a structural
8 dynamic of having governments involved in this issue.

9 Other members of the GAC also said to me
10 that one of the reasons that they considered why they
11 were somewhat late to it was they just didn't think
12 this was going to proceed because of their
13 interpretations of what had happened in 2001, that
14 because an application in 2001 had not been one of
15 the selected applications of the seven that were
16 chosen, they had made the wrong assumption that
17 therefore this string had been rejected. So people
18 had a number of reasons, but most of them were on the
19 structural dynamic.

20 And I have to say, this is not unusual.
21 It is not at all unusual. We're in the exact
22 situation right now with the new generic top-level

1 domains on some of the issues that they attend.

2 MR. PAULSSON: The who?

3 THE WITNESS: I'm sorry, I should explain,
4 Your Honor. What I said earlier -- I said new
5 generic top-level domains. When I said earlier we
6 had a two-part process that we decided upon in 2003,
7 that second process of really working through the
8 policy for full liberalization is now only coming to
9 its final stages of consideration. So when I say new
10 generic top-level domains, it's that policy process
11 that's still underway. I'm sorry about the acronyms.

12 BY MR. LEVEE:

13 Q. And did the GAC in the communique express
14 concern about the application or the XXX proposal?

15 A. They did express concern, yes.

16 Q. Again, without having you read it, and the
17 panel has seen it several times before, did you have
18 a general understanding of concerns as reflected by
19 the communique?

20 A. Yes. The communique, first of all, has
21 several parts, one of which was frankly we don't
22 understand the process whereby -- that the issue of

1 sponsorship is still continuing, which is the first
2 paragraph which deals with insufficient detail
3 regarding the rationale. That paragraph is all about
4 we don't understand how you're still dealing with
5 sponsorship. We thought sponsorship had been dealt
6 with and it was dead.

7 So this was a please explain to us more
8 how this process has worked. As in the original
9 panel had said, you shouldn't proceed. The original
10 evaluation panel said you shouldn't proceed.

11 Q. Not that the board had made a decision --

12 A. No, the evaluation team had. So they were
13 still asking questions about that process. And the
14 second one relates to there is a series of public
15 policy concerns, and if there was to be -- without
16 making any comment upon the agreement or not, that
17 they would have -- this laid out a set of things that
18 they thought were important for public policy
19 reasons.

20 Q. Let me ask you, then, to turn to Exhibit
21 188, which I think we've also handed to you. Exhibit
22 188 is a multiple page document. It looks as if you

1 signed it on the last page.

2 A. Yes, that's right.

3 Q. And can you tell the panel what Exhibit
4 188 is?

5 A. It is a letter from myself on behalf of
6 ICANN to the chair of the GAC.

7 Q. And what was the purpose of preparing this
8 letter?

9 A. Particularly to respond to issues raised
10 in the GAC communique from Wellington on the 26th of
11 March, the previous exhibit.

12 Q. Let me ask you to turn to the bottom of
13 page 2 and the last paragraph. You refer to .jobs,
14 .travel and .mobi, and then you refer to .tel, .asia
15 and .XXX. And in the last sentence, you say, "None
16 of the registry agreements for these three sTLDs have
17 been approved, and the board will not approve the
18 registry agreements until they are assured that the
19 agreements demonstrate the applicant's ability to
20 comply with the representations made in the
21 application of the supporting materials that have
22 been provided in support of the applications." Do

1 you see that?

2 A. That's right.

3 Q. And was this a true statement at the time?

4 A. It was.

5 Q. And was the GAC communique posted on

6 ICANN's website somewhere?

7 A. The GAC communique was posted on the

8 GAC's website.

9 Q. The GAC's website?

10 A. That's right.

11 Q. And was your response, that is, Exhibit

12 188, was that also posted?

13 A. From my recollection, yes.

14 Q. After the GAC issued its communique, did

15 ICM revise the draft agreement for the top-level

16 domain XXX?

17 A. They did.

18 Q. And what did you understand that ICM did

19 in order to make revisions?

20 A. They basically just lifted public policy

21 issues related out here, and put them in as things

22 that they would find.

1 Q. And did that agreement then get posted for
2 review?

3 A. It did.

4 Q. And did the board consider the agreement,
5 I think on May 10th of 2006?

6 A. I think that's the date.

7 Q. Now, let me ask you first, in the changes
8 that ICM made, how did you perceive those changes?
9 Did they address to your satisfaction concerns that
10 existed by the GAC?

11 A. When the GAC was making these concerns and
12 actually put up its recommendations, I can remember
13 conversations with representatives for the applicant
14 saying, well, how are you going to -- basically what
15 are you going to do? How are you going to respond to
16 this?

17 And they said, we'll just put this -- as
18 often, just tell us what we've got to do, just tell
19 us what we've got to do. And I said, how are you
20 going to respond to the GAC recommendations? And
21 they said, well, we'll do whatever they want us to
22 do. And they just copied this and put it in the

1 application, in the proposed contract. I can
2 remember saying particularly to counsel for the
3 applicant on many occasions, how are you going to
4 enforce this? How are you going to enforce these
5 things that the GAC is wanting?

6 And I can remember actually walking
7 between the hotel and the meeting room in Wellington
8 several times with the counsel saying, how are you
9 going to enforce it? Just explain to me. I don't
10 understand how you're going to be able to enforce the
11 things they're putting forward. Particularly this
12 issue of restrict access to illegal and offensive
13 content.

14 The specific thing said take appropriate
15 measures to restrict access to inappropriate and
16 illegal content. Because the previous night, I had
17 been in a meeting with the New Zealand prime minister
18 and a series of South Pacific island ministers. And
19 knowing the South Pacific as I do, I know their idea
20 of what is illegal and offensive is very different
21 from what it is in the United States.

22 So I was just saying to the counsel, how

1 are you going to enforce this general wording? I
2 didn't really get a response, I didn't think. So
3 they placed this wording in the agreement. I think
4 what I perceived is we'll do what the GAC is asking
5 us to do, so we'll put this in and we can do this.

6 I think when the name came up for
7 consideration in the board and my consideration, it
8 became clearer that the GAC wording was very complex
9 and had a series of complexities in it that I didn't
10 know how we were going to be able to address,
11 particularly how we were going to define what was
12 illegal and offensive as well as other issues here
13 about really going down and looking at the details
14 from registrants because our role is not to be at the
15 second level. It's certainly not to be at the
16 registrant level.

17 Q. What do you mean by second level?

18 A. What I mean by the second level is, if I
19 could use .com as an example. .com is what we call
20 the top level. Paul.com is the second level, so it's
21 actually IBM.com is a second level registration.
22 It's actually the sort of thing people would actually

1 then use for a website and would actually host -- our
2 responsibility is sort of at the top level space.

3 Q. And why was the board and why were you
4 concerned about acting at the second level?

5 A. The difficulty of what was put forward in
6 the contract from ICM, which was the lifting of this
7 public policy language from the GAC, was that it
8 required the applicant to be enforcing content issues
9 at the second level. In other words, the applicant
10 was now saying, I will enforce content issues whether
11 something is illegal or not, offensive or not, at the
12 second level.

13 Now, ICANN's mission is very, very clear.
14 We are the technical coordination of the unique
15 identifier system. And I'm sorry, that's technical
16 but it is a technical issue. What had been very
17 clear in many discussions is we are not involved with
18 Internet content, which is the stuff at the
19 application layer, if you like. So we're at this
20 level and above it is the application layer, Google,
21 IBM, websites. That's outside our mandate. Our
22 mandate is very clear. We're not in that space.

1 We're not in the business of content.

2 The difficulty was not just that the
3 applicant undertook that, which the applicant by
4 contract could, but more importantly that the
5 expectation was that we would have to enforce that
6 the applicant was doing that. And indeed, received a
7 letter from the British government one sentence of
8 which made quite clear that there would be an
9 expectation that if the applicant didn't do the
10 enforcing, that we would be expected to do the
11 enforcing. In other words, we would be expected to
12 enforce content rules at the second level around the
13 world.

14 Q. I was actually going to show you the
15 letter, Exhibit 182. Is this the letter you were
16 referring to in your previous answer?

17 A. It is.

18 Q. And who is the letter written from?

19 A. Martin Boyle was then the British
20 representative to the Governmental Advisory
21 Committee.

22 Q. And the letter was written to Dr. Cerf.

1 Did you also see a copy at the time?

2 A. I was copied on it, yes.

3 Q. There it is, yes. What were Mr. Boyle's
4 concerns?

5 A. Mr. Boyle's concerns were that if the
6 application was approved -- and he was not arguing
7 for or against it being approved, but if it was being
8 approved, it would be important that ICANN ensures
9 that the benefits and safeguards being proposed by
10 ICM should actually be achieved. As he says here,
11 should be achieved from day one.

12 And if I can quote his sentence here,
13 because I think this is the important one,
14 "Furthermore, it will be important for the integrity
15 of ICANN's position as final approving authority for
16 the .XXX domain name to be seen as able to intervene
17 promptly and effectively if for any reason failure on
18 the part of ICM in any of these fundamental
19 safeguards becomes apparent."

20 So it wasn't just that, yes, we expected
21 they have to do these things they're undertaking, but
22 that you, ICANN, will have to intervene if it's not

1 happening. Implicit within that is that we would
2 have to monitor the content within the second level.
3 This is the way that I and other board members saw
4 it, that we would have to monitor the content in the
5 second levels being registered in XXX to ensure that
6 XXX was actually undertaking these requirements.

7 The difficulty with that was that was
8 outside our mandate. It was beyond our bylaw powers.
9 We were being asked to do something that we could not
10 do. Indeed, I think there was a later communication
11 from the Canadian government making it clear that we
12 had no power to do such a thing.

13 Q. This letter of May 4 comes six days prior
14 to the board's meeting, and I'm going to give you the
15 minutes in a moment. Ms. Burr, in her testimony on
16 Tuesday, said that this particular letter from Martin
17 Boyle had come in and that you had somehow
18 mischaracterized the letter in trying to persuade the
19 board to reject ICM's application. Let me ask you
20 first, did other members of the board have the
21 letter?

22 A. Yes, they did.

1 Q. So they could read it themselves?

2 A. It was shared amongst the board.

3 Q. Second, did you characterize the letter
4 during the board's meeting on May 10th in a way that
5 was inconsistent with what Mr. Boyle actually wrote?

6 A. What I said at the May 10th meeting was
7 exactly what I've just said to the panel.

8 Q. So let me show you the minutes of the May
9 10 meeting which is Exhibit T, as in Tom. Do you
10 recognize Exhibit T?

11 A. I do.

12 Q. And do you see at the bottom of the first
13 page, the reference to the .XXX sTLD registry
14 agreement?

15 A. I do.

16 Q. Now, the minutes, if you look ahead to the
17 next page, the entire -- this is a teleconference, by
18 the way, as it says in the first paragraph, and the
19 minutes have only two paragraphs with respect to
20 .XXX. Do you have your own recollection as to how
21 much time was devoted during this teleconference to
22 the .XXX application?

1 A. A lot of discussion. A lot of discussion.
2 I think from memory it was the overwhelming topic of
3 discussion in the call. And indeed most of the other
4 items, I think, were basically approved on
5 frequently.

6 Q. How did you vote? And because it's come
7 up before, it looks as if the motion that was on the
8 table was to approve the .XXX registry agreement. So
9 how did you vote?

10 A. I voted against it.

11 Q. And why did you vote that way?

12 A. Consistent with my -- what I've said so
13 far this morning, I voted against it partly because I
14 remained concerned about the issues of self-defined
15 sponsorship, that ICM and IFFOR had not, to my
16 satisfaction, had a clear view of who actually was
17 sponsoring this. To me it looked more
18 entrepreneurial, that it was an entrepreneurial
19 outcome, presentation seeking to clothe itself in a
20 community.

21 I was still struggling to say, show me --
22 you know, I still don't have a grasp of who this

1 community is. But probably more importantly in my
2 mind was the point I've just made was that the
3 applicants, in adopting holus bolus the GAC language
4 as a public policy into a contract, that the language
5 then had certain implications that simply made it
6 very difficult to actually -- for the applicant, I
7 thought, to actually administer. The laws as to what
8 is offensive in Tonga or in Saudi Arabia are very
9 different than in the United States, and how are we
10 going to determine whose laws were they going to
11 listen to?

12 And more importantly, that we would be
13 necessarily, when I looked down the track, we would
14 necessarily be confronted with the problem that if
15 there was an accusation made, even if just an
16 accusation made that the ICM was not enforcing these
17 rules on its applicants, and we were to say to the
18 community, we don't know, the GAC would say, but
19 you're supposed to, you're administering it. So we
20 would have to -- even if they do everything right, we
21 would still have to be in the business of monitoring
22 content on second level websites and that is outside

1 our mandate.

2 I think I also made the point in my vote
3 that I did consider that the applicants had proceeded
4 in quite good -- we had been trying to maintain good
5 working relationships, I had been trying to maintain
6 good relationships and making this work, but it just
7 got too complex. Once these public policy issues had
8 been placed inside this and the applicant had put
9 them in the contract, then I just thought we were
10 being asked to be something that we were not supposed
11 to be.

12 Q. And I take it eight other members of
13 ICANN's board agreed with your position?

14 A. Well, they agreed with the outcome. They
15 had various reasons as to why they -- various people
16 had various emphasis on different arguments when they
17 came to conclusions.

18 Q. In your judgment, did the members of the
19 board approach these issues seriously and in good
20 faith?

21 A. Oh, very seriously. I mean, indeed, there
22 was even complaints amongst the board members, you

1 know, grumbles would possibly be a better word, about
2 just how much time XXX was taking throughout these
3 years, that if we look at how much -- we actually had
4 to do a calculation of how much costs. I forget what
5 the number was, but it was a huge number. If you
6 actually costed out the amount of time that we had
7 spent on the XXX application both in -- with due
8 respect to Mr. LeVee -- outside counsel's lawyers
9 costs, but also in terms of our own internal costs
10 and time of staff and more importantly for the board
11 members. The board members spent an enormous amount
12 of time in each meeting on this topic.

13 JUDGE SCHWEBEL: My recollection of
14 Ms. Burr's testimony is that one of the points she
15 made was that ICM was unfairly treated because the
16 Governmental Advisory Committee had raised questions
17 about apparently what it saw as omissions or
18 deficiencies in the application, and that in response
19 to that, the applicant had added to its application
20 the very points that were claimed to have been
21 omitted. And that once they were added, ICANN then
22 concluded that the applicant wasn't capable of

1 performing the obligations it undertook in response
2 to the GAC's criticism. And she characterized that,
3 if I understood it correctly, as being quite
4 inequitable. Do you share that view? What's your
5 answer to that?

6 THE WITNESS: I don't share that view.
7 People don't have TLDs by right. We put up an RFP
8 process and we said, please apply, right? Within the
9 context of the RFP and our bylaws and our procedures.
10 And frankly, the applicant's advisors knew those very
11 well. They knew how there can be risks and issues
12 that emerge through an ICANN process because they've
13 had experience with this ICANN process. We didn't
14 put that wording in the proposed contract. The
15 applicants did. The wording that came from the GAC
16 naturally came from a series of governments who wrote
17 a political statement. They didn't write wording to
18 put in a contract per se. They wrote wording which
19 reflected their public policy position.

20 The applicant took that wording and put it
21 in a contract and gave it to me and said, I want to
22 do that. Now, that's not unfairness on my ground or

1 on our -- if the applicant decided to take wording
2 that came out of a public policy discussion and just
3 stick it in the contract and give it to us, I can
4 understand why they would. They were trying to deal
5 with this thing that keeps evolving on me. I
6 understand that.

7 But then when we had to look at it as a
8 contract, something that had to be enforceable with
9 the fiduciary obligations that we had and the
10 obligations to the security and stability of the
11 Internet going forward, that's when it became
12 difficult to enforce.

13 Unfortunate? Yes, possibly. But I don't
14 think it's unfair.

15 MR. PAULSSON: Self-inflicted wound?

16 THE WITNESS: Potentially. I'm saying
17 that having not really thought through the language
18 as may be, it was a self-inflicted wound, yes.

19 JUDGE TEVRIZIAN: When you're speaking of
20 the contract, you're talking about the proposed
21 registry agreement, is that correct?

22 THE WITNESS: Yes. I'm sorry, the

1 proposed registry agreement.

2 BY MR. LEVEE:

3 Q. Thank you. Was there a point in time
4 where the applicant, ICM, moved for reconsideration
5 of this decision?

6 A. There was.

7 Q. And then was there a point in time where
8 the applicant withdrew the request?

9 A. They did.

10 Q. So I'm going to skip ahead. Did the board
11 wind up considering another version of the draft
12 registry agreement?

13 A. They did.

14 Q. And were you involved in reviewing that
15 draft?

16 A. I was.

17 Q. Did the board post the draft for public
18 comment?

19 A. It did.

20 Q. And did the board receive public comments?

21 A. It did.

22 Q. And we've already seen exhibits, so I'm

1 not going to take the time to show you now, but were
2 the comments -- were there comments in support as
3 well as in opposition and can you characterize the
4 balance?

5 A. From my recollection, there were. There
6 were comments in support. There were more comments
7 against.

8 Q. Dr. Twomey, I've asked Ms. Wallace to hand
9 you Exhibit DI. Members of the panel, you do not
10 have this in your binders. Or do they?

11 MS. WALLACE: I updated them.

12 MR. LEVEE: My apologies.

13 BY MR. LEVEE:

14 Q. Dr. Twomey, do you recognize this
15 document?

16 A. Yes, I do.

17 MR. LEVEE: I apologize to members of the
18 panel. I think this document is already in evidence
19 as a different exhibit number, but I just couldn't
20 find it last night. And the reason I said that was
21 because if you look at the second page, there is
22 reference to AOL and AT&T and Cisco and we've heard

1 some testimony about that, and I just couldn't find
2 it.

3 BY MR. LEVEE:

4 Q. In any case, what is this document,
5 Dr. Twomey?

6 A. It's a memorandum to the ICANN board by
7 ICM supporting why their application should be
8 approved.

9 Q. And this was in advance of the March 30,
10 2007 meeting in Lisbon, Portugal that had been
11 scheduled?

12 A. Yes, that's right.

13 Q. Did ICM in this letter address the issue
14 of sponsorship?

15 A. Yes, they did.

16 Q. And did ICM, in this letter, take the
17 position that it should not have to address the issue
18 of sponsorship because that issue had been decided by
19 the board on June 1st, 2005?

20 A. No. And indeed, in pre-conversations we
21 had before this with my senior members including
22 conversations in December 2006 and further

1 conversations, they quite specifically kept raising
2 the issue of how to address the sponsorship thing.

3 Q. Now I'm going to ask you to take a look at
4 Exhibit 200. What is Exhibit 200, Dr. Twomey?

5 A. It is the communique of the Governmental
6 Advisory Committee from the meeting in Lisbon issued
7 on the 28th of March 2007.

8 Q. So this is two days before the board's
9 meeting in that same week or 10-day period?

10 A. That's right.

11 Q. Let me ask you to take a look or turn to
12 page 4. Could I just ask you at the bottom to read
13 the first paragraph under "other matters"?

14 A. 1, .XXX, "The GAC reaffirms the letter
15 sent to the ICANN board on 2nd February 2007. The
16 Wellington communique remains a valid and important
17 expression of the GAC's views on .XXX. The GAC does
18 not consider the information provided by the board to
19 have answered the GAC concerns as to whether the ICM
20 application meets the sponsorship criteria."

21 Q. Now, at this point, the GAC had at least
22 one, if not two, additional drafts of the registry

1 agreement, is that correct? Drafts that had been
2 posted on ICANN's website?

3 A. I think that's -- at least one, and I
4 think it's two.

5 Q. So now let me move ahead two days to the
6 board's March 30, 2007 vote. Again, it was in
7 Lisbon. I take it you were present at the meeting?

8 A. I was.

9 Q. Let me first ask you, with respect to
10 .XXX, was there much time devoted that week to
11 consideration of the issues associated with .XXX?

12 A. There was. There was quite a discussion
13 amongst the board the night before we had our meeting
14 where this was discussed, so it was a discussed
15 issue. There had been a lot of discussion amongst
16 the board members leading up to the meeting as well.

17 Q. Now, if you take a look at Exhibit 201, do
18 you recognize Exhibit 201?

19 A. I do.

20 Q. And what is the document?

21 A. It is a transcript of the ICANN board of
22 directors meeting on the 30th of March 2007.

1 Q. Now, I covered this with Dr. Cerf, so I'm
2 not going to ask you to read the whole thing, of
3 course. I'll just ask you to note that it appears as
4 if the discussion regarding .XXX goes from page 1 to
5 page 13. Does that seem right?

6 A. That's right.

7 Q. Now, about a third of the way down on page
8 13, Dr. Cerf calls on you to vote, and the vote I
9 believe at that point is 9 to 5 against a resolution
10 that would have approved, and you abstained?

11 A. I did.

12 Q. Why?

13 A. I abstained because although I had made my
14 concerns expressed in previous board votes on this
15 topic, I -- you know, at the request of the board,
16 had spent a lot of time working with the applicant
17 and applicant's counsel and others to see if there
18 were ways to try to make this work. And I had been
19 tasked by the board, as president, to do that. I had
20 felt -- there were numerous meetings, numerous
21 meetings between myself and my staff and the
22 applicants in the months leading up to this. There

1 were teleconferences that we held, there were video
2 conferences we organized for British board members,
3 we had done a lot of work. And I had been basically
4 saying, is there a way we can make this work?

5 I felt, frankly, that I had been so
6 involved in that that when I took the hat of being a
7 board director, I just felt more comfortable
8 abstaining because I felt like I had become part of
9 this. I had sort of become an advocate almost for
10 how to make this work. So I had been a force that
11 kept saying, how are we going to make this work? Are
12 there ways we can do this? Is there a way we can
13 make these two things, this bridge work? So that was
14 my rationale for not voting.

15 Q. ICM has a couple of times referred to
16 Susan Crawford's discussion at the board meeting.
17 Was she a board director?

18 A. At this board meeting, she was, yes.

19 Q. And what were her views generally?

20 A. She was in favor of the application.

21 Q. And did she make any accusations against
22 other board members in terms of --

1 A. Yes, she made a number of freewheeling
2 comments, I think, about board members, yes.

3 Q. And did the other members respond to those
4 comments?

5 A. Yes, privately and publicly.

6 Q. And did the other board members express
7 the view that they had been influenced by political
8 pressures to vote the way that they voted?

9 A. Nobody -- nobody on the board ever said
10 that they were influenced by political motivations in
11 that discussion.

12 Q. And did you sense that at all?

13 A. I didn't. In terms of listening to the
14 public policy issues being raised by the GAC, yes,
15 but in terms of I've been lobbied by government X or
16 government Y, or I am carrying the water of some
17 particular government, no. Board members took this
18 very, very seriously. This was a very serious topic.
19 It was very clear fiduciary obligations, and I think
20 everybody expected at some stage potentially we would
21 find ourselves in this sort of a room. So we were
22 all very careful about how we considered this issue.

1 It was taken very seriously.

2 Q. Finally, Dr. Twomey, let me ask you, in
3 all of the consideration of ICM's application, did
4 you believe the board violated its bylaws or articles
5 of incorporation?

6 A. No. I thought the board was very
7 concerned to remain within those bylaws.

8 Q. Did it treat ICM discriminatorily?

9 A. Yes.

10 Q. How so?

11 A. Positively.

12 Q. How so?

13 A. It went out of its way to keep giving ICM
14 opportunities to see if it could proceed and make
15 this work. It kept saying -- we went out of our way
16 to keep saying, is there a way in which these
17 applications can work because of our commitment
18 towards having more TLDs, and particularly with this
19 one. There was frustration about how much time this
20 was taking and how much expense it was taking, but
21 our commitment was we've got to keep -- we think the
22 right thing to do is keep giving this applicant as

1 much opportunity as we can.

2 MR. LEVEE: I have no further questions.

3 Thank you.

4 JUDGE SCHWEBEL: Thank you so much.

5 Mr. Ali?

6 MR. ALI: Judge Schwebel, we do of course
7 have quite a lot to discuss with Mr. Twomey, but
8 since we're at 12:35, I think perhaps if we could
9 take a lunch break now and come back at 2 o'clock, or
10 earlier if --

11 JUDGE TEVRIZIAN: Let's take one hour this
12 time.

13 MR. ALI: One hour would be fine with us.
14 In fact, would it be possible to take an hour and a
15 half?

16 JUDGE SCHWEBEL: Why don't we say we will
17 meet at 2 o'clock.

18 MR. ALI: Thank you. And of course,
19 Mr. Twomey is not to discuss his testimony with
20 anyone.

21 JUDGE SCHWEBEL: Mr. Twomey, please don't
22 discuss your testimony.

1 THE WITNESS: I understand that, Your
2 Honor.

3 (Whereupon, at 12:36 p.m., the Independent
4 Review Process in the above-entitled matter was
5 recessed, to reconvene at 2:00 p.m., this same day.)

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1 that ICM hadn't met the sponsorship criteria but that
2 you would allow ICM to proceed in negotiations to see
3 if those issues could be worked out in the
4 negotiations?

5 A. I think I testified that there were
6 concerns around the sponsorship criteria, that the
7 vote on the 1st of June was 6-3 to say they would be
8 confident moving ahead with the negotiations on the
9 contract to give more chance of people to come to a
10 view and then be concerned about the sponsorship
11 concerns.

12 Q. And the sponsorship issues were complex,
13 is that right?

14 A. The sponsorship issues were complex coming
15 from the self-selecting aspect of what had been put
16 forward.

17 Q. But the board believed, according to your
18 testimony, that those complex issues could be worked
19 out during negotiations?

20 A. As in other applications, the board was
21 comfortable moving forward with negotiations around
22 aspects of the contract to see if things needed to be

1 clarified.

2 Q. Was Mr. Jeffrey privy to that decision?

3 A. Mr. Jeffrey is the secretary of the --
4 board secretary so yes.

5 Q. Would you take a look at tab 39 of your
6 notebook which is Exhibit 150?

7 A. I'm sorry, would you repeat the number for
8 me?

9 Q. Yes, sir. It's tab 39. And sir, we're
10 looking at an e-mail from Mr. Jeffrey dated June
11 13th, 2005 to Becky Burr. And was Mr. Jeffrey going
12 to handle the negotiations for ICANN?

13 A. There were a number of people involved in
14 the negotiations.

15 Q. And Ms. Burr handled the negotiations for
16 ICM?

17 A. She was one of the people involved in the
18 negotiations.

19 Q. And the e-mail says, "Thanks for
20 forwarding your proposed draft of the agreement. We
21 will need a few days to look it over and we will get
22 back to you later in the week with a markup and

1 issues list of any matters that we would like to
2 discuss further. We anticipate that this should be a
3 fairly straightforward negotiation and also look for
4 a quick conclusion to any required discussions
5 relating to the agreement." Do you see that?

6 A. I do.

7 Q. Now, if the issue of sponsorship was so
8 complex and to be worked out during the course of
9 negotiations, why does Mr. Jeffrey look forward to a
10 straightforward negotiation and a quick conclusion?

11 A. Well, I can't really speak for
12 Mr. Jeffrey.

13 Q. And you don't see anything about
14 sponsorship in that e-mail, do you?

15 A. Not in that e-mail.

16 Q. And why not say anything about it in the
17 resolution approving ICM to proceed to negotiations
18 if the issue was so complex and important?

19 A. The resolution I think spoke to the next
20 steps. Our resolutions tend to be of that format so
21 I think the resolution was fairly clearly the
22 traditional format of an ICANN resolution.

1 Q. Well, in fact, when there were
2 reservations as to other applicants, those
3 reservations were set forth in their resolutions,
4 isn't that correct?

5 A. That may or may not be true. I would have
6 to look at the resolutions.

7 Q. Let's take a look at tab 6 which is
8 Exhibit 116 and with respect to .jobs, the resolution
9 says, "During these negotiations, the board requests
10 that special consideration be taken as to how
11 broad-based policy-making would be created for the
12 sponsored community, and how this sTLD would be
13 differentiated in the name space." Do you see that?

14 A. I do.

15 Q. And for .mobi, it says, "During these
16 negotiations, the board requests that special
17 consideration be taken as to confirm the sTLD
18 applicant's proposed community of content providers
19 for mobile phone users, and confirmation that the
20 sTLD applicant's approach will not conflict with the
21 current telephone numbering systems." Do you see
22 that?

1 A. I do.

2 Q. And the purpose of these caveats is to put
3 the applicants on notice that they would have to
4 address these issues during negotiations?

5 A. Potentially, yes.

6 Q. But there is no such caveat and no such
7 reservation in the resolution approving .XXX to move
8 to negotiations?

9 A. Well, Counsel, I point you out to the date
10 of the resolutions you just pointed me to which is 13
11 December 2004. The concern around the sponsorship
12 issue for ICM was so significant that the board
13 didn't pass a resolution. It actually invited ICM to
14 make a presentation in April 2005 at a face-to-face
15 meeting.

16 So I think in terms of communication, that
17 this was an issue. I would have thought the board
18 actually thought that face-to-face communication was
19 part of its messaging that this remained a continuing
20 concern. So if there was no mention of it in the
21 resolution of the previous day, which was June I
22 think that you're referring to, I don't think you

1 should read it as being that the board hadn't
2 communicated to the applicant in the months around
3 that that that sponsorship was an issue. It had.

4 Q. Prior to June 1st?

5 A. Yes.

6 Q. So the applicant may have believed that
7 sponsorship was an issue prior to June 1st but as of
8 June 1st, 2005 when the board voted to proceed
9 without reservations, it had no reason to believe
10 that sponsorship had not been resolved?

11 A. Well, I can't speak for it being in the
12 mind of the applicant but I know this is necessarily
13 what was in the mind of the board and what was
14 necessarily being communicated by the staff for a
15 period of time afterwards.

16 Q. Are you aware of any communications from
17 the staff to ICM between June 1st, 2005 and early
18 2006 that said sponsorship was an issue?

19 A. It is my recollection that it was a fairly
20 constant topic of discussion in all of our
21 interactions with ICM and its staff. I would have to
22 go back and -- it's a long time ago and a lot of

1 issues have taken place since. I would have to go
2 back and review materials potentially but my memory
3 is this was always an issue up for discussion.

4 Q. And Ms. Burr testified that there was
5 absolutely no discussion of the issues in that time
6 frame, between June 1st, 2005 and 2006.

7 A. I can't make an observation about that.

8 Q. And in fact, following the June 1st, 2005
9 meeting, numerous ICANN officials publicly stated
10 that the criteria had been met. Do you recall that?

11 A. No, I do not recall that.

12 Q. We looked at the Luxembourg meeting in
13 July where Dr. Cerf said that ICM had, quote, "met
14 the three main criteria, financial, technical,
15 sponsorship." You testified you didn't recall that.
16 You have to answer audibly for the record.

17 A. Yes, I did make reference to that in my
18 earlier testimony.

19 Q. Do you recall that Joichi Ito's blog said
20 that the board had determined that the criteria had
21 been met?

22 A. No, I do not. I was not a reader of Joichi

1 Ito's blog.

2 Q. Do you recall that Mr. Pritz at Luxembourg
3 said that ICM had met the criteria?

4 A. I have no recollection of Mr. Pritz making
5 such a statement. Mr. Pritz, during meetings and
6 myself, are often in different rooms so I could not
7 necessarily comment on what he would have said.

8 Q. Do you recall that Mr. Jeffrey approved
9 the issuance of a press release stating that the
10 criteria had been satisfied?

11 A. No, I do not recall.

12 Q. Now, Mr. Jeffrey told Ms. Burr that he
13 expected negotiations to be straightforward and
14 expeditious based on the e-mail that we looked at a
15 few moments ago, right? And again, sir, you have to
16 answer audibly.

17 A. I'm sorry. Yes.

18 Q. And the board was scheduled to vote on the
19 contract in mid-August 2005, is that correct?

20 A. That's right.

21 Q. And that's when --

22 A. Now, I made the point before, while the

1 agenda said that the -- the agenda for the meeting
2 said possible approval of the contract. It was not
3 our expectation at all that the board would vote on
4 the contract in mid-August. It was always our
5 expectation that on August, the board would take
6 several meetings to work through the topics. That
7 was the way they tended to work.

8 Q. Well, in fact, the contract negotiations
9 were straightforward and expeditious and ICM and
10 ICANN staff agreed on a draft contract by early
11 August 2005. Do you recall that?

12 A. There was a draft contract put forward to
13 the board.

14 Q. And it was posted on ICANN's website?

15 A. That's right.

16 Q. And that's when Mr. Gallagher called you,
17 around mid-August, is that right?

18 A. 11th of August, that's right. U.S. time.

19 Q. And he said, if I remember your testimony,
20 "All hell has broken loose." Do you recall that?

21 A. Something along those lines, yes.

22 Q. And he told you that he was going to write

1 a letter to ICANN asking for more time to be taken to
2 consider whether XXX should be approved?

3 A. That's right.

4 Q. And you testified that you happened to be
5 on the phone with Dr. Tarmizi at the same time. Do
6 you recall that?

7 A. Yes.

8 Q. And so you asked Dr. Tarmizi to write a
9 letter as well?

10 A. No. What I said in my testimony before
11 was that I was in a conversation with Dr. Tarmizi,
12 that Mr. Gallagher rang me during the conversation
13 and I said to Mr. Tarmizi that I would call him back.
14 And then in the following conversation with
15 Mr. Tarmizi, we both discussed the mechanism of how
16 he should try to communicate the concerns that he is
17 receiving and he felt he needed to communicate.

18 And it was out of that discussion that it
19 was decided that the letter should be sent. It was
20 not an illustration of my telling him he should write
21 a letter.

22 Q. Well, at the Luxembourg meeting in July,

1 several GAC members had expressed concerns about
2 .XXX. Do you recall that?

3 A. Yes.

4 Q. Why didn't you suggest to Mr. Tarmizi that
5 you send a letter then?

6 A. They raised issues during the meeting and
7 they raised it directly with us. They did not raise
8 something -- Mr. Tarmizi did not communicate anything
9 from the GAC meeting to us on the board officially.
10 I think he wrote this down.

11 Q. Why did he need to write a letter then at
12 the same time that Mr. Gallagher was writing a
13 letter?

14 A. In his discussions with me on the
15 telephone, he was concerned as to how to, because of
16 the agenda item being put up for the board
17 consideration, how is he going to share to the board
18 the concerns that he was receiving from some members
19 of his GAC.

20 Q. I thought those had already been shared at
21 Luxembourg in July.

22 A. I can't speak for all of Mr. Tarmizi's

1 communications with all of the GAC members. He
2 referred to me in his telephone call that he was
3 receiving, you know, concerns expressed by GAC
4 members.

5 Q. And do you recall that Mr. Tarmizi's
6 letter was posted prominently on the ICANN website
7 whereas Mr. Gallagher's was buried in the
8 correspondence file?

9 A. My recollection is that communications
10 from the chair of the GAC normally are posted very
11 prominently and I think if my memory serves me
12 correctly, communications from the United States
13 Government have always been posted in our
14 correspondence file.

15 Q. And Ms. Burr testified that you had said
16 that you had asked Dr. Tarmizi to send a letter to
17 cover Mr. Gallagher's letter but you dispute that
18 this morning?

19 A. That's right. Well, I haven't seen
20 Ms. Burr's evidence but I don't agree with the
21 statement.

22 JUDGE SCHWEBEL: I'm sorry, could you

1 repeat that?

2 THE WITNESS: I'm sorry. I have not seen
3 Ms. Burr's evidence but I'm saying I don't agree with
4 the statement. I did not ask for the letter as
5 "cover," quote.

6 BY MR. DE GRAMONT:

7 Q. Now, you testified that in your
8 conversation with Mr. Gallagher, he said that someone
9 at DOC, Department of Commerce, had suggested that
10 the U.S. might refuse to put .XXX on the root if
11 ICANN approved it. Do you recall that?

12 A. Yes.

13 Q. And who was Mr. Gallagher?

14 A. The deputy secretary.

15 Q. And that's the number two person at the
16 Department of Commerce?

17 A. That's right.

18 Q. And Mr. Gallagher himself is the head of
19 the NTIA, is that right?

20 A. That's right.

21 Q. And you weren't concerned that the number
22 two person at the Department of Commerce and the head

1 of NTIA were suggesting that if ICANN approved a TLD,
2 the U.S. Government would refuse to put it on the
3 root?

4 A. No. Quite specifically, first of all,
5 your question is not what I said. What I said was
6 that he expressed that his new deputy secretary had
7 even raised, but Michael Gallagher himself did not
8 raise as his own view, the decision not to put it in
9 the root. He was using it as the example of the sort
10 of discussion that was going on internally.

11 Secondly, I was also very aware that the
12 deputy secretary was very new and that I would
13 expect, as is my experience in government, that when
14 you have a new person in place, they often come with
15 certain views or certain initial reactions and they
16 have to be briefed, have discussions with the case
17 managers or the case officers of the particular
18 project. So I expected there was going to be an
19 internal discussion.

20 And for the reasons I said before, while
21 it was certainly an illustration and I think
22 interestingly later on that is one of the reasons why

1 I shared it with Ms. Burr, certainly an illustration
2 of how activated they were about the process at the
3 time, I never considered the United States Government
4 was ever in a situation where it could refuse to put
5 something in the root or could refuse to take
6 something out of the root because its entire position
7 internationally about being the guardian of the root
8 server system was dependent upon it being seen always
9 to act as a fair broker, not driven by its own
10 domestic or foreign policies.

11 Q. Right. You said that you weren't
12 particularly concerned by what Mr. Gallagher told you
13 because if the U.S. Government balked and ICANN
14 recommended TLD, that would be the -- I think you
15 used the term "sword of Damocles" for the U.S. over
16 the root?

17 A. I didn't say anything of the sort. And
18 I'm sorry if I wasn't clear in the expression but I
19 actually checked the wording with the court reporter
20 before. The sword of Damocles was that the
21 United States Government does not have the capacity
22 in practical terms to refuse to put something in the

1 root. So any stick to try to do so would end up with
2 very severe outcomes from the international community
3 about the United States Government's role with the
4 root zone system. So I wasn't expressing any fear
5 that they were not going to put it in.

6 MR. PAULSSON: What outcome was that, very
7 severe?

8 THE WITNESS: This is a matter of
9 speculation, Your Honor, but if you want me to
10 speculate on that --

11 MR. PAULSSON: You testified about this
12 earlier and I didn't quite hear you.

13 THE WITNESS: The root zone has, at the
14 moment, 21, 23 generic top-level domains in this zone
15 file and has 243 country codes in that zone, .SC,
16 .EK, .DK, .DE, et cetera. And there has been an
17 express concern for quite some time by people like
18 Saudi Arabia or other countries that there is
19 potential risk that the United States Government,
20 because it has the IANA contract with ICANN, because
21 it has some role with this root zone, that it could
22 unilaterally, according to its own policies, take a

1 country in or out of Internet, that it could take DK
2 out or put it in.

3 The consensus in Europe supporting the
4 American position during this UN conference and
5 certainly the northern Europeans and people like the
6 British, as I pointed out, was that while
7 theoretically you could dream up such a scenario, the
8 United States never could do so because if it ever
9 did it once, if it ever did it once, it would so lose
10 the confidence of the international community that
11 its role as the guardian of the system, that they
12 would immediately move to ensure that it was done
13 separately.

14 The example often given to me in Europe
15 was what the American government did with the GPS
16 system during the first days of the Iraq war, the
17 first Iraq war, when they changed the GPS system for
18 launching their attack. It's the reason why the
19 Europeans are spending 8 billion Euros or whatever
20 the number is moving Galileo. The Europeans said you
21 cannot trust the Americans. If you can't trust them
22 once, build your own system.

1 So that's what I'm saying is that the
2 people who were supporting the U.S. position for U.S.
3 of the guardianship of the root server system, their
4 analysis was the U.S. could never afford to actually
5 utilize the power. And I have to say I concur with
6 the analysis.

7 BY MR. DE GRAMONT:

8 Q. And again, the reason that the U.S.
9 couldn't afford to exercise the power was because the
10 international community would react very negatively
11 and that could end the U.S. control over the root?

12 A. Well, the phrase "control of the root" is
13 I think a very strong statement but yes, the basic
14 proposition is right.

15 Q. And that in turn would have very negative
16 consequences for ICANN, correct?

17 A. Maybe, maybe not.

18 Q. Well, ICANN is a nonprofit California
19 corporation that controls the DNS because of its
20 contract with the United States, right?

21 A. Yes.

22 Q. And if there were a negative reaction to

1 the U.S. refusal to put a TLD approved by ICANN on
2 the root, there would also be a negative reaction to
3 ICANN itself?

4 A. There could be. One could speculate about
5 a number of scenarios. One could speculate that
6 potentially others would ask us to play the role from
7 the alternative standpoint. We're in the area of
8 speculation now.

9 Q. Do you have any reason to believe that the
10 statement that Mr. Gallagher referred to from the
11 number two person at the Department of Commerce, that
12 the U.S. Government could refuse to put .XXX on the
13 root, did not reflect the position of the Bush
14 Administration?

15 A. I'm sorry, there were a lot of double
16 negatives there. Could you say it again?

17 Q. Let me restate it. Mr. Gallagher told you
18 that the number two person at the Department of
19 Commerce took the position that the U.S. Government
20 could refuse to put .XXX on the root?

21 A. He had raised it as an example in our
22 conversation.

1 Q. Do you have any reason to believe that
2 that didn't reflect the views of the White House?

3 A. I had no understanding or no communication
4 or knowledge that it would have reflected the views
5 of the White House. And to take it further, what I
6 was particularly interested in seeing was what was
7 actually written in writing regarding this concern.
8 And the -- of what was written and eventually signed
9 by an officer of the United States Government was,
10 please give us more time. So that was the key thing
11 I focused on.

12 Q. And again, Mr. Gallagher said all hell had
13 broken loose, that the number two person in Commerce
14 was even saying that .XXX might not be allowed to go
15 onto the root and, in fact, from that moment on, your
16 life became very difficult politically as well, isn't
17 that true?

18 A. Probably not more so than it had been the
19 day before. You have to remember this is one of many
20 issues that we were dealing with at the time.

21 Q. Did you read Dr. Williams' witness
22 statement submitted in this case?

1 A. Quite some time ago so I don't have a good
2 recollection of it.

3 Q. And who is Dr. Williams?

4 A. Dr. Williams is or was a member of the
5 evaluation committee for -- it's after lunch.

6 Q. The sponsorship?

7 A. Yes, the sponsorship criteria.

8 Q. In addition to being a colleague, she was
9 a close friend?

10 A. I've known her for some time.

11 Q. Let's take a look at Dr. Williams'
12 testimony which is at tab C of your binder. And I
13 would like to direct your attention to page 26,
14 paragraph 25. And Dr. Williams says, "The June 2005
15 vote should have marked the completion of the
16 substantive discussions of the .XXX application,
17 especially in light of the board resolution that
18 approved the .XXX application with no reservations or
19 caveats. Instead, following the vote, the ICANN
20 governmental advisory committee woke up to the XXX
21 application, and ICANN began to feel pressure from a
22 number of governments, especially from the

1 United States and Australia. It was common knowledge
2 among ICANN staff (particularly for Steve Conte, who
3 was then the general manager of information services
4 and therefore responsible for fixing the problem)
5 that Dr. Twomey's e-mail in-box was flooded to the
6 point of incapacitation with comments about .XXX,
7 principally from automated e-mail from the
8 United States."

9 Do you agree with Dr. Williams' assertion?

10 A. I disagree with her in significant ways
11 and agree with one point so let me go through that
12 carefully.

13 Q. All right.

14 A. Whether she thinks it should have marked
15 the completion of the discussions of the application
16 is somewhat irrelevant. She's not the board. The
17 board gets the decision to make that decision. And
18 her role was to provide a particular service in part
19 of a process of an RFP process that eventually was
20 one part of what led up to the board decision.

21 I've already talked to the issue of the
22 board resolution so I don't believe the board

1 resolution approved the application without
2 reservations and caveats in the sense that she puts
3 it.

4 The resolution was let's move forward --
5 if it's referring to the 1st of June 2005 decision,
6 the board resolution was going to let us move --
7 neither the 15 board members who were then present,
8 plus the 6 that weren't in the meeting, said let's
9 move forward with this and move forward with
10 negotiations but to come back to the board for its
11 authority and authorization. So that's not an
12 approval statement of any sort.

13 In terms of the GAC waking up to the
14 application, I think I pointed out to the panel
15 before lunch the process that takes place within
16 governments and their reaction to this process. So I
17 think they're responding later in the process with
18 something that we had -- we've seen in other
19 processes where they will look at it when it comes
20 towards the end of the process, when the document is
21 clear.

22 I think they did respond once they saw --

1 we saw lots of good people who were already making
2 comments but we saw when people thought it was
3 actually before the board for a decision, that's when
4 they were taken by surprise and that's when they were
5 sort of responding.

6 As for the issue of my receiving lots of
7 e-mail, my e-mail box did not become incapacitated
8 but yes, I was receiving a lot of automated e-mail.

9 Q. Paragraph 26 goes on to say, "Dr. Twomey
10 was particularly sensitive to pressure from
11 Australia, as he had previously headed the National
12 Office For the Information Economy and worked with
13 that government department as the chair of the
14 governmental advisory committee. NOIE was under the
15 ministerial function headed by Senator Richard Alson
16 and then-Senator Helen Coonan, both vocal opponents
17 of .XXX. Following the June 2005 vote, Senator
18 Coonan was very critical of Dr. Twomey in the press
19 regarding the approval of .XXX, and Dr. Twomey
20 expressed to me several times his frustration and
21 stress as a result of that focus on a small part of
22 his and ICANN's work."

1 Do you recall expressing to Dr. Williams
2 your frustration and stress as a result of the
3 controversy surrounding .XXX?

4 A. I recall one or two conversations. I
5 found this entire paragraph close to fantasy. I
6 found this to be amusing. I was not particularly
7 sensitive to any criticism from the Australian
8 government more than I was to any other government.
9 And as I said before, I come from the tradition of
10 the Westminster system where the civil servant is
11 charged to give frank and fearless advice. I very
12 strongly feel that my responsibilities are to the
13 bylaws of ICANN and to serving the ICANN community.
14 Any thought that somehow or other some pressure by
15 somebody in Australia was going to have an influence
16 on my performing that role I find both ludicrous and
17 insulting.

18 As far as any conversation about my
19 concerns with Ms. Williams concerning anything that
20 was taking place related to this issue she refers to,
21 I remember one or two conversations where I may have
22 expressed my frustration that censorship had become

1 an issue in the Australian political debate. We had
2 previously managed to keep the censorship issue not
3 involved around the Internet. Their focus had been
4 basically the Internet was strongly promoted. But I
5 was a bit frustrated that here we are having a
6 censorship discussion in Australia. But in no way
7 did that influence my decision-making or role.

8 Q. Paragraph 27 goes on to say, "The
9 United States Government also had a great deal of
10 influence on ICANN and its executives. At that time,
11 ICANN was even more connected to the United States
12 Government than it is currently, as it had not yet
13 transitioned from the memorandum of understanding to
14 the presumed greater autonomy allowed under the joint
15 project agreement. An open dispute with the
16 United States would have been very damaging to
17 ICANN's credibility, and it was therefore very
18 difficult to resist pressure from the United States,
19 particularly from Michael Gallagher and senior
20 members of President George W. Bush's administration.
21 Although he could not describe his conversations with
22 U.S. representatives in great detail, Dr. Twomey

1 expressed to me his anxiety about the .XXX registry
2 agreement as a result of this intervention. This
3 concern went to the heart of ICANN's legitimacy as a
4 quasi-independent technical regulatory organization
5 with the power to establish the process by which new
6 TLDs could be created and put on the root."

7 Do you remember expressing to Dr. Williams
8 your anxiety about the U.S. intervention, in
9 connection with --

10 A. I don't recollect in detail any
11 conversation with Dr. Williams on the topic. I may
12 well have discussed it. But one thing that should be
13 quite clear in terms of what's said in this
14 paragraph, my concern and what it was I did express
15 to Mike Gallagher was around process.

16 Not to say that they didn't have a
17 position, but the process that they followed was
18 through the GAC, that they're a member of the
19 Governmental Advisory Committee and, like I said, was
20 to maintain the structural integrity at this of the
21 ICANN process. So that's the point at which my
22 concern was on.

1 Q. Well, let's talk about process. In
2 November of 2005 after all hell had broken loose, to
3 use your description of Mr. Gallagher's words, you
4 decided to release the independent evaluation
5 reports. Do you remember that?

6 A. Yes.

7 Q. And again, the initial evaluation of
8 whether the applicants met the RFP criteria was
9 conducted by independent evaluation teams?

10 A. That's right.

11 Q. And in fact, Dr. Williams chaired the
12 sponsorship committee?

13 A. That's right.

14 Q. And the sponsorship committee failed 8 of
15 the 10 applicants, is that correct?

16 A. That's right.

17 Q. And at that point, the board decided to
18 take over the evaluation process?

19 A. I wouldn't say take over. I thought that
20 the board went to the next stage of the evaluation
21 process. The evaluation process is in the
22 application. We're always going to go from the

1 evaluation panels and then you get to the board. So
2 it's not a question of taking over. It moved to,
3 yes.

4 Q. The independent evaluation committees
5 completed their work in the summer of 2004, isn't
6 that right?

7 A. I can't recollect the exact date but that
8 sounds about right.

9 Q. You can take a look at Dr. Williams'
10 statement at paragraph 13. I'm sorry, it's page 10,
11 paragraph 13, the final sentence, "Our final report
12 was provided to the board in July 2004."

13 A. That may be the case for the sponsorship
14 team. There were two other teams, of course. This
15 isn't technical.

16 Q. Now, let's take a look at your witness
17 statement submitted in this case at tab B.

18 A. It's probably not surprising to you but I
19 actually don't have a tab D.

20 Q. B.

21 A. Oh, B, did you say?

22 Q. Yes.

1 A. Sorry.

2 Q. And let's take a look at paragraph 45 on
3 page 17 and it says, "The GAC and ICANN were to meet
4 in Vancouver, Canada on November 19th, 2005 to
5 continue a discussion of matters arising from the
6 Luxembourg meeting. Before the Vancouver meeting, on
7 November 28, 2005, consistent with ICANN's interest
8 in transparency and openness, ICANN posted on its
9 website a status report on the sTLD evaluation
10 process. The reports were not released earlier
11 because of concern for the confidentiality of the
12 evaluators while their work was ongoing, in order to
13 insulate them from outside pressures." Do you see
14 that?

15 A. I do.

16 Q. But the reports in fact had been completed
17 more than a year earlier so why release them now?

18 A. The evaluators, the various evaluators,
19 people we considered in the evaluation selection
20 process, evaluator selection process, voiced their
21 concerns about confidentiality of the work. This was
22 particularly the case in the technical evaluation

1 panel and I can recall very strident pleas or demands
2 from some members of the technical evaluation panel
3 that their names not be released until the entire
4 process was completed -- not the evaluation process
5 but the allocation process was completed. And they
6 were very -- some of them were very strident about
7 this particular demand and we tried to maintain that.

8 You've got to remember at the beginning of
9 this process we actually expected it was going to be
10 relatively straightforward. Perhaps naive of us but
11 we thought it was going to be straightforward. And
12 so the request particularly from the technical
13 evaluation panel members for confidentiality was
14 something that we had taken seriously. Eventually it
15 was getting to such -- quite clearly, where we had
16 pressures for "please explain, you know, disclose the
17 reports" and yet we still hadn't finished going
18 through not just this one, but other applications.

19 Eventually we had to make a judgment. We
20 said, we're going to have to err on the side of
21 transparency now. We can't keep it even though we
22 had made -- we discussed with the technical

1 evaluators in particular that we would try to keep
2 their names confidential.

3 Q. But in fact you released the sponsorship
4 reports including for a number of applicants that had
5 already passed and entered into contracts while XXX's
6 application was still pending?

7 A. Well, we did release them on that day.

8 Q. And by that time .jobs, .mobi, .travel,
9 .CAT, they had already moved into registries?

10 A. I would have to go back and check as to
11 who had entered into agreements by that stage.

12 Q. Well, let's go back to Dr. Williams'
13 witness statement at page 23, paragraph 22. It says,
14 "After we provided our reports to the board, the
15 sponsorship team was no longer formally involved in
16 the process (although I believe the other two teams
17 continued to work with certain applicants)."

18 A. I'm sorry, could you just repeat what
19 paragraph you're on?

20 Q. I'm sorry, it's paragraph 22, page 23.

21 A. Thank you.

22 Q. Again, it says, "After we provided our

1 reports to the board, the sponsorship team was no
2 longer formally involved in the process (although I
3 believe the other two teams continued to work with
4 certain applicants). It was the evaluators'
5 understanding that our report for each application
6 would be made public at the same time, and the
7 anonymity of the evaluators would end, as soon as the
8 reports were provided to the board. This commitment
9 had been made to us by ICANN when the evaluation
10 teams were formed. If that procedure had been
11 followed, all applications would have been at the
12 same stage of the process when the reports were
13 published. Instead, the reports were not made public
14 until November 2005, after various debates and
15 discussions I had with Dr. Twomey and Mr. Jeffrey."

16 Do you remember those debates and
17 discussions?

18 A. I have to say, I cannot.

19 Q. If you turn to the next page, at the top
20 of page 24, she goes on to say, "When the evaluations
21 were finally published, some applicants had already
22 finalized and signed their registry agreements with

1 ICANN (namely, .jobs .mobi and .travel), where
2 others, such as .XXX and .TEL) had received board
3 approval of their applications but were still in
4 contract negotiations and had not yet finalized and
5 executed their registry agreements. Thus, our
6 critical comments in the evaluation report became
7 available to be used by those seeking to block the
8 XXX application. However, applications for which
9 registry agreements had already been executed were
10 insulated from such similar criticisms."

11 Do you agree with that?

12 A. No, I don't, on several levels. The first
13 point I would make and very clear, is your previous
14 question is we just didn't deal with this one panel.
15 We were dealing with the technical panel and we were
16 dealing with the business evaluation panel. And to
17 give you an example of the .TEL (Telnic) application,
18 there were some significant technical issues worked
19 through and discussed by that panel.

20 So my point is that understandings of what
21 might be -- Ms. Williams might feel were her
22 understandings from her panel, were not necessarily

1 the --- all the panels, nor the issues raised by the
2 U.S. panel members -- in the technical evaluation
3 underway.

4 Q. Can I interrupt you for a second?

5 A. Sure.

6 Q. How does that respond to the concern that
7 the sponsorship, the negative sponsorship reports
8 were released as to .XXX before .XXX had their
9 contract concluded, whereas other applicants had
10 already had their contracts concluded?

11 A. I was actually really referring to -- my
12 comment was referring to the first part of this
13 paragraph that you read through about evaluate and
14 understanding our report.

15 To answer the question you're now
16 referring to, the undertakings -- first of all, I
17 make it quite clear that she says here that the board
18 had approval of their applications but was still in
19 contract negotiations. As I said several times
20 today, that is not my understanding at all.

21 It was not a question that the board had
22 approved the previous applications. The application

1 process, as the resolution on the 1st of June said,
2 was when -- the contract itself was authorized.

3 In terms of the requests for posting of
4 this material, seeing that this material is
5 becoming -- requests for posting of the materials of
6 all the evaluations was very extensive. We had
7 always considered that we would be able to post
8 this -- our expectation was we would be able to do
9 the evaluation, we would evaluate, there would be
10 quite clear contracts you could sign. It would all
11 be done all at basically at the same time.

12 It became quite -- quite obvious by this
13 stage that some applications were much more
14 complicated than other applications, and they were
15 going to take longer than other applications and be
16 detrimental to other applications if -- be delayed by
17 the most difficult case. And as a consequence, we
18 had to make a judgment as to when we're going to
19 release these reports that were relevant in some of
20 the discussions, but we had undertaken to release the
21 reports, that all of the -- that the endpoint for
22 each of the applications was proving to be quite a

1 lot of difference. So that was the judgment made.

2 Q. And in fact, the negative evaluation
3 reports gave fodder to those who wanted to delay or
4 kill .XXX?

5 A. They may have.

6 Q. Well, in fact, they did. You have to
7 answer audibly, sir.

8 A. Well, you say so.

9 Q. Well, I want to know what you say.

10 A. Well, I -- my perspective is when it
11 eventually came to the board's decision making, the
12 board took a broad range of -- issues.

13 Q. But certainly others seized upon the
14 negative evaluation reports --

15 A. Others made reference to it, yes.

16 Q. And they used it against ICM?

17 A. They made reference to it in their -- in
18 their positions.

19 Q. Let's take a look at the Wellington
20 communique which is tab 25, Exhibit 181. And we
21 looked at that with your counsel during your direct
22 examination. And I want to look specifically at page

1 3. And you said that the GAC communiques were
2 carefully worded, is that correct?

3 A. That's been my experience.

4 Q. And here at the bottom of the first
5 paragraph, it says, "The GAC does not believe that
6 the February 11th letter" -- and that was the letter
7 from you to Dr. Tarmizi?

8 A. Yes.

9 Q. -- "provides sufficient detail regarding
10 the rationale for the board determination that the
11 application had overcome the deficiencies noted in
12 the evaluation report."

13 So the GAC believed that the board had
14 determined that the application had overcome the
15 deficiencies in the evaluation report, is that true?

16 A. I can't really speak for what the GAC
17 believed. I mean, that's what the wording says here.

18 Q. That is what the wording says.

19 A. But I also have said quite clearly earlier
20 today that in the resolution of the 1st of June 2005,
21 the view of the majority of the board that we have
22 said was said to move forward, was to move forward in

1 the negotiations, and that the issue of -- sorry --
2 the sponsorship issue, some of them considered that
3 the application during the process of the contract
4 negotiation, the options for that become clearer.

5 Q. But again, that's not reflected in the
6 resolution, is it?

7 A. Well, I've said that.

8 Q. And did you also believe that in addition
9 to the sponsorship criteria being worked out in the
10 negotiations, that public policy issues were also
11 going to have to be worked out during the
12 negotiations?

13 A. I think in -- in -- in 2000 -- prior to
14 the GAC raising public policy issues, I don't think
15 that was our expectations.

16 Q. Let's take a look at the approximate
17 public policy issues that the GAC sets forth in the
18 Wellington communique. And in fact, there are five
19 of them. And the first one is that they want the XXX
20 application to, quote, "take appropriate measures to
21 restrict access to illegal and offensive content on
22 the site." Do you see that?

1 A. That's right.

2 Q. And that's ridiculous on its face, isn't
3 it? I mean, didn't you testify earlier that it was
4 beyond ICANN's mission to try to restrict access to
5 illegal and offensive content?

6 A. Counsel, I point out to you that the
7 wording of the GAC is for the XXX applicant, not
8 ICANN. The XXX applicant is --

9 Q. Yeah.

10 A. And as I said before, this is a product of
11 a public policy political group, so they were right
12 wording that they do. That's --

13 Q. And did you ever respond to GAC that ICANN
14 thinks that this is beyond the mission of ICANN and
15 that it would be unreasonable to ask .XXX to include
16 provisions like that in their contract?

17 A. The bylaws only require us to communicate
18 with the GAC if we do not agree with the advice.

19 Q. And did you agree --

20 A. It --

21 Q. Let me finish my question. Did you agree
22 with their advice that ICM should take appropriate

1 measures to restrict access to illegal and offensive
2 content?

3 A. The board did not make a decision. The
4 bylaws say if the board makes a decision contrary to
5 advice of -- it needs to be made clear that it's
6 contrary to advice. The board never made a decision
7 contrary to this advice. So are they required to
8 respond? No.

9 Q. Just simply passed the information on to
10 ICM and said, you handle this?

11 A. ICM read this at the same time we did.

12 Q. And we'll get to the content of the
13 contract shortly but in fact, the reality is that
14 there are no commitments in the ICM contract to,
15 quote, "restrict access to illegal and offensive
16 content," isn't that true?

17 A. I could not confirm that.

18 Q. Well, we'll go through the contract in
19 detail shortly. Now, the second bullet point is that
20 the GAC wanted ICM to, quote, "support the
21 development of tools and programs to protect
22 vulnerable members of the community," end quote. And

1 in fact, there are provisions that address that
2 concern in the contract, correct?

3 A. Yes, there are.

4 Q. And bullet point number 3 says the GAC
5 wants ICM to, quote, "maintain accurate details of
6 registrants and assist law enforcement agencies to
7 identify and contact the owners of particular
8 websites, if need be," unquote. And in fact, there
9 are provisions in the contract that address those
10 issues in terms of keeping accurate details of
11 registrants. Do you recall that?

12 A. I would have to look at the provisions of
13 the contract to confirm it.

14 Q. And then bullet point number 4 says that
15 the GAC wants ICM, quote, "to act to ensure the
16 protection of intellectual property and trademark
17 rights, personal names, country names, names of
18 historical, cultural and religious significance and
19 names of geographic identifiers, drawing on best
20 practices in the development of registration and
21 eligibility rules," unquote.

22 And in fact, that's not dissimilar to

1 requests that are made of other sTLDs, right?

2 A. Requests made by whom?

3 Q. Well, aren't the applicants for TLDs and
4 the registrants that receive contracts asked to take
5 on measures to protect intellectual property and
6 promote best practices with those respects?

7 A. Intellectual property, that is correct.
8 It varies according to personal names. It's variable
9 going to country names. And historical, cultural and
10 religious significance, is a matter of quite a lot of
11 debate -- around contracts doesn't exist in a lot of
12 contracts, so --

13 Q. I'm sorry?

14 A. It doesn't exist -- names of historical,
15 cultural and religious significance do not exist in
16 other contracts, if my memory serves. This catch-all
17 paragraph has elements which are included in other
18 TLD contracts and elements that are not.

19 Q. Okay. But did ICANN take -- put measures
20 into its contracts to address those issues?

21 A. They were measures for addressing some of
22 those concerns in the first initial contract put

1 forward. You must remember, Counsel, at this stage,
2 the contract that is being put forward -- after this
3 is being put forward, by ICM itself. And these
4 elements.

5 Q. You testified this morning that ICANN
6 basically took these words and dropped them into the
7 contract?

8 A. I actually testified to the opposite. I
9 said ICM took these words and dropped them into the
10 contract.

11 Q. If I said ICANN, I apologize.

12 Let's take a look at the contract which is
13 at tab 37, Exhibit 286 and this is the final draft of
14 the registry agreement that had been submitted to
15 ICANN, is that correct?

16 A. I don't actually know. There was a series
17 of agreements. I would have to check to see. I'm
18 sorry to do that. I just don't --

19 Q. No, that's fair. I'll represent to you
20 that it's what I believe to be the final draft.

21 A. Thank you.

22 Q. Before we get into it in detail, you

1 mentioned a motion for reconsideration that ICM had
2 filed. Do you recall that?

3 A. Yes, it was discussed this morning.

4 MR. DE GRAMONT: May I approach the
5 witness, Mr. Chairman?

6 THE WITNESS: Thank you.

7 BY MR. DE GRAMONT:

8 Q. I don't have a lot of questions about this
9 and I don't think it's going to be that controversial
10 so I'm not handing copies to the tribunal unless they
11 request it.

12 You also testified, if I understood you
13 correctly, that ICM had never taken the position in
14 its discussions with you that the June 1st, 2005 vote
15 signified that the ICM application had met the
16 board-approved qualifications. Do you recall that?

17 A. No, I thought I was pretty careful this
18 morning. What I said was that in numerous
19 conversations with ICANN's staff, myself included,
20 representatives of ICM discussed and raised issues
21 and we raised with them issues concerning the
22 sponsorship issue, and the issue of sponsorship was

1 alive.

2 Q. But in fact -- let's take a look at page
3 4. In fact, in the motion for reconsideration, ICM
4 was quite clear, "The 1 June 2005 action reflected
5 the board's determination that the ICM application
6 met the board-approved qualifications contained in
7 the application criteria for new sTLDs issued 15
8 December 2003."

9 A. It does read that way, yes.

10 Q. So you do recall that ICM had taken that
11 position in this time frame?

12 A. This is correct as to the presentation to
13 the panel. I wasn't part of that panel. I wasn't
14 part of the review panel.

15 But I also recall, Counsel, that in a
16 meeting in December the same year after this, that
17 both Mr. Lawley and Ms. Burr openly discussed and
18 were trying to address issues around sponsorship when
19 talking with me and staff. I also remember that they
20 requested that they could do a teleconference or
21 videoconference briefings for board members in March
22 of 2007 or prior to March 2007 where again in those

1 meetings they specifically reflected on issues
2 concerning sponsorship. So --

3 Q. Well, the board members, regardless of
4 whether they thought the June 1st vote had indicated
5 that the criteria had been satisfied, if board
6 members nonetheless continued to raise them, what
7 would you expect ICM's officials to do?

8 A. Well, I'm just stating the facts as I
9 understand them.

10 Q. And, in fact, Mr. Jeffrey persuaded ICM to
11 withdraw the motion for reconsideration and to
12 continue in contract negotiations. Do you recall
13 that?

14 A. I understand it was withdrawn and they did
15 move forward on negotiation.

16 Q. Let's take a look at the contract itself.

17 MR. LEVEE: Excuse me. I don't think that
18 it matters, but you represented that this was the
19 last version of the contract and it's not. I'm happy
20 to hand you -- there is one more version that
21 followed, and if it matters to your discussion, I
22 would ask you to get the other one.

1 MR. DE GRAMONT: Oh, no, I appreciate that
2 and why don't we take a quick break because I want to
3 be sure that we have the right exhibit. Excuse me?

4 MR. PAULSSON: 8 February would be the
5 last one?

6 MR. DE GRAMONT: Yes, Your Honor.

7 (Pause.)

8 MR. DE GRAMONT: My colleagues have
9 clarified for me that what changed was appendix S, as
10 in Sam. So that the 5 January 2007 version didn't
11 have any changes to it, and the -- page 81 says
12 February 8, 2006 but I understand that's a typo.

13 (Discussion off the record.)

14 BY MR. DE GRAMONT:

15 Q. I will represent to you that it's the
16 final version and it may or may not affect my
17 questions. If there is still an issue of dispute,
18 I'm sure we can work that out with Mr. LeVee.

19 Now, the way the contract was put together
20 is that it was essentially divided into three parts.
21 There is the main body which is pages 1 through 22.

22 A. Yes.

1 Q. And that was essentially standard for all
2 of the applicants?

3 A. From my recollection. I would have to
4 read these, though, to confirm but that's my
5 recollection, yes.

6 Q. And then there are seven appendices which
7 are at pages 23 through 62 and those were essentially
8 standard for all of the applicants?

9 A. I would have to read through to confirm
10 that.

11 Q. Well, let me go on and ask you a different
12 question.

13 A. Okay.

14 Q. Appendix S, as in Sam, is at page 63 to
15 the end and all of the negotiations over the five
16 drafts were about appendix S. Do you recall that?

17 A. Certainly most of them were. I can't
18 remember all of them but most of them. That was the
19 main focus.

20 JUDGE SCHWEBEL: A little louder.

21 THE WITNESS: I'm sorry. I said certainly
22 most of the discussion was. I can't confirm that all

1 of the discussion was on appendix S but it was the
2 main focus. I'm sorry, Your Honor.

3 BY MR. DE GRAMONT:

4 Q. Let's look at some of the provisions. In
5 the main part of the contract at page 14, there are
6 provisions for terminations of the contract?

7 A. Yes.

8 Q. And section 6.1 A says, "ICANN may
9 terminate this agreement if registry operator fails
10 to cure any fundamental and material breach of
11 registry operator's obligations set forth in
12 sections" -- and it mentions various sections --
13 "despite notice and a reasonable opportunity to cure
14 in accordance with section 6.3." Now, do you recall
15 that?

16 A. Yes.

17 Q. And one of the sections referenced, 3.1 D,
18 is on page 6 and that deals with the registry
19 operator having to establish policies and procedures
20 for the enforcement of the applicable charter
21 restrictions. Do you see that?

22 A. Not yet.

1 Q. It's page 6 and this is section 3.1 D.

2 A. Right.

3 Q. So that provides that one of the bases on
4 which ICANN can terminate the contract upon
5 reasonable notice is if the registry operator is
6 failing to establish and enforce the procedures that
7 it says it's going to establish and enforce?

8 A. That's what the contract says.

9 Q. And in fact, the application for an sTLD
10 required ICM to designate a backup, a fail-over to
11 take over if the contract was ever terminated. Do
12 you recall that?

13 A. I would ask you to point me out to where
14 that qualification was.

15 Q. Oh, this is in the application itself. If
16 you don't recall it, then we'll just skip over it.

17 A. I don't.

18 Q. You don't recall the affiliate AFILIAS was
19 the fail-over for ICM?

20 A. I wonder if you're confusing fail-over as
21 scroll -- functions for the data. This is fail-over
22 for the management of the top-level domain. I think

1 the contract provides for if, there is a technical
2 failure with the database, that somebody else will
3 follow up for it. But I may be getting confused.

4 Q. I think it was both but we'll skip it.

5 A. I don't think it would have been for the
6 TLD as a whole, because I think that -- we don't
7 allow TLDs to be simply shifted to another player
8 without going through approval. So --

9 Q. Well, let's look at appendix 1. It starts
10 at page 23. And all of the data that the TLD
11 registry compiled had to be put into escrow.

12 A. Yes.

13 Q. And why is that?

14 A. That's a security provision in case there
15 is a computer failure in the registry.

16 Q. It's not so that another -- a fail-safe
17 can take over the registry operations in the event
18 the contract is terminated?

19 A. Not necessarily.

20 Q. Well not necessarily, but -- but it could
21 be used for that?

22 A. It could be used for that if there was a

1 change of management of the TLD. And I want to be
2 quite specific about this because I think your line
3 of questioning illustrates it.

4 There is two parts of being a registry of
5 a top-level domain. There is the technical part of
6 running databases and there is the management part of
7 actually managing under what rules you are taking in
8 these applications and you're allowing them to be
9 sold in the marketplace.

10 And we distinguish pretty clearly that --
11 the contractor people who are running the management
12 aspect of the registry and the string. And the
13 further thing which is a matter of great concern to
14 us is that once you put a TLD in the root and you
15 have applicants, we are very constrained about being
16 able to take that TLD out of the root. We may be
17 able to move the contractor -- on the management
18 provision -- but the contract --

19 I can give you a real example. We have to
20 deal with country codes that occasionally no longer
21 exist. The Eastern Bloc has been a very good
22 example. The Soviet Union ceased to exist in 1990.

1 We still have a .SU operating in the root because
2 there are some 60,000 registrants presently using it
3 and we have an ongoing process of trying to find a
4 way of not damaging the interests of 60,000
5 registrants while still trying to have this group
6 taken out.

7 So it's not a simple issue of if
8 somebody's in breach, I can now simply close down
9 that TLD and take it out of the root, because our
10 bylaw requirement to look after the stability and
11 security of the DNS, makes me have to look out that
12 the registrants are not suddenly being taken -- just
13 disappearing. So it is a complex issue.

14 JUDGE TEVRIZIAN: I guess my question is,
15 are you saying that where you have a termination or a
16 failure of a technical aspect of the top-level domain
17 or registry, that there is a default provider named
18 in the registration agreement?

19 THE WITNESS: Yes. At least as provider
20 of the technical aspect.

21 JUDGE TEVRIZIAN: You also say that if
22 there is a default based upon -- I shouldn't use the

1 word default. If there is a termination based upon a
2 breach of the registration agreement, that there is
3 no automatic default fail-safe provider that could be
4 named in the contract?

5 THE WITNESS: Not that I'm aware of. Not
6 in these contracts. And I'm also saying that we
7 simply cannot have -- the remedy -- we feel very
8 strongly the remedy cannot be taking the TLD out of
9 the root.

10 JUDGE TEVRIZIAN: In this registration
11 agreement that was negotiated but never approved,
12 that was the last one submitted by ICM, there was a
13 concern that somebody might purchase ICM out and end
14 up as the management or operator of that TLD. What
15 provisions were there that were negotiated that ended
16 up in that last version of the registry agreement
17 that was never signed?

18 THE WITNESS: I have not seen -- I'm not
19 aware of the provisions that might be in there. I
20 just don't recall.

21 JUDGE TEVRIZIAN: Are you aware of any
22 discussions during the negotiation phase that someone

1 was concerned that Larry Flynt might buy ICM?

2 THE WITNESS: I don't recall hearing that
3 concern.

4 BY MR. DE GRAMONT:

5 Q. But in fact there was a provision
6 negotiated into the contract that required ICANN to
7 be able to approve any transfer of ICM's --

8 A. That's right. Yes, that's what we have
9 done in previous cases, that's right.

10 Q. I know we're taking a lot of time and I
11 want to try to move things along, as I'm sure the
12 panel does. Let's take a look at page 67 of Exhibit
13 286 which is the description of the sTLD community.

14 A. Do you have the tab number?

15 Q. We're still at tab 37.

16 A. Okay. My apologies.

17 Q. And that provides a description of a
18 voluntary community, right?

19 A. This was the description put forward by
20 the applicant, yes.

21 Q. And it provides for a self-selecting
22 community or a voluntary community, isn't that right?

1 A. It does.

2 Q. Now, you testified earlier that one of the
3 concerns expressed by some of the members at the June
4 1st, 2005 meeting was that this was a self-selecting
5 community, but in fact many approved sTLDs are
6 self-selecting communities, right?

7 A. Some of them are. I was just, what I was
8 reporting was positions taken by board members.

9 Q. But there is nothing wrong with a group of
10 people in a particular business agreeing to
11 voluntarily be part of an sTLD that adheres to best
12 practices and policies? In fact, that's what many of
13 the other sTLDs are?

14 A. There is nothing wrong with a group --
15 well, I should go back one step.

16 Eventually the board made the final
17 decision as to whether something passed the criteria
18 and would eventually be approved. What I said before
19 was there were some board members who expressed
20 consistently their discomfort with the self-described
21 community and you would have to check the voting in
22 other TLDs, but some of the board members said this

1 is a consistent thing for why they -- what they were
2 concerned about.

3 Q. But other sTLDs were self-identified and
4 they were approved?

5 A. That's right, and other board members did
6 not have the same concern.

7 Q. Let's take a look at page 84 of this
8 exhibit and these are in fact the obligations that
9 ICM undertook to follow. And I'll just read a few of
10 them. Promote the principles set forth in the
11 United Nations Declaration of Human Rights related to
12 free expression, and prohibit child pornography as
13 defined in the United Nations Convention on the
14 Rights of the Child. Publish a policy prohibiting
15 child pornography, including practices that are
16 designed to appeal to pedophiles or suggest the
17 presence of child pornography on the site. Require
18 registrants to accurately and clearly label their
19 sites, and any site to which a user entering the
20 registrant's site into a browser is automatically
21 redirected. Implement and enforce IFFOR best
22 practices, et cetera.

1 Is there anywhere in this agreement where
2 ICM takes on the responsibility to regulate and
3 restrict offensive content on the Internet?

4 A. Well, that's not the only position in the
5 contract that -- ICM is undertaking so --

6 JUDGE SCHWEBEL: A little more loudly.

7 THE WITNESS: I'm sorry. I would have to
8 look back through the rest of -- I can't say from a
9 one--page document whether this is the only place
10 where this is undertaking.

11 BY MR. DE GRAMONT:

12 Q. As you sit here today, do you recall any
13 other such undertaking anywhere in the agreement?

14 A. I can't answer that. I can't recall.

15 Q. And in fact, what ICM was doing was
16 agreeing to promote best policies, publish best
17 policies, require labeling and other various
18 technical requirements very similar to what many
19 other sTLD successful contracts also committed to?

20 A. It was doing that. It also was -- it had
21 undertaken to it implement and enforce IFFOR best
22 practice policies.

1 THE REPORTER: It had --

2 THE WITNESS: It has been -- what it
3 called implement and enforce IFFOR best practice
4 policies. Of course, we did not yet know who IFFOR
5 were, nor had IFFOR been founded, nor did we know
6 what their best policies were.

7 BY MR. DE GRAMONT:

8 Q. And that's true of many of the other
9 sponsors for sTLDs that were approved?

10 A. No. It would not have had this degree of
11 uncertainty.

12 Q. Well, in fact, there were many sponsors
13 that had not been created at the time the sTLD was
14 approved?

15 A. I'm not talking about the sponsor. This
16 is IFFOR. Here's the best practice policies being
17 put forward by the applicant in the names of a
18 not-yet-formed thing called IFFOR, with names we
19 didn't know who have been involved, who have not yet
20 set their policies. So this was a very vague,
21 open-ended undertaking. It's quite different from
22 what was in other applicants.

1 Q. Isn't it true that numerous other
2 applicants had not established their sponsor -- their
3 IFFOR equivalents at the time that their sTLDs were
4 approved?

5 A. Other applicants whom I recall did not
6 have this sort of structure. Other applicants had a
7 community, some may be more self-defined than others,
8 that were making the application. IFFOR is a policy
9 superstructure that is -- what ICM was asking us was
10 saying, we are a self-defining group of adult
11 entertainment, and that is our sponsoring community.
12 And when you said, well, who are they? Well, they're
13 the people who are going to join.

14 But uniquely, from my recollection, ICM
15 said that our policy aspects of this are going to be
16 formed by this other group. We said, who are they?
17 And they said, IFFOR. And who are they? And there
18 was never any specifics about who these people were
19 put in paper. And this undertaking says registry
20 operator will implement and enforce IFFOR best
21 practice policies. There were no best practice
22 policies, there was no IFFOR and there were no people

1 yet.

2 So just on that clause alone, there were a
3 set of uncertainties and vagueness as to exactly what
4 it was that they were undertaking, or proposing to
5 undertake. It's quite a significant difference
6 between this application and all the other
7 applications we received.

8 Q. It says, "Implement and enforce IFFOR best
9 practices policies, in the manner set forth in the
10 documentation." Do you recall that IFFOR's charter
11 was described in the application?

12 A. There was a charter set forth in the
13 application. The policies were not set forth.

14 Q. Well, the policies are the policies
15 reflected here in -- on pages 84 and 85 of the
16 registry agreement.

17 A. That's not how I read page 84 and 85.
18 Page 84 and 85 starts with, "Registry operator will."
19 It doesn't start with, "IFFOR's best practice
20 policies are."

21 Q. But the best practices are described in
22 the charter, right?

1 A. In the charter.

2 Q. Yes. Do you recall that the charter
3 describes generally what the best practices are?

4 A. I can't recall what that document called
5 the charter is. Can you show me the document?

6 Q. Yes, you said that -- we'll try to get it.
7 But the charter was included in the application?

8 A. There were some documents in the
9 application.

10 MR. DE GRAMONT: Can I have just a moment?
11 In fact, we've been going for well over an hour. Can
12 we take a 10-minute break?

13 JUDGE SCHWEBEL: 10-minute break.

14 (Recess.)

15 MR. DE GRAMONT: May I proceed,
16 Mr. Chairman?

17 JUDGE SCHWEBEL: Please.

18 BY MR. DE GRAMONT:

19 Q. Dr. Twomey, we were talking before the
20 break about IFFOR and your position that IFFOR
21 distinguished ICM's application from others because
22 it was a sponsoring organization that had not yet

1 identified its members and its structure, et cetera.

2 If I get that wrong, please clarify it.

3 A. Yes, I said that this was an application
4 which had a self-selecting sponsorship proposal which
5 was not IFFOR. It was a self-selecting group of
6 adult entertainment providers.

7 Q. That was the community, correct?

8 A. I'm sorry?

9 Q. That was the community?

10 A. Correct.

11 Q. Now, what's IFFOR?

12 A. Well, sorry, then you were saying IFFOR
13 was the --

14 Q. The sponsor.

15 A. The sponsor.

16 Q. And you were distinguishing ICM from other
17 applications by saying that IFFOR had not yet been
18 constituted?

19 A. Yes, I was, but I was -- and then in terms
20 of your question, which was about sponsors, other
21 sponsors not yet determined, I agreed with your
22 proposal. I suppose my point, if it needs

1 clarification, was that in Appendix S, as it's
2 indicated, a lot of the policy-making for this TLD
3 has been delegated to IFFOR.

4 Q. Well, in fact, .mobi had a membership
5 advisory group and a policy advisory board when it
6 was approved that had no members identified and no
7 procedures identified. Do you recall that?

8 A. I can't recall that.

9 Q. And the same was true for .tel. Do you
10 recall that?

11 A. I can't.

12 Q. I'm going to hand you a confidential
13 Exhibit B.

14 MR. LEVEE: My only concern is there are
15 visitors who are not supposed to be seeing the
16 confidential exhibits. And since I don't know what
17 they are, I don't know whether I'm supposed to
18 object.

19 MR. DE GRAMONT: May I approach the
20 witness, Mr. Chairman?

21 JUDGE SCHWEBEL: Certainly.

22 JUDGE TEVRIZIAN: When you use the IFFOR

1 here, I see it's the International Foundation For
2 Online Responsibility is the sponsoring organization
3 for the proposed XXX domain. IFFOR will be
4 responsible for the policy development for the XXX
5 domain. Is that what you're referring to?

6 MR. DE GRAMONT: Yes, Judge.

7 BY MR. DE GRAMONT:

8 Q. And I'm not going to discuss this exhibit
9 at length, but it's confidential Exhibit B. It's the
10 application by ICM that was submitted in March of
11 2004. And if we go to page 3 and starting down in
12 page 3, in fact, there is lengthy information about
13 IFFOR is a Canadian not for profit corporation. Its
14 incorporation is the result of a four-year outreach
15 campaign. It describes the principles of its
16 charter.

17 If we go on to the next page, it describes
18 its structure. It goes on to describe what its board
19 of directors will be like, its supporting
20 organizations, its missions. It has a -- keep going,
21 please. Page 6 has an ombudsman structure. So in
22 fact, quite a lot of detail was provided about IFFOR

1 in the original application?

2 A. I would agree with that, Counsel. My
3 observation, I suppose, is twofold. First of all, in
4 the whole history of dealing with this application, I
5 never once met anyone who said I'm from IFFOR, I'm
6 going to be involved with IFFOR, I'm going to be on
7 the council of IFFOR. I dealt with the counsel and I
8 dealt with Mr. Lawley.

9 If you would make a contrast, for
10 instance, with mobi, where you quite rightly might
11 say some of the members of those panels might have
12 been filled, it was pretty clear in the discussions
13 with the GSM association, with quite a number of --
14 and others, that you could see the people behind that
15 community putting forward .mobi. We consistently saw
16 Mr. Lawley and his counsel.

17 The second point I just was going to make
18 about IFFOR which has a lot of detail about a
19 structure, the structure is also delegated, or the
20 policy formulation process. So I think the big
21 difference here is that it was the same two or three
22 people we saw consistently. And when we asked for

1 who was going to be on IFFOR, who are these people
2 going to be, it would be better if you could put
3 forward the names of some of these people.

4 Q. Actually, they did provide you with a
5 number of names, right?

6 A. In a public format?

7 Q. No. I believe it was in a confidential
8 letter.

9 A. I believe there were private conversations
10 where a few names were mentioned and when we said,
11 can you put this forward? The answer was no, we
12 can't.

13 Q. But there was no board membership for
14 .mobi -- I'm sorry, for the .mobi membership advisory
15 group and policy advisory board, there were no
16 members identified for the membership advisory group
17 and policy advisory board of .tel?

18 A. But we would -- that is true, but when we
19 were dealing with .mobi, for instance, the GSM
20 association, executive leadership who were the
21 association for the GSM mobile telephone operators of
22 the world. We were dealing with the executives of

1 Nokia, we were dealing with the executives from some
2 of these companies. So we had a sense of, you know,
3 if that was thought through, it was clear where the
4 understanding was coming from.

5 Q. But there were never any complaints in the
6 GAC, for example, that they didn't know who was going
7 to be on IFFOR's board and et cetera?

8 A. I don't know what took place in the GAC
9 apart from what's in the record.

10 Q. Let's take a look at the March 30th
11 resolution and the five reasons given for denying the
12 application. And that's at tab 31 of your notebook.
13 It's hearing Exhibit 121, and it's on page 2 and
14 there are five bullet points. And let's see if we
15 can deconstruct these a little bit.

16 A. While I'm turning there, Counsel, you
17 asked me before in your questions whether there were
18 any provisions for ICM to be doing enforcement. I
19 did actually notice that if you go to the next page,
20 when you went to pages 86 and 87, this series of
21 paragraphs about ICM -- about the applicants, sorry.
22 I'm doing enforcement. So there were actually

1 enforcement provisions in this document. They were
2 just on the next page.

3 Q. The question is whether ICM had undertaken
4 to regulate offensive content on the Internet as set
5 forth in the GAC communique.

6 A. Well, the problem I have with that,
7 Counsel, if I can take you to page 81 and look at
8 task line number 5, the registry operator
9 undertakes -- whether directly or as appropriate as
10 set forth in the application in conjunction with
11 IFFOR to establish policies, procedures and
12 registrations with regards to the sTLD, including,
13 without limitation, policies, procedures and registry
14 requirements reflecting registry operating
15 commitments contained in the following documents
16 submitted to ICANN by the registry operator.

17 I would have to look at documents G, H and
18 I. G, H and I were certainly documents that were
19 prepared particularly by presentation to the ICANN
20 Government Advisory Committee on the 29th of November
21 2005. So I would have to look at those to answer
22 your question.

1 Q. Let's compare that to the language of the
2 Wellington communique, which said, take appropriate
3 measures to restrict access to offensive and illegal
4 content.

5 A. I would have to look at the documents
6 referred to in 1-5.

7 Q. Let's take a look at the actual resolution
8 rejecting the application from March 30th, 2007. And
9 let's go through them one by one. And the first
10 reason is, "ICM's application and the revised
11 agreement fail to meet, among other things, the
12 sponsored community criteria of the RFP
13 specification." Now, we've had a lot of discussion
14 about whether the board already determined that issue
15 on June 1st, 2005, and I'm not going to ask you any
16 further questions about that unless the panel has
17 questions.

18 And I take it that it's your position that
19 the ICANN board applied the sponsorship community
20 criteria to ICM in the same fashion that it did to
21 all of the other applicants?

22 A. I would say that it went out of its way to

1 give ICM an opportunity to prove the criteria much
2 beyond what it gave the other applicants.

3 Q. And we've had a lot of testimony about
4 that, so unless the panel has any questions, I'll
5 move on to bullet point number 2. Bullet point
6 number 2, "Based on the extensive public comment and
7 from the GAC's communiques that this agreement raises
8 public policy issues." Is there anything about that
9 in the RFP criteria?

10 A. The RFP criteria, I would have to check
11 the exact wording of the whole RFP, but the RFP
12 itself is drafted in the context of the ICANN bylaws.
13 You know, we can't put out an RFP, and then act not
14 in the context of the ICANN bylaws. And I'm pretty
15 sure there is wording in the RFP that referred to
16 things being -- I know there is wording about
17 consistent with existing policies. So I know there
18 is wording that certainly referred to broader aspects
19 beyond the RFP's wording itself. But the basic line
20 is we cannot work beyond the ICANN bylaws.

21 Q. So reading this, what extensive public
22 comment was it that led the board to reject the

1 application?

2 A. Well, I think the board members' decisions
3 are a public -- I think the panel has probably seen
4 them. And each board member made a clear public
5 statement as to why they voted on this day, so I
6 would prefer to let them speak to that. As far as
7 what was the extensive public comment, I think it was
8 the public comment that we were receiving
9 communications on the website about the application,
10 and I think there was comment made actually during
11 the Lisbon meeting. People were standing up in
12 public session of the Lisbon meeting making public
13 comment.

14 Q. So it was the e-mail campaign from the
15 religious right, it was the GAC communique saying
16 that they wanted ICM to restrict offensive content on
17 the Internet? Those were the concerns that led ICANN
18 to reject ICM's application?

19 A. I think there was some submissions put in
20 favor of the applicant from members of the adult
21 community. I think very importantly in the eyes of
22 the board was what appeared to be a complete -- a

1 fracturing of support from the adult entertainment
2 industry. I know the board took quite seriously this
3 letter received from Mr. Larry Flynt because of his
4 organization's significance in that industry. The
5 name of that -- the online freedom group -- I've
6 forgotten.

7 JUDGE SCHWEBEL: Free Speech Coalition.

8 THE WITNESS: Thank you, Your Honor. Your
9 memory is so much better on this than mine on that
10 point. They were consistently speaking and they came
11 and attended in the meeting at Lisbon and made a
12 strong case.

13 There was a series of communications we
14 received concerning a meeting that took place in an
15 industry association outside where there had been
16 people arguing about this. That was just noted in
17 passing. But I think those recommendations,
18 particularly the verbal argument we heard in front of
19 us in Lisbon, I think, also sort of reflected -- you
20 know, was seen by the board members as showing that
21 there was -- it was hard to see how there was this
22 community or this sponsorship community.

1 BY MR. DE GRAMONT:

2 Q. In fact, there was substantial evidence of
3 sponsored community support including in the exhibit
4 that your lawyer showed you marked DI. I'll just
5 read it very quickly. More than 76,000 adult website
6 names have been pre-reserved. 1,217 adult web
7 masters from over 70 countries have registered on the
8 ICM Registry. An additional 300 web masters e-mailed
9 ICM Registry requesting information. Was there any
10 evidence besides a few letters and an e-mail campaign
11 from the religious right, any significant evidence
12 that the sponsorship was --

13 A. Yes, I think quite significantly. The
14 fact that you had 70-whatever thousand pre-sales was
15 not seen by the board -- I mean, I could be one
16 participant in the industry and I could buy -- this
17 is like the movie industry. If I happen to have --
18 if I'm at one movie studio, and I produce 20,000
19 movies that year and they've all got 20,000 titles,
20 that doesn't mean I'm 20,000 people. So the presale
21 number was some reflection of what would be the
22 content of the industry. It doesn't necessarily tell

1 us there were 76,000 individual participants.

2 Q. Was there any evidence of that, that they
3 didn't represent that many participants?

4 A. There was -- some board members had
5 done -- had asked questions about who was
6 participating, had asked much more about the industry
7 structure and who was involved in the industry
8 structure. But the Free Speech Coalition people
9 claimed to stand for 3,000 members of the community
10 and spoke very eloquently. So I don't think you
11 could discount them.

12 I did say to you before, Counselor, I
13 think there was public comment from both sides. I
14 did make that point.

15 Q. And the board minutes go on to talk about
16 offensive content, the GAC's concern for offensive
17 content not being addressed. Do you see that?

18 A. Yes, it does.

19 Q. It goes on to say that the ICM application
20 raises significant law enforcement compliance because
21 of the countries' varying laws relating to content
22 and practices defined in the application and

1 therefore obligating ICANN to acquire a
2 responsibility relating to content and conduct. Do
3 you see that?

4 A. Yes.

5 Q. And in fact, looking at the contract, ICM
6 did not take any obligations to enforce or restrict
7 content according to different countries. In fact,
8 the sTLD would have made it much easier for countries
9 to enforce their laws because everything would have
10 been tagged and easy to filter?

11 A. All I could tell you is that we received
12 communications from governments who raised that
13 issue. The GAC raised that issue. We received a
14 very thoughtful communication from the government of
15 Canada just prior to this meeting, where it went out
16 of its way quite specifically to make this point
17 based on the agreement.

18 And to say that ICANN -- in its analysis,
19 that ICANN would have responsibilities for the
20 content, it's a two-page letter in quite detail of
21 what it saw this would mean for ICANN's
22 implementation and it was -- and then went on to say,

1 this takes ICANN into the issues of content
2 management and this is inappropriate for ICANN.

3 Q. And the point is, is that ICANN didn't
4 agree to do that?

5 A. I'm not certain, as I said to you, I read
6 your Appendix S the same way. And I further go
7 forward and say that IFFOR was delegated the policy
8 making. So the actual policies, the specific
9 policies are still a little vague.

10 Q. Putting sponsorship aside, do these
11 reasons expressed here have any rational relationship
12 to the RFP criteria?

13 A. Well, the RFP criteria included sponsorship
14 criteria. And as I said to you, sponsorship was
15 always a consistent issue in the discussions of the
16 board. And the other issues related to the operation
17 of ICANN's bylaws, the applicants were well informed.
18 I think you've been quoting from testimony from
19 members of who are on the ICM side who were
20 well-established members of the ICANN community.
21 They know that ICANN operates within its bylaws.

22 So I can't say that -- you know, you can't

1 see the RFP outside the context of being implemented
2 within the ICANN bylaws which is what comes to the
3 public policy issues. The public policy issue is
4 specifically an issue sitting on the ICANN bylaws
5 that the board has to take into consideration if
6 advised by the GAC.

7 Q. Aren't the bylaws' provisions about
8 well-documented policies being applied neutrally and
9 objectively, fairly, about nondiscrimination, about
10 openness and transparency, aren't they supposed to
11 insulate the ICANN board from being jerked around
12 like a puppet every time a particular government
13 wants it to do something? Isn't that part of the
14 reason that ICANN has those articles and bylaws?

15 A. We had those articles and bylaws. The
16 articles and bylaws that refers to the Governmental
17 Advisory Committee is very specific. It does not say
18 country A or country B or a government. It says an
19 organ of ICANN, the Governmental Advisory Committee.

20 Q. There is a new round for TLDs coming up.

21 A. Uh-huh.

22 Q. You have to say yes or no.

1 A. Yes, I'm sorry.

2 Q. And applicants who are going to bid to get
3 TLDs?

4 A. Well, I should be quite precise here. The
5 process is underway looking at implementation, but
6 this is not yet being finalized by the ICANN board.
7 The ICANN community has not yet finalized the process
8 but it is quite feasible that it will take place,
9 yes.

10 Q. And if it does take place, do you expect
11 that there will be applicants for a .XXX or a .sex or
12 an adult TLD?

13 A. We expect there will be applicants for
14 lots of strings.

15 Q. And do you think that any such strings
16 will be granted?

17 A. I'm sorry, what do you mean by any such
18 strings?

19 Q. Do you believe that there will be an adult
20 content TLD entered on the root?

21 A. I couldn't comment. It's a hypothetical.
22 I could not answer you.

1 MR. DE GRAMONT: Dr. Twomey, I have no
2 further questions. I want to thank you very much for
3 your time.

4 THE WITNESS: Thank you.

5 MR. LEVEE: If I may, members of the
6 panel, I have less than five minutes.

7 REDIRECT EXAMINATION

8 BY MR. LEVEE:

9 Q. Dr. Twomey, let me hand you Exhibit DJ.
10 You referred to a letter from the government of
11 Canada about 10 minutes ago. I just wanted to
12 establish if that's the letter.

13 A. That is the letter.

14 Q. And what was the import of the letter?
15 It's long, so I don't want to read it.

16 A. One of the end quotes of this letter --
17 there is two levels of end quote. The first is
18 the -- basically, it's a very careful analysis by the
19 government of Canada about the ICM application. And
20 it basically says that it would be inappropriate for
21 ICANN to take on an ongoing role such as the one
22 outlined in the revised proposed agreement with ICM.

1 Specifically it's argued that ICANN was not conceived
2 to be the global Internet content regulator and it
3 makes that case. I could read it in detail. It's
4 very carefully thought out.

5 But if I could say there is another
6 significant aspect to this letter. Aside from the
7 GAC, the government of Canada has always played a
8 particular impact role. Interventions are always
9 considered to be very careful and there are a number
10 of instances in the history of ICANN where the
11 intervention of Canada has seemed to be quite
12 significant.

13 So if you have an understanding of the
14 GAC, you would know that an intervention from the
15 government of Canada draws a lot of attention from
16 other members of the community.

17 JUDGE TEVRIZIAN: It's not clear as to the
18 date of this letter.

19 MR. LEVEE: Actually, that was my next
20 question.

21 BY MR. LEVEE:

22 Q. Do you remember approximately when the

1 letter was written to ICANN?

2 A. It was actually part -- it was posted as
3 part of the public comment period prior to the March
4 2000 -- the final decision.

5 Q. March 2007?

6 A. Yes. And it actually also refers to
7 comments that they made in 2006 to the U.S.
8 Department -- notice of inquiry related to the joint
9 project agreement over the memorandum of
10 understanding that we had with the United States
11 Government. So that would have been around September
12 2006 or August of 2006, I think.

13 Q. So the letter itself that we're looking at
14 would have been written in the first quarter of 2007?

15 A. 2007.

16 Q. You can set that aside. You were shown
17 during your cross-examination confidential hearing
18 Exhibit 2. Do you still have that in front of you?

19 A. Yes, I do have that in front of me.

20 Q. And you were asked to look at page 3.

21 A. Yes.

22 Q. Sponsoring organization structure. Let me

1 just ask a couple of questions. In the very last --
2 there are a bunch of question marks, and I assume
3 maybe they were supposed to be bullets. And the very
4 last one on that page says that IFFOR will employ
5 open and transparent policy development mechanisms
6 that promote well-informed decisions based on expert
7 advice, and ensure those entities most affected can
8 assist in the policy development process. Did ICM
9 ever elaborate via its contract on what those
10 mechanisms would be?

11 A. Not to my recollection. And my
12 recollection is, from what was in Appendix S, was
13 that they were delegating that fairly blanketly in an
14 open way to IFFOR.

15 Q. And then let me ask you to turn the page.
16 Just above the chart, there is a sentence that says,
17 "IFFOR will be responsible for establishing
18 registration requirements for the .XXX TLD consistent
19 with this charter and registrations will be
20 restricted to members of the community as defined
21 above." At any time did IFFOR establish these
22 registration requirements?

1 A. No, I never saw a document that said here
2 are the registration requirements.

3 MR. LEVEE: Thank you, members of the
4 panel. I have no nothing further.

5 JUDGE SCHWEBEL: Thank you so much.
6 Dr. Twomey, then I think we've concluded your
7 testimony. We are very grateful for it. Thank you
8 so very much for your time and contributions.

9 THE WITNESS: Thank you, Your Honor, and
10 my apologies for my accent. I hope you've survived
11 or struggled through it.

12 MR. LEVEE: ICANN's next witness will be
13 Professor David Caron who has been in a secret
14 location and he is being retrieved and should be here
15 within the minute.

16 JUDGE SCHWEBEL: Yes, I've seen him
17 loitering outside in the hallway.

18 MR. LEVEE: Impatiently.

19 DIRECT EXAMINATION

20 MR. ENSON: Members of the panel, ICANN
21 now calls Professor Caron.

22 BY MR. ENSON:

1 Q. Professor Caron, can you state your full
2 name for the record?

3 A. David Dennis Caron.

4 Q. Where do you currently work?

5 A. University of California at Berkeley.

6 Q. And what do you do at UC Berkeley?

7 A. I'm a member of the faculty of law.

8 Q. And what courses do you teach there?

9 A. I teach the basic course in international
10 law, ocean law. I teach a course entitled resolution
11 of private international disputes which is a
12 combination of international arbitration and
13 transnational litigation, and I do the writing
14 seminar.

15 Q. Professor Caron, your extensive
16 credentials are laid out in your written witness
17 statement so I won't spend much time going over them,
18 but I hear there is an additional honor. I hear
19 you've been called to the bar of England recently?

20 A. Well, the technical term is I will be
21 called.

22 Q. You will be called?

1 A. October 8th.

2 Q. Congratulations.

3 A. At the Inner Temple, yes.

4 Q. Let's move on. Dr. Caron, could you
5 please describe your involvement in this proceeding?

6 A. In this proceeding, I was contacted in
7 February of this year by counsel for ICANN to prepare
8 an expert opinion on the question of international --
9 the role of international law in these proceedings
10 and, in particular, the meaning of Article 4 where it
11 states that ICANN shall act in conformity with
12 relevant principles of international law.

13 Q. And what did you do to prepare for your
14 written report?

15 A. Well, I had the ICM memorial to which is
16 attached Professor Goldsmith's expert report. And in
17 time, I became aware of the ICANN website where
18 virtually everything in this proceeding is up,
19 although I must say I didn't have to use it that
20 much, and I of course went to books and articles to
21 do my research.

22 Q. Professor Caron, would you please turn to

1 Exhibit 4 in your binder there?

2 A. I have tab 4.

3 Q. Do you understand that that is the
4 articles of incorporation of ICANN?

5 A. Yes, I do.

6 Q. And do you understand that the claimant in
7 this matter, ICM, has argued that Article 4 of
8 ICANN's articles of incorporation is a choice of law
9 provision which makes all general principles of
10 international law applicable to ICANN's conduct?

11 A. Yes. You said two things. I understand
12 they argue it's a choice of law provision and that it
13 makes relevant a great deal of international law,
14 yes.

15 Q. And do you agree with this conclusion that
16 Article 4 of the articles of incorporation is a
17 choice of law clause?

18 A. No, I do not. There is a number of
19 problems with that. First of all, it's not
20 explicitly a choice of law clause. It's not in the
21 language one would expect in a choice of law clause.
22 It doesn't say the articles of incorporation shall be

1 governed by.

2 Secondly, it seemed odd to me that the
3 bylaws later agreed to did not refer back to this
4 provision as being the law to be applied by this
5 panel. Third, it seems odd to me to have a governing
6 law clause that is not applicable to the articles of
7 incorporation entirely. It's not by its terms. And
8 Article 5 and Article 8 both would exclude the
9 applicability of Article 4 by its own terms.

10 Lastly, it strikes me as very unusual that
11 the governing law clause would list three sources at
12 an equal level. That's without any hierarchy to
13 guide how you would apply them, assuming they were
14 somehow inconsistent. I mean, it does raise the
15 question of what do I think that clause is and I
16 think this is the articles of incorporation where a
17 corporation states its purpose, what it regards
18 itself as doing. And this Article 4 is an
19 undertaking, that they view themselves as a
20 corporation that shall carry out their activities in
21 conformity with local law, also applicable
22 international conventions and relevant principles of

1 international law.

2 Q. Professor Caron, I think you said that --
3 or one of the reasons that you didn't believe this to
4 be a choice of law clause was that the bylaws did not
5 refer back to Article 4. What did you mean by that?

6 A. Well, what I meant by that is often in a
7 contract, in the normal setting, you would have a
8 choice of forum clause and you would have a choice of
9 law clause, governing law clause, however you want to
10 term it. They would be together. That obviously did
11 not happen here.

12 Rather, the forum clause comes later in
13 the bylaws in this case. It's drafted later.
14 They're fully aware that this is referring back to
15 the articles of incorporation. If they had regarded
16 this panel -- they were saying to this panel, we have
17 agreement as to the governing law, it would have
18 seemed quite natural to me that that refer back to
19 Article 4.

20 Q. If Article 4 is not a choice of law
21 clause, what law applies to these proceedings, in
22 your opinion?

1 A. Correct. And I think for the purposes of
2 my opinion, that was a crucial question to ask
3 because my opinion is a question of trying to
4 interpret Article 4, and therefore the first question
5 is to ask what law is governing interpretation.

6 So since I do not view there to be an
7 agreed governing law, if I go to the applicable rules
8 in this case, Article 28, it says first the panel
9 should apply the agreed law. Since there isn't one,
10 in my view, in my opinion, the panel should look to
11 the appropriate law.

12 And as far as interpretation of the
13 articles of incorporation, in my opinion, that would
14 be California law. Certainly Judge Tevrizian -- he
15 has a great deal of expertise in California law so I
16 won't speak to this definitively. In my opinion, I
17 say I'm a member of the bar. I don't claim expertise
18 in California law but it would seem that the articles
19 of incorporation of a California nonprofit
20 corporation would be governed/interpreted by the law
21 of the state of California.

22 Q. Let's talk a little bit about --

1 JUDGE TEVRIZIAN: Let me interrupt a
2 moment. Under a 501(c)(3) corporation, which ICANN
3 is qualified to do business in California, the
4 articles definitely state that ICANN is incorporated
5 under the laws of the state of California. What is
6 your opinion as to who enforces the laws with regard
7 to the regulation of charitable organizations and
8 corporations incorporated in the state of California?

9 THE WITNESS: So on the basis I described
10 as to my being a member of the bar, I looked into
11 that and it is, as an ordinary matter, the attorney
12 general of the state of California, within his
13 office. There are a few extraordinary procedures in
14 which a shareholder could raise a matter. In a
15 nonprofit corporation, it becomes less clear about
16 how that might happen. So it would primarily the
17 attorney general as a state matter.

18 But if I could just add, that's why, in my
19 opinion, I stated that I would think it highly
20 unlikely that the state attorney general's office
21 would not interpret these articles in accordance with
22 the law of the state of California.

1 BY MR. ENSON:

2 Q. Professor Caron, let's talk a little bit
3 about what Article 4 does, then. As we've seen,
4 Article 4 requires that ICANN carry out its
5 activities in conformity with relevant principles of
6 international law. What does the word relevant mean
7 in that phrase?

8 A. Well, in my opinion, I tried to break it
9 down entirely and go step by step.

10 Q. And we can go that way if you would like.

11 A. So to be clear, the activities are
12 referring back to Article 3. What activities are
13 they carrying out? In conformity with -- I think
14 it's not a major point but to me a significant point
15 that often the statement that's made is, did ICANN
16 act inconsistently with relevant principles of
17 international law, when I think actually the question
18 is, did they act inconsistently with acting in
19 conformity with relevant principles of international
20 law. And looking, and I would say just briefly, at
21 California law, there is support for the notion that
22 in conformity with is not the same as in strict

1 conformity with. And it fits in that way in some
2 sense of this is a statement of who we are.

3 Now, you are correct that I spend much
4 more time on the word relevant as being an important
5 word. And relevant to me means relevant to the
6 situation and to which there are two aspects. What
7 is the activity relevant to, the subject matter, and
8 relevant to the actor, namely, ICANN. And from those
9 two things, relevant to me becomes important about
10 what rules -- what principles, excuse me, what
11 principles of international law would be relevant to
12 ICANN, a California nonprofit corporation.

13 Q. As a general matter, does international
14 law impose obligations on private corporations like
15 ICANN?

16 A. As a general matter, international law
17 relates to the subjects of international law, in
18 terms of benefits and obligations, and that would be
19 primarily states and, to some degree, international
20 organizations as well.

21 Q. How might international law apply to a
22 private corporation?

1 A. Well, it would do so in a couple of ways.
2 Several of them are not relevant here. So on the one
3 hand, for example, clearly it applies to private
4 entities in terms of piracy, in terms of certain war
5 crimes and that's to the side. So that would --
6 absent some -- barring some extraordinary
7 circumstance, that's to the side.

8 When you ask how it might apply, it
9 strikes me that there is, for example, a whole line
10 of cases in the United States right now where a
11 corporation is said to have violated a norm of
12 international law. Now, how might that be? In the
13 alien tort statute context. How might that be if the
14 norm is not binding on them?

15 And in those cases, the basic, the
16 fundamental argument, about which I don't think there
17 is a doubt -- the debate is more sophisticated -- is
18 that certainly an act of a state is done normally by
19 a state official, but you could have a de facto actor
20 within the state. A corporation could de facto be an
21 actor with the state and in that sense could be said
22 to breach a rule -- be a part of a breach of a rule

1 or a principle of international law.

2 So in that sense, one could see Article 4
3 as a statement that we will act in conformity with
4 international law and the relevant principles of
5 international law in the sense that we will not be a
6 part of an action or a state breaching international
7 laws. We will not be a de facto agent.

8 Q. In his report, Professor Goldsmith focuses
9 on the principle of good faith found in international
10 law. Does the international law principle of good
11 faith generally impose obligations on private
12 corporations?

13 A. No. To the extent we're talking about a
14 general principle of international law -- so let me
15 just say I find the discussion of general principles
16 not sufficiently careful so I would distinguish
17 general principles of law from general principles of
18 law recognized by civilized nations from general
19 principles of international law. It is true --
20 taking the last category, general principles of
21 international law, what I write in my opinion is they
22 could -- in most cases, they would be principles

1 found in custom. They might also come from general
2 principles of law recognized by civilizations and
3 they might be found in a multilateral treaty where
4 the principle is present.

5 The question you raise is -- and so what
6 I'm trying to be careful is general principles of
7 international law are, by definition, law principles
8 running between states. So again, for the same
9 reason I mentioned a moment ago, they're not normally
10 applicable to private corporations.

11 Q. And what about the three applications that
12 Professor Goldsmith pulls from -- the three
13 applications that he pulls from the overarching
14 application of good faith. I think it is good faith
15 in complying with legal restrictions, abuse of
16 rights, good faith in contractual negotiations. Do
17 these principles impose obligations on private
18 corporations?

19 A. Well, when you ask that question, I have
20 two reactions. One is the same I just had. If I
21 have a general reaction about the general principle
22 of good faith in international law, that these

1 related ones are also not applicable to private
2 corporations. I have some issues with the whole
3 notion of related applications. I take no issue with
4 the conclusion that good faith is a general principle
5 of international law. And it clearly can be
6 rephrased, manifested in other ways. But I think
7 when one does that, one has to be very careful
8 not to start spinning out a set of -- a legal system
9 based on what seems related and logical.

10 And what occurred to me here -- so on the
11 first one, I think principle of -- what did you say,
12 good faith in --

13 Q. Complying with legal restrictions.

14 A. To me that is a direct statement of the
15 principle of good faith. The second one you
16 mentioned was abuse of rights. And to me abuse of
17 rights -- and here I would agree with Professor
18 Goldsmith that that is directly related to good
19 faith. It seems almost the inverse, that you must
20 exercise a right in good faith and one would allege
21 that there was abuse of that right in the way it was
22 exercised. How I would apply that, that's a

1 difficult thing.

2 So if I were applying that, I would ask
3 what is the right that's being exercised. I suppose
4 in this case that is the discretion to -- the right
5 to grant a top domain level domain and you would have
6 to allege that that right was abused. And for the
7 reasons I describe in the opinion -- and I don't know
8 if I'm jumping ahead here too much but to me, that
9 has to be a manifest abuse. To look at -- to say
10 that means an inconsistency between what was said one
11 day and the next, that is not an abuse of right. And
12 I can speak more to that.

13 But the point I want to make here for a
14 moment is I reflected more on the third one you
15 mentioned, the --

16 Q. Good faith in contractual negotiations?

17 A. Right. And I would say I would have to
18 think a lot more about that one as to whether that is
19 actually part of good faith. It seems that on its
20 face, seems very obvious, but then I was reading the
21 Cameroon/Nigerian land boundary case and it's a
22 little off point, but on point where the allegation

1 is that one state party during bilateral discussions
2 was acting not in good faith by setting up the
3 jurisdiction of the court while those discussions
4 were going on. And the Court replies that this is
5 not an obligation, so therefore, there is not a
6 violation in that sense. And to the extent one views
7 that as some sort of negotiation, there seems
8 something going on there.

9 Secondly, if I thought about it even as a
10 general principle of law recognized by civilized
11 nations, the world is not in agreement on
12 precontractual liability. So it is a rule in civil
13 law countries. There is in Germany in culpa
14 contrahendo, but in the common law world, that is not
15 generally a rule. So I just wonder about the
16 whole -- again, you could start spinning out a whole
17 set of rules. I'm not saying it's necessarily
18 incorrect. I'm just saying I would think about it a
19 lot longer.

20 Q. Let's talk about these principles'
21 application here. Professor Goldsmith's statements
22 in his reports and he testified here that these

1 applications apply to ICANN in this matter because
2 ICANN voluntarily subjected itself to this law in
3 adopting Article 4. Do you agree with that analysis?

4 A. No, I don't. Well, let me rephrase that.
5 What he doesn't say is to me, the question is, to
6 interpret Article 4. And what he's doing is side
7 stepping the question of interpreting it in that he
8 does not make explicit that there is a jump there.
9 There is an implication. The text does not say we
10 will act in conformity with relevant principles of
11 international law as though we were a state or some
12 set of wording that would make it explicit. So there
13 is a step of implication.

14 Similarly under the local law -- to make
15 it clear, if I went to California law on the last
16 one, we all assumed that that is the California law
17 applicable to a nonprofit corporation. We're not
18 implying the law applicable to a California state
19 agency that happens to regulate something. So we
20 seem to be clear on that one. On the first one, we
21 are slipping into an implication quickly and it's
22 just something to note and to make clear that you are

1 making that implication. To me that's a step to make
2 and one I wouldn't make lightly.

3 Q. I think in your report you refer to this
4 as transforming international law and you mentioned
5 earlier a jump and a step.

6 A. Right.

7 Q. What would you have to see to feel
8 comfortable with the conclusion that a nonprofit
9 corporation has taken this jump and has voluntarily
10 subjected itself to international law that is usually
11 applied to states, if you can answer that?

12 A. So in the report, I mention, for example,
13 article 25 of the German constitution, which is
14 explicit, when they bring international law into
15 their national legal system, they explicitly make
16 both the rights and obligations -- and their word is
17 directly -- applicable to German nationals. Now,
18 that's not done in U.S. law. It leads to -- it was
19 implied in some cases in U.S. law that it would
20 become directly applicable, but it's also a point of
21 controversy in U.S. law. So courts have trouble
22 about whether a private individual somehow enjoys the

1 right that U.S. law -- even though international law
2 is part of U.S. law, it's not always clear.

3 To answer your question, I guess that's
4 what I would look for, for something to be --

5 Q. An express statement, is that what you're
6 saying?

7 A. I'm saying if you're interpreting the
8 document and you want it to be express, that is
9 express. It's important to be clear that we are
10 implying something in this case.

11 Q. And to make that implication, do you feel
12 it would be important to focus on the intent in the
13 drafting and adoption of those documents?

14 A. Well, you would have to. I suppose there
15 would be a couple of interpretative arguments you
16 could make. One would be to go to the drafter's
17 intent. What we see in California law, if you're
18 applying statutory canons, that is gone to if there
19 is ambiguity or uncertainty. So you could argue
20 there is uncertainty and we should go to those
21 things. It's very difficult to use the language of
22 particular drafters. It can be done but it's

1 extrinsic evidence to the actual text.

2 The other would be an argument that there
3 is no other plausible meaning to the -- if you
4 exclude all principles of international law, then
5 what does it mean? And in my view, taking my view
6 that it's a step to imply that, I would ask what's
7 left and I've already offered at least a meaning of
8 what it means, that ICANN agrees not to be part of --
9 to be a de facto agent of a state in breach of
10 international law.

11 Q. Professor Goldsmith, with your --

12 A. Professor Caron.

13 Q. That was a bad slip, wasn't it? Professor
14 Caron, with your experience in this field, can you
15 think of any examples in which a private corporation
16 has voluntarily subjected itself to the international
17 law applicable to states?

18 A. So from my experience and thinking about
19 it a little bit, I'm not aware of a corporation
20 that's done that. I did consider -- I thought about,
21 well, there are these multinational corporations that
22 adopt a code of conduct about how labor will be used

1 in another country but they constructed their own
2 code of conduct. They don't subject themselves to
3 the obligations on the state in those questions. I
4 considered a number of cases where I thought maybe
5 that's possible, but what one sees in those cases is
6 an individual or a corporation actually trying to get
7 the benefits of international law. Either -- there
8 is sort of one set of cases where an individual
9 claims to be a diplomat and they're not, an
10 organization claims to be a state and they're not,
11 but it's all in order to gain immunity, is the normal
12 rule.

13 I considered stabilization clauses. There
14 are a few classic cases, the Topco case in '76, where
15 there is an argument that the corporation in essence
16 enjoys the stability of the contract even though they
17 are not a state. But again, that's pointing to a
18 benefit, not to an obligation. So I don't know of an
19 example.

20 Q. In your report, you discuss the
21 differences between the principles of international
22 law and the rules of international law. Would you

1 elaborate on that for the panel?

2 A. Yes. So I summarize the opinion upfront,
3 but in the conclusion, I point to three things that I
4 think are very important. And I think particularly
5 important is the fact that the word principle rather
6 than rule is used and I think it's particularly
7 important that one then must ask what is the
8 reasoning that a tribunal uses in evaluating whether
9 a principle is violated.

10 As to the difference between a principle
11 and a rule, I find it interesting that that's not
12 discussed particularly so far, but to me, it's a
13 crucial difference and a crucial difference in
14 reasoning where the principle is almost like a
15 proto-law. It's a generalized truth. It is
16 something that permeates the legal system, one could
17 say, whereas the rule, as some of the quotes said, is
18 a more definite, practical, clear statement of what's
19 required.

20 Often the principle is almost a statement
21 of normative conduct. The parties shall act in good
22 faith, rather than one should obey this particular

1 rule. So to me that's a key distinction to keep and
2 I think in-state practice is a key distinction. If
3 one looks, for example, at the precautionary
4 principle or the Rio Declaration on the environment,
5 the states are very careful in those instances to use
6 the word principle. They don't want the word rule.
7 Rule implies a certain definiteness.

8 Now, am I saying it's not binding? No, it
9 is binding. Principle of good faith is binding. But
10 how one reasons out whether there is a violation of
11 good faith, the fact that it's rather difficult to
12 find a violation of good faith, the principle of good
13 faith all point to that nature of the principles.

14 Q. In his report, Professor Goldsmith states
15 that principles give detail to and amplify legal
16 requirements. Do you agree with that?

17 A. No.

18 Q. Why not?

19 A. I think it's just the opposite. Again, I
20 think the rules are what are a detailed manifestation
21 of a background principle. It may be that one
22 satisfies the rule and still, in some remote case,

1 violate the principle. But it would be extremely
2 rare, in my view.

3 The principles, again, I think one is more
4 tempted to move into a more natural law approach. In
5 my view, all the positivism is a reaction to this
6 tendency where you start with a principle and you
7 spin out a legal system. And you can keep doing
8 that. But to me that's not the way the principles
9 operate.

10 Q. And do you feel that Professor Goldsmith
11 did that to a certain extent in his report with
12 respect to the principle of good faith?

13 A. To a certain extent, yes, I think he did.
14 Estoppel is -- there are a lot of views on estoppel.
15 There are rules of estoppel, there are principles of
16 estoppel. The principle of estoppel is a difficult
17 principle, to me, to give a definite content to. It
18 is somewhat related to good faith, one could say, but
19 to push at it and form the definite rule is difficult
20 to do. Even, again, under general principles of law
21 of civilized nations, estoppel has a lot of variety.
22 And so I find that a difficult example, for example.

1 From estoppel, you go to legitimate
2 expectations, then you're into investment cases and
3 then to me that's amplifying and that's not the
4 principle amplifying in giving detail. That's the
5 use of some rules in order to make a principle into a
6 rule.

7 Q. Professor Caron, I have one final
8 question. Assuming the principle of good faith did
9 apply here and it did apply to ICANN's action, how
10 would you advise the panel on determining whether or
11 not that principle was violated here?

12 A. Well, to me that question goes to how does
13 the tribunal reason about principles as opposed to
14 rules. And to me if you look at a rule, you look at
15 the conduct and ask if the rule is met or not. With
16 a principle, again, it is almost -- the metaphor I
17 give in the opinion is that of a target, that there
18 is an epitome of good conduct. You could ask 20
19 states the same obligation and ask them to act in
20 good conduct and then you could step back and look at
21 all the conduct and you would see different conduct.
22 And you would look at it and say that state acted

1 particularly in good faith. That one, not so much in
2 good faith, but in good faith. And there would be
3 multiple examples of what is the exercise of good
4 faith.

5 So my metaphor is that it is like a target
6 in which there is the epitome of good faith in the
7 middle and bad faith is off the target. And the task
8 for the tribunal is not to look at the center of the
9 target and ask whether they acted in perfectly good
10 faith but rather whether it's manifest that they
11 acted in bad faith.

12 So one case cited in my opinion is the
13 1951 treatment by the International Court of Justice
14 of the Anglo Norwegian Fisheries case. In that case,
15 when they concluded that the British rule did not
16 apply to Norway, they said the absence of a set of
17 rules does not mean there is no guidance. There is a
18 principle in this case. They then had to assess
19 whether Norway met that principle. Norway could have
20 drawn those lines -- and the test was -- they state
21 this is not a manifest abuse. It was a reasonable
22 and moderate drawing of the lines. The lines could

1 have been drawn in many ways. All you needed to do
2 was follow the general direction of the coast, do not
3 depart to an appreciable distance.

4 They recognized that the principle can be
5 met in numerous ways, maybe some better than others
6 in some sense of the principle, but that is a -- and
7 therefore, the only way you really know if it's
8 violated is if it's quite obvious that it's been
9 violated.

10 MR. ENSON: Professor Caron, that's all I
11 have. Thank you very much.

12 MR. ALI: Judge Schwebel, can I just take
13 a minute, please? Judge Schwebel, Professor Caron
14 has known me since I was a baby lawyer and he may
15 still think of me as a baby lawyer and I hold him in
16 the highest regard, as he knows. And so, Professor
17 Caron, I mean no disrespect by what I'm about to say.

18 Professor Caron is not an expert on ICANN,
19 nor an expert on California law. And I say what I'm
20 about to say just because Mr. LeVee has just told me
21 I have 40 minutes and intends to ring the bell very
22 vigorously when those 40 minutes are up.

1 With respect to California law, there is
2 no greater expert in the room than Judge Tevrizian,
3 so there is not much that we could educate you on on
4 California law in that respect. And with respect to
5 international law, I would say that the same with
6 respect to you, Judge Schwebel, and Professor
7 Paulsson and certainly, Judge, yourself as well.

8 And as for the issues of international
9 law, while I would never put myself nor Professor
10 Becker or Mr. De Gramont at the same level as the
11 three of yourselves, we are professors of
12 international law as well of international
13 arbitration and have written extensively on the
14 subject and have also practiced in the area. So
15 we'll take our chances tomorrow in oral argument and
16 waive cross-examination. So Professor Caron, thank
17 you and my apologies. We had a lot to discuss but
18 given the time limitations, we need to focus on the
19 fact witnesses, but I leave you to the questioning of
20 the tribunal.

21 THE WITNESS: Thank you.

22 MR. PAULSSON: I hope you won't find it

1 discourteous that I don't ask any questions.

2 JUDGE TEVRIZIAN: I have no questions.

3 JUDGE SCHWEBEL: Professor Caron, wouldn't
4 you agree that here ICANN is administering an
5 important international resource? Substantively it's
6 dealing with a resource which is used by the
7 international community at large, is that correct?

8 THE WITNESS: So as counsel for ICM just
9 stated, I'm not an expert on the Internet. I would
10 say I have wondered about that question and let me
11 just put that as a question. So I have thought a lot
12 about the articles of state responsibility. There
13 are many points where we try to decide what is
14 uniquely public and what is private, what is
15 governmental authority, when it's exercised, even if
16 by a private party.

17 And what I have always struggled with in
18 that context is that so much of the contemporary
19 world is in private hands. Whether it's water or
20 health, there are so many public goods that seem to
21 have moved into a different frame. And so again, I'm
22 not going to venture an opinion on that question

1 except to say I have wondered about that argument,
2 that this is somehow so uniquely a public good, that
3 it must be somehow placed within a state or an
4 international organization. I understand the
5 argument. I'm just saying it, on the other hand,
6 doesn't match with other areas I look at.

7 JUDGE SCHWEBEL: My question wasn't meant
8 to suggest that the Internet must be placed under a
9 governmental umbrella, interstate or otherwise, but
10 rather to inquire whether you did not agree that the
11 subject matter of ICANN's concern, namely regulation
12 of access to the Internet is intriguing and
13 essentially international resource by its nature
14 because after all, the Internet is used by persons
15 and companies and governments the world over?

16 THE WITNESS: Well, I'm trying to take the
17 line of the question and understand it. The way I
18 take that line -- so please correct me if I'm
19 incorrect here. The way I take that line is to say
20 that in agreeing with relevant -- in ICANN stating we
21 will act in conformity with relevant principles of
22 international law, they did so because they

1 recognized that it was important for them to take on
2 the obligations of international organizations or
3 states or whatever because of the nature of what it
4 is they do. And I think I viewed my opinion as
5 trying to give clarity to the panel, and to me the
6 clear thing to do is to start first with the
7 interpretation of the text in accordance with the
8 law.

9 So the argument that's being raised is an
10 argument about the surrounding context of the
11 document and how that should be incorporated into the
12 otherwise textual interpretation of the document
13 because textually to me it's not law that in the main
14 is applicable to ICANN.

15 So how is one to -- how is the tribunal to
16 approach that question? And that is the question
17 before them. Do they imply -- and I think it is an
18 implication. Do they imply this transformation of
19 these obligations? And I would say also if we think
20 about it, it's not easy to do all that
21 transformation. One has to think about how they
22 would actually be transformed. Do we transform those

1 obligations as applicable to ICANN on the basis of
2 this external view? And so I don't have all the
3 evidence before me about what all that extrinsic
4 evidence is. To me it's a step and I don't regard
5 the phrase as devoid of content, so to me that
6 doesn't push me there. So that's partly my view.

7 JUDGE SCHWEBEL: But are we to understand
8 on the basis of your testimony today that the meaning
9 of relevant principles of international law is those
10 principles which would apply insofar as ICANN acts as
11 a de facto state agent?

12 THE WITNESS: Well, there are a number of
13 controversies right now with more service providers
14 so, for example, in China, there are questions of the
15 relationship of Cisco and Yahoo in various matters to
16 the government of China, the provision of software of
17 assistance in the ability to identify dissidents who
18 are operating on the Chinese network, for example.

19 Now, there is an issue in the
20 United States, a very important issue, about how
21 close that relationship has to be. What is it that
22 makes a corporation so close to the state that you

1 would regard it as an agent? And I don't think there
2 is an argument that you could be close enough and be
3 such an agent. And so for me, taking what you just
4 said, a very plausible meaning to that is, as we go
5 around the world, as we do this, we will not be part
6 of a violation of a principle of international law.
7 Part -- may be stronger than that. A de facto agent.
8 Adding our capacity to that breach of the principle.

9 JUDGE SCHWEBEL: Is it your conclusion
10 that in adopting paragraph 4 of the articles of
11 incorporation containing the reference to relevant
12 principles of international law and applicable
13 international conventions, the drafters of those
14 articles had that element in mind, that is to say,
15 ICANN acting as a de facto agent of or cooperator
16 with the state, or were they more loosely applying
17 relevant principles of international law and
18 applicable international conventions perhaps in the
19 sentiment rather than the thought-through conclusion
20 that since ICANN would be administering a resource
21 and substance so international, it should do so in
22 conformity with any provisions of international law

1 that are relevant. And it may have meant no more
2 than that.

3 THE WITNESS: Well, I have two reactions.
4 It reminds me of a high school discussion of what
5 Mark Twain meant in Huckleberry Finn. And when I
6 said, did Mark Twain really mean that? And the point
7 is that I don't know what ICANN meant. And I
8 sometimes have trouble in our rules of interpretation
9 that we could give weight to something that in fact
10 did not have that much weight. In this case, what I
11 come around from that to is I don't know what they
12 intended. I can only deal with the words I have in
13 front of me, or possibly go to extrinsic evidence
14 ultimately. And as I deal with the words in front of
15 me, I see a meaning to it. Did they understand
16 everything about this? I really don't know.

17 The second point I have, and it's part of
18 what you're saying, is I've often wondered here about
19 the fact that this is a unilateral document and how
20 does one think about implication in the sense of a
21 unilateral document. This document is totally in the
22 control of ICANN. A, they have stated what they

1 think it means. If they disagree with the outcome,
2 the wording, if they disagree with the reaction from
3 the public, they can change this document. That may
4 be an outcome of the effort to understand more what
5 is it we agreed to in Article 4, what did we state.

6 But the fact that it's unilateral and can
7 be amended to me argues against implication -- that
8 they can so easily control what it means argues that
9 we should try and stick -- not we. I'm sorry. That
10 the panel should endeavor to stick as closely as
11 possible to the text and the meaning of the words.

12 JUDGE SCHWEBEL: Well, thank you so much.

13 JUDGE TEVRIZIAN: I have one question.

14 JUDGE SCHWEBEL: Please.

15 JUDGE TEVRIZIAN: You said it can be
16 amended. There is a requirement that it is looked at
17 and amended from time to time in the bylaws. Isn't
18 that an accurate statement?

19 THE WITNESS: I'm sorry, could you repeat
20 the question?

21 JUDGE TEVRIZIAN: The bylaws require that
22 the purpose of ICANN being looked at and reviewed

1 periodically and that changes in fact be made is a
2 requirement, not something that's a discretionary
3 obligation. That's my understanding of the bylaws.
4 Do you have the same understanding?

5 THE WITNESS: Well, A, I don't have that
6 knowledge so I'm just reacting to what you're saying,
7 Judge Tevrizian. Are you saying that the fact that
8 they're required to do it bars them from doing it at
9 any other time?

10 JUDGE TEVRIZIAN: No. What I'm saying is
11 that the provision in the bylaws that requires a
12 periodic review and change would reinforce the last
13 statement that you just made that it is to be
14 governed explicitly rather than by the implicit grant
15 of authority?

16 THE WITNESS: Well, they have plenty of
17 opportunities, correct. I would agree with you.
18 They have regular opportunities in that sense to
19 consider such changes.

20 MR. PAULSSON: When you think about Judge
21 Schwebel's question from the very beginning, the 3 to
22 1 question as he first phrased it, if you looked at

1 it, would you agree that it's quite striking that the
2 particular text, the very key words that you focused
3 on emerged by some drafters who made statements about
4 why it was they were changing them in that way. And
5 what they seemed to be focusing on was Judge
6 Schwebel's question, we are operating in an
7 environment where it seems perhaps difficult to
8 maintain that we are operating only for the
9 stakeholders of one country, so it's the
10 international convention that informs the emergence
11 of the -- wouldn't you then want to check whether or
12 not the understanding of the text is in conformity
13 with the expectations and the purposes that the
14 drafters articulate at the time of doing it?

15 THE WITNESS: So I'm going to back up and
16 just approach it as a matter of interpretation. So
17 again, I don't know all the extrinsic evidence that's
18 being offered so let me take what you're saying and
19 that is that you want -- if the tribunal -- if the
20 panel were to conclude that there is some clear
21 intent yet not evidenced in the text, then you have a
22 question before you of whether you will imply

1 something into that text in order to attain what you
2 have concluded was actually the intent, although the
3 words do not reflect that intent.

4 MR. PAULSSON: Maybe just the meaning of
5 the words as opposed to the purpose.

6 THE WITNESS: Well, the meaning of the
7 words don't fit that. To me that -- again, I think
8 that is a transformation of those obligations. If I
9 had been the counsel for them, I would have pointed
10 it out. I wouldn't have said this is -- oh, you're
11 achieving your mission here by putting this in,
12 assuming the intent you described.

13 MR. PAULSSON: I'm talking about the
14 purposes of amending particular words in the text,
15 not general purposes of why do we have this clause
16 but when it was amended.

17 THE WITNESS: You mean going from the
18 fifth iteration to the final iteration?

19 MR. PAULSSON: Have you read the
20 statements that were made at the time?

21 THE WITNESS: I read the statements that
22 were in the ICM memorial.

1 MR. PAULSSON: Ms. Dyson's for example?

2 THE WITNESS: Correct. My concern with
3 that letter and the reason I stepped back from
4 addressing it was it was unclear to me what was the
5 context, what were the views -- you stated the views
6 of the drafters. This was an individual. I realize
7 she held a position. And from U.S. statutory
8 interpretation, it's become very difficult to
9 identify -- oh, we have a congressman saying this, we
10 have a congressman saying that. What is the meaning
11 here to be given to this statute?

12 There are a number of U.S. judges that are
13 very reluctant to go to the drafter state. That's
14 not to say there is enough statements or there is
15 enough context to somehow do it and I would say that
16 is a question for the panel to decide. But to me
17 it's not textual. It is an implication to make.

18 When I go from the fifth to the last, what
19 I see as important in part -- A, I see a stressing on
20 the word principle because one question you could ask
21 is, if you've said international law, why did you
22 need to add or retain applicable international

1 conventions? The reason is because all the specific
2 rules are over there in the conventions, and so we'll
3 leave that in. But now we want to think about some
4 principles as well.

5 So for me what was happening in part was
6 an amplification of the word principle. There is, I
7 would agree with -- and I do agree in my opinion with
8 Professor Goldsmith that there is a, as he put it,
9 ratcheting up when you go from due regard to in
10 conformity with, but the question is what meaning to
11 give this phrase, relevant principles of
12 international law. And at a minimum to me, it's
13 inartfully drafted and textually it doesn't lead to
14 that conclusion. So to me, it is an implication to
15 make.

16 JUDGE SCHWEBEL: Well, thank you so much,
17 Professor Caron. We appreciate your coming.

18 THE WITNESS: My pleasure. Thank you.

19 MR. LEVEE: ICANN closes its case in chief
20 and I understand there is some rebuttal.

21 MR. ALI: Yes, Judge Schwebel, we'll be
22 calling one rebuttal witness, Ms. Becky Burr. If we

1 may take just five minutes to go get her and make the
2 necessary arrangements.

3 JUDGE SCHWEBEL: Okay. We will resume in
4 five minutes.

5 (Recess.)

6 MR. ALI: Judge Schwebel, I'm on the clock
7 so I'm going to try and get through this very
8 quickly.

9 DIRECT EXAMINATION

10 BY MR. ALI:

11 Q. Ms. Burr, there are a number of points to
12 which Dr. Twomey testified and I would like you --
13 I'm going to put his testimony to you as best as I
14 can paraphrase it and ask you to respond. He
15 indicated that for purposes of a sponsored top-level
16 domain application to be strong and successful, there
17 needed to be a pre-existing -- and I quote,
18 pre-existing community like a trade association. Is
19 that correct?

20 A. That is not correct. And publicly most of
21 the applications did not have pre-existing
22 communities.

1 Q. Now, he also testified that the ICM XXX
2 application was the only one with a separate
3 policy-making structure. Is that correct?

4 A. No. .tel, for example, in its application
5 proposed to constitute a not for profit entity after
6 it had been awarded the TLD. In contrast, ICM's
7 proposal went in with a fully formed existing not for
8 profit organization. It had a board of directors, it
9 had a bylaws and it also had a highly developed
10 policy development process and structure that was
11 laid out in the application.

12 Q. And what about for .mobi?

13 A. .mobi proposed to create sort of
14 committees, a MAC, a membership advisory committee
15 and a policy advisory board after it was launched to
16 be populated with people from the community, but
17 there was no existing body. Now, they didn't intend
18 to set a separate corporate entity, but it did not
19 exist and there were no members. And the .tel
20 application, I just want to say, in the application
21 it said that the not for profit would be populated,
22 the board would be populated by a cross-section of

1 the community.

2 Q. And you were the counsel for .mobi?

3 A. I was the counsel for .mobi.

4 Q. Now, Mr. Twomey suggested in his testimony
5 that ICM was, and I quote, persistently evasive with
6 respect to the composition of IFFOR and what it would
7 do and that there was a high degree of uncertainty
8 with IFFOR as late as March 2007. I'm just adding
9 the March 2007. That was the context of some of his
10 responses. Especially with respect to policy making.
11 Do you agree with that testimony?

12 A. No, I do not agree with that testimony.

13 Q. And why not?

14 A. Because, as I said, in our application,
15 there was very detailed organizational structure.
16 The members of the board were in fact identified. In
17 fact, the person who was going to run the day-to-day
18 operations, [--- Redacted ---], has since been hired by
19 ICANN, so they knew him and were familiar with him.
20 As Dr. Cerf said yesterday, he's quite familiar with
21 [--- Redacted
22 ---] has always been part of

1 this.

2 We sent information to the board about the
3 representatives of the children's advocacy community
4 who had said that they would be willing to be on the
5 board. That included [--- Redacted

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13 ---].

14 Q. [--- Redacted ---]. And these individuals
15 were identified in writing to ICANN?

16 A. They were identified in writing to ICANN
17 and they had publicly written in support of the ICM
18 application as well. I forgot to mention -- I'm
19 sorry, [--- Redacted

20 ---],

21 a very, very well respected and highly experienced
22 advocate.

1 Q. And these are all individuals that were
2 eventually going to be part of IFFOR?

3 A. Yes.

4 Q. Thank you. Let's go on to the next topic.
5 Mr. Twomey testified that he told you Mike Gallagher,
6 who is the deputy head of the NTIA, had told him in
7 a very offhand manner that .XXX would not be put into
8 the root and this was not a very serious comment when
9 this was passed on to him.

10 He also went on in responding to
11 questioning from Mr. De Gramont that he had a
12 conversation with you about this conversation that he
13 had with Mr. Gallagher and that Mr. Gallagher had
14 referred to a very uninitiated and new Deputy
15 Secretary of Commerce who had apparently made this
16 very offhand comment that .XXX would never be entered
17 into the root.

18 Now, I think I'm reasonably fairly or
19 reasonably summarizing the testimony. Could you
20 comment on what I've just said?

21 A. Yes. First of all, Dr. Twomey said to me,
22 in a sort of -- you know, this is a bad situation

1 voice. He said, they even threatened not to put it
2 into the root. Now, Mike Gallagher is the -- he was
3 the Assistant Secretary. He was in charge of NTIA.
4 In fact, I knew nothing about the Deputy Secretary
5 who is the second in command and I would have been
6 far more concerned because the Deputy Secretary at
7 that time was a gentleman by the name of David
8 Samson. He had been the Assistant Secretary for
9 Economic Development. He was part of the Bush inner
10 circle. He had been the head of George Bush's
11 economic development commission in Texas and another
12 economic development commission. He was part of the
13 campaign. He was a Ph.D. from Abilene Christian
14 college and a Southern Baptist minister. So to me,
15 had I known that he had had any part of that, which I
16 didn't, I would have been much more worried.

17 Q. Now, turning to the Wellington communique,
18 in respect of discussion that Mr. De Gramont had with
19 Mr. Twomey, Mr. Twomey testified that the public
20 policy considerations that were in the Wellington
21 communique were -- and I'm again paraphrasing -- just
22 dumped into the agreement, and then in a conversation

1 he had with you, Mr. Twomey said, "Becky, how are you
2 going to enforce these things? I really got no
3 response." How would you respond to that testimony?

4 A. Well, first of all, the public policy
5 concerns articulated in the Wellington communique
6 were in very general terms, make sure that ICM does
7 what it says it's going to do with respect to
8 intellectual property, third-party rights, protecting
9 innocent children and vulnerable members of the
10 population and the like. What I did there is
11 essentially referenced the documents that we had
12 submitted as part of our documentation and expanded
13 some of the narrative. But that was actually a very
14 small part of this.

15 When they -- let me just take that in
16 parts. I do recall a conversation with Dr. Twomey in
17 Wellington when we were walking back to his hotel and
18 I was going to see John Jeffrey, the general counsel,
19 to go over the contract with him. And Mr. Twomey,
20 Dr. Twomey, said, you know, they want you to enforce
21 all of the laws of all of the countries on
22 pornography. How can you possibly do that?

1 Now, I apologize if I didn't give you a
2 clear answer, but the fact of the matter is what I
3 would have said was, that's not what they asked us to
4 do, that's not a reasonable request and that is not
5 what we have offered to do. That's not what this
6 says. As we saw, that was how Dr. Twomey was reading
7 the GAC communique and if you read the GAC communique
8 that way, then I would not have been able to give him
9 a satisfactory response because it was not a logical
10 reading of it.

11 Finally, with respect to where the
12 provisions in the Appendix S came from, after the
13 reconsideration petition was withdrawn, I met with
14 John Jeffrey and Kurt Pritz. We discussed what they
15 wanted to have in the contract. We then had a
16 telephone call on the 20th of December. Dr. Twomey
17 was on the call. In fact, that was the only
18 negotiation about the contract that he participated
19 in that I was part of, at least.

20 We went over the sort of documents that
21 they wanted. The next day I got a -- actually, it
22 was the 19th of December and then the next day, I got

1 an e-mail from John Jeffrey saying, here are all the
2 things we agreed you are going to send us and then he
3 asked for -- I had previously, for our own purposes,
4 gone through every document and listed every policy
5 commitment that we had made in any of those documents
6 and I had them listed document by document so you
7 could know where the source was.

8 He asked me to send that to them so that
9 their outside counsel could compile the additional
10 provisions that they wanted to put in the contract.
11 I offered to do it. He said no, he wanted Esme to do
12 it.

13 Q. And who is Esme?

14 A. Esme Smith was then at Jones Day, an
15 outside counsel with whom we were negotiating. After
16 that, I received the Appendix S8, the new appendix
17 that she had created. I was frankly troubled by it
18 because she had been working from a list that listed
19 each commitment from each document and it was
20 extremely repetitive and not organized in a way that
21 I thought anybody would be able to comprehend. I
22 tried to clean it up a little and organize it a

1 little better but, as I said, this was Christmas and
2 there was only so much we had time to do. But I was
3 working on a document that had been created by Esme.

4 After the board meeting in January when
5 Susan Crawford raised --

6 JUDGE TEVRIZIAN: 2007?

7 THE WITNESS: 2007, which was -- this was
8 posted -- the contract that Esme and John and I
9 negotiated was posted on the 5th of January of 2007.
10 The board met on the 15th or 16th of January of 2007
11 and according to the preliminary reports and my
12 conversation with John afterwards, Susan Crawford had
13 been concerned about the sort of hands-on and all of
14 the stuff in the contract. I spoke to John about it
15 and he told me that Esme would get back to me with
16 changes, additional changes to address the concerns
17 expressed by board members at that meeting.

18 Esme made the changes, I looked at them, I
19 corrected a few typos and small things. Those
20 changes that were made, as John said, to address the
21 concerns expressed by the board were drafted by their
22 outside counsel, not by us.

1 BY MR. ALI:

2 Q. So with respect to Mr. Twomey's testimony
3 to the effect that we didn't put that wording in the
4 contract, referring to the wording that was in the
5 appendices and the public policy commitments or
6 requirements from the Wellington communique, the
7 applicant did, you would disagree with that
8 testimony?

9 A. I would strongly disagree with that
10 testimony.

11 Q. Thank you. Just a couple more topics.
12 Mr. Twomey testified that the difficulty is that ICM
13 undertook to enforce content at the second level as
14 to what is offensive or appropriate. We would have
15 to enforce in the event that ICM did not do what it
16 was saying. This would have gotten us into content
17 regulation and that is beyond our mandate.

18 If I may just say, Judge Schwebel, that I
19 will find the transcript references and make sure
20 that they are reflected in the record.

21 JUDGE SCHWEBEL: Thank you.

22 THE WITNESS: Would it be possible for me

1 to look at the Wellington communique? Okay. On page
2 3 of Exhibit 181, the policy advice by the Government
3 Advisory Committee says, "ICM promised a range of
4 public interest benefits as part of its bid to
5 operate the XXX domain. To the GAC's knowledge,
6 these undertakings have not been included as ICM
7 obligations." And then there is a list of the public
8 policy benefits which includes measures to restrict
9 access to illegal and offensive content.

10 Now, what we told ICANN in our
11 application, what we said every single time that we
12 mentioned this, what we said to the GAC and is
13 clearly reflected in our presentation to the GAC is
14 that ICM would require all registrants to clearly tag
15 their sites as XXX sites so that they could be
16 automatically filtered, that ICM would monitor
17 compliance with that using an automated means of
18 doing that, and that ICM would prohibit child
19 pornography including virtual child pornography or
20 any stuff designed to appeal to pedophiles or
21 anything like that, and that they would enforce that
22 by having all of the registrants agree to permit

1 their sites to be crawled by a service that looks for
2 words and images and those things. That had been
3 determined by experts like the Center For Missing and
4 Exploited Children or the various hotlines to be
5 indications of child pornography.

6 That is not a representation to enforce
7 the laws of the world on pornography.

8 BY MR. ALI:

9 Q. And in fact, Ms. Burr, there is a document
10 that was provided by ICM to ICANN in early January
11 2007 indicating how it is that various commitments
12 that the GAC had requested would be reflected?

13 A. Yes. That was one of the documents that
14 was requested by ICANN in Mr. Jeffrey's e-mail to me
15 of December 20th, a document that says, please
16 provide a short summary of how you have addressed the
17 GAC's concerns. So we provided a two-page document.

18 MR. ALI: Could we hand out hearing
19 Exhibit 289, please?

20 JUDGE TEVRIZIAN: Is this going to be a
21 new exhibit?

22 MR. ALI: It is a new exhibit. It is used

1 as a rebuttal exhibit between the parties based on
2 the exhibits we received last night.

3 BY MR. ALI:

4 Q. Let me ask you another question.

5 Mr. Twomey indicated that AFILIAS's fail-over
6 function was going to be limited to technical issues.
7 Is that correct?

8 A. Well, the requirement in the application
9 is to describe a fail-over process in the event that
10 the registry operator is no longer able to fulfill
11 its functions. That was coupled with a requirement
12 in the application that you just provide a backup
13 sort of copy of your data and AFILIAS was also
14 serving that purpose.

15 Now, let me say that this question of
16 registry fail-over is being debated and a policy has
17 been developed and promulgated by ICANN now on
18 registry fail-over, but includes specific provisions
19 about takeovers when a contract is terminated and the
20 process by which the operation of the registry is
21 ensured. AFILIAS is a registry but it also operates
22 .info so it knows how to be a registry in a more than

1 technical back end provider. And I think it's safe
2 to say that there were probably -- ICANN has a
3 process that calls for options or requests for
4 proposals to take these over.

5 So the process of taking over a registry
6 in the event that the registry operator is being
7 replaced, whether voluntarily or not, is something
8 that was contemplated in the application process and
9 has, as of now, sometime spring this year, resulted
10 in quite a formal ICANN process developed with the
11 registry operators.

12 Q. Thank you. Let me go to hearing Exhibit
13 289, which is right here. We were discussing the
14 fact that ICM had provided a document to ICANN
15 reflecting agreed changes with respect to GAC advice.
16 Could you provide the context of this document for
17 the panel and as quickly as you can take us through
18 the sum and substance of this agreement? Because I
19 am running out of time.

20 A. Okay.

21 Q. And I have one more document to discuss
22 with you.

1 A. Okay. This was part of -- when we
2 discussed in December of 2006 the expedited review
3 post-reconsideration, as I said, we had a
4 consideration and I got a list of requested documents
5 to go along with the revised contract from John
6 Jeffrey. And one of the things they asked for was a
7 short summary of the changes that we made in the
8 agreement to reflect the GAC advice.

9 This goes through the list. Provide
10 financial support for child safety organizations and
11 there was a requirement of funding, \$10 per name.
12 "Develop and promulgate best practices to promote
13 child safety." At this time, we had provided a
14 commitment to enter into a contract with the Internet
15 Content Rating Association. By the time this
16 actually got voted on, there was actually a signed
17 contract. "Prohibit child pornography," that's a
18 policy. And require registrant labeling.

19 But then it goes on later to say monitor
20 for that, which we've discussed how that would be
21 done. Authenticate prospective registrants, and
22 maintain confirmed authentication information.

1 Appendix S8 has a quite detailed description about
2 the ways in which registrants would be authenticated.
3 That was something that we discussed at length with
4 the intellectual property community in particular.

5 Develop and create automated tools to
6 proactively monitor compliance, which we've
7 discussed. Enter into monitoring and oversight
8 arrangements with independent associations acceptable
9 to ICANN who will be responsible for registry
10 operator compliance. As I said, that's the signed
11 contract that we provided. Easy to use mechanisms
12 for use or reporting of noncompliance with registry
13 policies and designated compliance manager. This is
14 pretty standard. You know, you have a button on a
15 page that says report abuse or something. Designate
16 an ombuds-person to address concerns about
17 enforcement of registry policies. In fact, ICANN's
18 assistant ombudsman had actually applied for the job.
19 Publish a modified uniform dispute resolution
20 applicable to abusive registrations.

21 And then create the two pre-launch
22 reservation provisions that allowed any government or

1 the GAC to send names, no questions asked, whatever
2 they wanted, that they considered to be names of
3 religious or --

4 JUDGE TEVRIZIAN: I have a question. This
5 was produced by ICM in support of their application.
6 Do you know whether or not this was ever published or
7 was this a confidential -- published on the --

8 THE WITNESS: It's published on the ICANN
9 website. It's not confidential. I'm sorry, so the
10 two pre-reservation services, one, any individual
11 government or the GAC or both could say, here are the
12 names that we think are culturally or religiously
13 significant, please don't let anybody register them.
14 We agreed to do that for free. And then we agreed to
15 use a list that had been recently compiled to create
16 a geographic reservation service.

17 BY MR. ALI:

18 Q. And then part 2 of the document summarizes
19 how the registry agreement would be enforced, i.e.
20 enforced by ICANN?

21 A. Yes. Most of the obligations were pretty
22 easy to see that they were being done. ICANN was

1 concerned about who was doing this and what happened
2 if the Internet Content Rating Association terminated
3 its contract or changed its contract. So we said, no
4 problem. We'll give you advance notice if we're
5 going to change that provider, we'll let you look at
6 them, we'll let you tell us if you think it's going
7 to create enforcement problems for you, we'll work in
8 good faith to resolve those disputes.

9 Q. So which part of this couldn't you do?

10 A. This unenforceable and undoable contract
11 thing bothers me. I write a lot of commercial
12 agreements and I never let my clients sign contracts
13 that they can't do. I say to them every day, the
14 worst thing that you can do is have a policy, for
15 example, that you're in violation of the first day.
16 Don't do it. I wouldn't have done that. There is
17 nothing in here they couldn't do.

18 Q. And this, in fact, was a document that you
19 had discussed with Mr. Jeffrey and other ICANN staff?

20 A. This was a document that was requested by
21 ICANN staff and provided.

22 Q. Thank you. Now, the board resolution, as

1 we know, was on the 30th of March 2007 and there was
2 a document which is Respondent's DI, I think it was,
3 that Mr. LeVeve referred to in his direct examination
4 of Mr. Twomey.

5 A. Yes.

6 Q. Now, Ms. Burr, as you know, there has been
7 a lot of discussion about waning support, decreasing
8 support, whether ICM provided information about the
9 support of the community to ICANN, whether ICANN
10 thought the support was -- whether they had received
11 enough information. So I would like you to describe
12 the purpose and context of this document to the panel
13 and then if you could take us through the highlights,
14 please.

15 A. Okay. On the 8th of March, I sent to
16 ICANN a list of documents to be posted for the
17 board's consideration, and there were quite detailed
18 memos including a 30-page legal brief on the question
19 of sponsorship, whether it was still open, whether it
20 had been decided on the 1st of June. So that was the
21 8th of March. A few days later, Susan Crawford
22 called me and she said, you know, you guys have sent

1 us a lot of paper. It would be really helpful if we
2 just had a summary about what the sponsorship issues
3 are. You know, not a legal brief, not an argument
4 about whether it's opened or closed. We know we've
5 gotten that 30-day memo. Just a summary so we can
6 have sort of a clearly easy to understand document.
7 And that's what this is. It's a summary. It's not a
8 legal argument about open or closed. It was really
9 intended to be -- you know, to help the board
10 understand what the state of support was.

11 Q. Now, did this mean that sponsorship, in
12 your view, was now a completely open issue and that
13 the board resolution in June was meaningless?

14 A. No, it didn't. That's the point of the
15 30-page legal memorandum sent on the 8th of March.
16 However, I would have been doing my client a
17 disservice had I not responded to a request for a
18 summary of this.

19 Moreover, whether my legal analysis was
20 going to prevail or not, I wanted to make sure that
21 every concern out there was addressed. We had been
22 doing this all the way through. We wanted to help

1 ICANN be in the position to say it had heard the
2 Government Advisory Committee's policy advice, it had
3 responded to them, it had taken them seriously. We
4 were operating in collaboration. We were trying to
5 help and be cooperative.

6 Q. And if you go to the second page,
7 basically for the next couple of pages, page 2, page
8 3, page 4, there is a lot of data provided there
9 regarding sponsored community support.

10 A. Yes.

11 Q. And how did you compile that data?

12 A. Well, much of this had been provided
13 before in different things so, in fact, there was
14 also a longer memo on the 8th of March, I believe,
15 that listed a lot of this stuff. But this was the
16 information that was on hand about the state of
17 support. It wasn't new, I don't think. It was not
18 something that they had not seen all of the pieces
19 of.

20 Q. So you would disagree with the position
21 we've heard expressed by ICANN to the effect that
22 there was very little information from ICM's side

1 about the support that was forthcoming from the
2 proposed sponsored community?

3 A. I would strongly disagree with that.

4 MR. ALI: I have no further questions.

5 CROSS-EXAMINATION

6 BY MR. LEVEE:

7 Q. I actually can't recall a he said/she said
8 situation quite like this, and so I will just ask a
9 few questions, Ms. Burr. You said that -- I think it
10 must have been relayed to you over lunch that
11 Dr. Twomey had said that the material that was,
12 quote, unquote, dumped into the contract was actually
13 prepared by Esme Smith who was my lawyer partner?

14 A. No, I'm sorry, none of that was conveyed
15 to me over lunch. The question that I was asked was,
16 take a look at the contract. Where did the language
17 that included all of those obligations come from?
18 And that was included in a new Appendix S provided by
19 Esme Smith who, by the way, I adore, on the 22nd of
20 December.

21 JUDGE TEVRIZIAN: 2006?

22 THE WITNESS: 2006, I'm sorry. And then

1 subsequently -- so this was in the -- as we're going
2 up to the expedited review process, we're creating
3 what we agree is going to be a negotiated contract
4 that's going to get all of this tied together. I
5 provided the information. John knew that I had
6 created a compilation for internal purposes of our
7 obligations. He asked me to send it. I sent it to
8 him and what I got back from Esme was a new appendix
9 that had included that. I have e-mails and I would
10 be happy to introduce those into the record.

11 BY MR. LEVEE:

12 Q. Well, let me do it this way. My
13 recollection of this wording was that Dr. Twomey was
14 testifying about 2006 and what happened after the GAC
15 communique. So I'm going to ask you to look at
16 hearing Exhibit 171, because I think your testimony
17 was referring to an entirely different time period
18 than Dr. Twomey's testimony. So let's take a look at
19 Exhibit 171 and let me ask you to take a look at page
20 64. This is Appendix S, correct?

21 A. Yes.

22 Q. And at the bottom, paragraph 5B, and

1 you're going to have to go over to the next page as
2 well, page 6, and you'll actually see -- this
3 document was prepared by you, correct?

4 A. Well, it is derivative from a negotiated
5 document that -- well, the document that Esme and I
6 reached closure on on the 19th of March, but ICANN --

7 JUDGE TEVRIZIAN: Which year?

8 THE WITNESS: 2006. I'm sorry.

9 BY MR. LEVEE:

10 Q. And you'll actually see in paragraph B
11 there is some different font. The font changes. And
12 do you see where it says illegal conduct, unfair,
13 deceptive or fraudulent marketing practices, the use
14 of malware, malicious code, et cetera, et cetera?

15 A. Yes, I do.

16 Q. That was language you added, not Esme,
17 correct?

18 A. Probably.

19 Q. And do you know whether that was the
20 language Dr. Twomey was referring to that was dumped
21 into the agreement after the Wellington meeting where
22 the GAC issued its communique in March 2006?

1 A. First of all, it wasn't dumped into this
2 and some of it was --

3 Q. It was just a bad word but --

4 A. And some of it was already in there from
5 the 19th of March draft. Second of all, it repeated
6 comments that -- it repeated commitments that ICM had
7 made through this process. Third of all, this in
8 particular did not reflect the GAC. It reflected the
9 Department of Commerce's yet another intervention
10 with, you know, a list of things that we had said we
11 would do that weren't in the contract.

12 And so yes, I did attempt -- as I
13 testified, I attempted to repeat the words that were
14 in the various government interventions so that ICANN
15 would be in the best position to be able to explain
16 that it had been responsive. But I want to further
17 say I do not recall having a conversation with Paul
18 Twomey about language dumped into this. To the
19 extent that Paul was concerned, it was about his
20 interpretation of the GAC communique being a
21 requirement that we enforce the porn laws of the
22 world.

1 Q. I won't use the phrase "dumped in." The
2 changes you made in response to the GAC communique
3 were made in the April 18th, 2006 draft, not the
4 early 2007 draft, true or false?

5 A. Yes, that is true, but the 2007 draft that
6 was on the floor in front of the board in March of
7 2007 was completely different and it was sourced from
8 Esme.

9 Q. Now, let me make sure I understood another
10 portion of your testimony. You said that you had
11 identified to the board names of individuals who
12 would be on the IFFOR board, is that correct?

13 A. Yes. We had identified individuals who we
14 were consulting with who would be on the interim
15 board, who had agreed to be on the interim board.

16 Q. Now, you have not produced the document in
17 this proceeding or counsel did not show you a
18 document referencing your letter, did counsel?

19 A. I don't know what the letter says.

20 Q. I want to show you the letter. And I
21 apologize, this is not in evidence and I'll explain
22 in a moment why. Kate, if you would put the letter

1 up on the board. And I apologize to the panel. We
2 don't have it in the way we would normally present
3 it. Does this look like the letter? And Kate, if
4 you could scroll down just a little so that Ms. Burr
5 can see.

6 A. Yes, it appears to be the letter.

7 MR. LEVEE: This is a confidential
8 document so let me first ask ICM if they have any
9 concerns with me showing it to anyone in the room.
10 Mr. Lawley has confirmed that the people in the room
11 can see the document.

12 BY MR. LEVEE:

13 Q. The first sentence, "ICANN staff has asked
14 me to provide information about members on the child
15 safety community who might be willing to serve on the
16 interim board," and then it goes on. Keep scrolling
17 down, Kate. "Throughout this process, ICM has
18 continuously reached out to highly respected
19 individuals. They have all indicated a continuing
20 interest in participating in IFFOR's policy
21 development process. They are, however,
22 understandably reluctant to be identified as having a

1 formal role until such time as the project gets the
2 final green light from ICANN. Thus, while I am
3 unable to tell you at this time precisely who will be
4 on the IFFOR board, I can assure you that in
5 selecting members, IFFOR's existing board intends to
6 be guided by the following individuals," and then you
7 go on. Is that what you wrote to the members of the
8 board?

9 A. Actually, I think this is Stuart Lawley's
10 letter but --

11 Q. Let's go down and see who signed the
12 letter. Is that what Mr. Lawley wrote to members of
13 the board?

14 A. Yes.

15 Q. And is that the letter you were referring
16 to in your testimony?

17 A. Yes. And it says we have identified those
18 members, they have publicly identified interest and
19 support. They have also said they are willing to be
20 involved in a continuing way. But because this
21 proposal is not approved yet and because there was
22 such contention among the industry participants who

1 were opposing this, who were harassing people and
2 posting threatening comments and all of that, it made
3 no sense and they were understandably reluctant to be
4 associated with something that they were going to
5 have to take grief for and that might not ever
6 happen.

7 Q. Ms. Burr, I'm just asking you a question.
8 In your direct examination, you said -- correct me if
9 I'm wrong -- these were the names of the IFFOR board
10 members that we had sent to the board. Did you say
11 that? Yes or no.

12 A. I would have to look at my exact words. I
13 may well have said that. These are the people who
14 Stuart Lawley intended to put on the board. It says
15 they have expressed a willingness to remain -- have a
16 continuing participation role. It's a little in
17 code, you're right, but those are the people who
18 would have been involved to the best of my knowledge.

19 Q. Now, when you say it's a little in code,
20 what I read is that these people have agreed to be
21 involved but they have not agreed to be on the board.
22 I take it you disagree with my interpretation?

1 A. I believe that they had agreed to be on
2 the board.

3 Q. And did you say that to anyone at ICANN or
4 did Mr. Lawley, to your knowledge, say that to anyone
5 at ICANN?

6 A. I believe that Mr. Lawley repeatedly said
7 that to people at ICANN.

8 Q. Now, let me go to the bottom of the page.
9 Isn't it the case, Ms. Burr, that ICM specifically
10 told ICANN that it could not circulate a copy of this
11 letter because they did not want ICANN to discuss any
12 of these names at a public board meeting?

13 A. Yes, for the reason I just described.

14 Q. So when members of the board were going to
15 be deliberating, you understood that they were going
16 to have names of people who might participate but
17 they would not be able to actually talk about who
18 those names were?

19 A. Well, could you go up to the date, please?

20 Q. Of course.

21 A. So this is December 14, 2006. The next
22 public meeting of the ICANN board is in March of

1 2007. Before that, there are three or four board
2 meetings and we understand -- my understanding from
3 John, based on his e-mail, was that this would
4 probably come up at a February 12th -- would come up
5 for a vote at a February 12th board meeting.

6 To be clear, by the time the February 12th
7 board meeting came along, we had actually provided an
8 executed contract with Stephen Balkam. But as I
9 said, there was a lot of intimidation and harassment
10 going on by the very noisy and aggressive web
11 masters. They were posting absolutely hateful
12 things, like I'm going to kill anybody who has
13 anything to do with it, hunt them down and kill them
14 and all of that stuff.

15 These people had expressed their support
16 publicly. ICANN knew that they were supportive.
17 ICANN had heard from them directly that they were
18 supportive. And so we requested that their privacy
19 be respected until such time as ICANN acted on the
20 application.

21 Q. But just to be clear, at no time prior to
22 the time the board rejected the application in March

1 of 2007 did ICM publicly for the community or to the
2 board specifically identify individuals who would be
3 guaranteed to be on the board?

4 A. Nor did tel, nor did mobi.

5 Q. Let me ask you one last question.

6 A. Tel and mobi, by the way, to my knowledge,
7 didn't even provide this much information.

8 Q. You represented .mobi, right?

9 A. Yes.

10 Q. And you have been a very active
11 participant in the ICANN world --

12 A. Yes.

13 Q. -- for a long time?

14 A. Correct.

15 Q. Have you ever seen the amount of
16 opposition to a sponsored TLD that occurred in
17 connection with the .XXX application?

18 A. I don't know why that is even remotely
19 relevant unless you're suggesting that ICANN cannot
20 do anything innovative or controversial. And that's
21 what I really think the consequence of where you're
22 going is. Yes, there were 100 really noisy web

1 masters out there who sent in dozens and dozens of
2 letters under different e-mail addresses and, yes,
3 there were 250,000 postcards from the Family Research
4 Council.

5 Now, we were told repeatedly that ICANN
6 didn't care if they got 250,000 more postcards from
7 the Family Research Council and I don't think that
8 ICANN should be in the business of providing a
9 heckler's veto to 100 noisy web masters when a
10 significant portion of an industry wants to get
11 together and use the DNS for a public benefit and to
12 self-regulate.

13 Q. Did you view the Free Speech Coalition,
14 the trade association, as angry web masters?

15 A. First of all, the Free Speech Coalition
16 has somewhere between 750 and 3,000 members, not all
17 of whom by any stretch of the imagination are even in
18 the online adult web master industry.

19 Second of all, they had a petition. They
20 sent a petition out to their members to say, okay,
21 guys, this is the last moment, sign up and oppose XXX
22 and they got 160 signatures out of their 750 to 3,000

1 applications. I respect the work that the Free
2 Speech Coalition does. I absolutely respect the work
3 that they do. But they do not represent the online
4 adult web master industry and they certainly don't
5 represent the community that ICM proposed to serve.

6 So I do think 160 votes, when we don't
7 know even whether they were web masters, is granting
8 a heckler's veto. That's what's happening here.

9 Q. Let me close on that because I had
10 promised that was my last question. Thank you very
11 much.

12 MR. ALI: I just have one question, if I
13 may.

14 JUDGE SCHWEBEL: Please.

15 MR. ALI: I believe I still have three
16 minutes left before the bell tolls.

17 REDIRECT EXAMINATION

18 BY MR. ALI:

19 Q. If we could go to the bottom of this
20 document.

21 JUDGE TEVRIZIAN: For the record, do we
22 have an identifying number on it other than the date

1 of December 14, 2006?

2 MR. LEVEE: Thank you. And we will of
3 course furnish copies to everyone tomorrow morning.
4 It was not a document that had been marked.

5 MR. PAULSSON: Give it a logical number.

6 MR. LEVEE: I can't assure you it will be
7 logical.

8 MR. PAULSSON: Well, it will be in
9 sequence anyway. It will not duplicate another one.

10 MR. LEVEE: That's correct.

11 BY MR. ALI:

12 Q. Ms. Burr, I'm just going to read to you
13 the text that's there. "Stephen Balkam, the CEO of
14 ICRA, has offered to speak with any member of the
15 ICANN board who wishes to discuss ICRA's support for
16 XXX, and the role he anticipates ICRA will play in
17 the policy development for XXX." Could you state for
18 the panel again what is ICRA?

19 A. ICRA is the Internet Content Rating
20 Association which has now been rechristened or was
21 rechristened in February of 2007 as the Family Online
22 Safety Institute. It is a not for profit

1 organization that is supported by and in fact its
2 board members come from AOL, AT&T, BT, Verizon,
3 Microsoft, Yahoo, whatever. I could go down the
4 list.

5 Q. Thank you.

6 A. And it is dedicated to making the --
7 helping bring education and self-empowerment to make
8 parents able to protect their children online.

9 Q. And do you know if any board member, any
10 ICANN board member in fact contacted Mr. Balkam?

11 A. No, I don't. Dr. Cerf indicated he was
12 familiar with Dr. Balkam.

13 Q. But you don't know if they ever made the
14 effort --

15 A. Absolutely not.

16 Q. -- to respond to this invitation?

17 A. I don't know.

18 MR. ALI: Thank you. No further
19 questions.

20 JUDGE SCHWEBEL: Thank you so much.

21 THE WITNESS: My pleasure.

22 JUDGE SCHWEBEL: It is a great pleasure

1 seeing you here again.

2 THE WITNESS: Thank you.

3 JUDGE SCHWEBEL: Well, gentlemen, have we
4 completed the proceedings for today?

5 MR. LEVEE: We have --

6 MR. ALI: We have.

7 MR. LEVEE: -- completed the evidence.

8 Yes, we are done. That's a better way of putting it.

9 JUDGE SCHWEBEL: Rehearse with us what you
10 plan to do tomorrow.

11 MR. LEVEE: We have agreed that each of
12 us -- Mr. Ali will go first, of course -- will give a
13 75-minute closing argument. At that point, we can
14 either break -- we're starting at 9:30. That was
15 what the petitions discussed. We can either break or
16 not, but should the panel have questions for either
17 of us, we would invite the panel to ask -- I would
18 invite the panel to ask questions during my closing
19 argument. I'm sure Mr. Ali feels the same. But we
20 had thought 75 minutes per side, allocate some time
21 to the panel, if the panel has no questions, we will
22 adjourn the hearing.

1 MR. ALI: Certainly that was just a
2 working model. I would say if there is any other way
3 in which you would like to be assisted by us,
4 tomorrow --

5 MR. PAULSSON: The other way is that the
6 panel or an individual member of the panel might go
7 off on an excursion which strikes that individual as
8 something which I might find interesting and is
9 actually a dead end or pointless, I've taken 10
10 minutes. Well, it had to be done because I'm here
11 and I thought it was relevant. It turns out not to
12 be, but that's not part of your --

13 MR. ALI: Right. And any thought to
14 particular areas or a particular way you might want
15 us to structure our closing so that they perhaps
16 match up, or particular issues that would be of
17 interest to the panel?

18 JUDGE TEVRIZIAN: Whatever you think is
19 appropriate. It's your strategy. I'm sure that
20 collectively we'll have questions.

21 MR. PAULSSON: Yes, we will not give
22 you -- there won't be a list of questions from the

1 panel in an organized way. You really know this case
2 and I think you have a sense of what you need to do
3 to overcome the other questions as they arise as you
4 go along. I think it will be spontaneous rather than
5 a set piece.

6 MR. ALI: Thank you.

7 MR. LEVEE: Thank you.

8 (Discussion off the record.)

9 (Whereupon, at 5:50 p.m., the Independent
10 Review Process adjourned, to reconvene at 9:30 a.m.
11 on Friday, September 25, 2009.)

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