

1 INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
2 -----X
3 IN THE MATTER OF: : ICDR
4 ICM Registry, LLC, : No. 50 117 T 00224 08
5 Claimant,
6 v.
7 Internet Corporation for
8 Assigned Names and
9 Numbers ("ICANN"),
10 Respondent.

11 -----X
12 Washington, D.C.
13 September 22, 2009
14 Independent Review Process held at the
15 offices of Sidley Austin LLP, 1501 K Street NW,
16 Washington, D.C. 20005, at 10:00 a.m., Tuesday,
17 September 22, 2009, and the proceedings being taken
18 down by Stenotype by ANDREA P. HUSTON, RPR, CRR, and
19 transcribed under her direction.

20 BEFORE:
21 Judge Stephen Schwebel, Hearing Chairman
 Jan Paulsson
22 Judge Dickran Tevrizian

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16 JOHN JEFFREY, ICANN
17 AMY STATHOS, ICANN
18 STEPHEN FERRY, tech support
19 STEVE PAGE, tech support
20 STUART LAWLEY, ICM
21 STEVE DUNCAN, Paralegal

22

1	C O N T E N T S				
2	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
3	STUART LAWLEY		314	352	361
4	DR. ELIZABETH WILLIAMS	365	375	395	
5	J. BECKWITH BURR	403	488		

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

2 CROSS-EXAMINATION

3 BY MR. LeVEE:

4 Q. Good morning, Mr. Lawley. ICM knew that
5 its application for the dot xxx sponsored TLD would
6 be controversial; you knew that, didn't you?

7 A. Yes.

8 Q. And you knew that in part because an
9 application for .XXX for an unsponsored TLD had been
10 rejected -- rejected may not be the right word, but
11 had not been accepted in the year 2000, correct?

12 A. Yes, we were not selected in 2000.

13 Q. And one of the reasons the board stated in
14 2000 was that a top level domain with the letters XXX
15 in effect would generate controversy?

16 A. Correct.

17 Q. Let me ask you to take -- we delivered a
18 binder to you with a handful of exhibits.

19 A. Uh-huh.

20 Q. And if you would look at what is marked as
21 CON-4. And for the panel, there were some exhibits
22 that parties marked as confidential. And CON means

1 confidential.

2 JUDGE TEVRIZIAN: What exhibit are we on?

3 MR. LeVEE: Con-4 in the binder we

4 delivered to you this morning.

5 BY MR. LeVEE:

6 Q. Mr. Lawley, would you just describe what
7 this document is?

8 A. This was a letter from me to the ICANN
9 board dated 2nd of November revised on 7
10 December 2004. At which time we were providing
11 supplemented information to the board about the
12 application.

13 Q. And I'm going to ask Kate on your monitor
14 there to highlight one paragraph. Let me ask you to
15 just read that paragraph.

16 JUDGE SCHWEBEL: Could you both speak a
17 little more loudly, please?

18 MR. LeVEE: Yes, my apologies.

19 THE WITNESS: Yes: "Nonetheless the
20 applicants fully understand that the topic of adult
21 entertainment on the internet is controversial. The
22 applicants also understand that the board might be

1 criticized whether it approves or disapproves the
2 proposal."

3 BY MR. LeVEE:

4 Q. Would it be fair to say, Mr. Lawley, that
5 you knew going into the process that there was a risk
6 that the board would turn down your proposal?

7 A. Could you restate a bit further? I mean,
8 our understanding was yes, the board had the
9 opportunity to reject the proposal, but only on the
10 terms of the objective criteria that they had
11 preannounced. Not on grounds of controversy.

12 Q. You also knew that once the board voted on
13 June 1, 2005, that the board would need to vote again
14 with respect to the registry agreement, correct?

15 A. Yes, after we had negotiated contractual
16 terms for technical and commercial matters, the
17 contract itself would need to be ratified and voted
18 on by the board, yes.

19 Q. And that in fact is what you understood
20 had happened with the other top level domain
21 applicants, correct?

22 A. Yes.

1 Q. Okay. Let me ask you to take a look at
2 Exhibit 191.

3 A. Yes.

4 Q. Would you describe for the panel what
5 Exhibit 191 is?

6 A. Just give me a few seconds to familiarize
7 myself with the document.

8 Q. Take your time, of course.

9 A. Uh-huh. Yes.

10 This is a letter from me to Vinton Cerf,
11 the chairman of the board of ICANN, dated May 30,
12 2006, in which I am expressing disappointment at the
13 board's vote to reject the contract, not the
14 application on the 10th of May 2006, and explaining
15 that we would be opening the pre-reservation service
16 that we discussed yesterday.

17 Q. Let me ask you to look at the attachment
18 to the letter which I think is on page 4 of the
19 exhibit.

20 A. Yes.

21 Q. What is attachment -- what is this
22 attachment?

1 A. This attachment is I believe the set of
2 terms and conditions that any would-be registrant in
3 the pre-reservation service would be agreeing to.

4 Q. And who prepared this document?

5 A. That would have been Becky Burr, our
6 counsel.

7 Q. And when was it prepared?

8 A. This would have been sometime between 10th
9 of May and 30th of May, 2006.

10 Q. Did you review the document before it was
11 attached to your letter to Dr. Cerf?

12 A. I would assume -- I would assume that's
13 safe to say, yes.

14 Q. Okay. And in the document -- I'm going to
15 ask Kate to blow up or highlight where it says "ICM
16 does not," do you see that? "ICM does not and cannot
17 guarantee that ICANN will authorize ICM to make .XXX
18 available for registration by members of the
19 community." Is that what Ms. Burr wrote?

20 A. Yes.

21 Q. And if you look to the last page, there is
22 a paragraph that is in bold and I'll just read the

1 first sentence. It says "ICANN has not authorized
2 ICM to operate the .XXX domain and may not in the
3 future." Is that what Ms. Burr wrote?

4 A. Yes.

5 Q. Is there something in this document
6 Exhibit 191, your letter to Dr. Cerf or Ms. Burr's
7 draft agreement that says anywhere that the board had
8 approved the .XXX application on June 1, 2005?

9 A. Without reading it in its entirety, I
10 wouldn't be sure, but I would imagine no, because the
11 June 1st vote was the vote that we met the criteria
12 and we could go forward into contract negotiations.
13 And we always understood that at this time we had not
14 executed a contract. So we had not been delegated to
15 run the TLD.

16 Q. Now this was written after the board's
17 May 2006 vote, correct?

18 A. Yes.

19 Q. And did you attend the board's meeting at
20 which the vote was held?

21 A. The 10th of May vote?

22 Q. Yes.

1 A. No, that was held by teleconference and
2 was a closed session.

3 Q. Did you have an opportunity to read the
4 minutes that were posted?

5 A. Yes.

6 Q. Do you recall from the minutes that the
7 issue of sponsorship was one of the concerns that
8 board members had expressed?

9 A. I recall that many of the board members
10 gave statements as to their reasons to reject the
11 contract and the only board member that mentioned
12 sponsorship was Paul Twomey. All of the other board
13 members out of the majority that had voted to reject
14 the contract mentioned specific contract terms rather
15 than sponsorship. I do believe that Paul Twomey
16 alone was the only member on the board that mentioned
17 sponsorship.

18 Q. And did you tell -- did you write a letter
19 to Dr. Twomey or tell Dr. Twomey that the issue of
20 sponsorship had already been resolved, why was he
21 bringing it back up?

22 A. Um -- I think that this would be the May

1 the 30th letter would have been our reaction to that.

2 Q. Is there somewhere in the May 30th letter
3 that you address your concerns that the board had at
4 least Dr. Twomey had raised the issue of sponsorship
5 and you thought that issue had already been resolved?

6 A. No, not that I can see.

7 Q. Was there ever a time during 2006 that you
8 wrote a document saying that the issue of sponsorship
9 had already been resolved, and that the board should
10 not have been revisiting that issue?

11 A. Yes, I do think there was, in December of
12 2006.

13 Q. What document is that?

14 A. I literally don't have it in hand, but I
15 believe I wrote in the strongest of terms in December
16 of 2006 to Dr. Cerf.

17 Q. Okay. And just to be clear, your
18 recollection from reading the board minutes of
19 May 2006 is that Dr. Twomey was the only one to raise
20 concerns regarding sponsorship?

21 A. He was the only one that vocalized those
22 in his written statements after the board meeting,

1 yes.

2 Q. Thank you.

3 Let me change the subject and discuss the
4 community that ICM was proposing to represent or
5 create. So to make sure I understand your testimony,
6 participation in the community of .XXX was intended
7 to be voluntary, correct?

8 A. Yes.

9 Q. And ICM was not proposing that everyone
10 who puts adult content on the internet would have to
11 register names in .XXX?

12 A. No, we were not.

13 Q. And in fact ICM had no power to force
14 adult webmasters to transfer their top level domains
15 to .XXX, right?

16 A. Of course not.

17 Q. And so participation in the community that
18 you were proposing was -- I think the words you used
19 yesterday were self-selected?

20 A. Yes, voluntary self-selection.

21 Q. So essentially what would happen is that
22 the members of the proposed .XXX community which ICM

1 defined as "the global responsible on-line adult
2 entertainment community" would self-select for
3 themselves as members of the community, correct?

4 A. You gave a partial definition of that
5 community. I think we went on -- sorry, we went on
6 to describe the community more fully as those members
7 that opposing counsel described who believed a system
8 of self-identification would be beneficial in which
9 to self-regulate.

10 Q. Okay. Now you understood, did you not,
11 that a provider of adult entertainment content in the
12 United States might differ in opinion as to what was
13 responsible from a provider of adult content, let's
14 say in Singapore?

15 A. Yes, I mean we were not proposing to be
16 the arbiter of what constituted responsible.
17 The .XXX domain was meant just to allow members of
18 the community to indicate to the world that they felt
19 they were behaving responsibly.

20 Q. And if someone felt that a webmaster that
21 had selected to have a .XXX domain was not acting
22 responsible, what was going to happen next?

1 A. We were -- we would have -- the top level
2 domain would have such a policy as we described
3 yesterday that were going to be developed by the
4 sponsoring organization, and just like every other
5 sponsored top level domain, there was a charter
6 eligibility dispute resolution process, that any
7 other member of the community or any other member
8 around the world could challenge someone's adherence
9 to the policies that had been developed.

10 Q. So, essentially ICM through its policies
11 would monitor whether members who had top level
12 domains in .XXX were acting responsibly?

13 A. No, we had a complaint-driven--
14 complaint-driven compliance process to deal with any
15 complaints that came in to see whether the policies
16 of the top level domain were being adhered to, and
17 that's very similar to every other sponsored top
18 level domain.

19 Q. And if somebody disagreed with the outcome
20 of the process and believed that a .XXX webmaster was
21 not acting responsibly, was it possible that those
22 people would contact ICANN?

1 A. Unlikely. We had a very detailed system
2 put in place including this dispute resolution policy
3 and in addition, very similar to ICANN, strangely
4 enough -- or not strangely enough, fondly enough, I
5 guess, we were going to appoint, as ICANN has, an
6 independent ombudsman to judge such matters and in
7 fact ICANN's own adjunct ombudsman had volunteered to
8 take that position.

9 So one of ICANN's own ombudsmen were
10 willing to be our ombudsman separate and distinct
11 from his duties within ICANN.

12 Q. When you submitted your application for
13 the .XXX sTLD, you advised ICANN that you had support
14 from members of your community, correct?

15 A. Yes.

16 Q. And would it be fair to say that as time
17 went by, ICM lost a lot of the support that it
18 thought it had?

19 A. No, that would not be true.

20 Q. Let me ask you to take a look at
21 Confidential Exhibit 11. Attached to Exhibit 11 are
22 a bunch of letters of support, correct?

1 A. Yes.

2 Q. And one of those letters is from [---
3 Redacted ---]?

4 A. [--- Redacted ---].

5 Q. For the panel, that's page 14 of
6 confidential hearing Exhibit 11. And as of July 15,
7 2003, [--- Redacted ---] supported your
8 application?

9 A. Yes.

10 Q. And if you turn the page, you had support
11 from [--- Redacted ---]?

12 A. Yes.

13 Q. Turn two more pages, if you would, to page
14 17. You had support from an entity known as [---
15 Redacted ---]?

16 A. Yes.

17 Q. Now, isn't it true that prior to the ICANN
18 board's May 10, 2006, vote, [--- Redacted
19 ---] opposed the creation of
20 the .XXX sponsored top level domain?

21 A. Yes.

22 Q. Why don't we take a look at Exhibit AT?

1 A. I'm sorry, exhibit --

2 Q. AT, apple-Tom.

3 I'm just going to read the first sentence.

4 First of all, do you recognize the document?

5 A. Yes, I do.

6 Q. The first sentence says: "Dear ICANN
7 representatives: Speaking on behalf of my company
8 Flynt Management Group, I would like to state my
9 opposition to the creation of .XXX top level domain
10 which I believe represents a direct threat to freedom
11 of speech on the internet." Now Larry Flynt
12 Enterprises is a prominent adult entertainment
13 webmaster, is that fair to say?

14 A. Yes.

15 Q. And isn't it also true that [---

16 Redacted ---] retracted its support?

17 A. I'm not sure about that. Did you have a
18 copy of that letter?

19 Q. I -- apparently not in my binder.

20 A. I'm not familiar with them retracting
21 support.

22 Q. Let me ask you about Private Media Group.

1 Have you heard of them?

2 A. Yes.

3 Q. Would you characterize them as a prominent
4 member of the adult entertainment community?

5 A. Yes.

6 Q. Let's take a look at the Exhibit AV, A as
7 in Apple, V as in Victor. Do you have that in front
8 of you?

9 A. Yes, I do.

10 Q. Do you recognize this letter?

11 A. Yes, I do.

12 Q. I'm going to ask Kate to highlight the
13 second paragraph. It says "Private has been a
14 leading member of the adult entertainment industry
15 for over 40 years. We would like to make clear to
16 you that we oppose the creation of this TLD and
17 believe that there is no compelling reason to
18 establish such a TLD." And they are referring in the
19 previous paragraph to the .XXX top level domain. Do
20 you recall seeing that at that time?

21 A. Yes. Can I comment on both of these
22 letters?

1 Q. Of course.

2 A. Yes, if you refer back to Mr. Flynt's
3 letter in the binder tab AT dated April 2006, if you
4 continue to read, which I could read out loud for
5 you, after the highlighted text that I was just asked
6 to mention, this same subject is mentioned in the
7 Private Media letter.

8 These letters were issued as a reaction by
9 Flynt Management Group to some proposed legislation
10 to -- introduced by Senators Baucus and Pryor in the
11 United States, totally nothing to do with our
12 application, to try to force ICANN to create a dot
13 XXX and make it mandatory, which was a bill that was
14 never going to go anywhere. It was playing to the
15 audience of their own constituents. It was a bill
16 that didn't ever go anywhere.

17 So Larry Flynt went on to say, which you
18 can tell this is why he wrote the letter:
19 "Legislation was recently introduced into the U.S.
20 Senate that will create a mandatory .XXX," et cetera,
21 et cetera, and he goes on to describe that such a
22 mandatory .XXX would be a restriction on free speech,

1 et cetera, et cetera, which are very much points that
2 we agree with.

3 So this time he was conflating our
4 operation with the proposed mandatory .XXX proposed
5 by Senators Baucus and Pryor, and hence this letter
6 coming out. And Private Media's letter refers to the
7 same issues, about governmental pressure. So this
8 time frame -- and this was two years after the
9 original public comment period, and three years after
10 when Larry Flynt originally supported dot XXX. These
11 were relating to matters outside of our control over
12 a proposed pie in the sky mandatory .XXX.

13 JUDGE PAULSSON: Why do you say the
14 proposed legislation was dead in the water?

15 THE WITNESS: Because it never reached an
16 amendment here in the United States. You cannot
17 force speech into the particular zones. It would be
18 a clear breach of the First Amendment.

19 BY MR. LeVEE:

20 Q. I don't see -- I am looking first at the
21 Private Media Group letter. I don't see any
22 reference to government legislation.

1 A. It -- it hints at it in the third
2 paragraph, when it says "The likelihood that
3 governmental and nongovernmental entities, both
4 domestic and foreign, will use a new TLD to impose
5 unacceptable restrictions." That was very much in
6 the same vein that mandatory .XXX could be considered
7 dangerous.

8 Q. Coming back to the letter from -- I'm
9 looking at the wrong letter. In the letter from
10 Larry Flynt, he says as you pointed out:
11 "Legislation was recently introduced. And even if
12 these individuals' initiatives fail" -- meaning the
13 legislation would fail -- he opposed the .XXX top
14 level domain, because he was concerned that the
15 consequence of that domain would be bad for his
16 company.

17 A. He says that if those initiatives failed,
18 they have convinced him, Mr. Flynt, that it is
19 inevitable that the government will continue to try
20 and impose a regulatory scheme on .XXX, which is
21 unnecessary and unconstitutional, which wasn't the
22 case in our XXX we were applying for, which was a

1 purely voluntary arrangement.

2 Q. Let me ask you to take a look at
3 Exhibit AU. Do you recognize that document?

4 A. Yes.

5 Q. This is from the president of Wicked
6 Pictures. They were a prominent adult entertainment
7 webmaster?

8 A. I'm not sure about the status of Wicked
9 Pictures.

10 Q. It says: "Speaking on behalf of my
11 company, Wicked Pictures, I would like to state for
12 the record our profound opposition to the
13 establishment of a .XXX top level domain. It is our
14 position that .XXX represents a threat to the health
15 and independence of the adult entertainment industry
16 and the free flow of information over the internet.
17 Indeed recent events in Washington, D.C. where a
18 proposal has been made to legislate a mandatory .XXX
19 TLD have further convinced us that whether government
20 or private industry will attempt" -- "that either
21 government or private industry will attempt to impose
22 a regulatory framework on .XXX that is incompatible

1 with our personal and business ethic."

2 So wasn't he saying, whether or not the
3 government in the United States or any other
4 government passed legislation, they would oppose
5 the .XXX?

6 A. Yes.

7 Q. Are you familiar with a coalition or trade
8 organization called the Free Speech Coalition?

9 A. Yes.

10 Q. And would you say that they are the
11 primary U.S.-based trade association for the adult
12 entertainment industry?

13 A. I'm not sure I am qualified to make that
14 statement.

15 Q. They were one of the U.S.-based trade
16 associations?

17 A. Yes, they are.

18 Q. Can you think of any others?

19 A. Yes, the Association of Sites Advocating
20 Child Protection, the ASACP.

21 Q. Any others?

22 A. No.

1 Q. Let me ask you to take a look at
2 Exhibit 263. Do you recognize Exhibit 263?

3 A. I think I have seen it before, yeah.

4 Q. Exhibit 263 is dated July 17, 2005, and in
5 that document the Free Speech Coalition reiterates
6 its concerns about the implementation of .XXX and
7 says that the official position is that "the creation
8 of such a content-based zone on the internet will
9 create considerable risks to industry free speech for
10 a variety of reasons." Do you see that?

11 A. Yes.

12 Q. And actually the Free Speech Coalition
13 opposed the dot XXX top level domain from the outset;
14 correct?

15 A. No, not exactly, that's not true.

16 Q. Did they ever write a letter in support?

17 A. No, we met with them back in 2003, and we
18 attended one of their in-person meeting of members
19 and at that meeting -- incidentally the Free Speech
20 Coalition had expressed its willingness to support
21 our application back in 2003 if we basically gave
22 them control of the sponsoring organization and gave

1 them the lion's share of the \$10 per domain name that
2 we were giving to our nonprofit foundation -- that if
3 we gave most of the money to the Free Speech
4 Coalition and gave them effective control of the
5 sponsoring organization, then they indicated they
6 would be willing to support.

7 We said we were not willing to do that,
8 the sponsoring entity would have to be in the form
9 that we envisioned. So they invited us to present in
10 a meeting of their members in California, which we
11 attended. And there was a show of hands whether to
12 support or not the .XXX application, forthcoming .XXX
13 application, and at that time it was more or less a
14 dead heat in the room, it was about 50/50. So they
15 made a position, which they documented. And I think
16 our counsel's comments memorialized it, and Bob
17 Corn-Revere in the 30th of March 2007 meeting, public
18 forum, shows the FSC official position back in 2003.
19 And in 2004 when they made the application was that
20 they were not going to support or oppose the
21 application and that's why they made no comments to
22 the original public comment forum on the application

1 back in early 2004.

2 BY MR. LeVEE:

3 Q. Well, let me ask you to take a look at
4 Exhibit S as in Sam.

5 A. Yes.

6 Q. Do you recognize this letter?

7 A. Once again, I think I may have seen this
8 before.

9 Q. This is a letter dated August 30, 2005,
10 from executive director of the Free Speech Coalition
11 addressed to Dr. Cerf. I'm just going to read the
12 first paragraph in the sentence. It says: "The Free
13 Speech Coalition is the trade association of the
14 adult entertainment industry with over 3,000 members
15 representing every area of the business." I will
16 skip to the next paragraph. "Our understanding is
17 that there will be a one-month extension during which
18 time discussions are to take place. As a significant
19 stakeholder not yet afforded a voice in these
20 discussions, we would like to take this opportunity
21 to express our strong opposition to the creation of
22 a .XXX top level domain. We are also concerned that

1 important decisions are being made allegedly on
2 behalf of the adult industry by individuals who have,
3 at best, minority support in the adult webmaster
4 community, and lack any other legitimate authority to
5 make such claims to representation."

6 It goes on: "Specifically we believe that
7 the ICM Registry has consistently and knowingly
8 distorted the support it has received from the adult
9 industry, and that it has done so in order to qualify
10 its application for a sponsored top level domain,
11 which requires said support. We are concerned about
12 the prospect of a sponsored TLD run by people who
13 would distort the truth in order to gain control of
14 such a lucrative monopoly, and we wonder how hard
15 they will fight for this industry when hostile forces
16 attempt to dictate policy for this top level domain."

17 Let me ask you again, do you recall seeing
18 the document when it was written?

19 A. Probably when it was posted to the ICANN
20 web site.

21 Q. Did you send a letter in response?

22 A. No. I mean we wholeheartedly disagreed

1 with these statements. They were false and there is
2 no substantiation. And one example of the
3 nonsensical nature of this letter, that on the one
4 hand they are saying there is no support, but in the
5 same sentence or paragraph, they described this as a
6 "lucrative monopoly." How can it be lucrative if we
7 have no supporters and therefore we get no
8 registrations?

9 JUDGE TEVRIZIAN: I have a question.

10 MR. LeVEE: Of course.

11 JUDGE TEVRIZIAN: Counsel has been
12 questioning you on Exhibits CON 11, AT, AV, AU, 263,
13 and S, which are letters from the adult entertainment
14 industry where it appears that the community support
15 for the creation of a .XXX is eroding. In looking at
16 the content of those letters, it appears that the
17 authors are concerned not only with government
18 regulation but with industry or private regulators.
19 Would you agree with this?

20 THE WITNESS: Well, first, Judge
21 Tevrizian, I would disagree with your comments -- I
22 will agree with your comments that these three or

1 four individual letters on the face of it would
2 appear that there was eroding support.

3 However, in the same time scale from the
4 1st of June 2005 through till May 2006 we had
5 received in addition to the original letters of
6 support from 20 of the major organizations around the
7 world, over 1,500 indications of support -- letters,
8 e-mails, expressions of support on our web site, from
9 1,500 -- so that's a huge number, 1,500 versus three
10 or four letters here -- expressing support, and from
11 members of the adult industry from 71 different
12 countries around the world.

13 We had forwarded all of these to ICANN
14 during this same time period, so ICANN were aware on
15 the one hand, from the date they made the judgment on
16 the 24 letters, by the time that this stuff was
17 happening in spring of 2006, they had scattering of a
18 few individual letters with specific points to raise,
19 but at the same time there was a whole mountain of
20 maybe 2,000 individual, smaller webmasters that were
21 supportive, extra support that we didn't and couldn't
22 document on June the 1st.

1 JUDGE TEVRIZIAN: If these letters that
2 were objecting to .XXX as being a top level domain
3 were concerned about government regulation and XXX
4 was set up to self-regulate, aren't they both a form
5 of censorship?

6 THE WITNESS: No, definitely not
7 censorship, because we'd obviously got strong free
8 speech issues in there. And that's just like any
9 club or association that you decide to join or not
10 join. You join because you like the policies of that
11 club and you are willing to adhere to those policies.
12 So --

13 JUDGE TEVRIZIAN: When you say it's for
14 responsible adult entertainment, how would you define
15 responsible adult entertainment?

16 THE WITNESS: We weren't defining
17 responsible. We were just letting the would-be
18 registrants know that this was a way that they could
19 present to the world, that they could show the world
20 that they were acting responsibly to a certain degree
21 because they were abiding by the terms and conditions
22 that they would help devise in conjunction with the

1 other impacted stakeholders.

2 So this was very much a voluntary
3 arrangement for voluntary self-regulation as is
4 common in many, many, many industries across the
5 nation and across the world. People who agree with
6 the idea and agree with the policies join the club or
7 join the association, join the self-regulatory body.
8 Those who reject them and don't want to participate,
9 don't join. It really is very straightforward.

10 JUDGE TEVRIZIAN: But if I was a webmaster
11 and I wanted to go on to, let's say .XXX, just to get
12 on there for exposure, but I also didn't like the
13 policies, I could also enroll on .com and stay on
14 .com, could I not?

15 THE WITNESS: Certainly, yes.

16 JUDGE TEVRIZIAN: I could be on two.

17 THE WITNESS: Yes.

18 BY MR. LeVEE:

19 Q. You have compared .XXX to dot MOBI and dot
20 CAT during your direct examination, correct?

21 A. In addition to most of the other top level
22 domains, yes.

1 Q. Are you aware of any significant
2 opposition from those communities to the creation of
3 those particular top level domains?

4 A. I know dot MOBI was opposed by Telefonica
5 Moviles of Spain, a very large mobile phone provider.
6 And I know it was also opposed by Sir Tim
7 Berners-Lee, the founder of the Worldwide Web, and
8 the guy who was in charge of the W3C consortium.

9 Q. Was he a member of the community?

10 A. The .MOBI community?

11 Q. Correct?

12 A. He was not a member of the community. He
13 didn't like it and wasn't going to register.
14 And .TEL, another applicant that I referred to, had
15 strong opposition from the European
16 Telecommunications Association, with many thousands
17 of members.

18 Q. You mentioned that you had received
19 numerous letters of support. Isn't it also the case
20 that ICANN received several hundred public comments
21 and e-mail opposing the top level domain in
22 conjunction with the early 2007 consideration

1 of .XXX?

2 A. The -- yes. That's -- but we also exposed
3 at the time and we showed it to ICANN, and ICANN is
4 very familiar with this, that many of the members of
5 the wider industry who were not members of our
6 community, which was a group of about 150 providers,
7 maximum, were conspiring on industry bulletin boards
8 to disguise themselves as being more providers and
9 they were bragging that they were submitting 10, 15,
10 20 comments to the ICANN public comment forum,
11 pretending to be other people and other providers.

12 So suddenly 150 angry web masters appeared
13 to be 500 or 600. And we were very much aware of
14 this going on because we were monitoring the chat
15 boards of the adult industry, and as soon as we were
16 aware of these tactics, these unsavory business
17 tactics, that we exposed them to ICANN on a
18 repetitive basis.

19 Q. Let me read to you, Mr. Lawley, on
20 Exhibit 199. It's not in your book, I apologize. It
21 is the minutes of the meeting of ICANN Board of
22 Directors. At the very bottom if you look on your

1 television screen in front of you, the monitor, the
2 very last paragraph, John, referring to John Jeffrey,
3 the General Counsel of ICANN, noted a summary of the
4 most recent public comments on the revised agreement
5 posted 5 January 2007 to 5 February 2007 was provided
6 to the board and was going to be posted publicly.

7 John reported that staff received over 600
8 public comments and approximately 55,579 e-mails
9 (from an e-mail campaign on a web site) during and
10 since this period. Of the comments posted in the
11 public forum, 77 percent were opposed and 16 percent
12 expressed support, with others not indicating a view,
13 of the e-mail, nearly all of which were written in
14 the same form opposing the introduction of the sTLD.

15 So what you were referring to in your last
16 answer was that there was an e-mail campaign that you
17 felt was inappropriate because it was being sponsored
18 by a particular group of people, correct?

19 A. No. That is not what I'm saying.

20 Q. Okay.

21 A. I'm saying that these large number of
22 e-mails that they are referring to here were not from

1 or even claim to be from members of the adult
2 entertainment industry. These were from the angry
3 Christian conservative groups here that had done an
4 e-mail campaign. So I think probably the 200 or 300
5 comments out of the total 600 comments, or probably
6 even less than that were -- I think they go on to say
7 they were 88 comments from webmasters somewhere else,
8 probably in the March resolution.

9 Q. Actually you are thinking correctly. In
10 the next paragraph.

11 A. Yes, so going back to the comment that you
12 already highlighted, these public comments here and
13 the e-mails were from the total nonmembers of the
14 industry, never mind the community -- the angry
15 Christian conservatives that were bombarding the
16 Department of Commerce.

17 Q. To be clear, what it says is that Rita
18 Rodin -- Ms. Rodin was a lawyer at Skadden Arps who
19 had joined the board after the 2005 vote, is that
20 your understanding?

21 A. Yes.

22 Q. And she said -- she indicated that a note

1 in the board materials prepared by staff indicated
2 that during the 5 January through 5 February 2007
3 public comment period, 88 commenters -- commentators
4 identified themselves as webmasters of adult content,
5 of whom 65 were opposed to the development of
6 the .XXX domain and 23 were in favor. Is that what
7 you were referring to?

8 A. Do you have a hard copy of this document,
9 because whoever is driving this for you, is sort of
10 cutting and pasting and jumping around the document,
11 and I'm finding it hard to follow.

12 Q. May I -- I am going to hand you my copy.

13 A. Okay.

14 JUDGE TEVRIZIAN: This is Exhibit 199, the
15 minutes of May 19?

16 BY MR. LeVEE:

17 Q. Yes, and it's in your materials not just
18 in your daily materials.

19 A. Yes, I have it in front of me now.

20 Q. Did I read accurately what Ms. Rodin said?

21 A. If we are talking about the highlighted
22 text, yes.

1 Q. Is there anything else in the documents
2 that indicates that there was greater support for
3 the .XXX top level domain than was expressed in this
4 meeting? Or referenced?

5 A. Yes, if you give me just a few seconds to
6 read the document, I think I may be able to answer,
7 if I could just have a few seconds to read the
8 document.

9 Q. Take your time.

10 A. All I can say at this point is Kurt Pritz
11 stating on the record that ICANN had not asked ICM
12 specifically about our level of support since board's
13 decision in June 2005 -- that he, Kurt, was very much
14 in the knowledge that we had these 70,000 or so
15 pre-reservations, plus the nearly 2,000 other
16 indications of support in addition to the original
17 letters of support.

18 Q. Well, then, let me turn to those
19 pre-reservations. During your examination yesterday
20 you testified that the large number of
21 reservations --

22 A. Sorry, there is a reference, I do beg your

1 pardon, if I could take you back to the original
2 exhibit where you finished the highlighted text
3 that -- from Rita Rodin, where you said 23 were in
4 favor.

5 Kurt Pritz, who is the staff member in
6 charge of this round, then goes on to say, "Kurt
7 Pritz said in relation to the issue establishing
8 where there was support for the domain creation
9 amongst the sponsorship community, that ICM had
10 provided extensive evidence of a sponsored community,
11 and the document could be found," la-de-la-de-la.

12 Q. Rather than la-de-la-de-la, finish the
13 whole sentence.

14 A. Okay. The documentation of this could be
15 found in the application. Kurt also pointed out at
16 the board's request additional information had been
17 presented to them during the ICANN Mar del Plata
18 meeting which included a poll that I think we
19 discussed yesterday conducted by X-BIZ that showed of
20 many thousands of people that responded, adult
21 webmasters, that 57 percent were in favor of creation
22 of a .XXX domain, 22 percent thought it was a

1 horrible idea, and you know, clearly these few
2 hundred that were opposing it are a part of the
3 22 percent that hated it.

4 Q. Let me go back to the pre-reservation
5 service. Yesterday you testified that the fact that
6 you had, I believe it was 70,000 at one point, and
7 then went up --

8 A. Yeah.

9 Q. -- pre-reservations, that indicated
10 support from the community, is that your testimony?

11 A. It's another example of support, yes.

12 Q. To be clear, ICM accepted those
13 reservations free of charge?

14 A. That's correct.

15 Q. So if I was an adult webmaster, there
16 would be no cost to me to pre-reserve .XXX?

17 A. No, pardon. Quite a lengthy time it took
18 to fill out the forms and check the boxes and enter
19 all the domains that you wish to register in, is
20 quite a lengthy process. But there was no charge for
21 it.

22 Q. Okay. And you stated in your testimony

1 yesterday that you did not expect that most of the
2 registrants in .XXX would give up their web sites in
3 .com or the other TLDs that they had, correct?

4 A. Agreed.

5 Q. And so even if an adult webmaster
6 opposed .XXX, wouldn't that webmaster still have had
7 reasons to complete the free registration, once you
8 opened registration in .XXX?

9 A. No, because ultimately they would not be
10 entitled to join the community because they
11 opposed .XXX; they clearly would not agree to the
12 policies and the term conditions of .XXX; and
13 therefore would not be able to register domains, and
14 so there would be no point.

15 Q. So you had advised the public that if an
16 adult webmaster had publicly stated opposition
17 to .XXX that they would not be able to register a
18 domain in .XXX?

19 A. The industry knew that. I'm sure those
20 terms and conditions that you showed before will
21 state that any eventual registration would be subject
22 to acceptance of the policies of the top level

1 domain, which had been clearly announced to the
2 industry.

3 Q. Wouldn't it be fair to say, Mr. Lawley, that
4 whether or not an adult content provider supported
5 XXX, once you made the preregistration available, it
6 made sense for the persons who had domain names
7 in .com to in essence defensively register in .XXX so
8 as to avoid trademark issues and other problems?

9 A. Yes, that is a familiar pattern in any new
10 TLD, that a certain proportion of registrations --
11 typically 5 percent to 10 percent of registrations --
12 are what is termed defensive registrations, that
13 people wish to buy the specific stream in the new top
14 level domain as a defensive move rather than a
15 proactive move.

16 And there were probably no reasons to
17 suspect either way that the pre-reservations that we
18 garnered had a higher or lower percentage of
19 pre-reservations than the industry norm, in the
20 domain name business.

21 JUDGE PAULSSON: Those might be people who
22 opposed the idea?

1 THE WITNESS: In the preregistration.
2 They wouldn't eventually be able to register if they
3 didn't agree to the terms, but there was nothing
4 stopping them pre-reserving, no.

5 MR. LeVEE: Thank you. That's all the
6 questions I have.

7 THE WITNESS: Okay. Thank you.

8 JUDGE SCHWEBEL: Thank you so much. Would
9 you like to reexamine the witness?

10 MR. ALI: Yes, if I may take a couple
11 minutes, just to organize my thoughts.

12 (Recess 11:03 a.m. - 11:04 a.m.)

13 REDIRECT EXAMINATION

14 MR. ALI: Judge Schwebel, with your
15 permission, I just have a couple of questions on
16 redirect.

17 JUDGE SCHWEBEL: Please.

18 BY MR. ALI:

19 Q. Mr. Lawley if you could please turn in the
20 binder that you were given by Mr. LeVee, in the
21 binder marked as 191?

22 A. Yes.

1 Q. This was the first or second document,
2 excuse me, that you were questioned about. I would
3 like you to look at the second paragraph. And I'm
4 going to read some language to you.

5 "Review of the voting transcript and
6 various press statements convinces me that certain
7 misconceptions prevented the board from reaching a
8 balanced and equitable judgment on the agreement. In
9 particular I am dismayed by the way in which the
10 letter from the United Kingdom's GAC representative,
11 Martin Boyle, has been mischaracterized and I am very
12 certain that ICM did not undertake until the
13 agreement to enforce pornography laws across
14 jurisdictions. Sadly, politics, not public policy
15 concerns, appear to have won the day."

16 Mr. Lawley, may I ask you what led you to
17 write what you did in the passage I just read?

18 A. That was as a result of the surprising
19 decision of May 10th -- the May 10th, 2006, vote to
20 reject the contract, and the reasons given by many of
21 the board members as the reason to reject the
22 contract at that time, that they were just not

1 supportable by the facts.

2 Q. So when you say politics, not public
3 policy concerns, appear to have won the day, you were
4 referring to some of the debate that had been going
5 on with the U.S. government?

6 A. Yes. The Gallagher letter, the subsequent
7 letter by the Department of Commerce in March of
8 2006, yes.

9 Q. Okay. Thank you. Now, you were asked a
10 number of questions by Mr. LeVee relating to the
11 question of whether or not there was sufficient
12 support for the .XXX TLD as you had conceptualized
13 it, you and your team had conceptualized this
14 particular domain.

15 I would like to pull out claimant's
16 Exhibit 201, which is Hearing Exhibit 201, and if you
17 have your opening binders, this would be under tab
18 30. That may be the easiest place to find it. But
19 if you like to look at the hearing exhibits, number
20 201.

21 I don't think that --

22 A. I don't seem to have it.

1 Q. These are the ICANN meetings in Lisbon,
2 Portugal dated 30 March 2007.

3 MR. ALI: Judge Schwebel, if I may
4 approach the witness?

5 JUDGE SCHWEBEL: I have a copy of it.

6 MR. ALI: Just to give him a copy of this.

7 JUDGE SCHWEBEL: Yes.

8 MR. ALI: Thank you.

9 BY MR. ALI:

10 Q. Hearing Exhibit 201. Alternatively tab 30
11 in the opening binder. Mr. Lawley, I'm just going to
12 -- I would like you to turn to the third page.

13 A. Yes.

14 Q. And these are the comments. We started on
15 the previous page of -- of Susan Crawford who was a
16 board member, and who commented on the board's
17 rejection of the TLD application.

18 A. Yes.

19 Q. I'm going to read out some language at the
20 top of the third page, the paragraph that says "since
21 then" and I'm going to ask you to comment.

22 A. I don't see.

1 Q. Thank you, it's up on the screen as well.

2 Are you there with me?

3 A. Doesn't seem to be on the top of my page

4 3.

5 BY MR. ALI:

6 Q. Take a look if you have got Hearing

7 Exhibit 201?

8 A. Page 10 on Exhibit 201.

9 Q. It happens to be the third page in my
10 binder.

11 A. Sorry.

12 Q. Are we there?

13 A. Yes.

14 Q. On the screen?

15 A. Yes.

16 Q. On the same page, on the same screen?

17 A. Yes, sir.

18 Q. Okay. "Since then, real and astroturf
19 comments" -- that's an Americanism meaning filed
20 comments claiming to be grass-roots opposition that
21 have actual been generated by organized campaigns --
22 "have come into ICANN that reflect opposition to this

1 application."

2 When you responded to Mr. LeVee's question
3 with respect to the thousands and thousands of
4 e-mails that were coming in and you said that there
5 was a campaign by the religious right, is this what
6 you were referring to?

7 A. Yes, exactly.

8 Q. And that's what Ms. Crawford is referring
9 to?

10 A. Correct.

11 Q. She goes on to say "I do not find these
12 recent comments sufficient to warrant revisiting the
13 question of the sponsorship strength of this TLD
14 which I personally believe to be closed." Then "no
15 applicant for any sponsored TLD could ever
16 demonstrate unanimous, cheering approval for its
17 application. We have no metric against which to
18 measure this opposition, we have no idea how
19 significant it is. We should not be in the business
20 of judging the level of market or community support
21 for a new TLD before the fact. We will only get in
22 the way of useful innovation if we take the view that

1 every new TLD must prove itself to us before it can
2 be added to the root."

3 Now, Mr. Lawley, perhaps you had a little
4 more time to reflect on Mr. LeVee's question about
5 other TLDs and the degree of support for those TLDs.
6 What is the level of support for .museum?

7 A. They are a sponsored top level domains and
8 they have less than 600 registrations, less than 600.

9 Q. Are there only 600 museums in the world?

10 A. Clearly not.

11 Q. Are there any other TLDs that you thought
12 about that may have also faced significant opposition
13 or any opposition?

14 A. Sure. There is, as I discussed .TEL was
15 opposed. And you know, there are billions of people
16 in the world with telephone numbers, and their
17 registration numbers are in the low hundreds of
18 thousands.

19 There was opposition to .MOBI that I
20 described. And some of the other registrants in the
21 same round than us that were approved like .JOBS had
22 13,000 registrations in total. So the level of

1 indication of support was far higher than most, if
2 not all of the other applicants and the potential
3 registration on those showed that this was likely to
4 be one of the most significant new top level domains
5 that ICANN had probably ever added to the root.

6 Q. Thank you. Let's continue with
7 Ms. Crawford. "It seems to me that what is meant by
8 sponsorship, the notion that I hope we abandon in the
9 next round is to show that there is enough interest
10 in a particular TLD that it will be viable. We also
11 have the idea that the registrants should participate
12 in and be bound by the creation of policies for a
13 particular string. Both of these requirements have
14 been met by this applicant. There is clearly enough
15 interest, including more than 70,000 preregistrations
16 from a thousand or more unique registrants who are
17 members of the adult industry, and the applicant has
18 undertaken to us that it will require adherence to
19 its self-regulatory policies by all of its
20 registrants."

21 Now, Mr. Lawley, in light of those -- in
22 light of the numbers that she is referring to, and in

1 light of the numbers that you are aware of and that
2 you mentioned in the panel yesterday, did you have
3 enough registrants at the time to make a go of it
4 from a business standpoint?

5 A. Yes, as I explained yesterday, our low
6 case to the business of financial evaluators was
7 70,000 registrations and in supplemental questions
8 from the business and financial team, we have to
9 prove to them that we have a viable business model
10 from as low as 20,000 registrations.

11 So in real terms, as long as we were going
12 to get 20,000 registrations, we were going to be able
13 to stay in business, and it's clear that 70,000 which
14 is now 100,000 registrations garnered in the period
15 when we had been rejected, I would now revise my
16 initial estimations of registrations between 125 and
17 250,000 to somewhere probably near 500 to a million
18 registrations.

19 Q. So if you had been given a chance to put
20 this on to the root by ICANN --

21 A. Yes.

22 Q. -- you would be making lot of money?

1 A. Yes, I think we would have more than a
2 million registrations by now.

3 Q. Thank you very much. No further
4 questions.

5 MR. LeVEE: May I ask one follow up
6 question?

7 JUDGE SCHWEBEL: Yes.

8 MR. LeVEE: It might be two.

9 JUDGE SCHWEBEL: But you must speak up.

10 RE CROSS-EXAMINATION

11 BY MR. LeVEE:

12 Q. Mr. Lawley, I'm staying with Exhibit 201.

13 A. Yes.

14 Q. These are the board minutes from the
15 March 2007 meeting, correct?

16 A. Yes.

17 Q. And did you attend this meeting?

18 A. Yes, I did. Sorry -- yes, I did. It was
19 a public meeting, yes.

20 Q. And your counsel focused on the comments
21 of Susan Crawford, but nine of the members of the
22 board disagreed with Ms. Crawford, correct?

1 A. Yes.

2 Q. Let me, for example, ask you to look at
3 page 12 and at the bottom you will see a reference to
4 Dr. Pisanty's statement?

5 A. Yes.

6 Q. Okay. He says: I have to distance myself
7 energetically, and I see other board members have
8 already done, so from the characterization made by
9 Susan Crawford. Rhetoric aside, the picture she
10 paints is plainly wrong. I do not consider that the
11 board has been swayed by political pressure of any
12 kind. It has acted to the best of its knowledge and
13 capacity within a vigorous discussion within the
14 board and within the community.

15 And if you go to the next page. He says:
16 "The resolution" -- this is the second paragraph
17 beginning on the page, page 13:

18 "The resolution is not based on the
19 judgment of the community support for the application
20 other than noting that this community support has
21 been divided and not consistent for a long time."

22 And that's actually the view of the

1 majority of the board at that meeting, correct?

2 A. Let me read that again. "This resolution
3 is not based on the judgment of the community support
4 for the application other than noting that this
5 community support has been divided and not
6 consistent." I mean, we had clearly demonstrated
7 that community support had only increased
8 substantially during the period between June 1 and
9 March 2007.

10 Q. So you disagree, of course, with the nine
11 members of the board who voted against your
12 application?

13 A. Yes.

14 Q. Thank you.

15 MR. LeVEE: No further questions.

16 MR. ALI: No further questions.

17 JUDGE SCHWEBEL: Well, Mr. Lawley, I would
18 ask do my colleagues have any further questions?

19 JUDGE TEVRIZIAN: I have no further
20 questions.

21 JUDGE PAULSSON: No.

22 JUDGE SCHWEBEL: Well, then Mr. Lawley, I

1 believe we have concluded your questioning. We very
2 much appreciate your testimony. Thank you.

3 THE WITNESS: I am allowed to stay and
4 listen to the other testimony as a representative for
5 ICM?

6 MR. LeVEE: Yes, that's fine.

7 MR. ALI: That's fine.

8 (The witness was excused from the stand.)

9 Whereupon,

10 ELIZABETH ANNE WILLIAMS,
11 took the stand and testified as follows:

12 JUDGE SCHWEBEL: Is she testifying as an
13 expert?

14 MR. DeGRAMONT: Mr. Chairman, Dr. Williams
15 is a fact witness.

16 JUDGE SCHWEBEL: As a fact witness?

17 MR. DeGRAMONT: Yes, sir.

18 JUDGE SCHWEBEL: Ms. Williams, will you
19 affirm that you will state the truth and nothing but
20 the truth?

21 THE WITNESS: I do.

22 JUDGE SCHWEBEL: Thank you so much.

1 DIRECT EXAMINATION

2 BY MR. DeGRAMONT:

3 Q. Good morning, Dr. Williams, would you
4 state your full name for the record?

5 A. Elizabeth Anne Williams.

6 JUDGE SCHWEBEL: Louder please.

7 THE WITNESS: Elizabeth Anne Williams.

8 BY MR. DeGRAMONT:

9 Q. Did you submit the witness statement that
10 you will find behind tab 1 of your witness binder?

11 A. Yes, I did.

12 Q. And do you confirm that it is true and
13 accurate to the best of your knowledge?

14 A. Yes.

15 Q. Is there anything that you would like to
16 add or change?

17 A. No, thank you.

18 Q. Dr. Williams, where do you currently work?

19 A. I live in the United Kingdom.

20 Q. And can you tell us a bit about your
21 educational background?

22 A. Yes. I have a bachelor's degree from the

1 Australia National University of international
2 affairs and political science. I have a master's
3 degree in communication on internet regulation and
4 privacy from the University of Camden, also in
5 Australia, and I have a Ph.D. in information
6 technology and law from the Queens University.

7 JUDGE SCHWEBEL: Speak up a bit more.

8 BY Mr. DeGRAMONT:

9 Q. And what do you do for a living,
10 Dr. Williams?

11 A. I'm an international management
12 consultant.

13 Q. And are you self-employed or do you work
14 for a particular company?

15 A. I had my own company since 1999.

16 Q. And can you identify some of the clients
17 you currently work with or have worked with recently?

18 A. My clients fall into three different
19 categories. Commercial clients like the -- Medical
20 Corporation in Canada, which is an ICANN-credited
21 registrar, Nustar which is an ICANN registry in
22 Virginia. My work is also with academic institutions

1 like the City University in London and I also work
2 for not-for-profit or public sector organizations
3 like the Asian Development Bank and ICANN.

4 Q. Tell us what work you have done for ICANN
5 over the years?

6 A. I have had three separate occasions of
7 large pieces of work with ICANN.

8 Q. And can you just briefly describe them for
9 us?

10 A. Yes. The first major piece was the
11 development of the 2003 application system and
12 process for enabling applicants to submit new top
13 level domain applications. The second piece was
14 chairing the sponsorship and other issues evaluation
15 team. And the third piece was a much longer piece of
16 work in Brussels, leading the policy development
17 process on the new top level domain round for 2010.

18 Q. And the Brussels assignment was after the
19 2004 round?

20 A. Yes. That's correct.

21 Q. Now are you familiar with the
22 December 2003 RFP for the 2004 round?

1 A. Yes, very.

2 Q. Did you write portions of it?

3 A. Yes, I did.

4 Q. Now there was three committees established
5 to review the criteria, could you tell was the three
6 committees were?

7 A. Yes, my group were sponsorship and other
8 issues which is a collection of regulatory and other
9 issues. The second committee evaluated technical
10 elements of the applications, and the third group
11 analyzed financial and business criteria.

12 Q. And you were the chair of the sponsorship
13 and community committees?

14 A. Yes.

15 Q. And I will refer to that just as
16 sponsorship for shorthand?

17 A. Okay.

18 Q. Now in the sponsorship criteria, were
19 there any criteria that related to morality?

20 A. No.

21 Q. Were there any criteria that related to
22 offensive conduct?

1 A. No.

2 Q. Were there any criteria that related to
3 public policy?

4 A. If you took a broad definition of what
5 public policy was, then, yes.

6 Q. Were there any criteria dealing with
7 morality or offensive content anywhere in the RFP?

8 A. No.

9 Q. Was it a surprise that ICM submitted an
10 application for .XXX in the 2004 round?

11 A. No, because in the previous round in 2000
12 they had submitted an application at that time for
13 exactly the same stream.

14 Q. But no criteria for morality or offensive
15 content were added to the RFP for the 2004 round?

16 A. No.

17 Q. How many applications were submitted?

18 A. 10.

19 Q. And how many did your committee pass?

20 A. 2.

21 Q. Would you please take a look at tab 9 of
22 your binder? And that is appendix A from ICANN's

1 opening memorial. Can you briefly explain what it
2 represents?

3 A. Yes, it's a schematic that shows for each
4 of the respective panels which of the applicants
5 passed each of the selection criteria that were
6 contained in each of the different elements.

7 Q. And again, your committee failed 8 of the
8 10. And indeed your committee failed several of the
9 applicants on more grounds than .XXX, is that true?

10 A. Yes, that's true.

11 Q. For example, .Asia failed on six
12 categories?

13 A. Yes.

14 Q. And .Asia went on to receive a registry
15 agreement?

16 A. It did.

17 Q. After your committee failed 8 of the 10
18 applicants, what happened next?

19 A. We submitted our initial report which had
20 been drafted. I was principally responsible as the
21 chair for the drafting of that report. We submitted
22 that report to the ICANN staff, and we were asked if

1 we would accept supplementary questions for each of
2 the applicants which extended that portion of our
3 evaluation.

4 Q. So you essentially re-reviewed the eight
5 applicants that you had failed. Did you change any
6 of your conclusions?

7 A. No, we did not.

8 Q. Now after that, did the board take over
9 the evaluation process?

10 A. In effect, yes. With the insertion of the
11 analysis done by the staff after we had presented the
12 collected reports.

13 Q. Now on June 1, 2005, the board determined
14 that .XXX was ready to go on to commercial and
15 technical negotiations. Are you familiar with that
16 vote?

17 A. Yes, I am.

18 Q. And what did that vote mean to you?

19 A. It signified to me that the evaluation
20 process had completed, and that given that the
21 evaluation process had completed, then the applicants
22 would move forward to commercial and technical term

1 support, establishing a contract.

2 Q. And why did you believe that the
3 evaluation process on the criteria had been
4 determined?

5 A. We had submitted our final report, and our
6 job is over and the remainders -- the remainder of
7 the committees were disbanded and we didn't have
8 anything more to do, so our evaluation process was
9 finished.

10 Q. And the board undertook its own evaluation
11 process and completed that as well?

12 A. In effect, yes.

13 Q. And once the evaluation process was over,
14 what was your understanding as to the scope of the
15 contract negotiations that would ensue?

16 A. Each applicant had been provided with a
17 draft registry agreement as part of the application
18 process and that's exactly -- exactly the same in
19 terms of conditions that were provided with the
20 existing registries, like .COM, and .net and .ORG, so
21 applicants were very familiar with the base terms of
22 the conditions, and negotiations beyond those base

1 terms and conditions were done on a one-by-one basis.

2 Q. And those negotiations were limited to the
3 commercial and technical terms?

4 A. Yes, that's right.

5 Q. What does that mean?

6 A. It did not include, for example, a
7 reanalysis -- sorry, I will speak more clearly. It
8 did not include for example reanalysis for the
9 sponsorship and other issues criteria, because it was
10 not part of the contract.

11 Q. Now are you aware that nearly two years
12 after the June 1st vote on March 30, 2007, the board
13 voted to reject the ICM application?

14 A. Yes.

15 Q. And have you read the March 2007
16 resolution rejecting the application?

17 A. Yes, I have.

18 Q. And does it set forth the proffered
19 reasons for the rejection?

20 A. Yes, it does.

21 Q. Would you turn to tab 11 of your binder,
22 please. And that's appendix E to ICM's memorial.

1 Can you describe briefly what it depicts?

2 A. On the left-hand side of the table it sets
3 out in abbreviated form the selecting criteria that
4 each of the applicants had to apply themselves
5 against. On the ICANN side it sets out the five
6 reasons for ICANN's rejection of the ICM application.

7 Q. And how did the RFP criteria on the left
8 compare with the reasons for rejection on the right?

9 A. They don't, except for part 1, on the
10 ICANN side of the table.

11 Q. So items 2 through 5 had nothing to do
12 with the original RFP criteria?

13 A. That's correct.

14 Q. And did the process set forth in the RFP
15 contemplate that -- strike that.

16 Did the process set forth in the RFP
17 contemplate that new criteria could be added after
18 the criteria had already been satisfied?

19 A. No.

20 Q. Now let's take a look briefly at the
21 sponsorship community issue. And you are familiar
22 with all of the other applications?

1 A. Yes, I am.

2 Q. And based on everything you know about
3 those applications, and the 2004 round, is there any
4 way to fairly apply the sponsorship criteria so that
5 ICM failed and all of the other sTLDs passed?

6 A. I don't believe so.

7 Q. And you explain in detail the reasons for
8 that conclusion within your witness statement, right?

9 A. Exactly.

10 Q. I have nothing further.

11 CROSS-EXAMINATION

12 BY MS. WALLACE:

13 Q. Good morning, members of the panel, Dr.
14 Williams. I am Kate Wallace. We will be asking you
15 some questions this morning. We want to focus just
16 specifically on your involvement in the sponsorship
17 evaluation -- oh, we're going to pass out binders for
18 the panel, which I'm sure you will appreciate.

19 (Off-the-record discussion.)

20 BY MS. WALLACE:

21 Q. Do you have a binder?

22 A. Yes, I do. I just don't have much space.

1 JUDGE SCHWEBEL: Please speak up, both
2 questions and answers, so we can hear you clearly.

3 MS. WALLACE: We will try our best.

4 BY MS. WALLACE:

5 Q. Dr. Williams, the independent evaluation
6 committee conducted a review of the sponsored top
7 level domain in May of 2004, is that right?

8 A. That is correct.

9 Q. And it was obvious from the proof of
10 concept round from 2000 that an application for an
11 adult content stream would be controversial?

12 A. Yes.

13 Q. Now about a month later in June of 2004 as
14 a member of the sponsorship team, you sent
15 supplemental questions to ICM regarding their XXX
16 application.

17 A. Yes, we sent them to all of the
18 applicants.

19 Q. Now did the -- and isn't it true that the
20 questions that were posed by the sponsorship team
21 reflected concerns that you had about ICM's ability
22 to satisfy the sponsorship criteria?

1 A. Yes, as we did for all of them.

2 Q. Why don't we take a look at the
3 supplemental questions that you posed to ICM?

4 This is Exhibit CX in your binder and we
5 are going to try to bring it up on the monitors as
6 well. What is this document, Dr. Williams?

7 A. It's a note from Lillian Shapiro, the
8 project manager, as a covering letter for the
9 supplementary questions that were sent to each of the
10 applicants.

11 Q. Were you involved in drafting this?

12 A. No.

13 Q. Did you review it before it was sent?

14 A. No.

15 Q. Are you familiar with the supplemental
16 questions about the sponsorship team posed?

17 A. Yes.

18 Q. Were you involved in drafting the
19 sponsorship team's questions to ICM?

20 A. Yes, the committee did it together.

21 Q. If we could turn to page 5. The first --
22 question, you asked ICM to explain how the new sTLD

1 would create a new and clearly differentiated space,
2 didn't you?

3 A. That's correct.

4 Q. And how ICM would satisfy needs that would
5 not be readily met through existing TLDs?

6 A. Yes.

7 Q. Isn't it true that these questions
8 reflected the sponsorship team's concerns that
9 the .XXX sTLD did not add new value to the internet
10 domain space?

11 A. It also reflected that other applicants
12 did not do that either.

13 Q. But as to ICM, it was one of your
14 concerns?

15 A. One of my concerns yes.

16 Q. That there was not new value being added
17 to the name space?

18 A. And the nature of what you could say was
19 new value was a very subjective criteria to be asking
20 in the first place, because adding a new value to the
21 internet was a highly subjective personal view that
22 could be interpreted differently by any person who

1 was reading the question.

2 Q. So you asked ICM to clarify how they might
3 be adding new value to the internet?

4 A. That's correct.

5 Q. Now you also asked ICM in question 2, if
6 you could highlight for the panel, "how it would
7 reconcile the various culturally based definitions
8 and what content is included and is not included as
9 part of the defined community," is that right?

10 A. Yes, that is correct.

11 Q. And isn't it true that this question
12 reflected the sponsorship team's concern that dot xxx
13 would not represent a clearly defined community?

14 A. It also represented that other communities
15 were also not able to do that as well.

16 Q. But that was one of your concerns --

17 A. We had the --

18 THE REPORTER: Excuse me, please wait for
19 the question to finish before you begin your answers,
20 because I'm trying to write down what you're saying.

21 THE WITNESS: Sorry.

22 THE REPORTER: Thank you.

1 BY MS. WALLACE:

2 Q. Just to confirm, that was one of the
3 concerns that you had with respect to dot XXX that it
4 would not represent a clearly defined community?

5 A. That's true.

6 Q. And isn't it also true that the
7 sponsorship team was not convinced that the .XXX
8 application had sufficient support outside of the
9 United States?

10 A. The criterion asked for very elastic
11 measures of what support was or was not. That the
12 application came from -- unlike some of the other
13 applications -- came from the United States was an
14 indicator of that differentiating levels of support,
15 and again highly subjective measures that we were
16 asked to analyze.

17 We were not asked to analyze, you would
18 have ten people, 50,000 names, 21 key
19 organizations -- we were not asked to do the matrix
20 like that and many of the applicants did not do that
21 and could not do that, because they were talking
22 about the development a community that was

1 futuristic, and it is not until after the fact that
2 you could analyze whether there was support or not or
3 whether indeed the business was going to be
4 successful.

5 Q. Did you ask ICM to provide letters of
6 support to establish or to show you that it had
7 sufficient support for the community?

8 A. Each of the applicants were asked to
9 provide signed letters of support. For example, with
10 respect to .Asia and .cat, those two particular
11 applicants were asked to provide letters of support
12 from their respective governments.

13 Q. And ICM submitted maybe 20 letters of
14 support?

15 A. I don't remember the precise number --
16 number of letters.

17 Q. But they responded to your request to
18 submit letters of support?

19 A. Yes, they did.

20 Q. And despite these letters didn't the
21 sponsorship team ultimately conclude that there was
22 not broad based support?

1 A. That's correct.

2 Q. Now you posed supplemental questions to
3 each of the applicants, I believe you testified,
4 correct?

5 A. (Nods).

6 Q. And each application was reviewed and
7 assessed separately by the independent evaluation
8 panel, true?

9 A. Yes.

10 Q. So each application was analyzed
11 independent of the other applications?

12 A. The process for evaluating the applicants
13 was not a competition between the applicants. It was
14 an individual process for the applicant to prove that
15 they had met the selection criteria independent of
16 the others.

17 Q. ICM and IFFOR or the sponsoring
18 organizations submitted a joint response to the
19 sponsorship team supplemental questions; is that
20 right?

21 A. That's true.

22 Q. And in July of 2004, the evaluation team

1 submitted its final report to the board of ICANN?

2 A. Yes, I hadn't finished my answer.

3 We had submitted it not to the board but
4 to the staff.

5 Q. Thank you. Why don't we look at that
6 final report that you submitted. Here in
7 Exhibit 110, if you could bring that up. Do you
8 recognize this document?

9 A. Yup. Yes, I do.

10 Q. What is it?

11 A. It's the evaluation report. There is a
12 collation of all of the reports produced finally by
13 Ms. Shapiro who was the project manager.

14 Q. If I can direct your attention to page --
15 of the lengthy document, page 110.

16 JUDGE TEVRIZIAN: 110 of 110?

17 MS. WALLACE: Correct.

18 BY MS. WALLACE:

19 Q. Do you recognize this?

20 A. Yes, thank you.

21 Q. And does this constitute the sponsorship
22 team's final recommendations to ICANN staff about

1 the .XXX sTLD?

2 A. Yes, it does.

3 Q. Did you draft this document?

4 A. We drafted it together. And I had final
5 responsibility for submitting the final report.

6 Q. And the evaluation reports were based both
7 on the applications as well as the responses you
8 received to the supplemental questions, is that
9 right?

10 A. That's correct as well as the conclusion
11 of the analysis of public comments and it also
12 included for the three of us on the committee, all of
13 us had quite detailed experience within the ICANN
14 environment that had gone back many years, and also
15 included the implications of the 2000 round.

16 Q. In the independent evaluation team's
17 view, .XXX did not meet all the selection criteria
18 and had deficiencies that could not be remedied
19 within the applicant's proposed framework, is that
20 right?

21 A. Along with many of the other applicants,
22 yes.

1 Q. Isn't it true that the independent
2 evaluation team recommended that ICANN not consider
3 .XXX any further?

4 A. That's correct.

5 Q. In particular, the sponsorship team which
6 you chaired, determined that ICM did not meet the
7 sponsorship criteria?

8 A. That's correct.

9 Q. The sponsorship team, you found that .XXX
10 did not present a clearly defined community, is that
11 right?

12 A. Correct.

13 Q. And a clearly defined community was a
14 specific requirement of the RFP which I believe you
15 stated in your direct you were responsible for
16 drafting; is that right?

17 A. That's correct. The measurement of a
18 clearly defined community was never determined. So
19 what did it look like, what shape was it, it was a
20 very loose ends, new process and we learned from that
21 experience that subjective terms like "clearly
22 defined" and "adding value" do cause problems for

1 evaluations, and they do cause problems depending on
2 where they come from and what their experience is.

3 Q. Isn't it true if the sponsorship team --
4 if we could direct your attention to the middle of
5 the first paragraph starting with the "extreme
6 variability" -- the sponsorship team concluded that
7 "the extreme variability of definitions of what
8 constitutes the content which defines this community
9 makes it difficult to establish which content and
10 associated persons or services would be in or out of
11 the community." Is that right?

12 A. That's correct.

13 Q. And you recognized that adult-oriented
14 information as described in ICM's application is
15 simply not susceptible to an objective, globally
16 applicable definition, is that right?

17 A. I think we understood that different
18 countries and different national jurisdictions took
19 different views about what adult content was. And
20 they also took different views about how old one
21 ought to be before we ever see it, where that contact
22 be would be available, and under what conditions.

1 Q. Just to be clear, in this application, ICM
2 defined the community to be served by dot XXX as the
3 global responsible online adult entertainment
4 community?

5 A. That's correct.

6 Q. Did any of the other applicants refer to
7 responsible members in their community?

8 A. Each of the members in each of the
9 different applications in the sponsored top level
10 domain realm assume a level of responsibility because
11 of the delegated policy-making process that goes with
12 a sponsored top level domain. So whether one talks
13 about responsible online adult entertainment
14 community, or whether one talks about responsible
15 Catalan community, or whether one talks about a
16 responsible identified community with dot -- or dot
17 Asia, the nature of responsibility was responsibility
18 for policy-making, that enabled a registrant to
19 determine whether they would be allowed to register a
20 name in that domain.

21 Q. Let me rephrase my question a little bit.

22 Did any of the other applicants have the

1 word "responsible" in the actual definition of their
2 proposed community?

3 A. I can't answer you precisely, because
4 having read thousands of pages, I would have to
5 search specifically on the word "responsible."

6 Q. Okay. Now didn't you, Dr. Williams,
7 believe that there was actually no preexisting
8 community for .XXX?

9 A. That's correct.

10 Q. And the proposed community had no shared
11 interests other than putting a certain type of
12 information on the internet in a certain space.

13 A. They had shared interests that were
14 certainly beyond a territorial stake-out. They had
15 shared interests with respect to categorizing content
16 and putting it in a particular place to enable them
17 to exclude users who did not want access to the
18 content; that was somehow a good way of managing
19 access to adult entertainment.

20 They also had very specific ways of
21 thinking about improving the way in which content was
22 paid for; and there was a number of other initiatives

1 that were included in the ICM application that were
2 designed to improve the way in which the industry
3 worked, that was identified by a particular place.
4 And if you are in that place, then you are allowed to
5 be in that place, then there were standards of
6 behavior that were associated with that, which were
7 desirable characteristics of establishing a new way
8 of doing things.

9 Q. If I may, would you look at your witness
10 statement which is in your binder, the first tab,
11 titled Witness Statement. And I will direct you to
12 page 10, paragraph 12.

13 In the last sentence you are
14 discussing .XXX and you state: "There was no
15 preexisting community and no shared interest other
16 than putting a certain set of information on the
17 internet in a certain space." Is that right?

18 A. That's correct.

19 Q. And did you believe that the .XXX
20 community was formed solely for the purpose of
21 applying for the sTLD?

22 A. Like other applicants, yes, indeed.

1 Q. And the IET -- independent evaluation team
2 determined that the interests of ICM's proposed dot
3 XXX community were unclear, is that right?

4 A. That's correct.

5 Q. And you ultimately concluded that the
6 application lacked support from the constituents it
7 intended to represent; is that right?

8 A. Like the other applications; they all
9 suffered from similar deficiencies; and determining
10 levels of support was one of the key pieces of that
11 puzzle.

12 Q. And let's turn back to the evaluation
13 report which is Hearing Exhibit 110. On page 111,
14 subsection D, which is Level of Support From the
15 Community: "The sponsorship team ultimately
16 concluded that there was inadequate evidence both in
17 the application and from the supplementary material
18 of the community even assuming that it is clearly
19 defined, speaks to services that the sponsor intends
20 to offer" -- "proposes to offer."

21 "There was considerable support from North
22 American representatives of the adult entertainment

1 industry. However, virtually no support was
2 available from the rest of the world or from users or
3 other members of this community." Is that what the
4 independent evaluation team concluded?

5 A. Yes, it is.

6 Q. The RFP provided that the key requirement
7 of an sTLD proposal was that it demonstrates broad
8 based support from the community it is intended to
9 represent, is that right?

10 A. That is correct. And the problem with
11 many of the other applications was that many of them
12 failed to provide evidence of support for an
13 application. For example, even though dot cat
14 passed, the major demonstration of support came from
15 Barcelona, where the majority of Catalan speakers
16 happened to reside. That was a major problem for
17 each and every one of the applicants, including for
18 example, .Asia.

19 As an Australian, we don't look like we
20 fit with Asia, but the definition of support for that
21 particular community was "Pan Asia and Asian
22 Pacific," a Pacific regional community into which

1 Australia fits. But hardly any outreach was done,
2 for example, in the dot Asia example, for support
3 from potential users outside of the Chinese speaking
4 diaspora in Hong Kong, Singapore and Taiwan.

5 Q. Finally, Doctor, with respect to the
6 evaluation report, didn't the sponsorship team
7 believe that the proposed dot XXX sTLD did not add
8 new community value to the internet interface, that
9 was in your conclusion?

10 A. Yes, that's correct and not dissimilar to
11 many of the other applicants that failed to engage
12 the imagination of a skeptical group of professionals
13 that were asked to evaluate a futuristic view of what
14 was good value, what was new value, what was
15 innovative and creative.

16 And with respect to the development of
17 that particular selection criteria, it is almost
18 impossible to get a room of people to agree on what
19 new value looks like. Which is why when the
20 committee tried to assess that we had to be very
21 conservative in our view about what new value was.

22 Q. So based on all of these conclusions, that

1 the .XXX community was not clearly defined, that ICM
2 did not have the requisite broad based support,
3 that .XXX did not add new value to the Internet name
4 space, based on all of these conclusions by the
5 sponsorship team, you recommended to the ICANN staff
6 that they not proceed with the .XXX application,
7 right?

8 A. Along with the others that did not pass
9 for the same reasons.

10 Q. And isn't it true, Dr. Williams, that
11 after the board received the independent evaluation
12 team's report, it could have properly rejected ICM's
13 application at that time?

14 A. It could have, but it didn't.

15 Q. Now Dr. Williams, you testified on direct
16 with respect to the June 1, 2005, board meeting.

17 Isn't it true that you were no longer
18 formally involved in the process of evaluating the
19 sTLD applications, after the evaluation team
20 submitted its report in July 2004?

21 A. Yes, but by the first of June 2005 I was
22 on my way to Brussels to take up a new post as a

1 policy development lead on the new top level domain
2 issue. I had remained very involved in what I had
3 been doing as an ICANN follower from 1999. This is a
4 very important piece of work. So even though you are
5 right, the evaluator jobs were all completed, each of
6 the evaluation team's jobs were completed.

7 I certainly maintained my very direct
8 interest, most particularly because I had been
9 working with Nustar, who was doing a .net rebid for
10 the content of registry services between VeriSign and
11 other potential -- on the net.

12 Q. But you weren't present at the June 2005
13 meeting, were you?

14 A. I wasn't a board member.

15 Q. Thank you, I have nothing further.

16 A. Thank you.

17 Mr. DeGRAMONT: Mr. Chairman, I will have
18 a few more questions, may we just take a short break
19 before redirect?

20 JUDGE SCHWEBEL: Yes, let's take a break
21 for 10 minutes, we will resume at 8 minutes after
22 12:00.

1 (Recess 11:58 a.m. - 12:08 p.m.)

2 REDIRECT EXAMINATION

3 BY Mr. DeGRAMONT:

4 Q. Dr. Williams, Ms. Wallace asked you a
5 series of questions about your committee's evaluation
6 of dot XXX; do you recall that?

7 A. Yes.

8 Q. And she didn't ask you any questions about
9 any of the others; is that true?

10 A. That's true.

11 Q. And again not to belabor this point but
12 you failed eight of the ten?

13 A. That's correct.

14 Q. Now Ms. Wallace asked you if the board
15 could have rejected .XXX right after your committee
16 decided it hadn't met the criteria; and you said that
17 that's not what the board did; do you remember that?

18 A. Yes.

19 Q. And in fact, the board undertook to
20 re-evaluate all of the applications that your
21 committee failed.

22 A. In effect that's what happened, yes.

1 Q. In undertaking that re-evaluation, was the
2 board obligated to apply the stated criteria fairly
3 and neutrally?

4 A. Oh, in ICANN's bylaws, mission and core
5 values, they are required to apply all of their
6 policies and fairly and transparently and accurately
7 and in a timely way. One would have thought that
8 that would extend to this differential evaluation
9 process.

10 Q. And in fact on June 1, 2005, the board did
11 find that XXX had satisfied the criteria; is that
12 correct?

13 A. That's correct.

14 Q. Now Ms. Wallace also asked you a series of
15 questions about the reasons your committee had given
16 for failing .XXX.

17 Let's take a look at tab 12 of your
18 binder, which is a list of the 2004 sTLD applicants
19 in the 2004 round. And just to be clear, the
20 applicants that received contracts for dot Asia, dot
21 cat, dot jobs, dot mil, dot mobi, dot tel - telnic
22 and dot travel. Did dot tel-pulver pull out of the

1 competition, do you recall that?

2 A. Yes. That's correct.

3 Q. And dot MOBI may have as well. And dot
4 post is still in --

5 A. Yes, it is, although they had passed.

6 Q. And now looking at the applicants that did
7 receive contracts, let's discuss some of the criteria
8 that Ms. Wallace raised with you. The first was
9 whether there was the creation of new and clearly
10 differentiated space. What does that mean?

11 A. The best way to answer that question is by
12 example. For example, in the dot CAT case, prior
13 to .CAT being established as a new registry there was
14 very little Catalan-specific content. Now several
15 years after, there are 30,000 new pages of
16 Catalan-specific content which addresses the needs of
17 that particular linguistically cultural community.
18 You can't assess that until you have had a chance for
19 the business to actually run.

20 Q. Now by contrast was there other applicants
21 that received registry agreements that you found did
22 not have a new and clearly differentiated space?

1 A. Yes, most. Yes.

2 Q. Can you identify those?

3 A. Dot Asia, dot MOBI, travel.

4 Q. And can you explain why dot Asia didn't
5 add a new and clearly differentiated space?

6 A. The sponsorship and evaluation committee
7 struggled with understanding how the .Asia registry
8 idea could not be manifest in existing .com or .net
9 or .org spaces. It also had difficulty analyzing
10 whether the needs of the particular registrants that
11 had a nexus with Asia could not be served by country
12 codes, for example, dot HK, dot CN for China and dot
13 SG for Singapore and dot AU for Australia. So we at
14 the time thought that it was more likely that those
15 who had a connection to that particular area and
16 culture, which was not at all homogeneous, at all,
17 could be served by existing registries.

18 At the time also, internationalized domain
19 names, which enabled the production of content and
20 scripts other than English script, for example,
21 English or French or Spanish, were not so heavily
22 used, and the dot Asia proposal did not propose

1 having an internationalized domain name method for
2 delivering differentiated content, so it was all
3 going to be English anyway.

4 Q. Ms. Wallace also noted that you found that
5 there was no clearly defined community for .XXX and
6 that there were variable definitions for the
7 community. Did that apply to any of the other sTLDs
8 that ultimately received contracts?

9 A. In the view of the committee, it applied
10 to each of them.

11 Q. And could you give me a couple of
12 examples?

13 A. For example, dot jobs, and dot travel. In
14 the dot jobs case recruitment advertising on the
15 internet at the time was becoming very popular. Now
16 most corporations list their job ads online,
17 Monster.com is a good example of an enormous global
18 web site that enables you to post jobs. LinkedIn is
19 another very good example that didn't exist at the
20 time.

21 So for example, in the JOBS case, we felt
22 that whilst there may well have been a community of

1 human resource management professionals that their
2 needs could have been met in the existing domain name
3 space.

4 Q. And Ms. Wallace also asked you about your
5 finding that .XXX was a self-selecting community.
6 Were any of these other communities self-selecting?

7 A. Indeed, anyone had a choice to register a
8 name wherever they wished. So the selection nature
9 of it was making a proactive decision, that you
10 either wanted to have a duplicate identity in the
11 existing registry or a new identity or a new idea,
12 for example in .CAT.

13 Q. Ms. Wallace also asked you about
14 whether -- whether it was a problem that the sponsor
15 was created solely for the purposes of the sTLD
16 round. For any of these others that received
17 contracts, had the sponsor been created solely for
18 the 2004 round?

19 A. Yes, and the clear distinction is for
20 example, in the jobs and travel case, there were
21 already existing internationally recognized
22 organizations, but they had only come together with

1 the registry services provider to put together the
2 organization, and the idea that they could create a
3 new registry.

4 The cat and post examples were very good
5 examples where they were indeed existing in the
6 international community. In the cat case I talked to
7 a linguistic diaspora located community. In the post
8 case it was the International Postal Union that
9 thought this was a rather good idea, and they would
10 get together and make a dot post space, which hadn't
11 existed before.

12 Q. Now, when the board ultimately rejected
13 ICM's application in March 2007, did the board apply
14 the criteria for rejection in the same way that it
15 had applied it to all of these other sTLDs that were
16 ultimately added to the root?

17 A. No.

18 Mr. DeGRAMONT: No further questions.

19 MS. WALLACE: No questions, Your Honor.

20 JUDGE SCHWEBEL: Thank you so much,
21 Dr. Williams.

22 THE WITNESS: Thank you.

1 (The witness was excused.)

2 JUDGE SCHWEBEL: What next?

3 MR. ALI: Well, Judge Schwebel, if we may
4 take a lunch break now or come back in an hour and a
5 half or two hours, whatever is your pleasure?

6 THE WITNESS: Do you have any sense as to
7 when Ms. Burr will be here?

8 MR. ALI: She will be here straightaway
9 after lunch break or shortly.

10 JUDGE SCHWEBEL: Why don't we resume at
11 2:15.

12 MR. ALI: Thank you.

13 (Recess is taken at 12:18 p.m.)

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1 AFTERNOON SESSION.

2 (2:15 p.m.)

3 MR. ALI: Good afternoon. We have our
4 third witness of the day is Becky Burr.
5 Whereupon,

6 J. BECKWITH BURR,
7 was called as a witness on behalf of the Claimant,
8 and being duly sworn by the Chairman, was examined
9 and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. ALI:

12 Q. Ms. Burr, could you please state your full
13 name for the record.

14 A. Yes, Justina Beckwith Burr.

15 Q. But you go by Becky Burr?

16 A. Yes.

17 Q. Now, you submitted a witness statement in
18 these proceedings, is that right?

19 A. Yes, I have.

20 Q. Any part of your testimony that you would
21 like to amend?

22 A. There is a typo on page 3. At the top of

1 page, 2008 should be 1998.

2 Q. Thank you. We will make sure that is
3 appropriately corrected.

4 A. Thanks.

5 Q. Ms. Burr, could you please describe for
6 the panel your current employment?

7 A. Yes, I'm an employee at Wilmer Cutler
8 Pickering Hale and Dorr.

9 Q. What is your area of practice?

10 A. My practice is internet regulation,
11 electronic commerce, data security and information
12 technology.

13 Q. And when did you join Wilmer?

14 A. I was in the government during the Clinton
15 Administration, and I returned to Wilmer, where I had
16 been an associate, in October of 2000.

17 Q. Could you please describe for the panel
18 the position you held while you were in the
19 government?

20 A. Yes, in 1995, I began working for
21 Christine Barney at the Federal Trade Commission, I
22 was an attorney advisor specializing in competition

1 and consumer protection issues related to information
2 technology in particular. In the course of that job,
3 I began to participate in the Clinton
4 Administration's interagency task force on electronic
5 commerce.

6 In June of 1997, when the global
7 electronic commerce framework was rolled out, I moved
8 into the Department of Commerce to the national
9 telecommunications and information administration,
10 which is the policy -- telecom's policy shop, sort of
11 the telecom side of the Federal Trade Commission. In
12 that position, I was the director of the office of
13 international affairs, the senior internet policy
14 advisor, and I was the member of NTIA serving on the
15 interagency task force on E commerce.

16 Q. Thank you. And have you held any
17 positions involving or relating to ICANN?

18 A. Yes, at NTIA, after the E commerce
19 framework was rolled out, I was responsible for the
20 privatization of the domain name system that was
21 identified as a goal of the administration in the
22 framework paper.

1 In that capacity, I edited both the green
2 paper and the white paper which were policy papers, I
3 think we will probably talk about -- I also was
4 involved in reviewing proposals that came in to
5 create a private sector coordinating body. And after
6 ICANN was formed, I served on the Government Advisory
7 Committee until I left in October of 2007.

8 Q. Thank you. You mentioned in what you just
9 said that you were involved in the initial stages of
10 privatization of the DNS. I think it would be
11 helpful to the panel if you could provide a brief
12 history of how ICANN came into existence?

13 A. Sure. In 1996, '97, when we were
14 beginning to create the framework for global E
15 commerce, the domain name system was operated under
16 two contracts with the U.S. government agencies. One
17 was a contract between the Defense Advanced Research
18 Products Agency and the University of Southern
19 California, where various policy elements of the DNS
20 management function were conducted, at least were run
21 by John Postell, who was sort of a legacy in the
22 community. And more consumer facing aspects of the

1 domain name system, and specifically the big top
2 level domains, com, net, org, gov, were operated
3 under a cooperative agreement between Network
4 Solutions And the National Science Foundation.

5 By 1996, there was a significant amount of
6 commercialization in the internet. The National
7 Science Foundation and DARPA were essentially done,
8 there was not a research project for them anymore.
9 So they were looking to move out of this space. At
10 the same time, the internet had really taken off and
11 Network Solutions, the contractor essentially for the
12 National Science Foundation was -- had gone public,
13 was making an enormous amount of money registering
14 in .com and .org in particular.

15 And for every two-year registration they
16 would charge \$100 and hand \$30 over to the U.S.
17 government for the Intellectual Infrastructure Fund.
18 As that was happening, it was sort of a monopoly --
19 not sort of a monopoly, it was a monopoly, the
20 international community became quite unhappy about
21 the fact that the U.S. government was controlling
22 this. In fact, a publicly traded U.S. company was

1 profiting. I remember once I got a note from a
2 friend of mine in Canada that said, dear Becky, there
3 are X-million Canadians who have registered domain
4 names in .com, the United States government owes
5 Canada X times 30 dollars.

6 There was really a feeling that this was a
7 global resource, but the U.S. was controlling it. At
8 the same time, the ITU, which is a U.N. agency that
9 manages telecommunications standards and the like was
10 in search of a new job, and they decided that the
11 domain name system would be a pretty good place for
12 them to focus.

13 We, on the other hand, in terms of the
14 policy development, were convinced that what had made
15 the internet successful was the very light-handed,
16 non-regulatory, let creativity and innovation manage,
17 and was sort of don't regulate the internet. And we
18 did not want to transition the domain name system
19 coordination function from U.S. contracts to a large
20 bureaucratic organization.

21 So after talking with individuals who were
22 involved in the -- in the domain name system and with

1 governments, our trading partners, we came up with
2 the idea that what we would do is transition the
3 management function for the domain name system to a
4 private not for profit corporation that would have a
5 very light-handed, non-regulatory mandate to
6 coordinate a specified, narrow set of functions.

7 So the first thing that we did was we
8 drafted kind of a straw man proposal that we called a
9 green paper, and it laid out what we thought of as
10 the tech -- the mandate, what the job of this
11 organization would be, which would be to manage the
12 technical parameters of the domain name system, and
13 we set out those principles under which it would
14 operate.

15 First and foremost it was -- the prime
16 directive was to maintain the stability and security
17 of the DNS. Second, it was intended to increase
18 competition in the domain name space where possible.
19 Third, it was intended to make decisions on a sort of
20 bottom-up consensus basis. And fourth, it was
21 intended to be representative of the diversity in the
22 internet community -- and by diversity, I mean both

1 geographic diversity, people from all over the world,
2 but also a functional diversity, so bringing
3 engineers, together with, you know, large brands that
4 rely on the domain name system and sort of every
5 flavor in between together to create this
6 organization.

7 JUDGE SCHWEBEL: When you say "bottom-up",
8 what do you mean by that?

9 THE WITNESS: It was not supposed to be a
10 regulatory agency. So it was supposed to develop
11 ways for managing situations by starting among the
12 people who were affected by it, and developing policy
13 through that process. Bringing policy up to a Board
14 of Directors that had been through a development
15 process.

16 So I will give you an example. One of the
17 first things that -- the first policies that ICANN
18 developed was something called the uniform dispute
19 resolution procedure, which is a system for resolving
20 trademark disputes related to the registration of
21 trademarks.

22 We have laws in the United States, and

1 other countries have laws, but by building into
2 ICANN's contract that everybody who registered a name
3 would be required to abide by a decision of this
4 arbitration panel -- WIPO was one of ICANN's service
5 providers, and WIPO was very involved in developing
6 the process, but that was a process where people who
7 have their trademarks infringed, and the people who
8 want to register trademarks and registries and
9 registrars in the system all got together and sort of
10 developed what would work.

11 JUDGE TEVRIZIAN: Who was the Secretary of
12 Commerce during this time?

13 THE WITNESS: Bill Daley.

14 BY MR. ALI:

15 Q. Now, you hinted at the tensions between
16 the United States government and foreign governments
17 with respect to the domain name system. Could you
18 explain to the panel what the relationship is
19 between, first of all, the United States government
20 and ICANN, and secondly, between foreign governments
21 and ICANN.

22 A. Okay. I just want to elaborate just a

1 little bit more on the tension. Because the United
2 States and most of our -- you know, our EU and Japan
3 and Canada, were all in agreement that we didn't want
4 to move this to the ITU. We wanted it to be a
5 light-handed and different approach.

6 But at the same time, in a very general
7 way, the developing countries were concerned that
8 they were sort of -- they didn't have places at the
9 table in our internet policy development process.
10 And the ITU was able to use that to create an
11 argument that they should be involved.

12 So there was also -- this internet thing
13 was happening really fast. Everybody thinks it's
14 going to change the world and make everybody rich and
15 will solve all the ills of the world, and we are not
16 sitting at the table, and there is no place for us to
17 sit at the table.

18 So it was a complicated set of tensions.
19 And of course, we also had our Congress, who
20 unfortunately were pretty comfortable with this sort
21 of we invented it, we own it. Which was not a happy
22 view for us to have to articulate to our partners

1 internationally.

2 So what we came up with was a system --
3 after we issued the green paper, we got comments back
4 from all over the world, including from governments
5 all over the world, and we digested those comments.
6 And for the most part, they said, we like the
7 mandate, we like the private sector leadership, we
8 like the principles, but don't do anything in the
9 interim, United States government, leave it to that
10 body, don't create top level domains. Let that body
11 create -- come together and let it do its -- make
12 those decisions.

13 So we reissued the green paper in the form
14 of the white paper, which sort of got rid of the U.S.
15 government would do the following things in the
16 meantime. And we essentially called on the private
17 sector to come together to create a private sector
18 organization that would take up this mandate.

19 And over the course of the summer -- in
20 fact, there were meetings all over the world. And at
21 the end of the process the Commerce Department
22 received four proposals for this entity, the

1 not-for-profit entity that we were calling New Co at
2 that time.

3 We reviewed all of those and put them up
4 for comment, and got a lot of comments from them.
5 And in the end, we decided that the one proposal that
6 worked best was the proposal that came in from the
7 University of Southern California, and from Dr. John
8 Postell to create something called the Internet
9 Corporation for Assigning Names and Numbers.

10 So I wrote a letter saying, we are
11 prepared to begin discussions with you to recognize
12 you as that private sector body. We have some
13 concerns based on our review of your proposal and the
14 public comments on that, but we would like to
15 initiate discussions that would lead to a memorandum
16 of understanding by which -- under which this new
17 organization, which is now going to be called ICANN
18 and the United States government would agree to work
19 together for a two-year transition period to develop
20 a process and procedures and a structure for the
21 organization that would enable the transition to
22 private sector development.

1 Separately, there is also a contract with
2 ICANN for a very sort of specific set of technical
3 functions which involve essentially receiving
4 requests or proposals to change the top level domain.
5 The domain name system is hierarchical and there is a
6 server at the top that is sort of the written
7 authority here. And so changing the authoritative
8 root was the way you eventually -- and I'm vastly
9 over-simplifying -- change registrations -- change
10 the way people find them -- find registrations in the
11 DNS.

12 So we -- the United States government had
13 the authority and only the United States government
14 had the authority at that time to approve changes in
15 the top level -- in the authoritative root which was
16 operated by VeriSign under contract with the U.S.
17 The government contracted with ICANN to receive
18 requests to change the root, consider them, provide
19 recommendations back to the U.S. government about
20 whether they should be implemented or not, at which
21 time the U.S. government would, if it agreed, direct
22 VeriSign to implement the changes. And that

1 functions contract is important in this setting
2 because that's the way that new top level domains get
3 into the authoritative root. So -- yes?

4 JUDGE TEVRIZIAN: Isn't there an
5 international treaty with the United States signatory
6 to, to resolve this by contract?

7 THE WITNESS: This is all by contract.
8 There is no international treaty. And one of the
9 concerns was that waiting for the development -- the
10 development and passage of a treaty would, you know,
11 take too long, frankly.

12 So this is not treaty-based whatsoever.
13 It's sort of consent and consensus among the parties
14 both governments and private sector and consistent
15 with sort of the internet model and rough code or
16 running code and rough consensus, was that sort of
17 get it good enough to move forward.

18 In any case, so there are these two
19 contracts between the United States and ICANN. But
20 the more technical one I described is called the IANA
21 functions contract, and the policy oriented contract
22 was a memorandum of understanding initially. So it's

1 called the MOU. Over time it was revised and
2 extended, became the joint project authority -- joint
3 project agreement. And I think as of October 1st
4 will have yet another name, an affirmation of
5 responsibilities -- something like that.

6 In addition, the United States has an
7 agreement with VeriSign under which VeriSign operates
8 the authoritative root and when the U.S. government
9 gets a recommendation from ICANN under the IANA
10 functions contract, it reviews that recommendation,
11 and then passes the -- and directs VeriSign to
12 implement it.

13 BY MR. ALI:

14 Q. Could you briefly describe the elements of
15 the JPA. We have heard a lot about it over the
16 course of yesterday and today, and I would like to
17 make sure the panel understands in substance what the
18 JPA is.

19 A. Well, it has changed over time. So I can
20 give you a high level description. A description of
21 what ICANN is going to bring to the table in this
22 cooperative undertaking and what the government is

1 going to bring to the table in terms of expertise.
2 And then commitment to work together to develop
3 policies and procedures designed to -- and then there
4 are -- serve a specific set of things. Add new top
5 level domains has been in there from the beginning.
6 Create competition at the retail level in this space,
7 create mechanisms for ICANN to be accountable to the
8 community that -- the ICANN community and the
9 internet community. Those kinds of things, but
10 basically they are undertakings about what policies
11 ICANN was going to develop.

12 Q. So early on, you basically said that ICANN
13 recommends and the U.S. government decides.

14 A. With respect to the top level
15 authoritative root, that's correct.

16 Q. So does it really matter what ICANN says
17 at all?

18 A. If the United States government disagreed
19 with what ICANN said, then the United States
20 government has to affirmatively act to make a change.
21 It doesn't have an affirmative -- it doesn't have a
22 role other than as part of the government advisory

1 committee with respect to the policy development, but
2 ultimately those policies are implemented through
3 changes in the authoritative root. So the United
4 States government has a significant role which it has
5 by and large exercised in a fairly hands-off way.

6 But there are significant issues that come
7 up in this. So, for example, if you get a request to
8 change the administrator of the country code top
9 level domain. So dot -- you know, dot I'm going to
10 think of one -- pick any one that you want, dot JP
11 for Japan. If IANA received a request to change the
12 administrator of dot JP which is the country code top
13 level domain for Japan, then IANA reviews it and
14 makes a recommendation.

15 Well, in the case of Japan, it's quite
16 straightforward, but you can imagine there are cases
17 where it's not quite straightforward. And during the
18 Clinton Administration we worked very, very hard to
19 ensure that those decisions were made on purely
20 technical grounds, and that the DNS was never used as
21 an instrument of foreign policy. But that is the
22 flavor that you can get there, and that's also one of

1 the reasons that there's some tension about it.

2 Q. So what you are saying is that the United
3 States is not supposed to under this scheme have a
4 super policy veto?

5 A. That was certainly never our intention.
6 But it has -- effectively if it wanted to exercise
7 that, it does have that.

8 JUDGE SCHWEBEL: Has it ever used that
9 power?

10 THE WITNESS: It did use that power in
11 this case, although not directly and forthrightly.

12 BY MR. ALI:

13 Q. Thank you, Ms. Burr. And how do other
14 governments in the world reflect their views with
15 respect to internet policy?

16 A. Well, the ICANN was intended to be a
17 private sector-led, private sector decision making
18 body. But it was clear that governments did have
19 views on the DNS, and they did have interests in the
20 DNS. They certainly had interests in the country
21 code top level domains, but in security and stability
22 related matters, there needed to be a place for

1 the -- for governments to express their views and
2 have their views considered with all of the
3 seriousness that governments generally deserve.

4 So ICANN was created with a Government
5 Advisory Committee that was a body where governments
6 from around the world come together at the ICANN
7 meetings and they have the ability to get together
8 telephonically in between, to provide advice to ICANN
9 on, in particular, public policy matters related to
10 ICANN's activities.

11 Q. Would I be incorrect in describing the GAC
12 as sort of an internet United Nations?

13 A. Well, that really overstates what the
14 intention was. I mean, keep in mind that we
15 intentionally set this up with a very narrow mission.
16 Because there wasn't an international treaty
17 underpinning this, it was contract and consensus. So
18 an international -- an internet U.N. is something
19 that would operate under a treaty, and have much more
20 extensive responsibilities.

21 There was a little bit of tension because
22 there wasn't any other place that existed for

1 governments to really come together and discuss
2 internet policy issues like spam, like Consumer
3 Protection, like those kinds of things that were
4 outside of ICANN's mission, but certainly where there
5 could be policy views and where international
6 cooperation was valued. The OECD had developed an
7 interest in this and was very useful, but that just
8 re-created the problem of are the developing
9 countries sitting at the table?

10 So there was some frustration that there
11 wasn't a place, and sometimes there has been some
12 effort to bring these issues into ICANN. The United
13 Nations did initiate the World Summit on Information
14 Society which has produced an on-going work stream
15 called the Internet Governance Forum, where these
16 kinds of issues are now being discussed.

17 And the other thing that I would say, is
18 that initially the government -- the government
19 representatives in the GAC were fairly senior as it
20 was starting out. It was something that the
21 governments were paying attention to in what's
22 important. Over time the level of the delegates has

1 varied quite a lot. And some countries like France
2 always send an ambassador. And other countries send
3 a very low level, you know, civil servant. So it's a
4 difficult place to turn into the United Nations of
5 the internet.

6 Q. Thank you. Before I turn to my next area
7 of discussion with Ms. Burr, members of the panel,
8 are there any questions that would you like to
9 address on this particular area of internet history
10 and governance?

11 JUDGE SCHWEBEL: What is the current
12 function of the Internet Governance Forum?

13 THE WITNESS: Well, the Internet
14 Governance Forum is an ongoing and I think -- I would
15 think of it as an OECD with an expanded participation
16 of governments from around the world, not just
17 developed countries, where the governments come
18 together with the private sector.

19 It's a multi-stake holder undertaking
20 where private sector and government and civil society
21 representatives get together and talk about issues of
22 concern globally on the internet. So, actually a

1 week from Friday, the IGF U.S. meeting will take
2 place here in Washington. And in preparation for the
3 next real IGF meeting, there will be panels on
4 security-related issues in the DNS, consumer
5 protection related issues, intellectual property
6 issues, all of it, policy issues that can benefit
7 from discussion.

8 But the concept is, the countries get
9 together, they discuss these things. This makes it
10 able for them to go back home and enact domestic
11 policy that is sensible and coordinated, but there is
12 no international law. There is no global, you
13 know -- it's not creating treaties, it's intended to
14 inform domestic law, national law.

15 JUDGE PAULSSON: I had the impression,
16 something I read in a document here that by the end
17 of this month, there was a more fundamental decision
18 of discussion to be made in terms of the internet
19 governance in terms of looking at the provisional
20 mechanisms -- provisional in quotes, if that had been
21 questioned to see whether it's going to continue on.
22 Did I misunderstand?

1 THE WITNESS: No, you were absolutely
2 correct. The joint project agreement which is the
3 policy agreement between ICANN and the Commerce
4 Department expires at the end of the month. I think
5 it's no secret that there were different views on
6 whether it should be extended, whether it should be
7 expanded, whether it should just be allowed to drift
8 away. And --

9 JUDGE PAULSSON: How would it drift away?

10 THE WITNESS: It just terminates by its
11 terms.

12 JUDGE PAULSSON: What would happen then?

13 THE WITNESS: That's a good question. But
14 I don't think we are going to have to find out.
15 Presumably what would happen is that ICANN would
16 continue to make policies, the IANA functions
17 contract would be in place, but there would not be
18 this sort of oversight role.

19 My understanding, and I think this is
20 widely being discussed by the Commerce Department, is
21 that there will be a new agreement called an
22 affirmation of responsibilities that will cover sort

1 of four areas where ICANN will undertake to do
2 certain work related to accountability and
3 intellectual property protection. And I'm sure that
4 the ICANN folks actually know what's in it as opposed
5 to my acting informed, but not firsthand knowledge.
6 And there will be some international oversight
7 mechanism, so some bodies, review boards set up
8 within ICANN to monitor progress on those. So the
9 bottom line is, it's a different kind of name but
10 it's the same kind of cooperative agreement with
11 respect to policy to be developed.

12 And please feel free to interrupt me. I
13 can get a little in the weeds here.

14 JUDGE SCHWEBEL: Will the developing world
15 acquiesce to the status quo or not?

16 THE WITNESS: Well, I think that a number
17 of countries have sort of signed on. I think that
18 the view of the developing world will depend a great
19 deal on how the United States government handles this
20 transition that's coming up. But there are still
21 countries that very much believe that this should be
22 a U.N. function. And that gets debated every five

1 years at the IT with a great deal of energy and
2 enthusiasm.

3 BY MR. ALI:

4 Q. I just wanted to show the panel that I am
5 going to get down from cyberspace to contractual
6 space that we will go from high level to very
7 detailed discussion of some of these contracts.

8 It was very self-evident to me why ICM
9 retained you, but when were you retained by ICM?

10 A. In December of 2003, and I began providing
11 legal advice in January of 2004.

12 Q. And what were you retained to do?

13 A. I was retained to assist them in
14 developing a proposal for a top level domain .xxx to
15 be submitted in response to an RFP issued by ICANN on
16 the 15th of December of 2003 for new sponsored top
17 level domains.

18 Q. Did you represent any other applicants in
19 the 2004 TLD round?

20 A. I also represented a consortium of
21 companies that proposed the .mobi top level
22 domain. .mobi is now in the root and operating.

1 Q. You didn't think there was a conflict of
2 interest here?

3 A. No, the 2004 round was specifically not a
4 beauty contest. There was no limit on the number of
5 top level domains. After a great deal of discussion,
6 the way ICANN chose to proceed was to establish a set
7 of criteria and say if you meet these criteria and
8 you negotiate a contract there's no limit on the
9 number. So it wasn't a conflict.

10 Q. Thank you.

11 ICM's application like .mobi's application
12 was for an sTLD. Could you explain to the panel what
13 your view of an sTLD is. What is an sTLD?

14 A. Let me start on what it is not. There is
15 a term called generic top level domains. GTLDs.
16 Those are top level domains like com, net, org, is,
17 and info. To the extent that there is policy related
18 to legislation it is very much limited to security
19 and resolution of disputes about registration.

20 And policy for those top level domains is
21 made by ICANN through the bottom-up policy
22 development process. In contrast, in a sponsored top

1 level domain, the needs of a particular community are
2 identified. And the authority to develop policy that
3 fulfill the needs of that sponsored community are
4 delegated down to the sponsoring organization.

5 So, in the case of .mobi, the notion was
6 to have a place where when you hooked up your mobile
7 device and looked at Mapquest.mobi, you could get a
8 map that you could actually read. So they were going
9 to have rules about the formatting for the content.
10 That's essentially what it is. You were going to
11 delegate an additional ability to create rules to
12 accomplish a goal that has been identified.

13 Q. So do you have to have a preexisting
14 community? Let's say like for a trade association?
15 IATA?

16 A. No. No. Just to be clear, there are new
17 rules being developed right now. And so what I'm
18 talking about is the 2000 round and the 2004 round
19 pools.

20 But in 2004, there was no requirement for
21 a trade association. In some cases, you
22 know, .museum brought a lot of museums together. But

1 there was no requirement for a trade association.
2 And in the 2004 round, all of the applications were
3 self-identified communities. Meaning that of course
4 it was voluntary. Every registration in a top level
5 domain is voluntary, and the members of that
6 community identified themselves by registering in a
7 top level domain.

8 Q. Would you have agreed to represent ICM in
9 they were applying for a gTLD?

10 A. No, what interested me in the ICM proposal
11 was the potential to use this space in a
12 self-regulatory way. So if you were just going to
13 have a gTLD for .xxx, there would be no difference
14 than what you have in com anyway. What interested me
15 and this was consistent with a study that the
16 National Research Council had just conducted about
17 the internet adult content industry, was that there
18 was a need for some self-regulation to address
19 concerns that responsible members of the industry
20 had, and that parents and teachers also had, to make
21 it possible for people who wanted to avoid that kind
22 of content to avoid it, and people who wanted to get

1 to it, to get to it.

2 But essentially sort of user empowerment
3 tools. I was very interested in that aspect of this
4 application. I would not have supported -- I
5 wouldn't -- I basically said at the time it would be
6 a waste of my time and their money to have me
7 represent them in that.

8 Q. In that meaning for a gTLD?

9 A. For a gTLD.

10 Q. Okay. Well, let's turn to the 2004 very
11 specifically. Are you familiar with the RFP issued
12 for the 2004 round?

13 A. Yes I am.

14 Q. Could you summarize for the panel the
15 different criteria that had to be satisfied in order
16 for an applicant to be accepted?

17 A. Yes. The going-in conception was we are
18 going to have articulated criteria for eligibility.
19 And those criteria are going to relate to technical
20 issues, is the applicant able to deliver the services
21 that they say in a way that is stable and that
22 doesn't put registrants or the domain name system at

1 risk. Financial and business. Is there a business
2 plan, is it sufficiently funded? Do the applicants
3 have the requisite business skill sets.

4 And then the third was a set of criteria
5 called sponsorship. And that's a big term. But it
6 kind of breaks down into the following things: Can
7 you identify a community -- a community -- a specific
8 community to be served that has needs that are not
9 being met by the current DNS. Do -- are you going to
10 bring some new value and diversity to the DNS space.

11 So a generic top level domain .xxx
12 wouldn't -- as I said, wouldn't be different from
13 .com. Do you have the -- are you able to demonstrate
14 the support of the community you propose to serve,
15 and have you put together a policy making process
16 that makes sense?

17 And finally, what steps are you going to
18 take to protect the rights of others? To prevent
19 abusive registrations, trademark violations, to
20 ensure that registrants in the domain are -- belong
21 in that -- are part of that community and to ensure
22 that you were getting accurate information so that

1 individuals who need to protect their rights can get
2 in contact with the registrant.

3 Q. With respect to the sponsorship or
4 community value criteria, did they contain any
5 content-based restrictions?

6 A. No.

7 Q. What was your understanding of the
8 evaluation process for the 2004 round?

9 A. Well, the evaluation process was laid out
10 from the beginning. In fact, in the board resolution
11 authorizing ICANN staff to finish the RFP. And laid
12 out in the RFP itself. So essentially a two-step
13 process.

14 First, you submitted an application and
15 that application was evaluated against the criteria
16 that had been published and adopted by the board with
17 input from the ICANN community as a whole. Once a
18 determination was made about the -- about whether you
19 satisfied those criteria, if you satisfied those
20 criteria, you would move into contract or what were
21 called commercial and technical negotiations.
22 Basically contract negotiations with ICANN. So there

1 are two steps. First, does it meet the criteria,
2 second, can you negotiate a contract. And those were
3 the two steps.

4 Q. Thank you.

5 Now I will put it to you that ICANN has
6 gone to great lengths to confuse ICM's position on
7 this subject. So I'm going to ask you the following
8 question: Did the board's determination on June 1,
9 2005, the board's resolution, that ICM had satisfied
10 the RFP criteria mean that .xxx was going into the
11 root?

12 A. No, it meant that the first step of the
13 process had been completed. The board had determined
14 that ICM's application met the criteria. There was a
15 second step that also had to be satisfied which was
16 negotiation of a contract.

17 Q. Over the technical and commercial terms?

18 A. Yes.

19 Q. What does that mean, negotiation of a
20 commercial and technical terms. We have talked a lot
21 about that. I would like you to explain it to the
22 panel, please?

1 A. It is a standard template and again it may
2 be changing. But in the 2004 round, the contract for
3 commercial and technical terms involved three
4 sections. The first section is a kind of standard
5 business and legal terms. How much is the registry
6 operator going to pay ICANN, what's the term of the
7 agreement, what are grounds for termination, what are
8 the choices of law, what's the dispute resolution
9 mechanism.

10 The second component was a set of standard
11 technical appendices that related to functional and
12 technical specifications, the availability of data
13 about the registry, escrow of registry data, so in
14 the event of a failed registry, a replacement
15 operator could be secured and moved in smoothly.

16 JUDGE PAULSSON: What's to negotiate?

17 THE WITNESS: So far we only negotiated
18 the commercial terms, price.

19 JUDGE PAULSSON: What's the second.

20 THE WITNESS: Nothing.

21 JUDGE PAULSSON: It is what it is.

22 THE WITNESS: Yes, other than these are

1 ICANN supplied and not negotiable -- we didn't have
2 any desire to negotiate them but --

3 JUDGE PAULSSON: So why mess with part?

4 THE WITNESS: It's part of the contract,
5 so it goes into it so they are obligated to comply
6 with it.

7 The third part of the contract is a set of
8 appendices called the appendix S. I imagine that's
9 because it's an sTLD, but I actually don't know where
10 the S comes from. And that is a set of appendices
11 that relate to the specific sponsored TLD proposed.
12 So each one of them has a description of the
13 sponsored community. Each one of them has something
14 called a charter that says "here's the obligation and
15 duty that the registry operator and the sponsoring
16 organization owe to the sponsored community." An
17 appendix on delegated authority. Here are the kinds
18 of authority that ICANN has delegated for policy.

19 What are your specific plans for building
20 the registry, testing it, and launching it. What are
21 your IT protection plans and the like and how are you
22 going to pick your registrars.

1 Now, again, that was laid out in terms of
2 what the specific sections were, and they were filled
3 in by importing -- you know, text that had been
4 provided to ICANN in the registry application in
5 supporting documents throughout the process.

6 BY MR. ALI:

7 Q. And you handled the negotiations for ICM?

8 A. Yes, I did.

9 Q. And who handled negotiations on behalf of
10 ICANN?

11 A. John Jeffrey, the General Counsel, and Esme
12 Smith, then at Jones Day, outside counsel for ICANN.

13 Q. And you also negotiate the .mobi
14 agreement?

15 A. That's correct.

16 Q. And the ICANN side?

17 A. John Jeffrey, Esme Smith, and also Paul
18 Twomey was also involved in that.

19 Q. During the course of the negotiations of
20 the ICM agreement, what did Mr. Jeffrey say to you
21 about the time frame during which all of this would
22 happen?

1 A. Well, I had just -- we had just finished
2 negotiating the .mobi agreement. So it was very
3 clear to me what was negotiable and what wasn't. It
4 also occurred to me that we had sort of reached the
5 limits of the negotiation. So my expectation was
6 that it would be pretty straightforward having just
7 negotiated these.

8 I sent John Jeffrey and Kurt Pritz a draft
9 contract registry agreement on the 12th of June of
10 2005, which was 12 days after the board voted that
11 the criteria had been met, and I got an e-mail back
12 saying, thanks, we will need a couple of days to take
13 a look, but we will circle back. My expectation is
14 that this will be a straightforward negotiation which
15 certainly comported with my expectations.

16 Q. Thank you. Before we proceed any further,
17 given that we are going to be discussing these
18 various drafts of the registry agreements, I would
19 like to ask -- excuse me -- the panel to turn to what
20 was tab 19 in the opening binder, where you will see
21 a chart that looks like the one that I am holding up,
22 and we have some extra copies that Ms. Hacque can

1 hand out, just to make it easy, if that's all right?

2 A. We are looking at this?

3 Q. Yes. We are looking at this chart. Do
4 you recognize this chart?

5 A. Yes, I do.

6 Q. Did you prepare it?

7 A. I did.

8 Q. In what context?

9 A. As I was preparing to appear before the
10 panel today, I wanted to go back through the
11 contract's negotiations and make sure that I had, you
12 know, was accurately remembering what was decided and
13 negotiated, each point in the process.

14 Q. Okay. Thank you. You have in the
15 left-hand most side a gray column?

16 A. Yes.

17 Q. Could you please briefly describe what it
18 is that you included in the gray column?

19 A. Okay. I talked about the three components
20 of the contract. First, the commercial and legal
21 terms in which the only negotiable pieces of that
22 were the fee arrangement. Then the ICANN appendices

1 1 through 7. Then the appendix S, that had 7 and in
2 the case of ICM 8 subcomponents. Those, because
3 that's where the negotiation was, are broken out by
4 individual piece.

5 Q. And you testified earlier that very soon
6 after the June 1st, 2005 vote, you sent Mr. Jeffrey a
7 draft of the agreement, and that he circled back to
8 you and there was an agreed draft?

9 A. No. What happened was I sent it to him
10 and he said okay, we will look it over and get back
11 to you. He and I met in Luxembourg at the next
12 meeting. We talked through some issues. I went --
13 we both went back home, and brought Esme Smith into
14 negotiations and agreed on a draft on the first of
15 August.

16 Q. And was this draft posted?

17 A. Yes, it was posted on the ICANN web site
18 on the 9th of August.

19 Q. What does posting mean exactly?

20 A. Well, ICANN's rules require it to post
21 for -- so that everybody knows what's going on,
22 posting agreements or actions that ICANN is going to

1 take. At the time, ICANN did not have specific
2 procedures about how much time needed to be posted.
3 But it was basically notice that at some point the
4 board was going to be considering this.

5 Q. So looking at the first column here, white
6 column that says 01 August 2005, posted 09
7 August 2005. This was the first agreed draft?

8 A. Yes, that's correct.

9 Q. And why don't we use that one as a
10 baseline. If you could briefly just establish that
11 baseline for the panel as to what was negotiated and
12 agreed.

13 A. Okay. We agreed on the fixed fee but per
14 registration or transaction fee, and a minimum
15 payment guarantee. We accepted all of the standard
16 provisions. And then we provided appendix S.
17 Appendix S-1 is by charter, and it basically says
18 here is what the registry operator is going to do in
19 the manner laid out in the application and this
20 agreement for the sponsored community.

21 Appendix S-2 is the delegated authority.
22 Here is the authority that ICANN is delegating to the

1 sponsored organization.

2 Appendix S-3 is the description of the
3 sponsored TLD community which is sort of the heart
4 and soul of this set of documents.

5 Appendix 4 is a start-up plan in which ICM
6 said, here are the steps we are going to take to
7 build, test, and launch the top level domain.

8 Appendix S-5, registrar selection. Here's
9 how we are going to decide which ICANN accredited
10 registrars are distributors.

11 Here's what we are going to do about names
12 and addresses and contact information for
13 registrants.

14 And then there was an appendix S-7 which
15 was additional provisions. And in the case of this
16 agreement, on the 1st of August, it had two very
17 general comments. 1 that was for ICANN, you required
18 ICM to demonstrate that it was different from what's
19 out there on the internet when we applied. And when
20 you put in new top level domains, please keep in mind
21 that you made that requirement. That was essentially
22 what was in it.

1 Q. So, negotiated with Mr. Jeffrey?

2 A. That's correct.

3 Q. Agreed draft with Mr. Jeffrey?

4 A. That's correct.

5 Q. Posted on ICANN site on August 9th?

6 A. Correct.

7 Q. Why doesn't this get signed?

8 A. It was scheduled to be discussed at the
9 ICANN board meeting on August 15th.

10 On August 12th, I got an emergency call
11 from Mr. Jeffrey saying that ICANN had received a
12 letter from Michael Gallagher, the Assistant
13 Secretary at the Department of Commerce saying that
14 the Commerce Department had received a lot of letters
15 about the xxx top level domain, and requesting ICANN
16 to defer consideration of .xxx until anybody who had
17 comments had an opportunity to make those comments
18 and a proper process could be had.

19 Q. Now, the next column over, the one that
20 says 19th of March 2006. Why do we have such a long
21 period of time between August 1, 2005, and 19
22 March 2006?

1 A. So when Mr. Jeffrey called me on
2 August 12th, I -- as you could imagine, it had
3 already been over a year since the application was
4 submitted, and I was dismayed and my client was very
5 dismayed. And I asked John if he could get Paul
6 Twomey, the CEO, to call me. Paul called me later.
7 I was on vacation and it was very dramatic. All of
8 my family was around.

9 And Paul and I had talked about what had
10 happened. Paul told me that he was extremely
11 concerned about how this unilateral intervention of
12 the U.S. government was going to be perceived by the
13 board and by the international community, given the
14 tensions that were in there. Thank you very much.
15 That he had been given a heads-up from NTIA that this
16 letter was coming. He had asked NTIA not to send
17 this letter directly, but to work through the
18 Government Advisory Committee, and that when the
19 NTIA, the Department of Commerce had declined to do
20 that, he had reached out to the chairman of the
21 Government Advisory Committee, Sharil Tarmizi, and
22 had asked him to provide a letter describing sort of

1 a more generalized concern, so that when the U.S.
2 government's letter appeared, it would not appear to
3 be tied to nothing that the GAC was doing. It would
4 sort of be a follow-up to the letter that Sharil had
5 provided.

6 I just want to say -- it was incredibly --
7 it was clear to everybody it was an incredibly
8 awkward situation. Because the U.S. government
9 had -- did have the power to stop that. It had the
10 power to prevent this from going forward. It had the
11 power to do other things to ICANN. It was a -- it
12 was very awkward for ICANN to be caught in the middle
13 of sort of the United States government saying "don't
14 go forward." And the rest of the international
15 community saying, "don't be controlled by the U.S.
16 government."

17 And you know, Paul and I talked through
18 that at great length. He told me on our call that in
19 fact the Commerce Department had threatened not to
20 put xxx in the root. In other words, not to tell
21 VeriSign to put it in the root if ICANN proceeded at
22 that time. And after lengthy discussions, this was a

1 problem for all of us. We were kind of all together
2 in this uncomfortable situation.

3 We decided that the best way to handle
4 this was for ICM to ask for a delay. To ask ICANN to
5 defer consideration so that the board wouldn't be in
6 this, do we look like we are following the U.S.
7 government's rules or do we say no to the U.S.
8 government. And so we wrote a letter on the 15th of
9 August asking for the ICANN board to defer
10 consideration for a month so that others who had
11 concerns as identified by the U.S. government could
12 get those concerns in.

13 So the ICANN board deferred that. And
14 this was all couched in the language of, the GAC's --
15 the chairman Tarmizi's letter and the GAC concerns
16 because Chairman Tarmizi provided his letter on the
17 12th. That letter was posted. And it remained there
18 alone. And then on the 15th, at the same time ICM
19 asked for a deferral, the letter from the U.S.
20 government dated the 11th of August was then posted
21 on the ICANN web site as well.

22 Q. So four days after it had been sent?

1 A. Yes.

2 Q. And likely received.

3 A. It was dated the 11th. John Jeffrey read
4 it to me on the 12th and it was stamped received on
5 the 15th and posted that day.

6 Q. Okay. So why not just stop. If that's
7 what you have been told by Mr. Twomey that the U.S.
8 is opposed to this, why not just stop. Why go
9 forward and then have the 19th March 2006 round?

10 A. Well, ICM certainly did not agree to cease
11 its application. And it had completed the first step
12 of the process. The U.S. government had said we want
13 more process and Mr. Twomey said, we just need to,
14 you know, postpone this for a while, and then we will
15 get on with it. We will move forward.

16 Q. So why didn't the 19th of March 2006 draft
17 then get executed?

18 A. So, what happens, the board met on
19 September 15th and discussed the xxx contract.

20 Q. September 15th, when?

21 A. 2005. A month after the August meeting.
22 It may have been the 16th. I'm getting the 15th and

1 16ths -- but about a month after the first time it
2 was scheduled. John called me after the board
3 meeting and said, good discussion, you know, the
4 board was -- had two concerns. The first was they're
5 comfortable with Stuart Lawley, but they are
6 uncomfortable about what would happen if there was a
7 change of controls, what if Larry Flynt bought out
8 ICM.

9 So we said, well, we can address that by
10 providing some advanced notice of change of control
11 and giving ICANN the opportunity to determine whether
12 that creates enforcement problems for them. The
13 other thing that the board asked for was a more
14 specific articulation of the commitment of ICM's
15 obligation to fulfill its commitments that were in
16 the application and various documents submitted in
17 the process of that, and ICM was quite happy to
18 provide that since it intended to be obligated.

19 I drafted those provisions for John's
20 review and sent them off on the 27th of September.
21 Got an acknowledging e-mail saying he would get back
22 to me if there were questions and then we were sort

1 of overtaken by events, and I was never able to get
2 on the schedule to discuss the specific terms that we
3 had proposed until March when we were preparing for
4 the Wellington meeting, where the expectation --
5 ICM's expectation, but also expectation of the press
6 in Wellington, having, you know, discussed this with
7 Dr. Twomey and Dr. Cerf was the xxx contract was
8 going to be considered there.

9 John and I spoke and he said, yeah, we got
10 to do this, but I am really busy getting ready for
11 Wellington, will you talk to Esme Smith directly.

12 The Jones Day counsel and I worked through the
13 changes that I had proposed in September. We added
14 one other change, which was when we met with the
15 Government Advisory Committee in the interim they had
16 expressed a concern about names of cultural and
17 religious significance. And they didn't want those
18 names to be taken and used in the .xxx top level
19 domain.

20 So Mr. Lawley said, fine, that's no
21 problem, we will sort of before we even launch
22 anything, we will give opportunities for governments

1 to identify any name of cultural or religious
2 significance that they don't want to be registered,
3 and we will put it on a reserve list, and those names
4 won't be available, it will be available free of
5 charge to the government. So those were the three
6 provisions that Esme and I worked through. We agreed
7 on them. She said, okay, great, we need to get this
8 to John and then we will get it out. She said I need
9 to get this to John, and I will try to get his
10 attention in the next few days.

11 That was on the 19th. We all traveled to
12 Wellington, New Zealand, this was in March 2006 for
13 the ICANN meeting in Wellington. Where our
14 expectation -- public expectation and press -- you
15 know, press mentions were that this was going to be
16 up for consideration.

17 The contract wasn't posted. I don't know
18 why. I suspect that John was, as he said, busy
19 getting ready for the Wellington meeting, and didn't
20 have the bandwidth to sort of get back to me on this.

21 Q. Just so I can be clear here, did the 19
22 March version of the contract get considered in

1 Wellington or the 1st of August 2005 version get
2 considered?

3 A. Actually, what happened is we got to
4 Wellington. The Commerce Department had intervened
5 yet again with another letter saying, by the way, ICM
6 promised all of these things, all of these policy
7 commitments, made all these policy commitments, but
8 we don't see where they are listed in the contract.
9 And we think that before you sign a contract with ICM
10 you should make sure that all of these commitments
11 are in the contract, so you can enforce them.

12 Of course, the 19th of March contract did
13 address those things by saying we will fulfill all
14 these policy commitments, but it wasn't posted. The
15 Government Advisory Committee didn't know that we had
16 been addressing those issues. In fact they were told
17 when they commented on it to consider 1st of August
18 provision. So based on that, the 1st of August of
19 2005, the contract that had been posted on
20 August 9th.

21 And so the -- in Wellington, the
22 Government Advisory Committee, taking into

1 consideration the letter that the United States
2 government had said about you promised all of these
3 things, they are not specifically referenced in the
4 agreement, issued a communique saying, with respect
5 to xxx, first, and this is not really the advice, but
6 they complained and said you, ICANN, didn't answer
7 these questions.

8 Q. ICANN or ICM?

9 A. No, ICANN didn't answer our questions that
10 we asked before. Notwithstanding that, we want to
11 advise you that it is important to the Government
12 Advisory Committee that if you go forward with the
13 ICM proposal that you ensure that there are
14 enforceable contract terms so that you can hold ICM's
15 feet to the fire to make sure it makes good on those
16 promises that it has made, and that it ended with an
17 again, not advice but a note. Notwithstanding
18 anything we said about this, a couple of governments
19 really hate this proposal.

20 Q. Okay. But is that what you are referring
21 to as the Wellington communique?

22 A. Yes, that's the Wellington communique.

1 Q. Let's take a look at the Wellington
2 communicate, if we might. This is hearing
3 Exhibit 181.

4 Now, we have heard much about the
5 Wellington communicate, this is dated 28 March 2006
6 and this is the mechanism through which the GAC
7 provides its advice?

8 A. Yes.

9 Q. Okay. Now, what happened or could you
10 perhaps describe circumstances that led to the 18
11 April 2006 draft?

12 A. Okay. So in Wellington, the Government
13 Advisory Committee drafted its communicate and
14 delivered its communicate in the public forum in
15 Wellington, and it said essentially we met with ICM
16 in November, and ICM described the commitments that
17 it had undertaken with respect to various issues in
18 the -- in connection with the registry agreement, and
19 to our knowledge, these undertakings have not been
20 included as ICM obligations in the proposed xxx
21 registry agreement negotiated with ICANN.

22 And then it lists the -- the -- the

1 various commitments that, um, the Government Advisory
2 Committee -- it's not an exhaustive list but the
3 commitments that they had noted that ICM had
4 discussed with them in Vancouver.

5 I took that -- this communique and I also
6 took the letter from the Department of Commerce, and
7 I went through the 19th of March agreement and I
8 added -- I didn't change anything substantively, but
9 I added a lot of text and specificity. And the point
10 was to enable ICANN to point to the contract and say,
11 okay, Government Advisory Committee, you advised us
12 to do this. Here's where we did it in the contract.
13 And go down the line and cover every point in the GAC
14 communique and also every point in the Department of
15 Commerce letter.

16 At the end of the Wellington meeting, John
17 Jeffrey and I met together and went over that
18 agreement, walked through it. Remember we were not
19 changing the substance. ICM from the beginning was
20 committed to doing what it had said it would do. So
21 this was a more fulsome articulation. I did not get
22 comments back from John. We had, you know, some

1 exchanges during the next couple of days, once we
2 returned home and the contract that I had provided
3 and walked through in Wellington with some small nits
4 being corrected along the way was posted by ICANN on
5 the 18th of April as an ICM proposal.

6 Q. So we have an August 1st version of the
7 contract, doesn't get signed because of the
8 controversy. Governments are going to be given an
9 opportunity to comment. Governments do comment from
10 what you just said in the Wellington communique.

11 A. Correct.

12 Q. Okay. Why doesn't the April 18, 2006
13 version get signed?

14 A. I knew going into the board meeting on the
15 18th, John told me what he thought would happen and
16 what the board had liked to do was to take a board
17 meeting to discuss the contract and then move, act on
18 it at the next meeting. So when the board met on the
19 18th of April, I did not expect them to vote on it.
20 There was no -- there were no votes so there were no
21 voting transcripts or resolutions related to it
22 published and the minutes of the April 18th meeting

1 weren't posted at the time, but I spoke to John, who
2 said that there had been a good discussion, but
3 Chairman Tarmizi had participated in the discussion
4 actively, and there were no particular issues. So
5 the contract was posted for 21 days for public
6 comment and scheduled for board consideration on the
7 10th of May in its board call on that day.

8 On that day, the board voted to reject the
9 contract. And the voting transcript was published,
10 and it was clear to me that what had happened was the
11 government of the United Kingdom, the GAC
12 representative from the U.K. had sent a letter to
13 Dr. Twomey, I believe, saying, however you decide to
14 proceed, please make sure that there are enforceable
15 provisions in the contract so that ICM has to do what
16 it says, or if ICM doesn't do what it says, so that
17 you can take steps to make them do what it says. And
18 please have -- make sure that they are willing to
19 interface with our hotlines. And the hotlines in all
20 of these countries are private sector organizations
21 that receive complaints about child pornography,
22 investigate it, and interact with law enforcement to

1 have it dealt with.

2 Sometimes law enforcement doesn't want it
3 taken down right away they want to investigate it or
4 whatever. But there are these hotlines that are
5 created so the U.K. government communicated the U.K.
6 hotline and said we sure hope that ICM will interact
7 with these people which of course ICM was committed
8 to doing.

9 I was obviously not at the board meeting,
10 so I don't want anybody to be mistaken about that.
11 But in reading the voting transcript, it became
12 apparent to me that Dr. Twomey had described the
13 letter from the U.K. in the following terms, this
14 letter says U.K. government expects that if you
15 don't -- that if ICM doesn't enforce the obligations
16 that it imposes on registrant, that you, ICANN, can
17 enforce those obligations on registrants.

18 That is not what the letter said, but you
19 can imagine that what was described was ICM has
20 agreed to enforce pornography laws of all the
21 countries in the world and if ICM fails to do that,
22 then the governments are going to be looking to you,

1 ICANN, to do that. The board members, most of whom
2 are not lawyers, were understandably concerned about
3 that. It would have been -- it was a completely
4 reasonable concern, if that had been what the U.K.
5 government letter said, or what the U.K. government
6 letter meant. That was not the case.

7 And the lawyers on the board knew that and
8 voted in favor of passing the contract. But
9 one-by-one the members of the board voted no on the
10 basis that the contract didn't contain the guarantees
11 that they were expecting. Yes, sir?

12 JUDGE TEVRIZIAN: I have a question. You
13 were the first negotiator for ICM with regard to the
14 -- I will use the word "alleged" contract. Was there
15 ever a meeting of the minds between ICM and ICANN as
16 to whether or not you did in fact have a contract?

17 THE WITNESS: Well, we didn't have a
18 contract that -- the contract had -- the proposed
19 contract -- it was definitely a proposed contract had
20 to go back to the board for the board's approval and
21 authorizing the staff to execute it. I'm sorry if
22 you misinterpreted what I'm saying.

1 What I'm saying is that we negotiated with
2 staff and reached agreement on the 1st of August. I
3 negotiated with outside counsel, and I'm not
4 representing that John Jeffrey, the General Counsel,
5 affirmatively signed off on that. I met with John
6 and walked him through the terms of the next contract
7 in Wellington. I'm not representing and I don't mean
8 to say that he affirmatively agreed to that. But we
9 walked through all of it, and so, there was no
10 contract until the board agreed that the staff could
11 sign a contract. And I'm sorry if that was unclear.

12 JUDGE PAULSSON: When you said one-by-one.
13 I think you meant the word yes, because yes meant no.

14 THE WITNESS: That was the next time they
15 vote, that is in Lisbon. But in the board call on
16 the 10th of May, they voted no, and in the voting
17 transcript they said this doesn't contain the
18 structural guarantees that we were expecting. The
19 one exception to that, to be fair, was that
20 Dr. Twomey said that he had always had doubts about
21 whether this was a sponsored top level domain after
22 all. And he voted against that.

1 Now, in the press conference following
2 that vote, Dr. Twomey said, the majority of the board
3 thought that the sponsorship criteria had been met,
4 the problem was with the contract. But I want to be
5 clear that Dr. Twomey on the 10th of May did
6 articulate in his voting record, concern about
7 sponsorship.

8 BY MR. ALI:

9 Q. Okay. But at this point in time after the
10 Wellington communique had been reflected in the
11 contract and this had gone to the board and it got
12 rejected, during this time period, when did you get a
13 sense you were being jerked around?

14 A. Well, frankly --

15 Q. Let me rephrase. Strike that.

16 Did you get the feeling that you were
17 being jerked around?

18 A. Well, certainly when the U.S. government
19 letter came on the eve of the Wellington meeting and
20 the GAC was not told that in fact the board had
21 raised those issues with us and we had endeavored to
22 address them. Then when we didn't see the minutes of

1 the April 18th meeting until after the vote on the
2 10th.

3 But the interpretation, frankly, of the
4 U.K. government's letter was astonishing. And it was
5 clear and I had pointed out to ICANN that there was a
6 lot going on in Australia, partisan politics related
7 to internet filtering, so by the 10th of May when the
8 board voted no, I sort of felt like something was up
9 and we were not being dealt with candidly.

10 Q. So then what happened?

11 A. ICM promptly filed a request for
12 reconsideration which is a procedure in the ICANN
13 bylaws where somebody affected by the board's action
14 can request reconsideration on very specific grounds.
15 The reconsideration committee requested some
16 extensions. There is a timeline for that which ICM
17 granted. In the meanwhile, I started thinking about
18 a petition for independent review because I certainly
19 was not at all sanguine that reconsideration would
20 have an outcome that was appropriate. And at the end
21 of October, the board met at a retreat, and I got a
22 call from the General Counsel saying -- and he was

1 very careful with his words, and I do not remember
2 his exact words. So I want to make sure that
3 everyone's clear. I am trying to be as faithfully
4 representing John's words to me as I can.

5 He said the reconsideration committee has
6 asked me to tell you that it will -- would not be
7 inappropriate for ICM to submit a new contract. I
8 took that to mean, and this is my interpretation that
9 if we withdrew -- that they weren't coming down to a
10 decision and they didn't want to have to make a
11 pronouncement that the board should reconsider. And
12 since the outcome of that was going to be a new
13 contract, we could just get -- make it easier, issue
14 a new contract. I said to John, if we withdraw and
15 submit a new contract, what happens? And we agreed
16 that the contract -- the substantive contract would
17 be considered expeditiously.

18 Q. And this was the draft that came out on
19 the 5th of January 2007?

20 A. Yes.

21 Q. What was different from the 5th of
22 January 2007 draft with the April 2006 draft?

1 A. Again, substantively there was no
2 difference, except that we rearranged things. We
3 took all the commitments that had been scattered
4 through various parts of appendix S and we created a
5 new appendix S-8 that included a comprehensive
6 listing of ICM's policy commitments.

7 Now, it's important for what happens next
8 to understand how that was put together. I went
9 through every document that had been identified as a
10 relevant document and I made a list. And this
11 document in the application ICM committed to do X, Y,
12 and Z. And in this ICM committed to do X, Y, and Z.
13 Obviously there was overlap because they were
14 committing to the do the same thing. I provided that
15 list to ICANN's outside counsel and ICANN's outside
16 counsel took that list and created sort of appendix
17 8.

18 It was -- we were working quickly and it
19 was over the Christmas holidays and Esme was probably
20 spending way more time than her family would have
21 liked in the office during Christmas week. But
22 because of the way I had compiled the list and basis

1 for it, it was repetitive, but that was what got
2 posted. Again, it's much longer, much more detailed
3 but we have incorporated by reference the documents
4 that contained those policy commitments in a previous
5 draft, so there was no substantive commitments about
6 that commitment.

7 Q. The idea was to take every single concern
8 that had ever been expressed by ICANN, by GAC, and
9 say here you go, we are going to give you a
10 comprehensive agreement?

11 A. Let's be clear here. What the GAC's
12 concern was, make sure that the contract obligates
13 ICM to do what it has promised to do, and make sure
14 that you have a way to enforce that against ICM.
15 That was the GAC's request. And that was essentially
16 also the Commerce Department request specifically and
17 the board's request and whatever.

18 So what we did was we took every single
19 commitment that was contained in any of the
20 documents, and listed them. That was included in the
21 contract. And -- you know, we wanted to make sure
22 that it was as easy as possible for ICANN to convey

1 to the Government Advisory Committee that it had
2 heard their concerns and responded to their concerns.

3 Q. And I'm going to deal with one more
4 contract here, then I would ask for a short break to
5 allow the witness a little respite, and I only have a
6 few more questions, Judge Schwebel.

7 So how do we get from the 5th of January
8 contract to the 8th of February 2007 contract?

9 A. The board met in the middle of January and
10 discussed the contract. John told me afterwards that
11 my partner Susan Crawford who was a board member had
12 been a little cranky about the appendix that wasn't
13 particularly crisp and that it was repetitious and
14 seemed kind of in the weeds. So, I undertook to take
15 that appendix S-8, streamline it, organize it, and in
16 addition because I knew Susan, who had been a
17 supporter of this proposal all along, was on about.

18 I also added a description after each set
19 of commitments that said here are the safeguards that
20 are in place that are going to enable ICANN to know
21 whether ICM is fulfilling its commitments. There
22 will be a contract with a monitoring agency for the

1 tagging requirements. There will be a contract for
2 crawling the web for child pornography. There will
3 be the following check points. And in addition,
4 under each section, here are the enforcement
5 mechanisms available to ICANN in the event that ICM
6 doesn't fulfill this.

7 Because I wanted to demonstrate that
8 everything ICM was undertaking to do was doable, that
9 it's compliance could be measured, and that ICANN
10 would not be in this, you know, sort of amorphous
11 situation where if ICM wasn't -- was not in fact
12 complying with its contract, they couldn't terminate
13 the contract. Because it was in my client's interest
14 to make it clear that ICM -- that ICANN had
15 enforcement mechanisms and that ICANN was going to be
16 able to use those enforcement mechanisms if ICM
17 didn't do its job.

18 Q. So at this point, you are really giving
19 them what you believe was everything that they
20 wanted?

21 A. Absolutely everything.

22 Q. Why didn't this agreement get signed?

1 A. (Chuckles.) I'm sorry. The board met
2 again on the 12th of August. There was a discussion
3 about the contract.

4 Q. The 12th of August.

5 A. I'm sorry, the 12th of February of 2007.
6 And in the middle of that discussion, out of the blue
7 -- and I really cannot emphasize how out of the blue
8 this was -- Rita Rodin, the board member, in fact the
9 board member who had represented the .tel application
10 which is now a contract and in the root in the top
11 level domain said, gee, I don't know if it's
12 appropriate to ask this, but is sponsorship still
13 open? Because, you know, I'm hearing some noises in
14 the community.

15 Now, I have to say, I have the greatest
16 amount of respect for Rita Rodin. Rita is a partner
17 at Skadden, she is a very talented person and if
18 anybody had suggested 2 1/2 years after a decision
19 had been made -- actually, 1 1/2 years after a
20 decision had been made, that the people had satisfied
21 the sponsorship criteria, that that was open again,
22 she would have taken my head off on that. It was

1 honestly shocking. I saw that. John and I discussed
2 the meeting.

3 And I said to John, honestly, my client is
4 spending so much money, the burn rate is incredible.
5 This is not going to happen. I can see that. This
6 sponsorship thing comes up out of nowhere, it's a
7 total red herring. No one cuts her off. I can see
8 the writing on the wall. Let's not waste a lot more
9 time and money. Let's just sort of invoke the
10 dispute resolution procedures that we have in place.
11 I want to be clear, that was not a threat. And I do
12 not believe that John heard it as a threat. I was
13 really saying, I can't justify doing this to my
14 client. Because I can see it's not going to happen.

15 John responded to me, and I felt at the
16 time -- and I continue to believe, that he was
17 earnest. He said that he was okay. They are just
18 going to demonstrate a sponsorship support that you
19 have already demonstrated before, and then we will be
20 able to move on, it's okay. Now, I mean -- I
21 believed that he was being genuine, and I do believe
22 that he was being genuine when he said that to me.

1 But for that, I would have, you know -- I would have
2 persuaded Stuart that the best thing for everybody
3 was to engage in a civilized dispute resolution over
4 this rather than continue on with the charade that
5 was clear to me had -- this had become.

6 Q. A charade.

7 A. Yes.

8 Q. And you still believe it was a charade?

9 A. Yes, I do.

10 MR. ALI: All right. If we could take a
11 break right there, Judge Schwebel. I will come back
12 with just a few questions and we will be done with
13 direct.

14 JUDGE SCHWEBEL: We will adjourn until
15 4:00.

16 (Recess.)

17 MR. ALI: Judge, if I may.

18 BY MR. ALI:

19 Q. Now, Ms. Burr, before the break you said
20 that this was all a charade?

21 Who, in your view, was the architect or
22 architects of this charade?

1 A. I believe that Dr. Twomey had determined
2 that this should not go forward. I don't know the
3 degree to which that was vocalized, but my view
4 based on the information and what was happening also
5 what was happening in Australia, maybe I should pause
6 for a minute just to describe that.

7 In March of 2006 as we were going into
8 Wellington, the leader of the opposition party had
9 announced that if his government was in charge,
10 Australia would be filtering the internet at the ISP
11 level to prevent the internet service provider at a
12 technical level, not -- as opposed to a filter on
13 your own computer, but you know, to functionally.

14 And that is how he would stop children
15 from being exposed to inappropriate material in
16 Australia. This was a big issue. The Minister of
17 Communications, Helen Coonan, responded first on the
18 21st of March, that's ridiculous, that will slow down
19 the internet on some enormous percent, which was
20 true. But on the 23rd of March, she had cited maybe
21 this wasn't such a bad idea. In fact this was such a
22 politically hot issue in Australia, this adult

1 content that she had changed her mind and said she
2 would consider this filter. So the headlines in
3 Australia read, Coonan flips on --

4 JUDGE PAULSSON: You said March of what
5 year?

6 THE WITNESS: This is March of 2006.
7 Wellington. While we were in Wellington, we expected
8 the contract to be considered, and Vint Cerf had said
9 he planned to vote for it. So this was my concern of
10 what happened in May of 2006, was that there had been
11 this change and I interpreted Mr. Twomey's reading of
12 the U.K. letter which I think was not a supportable
13 reading of it, and which outraged the U.K. rep, and
14 his raising -- the lone voice raising the sponsorship
15 issue in May of 2006, to be a matter of concern. And
16 then on February 2nd of 2007, so 10 days before the
17 board meeting on the 12th of February where Rita
18 Rodin out of the blue raises this sponsorship issue,
19 there is another uproar in Australia.

20 The government of Australia, rather than
21 filtering at the ISP level had permitted to roll out
22 \$117 million filtering program, providing filtering

1 for every home, and the software was not there. It
2 hadn't been delivered. There were problems with it.
3 And so the opposition party, again, made a huge noise
4 about, you know, she's not delivering on her promise,
5 our children are being ruined, all of these things.
6 I can't quite describe to you how big an issue this
7 was in Australia, but it was a very significant
8 partisan politics issue. Significant in the same way
9 that when the Bush Administration gets 200,000
10 postcards from the forum -- Focus on Families or
11 Family Research Council, that is a significant
12 domestic political -- I'm not demeaning the
13 positions, I'm just saying it's not ignorable. And
14 that was the same thing that was happening in
15 Australia.

16 JUDGE PAULSSON: What was the name.

17 THE WITNESS: Helen Coonan, C-O-O-N-A-N.
18 She may have been at sometime -- at that time she was
19 the Minister of Communications.

20 BY MR. ALI:

21 Q. So other than the fact that Mr. Twomey is
22 also Australian, why should he care?

1 A. Well, the Australian government clearly
2 had a strong and vested interest in him. He had
3 worked for the government of Australia. He knew
4 those people. They were capable of picking up the
5 telephone and calling him. And if he left the job at
6 ICANN, he would go home to Australia and certainly
7 very high on the list of his likely jobs would be a
8 job in the government.

9 Q. So this self-interest, what you are
10 saying, may well have motivated him to play out this
11 charade?

12 A. I hate to speculate. All I can tell you
13 is that a call from the minister's office would have
14 been very important to him, and he would have had to
15 pay attention to it.

16 Q. Okay. Thank you. And this charade
17 obviously resulted in the March 2007 resolution in
18 which the ICM registry -- ICM's application, sorry,
19 was finally rejected?

20 A. That's correct.

21 Q. Now, do you recall the reasons that were
22 given by the board for rejecting the ICM application?

1 A. Well, there was a resolution in -- in
2 Lisbon that described the board's reasons for
3 rejecting it, and I remember them generally, but
4 would prefer to either look at that.

5 Q. Oh, sure, of course.

6 Perhaps if we could pull out Hearing
7 Exhibit 121, which is also under tab 29 of the
8 opening binder.

9 I think they appear on the second page.
10 Have you had a chance to review them?

11 A. Yes.

12 Q. Now let me ask you a very broad question
13 here again, was the board justified in rejecting
14 ICM's application on the basis of these reasons?

15 A. No.

16 Q. And why not?

17 A. First of all, only the first bullet point
18 which relates to sponsored community was among the
19 elements of the RFP criteria. And in that respect,
20 ICM had demonstrated over and over and over again
21 that it had fulfilled the requirements for the
22 sponsorship community -- sponsorship criteria for the

1 sTLD.

2 Even after the February 12th board meeting
3 where I really did think the fix was in, and even
4 though the sponsorship issues were clearly asked and
5 answered, ICM nonetheless came forward and offered
6 current evidence of support in the form of 2,000
7 unsolicited e-mails from webmasters from 71 countries
8 around the world saying we support this and we would
9 like to be in this and in the form of 76,000
10 pre-reservations that were made by members of the
11 adult industry, saying, "I'm an adult webmaster. I
12 would like to pre-reserve my name in .xxx."

13 This service was not made available until
14 after the board had rejected the contract in May of
15 2006 and there was no publicity about it. The ICM
16 people just put the pre-reservation service up there
17 to see what happened. And in very short order 76,000
18 names were pre-reserved which would have made ICM one
19 of the most successful instant launches in ICANN's
20 history.

21 Q. So as a result of those pre-reservations
22 it did give you the sense that you had a viable

1 business model?

2 A. Oh, well, more than that. It exceeded
3 even their sort of medium projections, and this was
4 of course at a time when the, you know, word on the
5 street was that ICM was dead. So, absolutely. This
6 confirmed that there were a group of adult webmasters
7 who thought there was value in being a clearly
8 delineated space, and being able to participate in a
9 policy development process that involved input from
10 stakeholders like child safety experts and free
11 expression advocates.

12 The second point cited in the board
13 resolution is "based on the extensive public comment
14 and from the GAC's communique, this agreement raises
15 public policy issues."

16 Well, I take the point that governments
17 have public policy concerns and those are legitimate.
18 The GAC expressed its public policy concerns in the
19 Wellington communique, and it says we want to make
20 sure that if you go forward with this, you have
21 enforceable contract terms to ensure that ICM
22 delivers on what it says. We had provided those. We

1 had clearly provided those. So we knew what the
2 GAC's public policy concerns were. They had
3 expressed them and we had responded to them in a
4 compelling manner.

5 The third item cited for the resolution
6 was that the ICM application is not appropriate, as
7 it has not resolved the issues raised in the GAC's
8 communique and specifically does not address the
9 GAC's concern for offensive content. Now this one
10 just really sort of pushes me over the edge, I have
11 to say. We had addressed every one of the GAC
12 communique concerns.

13 Moreover, this response -- this
14 description of the GAC's concern about offensive
15 content is simply not in the Wellington communique.
16 The GAC said very specifically, you may made promises
17 ICM about making it possible to prevent access to
18 illegal and inappropriate content. What ICM had
19 promised is that it would require every registrant to
20 tag its site so that it can be automatically
21 identified by every filter as an adult site, so that
22 the xxx filters would work, and that parents if they

1 didn't want their children to see it, or adults who
2 didn't want to come across this, frankly, could turn
3 that filter on and make sure it wasn't available.

4 ICM did not make any representations about
5 offensive content, and we would have had to have our
6 heads examined to do that, if anybody spent any time
7 on the internet. What ICM undertook to do was to
8 provide this, this tagging and to monitor for that
9 tagging. ICM had come forward with a signed contract
10 by the -- signed by the Internet Content Rating
11 Association, an established company not-for-profit
12 organization that was backed by every major internet
13 company, Cisco, Intel, Microsoft, AOL, Google, AT&T,
14 you name it.

15 So largest, most respected sort of
16 internet technology companies were essentially
17 saying, we will take on -- our organization will take
18 on this obligation. And if ICM had not made good on
19 its commitment, there is no doubt in my mind that in
20 37 seconds, the head of the Internet Content Rating
21 Association would have been on the phone going crazy
22 because his board members would have been harassing

1 him. So the -- so to describe this as the board's --
2 or the GAC's concern about offensive content simply
3 is misleading as to what the GAC said in its
4 communique.

5 The fourth bullet point is the ICM
6 application raises significant law enforcement
7 compliance issues because of countries' varying laws
8 regarding content and practices regarding the content
9 of the application. Frankly, I have to say I have no
10 idea where this comes from. We never heard law
11 enforcement in the process.

12 My only thought on this is that the U.K.
13 GAC representative's letter had cited cooperation
14 with the hotline companies which ICM had committed to
15 do, and also the operator law enforcement concern,
16 very real concern, was, do you have accurate and
17 up-to-date information about the registrants, so if
18 they are doing something illegal, law enforcement can
19 find them and go after them. ICM had proposed an
20 extremely rigorous verification process that the IP
21 community who have maybe even more purview in their
22 concern about this -- we had worked it out with the

1 IP community. Finally --

2 Q. IP, intellectual property?

3 A. IP, intellectual property, I'm sorry, who
4 have a very big interest in being able to find out
5 who's registered names related to trademark. So law
6 enforcement doesn't usually sort of negotiate these
7 kinds of issues but the intellectual property
8 community wants to identify people, somebody who is
9 ripping off their trademark and go get them and
10 that's what law enforcement wants more than anything
11 else.

12 The final point is that the board agrees
13 with the reference in the GAC communique from Lisbon
14 that under the revised agreement, there are credible
15 scenarios that lead to circumstances in which ICANN
16 can be forced to assume an ongoing management and
17 oversight role regarding the internet content which
18 is inconsistent with its technical mandates.

19 This is sort of incredibly clever in the
20 sense that the board is acknowledging something in
21 the GAC's communique which acknowledges Paul Twomey's
22 reading of the U.K. letter from the previous May in

1 which he said, the U.K. government letter
2 demonstrates that if ICANN does not enforce its
3 contract terms, the governments of the world who
4 expect ICANN to enforce those directly. Not that it
5 will enforce the contract with ICANN, but it will
6 take -- or ICM out of the root, that it will
7 terminate the contract name, that it will enforce the
8 contract with individual registrants. Now that is
9 just, I'm sorry, preposterous. And it wasn't --
10 wasn't what the U.K. letter said, and it was not what
11 any of the governments responded to.

12 I have been in a government chair. I know
13 what governments are concerned about, and I think
14 that those concerns ought to be addressed and paid
15 attention to. And that's what ICM did.

16 Q. So reasons numbers 2, 3, and 4, what I
17 take you to be saying is that these were all
18 pretextual.

19 A. 2, 3, 4, and 5.

20 Q. 2, 3, 4, and 5, excuse me?

21 A. Yes, there is no basis in any of the
22 discussions over the three years for these.

1 Q. And 2, 3, 4, and 5, do they appear
2 anywhere in any remote sense in the RFP criteria?

3 A. I mean, I think that at some level, you
4 might say that, you know, the value proposition in
5 the criteria goes to public policy. I think that's
6 arguable. But I do think that, I'm not going to
7 discount that. I think that to the extent in this
8 one case you could make an argument that 2, 3, 4 and
9 5 have any bearing with the RFP criteria, that's
10 where it would be. And ICM clearly demonstrated head
11 and shoulders above any of the value brought to the
12 DNS space by most of the other sTLD applicants that
13 it was going to add value to the internet.

14 Q. And you think that what you have just
15 described as your understanding or what might be the
16 broad public policy interpretation was something that
17 the board also understood?

18 A. Honestly, I have no idea what the board
19 understood from this.

20 Q. Okay. So let's go back to -- you read
21 ICANN's memorial in this arbitration?

22 A. Yes, I have.

1 Q. Now, ICANN doesn't deal with reasons 2, 3,
2 4, and 5 in this memorial at all, so they seem to
3 have abandoned it, so I'm going to focus on -- any of
4 those reasons. So I'm going to focus just on the
5 reasons they have dealt with in their memorial and
6 would ask you to help us understand or address their
7 particular arguments.

8 The first reason they give is as follows:
9 I'm quoting from the ICANN response here at paragraph
10 270. First the RFP required applicants to
11 "demonstrate that the sponsored TLD community is
12 precisely defined so it can readily be determined
13 which person or entities make up their community."
14 Several board members determined that ICM could not
15 satisfy this criteria despite having ample
16 opportunity to do so throughout the contract
17 negotiations. That's what, as its first -- what
18 ICANN states as its first criteria not being met.

19 A. First of all, I think that sponsorship
20 criteria both established on the 1st June 2005 that
21 those were met. Having said that, ICM had a
22 definition of a sponsored community that was in the

1 contract on the 1st of August, agreed with ICANN
2 staff that was posted on the board. That was those
3 adult webmasters who believed that they would benefit
4 from being in a clearly delineated space and would
5 benefit from participating in policy-making around
6 best practices involving input from stake holder
7 communities. That was the definition in the first
8 contract, in the second contract, in the third
9 contract, in the fourth contract and in the fifth
10 contract.

11 Not only was ICM never asked to change
12 that, at one point, John reported that some board
13 members were concerned that ICM might try to get out
14 from under its obligations by changing the definition
15 of the sponsored community. So they affirmatively
16 did not want it to be changed.

17 Q. Thank you.

18 The second criticism, if you will,
19 contained in the ICANN memorial comes from 272.
20 Second, that the RFP required that the community be
21 comprised of persons that have needs and interests in
22 common which are differentiated from those of the

1 general internet community. While on its face, ICM's
2 sponsored community appears to have common needs and
3 interests, some agree that the revised agreement in
4 2007 failed to make this portion of the RFP
5 specification because of its selective membership.

6 Could you please comment?

7 A. The membership of the sponsored community
8 did not change from day 1. So to the extent that it
9 was a self-identified community, those adult
10 webmasters who registered were members of the
11 community, that's the same thing on 2001 as it was in
12 2007. So I don't actually understand that reference.

13 Moreover, of all the sponsored top level
14 domains xxx was really the application that couldn't
15 be made in the DNS structure. They needed a clearly
16 delineated space. That's what they were after. It
17 was not like jobs, where the sponsorship evaluator
18 said, "why don't they just go to jobs.com and look up
19 the job company that they are looking for?" The
20 nature of the application was we want a clearly
21 delineated space where we can impose best practices,
22 agreed by the industry that community members on

1 itself.

2 Q. And in fact, in the chart we were looking
3 at early on the definition of sponsored community
4 never changed?

5 A. Never.

6 Q. And you were never asked to change it by
7 ICANN?

8 A. No, we were told that board members would
9 be concerned if we tried to.

10 Q. Third reason, paragraph 273. The RFP
11 required ICM to demonstrate broad based support from
12 the community it is intended to represent. The RFP
13 was phrased in the present tense such that to satisfy
14 the RFP criteria, ICM had to show broad based support
15 from the sponsored community for the sTLD, the
16 sponsoring organization and for the proposed policy
17 formulation process at all times. Is that correct?

18 A. Well, the RFP requirements did require the
19 applicant to demonstrate broad based support from the
20 community intended to be served by the sTLD. And ICM
21 did that. This present tense description is a new
22 one to me, since all of the top -- all of the

1 applicants were self-identified. That is to say, the
2 community would be identified by their registration.
3 .tel, I just looked back, the public forum comments,
4 both in the initial comments when it was first posted
5 and in the comments when the contract was posted.
6 There was 1 comment in support of it. The
7 independent evaluator said that most of the support
8 came from either TELNET itself, or its employees or
9 contractors.

10 And in fact, the European telephone
11 network operators, 41 European telcos had objected to
12 it, Telephonica had objected to it and JP had
13 objected to it. So notwithstanding the support
14 demonstrated by ICM, both in the June 2005 time frame
15 and again in February of 2007, which was present, you
16 cannot square the requirements that were imposed
17 on .tel with the requirements that were imposed
18 on .xxx.

19 Q. I only have two more questions.

20 The next reason from 278, paragraph 278,
21 ICM could not demonstrate that it was adding new and
22 valuable space to the internet name space as required

1 by the RFP. Is that in fact correct?

2 A. No. The new and valuable space means its
3 differentiated, it's providing a need that's not
4 otherwise being provided. All of that had been
5 demonstrated in the application in June of 2005. And
6 this particular -- to the extent that sponsorship
7 ever came up in 2007, it was only about the community
8 support. So this is new. If that was a concern, we
9 never ever heard it.

10 MR. ALI: I think the panel and the
11 witness will be glad to hear that I will end here.

12 JUDGE PAULSSON: The episode of the U.K.
13 letter which you said was misrepresented, is it
14 double --

15 THE WITNESS: Yes it is. It is. And I'm
16 sure it's in there.

17 (Off-the-record discussion).

18 CROSS-EXAMINATION

19 BY MR. LeVEE:

20 Q. Ms. Burr, members of the panel. Let me
21 just start by saying that the last hour or so had
22 involved significant accusations with respect to

1 charades and the preposterous, pretextual, et cetera.
2 A lot of opinions. ICANN believes that the easiest
3 approach and most appropriate approach would be to
4 have the panel hear from the individuals who are
5 alleged to have been conducting the charade and so
6 forth. And you will hear from those individuals
7 tomorrow and Thursday.

8 So, I am going to keep my
9 cross-examination extremely short. I don't agree
10 with many of Ms. Burr's opinions. But I think it
11 would be better to have someone who is testifying
12 rather than an examiner provide for you a contrary
13 view. So we will let Dr. Cerf, Dr. Twomey, and
14 Dr. Pisanty, tomorrow and Thursday, express their
15 views and I will ask them specific questions about
16 Ms. Burr's testimony and ask them to respond. And
17 I'm sure if I don't, opposing counsel will do so for
18 me.

19 I just have a few questions. Do you
20 understand that ICM's taking the position that this
21 proceeding is governed by international law?

22 A. I do understand that.

1 Q. And when you were counsel to ICM, did you
2 take the position that any dispute between ICANN and
3 ICM with respect to ICANN's bylaws would be governed
4 by U.S. law?

5 A. With respect to the contract, yes, because
6 the choice of law imposed by ICANN on the contract
7 terms was California law. I never had occasion to
8 consider whether ICANN's actions in a more general
9 sense in the context we are discussing here were
10 governed by international law. That was not --

11 Q. I'm going to ask the panel and Ms. Burr to
12 look at Exhibit 241. I have copies, rather than
13 distributing a binder since Mr. Ali did not do so, I
14 felt inclined not to give you one as well.

15 Do you recognize Exhibit 241?

16 A. Yes, I do.

17 Q. Looks to me as if there is an e-mail at
18 the top from you to Mr. Jeffrey of ICANN, correct?

19 A. That's correct.

20 Q. And then at the bottom there's an e-mail
21 to you -- from you, I apologize to, among others,
22 members of the GAC, is that correct?

1 A. That's correct.

2 Q. And you entitle it Sharil because that's
3 Mr. Tarmizi; is that correct?

4 A. That's correct.

5 Q. So let me ask you to turn the page?

6 A. Yes.

7 Q. Last long paragraph beginning with the
8 word "finally," why don't you read that?

9 A. Finally, I would not presume to offer the
10 GAC legal advice but you may want to consider whether
11 the approach advocated by the Australians puts GAC in
12 the awkward situation of recommending to ICANN that
13 it violate the nondiscrimination provisions of its
14 bylaws. Any dispute between ICANN and ICM on this
15 point will be decided under U.S. law and you may want
16 to seek input from ICANN's General Counsel on this
17 question. It would be unfortunate indeed for the GAC
18 to recommend that ICANN act in a way that contravenes
19 its bylaws.

20 Q. So isn't it what you were saying that if
21 there was an allegation that ICANN was violating its
22 bylaws, that that dispute would be decided under U.S.

1 law?

2 A. Yes, it appears that I did say that here.

3 But I need to tell you this was in the context of the
4 Australia government saying that ICM should come
5 forward with all of the policies and procedures and
6 that ICM could not be moved forward and ICANN should
7 treat ICM in an entirely different way without
8 justification, and I think that under anybody's laws
9 the -- interpreting the antidiscrimination provisions
10 of the bylaws in this way would have been
11 problematic. But finally, I am not an international
12 lawyer, and I probably -- I made an assumption and
13 spoke hastily. I have no idea what the right answer
14 to that is.

15 Q. Let's go back to 2002. You were involved
16 with ICANN's committee on evolution and reform?

17 A. Actually, that's not correct. I was not
18 involved in the committee on evolution and reform.

19 Q. You were involved in recommending changes
20 to ICANN's structure and processes, correct?

21 A. What actually happened was the evolution
22 reform committee -- the evolution and reform

1 committee in 2002 worked on evolution reform
2 proposals. They came up with something called a blue
3 print. One of the elements of the blueprint was an
4 accountability framework. They established in the
5 blueprint the parameters of that accountability
6 framework, and then after that Joe Simms asked me if
7 I would volunteer to draft up some articulation of
8 that blueprint. So I was not on the committee, I was
9 not interacting with the committee. I was
10 interacting with ICANN's outside counsel on that
11 behalf, and responding to a circumscribed task.

12 Q. So let's take a look at Exhibit AC, which
13 is the blueprint. Is this the blueprint that you
14 referred to?

15 A. Yes, it is.

16 Q. Let me ask you to take a look at page 12.
17 And then just in front of paragraph 6, do you see
18 where it says bylaw amendments and alleged
19 infringements?

20 A. Yes, I do.

21 Q. Could you read that, please?

22 A. The highlighted area says, the board

1 should create a process to require nonbinding
2 arbitration by an international arbitration body to
3 address any allegation that board had acted in
4 conflict with ICANN bylaws.

5 Q. So you understood, did you not, that the
6 procedure involving an independent review panel was
7 nonbinding?

8 A. The blueprint clearly said that and the
9 implementation description that I provided also said
10 nonbinding.

11 Q. Why don't we take a look at Exhibit V as
12 in Victor. Do you recognize this document?

13 A. Yes, I do.

14 Q. What is this document?

15 A. It's the recommendations regarding
16 accountability which was the final work product of my
17 undertaking from Joe. It was the second in two. I
18 had initially given him a draft which didn't please
19 him very much. You know, Joe, he made it clear that
20 I had exceeded the scope of my assigned authority and
21 directed me to return to my work and give him
22 something that complied with the blueprint. This was

1 that product.

2 Q. So that the panel understands, she is
3 referring to Joe Simms who is my law partner. And
4 that's why she refers to him as "I know Joe." And
5 she is correct.

6 A. Just to say I love Joe.

7 Q. Let me ask you to turn to page 3. And the
8 very first bullet at the top of the page?

9 A. Yes.

10 Q. Where it says under the ERC proposal. And
11 the ERC proposal was the document that you just
12 looked at previously, correct?

13 A. The blueprint, yes.

14 Q. It says "under the ERC proposal,
15 nonbinding arbitration will be available exclusively
16 to address allegations that the board has acted in
17 conflict with ICANN's bylaws?"

18 A. That's correct.

19 Q. And you wrote that because you understood
20 that that's what the ERC had recommended, correct?

21 A. That's what was in the blueprint, yes.

22 Q. And in the second sort of subbullet, it

1 says that the ERC considers that the expanding of the
2 range of issues appropriate for independent review
3 will create a costly unworkable Supreme Court or
4 super board with the ability to nullify decisions
5 reached by the ICANN board. Do you see that?

6 A. That is an articulation of what's in the
7 blueprint.

8 Q. Okay.

9 Now, you are aware that the -- let me
10 actually show you one more document. Exhibit B is
11 dated 23 August 2002. And now I want to show you
12 something posted on 2 October 2002, which is
13 Exhibit AE.

14 A. Yes.

15 Q. And do you recognize Exhibit AE?

16 A. This appears to be the evolution and
17 reform committee's final report.

18 Q. And do you understand that the board
19 essentially adopted the blueprint that we referred to
20 earlier and that you wrote about in previous
21 exhibits?

22 A. I have not made a comparison. That would

1 be my assumption, but I honestly hadn't compared the
2 blueprint and the final report. I have no reason to
3 doubt that.

4 Q. And do you understand in this proceeding
5 that ICM has taken the position that the panel's
6 recommendations shall be binding?

7 A. Yes, I do understand that, they were put
8 in that position.

9 Q. And did you ever discuss with ICM or its
10 counsel that you had been involved in this ERC
11 process and had written a report indicating that the
12 process would be non-binding?

13 A. Yes. I mentioned earlier that in the
14 summer of 2006, after we had submitted the
15 reconsideration petition, we started work on an
16 independent review petition. I'm not an
17 international arbitration lawyer, but I consulted my
18 partner Gary Born and Rachael Kent, who are. And I
19 involved them in the initial drafts that Wilmer
20 prepared. I gave them the information and they came
21 back to me and they said, you know, we think this is
22 binding arbitration. And I said, that can't be

1 right. I wrote the implementation stuff and it said
2 non-binding. That can't be right. And Gary and
3 Rachael walked me through it.

4 I then called John Jeffrey or emailed him
5 and said, I just want to make sure -- the ICANN web
6 site points to these rules. Are those the rules? Am
7 I missing anything is that what governs the -- that
8 independent review? John confirmed that it was. And
9 so, do I -- do I think that it was intended by the
10 evolution and reform committee to be binding?
11 Absolutely not. Do I think it is conceivable that
12 ICANN implemented it in a way that created binding
13 arbitration, based on Gary Borne's analysis, I do
14 believe that they could have implemented it in that
15 way.

16 MR. LeVEE: Then we will leave it at that.
17 Thank you.

18 MR. ALI: No redirect.

19 JUDGE SCHWEBEL: Do you have any
20 questions?

21 JUDGE TEVRIZIAN: No, I don't have any.

22 JUDGE SCHWEBEL: Thank you very much.

1 THE WITNESS: Thank you very much.

2 (The witness steps down.)

3 MR. ALI: Well, we have no further
4 witnesses today from claimant's side, Judge Schwebel.

5 JUDGE SCHWEBEL: How do you plan to
6 proceed tomorrow?

7 MR. LeVEE: I'm coming closer since there
8 is no microphone. The first witness will be ICM's
9 expert witness, and we are hoping he is not taking
10 any more than an hour. At that time, Dr. Cerf will
11 testify. And I expect he will take more than an
12 hour. And following Dr. Cerf will be Dr. Pisanty.
13 We are hoping to finish those three witnesses
14 tomorrow.

15 Thursday morning, Dr. Twomey will begin
16 the day. And after Dr. Twomey testifies, Professor
17 Caron will testify. Likely in the afternoon on
18 Thursday. At which point, the evidence will close.

19 Now, counsel and I, Mr. Ali and I have
20 discussed over the lunch break a little bit more of
21 closing argument and we have a proposal. We had
22 originally allocated a total of four hours, two to

1 each side. We still think that four hours of closing
2 argument is appropriate, however, what we would
3 propose is that Mr. Ali give 75 minutes of closing
4 argument. And that I give 75 minutes of closing
5 argument. At which point we will take the lunch
6 break. We would then return so that the panel could
7 ask questions as long as they wish to ask questions
8 and when you are done asking questions. We will go
9 home.

10 Certainly if you want to provide us with
11 some direction of what may be of interest to you,
12 given there is so much information that has been
13 presented and of course with the flexibility that we
14 address those points that we believe are important
15 for our respective cases. But some direction of the
16 panel would be most appreciated.

17 JUDGE SCHWEBEL: We'll try. Thank you so
18 much.

19 MR. LeVEE: Thank you, have a very nice
20 evening.

21 JUDGE SCHWEBEL: Thank you then we will
22 meet tomorrow morning at 10:00 a.m.

1 (The panel was then adjourned for the
2 evening at 4:53 p.m.)

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