INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD.,
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Claimant,
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vs.
)
ICDR Case No.
)
01-18-0004-
)
2702
)

INTERNET CORPORATION FOR
)
ASSIGNED NAMES AND NUMBERS,
)
)
Respondent.
)

VOLUME III

ARBITRATION

AUGUST 5, 2020

BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
465534
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ICDR Case No. 01-18-0004-2702

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WEDNESDAY, AUGUST 5, 2020

ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME III (Pages 424-586)

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ARBITRATOR BIENVENU: Let me begin by wishing everyone welcome to Day 3 of this hearing. We are a few minutes past the hour, and that's because of me. I had a problem joining the meeting.

Are there any preliminary matters that anyone would wish to raise before we continue with the cross-examination of Ms. Eisner?

MR. ALI: Yes, Mr. Chairman. This is Arif here. Good morning and good evening to everyone.

The matter we would like to raise is one regarding which I just sent a message literally a couple minutes ago, so I apologize for the tardiness, but it is the matter of three documents we would like to add to the record, one of which I mentioned yesterday, mainly the Board resolution associated with the admission -- the Board's acceptance of the CCWG and its report and transmittal to the NTIA.

ARBITRATOR BIENVENU: Mr. Ali, sorry to cut you off. Is this something you have had occasion to discuss with your friends opposite?

MR. ALI: Yes. We transmitted the
documents with a request that the parties agree to have the documents admitted to the record by agreement.

Amici responded that they objected -- can you hear me?

ARBITRATOR BIENVENU: Yes.

MR. ALI: And Mr. LeVee sent a message this morning saying that ICANN endorses and supports the Amici's position objecting to the admission of the documents.

My proposal, sir, is that we address this matter perhaps after Ms. Eisner's testimony, and indeed we can do so at the end of the day if it is not too much of an imposition on Professor Kessedjian, so that we don't take up time and keep Ms. Eisner waiting.

ARBITRATOR BIENVENU: Let's do that. In the meantime, we'll have occasion to read your email message.

Any other preliminary matter?

MR. LeVEE: Mr. Chairman, I apologize for cutting you off. I just wanted to say we have a written response that we are preparing this morning, and we will send that as well. So the Panel can either decide during the break on its own
or it can take a hearing at a convenient time.

ARBITRATOR BIENVENU: That's helpful.

Thank you for mentioning this. Let's push it off to the end of the day.

In the meantime, we will have occasion to read the parties' written submissions on the point.

MR. LeVEE: Thank you so much.

MR. ALI: Mr. Chairman, we haven't made a written submission. We were proposing oral argument just to deal with the matter very promptly in the context of the hearings.

But if Mr. LeVee is preparing a written response, then I suppose we should make a formal written application to the Panel, which you could then respond or he puts in his position and then we respond.

ARBITRATOR BIENVENU: Let's let Mr. LeVee put in his position and let us look at the request and the objection to the request, and rest assured that you'll have occasion to address us before a decision is made; is that all right?

MR. LeVEE: It is. The reason that I indicated that we would have a written response is that Mr. Ali sent me a several-paragraph statement yesterday. I thought he was sending me -- I have
been standing here, so I don't have my laptop in front of me. So I did not appreciate that he had only sent a request. Yesterday he sent a fairly thorough request, and if he forwards that to the Panel, I was planning to respond to that.

ARBITRATOR BIENVENU: Okay. Why don't you look at what he sent us and let us look at the request before we, perhaps, make more of something that can be dealt with summarily.

MR. LeVEE: Thank you.

ARBITRATOR BIENVENU: Good with you, Mr. Ali?

MR. ALI: Yes, Mr. Chairman. I went mute and dark. Yes, excellent.

ARBITRATOR BIENVENU: Any other preliminary matters?

MR. LeVEE: No.

MR. ALI: Nothing from claimant.

ARBITRATOR BIENVENU: JD, please bring back Ms. Eisner.

Ms. Eisner, good morning. This is Pierre Bienvenu, Chairman of the Panel. How are you?

THE WITNESS: I am doing very well today.

How are you?

ARBITRATOR BIENVENU: Excellent.
Ms. Eisner, you will be testifying under the same solemn -- not solid, for the stenographer -- solemn affirmation as yesterday?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: Thank you very much.

Mr. Litwin, you are prepared to continue your cross-examination?

MR. LITWIN: Yes.

ARBITRATOR BIENVENU: Please proceed.

MR. LITWIN: Thank you, Mr. Chairman.

CROSS-EXAMINATION (Cont'd)

BY MR. LITWIN

Q. Good morning, Ms. Eisner. Can you hear me okay?

A. Yes, I can. Can you hear me?

Q. I can. I just wanted to set the stage on where we left off yesterday. We had just established, and I just would ask if you recollect that the IOT had not held any meetings during the months of July, August and September 2008?

Do you recall that?

A. Yes.

Q. And that the IOT's meeting on October 9, 2018, was the committee's first meeting in nearly four months, correct?
A. Yes. There is a likelihood that we were -- we had times that we convened but did not have a quorum. So there might have been a request to continue items on list or take matters through with emails.

So we had likely had times when people had talked, but there was no decisional discussion or anything, and they were not treated as regular meetings because they were not a quorum.

Q. So if there were a nonquorum meeting or an email discussion among IOT members, those emails and transcripts would have been posted to the IOT's Wiki page, correct?

A. So the emails would have been on the probably available mailing list. We would not have continued with the meeting -- we would never have convened a meeting for discussion if it was not a quorum. So there wouldn't be transcripts of that.

Q. Okay. So the first substantive meeting where you discussed the proposed interim rules in detail would have been -- the first one after June 2018 would have been on October 9; is that correct?

A. Based on your representation of the status of the Wiki page, yes.

Q. Okay. So were you aware that there were
only six other people in addition to yourself that participated on October 9, 2018?

A. I don't recall the exact attendee list, but I know that we had very small numbers of attendees, so that would not surprise me.

Q. Okay. And two of the people who attended on October 9 were Kate Wallace of Jones Day and Elizabeth Le of ICANN's in-house legal department, correct?

A. If they were listed among the attendees, yes.

Q. And also Mr. McAuley, David McAuley, who was the chair of the IOT, attended that meeting, correct?

A. Again, if he was recorded as an attendee, yes.

Q. So if you accept my representation that there were seven participants, including yourself, by my count, that is four participants who were either ICANN lawyers or -- well, let me just ask this before I do that.

Mr. McAuley was employed by VeriSign as of October 9, 2018, correct?

A. As far as I am aware.

Q. So going back to my question, by my math,
there were seven attendees, four of whom were
either ICANN lawyers or an employee of VeriSign; is that right?

A. If you're referring to Liz, me and Kate
from ICANN and then David, yeah.

Q. So I'd like to direct your attention to
Tab 3 of your binder, and this is the transcript as
it appears on the IOT Wiki page for the October 9,
2018, meeting.

A. Okay.

Q. Can you please turn to Page 14 of that
transcript?

A. With your unique numbers?

Q. Yes, my unique numbers. It is Page 13 of
the transcript, but Page 14 as we have marked it.

A. Thanks so much.

Q. So you'll see in the middle of the page
that a gentleman named Bernard Turcotte is
speaking?

A. Correct.

Q. Who is Mr. Turcotte?

A. He is a contractor that in this instance
that was employed by ICANN to help facilitate the
work of the IOT.

Q. So it's someone who was facilitating the
work of the IOT; he was not a member of the IOT, correct?

A. Correct.

Q. Now, is it fair to say that during this October 9 meeting, Mr. Turcotte was reading the text of various rules to the attending IOT members?

A. Yes.

Q. Now, on Page 14 he's reading the text of what was then the current draft of Rule 7, consolidation, intervention and joinder, correct?

A. Yes.

Q. As Mr. Turcotte reads, Rule 7 provides that, quote, "Requests for consolidation and intervention or participation as an amicus are committed to the reasonable discussion of the" -- it says "properties officer," but I am assuming that's "procedures officer"?

A. Yes. Just so you know and the Panel knows, we were using an automated transcription service. So you will see random items in the transcript that you have to kind of piece together.

Q. Yeah, we'll come to that later. I had to go back to the audio recording to make sense of it.

A. Right.

Q. But thank you for pointing that out.
So that's what Rule 7 provided as of October 9, that participation as an amicus was committed to the reasonable discretion of the procedures officer, right?

A. Yes.

Q. So if we turn to Page 15, which is the next page, and look towards the bottom of the page, it is the second-to-last paragraph, Mr. Turcotte continues, and I quote, "If the procedures officer determines in his or her discretion that the proposed amicus has a material interest relevant to the dispute, he or she shall allow the participation by the amicus curiae."

That is also what Rule 7 provided as of October 9, correct?

A. Correct.

Q. Now, that was a general rule, and there was one exception that the IOT had provided for, and that's what comes next, that if the IRP concerned a review of a decision made by what is quoted here, an underlying proceeding, the participants in that underlying proceeding would be deemed to have a material interest, and therefore, would have a right to participate, correct?

A. Correct.
Q. Now, as you look at Page 15, Rule 7 also provided that the scope of amicus participation was committed to the discretion of the IRP Panel. That's at the very bottom of the page, continuing on to the next page, yeah, Page 16, where Mr. Turcotte quotes, "The IRP Panel may request briefing in the discretion of the IRP Panel and subject to such deadlines and page limits and other procedural rules as the IRP Panel may specify in its discretion."

Do you see that?

A. Yes.

Q. Okay. Now, looking down the page, you'll see that Mr. McAuley responds first. You see where he starts speaking?

A. Yes.

Q. And he says here that he has his hand up because "I want to participate as a participant here." So he's distinguishing his role between being a participant and Chair of the IRP -- of IOT, correct?

A. Correct.

Q. He goes on, he says, "I do have a concern about this, and what I believe is that on joinder intervention, whatever we are going to call it,
it's essential that a person or entity have a right to join an IRP if they feel that a significant -- if they claim that a significant interest they have relates to the subject of an IRP and that adjudicating the IRP in their absence would impair or impede their ability to protect that."

Do you see where he says that?

A. Yes.

Q. So what Mr. McAuley is proposing here is to amend Rule 7 to provide that if an entity believes that it has a significant interest to protect and that interest relates to the subject of an IRP, then that IRP would have a right to participate in the IRP; is that what you understood?

A. Yes.

Q. Now, Mr. McAuley goes on to say on Page 16 that "It's important to provide this right to participate," quote, "especially given the finality of these kinds of proceedings. It's my view that intervention, whatever term we are using, needs to capture that."

Do you see that?

A. Yes.

Q. So essentially Mr. McAuley is saying if
you have a significant interest and that interest is relevant to an IRP, and given the Panel's authority to issue final and binding decisions that affect that interest, you need to be able to participate in the IRP; is that fair?

A. That's my understanding of what he was saying, yes.

Q. Okay. And Mr. McAuley concludes that he would propose specific language on the, quote, "List," and that's the LISTSERV, "the group email for the entire IOT committee," correct?

A. Correct, the publicly-available list, yeah.

Q. In fact, Mr. McAuley did send an email to the IOT list on October 11, 2018, the next day, with his proposed language.

Do you recall that?

A. Yes.

Q. Okay. If you turn to Tab 4 in your binder, that is Mr. McAuley's email from October 11, 2018.

Do you recall reviewing that?

A. Yes, I do.

Q. Okay. If you could turn to Page 5 in that exhibit, which is an attachment to his email,
you'll see that Mr. McAuley has inserted what I'll characterize as a redline. I suppose this was probably Track Changes --

A. Yes.

Q. -- into the draft of Rule 7? What he writes here is that, "In addition, any person, group or entity shall have a right to intervene as a claimant where, one, that person, group or entity claims a significant interest relating to the subjects of the Independent Review Process."

And if you skip down a couple of lines, he says, "Because that entity's absence might impair or impede that person, group or entity's ability to protect that interest."

Do you see that?

A. Yes.

Q. So this is essentially in written form what Mr. McAuley was proposing the day before, on October 9, correct?

A. Right.

Q. Or two days before, sorry. Yeah, two days before, on October 9.

And what he's proposing here essentially is to broaden claimant standing; is that your understanding?
A. Yes.

Q. Okay. And the IOT discussed Mr. McAuley's proposal during its meeting later that day on October 11; is that right?

A. Yes.

Q. Okay. Turning to the next tab in your binder, Tab 5, you'll see that's the transcript from October 11, 2018; is that correct?

A. Yes.

Q. Okay. I'll represent to you that in addition to yourself, there were five other attendees at that meeting. Again, they included Kate Wallace and Liz Le of ICANN's legal department, and Mr. McAuley of VeriSign; is that correct?

A. I don't know. I would ask -- are you taking the attendees off of the recording that would appear from the electronic meeting room or based on the transcript? Because sometimes you might have attendees who would not speak during the meeting.

Q. I will represent to you that I get the participant list from -- there's a page for each IOT meeting, and it lists who attended it. Is that --
A. If you take it from there, yes.

Q. Okay. And that listing on the Wiki page indicates that you and Kate Wallace of Jones Day and Elizabeth Le of ICANN's legal department attended that meeting and Mr. McAuley attended, but there were only six attendees in that meeting.

   So do you have any reason to believe that that listing is inaccurate in any way?

A. Do you have the names of the other people? I don't have any reason to believe that what was recorded on the page is incorrect.

Q. Okay. That's fair enough.

Now, during the October meeting, you responded to Mr. McAuley's proposal.

   Do you recall that?

A. Yes.

Q. And is it fair to say that in general, your primary concern was that Mr. McAuley was proposing to significantly expand claimant standing; is that right?

A. I would have to look specifically when I said that I know that was a very large part of my concern. I received the text within a short amount of time before the meeting. So I probably had highlighted my biggest concern that I wanted to
raise on this. I believe I also took time to go back to more specifically look at the language.

Q. Fair enough. And do you recall that your proposal was essentially to move some of what Mr. McAuley was proposing from claimant standing down to the amicus participation standing of Rule 7?

I can direct you to Pages 14 and 15 of the transcript, if that will help.

A. Great. Thank you.

Q. That's our 14 and 15, just to be clear.

A. Yes.

So my concerns were both regarding the significant interest test and the confusion between claimant versus amicus status.

Q. Could you explain what you mean by confusion between claimant and amicus?

A. Sure. So one of the issues that we had long -- as a lasting issue, including when we were drafting the new bylaws as well as in the discussions in the IOT, that because the IOT is such a narrow process, that it is really about someone coming to ICANN and saying, "You violated your bylaws or you violated your articles in doing something." It is a very unique set of persons or
entities that would serve as claimant status. And that the IRP is not about adjudicating all of the rights -- all of the issues or disputes that might be amongst ICANN and the claimant or between other people who have interest in the proceeding.

So here what I saw was the suggestion that McAuley had raised that because someone might have an interest in the proceeding, they should be a claimant, which would also technically mean under the bylaws that they would be asserting that ICANN violated its bylaws or its articles, but that might not always be the case for someone who has an interest in a proceeding.

I think it is very important to be clear and narrow in what you mean about who is a claimant for the purposes of an efficient IRP.

Q. Okay.

A. What Mr. McAuley said is creating confusion between those lines.

Q. Right. So Rule 7 is entitled "Consolidation, Intervention and Participation As an Amicus," right?

A. I believe so, yes.

Q. Well, you can refer back to Tab 4 on Page 4 just to refresh your recollection on that.
A. Yes.

Q. So what -- if I understand you correctly, Mr. McAuley had proposed to broaden the intervention rules, and your suggestion was rather you should look to broadening the participation as an amicus rule; is that right?

A. I don't believe it was a broadening of the amicus rule. I think it was a consideration of whether or not there might be other parties that might be appropriate to consider -- deem having a material interest as opposed to leave it up to a briefing matter as to whether or not they had a material interest, but it wasn't necessarily a broadening of the amicus rule.

Because that would have been -- if we had taken, for example, his significant interest test and made that the test for amicus as opposed to material interest, that would have been a broadening, but that's not anything from the ICANN side we were considering or supporting.

Q. Okay. Well, if we can look back at Page 14 of your -- of the October 11 transcript, which is Tab 5, what you say there is, "So I think we can move that down either to amicus. So I think we can put some things into the amicus section that cover
this type of interest in a proceeding."

So you were essentially saying, "I hear what you're saying about entities with a significant interest. Let's look at moving that down to the amicus section"; is that fair?

A. I think it's more I hear what you're saying about the need for having a full and final adjudication -- having parties that are necessary to -- not necessary, but having parties that could be impacted by an IRP decision having the opportunity to participate in some way, shape or form within the IRP so that they are also going to abide by the standing -- the binding decision that's coming out of the IRP Panel.

Because that is one of the significant changes to the IRP that happened throughout this whole process, is that no longer was it just an advisory declaration that the Panel was issuing, but they are now binding precedent across ICANN. So it binds people, even those who are not part of the process.

Q. Okay. So let's look at how Mr. McAuley responded to you, and I am going to refer to the second full paragraph on Page 15, that's our 15, of the October 11 transcript.
As you helpfully previewed a few minutes ago, sometimes the transcript's a little rough. So I will represent to you that I listened to the audio recording, and I am going to read to you what I heard on the audio recording, and I'd like your reaction as to whether or not that's a reasonable and fair and accurate representation of what you recall Mr. McAuley said here.

As I heard it, Mr. McAuley said, "But if it was moved to an amicus thing, I would like to look at the language you came up with. You can tell between this and Rule 8 where I'm coming from is a competitive situation where members of contracted party houses or others who have contracts with ICANN or others that have contracts that are affected by ICANN have to be able to protect their interest in competitive situations. So I used language that largely followed U.S. rules -- U.S. Federal Rules of Procedure, but these rules are fairly -- I think, at least in common-law countries, fairly routinely accepted that someone has an interest can defend themselves because they can't look for the defendant to make their argument for them."

Is that a fair representation of what
Mr. McAuley said?

A. Yes, I believe so.

Q. Now, you proposed that instead of
Mr. McAuley's -- strike that.

Now, you responded to Mr. McAuley, and you
noted that time was of the essence, and I am
referring you to the top of Page 16, that's our 16
in the October 11th transcript, where you state,
"From the ICANN org side, we are getting very
nervous that we are on the precipice of having IRPs
filed for which we don't have an adequate set of
procedures to meet the bylaws."

Now, as we discussed yesterday, Afilias
had sent a draft of its IRP request to ICANN the
day before, on October 10th.

Do you recall that conversation?

A. I recall the conversation, yes.

Q. Yeah. And now you're telling the IOT on
October 11th that ICANN was, quote, "On the
precipice of having an IRP filed."

Was that a reference to Afilias's
forthcoming IRP?

A. No, it was not. I had -- if you go back
into the record of the IOT proceedings, back in May
of 2018, I had introduced to the IOT the idea of
bringing forth a set of interim rules, because we were nervous then, too, that we could be subject to an IRP because we could be subject to an IRP over anything.

And at this point, we were -- when you sit here in October, we were two years out from the passage of the new ICANN bylaws after the IANA transition. Even in May we were a year and a half out, and we were well-aware from the ICANN side that there would be great confusion if an IRP was filed under the supplementary procedures that did not align with the new bylaws.

So this concern was part of the genesis of even introducing that idea of an interim supplementary procedure note in May.

By this point, we had already -- we had been working with the IOT to get a set of interim procedures finalized and had it on our board agenda for that end of October meeting, and it was becoming very clear that if we weren't going to have a set coming out of the IOT, we then had an even longer delay.

So we had been -- from my side with ICANN, I had been working with a sense of urgency about this since at least May of 2018.
Q. Okay. Now, you state on October 11th that ICANN was on the precipice.

"Precipice" means right at the edge; is that fair?
A. Yes.

Q. And let's just look at what the status was of IRPs and accountability mechanisms on October 11th. The .WEB contention set was on hold because there were two accountability mechanisms pending as of October 11th, 2018; is that correct?
A. I know that the .WEB contention set was on hold. I don't recall the number of accountability proceedings around it.

Q. So I will represent to you that Afilias's CEP was still pending, correct, do you understand that?
A. Based on the conversation, yes, yes.

Q. Were you also aware that Afilias had a reconsideration request pending at that time concerning .WEB?
A. I probably was. I don't recall that today, but I probably was at the time.

Q. Now, on October 11th, ICANN emailed Afilias to request times for a CEP conference between November 1st and November 16th.
Are you aware of that?

A. No, I don't recall that.

Q. And we know from -- well, I will represent to you that at the start of the next conference that we had with ICANN in CEP, which was on November 13th, ICANN terminated the CEP.

Are you aware that ICANN terminated the CEP on November 13th?

A. Only based on your representation yesterday and today.

Q. Now, ICANN had also scheduled a special Board meeting on November 6 to consider Afilias's reconsideration request.

Were you aware of that?

A. I don't have specific recollection about that, but we do have specific time limits within which the Board must consider a reconsideration request. So that is actually a normal thing to happen as a reconsideration request is hitting the end of that deadline.

Q. In fact, on November 6th, ICANN rejected and denied Afilias' reconsideration request.

Are you aware of that?

A. I am aware that Afilias' reconsideration request was denied.
Q. So on --

A. I don't remember the specific date.

Q. So on October 11th, as you are representing to the IOT that ICANN is on the precipice of having an IRP filed, ICANN is getting ready to remove over the next few weeks the only two accountability mechanisms that were keeping the .WEB contention set on hold; is that fair to say?

A. I wasn't involved in the discussions around the reconsideration or the CEP.

Q. And ICANN also knew that Afilias was ready to file its IRP because it had a copy of its draft IRP request which it had gotten the day before; is that right?

A. There might have been people aware at ICANN, but that was not the basis of my participation in the IOT.

Q. So you were under pressure to get the interim rules adopted by the Board at the October 25 Board meeting; is that fair to say?

A. Yes.

Q. And --

A. I felt pressure to do that based on the totality of not having supplementary procedures in place for two years.
Q. Now, the Board was scheduled to meet on -- next in mid-January 2019.
Are you aware of that?
A. I'm aware that the Board has regularly scheduled meetings, and then at that time our practice would be to identify if there's any need for a meeting in between those regularly-scheduled meetings, but at that point we were not -- it was not our practice to have monthly or bimonthly meetings scheduled outside of the ICANN meeting or org workshop session.

Q. So I'll represent to you that if you go to ICANN's website and look at the page for Board meetings for 2018, it shows that the last regular Board meeting was on October 25th, 2018.
Do you recall that being the case for 2018?
A. So in terms of regular -- if it was a meeting titled "Regular," that has a particular meaning within ICANN as opposed to "Special."

So "regular" reflects the times when the Board is expected to come together face-to-face and revisit that in today's world, but then "special" would be the meetings that are convened by teleconference.
So "special" doesn't mean extraordinary in any case, it just is kind of an external designation as to whether or not it happened by teleconference or in a face-to-face setting.

Q. Right. So --
A. So the October 2018 meeting, the last one.
Q. It was regular?
A. Yes. So that would be the last face-to-face meeting scheduled for the Board.
Q. Then there was the November 6 special meeting, correct?
A. Yes. That meeting would have been designated as special, yes.
Q. Then the next regular ICANN Board meeting, the next face-to-face Board meeting, as I can tell from ICANN's website, occurred on January 19, 2019?
A. That date makes sense to me because that would align when we hold our workshops for the Board.
Q. Now, if the Board wanted to take up approval of the interim rules, could it have scheduled a special meeting between October 25th and January 19th?
A. Yes.
Q. Now --
A. If it was prepared to do it on October 25th or 26th, whatever the date was.

Q. But the October 25th date was the one that you felt the pressure to get the interim rules before the Board on, correct?

A. That was the date that we had been working to. I believe we had a version that had come out of the IOT at the end of September, and it was prepared. We had briefed it for the Board. It was already on the Board's agenda. We were trying to keep it on the Board's agenda for that date even when we had late edits coming in, as you see here.

Q. And that's because ICANN was getting ready to terminate CEP and deny Afilias' reconsideration request as early as November 6th, and it was reasonable to believe that after that Afilias would file pretty quickly, right?

A. If ICANN had an intention to terminate the CEP, that was never communicated to me.

Q. In fact, that's what happened, Afilias filed its IRP request on November 14th, correct?

A. Based on our conversations about when the CEP terminated, I accept your representation, and yes, Afilias filed, as far as I recall, on November 14th.
Q. And, in fact, the very next IRP to be filed after this one wouldn't be filed for more than another year, in December of 2019; isn't that right?

A. As far as I recall, yes, but people can file an IRP on any day.

Q. Okay. So now I would like to return to the October 11th transcript, which is Tab 5 in your binder. And on Page 16 you write, "I will come back on list with some proposals about how to integrate some of these ideas into the set of interim rules," which I assume is a reference to the ideas regarding Rule 7 that you had been discussing, correct?

A. Yes.

Q. Okay. I'd like to direct your attention to Tab 6 in your binder. This is a copy of an email that you sent to Mr. McAuley on October 12, 2018, the day after the IOT meeting we had just reviewed.

Starting at the top of your email, you write, "I sat down with this and tried to develop some language, but realized that this is really tricky definitional issue. Without being extremely careful, we would be granting anyone who said they
have an interest in the case the right to participate, which takes away from the discretion of the Panel on a much broader basis than is currently allowed."

Is it fair to say that you were concerned that granting anyone who says they have an interest in an IRP a right to participate would take away from the IRP Panel's discretion in a pretty significant way?

A. Yes.

Q. You proceed to write, "As I was thinking through all this, I realized that giving this participation as of right based on significant interest is broader than what the IOT discussed in the outcomes of the public comment. As I understand, we agreed as an IOT, and we have reflected in the rules, that those who participate in underlying panels should have the ability to participate as of right (either as a claimant, where we've identified that they meet the material harm threshold, or as an amicus, also reflected in there). We do not have comments on nor agree as an IOT, from what I can tell, that having an interest that might be impaired by or is similar to that which is under discussion should give right to
participation."

So to summarize, is it fair to say that you were concerned that granting broader amicus participation as of right went beyond the scope of the IOT's discussion of the public comments?

A. It was -- so just no. I think my statement here is that allowing someone to just put up their hand and say "I have an interest" and then making that sufficient to participate as of right as an amicus was an inappropriate threshold for the IRP and that it would impair the Panel's discretion.

Q. Right. And what you specifically say here is that, "As I understand, we agreed as an IOT and reflect in the rules that those who participate in underlying Panels should have the ability to participate as of right," correct?

A. Yes.

Q. And you go on to say that, "We did not have comments on, nor agree as an IOT on anything else," correct?

A. Well, that we didn't agree that other people with different interests would have the ability to participate as of right. We had very -- we have a lot of discussion about this within the
IOT as we are going over the public comment.

And what was coming out of the IOT is that -- based on the public comment was that there was a need to allow people who did not fit into a claimant category but could state a material interest in the proceedings should be -- should be able to have the opportunity to come in and ask to participate in the proceeding.

And we had already started using that tool of identifying if there was anyone who might come in as of right -- as a matter of reducing the level of briefing and streamlining the IRP proceedings. Again, thinking back to that idea that IRPs are now binding.

So when -- like in this situation, we'll just talk about the situation at hand, there are other parties to this that would be impaired by -- or might not be impaired, but would have -- they would expect to have some visibility into the proceedings when the outcome of the Panel declaration could impact their expectation on a contract right.

That's a little bit different than the very broad discussion that McAuley was bringing in, where he said anyone who has a -- who is just a
contracted party should be able to come in at any
time to an IRP.

For looking at that, what he was
suggesting was so much broader than how you
consider a normal type of interest passer or where
you might have reason to draw a line about coming
into an IRP either as a claimant or as an amicus.

Q. Okay. So moving on in your email, you
then write, "I don't have an objection to
continuing this conversation for the final set of
rules, but think that from the principles laid out
for the interim set, this inclusion goes far
beyond."

Just to break there, what you're saying
there is, "Look, we are in the home stretch. We
are trying to get this done by October 25th. We
have principles laid out that govern how we are
supposed to adopt rules. Why don't we just take up
this discussion when we are working on the final
rules?"

Is that fair?

A. Basically. If you want to change the
standard or make it really broader than you've ever
discussed, this is not the time to do it, and we
would have to reserve that conversation for when we
were back and having fulsome conversations about where there were any major revisions that need to happen.

Q. Right. Because what you say here is that, "Working on it for too short a time frame also increases the possibility that we make it too broad and make it very difficult to tailor in the final rule," right? That was your basic concern, that it would overly complicate the IRP, as you have testified here today; is that fair?

A. Yes. If we went, for example, to a significant interest test, that would be a very hard test to move back from in a final rule set. So we didn't want to go -- things like that, going too far, where you could then create new expectations for how people would participate and then moving back is a really difficult way to go.

So if you start narrower, you still have the ability to radically change the rule in the future, but it doesn't make sense to start off too broad when you think you might need to pull it back.

Q. Then you go on to say, "Finally, depending on the scope of the final rule, we propose we'd have to see how significant change it is from what
was posted from comment previously." And that's because if it's a significant change, you would have to go back out for a second public consultation; is that right?

A. Correct.

Q. And that's, in fact, what you did in June of 2018 with Rule 4, correct?

A. Yes. Because that's an issue that there hadn't been any identified trends and public comment on, and one of the proposals was very different from what you saw in the posted for public comment, and there hadn't been significant agreement in the community and the public comment forum about how that should proceed.

Q. Now, you close your October email, October 12 email by writing, "The rules" -- in your view, that, "The rules are broad enough, and in particular, the amicus rules are quite broad as well."

So is it fair to say that in considering Mr. McAuley's concerns, as he discussed them on October 9 in his email of October 11 and at the IOT meeting on October 11, that the rules were probably good enough for the interim; is that a fair representation of what you were saying there?
A. Yes. I was prepared to recommend to the Board that they move along with that version.

Q. Now, I'll represent to you that October 12th was a Friday. And do you recall that Mr. McAuley initially responded to you that he looked at your email over the weekend?

A. I recall he responded in some way, shape or form.

Q. And then on Monday, October 15th, he wrote back to you saying he had some concerns about what you had written and wanted to discuss your October 12th email on your 1:00 p.m. call.

Do you recall that?

A. I don't recall that.

Q. Did you have a regular standing call with Mr. McAuley?

A. No, I did not.

Q. Do you recall having a telephone call with Mr. McAuley on October 15th, 2018?

A. I don't recall specifically having that call.

Q. Between the time that you sent your October 12 email -- actually, let me do this: If you turn to Tab 7 in your binder, you'll see a copy of an email that you sent on Tuesday, October 16,
2018.

Do you see that?

A. Yes.

Q. Between the time that you -- that you sent your email on Friday, October 12th, and your sending of this email, Tab 7 on October 18 at 11:00 a.m., did you speak with Mr. McAuley by phone?

A. I don't recall if I did.

Q. Do you recall around this period of time, when you were drafting Rule 7, having a telephone conversation with Mr. McAuley?

A. I really don't recall that.

Q. Do you recall ever discussing with Mr. McAuley the various concerns that you identified in your October 12 email?

A. Discussing orally?

Q. Yes, orally.

A. I don't recall.

Q. Okay. Well, let's take a look at your October 16 email.

In this email, what you have done here is -- is it fair to say -- to propose specific modifications to Rule 7's amicus participation provisions; is that right?

A. I proposed modifications to those who
could participate as of right, though not changing
the basic premise that any party could apply for an
amicus to the Panel.

Q. Okay. Just specifically you added -- or
you proposed adding two categories of amicus who
would be deemed to have a material interest in the
IRP; is that correct?

A. Yes.

Q. Okay. The first category relates to an
application arising out of ICANN's new gTLD program
so that any member of a contention set for a
particular new gTLD would have the right to
participate as an amicus in an IRP that concerned
that gTLD and the resolution of that contention
set; is that right?

A. Yes.

Q. So, for example, this IRP concerns
Afilias' application for .WEB, correct?

A. Correct.

Q. So any member of the .WEB contention set
would have a right to participate in this IRP as of
right; is that correct?

A. As an amicus?

Q. As an amicus, yes.

A. Yes.
Q. And that's because all of the members of the .WEB contention set would be deemed to have a material interest in the outcome of this IRP, correct?

A. Under this rule, yes.

Q. And the procedures officer would have no discretion to request their -- to reject their request to participate as an amicus curiae in this IRP, correct?

A. Correct. So --

Q. Please.

A. The Panel would self-discretion about the terms of how they would participate.

Q. So if all of the members of the contention set had applied to appear here and participate as amicus curiae, we could have had five more amici in this IRP, correct?

A. If that's the number who applied for .WEB.

Q. I will represent to you there were seven applicants, two of which are already in the IRP, Afilias and NU DOT CO, and then there were five others. So we would have had five others?

A. Right.

Q. That would seem to cure your concerns on October 12th that this was pretty tricky to draft
and, quote, "Granting anyone that says they have an
interest in the case the right to participate takes
away from the discretion of the Panel on a much
broader basis and could complicate the IRP"; isn't
that right?

A. I don't think so. So if you look back at
the genesis of some of the concerns around the
updating of the IRP and then the history of the use
of ICANN's accountability mechanisms, we had
become -- within ICANN, I think if you look both at
the reconsideration level and at the IRP level, the
one that has become a surety within ICANN was when
someone lost an application or the right to operate
a new gTLD through a process, be it the 2012
process or our previous processes, that those
losers, in quotes, I am not trying to be
deprecating at all, would then use ICANN's
accountability processes to try to challenge that.

We knew that that was a very typical and
expected use case for the IRP. So when you step
back and you think about it, if you have a
contention set, for example, in this case, as I
understand it, there were a smaller number of
people who got to the final auction of last resort.
So those who had previously dropped out likely
wouldn't come in any way.

Contention sets could be small, they could be large. Typically within a contention set, you wouldn't have all seven people coming, but you could. And they might each have an interest in making sure that they got to see how this run if they were all in active contention at the time that ICANN took whatever action that's been complained about.

So if you look at the expectations for how we thought the IRP would be run, on the other hand, would you really want to have a process, as a claimant in the process, to have to consider the briefing of seven different entities to come in where the question could just be what right -- how should these people participate and leave that to the discretion of the Panel instead of barging on the proceedings in seven different, possibly somewhat unique, but very similar situations of requesting amicus status?

So I think you can look at it either way. And really based on the use cases that we knew existed for an IRP, this seemed to be a way to actually streamline the proceedings.

Q. Okay. Now, looking at the next change
that you propose, that's for any person, group or
entity who is not in the IRP but whose actions are
significantly referred to in the briefings before
the Panel, they would also have a right to
participate as an amicus, correct?

A. Correct.

Q. Now, the IRP rules are supposed to be
based on norms of international arbitration. Can
you refer me to a norm of international arbitration
that would grant an entity a right to participate
in an arbitration solely because the pleadings or
briefings before the arbitrator significantly
referred to actions taken by that entity?

A. I think this is where the IRP is unique
when you consider it alongside arbitration. So
typically you would not have a private arbitration
outcome that becomes binding across an organization
like ICANN to guide future decisions and possibly
impact past decisions that go broader than just the
dispute between two parties.

This is really the crux of what makes some
of the development of the rule set for the
supplemental rules difficult and where some of the
confusion that we see about issues of intervention
and that continued change of -- maybe from a
claimant, maybe from a joinder.

    The IRP -- one of the things that we wanted to do, one of the things the community asked us to do with it was to make it a binding process and to make it look more like international arbitration. That's exactly why we had the language in there about the international arbitration norms.

    But you can't look at the IRP as it's been designed and suggest that only international arbitration norms should apply. If that's the case, we wouldn't need to have detailed supplemental rules that we have, and we would just pick a set of international arbitration rules to apply and go with it.

    But it's always been clear that some modification to those international arbitration norms needed to be in place to better reflect the purpose and the intent and the import of the IRP within the ICANN process.

    Q. Okay. So I think I understand. Let me try and just summarize here.

    So the IRP was supposed to move more towards what international arbitration looks like, right, and that's why you have the language about
norms of international arbitration, right, that's what you're saying?

A. The big way that the IRP was supposed to move more like international arbitration is it was supposed to become binding.

In the past, IRP declarations were not binding on ICANN, and that's very different from a normal arbitrable proceeding, where the Panel has come to a decision and the parties are expected to abide by it and not just take it as advisory.

Q. Right.

A. That was a big accountability gap that the community said, "We want this closed." So what -- how do you make that closed? You say that it is more like arbitration because you expect the binding nature to be there.

Q. So --

A. They didn't expect it to become arbitration, but they expected it to be final like arbitrations are final.

Q. Got it. Not only final and binding, but because of sort of the unique nature of ICANN and the IRP process, it can be final and binding on a really broad stroke, including the rights of third parties, right?
A. That's right.

Q. Now, where did you get this language from that you were proposing here about entities whose actions were significantly referred to in the briefings before the Panel?

A. I was thinking about past cases we have had, IRPs where we have had mention of other parties, for example, the .AFRICA IRP talks a lot about the actions of some of the other parties to the contention set. I was thinking about how this could present and what would make sense in terms of allowing an IRP to move forward and not get bogged down in briefing just about who can be there as an amicus and who can't.

Q. Well, let me ask you this: Let's assume that there is an IRP that contains a lengthy discussion of a prior IRP, and therefore, in that discussion of the prior IRP, the claimant has a lengthy discussion of what the prior claimant in that prior IRP had done. So its briefings before the Panel contain a relatively significant description of actions taken by that other claimant in the prior IRP.

Under this language, wouldn't that other entity that participated in a different IRP have a
right to participate in this -- in the new IRP?

A. If they chose to, yes. And also, you know, depending on how their actions were being characterized and if it would result in language in a Panel declaration that would impact them or recast their actions in the future, that could be fully appropriate.

But if it is just a recounting of facts like in the facts section, when you are trying to suggest that one situation is like another, that's just a fully factual recounting of what happened, why would they want to come in? They are not required to. This isn't an intervention where you pull them in. It is an opportunity for someone to come in and preserve their right.

So if there is significant discussion, even if it is someone fully outside of a process, but for some reason they are recounting how they did something and it is not correct, that party, if they got on notice about it, should have the ability to come in and clear their name or get something clarified within the process without having to fight about coming to do that.

Q. Well, what about a competitor? A competitor may want to intervene in an IRP just to
disrupt it. And if they have a procedural hook that removes all discretion of the procedures panelists, doesn't that give them a pretty good opportunity just to come in and muck up the
process?

A. Well, first, you have to consider what mucking up the process means. Is it making -- is it giving one party the ability to cast however they wish the actions of another? If this is a competitive situation, the competitor wouldn't be able to come into the IRP under this rule, and their actions have been significantly discussed within the papers.

So it is not like someone just looking, oh, Afilias is doing this, I am a competitor, I want to come in, then they have to go through all the normal -- the normal briefings to document how they have a material interest to come in as an amicus, as opposed to saying, "Afilias keeps talking about me. Can you hear me and what I think about this?" That's the difference here.

Q. Okay. I get that.

Now, the Sidley firm had been advising the IOT on the drafting of these rules, correct?

A. Yes.
Q. Did you show these edits that you made here in your October 16 email to anyone at the Sidley firm?

A. No.

Q. Did anyone provide you with advice or language about how to change Rule 7 between the time you sent your October 12 letter to Mr. -- email to Mr. McAuley and the time that you sent these edits on October 16?

A. There may have been privileged interactions internal at ICANN.

Q. Okay. Did you speak with anybody within ICANN? Without revealing the substance of those communications, did you speak with anybody at ICANN about edits to Rule 7 between October 12 and October 16?

A. Likely, yes.

Q. Who?

A. Most likely Liz Le, who I was working with on the IOT.

Q. Anyone else?

A. Not that I recall.

Q. Now, in your October 16 email you also included a proposed footnote that is also underlined. I think as you were stating earlier,
this is where you provided that the IRP Panel should have discretion to determine the proper scope of amicus participation, correct?

A. Yes.

Q. Do you recall that Mr. McAuley proposed amending this footnote to provide that Amici should be allowed to, quote, "Participate broadly in the IRP"?

A. Yes.

Q. And you revised the final version of Rule 7 to reflect Mr. McAuley's proposal, correct?

A. I'd have to look at the final text that was approved to see what I proposed.

Q. Sure. It is in the -- well, we don't need to do that now. That's fine.

A. I do believe that Mr. McAuley was proposing to remove some discretion of the Panel about the terms of that broad participation. If I included the word "broad" in the final topic, it was solely the discretion of the Panel, but encouraging broad participation. I think there's a difference, if I recall what Mr. McAuley proposed and how that was reflected in the Rule 7 that was approved.

Q. Okay. Now, the full set of the interim
supplementary rules were sent to the entire membership of the IOT on Friday, October 19th, correct?

A. I believe that's right, yes.

Q. And the cover note, which is Tab 8 in your binder, if you want to refer to it, states that, "If comments are not received by midnight on Sunday, October 21st, the interim rules would be deemed approved by the committee"; is that right?

A. Yes.

Q. And turning to Tab 9 in your binder, in fact, Mr. Turcotte reports on Sunday, October 21st, that there had been no comments received, correct?

A. Yes.

Q. Now, there was no requirement that any member reply with their assent to the proposed rules, correct?

A. Correct.

Q. So there was no way to confirm whether any member of the IOT had even looked at the draft over the weekend, correct?

A. There was no way to confirm by the record, but this was also in the middle of an ICANN meeting, where by the Saturday most people were on site and active in meetings. So there was hallway
conversation. There were reminders as people were passing each other, "Did you look at this?" "Can you make sure you check it?" So this wasn't a normal weekend, right. It wasn't a normal Friday to Sunday time frame.

This was a time when most of the people who are active on the IOT, including those who hadn't necessarily been quite active, would be typically in meetings, on their email, talking to people, interacting face-to-face with people in the IOT. So there was --

Q. I'm sorry, I cut you -- but there was no record and you can't point to any document to confirm that any other member of the IOT, other than you and Mr. McAuley, had seen the proposed changes to Rule 7 by the time it was deemed approved by the IOT on Sunday, October 21st; isn't that right?

A. There's no record, but there was -- there were additional issues relating to the time for filing issues that made it clear that other members of the IOT were looking at the rule set because they were approved and were having discussions about that in other channels, but not on this list, but not about the amicus.
Q. So those other communications about the time for filing Rule 4, were they posted to the IOT's LISTSERV?

A. I don't believe so. There was a member of the IOT who was coordinating off IOT list a time in writing and a time back -- I don't -- to the extent I might have any of those records, they were only forwarded to me because they weren't on publicly-available lists -- where they were trying to impact the Board consideration regarding the time for filing issue and having that conversation.

Q. And that was Mr. Hutty, correct?

A. Correct.

Q. And Mr. Hutty was one of the few non-ICANN lawyers or VeriSign employees who attended the October 9 and October 11 IOT meetings, correct?

A. He was one of the attendees, yes.

Q. Yeah. And did you hear from any of the other members of the IOT over the weekend between October 19 and October 21st that confirmed that they had, in fact, read the interim rules that were circulated?

A. I don't recall specific conversations that I had.

Q. Now, the ICANN Board voted to adopt the
interim rules on October 25th, correct?
   A. Correct.
Q. Did you attend that Board meeting?
   A. Yes.
Q. In preparation for Board meetings, is it customary for ICANN legal to draft resolutions for the Board's consideration?
   A. Yes, or other members of the organization.
Q. And on October 25th the Board considered a draft resolution adopting the interim rules; is that correct?
   A. Correct.
Q. Did you draft those resolution?
   A. I did.
Q. I would direct your attention to Tab 10 in your binder, which is a copy -- a full copy of the October 25 Board resolution, and there were quite a few things on the agenda. So I would direct your attention to Page 57. This is where the discussion of the interim supplementary rules start.
   If you turn to Page 60, that's the rationale for the resolutions that were adopted; is that right?
   A. Correct.
Q. So this is the explanation for why the
Board voted to adopt the interim rules; is that right?

A. Yes.

Q. Turning to Page 62, the resolution reflected the principles that we mentioned earlier about the adoption on how the IOT went about adopting the supplementary rules; is that right?

A. I don't recall that we really discussed that, but yes, they reflect that principle.

Q. And, in fact, I direct your attention to the first page in the document behind Tab 11, which is the final set of rules that were adopted on October 25th. Those principles are reflected in the last paragraph on Page 1, going on to Page 2; is that right?

A. Yes.

Q. Okay. I just want to go through these with you.

In drafting the interim supplementary procedures, what the principles state is that the IOT applied the following principles: "One, remain as close as possible to the current supplementary procedures for the updated supplementary procedures posted for public comment on 28 November of 2016," correct?
A. Correct.

Q. So that first principle was to remain as close as possible to the rules that were already in effect or the draft rules that had been posted for comment in 2016; is that right?

A. Right, the first of three principles, yes.

Q. Yes. We are going to go through all of them, I promise.

A. Okay.

Q. The second principle is, "Two, to the extent that public comments received in response to the draft that was posted in 2016 and reflect clear movement away from either the current supplementary procedures or the draft," the public comment draft, "that the IOT should reflect that movement," so I think as you said, trend, "unless doing so would require significant drafting that should be properly deferred for broader consideration."

Is that a fair summary of what that second principle is?

A. Yes.

Q. So in short, the IOT should reflect the changes that the public suggests unless doing so would require significant drafting; is that right?

A. Correct, and unless -- yes. We don't
necessarily have a significant drafting task, but
that's what's there.

Q. And is that because if one comment
suggested something and the IOT thought it was a
good idea but it required significant drafting, the
rest of the community should have an opportunity to
see what that is; is that right?

A. And also, if you reflect back, these
principles were initially put in in May, when the
interim supplementary procedures were initially
proposed. So there it was -- there were some
situations where it wasn't clear that we had -- if
we were to approve a rule set in May, say, for
example, the IOT looked at the rule set that was
produced in May as the interim set, that would
reflect for the IOT why some of those trends that
had been reflected in public comment might not be
incorporated.

Here we do have some of the passage of
time as well, where there had been significant work
towards embodying those trends and language and
significant agreement amongst the IOT to reflect
those trends.

Q. So --

A. Go on.
Q. I'm sorry. I didn't mean to interrupt you. Have you completed your answer?
A. Yes, yes.
Q. Okay. Now, you recall that when the draft IRP rules were posted for public comment in 2016, there was a page devoted to that on the ICANN website, correct?
A. Yes.
Q. And on that -- and I am reading from it right now. I don't have a copy in your binder, but I will represent I am reading to you. It says, "Next Steps. If significant changes are required as a result of the public consultation, the IOT may opt out" -- sorry -- "the IOT may opt to have a further public comment period on these changes. If there are no significant changes, the rule will be included in the updated supplementary procedures."
Do you recall that?
A. Yes.
Q. So I think that it is fair to say that what you told the community in 2016 and what you reflect here in Principle 2 is that we are going to take the public comments unless it's a significant change, and if it's a significant change, like there was in Rule 4, we are going to go back out

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for a second public comment; is that right?

A. I think so. What we do -- when we take public comment, if it requires significant change, particularly significant change that is not expected or supported by public comment, we would take it back out for public comment, and that's what the community should expect.

Q. Okay. Looking at Principle 3, it says, "Three, take no action that would materially expand on any part of the supplementary procedures that the IRP-IOT has not clearly agreed upon or that represents a significant change from what was posted for comment and would, therefore, require further public consultation."

So that's basically what we just talked about, correct?

A. Right, right.

Q. Just to refresh your recollection, that's also what you were talking about in your October 12 email that the IOT would need to consider whether the changes to Rule 7 that Mr. McAuley was proposing was a significant change than what had been posted for public comment, right?

A. Right, particularly in that significant interest test that he was introducing.
Q. Now, is it fair to say that when the Board adopts a resolution and it includes a rationale for that conclusion, that the Board has reviewed and agrees with everything that's in the resolution and the rationales?

A. Yes, each Board member has the opportunity to either abstain or vote against.

Q. So would you say, as someone who attends Board meetings and someone who has drafted resolutions and rationales, that these resolutions and rationales that were adopted on October 25th reflect the fact that the Board believed that the IOT had followed these procedures, correct?

A. Yes. And then further in the rationale it also identified the Board's understanding of the continued conversation and how things might have changed over the time leading up to the Board meeting.

Q. Okay. I'd like to direct your attention to the document behind Tab 12 in your binder, and this is, I will represent to you, a redline that we ran some time ago when we were in front of the Panel on Phase I.

And this redline is the current version of Rule 7 that was adopted on the 25th of October 2018.
against the version that went out for public
comment in November of 2016. And I would just ask
you to review the four pages of this document.

And I would ask that whether or not --
given the changes reflected in this redline, this
is a significant change, isn't it?

A. If you mean "significant" in terms of
volume of words, yes, but I don't think that it is
significant in terms of between what was posted,
particularly as it relates to the consolidation and
intervention.

And the changes there really are
reflecting some of the other specifics that were
raised through public comment about how to make
sure we were doing it correctly, and then the
addition of the amicus part also comes out of
public comments.

So while there's clearly two and a half
additional pages here, I won't say there's not --
there's -- volume alone doesn't mean that it is a
significant change.

Q. Well, if you look at the bottom of Page 2
and the top of Page 3, which is "Participation as
an Amicus Curiae" -- I know it is called a redline,
but this is a blue line. It is all blue, right?
A. Yeah.

Q. And what you had told the community in
2016, that if significant changes are required as a
result of the public consultation, the IOT may opt
to have a further public comment period on these
changes.

So is it fair to say that you opted not to
have a further public comment on these changes?

A. There clearly was not a further public
comment on these changes because there were
multiple comments that asked us to consider
including an amicus section, and that's what the
IOT delivered.

If we put things back out for public
comment once there's a change that clearly reflects
a trend for public comment, we would be in a
never-ending loop of not getting our work
completed.

I think when we look back at the IOT's
expectations of this and the community's
expectations of this, we didn't hear -- even after
the Board approved it, we heard no concerns from
the IOT that the Board had approved the rules in
this form, and we also didn't hear from the
community other than Afilias of a concern that the
Board had approved the rule in this form.

We have a very vocal community that will stand up and raise their hand and raise issues regarding that if they had concerns.

MR. LITWIN: Mr. Chairman, I know we have been going for about an hour and a half now. I probably have about another 10 or 15 minutes for Ms. Eisner. Would you like to take a break now or would you like for me to finish my cross-examination?

ARBITRATOR BIENVENU: I think we should take a break now. How long did you say you still have?

MR. LITWIN: I think 10 or 15 minutes at most.

ARBITRATOR BIENVENU: Okay. Very well. So that means that you're going beyond your estimate, at least as reflected in the agenda.

MR. LITWIN: That is possible, Mr. Chairman. I do expect that future witnesses will go quite a bit faster than anticipated.

ARBITRATOR BIENVENU: Very well. I am not reproaching you. I am just observing that will be the case.

So we will take our first 15-minute break.
Ms. Eisner, as I instructed you yesterday, you are not to discuss your evidence during the break. You are aware of that?

THE WITNESS: Yes, I am. Thank you.

ARBITRATOR BIENVENU: Mr. Wallach, any sense, as we stand now, of the length of your redirect?

MR. WALLACH: It will not be long. I would not expect it to be more than 10 or 15 minutes.

ARBITRATOR BIENVENU: Very well. So we will resume in 15 minutes. Thank you all.

MR. LITWIN: Thank you, Mr. Chairman.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Ms. Eisner, you are under the same solemn affirmation.

And, Mr. Litwin, please continue with your cross.

MR. LITWIN: Thank you, Mr. Chairman.

Q. Ms. Eisner, I'd like to switch topics and ask you a few questions about Rule 4 of the supplementary rules.

Before the interim rules came into effect on October 25th, 2018, the deadline to file an IRP had been set in ICANN's bylaws; is that right?
A. Before October 1st, 2016, the deadlines had been set in ICANN's bylaws.

Q. Before October 2016 the bylaws required a claimant to file within 30 days of the posting of the minutes of a Board meeting, correct?

A. Yes, I believe that's right.

Q. And those bylaws, I think, as you've anticipated my question, were replaced in 2016, and the new bylaws didn't have a timing provision in it; is that right?

A. Correct. The accountability group that came up with the recommendations on the IRP reserved that matter for the IOT to decide.

Q. So I just want to go through the timetable here with you.

Are you aware that ICANN maintains in this IRP that the relevant ICANN action here was the ICANN Board's decision to defer consideration of Afilias' complaints about how the .WEB contention set had been resolved; are you aware of that?

A. I have read the papers, but that's the extent to which I am aware of it.

Q. Okay. Now, that decision to defer consideration, according to ICANN, took place on November 3rd, 2016; are you aware of that?
A. Only from the papers.

Q. Okay. Now, I'll represent to you that ICANN did not disclose the fact that that Board workshop on November 3rd, 2016, was occurring and did not disclose any decision that was taken during that November 3rd meeting.

Are you aware of that?

A. I am not aware of that.

Q. Okay. Now, let's just consider the date of November 13, 2016. I think as you just testified the then-current bylaws did not have any deadline in it for filing an IRP, correct?

A. On November 13th, 2016?

Q. Correct?

MR. BIENVENU: You said 13. Did you mean to say 3rd?

MR. LITWIN: I'm sorry, November 3rd.

Thank you, Mr. Chairman.

Q. As of November 3rd, 2016, the then-current bylaws did not have a deadline in it for the filing of an IRP; is that right?

A. That's correct.

Q. And the supplementary rules for the IRP that were in effect on November 3rd, 2016, didn't have a deadline for filing either; is that correct?
A. I believe that's correct. I would have to go back and refer to them, but I believe the bylaws at the time specified, but the supplementary procedures did not.

Q. So let's fast-forward to 2018. Afilias initiated its CEP on June 18, 2018; is that right?

A. That's right, based on your representation.

Q. As of that date, June 18, 2018, there was still no deadline to file an IRP because neither the bylaws nor the supplementary rules that were in effect had a timing provision in it; is that right?

A. Yes.

Q. Now, in October of 2018, Afilias was still in CEP with ICANN; is that correct?

A. Based on our discussions today, yes.

Q. And on October 10, as I have represented to you, Afilias had sent a draft IRP request to ICANN to enable ICANN to respond to the merits of its claim in the context of that CEP.

Do you remember that discussion?

A. Yes, I do.

Q. Now, at the same time within the IOT, is it fair to say that the committee was debating the substance of the interim rules?
A. "At the same time" being that November 3rd, 2016, up through --

Q. During October 2018.

A. During October 2018, yes, the committee was debating the substance of a few different rules that are reflected in the exhibits that you presented.

Q. And one of them was, in fact, Rule 4, the timing provisions, correct?

A. Yes.

Q. In fact, Mr. Hutty objected, I will say strenuously --

A. Yes.

Q. -- to the adoption of those rules?

I always think of A Few Good Men when I say that.

Those draft rules weren't finalized until October 19th, correct?

A. If we consider what was sent in the email, yes, that's correct.

Q. And they were first deemed approved by the IOT on Sunday, October 21st, correct?

A. Yes, I think so.

Q. And they were first sent to the Board on Monday, October 22nd, correct?
So let's back up for a second. In terms of deemed approved, I believe that we had had a set at the end of September that had been pretty well gone through, recognizing that there were a few minor changes that might have happened a couple other places. There was -- and then there was a discussion of Rule 7. We will set that aside.

So in the other form -- I have to go back and recall, but I think that one of the only areas where there was any change on the time for filing issue -- if we're discussing that part -- had to do with the fact that we agreed at some point and finalized language on a footnote that would confirm that if there was a future change in a deadline for time for filing, that ICANN would work to make sure no one was prejudiced by that.

But I think that the language otherwise in Rule 4 had remained pretty steady up to that point and there had been final readings through the IOT on that.

Q. And the Board voted on the interim rules, including the text of Rule 4, on October 25th, correct?

A. Yes.

Q. And that's the first time that the
time-bar rules in Rule 4 came into effect, correct?

A. It is the first time that a time for filing had been specified and came into effect for the IRPs after October 1st, 2016.

Q. And then the ICANN Board rejected Afilias' reconsideration request on November 6th, correct?

A. Based on your representation, yes.

Q. And then ICANN terminated CEP on November 13th, correct?

A. Again, based on our discussion, yes.

Q. And then Afilias filed its IRP the next day, on November 14th, correct?

A. I believe that's correct.

Q. But ICANN's Board was going to work to make sure no one would be prejudiced by the adoption of Rule 4; is that what you said?

A. The footnote that was included in the Rule 4 was about the change between the -- we are putting the interim rules into effect.

And then if in the future a discussion where people were suggesting that there should be basically no statute of limitations on the ability to challenge an act of ICANN, if that were to be the predominant view, and what the Board put into effect that there would be some sort of stopgap
measure put in so that anyone who was not able to
file under the interim rules and the timing set out
there but could have filed if the other rules, the
broader rules had been in effect, that we would put
in a stopgap to make sure that no one was
prejudiced by that differentiation because we had
agreed on a different timing for the final set.

Q. Ms. Eisner, who at ICANN legal was
responsible for tracking and working on CEPs and
IRPs?

A. That would be a team led by Amy Stathos,
one of the deputy general counsel, and the people
who work for her that she would assign based on
availability and subject matter.

Q. So when you -- I'm sorry.

A. Go on. Sorry.

Q. So when you said during the IOT meeting on
October 11th that, "We at ICANN org are getting
nervous about being on the precipice of having an
IRP filed," were you referring to Ms. Stathos?

A. In part. It was a general area of
discomfort for us. We committed to have this IRP
in place through our bylaws, and we knew that it
was a stopgap measure. Every single day we are at
risk of having IRPs filed. So it is a general
collective concern.

We are -- we're the lawyers responsible for making sure that our entity's in compliance, and part of that is in compliance to our bylaws, and there's a really big gap there.

Q. And, in fact, Afilias filed its IRP 34 days after that October 11th meeting, right?

A. Yes.

Q. And the next IRP to be filed wouldn't be filed for more than 400 days; is that right?

A. I believe so, based on when you said the next filing was.

MR. LITWIN: Thank you, Ms. Eisner.

I have no further questions, Mr. Chairman.

Thank you, Ms. Eisner, very much for your time today.

THE WITNESS: Thank you.

ARBITRATOR BIENVENU: Thank you,

Mr. Litwin.

Do my colleagues have questions for Ms. Eisner, starting with Catherine Kessedjian?

ARBITRATOR KESSEDJIAN: I do.

Ms. Eisner, I am Catherine Kessedjian. I am speaking from Paris.

I noted at the very beginning of your
testimony today before us that you are in the position in which you are at ICANN as deputy counsel, general counsel since 2014; is that correct?

THE WITNESS: I have been -- I can't recall when I was promoted to deputy. I believe it was somewhere in 2016, but I have been either associate general counsel or deputy since 2014 and doing the same work since 2014.

ARBITRATOR KESSEDJIAN: Okay. My recollection may not be good, but I think I have seen a CV of yours on the Internet saying that you have joined ICANN in 2009; is that correct?

THE WITNESS: That's correct, yes.

ARBITRATOR KESSEDJIAN: So could you describe for us what you did before becoming the deputy general counsel?

THE WITNESS: Sure. When I joined ICANN in 2009, I joined a three-person department, making it a four-person department, and I was the most junior member of the department at that point.

ARBITRATOR KESSEDJIAN: You mean the legal department?

THE WITNESS: The legal department, yes. So I assisted on any matter that came up before --
across the legal needs of the organization.

So because ICANN itself was a smaller organization and the legal department was smaller, we all covered a lot of the areas and kind of stepped in and out as needed to cover our service areas.

In 2013 ICANN doubled the size of its legal department, and with that came a differentiation of duties. So we wound up separating out the work that we do across Ms. Stathos, who is a deputy -- she was a deputy then and remains a deputy now, who manages our litigation management as well as the internal work.

We have someone that handles a lot of the policy side of what we do and our stakeholder services and actually for the contracted parties.

And I stepped into a role of -- that I explained yesterday of supporting our strategic initiatives work as well as the global stakeholder engagement work and then special projects that come up, such as the community-facing work that I do.

ARBITRATOR KESSEDJIAN: Thank you. You have described many times during the cross-examination the fact that IRPs have been at the center of the worries, if I may say so, of the
legal department and of ICANN org.

Could you explain to us how the
information is going through the legal department
throughout the community? What information do you
get and how often do you discuss that with your
colleagues?

And since you were drafting rules about
IRPs, how come -- I may have misunderstood you. I
would have to read the transcript again -- but how
come you cannot recall anything about IRPs? I find
a disconnect from what you have been telling us in
your cross-examination between the fact that you
say it's a major worry and the fact that you have
answered a lot that you do not recall when you are
asked precise questions about IRPs.

THE WITNESS: Thank you. I appreciate why
it might appear that there's a disconnect.

So I am not involved in the day-to-day
operation of the IRPs. I am not part of our
regular litigation support function that prepares
our defenses and really engages on the substance of
how ICANN itself will, you know, participate in IRP
proceedings or, for that matter, our other
accountability mechanisms.

My day-to-day work -- and there's a lot of
it and separate, but that doesn't mean that I am not involved in helping to make sure that ICANN as an organization is prepared to handle those.

So one of my biggest roles in our legal department is to help make sure that we are acting in alignment with our bylaws. It is one of the obligations of all of our counsel, of course.

Because of the specific nature of work that I do and I have been very involved in the accountability processes that led up to the development of the recommendations that enhance the IRPs, and so then I kept going with that work.

That's one of the reasons why we also had Liz Le, Elizabeth Le, who you have heard me discuss and she's been referred to, she works more closely with Amy and her team on the litigation management. I am not sure about her involvement in individual IRPs.

So I am very familiar with the operation of IRPs in general, and I am very familiar with how actions taken within the supplementary procedures might impact efficiency of proceedings, resources needed and those sorts of things.

It is like -- imagine really understanding civil procedure, for example, but not getting
involved in the day-to-day procedure of a case. That's exactly kind of where I sit.

So I, of course -- if that makes sense.

ARBITRATOR KESSEDJIAN: But saying that you are not involved in the day-to-day management of a case, I fully understand that. But when an IRP is filed or about to be filed, there are some conversations within the department of which you are, if not a participant, at least an observer, aren't you?

THE WITNESS: Of course there are times when I know when an IRP is filed. I will get an update about that fact. It is both a special and a regular course of our life at ICANN.

So it is something that -- like this IRP, of course, has touched me much differently than any IRP that has happened since I was a junior attorney in 2009, working with ICANN, where I might have been more directly involved with litigation support, only because as you can manage, my name is in it and it is about the activities and centers around some of that.

But often also the IRPs themselves relate to day-to-day work at ICANN that I am also not involved in. So, for example, I don't do a lot of
the work that relates to the new gTLD Program or
those -- as I discussed earlier, much of the IRPs
have been about processing the applications for the
new gTLD Program.

So because I don't have substantive
expertise on that and it's not my role, I hear
things are coming in and I am aware of what my
colleagues are working on, but I have a full desk
of work, so I don't necessarily get involved in a
lot of the day-to-day conversations about it.

It becomes a fact of something that's
going on, but because it's not something that I
need to give attention to, I would only give
support when I'm called on to give support for it,
but otherwise I don't get involved in regular
status updates with my colleagues on it because it
is not something that -- typically just a general
conversation among our department unless there's --
we know that there's hearings coming up.

Someone says, "There's a hearing coming up
in this IRP, so I'll be very busy with that. Maybe
you can help pick up some of my work over here."

Something like that.

ARBITRATOR KESSEDJIAN: My last question.
I understand you cannot recall now in 2020 what has
happened in 2016 and '18, but it would be fair to say that at the time when you were working on those rules, you heard about what was going on in the other parts of the department, and so your thinking may have been influenced by that?

THE WITNESS: I would have had general knowledge of it, but I think it is also important to recall that I -- knowing that someone might be filing an IRP, that's -- it makes it important to make sure we have the basis for that IRP to be filed. That's one thing that exists no matter what the topic or who that entity might be.

So even -- I would assume I was aware at some point that there was a CEP happening, for example, that I don't recall the specifics of because, again, it was a fact of note, right. But it wasn't about who it was. It was about the fact that there was something happening.

ARBITRATOR KESSEDJIAN: Because it was directly important for the work you were doing?

THE WITNESS: In order to make sure that we had the basis of rules coming through. So it could have been any entity that had initiated a CEP, for example. That didn't matter.

So the important thing was we needed to
have some rules that matched with the bylaws to allow the Panel to run an IRP that made sense for everyone.

ARBITRATOR KESSEDJIAN: Thank you very much. I am done.

ARBITRATOR BIENVENU: Mr. Chernick, any questions for Ms. Eisner?

ARBITRATOR CHERNICK: No. Thank you.

ARBITRATOR BIENVENU: Ms. Eisner, could I ask you to turn to Paragraph 5 of your witness statement?

THE WITNESS: Yes. I am there.

ARBITRATOR BIENVENU: So this paragraph deals with the period between 11 October 2018 and 16 October 2018, a period during -- concerning which Mr. Litwin questioned you.

THE WITNESS: Yes.

ARBITRATOR BIENVENU: And there is presented in this paragraph a sequence of events which, for the purpose of my question, I'll break down in five steps, if I may.

The first one is Mr. McAuley's suggestion to give claimant status to persons with a significant interest, correct?

THE WITNESS: Yes.
ARBITRATOR BIENVENU: Then you mentioned Mr. Hutty's suggestion that interim procedures should specify the categories of persons entitled as a matter of right to participate in an IRP, right?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: And then you mentioned that you are tasked by the IOT to propose language to reflect the discussion?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: And then you mentioned that you drafted further revisions which included a deemed interest in favor of members of the contention set or an entity whose actions are significantly referred to in the IRP, that's Step 4?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: Then you mentioned that you send out those revisions on 16 October to Mr. Turcotte and McAuley and then you and McAuley had subsequent exchanges over the next three days, right?

THE WITNESS: Right.

ARBITRATOR BIENVENU: There is no mention in that sequence of events of the fact that between
Steps 3 and 5, as I understand it, you had contacts with Mr. McAuley and to the fact that Mr. McAuley had input into the drafting of the revisions that were sent out on 16 October; is that correct?

THE WITNESS: I don't recall the contact that you are speaking of.

ARBITRATOR BIENVENU: Can you look at Tab 8 of the witness bundle?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: You recognize this email message? This is the email by which Mr. Turcotte, on behalf of Mr. McAuley, sends out the draft that you have been working on since October 11, correct?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: Can you look at the fifth paragraph?

Just before you do that, we know that this email was, in fact, drafted by Mr. McAuley, who sent that draft to Mr. Turcotte, who then on behalf of Mr. McAuley sent that out to the members of the IOT, correct?

THE WITNESS: That's correct.

ARBITRATOR BIENVENU: So if we look at this paragraph, we read, "As some attempted to
draft a compromise in this respect." So he's talking about the period between the 11th of October and the 16th of October, correct?

THE WITNESS: Let me just refer back to my declaration. Can you repeat your question?

ARBITRATOR BIENVENU: Yes. I am just trying to situate this language here.

What I'm understanding reading this email is that Mr. McAuley is explaining to the members of the IOT that as you were attempting to draft the compromise, basically to deliver on the task that you were given on the 11th of October, you encountered difficulty, and he explains here that you "encountered difficulty in capturing appropriate language that she felt would be consistent with bylaws."

Then he goes on to say, "Sam reached out to me in my participant capacity, and we discussed over the ensuing days, and so the language you will see there is not exactly as discussed on the calls. The language is acceptable to me in my participant capacity. I felt these discussions were appropriate inasmuch as I had raised the issue as participant and knew I would forward the resulting language to the list, a way to try to take
advantage of Board action at next week's meeting,"
end of quote.

THE WITNESS: Yes.

ARBITRATOR BIENVENU: So in point of fact, there were discussions between you and Mr. McAuley on the subject of the changes to Rule 7 between the 11 of October meeting and the 16 of October draft, correct?

THE WITNESS: Yes. And there are email discussions that reflect that that are in the record. For example, at Tab 6 of my binder, the binder that Afilias' counsel presented to me, you'll see the difficulty reflected on that February 12th -- sorry, on that Friday, October 12th, email.

ARBITRATOR BIENVENU: Right.

THE WITNESS: And then we had exchanged emails regarding that. So we had email discussions that I -- that's what I understand he's referring to here.

ARBITRATOR BIENVENU: And do I understand that these discussions were only by emails? There were no telephone discussions?

THE WITNESS: As far as I recall, that's the case.
ARBITRATOR BIENVENU: As you sit here today, Ms. Eisner, do you remember these exchanges?

THE WITNESS: Yes. I remember the email exchanges that are in front of us, yes.

ARBITRATOR BIENVENU: Are you sure that they were only email exchanges, or might you have had telephone exchanges?

THE WITNESS: There were times when I spoke with Mr. McAuley in his role on the IOT on the telephone.

I don't recall specifically when those occurred, and I don't recall if it was around this time period or about this topic.

I did speak with Mr. McAuley at times by telephone, but I don't recall sitting here today if we ever discussed this topic by telephone.

ARBITRATOR BIENVENU: Do you recall -- or I'll put it even in sensitive terms.

Is it possible that in the course of these discussions, Mr. McAuley influenced or shaped the language added to Rule 7 during that very short and critical period, and in particular, the two categories of parties who, according to the new draft, would be deemed to have a material interest?

THE WITNESS: So Mr. -- the revisions that
happened in that middle part of October would never
have happened if Mr. McAuley hadn't introduced the
new language that he did around the October 9 to
October 11 time frame, that's true. We were
prepared to move the rules forward.

Whether Mr. McAuley -- to your question of
did Mr. McAuley influence the specific language --

ARBITRATOR BENVENUT: I wouldn't even put
it in those terms. What I suggested is whether
your discussions with him may have influenced or
shaped that language? Because they are very
specific scenarios that are contemplated there.
They emerged during that period.

And what we know based on that email --
unless you correct it -- is that, as he says, you
reached out to him and you discussed over the
ensuing dates, so the language that you see there
is not exactly as discussed on the calls.

So the question I have is: Is it possible
that during that period, the language that you came
up with was shaped by those discussions?

THE WITNESS: I believe my outreach to him
in his participant capacity would have been a
Friday, October 12th, email that was directed to
him with Mr. Turcotte and Ms. Le. That's where you
see my discomfort with his initial language reflected. I clearly -- so within my role at ICANN -- or with ICANN and as we get to points where we are getting ready to have something sent to the Board to reach conclusion in a group, it sometimes happens that people come in towards the end and request changes.

No matter who those people are, my role in this group was to help move this language forward. It didn't matter who was presenting it. Anyone else could have raised this language, and I would have had the same obligation to try to move the language forward.

I clearly had to think about the issues that Mr. McAuley was raising that he was expressing regarding why he was proposing this to see if I could move this language within the bounds of the appropriate structure of the IRP, and where it appeared that we had the ability to go with it, to make -- to see if we could move it to a place where we would have rules that we could put in place.

But I was also extremely careful to not expand the rules beyond a place where it didn't seem appropriate.
MR. LITWIN: Mr. Chairman.

ARBITRATOR BIENVENU: Yes.

MR. LITWIN: There is a document that I referred to obliquely in my questioning, which is not a substantitive document. It is a two-line email that Mr. McAuley sent to Ms. Eisner at 7:09 a.m. on October 15, 2018. It is one of the documents that ICANN posted to the IOT-IRP website in response to our motion before the procedures officer.

It is not in the record, but I do believe that if we could introduce this document and ask Ms. Eisner about it, it would confirm the existence of a phone call between Mr. McAuley and Ms. Eisner on October 15th.

ARBITRATOR BIENVENU: I don't think we should embark on a discussion of adding to the record at this point, Mr. Litwin.

MR. ALI: Mr. Chairman, if I may, this is a two-line email, which was sent -- where Ms. Eisner, who is the witness before you, is the recipient. It seems to me that she can be asked about it, particularly in light of the line of your questioning.

It is simply a question of confirming or helping her to refresh her memory that, in fact,
there was the phone call that you were alluding to. It is there in black and white. It doesn't take more than 30 seconds for her to review the message.

MR. WALLACH: Mr. Bienvenu, may I say something?

ARBITRATOR BIENVENU: Is that Mr. Wallach?

MR. WALLACH: Yes, it is.

ARBITRATOR BIENVENU: I think Mr. LeVee also wanted to say something, but I'll listen to you, Mr. Wallach.

MR. WALLACH: I would object to the addition of new evidence, new documents into the record at this point on any issue, but particularly on the Rule 7 issue, which has been the subject of significant briefing going back a year and a half now. It has already been the subject of one hearing.

I would also object to Mr. Ali's interjecting himself at this point. We agreed that one attorney would do the examination other than in exceptional circumstances. Mr. Litwin did the examination.

This came up also in respect to Ms. Burr's examination yesterday, where Mr. Litwin did the examination and Mr. Ali interjected himself in
objecting to questions on redirect. I believe we have agreed that one attorney will do the examination, and that should apply to redirect. That should also apply to other issues, such as this, that are interjected during the course of the examination.

MR. ALI: Mr. Chairman, I think that is, I would say, unfortunately an uninformed view. We had agreed that there would be only one counsel to question a witness, which we have stuck by that rule.

I am lead counsel representing Afilias in this matter, and I believe I am entitled, with your permission, to make interventions before you on matters.

I have not posed a single question to a witness. Unfortunately, we are having this conversation in front of Ms. Eisner, and I remember Professor Kessedjian's admonition yesterday. So perhaps Ms. Eisner could go back into the waiting room while we hear from Mr. LeVee on other matters, if I may suggest that.

ARBITRATOR BIENVENU: Yes, that's probably appropriate. Ms. Eisner, forgive us, but we'll ask you to go to another room.
I do want to take this opportunity -- well, I address everybody. We had a discussion about the one-lawyer rule, and we decided that a counsel team would be permitted to consult during cross-examination, and we were asked to pause to allow such consultations, and we will continue to do so. That is appropriate.

To correct you, Mr. Ali, you did yesterday raise an objection in the course of the redirect examination of a witness, and that normally would have been for the counsel who had conducted the cross-examination to do.

We do not want to be formally -- we do not want to be overly formal, but we do want both parties to feel that there are rules of engagement that have been either agreed or determined by the Panel and that those rules apply to everybody.

I don't want to have a discussion about it, Mr. Ali.

MR. ALI: I'd like to put it on the record. No, Mr. Bienvenu, I need to put it on the record.

We are here in a virtual hearing because of ICANN's insistence and because the Panel insisted on having this hearing. We have been put
under incredible pressure because of the way in which this procedure has been played out. The pressure has resulted from the manner in which ICANN has chosen to conduct itself.

I don't want to sound like I'm whining, but the way in which this is played out has not only put us under incredible pressure that if it continues will give rise to issue of fairness, number one.

Number two, we have been put in the position because of the way in which we have been proceeding, where I have had to -- where my team has had to basically break every rule of engagement that is required by the D.C. government and by my law firm in terms of health and safety because of the pace at which we are proceeding.

We are proceeding under immense pressure by this Panel that allows -- that -- where we are. We have nine witnesses.

Mr. Chairman, you, yourself, have been counsel in international arbitrations. One week to get ready for a hearing with nine witnesses that we have to cross-examine is no mean feat, and we are doing so where people are not in the same room. People are having to make special arrangements
because of how they live and where they live and
who they live with in order to be able to
participate in the hearings, unlike the three
arbitrators and some of the members of the team, do
not have the luxury of being in a location where
they can work easily or, for that matter, the lead
counsel and the partners. So it has, indeed, been
extremely difficult.

I will say if I were sitting next to
Mr. Litwin, as would be the case for any lead
counsel, Mr. Chairman and members of the Panel, I
would have been able to pass him a note.

So these objections that are being raised
I find are to the rules of engagement and the
formalities and the procedures. You know, it is
either virtual or not virtual. If we are in a
virtual world, then allowances need to be made as
we are all learning how to manage the technology,
how we are trying to manage health and safety
issues, how we are trying to manage the time zone
witnesses, how we are trying to get nine witnesses
done in truncated hearing days.

So, Mr. Chairman, yes, I do need to put
that on record, and I apologize if I'm being
strident about this, but, frankly, I have reached
the end of my tether in the way in which some of
this has been -- how some of this has played itself
out.

I do think that allowances need to be made
for the circumstances that we are in because I am
seeing what this has done and is doing to my team,
whose health and safety is paramount.

And together with that is our right to a
fair hearing in which we are given an opportunity,
a full and fair opportunity to present our case.

Thank you.

MR. BIENVENU: Thank you, Mr. Ali. So we
will take the request for the addition of this
document into the record under advisement. I will
discuss it with my colleagues during the next
break.

And for the moment, unless there are
questions from my colleagues for Ms. Eisner, we
would move to the redirect, then probably break and
then see if the addition into the record of this
document would lead to a few additional questions.

So let’s bring the witness back in.

Before we do, Mr. Ali, I will just say
that we are conscious of the additional burden that
the crisis which befalls the world is putting on
parties engaged in dispute resolution. We are
conscious of the fact that the burden is
particularly heavy for the party in the case that
has to conduct the cross-examination of witnesses,
and in your case there are many. We are fully
conscious of that.

My recalling the one-counsel rule was to
make sure that both parties feel that the rules
agreed -- discussed and agreed are followed, so
that was the only import of my reference to that
rule.

So let us then bring -- I have no more
questions for Ms. Eisner. Let's bring her back in.

Mr. Wallach, are you ready for your
redirect?

MR. ALI: Just one more point of order
before she comes back because I don't want her to
hear this question. We would request that she not
be released until the Panel has decided on the
document.

ARBITRATOR BIENVENU: Of course. It goes
without saying.

MR. ALI: Thank you.

ARBITRATOR BIENVENU: So, Mr. Wallach,
please proceed with your redirect.
MR. WALLACH: Thank you, Mr. Bienvenu.

REDIRECT EXAMINATION

BY MR. WALLACH

Q. Good morning, Ms. Eisner.
A. Good morning.

Q. I have only a few questions for you.
First, you were asked by Mr. Litwin some
questions about the number and identity of
attendees at certain meetings of the IOT?
A. Yes.

Q. Were all IOT members given notice before a
meeting was held?
A. Yes. It is a practice that there's
typically both an email on the list as well as
calendar notifications that go out from the
secretary to all the people who are in that group.

Q. And were all IOT members given an
opportunity to attend any meeting that was held?
A. Yes.

Q. Okay. Moving on to another subject. I
believe Mr. Litwin suggested to you -- or asked a
series of questions which suggested that any
significant change to the version of the
supplementary procedures that was sent out for
public comment would need to be sent out for a
second public comment period.

Is it a correct statement of your
understanding of the standard that any significant
change to the supplementary procedures sent out for
public comment would need to be sent out for a
second public comment period?

MR. LITWIN: Objection; that's a leading
question.

ARBITRATOR BIENVENU: Mr. Wallach, do you
want to reformulate your question?

Q. BY MR. WALLACH: Okay. What is your
understanding of the standard applied within ICANN
regarding when a change to the version of the
supplementary procedures sent out for public
comment would need to be subjected to a second
public comment period?

A. My understanding of when a change made to
a version of the supplementary procedures that have
previously been put out for public comment would
have to go out again would be if it was -- if there
was a change made that is not reflective of a trend
that arrived from that first public comment or if
it was significant or an unexpected change --
significant and unexpected change from that version
that was previously put out.
Q. Thank you. Did you have a view on whether the changes to Rule 7 were required to be put out for a second public comment period?
A. I did not think that the changes made to Rule 7 as reflected in the version that the Board approved needed to go out for public comment because I believe they were in line with the trend of public comment that we had received on the versions that had been posted in 2016.
Q. Thank you. And now I'd like to look at a document. This is Tab 10 of the binder that was provided to you by Mr. Litwin. It is Exhibit C-314 for the arbitrator.
I'd like to turn to Page 63, using the page numbers that are in the bottom right-hand corner of the document. Actually, if we could refer to 62 for a moment.
On Page 62, you have that on the screen, on Page 62 in the final full paragraph you'll see a paragraph that Mr. Litwin referred to and took you through.
Do you recall that?
A. Yes.
Q. Okay. So now if we could turn over to Page 63 and look at the top paragraph. It says,
"The IOT began consideration of a set of interim supplementary procedures in May 2018. The versions considered by the Board today was the subject of intensive focus by the IOT in two meetings on 9 and 11 October 2018, convened with the intention of delivering a set to the Board for our consideration at ICANN63. There were modifications to four sections identified through those meetings, and a set reflecting those changes was proposed to the IOT on 9 October 2018."

Do you see that?

A. Yes.

Q. What is your view on whether the Board was aware of the changes made to the amicus procedures in the interim supplementary procedures in October 2018?

A. My view is the Board was aware of the changes that had been made.

MR. WALLACH: Thank you. Those are all my questions. Thank you very much for your testimony.

ARBITRATOR BIENVENU: Thank you, Mr. Wallach. Let me just see here.

So I am looking at my colleagues, Professor Kessedjian, Mr. Chernick, would you be agreeable to breaking now? We can have a side-bar
and discuss the request for the addition of a document.

We would ask Ms. Eisner to remain available, and then we would move to hearing either more from Ms. Eisner or to move to Ms. Willett. Is that agreeable to you?

ARBITRATOR CHERNICK: Yes.

ARBITRATOR KESSEDJIAN: Fine. Thank you.

MR. BIENVENU: Very good.

So, Ms. Eisner, I cannot see you, but I think you can still hear me?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: Okay. May we ask you to go back in your room, if I may say so, stay available to the parties and the Panel, and we will instruct you and communicate our decision, and we'll go from there.

THE WITNESS: I'll be ready whenever you are.

ARBITRATOR BIENVENU: Thank you very much. So take our break, 15 minutes, and we'll convene in our break-out room.

Oh, before we break, is everyone still there?

MR. LITWIN: Yes, Mr. Chairman.
ARBITRATOR BIENVENU: This question is for Mr. Litwin or Mr. Ali, depending on who can provide an answer. When did the claimant become aware of the document that you wish to add to the record?

MR. LITWIN: May I answer this, Arif?

MR. ALI: Yeah, I was going to say, Ethan, please do.

MR. LITWIN: Mr. Chairman, as you are aware, we had made a motion before the procedures officer to disclose what is called off-list communications that took place in this October time period because they had not been posted to the ICANN IRP-IOT's Wiki website that contained all the other emails that are in the record.

ICANN produced those on a sliding scale. These were -- this email along with, as you may recall, the October 12th email, were disclosed at the end of April 2019, after we had concluded the procedures panelist process. That record is now closed.

That caused us really on the eve of the Phase I hearing to move the Panel to admit the October 12 email, which ICANN objected to at the time because it was not part of the record that was before this Panel, as we had agreed to abide by the
record that had been developed before the procedures officer.

We were at the time, of course, aware of all the other emails that had been disclosed at the time, but given that they were nonsubstantive in nature, chose only to move to admit the October 12 email at that time.

This is also a nonsubstantive email. It is two lines that respond directly to Ms. Eisner's October 12th email. For that reason and because the relevance of it became clear today, particularly in light of, Mr. Chairman, your questioning, we thought it would assist the Panel in answering a question that you were trying to elicit from Ms. Eisner.

ARBITRATOR BIENVENU: And can you -- could you please repeat, what is the date of that email?

MR. LITWIN: It is Monday, October 15th, 2018, at 7:09 a.m., so a day before Ms. Eisner sends her October 16 email that you questioned her about, and I did as well.

MR. WALLACH: Mr. Bienvenu, could I just briefly respond to that?

MR. ALI: May I just supplement, David, so you can respond to everything?
1 Just points of information so we have
2 everything in front of the Panel.
3 Chairman, this isn't clear, Ethan wasn't
4 aware, this is not an email from Ms. Eisner to
5 Mr. McAuley. It is from Mr. McAuley to Ms. Eisner.
6 ARBITRATOR BIENVENU: Yeah.
7 MR. ALI: This is a document that would
8 also be helpful to examine Mr. McAuley when he
9 testifies later next week.
10 Sorry, David.
11 ARBITRATOR BIENVENU: Someone on behalf of
12 ICANN wanted to say something. Could you please
13 identify yourself? I see Mr. LeVee, but I hear
14 someone else.
15 MR. WALLACH: Yes. This is David Wallach.
16 I just had something to say very briefly. I
17 haven't seen the document that they are proposing
18 to enter. It has never previously been provided to
19 counsel for ICANN or mentioned in any context
20 before it was raised for the first time this
21 morning. So I obviously have not had a chance to
22 investigate any of what Mr. Litwin said.
23 I believe the crux of what he said, the
24 answer to your question, was that Afilias has had
25 this document since April of 2019, which, of
course, is approximately 16 months ago.

ARBITRATOR BIENVENU: Yes. I think he was also saying, Mr. Wallach, that the relevance of that document arose out of questions asked by the Panel.

MR. WALLACH: I would not accept that representation, though. The issue of the drafting of these provisions of the interim supplementary procedures and exactly what communications happened in the lead-up to their adoption in October of 2018 has been front and center since the Amici sought to intervene in this proceeding and Afilias opposed their request on the basis of alleged improprieties in the adoption of Rule 7.

So the notion that Afilias had no concept that what they represent this email to say had any relevance until this morning is difficult to understand.

MR. LITWIN: Mr. Chairman, if I might, yes, this issue has been front and center, as Mr. Wallach says, since December 2018, when NDC and VeriSign sought to intervene in this IRP, but ICANN had not disclosed that document by then.

It was also relevant in the hearings before the procedures officer where that issue was
arbitrated, but ICANN had not produced that
document at that time.

It was produced months after we made the
arguments and the record had closed on the Rule 7
issue. We had agreed to simplify things and not
overcomplicate the matters and burden this Panel in
Phase I by relying on the record as it had been
developed before the procedures officer, i.e.,
before this document had been produced, which would
have, if that rule was followed strictly, exclude
the October 12 email, which is so interesting and
that the Panel quoted in its entirety in its Phase
I decision.

This is not a substantive email. This is
not an email that reflects any substantive
communication between Mr. McAuley and Ms. Eisner on
any point.

It simply goes to answer the question of
whether or not there was a telephone call between
Mr. McAuley and Ms. Eisner the day before she sent
her September -- her October 16 email, and that is
it.

MR. BLACKBURN: May I speak for a moment?

MR. WALLACH: May I speak briefly and then
I will turn it over to Mr. Blackburn? It will not
take me more than 30 seconds.

ARBITRATOR BIENVENU: Go ahead.

MR. WALLACH: I believe Mr. Litwin said Afilias has been aware of this email and the relevance of this email since prior to the Phase I hearing. There was a deadline for the introduction of all new evidence into the record, which the parties agreed was the 23rd of July.

If they sought -- if Afilias wanted to add this to the record, they could have added it then. They chose to sit on it and wait until Ms. Eisner's testimony was underway and to spring it in the course of that. I believe those circumstances should be sufficient to resolve their application.

ARBITRATOR BIENVENU: Thank you, Mr. Wallach.

I saw counsel for VeriSign raising his hand metaphorically.

MR. BLACKBURN: Yes, Mr. Bienvenu. I just wanted to note on this issue that if the Panel refers back to its Phase I decision, as Mr. Litwin noted, the October 12th email is set out in full followed by a discussion in which I believe the Panel does directly question the communications that occurred between Mr. McAuley and Ms. Eisner
between that date and the October 16th email.

So I would say that the Panel has raised that question first in the Phase I decision in which it also then continued its final decision on Rule 7 to this proceeding.

So the Panel's questions in that regard were evident in the Phase I decision and amplified by you today. That's all.

ARBITRATOR BIENVENU: Thank you very much, sir.

So we will take our second break and resume in 15 minutes.

MR. LITWIN: Thank you, Mr. Chairman.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: So on the request by Afilias to admit into the record an email from Mr. McAuley to Ms. Eisner dated 15 October 2018, the Panel decides as follows: Counsel for Afilias will be permitted to show the email in question to Ms. Eisner in order to see if it assists in refreshing Ms. Eisner's memory on the question of whether before October 11 and October 16 she had conversations with Mr. McAuley, as opposed to email communications, about the draft of Rule 7, a question that I raised with the witness at the end
of her cross-examination by counsel for Afilias.

The email is allowed to be used strictly for that purpose and is not admitted as an additional exhibit into the record, although evidently the transcript will reflect the Panel's decision and the text of the email when it is put to the witness.

Mr. Litwin, we will call the witness back into the hearing room, and you are permitted to show her that email. I will continue with my questions and will ask the witness if that email assists in refreshing her memory.

MR. LITWIN: Very good, your Honor --

Mr. Chairman.

MR. BIENVENU: Ms. Eisner, this is Pierre Bienvenu. So the Panel has decided that counsel for Afilias would be permitted to show you the email -- an email dated 15 October 2018 that Mr. McAuley sent you in order to see if it assists you in recalling whether you had discussions with -- discussions as apart from -- as opposed from email communications with Mr. McAuley during the period between October 11th and October 16th.

So Mr. Litwin.

MR. LITWIN: Thank you, Mr. Chairman.
Can we have the exhibit brought up so Ms. Eisner can see it? Chuck, if you can focus on the top half of that where it is Mr. McAuley's email down to, "Hi, David," because it is very small on my screen.

RE CROSS-EXAMINATION

BY MR. LITWIN

Q. Can you see this, Ms. Eisner?
A. Yes.

Q. Ms. Eisner, this is an email dated Monday, October 15th, 2018, and it is an email that Mr. McAuley sent to you in response to that email that you sent to him on October 12th, 2018.

If you can take a minute and review it. And my only question for you is whether this helps refresh your recollection whether you had a telephone call with Mr. McAuley at 1:00 p.m. on October 15th, 2018, to discuss your email of Friday, October 12th, 2018?
A. I don't have any recollection of the call, but I don't have any reason to think this email is untrue.

MR. LITWIN: Mr. Chairman, that is my only question.

ARBITRATOR BIENVENU: Thank you very much.
Mr. Wallach, anything arising from this exchange?

MR. WALLACH: No, nothing for me. Thank you, Mr. Bienvenu.

ARBITRATOR BIENVENU: Okay. Ms. Eisner, it remains for me on behalf of the Panel to thank you very much for your evidence and for assisting the Panel in this matter.

MR. LITWIN: Thank you, Ms. Eisner.

THE WITNESS: Thank you.

ARBITRATOR BIENVENU: Ms. Eisner, you're still there?

MR. ENGLISH: I'm sorry, Pierre, I removed her. Do you want her to come back?

ARBITRATOR BIENVENU: Yes, please.

MR. ENGLISH: She's back. Sorry.

ARBITRATOR BIENVENU: Ms. Eisner, I would like to inform you that the sequestration effect of witnesses in this case extends to instructing witnesses after they have been heard by the Panel to not communicate or discuss with other witnesses whose testimony has not yet been heard.

MR. ENGLISH: Sorry, Mr. Bienvenu, she hasn't appeared yet.

ARBITRATOR KESSEDJIAN: She hasn't
appeared. I don't think she is there.

    ARBITRATOR BIENVENU: Okay. Mr. Litwin,
ar are you satisfied if we ask your friends opposite
to convey these instructions to Ms. Eisner on
behalf of the Panel?

    MR. LITWIN: Of course, Mr. Chairman.
    MR. BIENVENU: Mr. Wallach?
    MR. WALLACH: We will give her the
instructions.

    ARBITRATOR BIENVENU: Thank you very much.
    So we move then to the
cross-examination -- well, to the introduction of
the next witness, which is Ms. Willett. And who
will be introducing the witness?

    MR. LeVEE: I will, Mr. Chairman, Jeff
LeVee.

    ARBITRATOR BIENVENU: Mr. LeVee, very
well. Is she waiting to be brought into the room?

    MR. LeVEE: She has been.

    Mr. Chairman, we have a fire alarm that is
going. I am assuming since the building is almost
empty, that we should follow the alarm.

    I will bring my phone so I can relay to
Mr. Smith what's happening. Usually these are
about five minutes.
ARBITRATOR BIENVENU: Okay. So we will wait to hear from you, Mr. LeVee. We will wait ten minutes.

MR. LeVEE: I apologize. This has certainly never happened to me. We are going to leave the line open. I am going to put us on mute.

ARBITRATOR BIENVENU: We will take a second — a third break, and perhaps, Mr. De Gramont, when you hear from your friends, or maybe we'll hear directly from them, then we can either reconnect or decide how we are going to move forward.

MR. De GRAMONT: Very good, Mr. Chairman. Thank you.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Ms. Willett, good afternoon, or end of morning, and welcome. My name is Pierre Bienvenu. I chair the Panel hearing this case.

I would like to direct your attention, Ms. Willett, to the witness statement that you signed on the 31st of May 2019.

THE WITNESS: Yes.

ARBITRATOR BIENVENU: And at the end of that statement, you swear that the content of the
witness statement is true and correct?

THE WITNESS: Yes, I did.

ARBITRATOR BIENVENU: May I ask you,

Ms. Willett, in relation to the evidence that you will give to the Panel today, likewise solemnly to affirm that it will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I so affirm.

ARBITRATOR BIENVENU: Thank you very much.

Mr. LeVee, your witness.

MR. LeVEE: Thank you, Mr. Chairman.

Good very late morning. How are you?

THE WITNESS: I'm well. How are you?

MR. LeVEE: Our apologies for keeping you in your own waiting period, but the fire alarm is over and it is fine.

I did want to ask if you have any corrections to your witness statement?

THE WITNESS: I have one correction. When I signed this witness statement in 2019 it was accurate, but since signing this statement I have left ICANN. I am no longer an employee of ICANN.

So the first paragraph that states I am the vice president of operations, I am no longer in that role at ICANN.
MR. LeVEE: So in order to make it accurate, you can say "I am the former president of operations"?

THE WITNESS: That would be correct.

MR. LeVEE: And likewise, Paragraph 5, it would say, "In my former role as vice president"?

THE WITNESS: That would be accurate.

MR. LeVEE: Okay. Any other corrections that you are aware of at this time?

THE WITNESS: No.

MR. LeVEE: Then, Mr. Chairman, Ms. Willett is available for cross-examination.

ARBITRATOR BIENVENU: Thank you very much, Mr. LeVee.

Mr. De Gramont, are you ready for your cross-examination?

MR. De GRAMONT: I am ready, Mr. Chairman. Thank you. May I proceed?

ARBITRATOR BIENVENU: Please proceed.

CROSS-EXAMINATION

BY MR. De GRAMONT

Q. Good morning, Ms. Willett. My name is Alex De Gramont. I represent Afilias. You should have with you a binder -- or rather a package that contains a binder, and pursuant to our agreement,
you can now open it. Your counsel, Mr. LeVee, who has been eagerly awaiting to open it, may do so as well.

Do you have it in front of you, Ms. Willett?

A. Yes.

Q. So at the first tab you will see your witness statement, and then in the following tabs are documents, some of which, or all of which, we will discuss with you today.

You will see that we have put the page numbers in brackets just so -- sometimes the hardcopies and the PDFs differ. So that we are all on the same page, literally, I will be referring to the page number in brackets.

I just want to confirm, this is the first time you have seen this binder; is that correct?

A. That's correct.

Q. Yes. And you haven't spoken to anyone about the testimony that's been provided in this hearing to date?

A. So today, no, but I have spoken with counsel.

Q. Okay. But you have not spoken to any of the witnesses?
A. No.

Q. And you haven't reviewed any of the transcripts?

A. No.

Q. All right. You said you have left ICANN. When did you leave ICANN?


Q. And what were the reasons for your leaving ICANN?

A. I was terminated as part of a restructuring within the organization.

Q. Okay. Did you sign any sort of agreement providing that you would give testimony in this proceeding?

A. So I did not sign anything pertaining to testimony in this proceeding.

Q. It wasn't part of your separation agreement or anything like that?

A. Correct.

Q. Are you currently employed?

A. I am not.

Q. Have you been employed in any capacity since 13 December 2019?

A. I have not.

Q. When did you start working at ICANN?
A. 1 October 2012 was my first day of employment at ICANN.

Q. Had you ever worked in the DNS industry before that?

A. No, I had not.

Q. And what was your first position in joining ICANN?

A. I believe the title that I was hired in with was as general manager of the new gTLD Program.

Q. Now, the deadline for new gTLD applications was June 2012. Do you recall that?

A. It was May, June of 2012, prior to my arrival at ICANN.

Q. So you started at ICANN after that deadline had already passed?

A. That is correct.

Q. And just to be clear, you started at ICANN after Afilias, NDC and the other .WEB applicants had submitted their .WEB applications?

A. Yes, that's correct.

Q. After being general manager of the program, you were promoted to vice president of the program; is that correct?
A. I believe that there was a restructuring of titles and title change. So I don't believe there was a promotion, but yes, my title did change.

Q. Did your responsibilities change?

A. At that time of the title change, no.

Q. To whom did you report in those positions?

A. So when I first joined ICANN, I reported to Akram Atallah. His position changed, but I believe he was COO at the time he was hired.

ARBITRATOR KESSEDJIAN: Sorry to interrupt. This is Catherine Kessedjian, a member of the Panel. I have a difficulty understanding what you said. You are cut off from time to time. So perhaps if you want to speak closer to your microphone. Particularly when you turn your head there is a problem.

I'm sorry, but we need to be clear.

THE WITNESS: Is this any better?

ARBITRATOR KESSEDJIAN: Much better.

Q. BY MR. De GRAMONT: When you first started at ICANN, you reported to Mr. Atallah, you were saying?

A. Yes.

Q. And what was his position at that time?
A. I believe his title at that time was chief operating officer.

Q. And did you always report to Mr. Atallah until the time he left ICANN?

A. Yes, I did.

Q. Let's take a look at your witness statement, which is, again, at Tab 1 of your binder, and you will see -- so you can look at the documents in the binder, which I personally find easier. Our exhibit wizard, Chuck Vaughan, will also be putting the documents up on the screen, but I personally prefer to look at the documents in hardcopy, but it is obviously your preference.

If you turn to Page 2 of the witness statement, Paragraph 4, it says, quote, "In connection with the new gTLD Program, ICANN published an applicant guidebook, which sets forth the requirements for new gTLD applications to be approved and the criteria by which they are evaluated. The guidebook was developed in a years-long public consultation process in which numerous versions were published for public comment and revised based on comments received from the public," close quote.

I take it you still agree with that
testimony?

   A. Yes, I do.

   Q. Now, the guidebook was completed before you started at ICANN; is that correct?

   A. Yes. There was a version of the guidebook completed. I don't think that there was any update to the guidebook after I started at ICANN.

   Q. So you must --

   A. It was completed.

   Q. So you must have studied the guidebook upon assuming your position at ICANN?

   A. Yes, I did.

   Q. Okay. And it's obvious from the guidebook itself that the purpose is, to use your words, set forth, quote, "The requirements of the new gTLD applications and the criteria by which they are evaluated," unquote.

   Do you agree?

   A. Yes, I do.

   Q. And in addition to studying the guidebook, I take it that you also studied ICANN's articles and bylaws?

   A. Well, I reviewed them. They were quite lengthy and -- but I could definitely say that there were aspects of the guidebook that I studied
in order to manage the operation of the program. I wouldn't say that I studied the articles of incorporation and the bylaws.

Q. But you understood that the new gTLD Program and the guidebook were designed to promote the principles in the bylaws, correct?

A. Correct.

Q. Okay. Take a look at Tab 3 in your bundle, which is Exhibit C-9. This document is entitled "ICANN Board Rationales for the Approval of the Launch of the new gTLD Program."

I assume you have seen this before?

A. I may have. I honestly don't recall. It does not look familiar to me.

Q. Take a look at Page 9, which is under the heading, quote, "ICANN Board Rationale on the Evaluation Process Associated with the gTLD Program," close quote. Under the heading "Introduction," it states, quote, "Through the development of the new gTLD program, one of the areas that required significant focus is a process that allows for the evaluation of applications for new gTLDs. The Board determined that the evaluation and selection procedure for new gTLD registries should respect the principles of
fairness, transparency and non-discrimination," end quote.

Do you see that?

A. Yes, I do.

Q. And those are all principles that are stated in the bylaws, are they not?

A. I believe them to be.

Q. You don't recall that specifically?

A. I don't.

Q. Okay. But the guidebook had lots of requirements to promote the principles of fairness and transparency and nondiscrimination.

Do you agree with that?

A. I would, yes.

Q. As an example, the guidebook required that the public had the right to know which gTLD strings were being applied for and who was behind the application, right?

A. Correct.

Q. You're familiar with the frequently asked questions about the new gTLD Program which is posted on the ICANN website; is that right?

A. Is there a specific page? There is an entire new gTLD microsite, a subset of the ICANN.org website.
Q. Yeah. Would you turn to Tab 4 of your binder. This is Exhibit C-181, and these are the frequently asked questions that are posted as of today. And I know that 1.6 has been posted since, I believe, at least 2014, and it says, "1.6, how and when can I see which gTLD strings are being applied for and who is behind the application?"

And the answer is: "Approximately 2 weeks after the application submission period closes, ICANN will post the public portions of all applications received, including applied-for strings, applicant names, application type, mission/purpose of the proposed gTLD, and other application data."

Do you see that?

A. Yes, I do.

Q. Do you know who prepared this document?

A. I don't know specifically.

Q. Okay. But, again, we can see that, consistent with the principle of transparency, ICANN committed that the public would be able to see which gTLD strings were applied for and who was behind each application, do you agree?

A. I don't know what you mean by "who was behind." The application required applicants to
disclose -- the applications had to be submitted by an applying entity, by a company, not by an individual. But we did, as part of the application, the directors had to be -- directors, officers, managers had to be disclosed and any ownership interest in the applying entity greater than 15 percent, and the other individual that would have been disclosed would be -- that was definitely public was the applicant primary contact.

So those were the people related to the application.

Q. All right. I am simply quoting the language of the document, who was behind the application. The purpose for that was so the public could know who, in fact, was seeking to obtain a particular gTLD string; is that right?

A. I think it was to inform the public of the entity.

Q. And "the public" included other applicants, correct?

A. Correct.

Q. And so the guidebook, as you say, provided rules for portions of each application to be posted publicly so the public could comment on them.
Do you recall that?

A. I believe there were multiple purposes of posting the public application.

Q. Would you take a look at Tab 5 of your binder, which contains the first 30 pages of Module 1 to the guidebook.

For the record, the entire guidebook is on the record as Exhibit C-3. I'd ask you to look at Page 1-5, which is Section 1.1.2.3, and the guidebook states, quote, "Public comment mechanisms are part of ICANN's policy development, implementation, and operational processes. As a private-public partnership, ICANN is dedicated to: preserving the operational security and stability of the Internet, promoting competition, achieving broad representation of global Internet communities and developing policy appropriate to its mission through bottom-up consensus-based processes. This necessarily involves the participation of many stakeholder groups in a public discussion," unquote.

Those are among the principles that the public comment period were seeking to advance; is that correct?

A. I believe this is describing the intention
of the comment period for applications.

Q. It also provided for governments to submit comments on applications?

A. Yes, yes, did it.

Q. Okay. In fact, on Page 1-6, Page 6, the highlighted paragraph just above "Comments and Formal Objection Process," says, "In the new gTLD application process, all applicants should be aware that comment fora are a mechanism for the public to bring relevant information and issues to the attention of those charged with handling new gTLD applications. Anyone may submit a comment in a public comment forum," unquote.

Was that your understanding?

A. Yes.

Q. There's a separate process by which governments can submit comments in response to applications as well.

Do you recall that?

A. I am not sure what you are referring to.

Q. There's a separate process by which members of the GAC can submit comments on applications?

A. I apologize. What do you mean by "comments"?
Q. Comments, concerns, there was a mechanism by which governments could express any concerns they had with respect to a particular gTLD and who was applying for it?

A. Yes, that's correct.

Q. Okay. Have you ever reviewed the public portions of NDC's .WEB application?

A. Not that I recall.

Q. You never took a look at NDC's application even though you were involved in the investigations that we'll talk about in a little bit?

A. So we had -- we received over 1,900 applications. They were frequently over 100 pages of content and dozens of attachments, and I had a large team of people, over 35, maybe 45 staff as well as hundreds of evaluators on various panels. They were the ones responsible for reviewing the content of the applications.

I on occasion did look at applications, but I don't -- I don't specifically recall looking at NU DOT CO's application.

Q. You recalled that in 2016 you were asked to investigate an allegation that there had been a change of ownership and control.

Did you not review the public portions of
the application at that time?

A. I may have. I don't personally recall looking at the application.

Q. Let's take a look at what's behind Tab 10 of your binder to see if it refreshes your recollection. This is Exhibit C-24, and it is the public portions of the NDC .WEB application. Just tell me when you're there.

A. I am there. Thank you.

Q. If you flip through it, Pages 1 through 3 contain background information about the applicant, who the main contacts are, what the address is and so on, right?

A. Yes.

Q. And it lists two primary contacts, Jose Ignacio Rasco and Mr. Nicolai Bezsonoff.

You see that on Page 2?

A. Yes.

Q. Then if you go to Page 4, it asks for the names and positions of all directors.

Do you see that?

A. Yes, I do.

Q. And, again, it lists Mr. Rasco, Mr. Bezsonoff and also Juan Diego Calle.

Do you see that?
A. Yes, I do.

Q. And then it asks for the names and positions of all officers and partners, and Mr. Rasco is listed as the CFO. Mr. Calle is listed as the CEO, and Mr. Bezsonoff is listed as the COO.

Do you see that?

A. Yes, I do.

Q. It asks for the names and positions of all shareholders holding at least 15 percent of the shares, and here we see Domain Marketing Holdings, LLC, and NUCO LP, LLC.

Do you know who owns those companies?

A. I have no idea.

Q. Okay. Have you reviewed Mr. Rasco's witness statement in this case?

A. I have not.

Q. He refers to beneficial owners of those companies. You don't know who the beneficial owners of these two companies are?

A. I do not.

Q. Now, Paragraph 11(d) says, quote, "For an applying entity that does not have directors, officers, partners or shareholders," it asks for the names and positions of all individuals having
legal or executive responsibility.

What was the purpose of that request, that question?

A. So I'll say I wasn't part of the team drafting the guidebook or the questions, but I can respond from the perspective of how we utilized that information in the course of administering the program.

Q. I assume it was because you wanted to know who, in fact, was controlling the entity if there were no directors, officers, partners or shareholders; is that a fair statement?

A. Well, I guess my understanding is that there's different legal structures in different countries around the globe and that they might -- those entities might not have typical directors, officers, partners, shareholders.

So it was an option that if you didn't -- in a way, if the applicant wasn't able to respond to 11(a), 11(b) and 11(c), then 11(d) was another place where they could respond with relevant information.

Q. Again, that's so ICANN and the public can see who is the controlling entity applying for a particular string, right?
A. I wouldn't use the word "controlling," but individuals who had some involvement in the organization.

Q. Who have legal or executive responsibility; those are the words used, right?

A. In 11(d), yes.

Q. Skipping ahead to Page 6, this is the mission/purpose part of the application, and ICANN requires that to be publicly posted; is that correct?

A. Yes. This is Question 18. This is one of the questions that is publicly posted.

Q. Okay. And you can see that it's one of the longer responses that NDC has given in the application; is that a fair assessment?

A. Well, it's -- their response to 18(b) is over two pages long, but I haven't reviewed the entire application. So two pages is lengthy. Some applicants' applications were very, very long. We did have some sort of -- I think there was some sort of word-count limit to questions.

Q. And if you look at the response to 18(b), "How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?"

It says in the last sentence of the first
paragraph, quote, "Prospective users benefit from the long-term commitment of a proven executive team that has a track record of building and successfully marketing affinity TLDs."

You understand the proven executive team to be referring to the NDC executive team?

A. Oh, I see. Sorry.

Q. In your understanding -- I think the plain language understanding that anyone reviewing this in the public portions of the application would understand that the proven executive team is a reference to NDC's executive team; is that a fair reading of this?

A. I don't know what NDC meant, but I would -- that's how I would interpret it.

Q. Okay. And then on Page 7, the first full paragraph, "The experienced team behind this application initially launched and currently operates the .CO ccTLD," and that's a country code TLD?

A. That's correct.

Q. It says, The intention is for .WEB to be added to .CO's product portfolio, where it can benefit from economies of scale along with the firm's experience and expertise in marketing and
branding TLD properties, unquote.

Again, the reader would assume the experienced team being referred to is the experienced team at NDC?

A. That's how I would read it.

Q. That's the experienced team behind this application, correct?

A. That would be my understanding.

Q. And then in the -- one, two, three -- third full paragraph on Page 7, last sentence, "We plan to implement a very similar strategy for .WEB in its launch, operation, promotion and growth," and the reader would assume that that's a similar strategy that NDC used for .CO.

Is that a fair reading?

A. I believe so.

Q. And then in the next paragraph, at the last sentence of the paragraph, quote, "The domain's marketing strategy will utilize a three-pillar framework similar to that used with .CO."

Is it fair to assume that the average reader would understand that to mean that NDC was going to use the same or similar strategy that it had used with .CO?
Q. And then if you go up in the middle of the second paragraph, it says, "In addition, .CO has become the standard secondary option to .COM from the leading global registrars to having the most conversions when presented with a non-.COM option."

And the suggestion is that NDC will use .WEB in the same manner as it used .CO to compete against .COM; is that a fair reading?

A. I don't -- I don't think I would take that understanding. Could I ask you to repeat the question? I was still reading this paragraph.

Q. Yeah, sure.

So NDC's mission purpose statement is saying that it successfully launched .CO as a -- as another option to .COM, and it is going to use -- it plans to use .WEB in the same manner; is that a fair summary?

A. Yes. I believe they plan to market .WEB in the same way.

Q. Let's turn to Tab 8 of your binder, and that is Module 6 to the guidebook, again, part of Exhibit C-3.

And these are the terms and conditions by which the applicant agrees to be bound when it
submits an application for a gTLD under the new
gTLD Program; is that correct?

A. Correct.

Q. And ICANN considers these terms and
conditions to be binding on the applicants, right?

A. Yes, they do.

Q. In fact, ICANN considers the submission of
a new gTLD application to form a contract between
the applicant and ICANN; is that your
understanding?

A. I am not a lawyer. I am not quite sure
if -- I don't think I could speak to it being a
contract.

Q. Have you ever heard ICANN refer to the
submission of a new gTLD application to form a
contract?

A. I don't recall it being expressed that
way.

Q. Okay. Do you recall that Ruby Glen filed
a lawsuit in Federal Court against ICANN in
connection with .WEB?

A. Yes, I do.

Q. And you submitted a declaration in that
lawsuit, right?

A. Yes.
Q. And ICANN invoked the litigation waiver that is a part of Module 6.
   Do you recall that?
A. I do.
Q. You don't recall that ICANN argued that the application formed a contract between the applicant and ICANN in those proceedings?
A. I don't recall reading ICANN's arguments in the matter.
Q. Do you remember that the Federal Court dismissed Ruby Glen's lawsuit based on the litigation waiver?
A. I recall that the lawsuit was -- it did not proceed. I believe you that it was based on the litigation waiver, but I don't recall knowing that either.
Q. Ordinarily I would offer you some water, but I'm afraid I can't.
A. Thank you.
Q. Let's take a look at the terms and conditions. And looking at the first paragraph of Module 6, on Page 2, the guidebook states that the applicant agrees to be bound by the terms and conditions, quote, "without modification," unquote. Do you recall that?
A. I do, yes.

Q. Okay. And you recall that according to Paragraph 1, and I quote, applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, end of quote.

Do you recall that warranty?

A. Yes, I do.

Q. And your understanding is that that warranty applied to all statements and representations contained in the application; is that your understanding?

A. Yes.

Q. Okay. And then the last sentence of Paragraph 1 says, quote, applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading, unquote.

Do you recall that?

A. Yes.

Q. Again, that applies to all of the information submitted in the application; is that
right?
   A. Yes.
   Q. If we turn to Page 4, Paragraph (c), you'll see the litigation waiver that we just talked about.
      Do you recall that?
   A. Yes.
   Q. And then I have a couple of questions about Paragraph 10 on Page 6. I want to ask you about the first sentence and the last sentence. So the first sentence says, quote, applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement.
      Do you see that?
   A. I do.
   Q. So by filing an application, an applicant doesn't receive any rights in the gTLD itself; is that your understanding?
   A. Correct. It is simply an application to operate a top-level domain in the future.
   Q. So it only receives rights in the gTLD if
it enters a registry agreement with ICANN; is that correct?

A. Correct.

Q. By contrast, the last sentence says, quote, applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application. Do you see that?

A. I do.

Q. So ICANN distinguishes between rights and obligations in the gTLD on the one hand from rights and obligations in the application on the other hand; is that right?

A. Yes, ICANN makes a significant distinction.

Q. So just as an example, one of the applicant's rights is that if they make it through the evaluation process and go on to an ICANN auction, they have the right to submit bids on their behalf in advance of the application, right?

A. So participating in an auction, the way I would express that is participating at auction is one of the applicant's rights or not participating in an ICANN auction of last resort.

Q. So they are prohibited under Section 10
from reselling, assigning or transferring that right, correct?

A. Well, they are prohibited from assigning -- reassigning, transferring their application.

Q. Well, you just said that they had certain rights in the application, one of which is to make bids in a public auction -- rather, an ICANN auction, whether to choose to enter a private auction.

So there are particular rights or obligations that they are not allowed to resell, assign or transfer?

A. Well, so applicants, because they were in many cases not always expert in how to submit an application, they engaged with third parties to submit their applications on their behalf or they -- to provide responses to how technical registry operations would be held to essentially provide them with the technical responses to their application.

I mean, in fact, Afilias was one of those consultants. They provided and submitted applications on behalf of a couple dozen other applicants. So applicants all the time were
assigning rights or designating third parties to operate on their behalf.

But the way we -- like, from an operational or transactional perspective, we viewed this Paragraph 10 about not assigning the rights and obligation of the application to be of the total application. You couldn't sell your application in total to someone else.

Q. You could hire someone to assist you, but you couldn't sell to someone the right to tell you whether you are allowed to bid in a public auction or not?

A. I don't -- I am not a lawyer. I don't think -- I haven't evaluated that. I wouldn't say so. I wouldn't agree with that, but I am not a lawyer.

Q. Do you know if anyone at ICANN has prepared any sort of analysis of what the rights or obligations in an application are?

A. Not that I'm aware of.

Q. But in any event, to your knowledge, NDC has not yet entered a .WEB registry agreement with ICANN, correct?

A. That's correct.

Q. And as far as you know, NDC has not
formally requested ICANN to prove -- to approve an assignment of the .WEB registry agreement to VeriSign, has it?

A. Since there's no agreement, registry agreement signed, there's nothing to assign.

Q. And the process for seeking agreement -- or, rather, assignment of an executed registry agreement is different from the process for applying for a new gTLD, do you agree?

A. Yes.

Q. For example, you don't have to pay 185,000 application fee to seek assignment of an executed registry agreement, right?

A. That's correct.

Q. And you don't have to go through a public notice and comment period, do you?

A. I don't recall all of the administrative aspects of assigning a registry agreement. I don't recall if there's a public notice period.

Q. Any event, it's a different process --

A. Yes.

Q. -- from the new gTLD?

A. Yes.

Q. Take a look at Tab 9 of your binder, which is the model Registry Agreement that's included
to -- in the guidebook.

We are going to skip to Page 18 -- sorry, Page 17, Paragraph 7.5, the heading is "Change in Control: Assignment and Contracting," quote, neither party may assign this Agreement without the prior written approval of the other party, which approval will not be unreasonably withheld.

Do you see that?

A. I do.

Q. And that's very different from the language and terms and conditions where they say applicant may not resell, assign or transfer any of the applicant's rights in connection with the application, do you agree?

A. You're asking if I agree that they are different language?

Q. Well, my question, ma'am, is: In the terms and conditions, the language "approval will not be unreasonably withheld" doesn't appear?

A. Correct.

Q. Now, in Paragraph 39 of your witness statement, you mention two transactions involving Afilias, one in which Afilias sought ICANN's permission to assign an executed registry agreement for .MEET to Google.
Do you remember that?

A. I am going to my witness statement. Thank you.

Q. Yes. Please take your time.

A. Yes. Afilias sought ICANN's approval to transfer, assign the .MEET registry agreement. It also -- another entity requested an assignment of the top-level domain .PROMO to Afilias, yes.

Q. Right. Those were requests made with respect to execute Registry Agreements that had already been entered; is that correct?

A. That's correct.

Q. So those requests were evaluated under a different process than the process for applying for a new gTLD; is that correct?

A. Yes.

Q. Are you aware that during the application process, Mr. Kane of VeriSign asked ICANN for information about assigning Registry Agreements?

A. I don't -- I am not aware of that. I don't recall.

Q. Okay. Would you take a look at Tab 11 of your binder, which is Exhibit R-18. It consists of several emails in early September 2015 between Mr. Pat Kane at VeriSign and Mr. Atallah and
Mr. Halloran at ICANN.

And my question is whether you have ever seen this before?

A. I have not.

Q. Okay. Let's skip ahead to the summer of 2016. And you now know that in early June 2016, Mr. Rasco of NDC was corresponding with Mr. Nevett of Donuts about whether .WEB could be resolved through a private auction.

Do you recall that?

A. I recall being informed that they were corresponding. I don't recall the exact date.

Q. Could you take a look at Tab 12 of your binder, Exhibit C-35?

A. I am there.

Q. Okay. We all know who Mr. Rasco is.

Mr. Nevett was an executive at Donuts, which owned Ruby Glen, which was one of the .WEB applicants, right?

A. Yes.

Q. And he says in the email below, written on 6 June 2016, "Hi, guys. Jose and I corresponded last week, but I wanted to take another run at the three of you."

Do you understand Jose to be -- well,
obviously it is a reference to Jose Rasco; is that your understanding?

A. That's my understanding.

Q. Okay. And he says, "Until Monday, I believe that we have a right to ask for a two-month delay of the ICANN auction with the agreement of all applicants. Would you be okay with an extension while we try to work this out cooperatively?"

Do you see that?

A. I do.

Q. Have you seen these two emails before?

A. I may have. I recall reading Mr. Rasco's response. It may have been -- I may have seen Mr. Nevett's response, but I don't specifically recall.

Q. Okay. Before we look at Mr. Rasco's response, do you recall that most contention sets are resolved privately?

A. Yes. Without ICANN's involvement, yes.

Q. In fact, in the guidebook, ICANN encourages contention sets to resolve the contention sets privately; is that right?

A. That is correct.

Q. So let's turn back to Tab 7, which is
Module 4 of the guidebook, on string contention procedures, and I'd ask you to turn to Page 6. Just let me know when you're there.

A. Yes, I am there.

Q. Okay. So under 4.1.3, "Self-Resolution of String Contention," it says in the first paragraph, quote, applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website."

Now, this applies only to applicants, correct?

A. Correct. Yes, it is regarding applicants with new gTLD applications.

Q. And it specifically applies only to applicants who have made it through the evaluation process and who are in a contention set?

A. Well, since it's -- I would disagree there. It says that it could happen as soon as the applications are received and the contention sets are posted. Evaluations are not complete at that time.
Q. I see. But, again, it is only referring to entities that have -- submitted applicants and are applying for a particular string and who have been identified in the public comment period?

A. Yeah, that's who had applications, so yes.

Q. Yeah. And applicants can resolve a contention set in any number of ways, right?

A. True.

Q. So if we look at the next paragraph, it says applicants may -- quote, applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications, unquote, right, that's one of the ways they could resolve contention?

A. Correct.

Q. But it goes on to say, "An applicant may not resolve string contention by selecting a new string or by replacing itself with a joint venture," unquote.

Then the next sentence says, quote, "It is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention," unquote.

And the way I understand this is that an applicant could not form a joint venture by -- let
An applicant could not resolve string contention by forming a joint venture with a nonapplicant, but that applicants could establish joint ventures with one another in their efforts to resolve string contention.

A. That would not be my understanding.

Q. What is your understanding?

A. So my understanding was that where it says, "An applicant may not resolve string contention by selecting a new string or replacing itself with a joint venture," meaning company Acme Corporation couldn't form a joint venture with Company B, C, D and E and then say, "We have a Joint Venture ABCDE, and we are now replacing my Acme Corporation application with Company ABCDE."

Essentially they couldn't change the applying entity.

But that they could form a joint venture with other applicants, anybody else, other interested parties, some subset of them, and potentially ICANN would not have any cause to reject if -- that new entity or joint venture that acquired Acme Corporation. That would have been consistent with the rules of the program and
consistent with the applicant guidebook.

Q. But the proviso is that any material changes in applications will require reevaluation, and so it goes on to say, quote, "Applicants are encouraged to resolve contention by combining in a way that does not materially affect the remaining application. Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation," end quote, right?

A. Yes. So may I explain?

Q. Sure.

A. My understanding -- again, I didn't write the language in the guidebook, but the mechanism for reevaluation was not fully understood and there were significant concerns that reevaluation would be extremely onerous and time-consuming.

During the course of operating the program and because the program went on for so many years, much longer than was anticipated in the guidebook, my team and I, we had to devise a mechanism, various mechanisms for reevaluation.

So truly we -- I believe we reevaluated dozens, possibly hundreds of applications, some portion, either financial reevaluation or technical
reevaluation. But the applicant itself wasn't changing, but some portion of their application may have changed, or the ownership, those interests, the directors and the 15 percent interest might have changed.

Q. Right. But the idea, again, is one of transparency. The joint venture, the combination can't fundamentally change the identity of the applicant or the purpose for which the string is being applied, right?

A. Well, there's a lot thrown in there. So certainly the applicant couldn't change. That was one of the hard-and-fast rules. The applying entity couldn't change.

However, there were multiple instances where the applying entity was acquired by another organization, did, in fact, no longer -- it ceased to exist, and it was subsumed or there was some -- its assets were acquired by some parent or tertiary organization.

Over years and years there were a variety of scenarios that weren't anticipated, in my belief, in this portion of the applicant guidebook that we then had to find a mechanism to manage, administer as part of the program.
Q. The applicants would have to provide notice to you so you could evaluate them, right?

A. Correct. We asked that they submit what we called an application change request in writing, and then the program team determined if and what reevaluation might have been necessary.

Q. Okay. Let's go back to Exhibit C-35, which is behind Tab 12 of your --

MR. BIENVENU: Mr. De Gramont, I am sorry to interrupt you, but while we are on this page, may I just ask a question?

MR. DE GRAMONT: Yes, please.

ARBITRATOR BIENVENU: So the second sentence of the highlighted paragraph, the first scenario there, "An applicant may not resolve string contention by selecting a new string," what does that mean?

THE WITNESS: So if the applicant applied for .WEB and then they noticed, wait, there are six other people who applied for .WEB, they can't say, "Oh, oops. Let me apply for .INTERNET. I don't want to be -- have to fight this out with six other people. So let me just change the string I applied for."

ARBITRATOR BIENVENU: Basically change
contention set?

THE WITNESS: Really even before applications were put into a contention set. Once they were published, the world, the applicants were able to see who had applied for the same string.

Those applicants presumed, rightly so, if you applied for the same string, that was a direct contention and only one applicant could prevail. And we did have requests for applicants to change their string to a completely different word.

ARBITRATOR BIENVENU: Okay. So there's a continuum here in time.

First there is a string contention, and that's when more than one person, one entity applies for a gTLD, and then at a subsequent time -- point in time, there is created a contention set where these competing applicants are placed?

THE WITNESS: Yes. This is a complex aspect of the program. I can explain sort of sequentially what occurred, if that's helpful.

So the applications came in, in May, June of 2012. ICANN published the list of all of those applications and saw -- applicants could see all of the other applications, so it was very easy for
them to see that there were seven applications for .WEB.

At that time, in June of 2012, there were no contention sets. There was another process described in the applicant guidebook that evaluated string similarity. And we had an expert panel who evaluated and made those determinations, and they defined for us what applications were put into the contention set. Those contention sets were published, to my best recollection, February of 2013, but then -- it still goes on.

And then the final complexity is that there were -- there was a type of objection that could be filed, a string-confusion objection, and it was -- such an objection was filed in this case that said even strings that were not obviously similar or hadn't been deemed by that string similarity panel to be in contention, that a party -- an applicant or another party could say -- raise this objection to say that they might be confusingly similar, which would change the constitution, and the members of that contention set.

ARBITRATOR BIENVENU: Right. But focusing back on the language that I was questioning you
about, when we see the words "string contention,"
that is at a point in time before the creation of a
contention set?

THE WITNESS: From my perspective, when
the guidebook refers to this and it says,
"Applicants may resolve string contention," that is
after ICANN has published contention sets. Until
then, it was all supposition what would be in a
contention set.

ARBITRATOR BIENVENU: Okay. Very well. I
understand. Thank you for that clarification.

Mr. De Gramont, we are coming to the end
of our hearing day as scheduled.

Today's the day when one member of the
Panel has a need for a hard close. It will not
always be the case, but today is such a day.

May I ask you how are we doing for time in
terms of your game plan and where you are in your
cross?

MR. DE GRAMONT: Mr. Chairman, we had
estimated that we would need about four hours of
time for the examination of Ms. Willett. I think
we have been going for about an hour and ten
minutes, so another two hours and 50 minutes or so
should get us there.
ARBITRATOR BIENVENU: So the four hours remains the right estimate?

MR. De GRAMONT: I believe so,
Mr. Chairman.

ARBITRATOR BIENVENU: Okay.

So, Ms. Willett, you haven't completed
giving your evidence to the Panel, and therefore, I
must instruct you not to discuss the case or your
evidence with anyone until we resume tomorrow.

MR. De GRAMONT: Mr. Chairman, I assume
that the witness should not be looking through the
exhibits. Ordinarily in a real hearing, we would
probably take back the bundle.

So I would request an instruction to the
witness not to be reviewing the exhibits about
which we have not yet questioned her.

ARBITRATOR BIENVENU: Very well.

You don't object to that, Mr. LeVee?

MR. LeVEE: No, that's fine.

After the witness leaves, I have a
scheduling issue I want to raise. It is something
I could raise in the morning. I just want to
handle this.

ARBITRATOR BIENVENU: Let's do one thing
at a time.
Ms. Willett, you are not to look at the witness binder that you were provided.

THE WITNESS: Understood. Thank you, Mr. Chairman.

ARBITRATOR BIENVENU: Thank you very much. So we say good-bye until tomorrow morning.

And you want to raise something, Mr. LeVee?

MR. LeVEE: Really I am just giving notice to the Panel and to the parties, following Ms. Willett, Mr. Disspain, because of the estimates -- I am not interested in casting dispersions at all -- the Panel has questions, and we will have to sort out questions later.

Mr. Disspain is available tomorrow and also on Friday. He's not available for chunks of next week. So I just wanted to alert everyone, we may -- we should get to Mr. Disspain tomorrow, but he needs to finish Friday.

Under the time estimates, that should not be a problem, but I don't know if anybody else has timing issues with the witness. I just wanted to make sure.

ARBITRATOR BIENVENU: That's very helpful for you to mention that, and everybody has taken
due note of it.

    MR. LeVEE: Thank you.

    ARBITRATOR BIENVENU: So we'll suspend the
hearing until tomorrow morning.

    MR. ALI: One other tiny issue is how
would you like to deal with the question of the
other plea documents?

    ARBITRATOR BIENVENU: We will look at the
exchange of emails overnight and communicate our
decision to the parties tomorrow.

    MR. ALI: Thank you.

    ARBITRATOR BIENVENU: Thank you, Mr. Ali.

    Good night, everyone.

    MR. De GRAMONT: Thank you, Mr. Chairman.

    Thank you, everyone.

    (Whereupon the proceedings were
concluded at 1:03 p.m.)

    ---o0o---
COURT REPORTERS CERTIFICATE

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I am a duly qualified Certified Shorthand Reporter, in the State of California, holder of Certificate Number CSR 10710 issued by the Court Reporters Board of California and which is in full force and effect.

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I am the reporter that stenographically recorded the testimony in the foregoing proceeding and the foregoing transcript is a true record of the testimony given.

Dated: August 13, 2020

[Signature]

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<td>31st (1)</td>
<td>539:22</td>
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<td>34 (1)</td>
<td>499:6</td>
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<td>35 (1)</td>
<td>554:15</td>
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<td>39 (1)</td>
<td>570:21</td>
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<td>3rd (8)</td>
<td>492:25;493:4,6,16,17,19,24,495:2</td>
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<td>7.5 (1)</td>
<td>570:3</td>
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<td>7:09 (2)</td>
<td>515:6;529:19</td>
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<td>7's (1)</td>
<td>465:23</td>
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| 4 (19) | 4 (4) | 448:12;478:5;