INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

IN THE MATTER OF: ICDR

ICM Registry, LLC, No. 50 117 T 00224 08
Claimant,
v.

Internet Corporation for Assigned Names and Numbers ("ICANN"),
Respondent.

Washington, D.C.
September 22, 2009

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

BEFORE:

Judge Stephen Schwebel, Hearing Chairman
Jan Paulsson
Judge Dickran Tevrizian
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JOHN JEFFREY, ICANN
AMY STATHOS, ICANN
STEPHEN FERRY, tech support
STEVE PAGE, tech support
STUART LAWLEY, ICM
STEVE DUNCAN, Paralegal
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Afternoon Session - Page 403
PROCEDINGS

CROSS-EXAMINATION

BY MR. LeVEE:

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

A. Yes.

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

A. Yes, we were not selected in 2000.

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

A. Correct.

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

A. Uh-huh.

Q. And if you would look at what is marked as CON-4. And for the panel, there were some exhibits that parties marked as confidential. And CON means
JUDGE TEVRIZIAN: What exhibit are we on?

MR. LeVEE: Con-4 in the binder we delivered to you this morning.

BY MR. LeVEE:

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

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

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

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

MR. LeVEE: Yes, my apologies.

THE WITNESS: Yes: "Nonetheless the applicants fully understand that the topic of adult entertainment on the internet is controversial. The applicants also understand that the board might be
criticized whether it approves or disapproves the
proposal."

BY MR. LeVEE:

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

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

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

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

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

A. Yes.
Q. Okay. Let me ask you to take a look at Exhibit 191.
A. Yes.
Q. Would you describe for the panel what Exhibit 191 is?
A. Just give me a few seconds to familiarize myself with the document.
Q. Take your time, of course.
A. Uh-huh. Yes.

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

Q. Let me ask you to look at the attachment to the letter which I think is on page 4 of the exhibit.
A. Yes.
Q. What is attachment -- what is this attachment?
A. This attachment is the set of terms and conditions that any would-be registrant in the pre-reservation service would be agreeing to.

Q. And who prepared this document?

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

Q. And when was it prepared?

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

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

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

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

A. Yes.

Q. And if you look to the last page, there is a paragraph that is in bold and I'll just read the
first sentence. It says "ICANN has not authorized ICM to operate the .XXX domain and may not in the future." Is that what Ms. Burr wrote?

A. Yes.

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

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

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

A. Yes.

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

A. The 10th of May vote?

Q. Yes.
A. No, that was held by teleconference and was a closed session.

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

A. Yes.

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

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

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

A. Um -- I think that this would be the May
the 30th letter would have been our reaction to that.

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

A. No, not that I can see.

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

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

Q. What document is that?

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

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

A. He was the only one that vocalized those in his written statements after the board meeting,
Q. Thank you.
Let me change the subject and discuss the community that ICM was proposing to represent or create. So to make sure I understand your testimony, participation in the community of .XXX was intended to be voluntary, correct?
A. Yes.
Q. And ICM was not proposing that everyone who puts adult content on the internet would have to register names in .XXX?
A. No, we were not.
Q. And in fact ICM had no power to force adult webmasters to transfer their top level domains to .XXX, right?
A. Of course not.
Q. And so participation in the community that you were proposing was -- I think the words you used yesterday were self-selected?
A. Yes, voluntary self-selection.
Q. So essentially what would happen is that the members of the proposed .XXX community which ICM
defined as "the global responsible on-line adult entertainment community" would self-select for themselves as members of the community, correct?

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

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

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

Q. And if someone felt that a webmaster that had selected to have a .XXX domain was not acting responsible, what was going to happen next?
A. We were -- we would have -- the top level domain would have such a policy as we described yesterday that were going to be developed by the sponsoring organization, and just like every other sponsored top level domain, there was a charter eligibility dispute resolution process, that any other member of the community or any other member around the world could challenge someone's adherence to the policies that had been developed.

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

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

Q. And if somebody disagreed with the outcome of the process and believed that a .XXX webmaster was not acting responsibly, was it possible that those people would contact ICANN?
A. Unlikely. We had a very detailed system put in place including this dispute resolution policy and in addition, very similar to ICANN, strangely enough -- or not strangely enough, fondly enough, I guess, we were going to appoint, as ICANN has, an independent ombudsman to judge such matters and in fact ICANN's own adjunct ombudsman had volunteered to take that position.

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

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

A. Yes.

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

A. No, that would not be true.

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

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

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

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Yes.

Q. Why don’t we take a look at Exhibit AT?
A. I'm sorry, exhibit --
Q. AT, apple-Tom.
I'm just going to read the first sentence.
First of all, do you recognize the document?
A. Yes, I do.
Q. The first sentence says: "Dear ICANN representatives: Speaking on behalf of my company Flynt Management Group, I would like to state my opposition to the creation of .XXX top level domain which I believe represents a direct threat to freedom of speech on the internet." Now Larry Flynt Enterprises is a prominent adult entertainment webmaster, is that fair to say?
A. Yes.
Q. And isn't it also true that [--- Redacted ---] retracted its support?
A. I'm not sure about that. Did you have a copy of that letter?
Q. I -- apparently not in my binder.
A. I'm not familiar with them retracting support.
Q. Let me ask you about Private Media Group.
1 Have you heard of them?
2 A. Yes.
3 Q. Would you characterize them as a prominent member of the adult entertainment community?
4 A. Yes.
5 Q. Let's take a look at the Exhibit AV, A as in Apple, V as in Victor. Do you have that in front of you?
6 A. Yes, I do.
7 Q. Do you recognize this letter?
8 A. Yes, I do.
9 Q. I'm going to ask Kate to highlight the second paragraph. It says "Private has been a leading member of the adult entertainment industry for over 40 years. We would like to make clear to you that we oppose the creation of this TLD and believe that there is no compelling reason to establish such a TLD." And they are referring in the previous paragraph to the .XXX top level domain. Do you recall seeing that at that time?
10 A. Yes. Can I comment on both of these letters?
Q. Of course.

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

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

So Larry Flynt went on to say, which you can tell this is why he wrote the letter:

"Legislation was recently introduced into the U.S. Senate that will create a mandatory .XXX," et cetera, et cetera, and he goes on to describe that such a mandatory .XXX would be a restriction on free speech,
et cetera, et cetera, which are very much points that we agree with.

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

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

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

BY MR. LeVEE:

Q. I don't see -- I am looking first at the Private Media Group letter. I don't see any reference to government legislation.
A. It -- it hints at it in the third paragraph, when it says "The likelihood that governmental and nongovernmental entities, both domestic and foreign, will use a new TLD to impose unacceptable restrictions." That was very much in the same vein that mandatory .XXX could be considered dangerous.

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

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

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

Q. This is from the president of Wicked Pictures. They were a prominent adult entertainment webmaster?
A. I'm not sure about the status of Wicked Pictures.

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

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

A. Yes.

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

A. Yes.

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

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

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

A. Yes, they are.

Q. Can you think of any others?

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

Q. Any others?

A. No.
Q. Let me ask you to take a look at Exhibit 263. Do you recognize Exhibit 263?
A. I think I have seen it before, yeah.
Q. Exhibit 263 is dated July 17, 2005, and in that document the Free Speech Coalition reiterates its concerns about the implementation of .XXX and says that the official position is that "the creation of such a content-based zone on the internet will create considerable risks to industry free speech for a variety of reasons." Do you see that?
A. Yes.
Q. And actually the Free Speech Coalition opposed the dot XXX top level domain from the outset; correct?
A. No, not exactly, that's not true.
Q. Did they ever write a letter in support?
A. No, we met with them back in 2003, and we attended one of their in-person meeting of members and at that meeting -- incidentally the Free Speech Coalition had expressed its willingness to support our application back in 2003 if we basically gave them control of the sponsoring organization and gave
them the lion's share of the $10 per domain name that we were giving to our nonprofit foundation -- that if we gave most of the money to the Free Speech Coalition and gave them effective control of the sponsoring organization, then they indicated they would be willing to support.

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

BY MR. LeVEE:

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

A. Yes.

Q. Do you recognize this letter?

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

Q. This is a letter dated August 30, 2005, from executive director of the Free Speech Coalition addressed to Dr. Cerf. I'm just going to read the first paragraph in the sentence. It says: "The Free Speech Coalition is the trade association of the adult entertainment industry with over 3,000 members representing every area of the business." I will skip to the next paragraph. "Our understanding is that there will be a one-month extension during which time discussions are to take place. As a significant stakeholder not yet afforded a voice in these discussions, we would like to take this opportunity to express our strong opposition to the creation of a .XXX top level domain. We are also concerned that
important decisions are being made allegedly on behalf of the adult industry by individuals who have, at best, minority support in the adult webmaster community, and lack any other legitimate authority to make such claims to representation."

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

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

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

Q. Did you send a letter in response?

A. No. I mean we wholeheartedly disagreed
with these statements. They were false and there is no substantiation. And one example of the nonsensical nature of this letter, that on the one hand they are saying there is no support, but in the same sentence or paragraph, they described this as a "lucrative monopoly." How can it be lucrative if we have no supporters and therefore we get no registrations?

JUDGE TEVRIZIAN: I have a question.

MR. LeVee: Of course.

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

THE WITNESS: Well, first, Judge Tevrizian, I would disagree with your comments -- I will agree with your comments that these three or
four individual letters on the face of it would appear that there was eroding support.

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

We had forwarded all of these to ICANN during this same time period, so ICANN were aware on the one hand, from the date they made the judgment on the 24 letters, by the time that this stuff was happening in spring of 2006, they had scattering of a few individual letters with specific points to raise, but at the same time there was a whole mountain of maybe 2,000 individual, smaller webmasters that were supportive, extra support that we didn't and couldn't document on June the 1st.
JUDGE TEVRIZIAN: If these letters that
were objecting to .XXX as being a top level domain
were concerned about government regulation and XXX
was set up to self-regulate, aren't they both a form
of censorship?

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

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

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

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

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

THE WITNESS: Certainly, yes.

JUDGE TEVRIZIAN: I could be on two.

THE WITNESS: Yes.

BY MR. LeVEE:

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

A. In addition to most of the other top level domains, yes.
Q. Are you aware of any significant opposition from those communities to the creation of those particular top level domains?
A. I know dot MOBI was opposed by Telefonica Moviles of Spain, a very large mobile phone provider. And I know it was also opposed by Sir Tim Berners-Lee, the founder of the Worldwide Web, and the guy who was in charge of the W3C consortium.
Q. Was he a member of the community?
A. The .MOBI community?
Q. Correct?
A. He was not a member of the community. He didn't like it and wasn't going to register.
And .TEL, another applicant that I referred to, had strong opposition from the European Telecommunications Association, with many thousands of members.
Q. You mentioned that you had received numerous letters of support. Isn't it also the case that ICANN received several hundred public comments and e-mail opposing the top level domain in conjunction with the early 2007 consideration
A. The -- yes. That's -- but we also exposed at the time and we showed it to ICANN, and ICANN is very familiar with this, that many of the members of the wider industry who were not members of our community, which was a group of about 150 providers, maximum, were conspiring on industry bulletin boards to disguise themselves as being more providers and they were bragging that they were submitting 10, 15, 20 comments to the ICANN public comment forum, pretending to be other people and other providers.

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

Q. Let me read to you, Mr. Lawley, on Exhibit 199. It's not in your book, I apologize. It is the minutes of the meeting of ICANN Board of Directors. At the very bottom if you look on your
television screen in front of you, the monitor, the
very last paragraph, John, referring to John Jeffrey,
the General Counsel of ICANN, noted a summary of the
most recent public comments on the revised agreement
posted 5 January 2007 to 5 February 2007 was provided
to the board and was going to be posted publicly.
John reported that staff received over 600
public comments and approximately 55,579 e-mails
(from an e-mail campaign on a web site) during and
since this period. Of the comments posted in the
public forum, 77 percent were opposed and 16 percent
expressed support, with others not indicating a view,
of the e-mail, nearly all of which were written in
the same form opposing the introduction of the sTLD.
So what you were referring to in your last
answer was that there was an e-mail campaign that you
felt was inappropriate because it was being sponsored
by a particular group of people, correct?
A. No. That is not what I'm saying.
Q. Okay.
A. I'm saying that these large number of
e-mails that they are referring to here were not from
or even claim to be from members of the adult entertainment industry. These were from the angry Christian conservative groups here that had done an e-mail campaign. So I think probably the 200 or 300 comments out of the total 600 comments, or probably even less than that were -- I think they go on to say they were 88 comments from webmasters somewhere else, probably in the March resolution.

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

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

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

A. Yes.

Q. And she said -- she indicated that a note
in the board materials prepared by staff indicated that during the 5 January through 5 February 2007 public comment period, 88 commenters -- commentators identified themselves as webmasters of adult content, of whom 65 were opposed to the development of the .XXX domain and 23 were in favor. Is that what you were referring to?

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

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

A. Okay.

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

BY MR. LeVEE:

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

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

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

A. If we are talking about the highlighted text, yes.
Q. Is there anything else in the documents that indicates that there was greater support for the .XXX top level domain than was expressed in this meeting? Or referenced?

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

Q. Take your time.

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

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

A. Sorry, there is a reference, I do beg your
pardon, if I could take you back to the original exhibit where you finished the highlighted text that -- from Rita Rodin, where you said 23 were in favor.

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

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

A. Okay. The documentation of this could be found in the application. Kurt also pointed out at the board's request additional information had been presented to them during the ICANN Mar del Plata meeting which included a poll that I think we discussed yesterday conducted by X-BIZ that showed of many thousands of people that responded, adult webmasters, that 57 percent were in favor of creation of a .XXX domain, 22 percent thought it was a
horrible idea, and you know, clearly these few
hundred that were opposing it are a part of the
22 percent that hated it.

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

A. Yeah.

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

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

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

A. That's correct.

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

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

Q. Okay. And you stated in your testimony
yesterday that you did not expect that most of the registrants in .XXX would give up their web sites in .com or the other TLDs that they had, correct?

A. Agreed.

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

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

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

A. The industry knew that. I'm sure those terms and conditions that you showed before will state that any eventual registration would be subject to acceptance of the policies of the top level
domain, which had been clearly announced to the
industry.

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

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

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

JUDGE PAULSSON: Those might be people who
opposed the idea?
THE WITNESS: In the preregistration.

They wouldn't eventually be able to register if they didn't agree to the terms, but there was nothing stopping them pre-reserving, no.

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

THE WITNESS: Okay. Thank you.

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

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

(RECESS 11:03 a.m. - 11:04 a.m.)

REDIRECT EXAMINATION

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

JUDGE SCHWEBEL: Please.

BY MR. ALI:

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

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

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

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

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

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

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

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

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

21 I don't think that --

22 A. I don't seem to have it.
Q. These are the ICANN meetings in Lisbon, Portugal dated 30 March 2007.

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

JUDGE SCHWEBEL: I have a copy of it.

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

JUDGE SCHWEBEL: Yes.

MR. ALI: Thank you.

BY MR. ALI:

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

A. Yes.

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

A. Yes.

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

A. I don't see.
Q. Thank you, it's up on the screen as well.

Are you there with me?

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

BY MR. ALI:

Q. Take a look if you have got Hearing Exhibit 201?

A. Page 10 on Exhibit 201.

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

A. Sorry.

Q. Are we there?

A. Yes.

Q. On the screen?

A. Yes.

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

A. Yes, sir.

Q. Okay. "Since then, real and astroturf comments" -- that's an Americanism meaning filed comments claiming to be grass-roots opposition that have actual been generated by organized campaigns -- "have come into ICANN that reflect opposition to this
When you responded to Mr. LeVee's question with respect to the thousands and thousands of e-mails that were coming in and you said that there was a campaign by the religious right, is this what you were referring to?

A. Yes, exactly.

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

A. Correct.

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

Now, Mr. Lawley, perhaps you had a little
more time to reflect on Mr. LeVee's question about
other TLDs and the degree of support for those TLDs.
What is the level of support for .museum?
A. They are a sponsored top level domains and
they have less than 600 registrations, less than 600.
Q. Are there only 600 museums in the world?
A. Clearly not.
Q. Are there any other TLDs that you thought
about that may have also faced significant opposition
or any opposition?
A. Sure. There is, as I discussed .TEL was
opposed. And you know, there are billions of people
in the world with telephone numbers, and their
registration numbers are in the low hundreds of
thousands.

There was opposition to .MOBI that I
described. And some of the other registrants in the
same round than us that were approved like .JOBS had
13,000 registrations in total. So the level of
1 indication of support was far higher than most, if
2 not all of the other applicants and the potential
3 registration on those showed that this was likely to
4 be one of the most significant new top level domains
5 that ICANN had probably ever added to the root.
6 Q. Thank you. Let's continue with
7 Ms. Crawford. "It seems to me that what is meant by
8 sponsorship, the notion that I hope we abandon in the
9 next round is to show that there is enough interest
10 in a particular TLD that it will be viable. We also
11 have the idea that the registrants should participate
12 in and be bound by the creation of policies for a
13 particular string. Both of these requirements have
14 been met by this applicant. There is clearly enough
15 interest, including more than 70,000 preregistrations
16 from a thousand or more unique registrants who are
17 members of the adult industry, and the applicant has
18 undertaken to us that it will require adherence to
19 its self-regulatory policies by all of its
20 registrants."
21
22 Now, Mr. Lawley, in light of those -- in
23 light of the numbers that she is referring to, and in
light of the numbers that you are aware of and that you mentioned in the panel yesterday, did you have enough registrants at the time to make a go of it from a business standpoint?

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

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

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

A. Yes.

Q. -- you would be making lot of money?
A. Yes, I think we would have more than a million registrations by now.

Q. Thank you very much. No further questions.

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

JUDGE SCHWEBEL: Yes.

MR. LeVEE: It might be two.

JUDGE SCHWEBEL: But you must speak up.

RE CROSS-EXAMINATION

BY MR. LeVEE:

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

A. Yes.

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

A. Yes.

Q. And did you attend this meeting?

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

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

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

A. Yes.

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

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

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

And that's actually the view of the
majority of the board at that meeting, correct?
A. Let me read that again. "This resolution is not based on the judgment of the community support for the application other than noting that this community support has been divided and not consistent." I mean, we had clearly demonstrated that community support had only increased substantially during the period between June 1 and March 2007.
Q. So you disagree, of course, with the nine members of the board who voted against your application?
A. Yes.
Q. Thank you.
MR. LeVEE: No further questions.
MR. ALI: No further questions.
JUDGE SCHWEBEL: Well, Mr. Lawley, I would ask do my colleagues have any further questions?
JUDGE TEVRIZIAN: I have no further questions.
JUDGE PAULSSON: No.
JUDGE SCHWEBEL: Well, then Mr. Lawley, I
believe we have concluded your questioning. We very
much appreciate your testimony. Thank you.

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

MR. LeVEE: Yes, that's fine.

MR. ALI: That's fine.

(The witness was excused from the stand.)

Whereupon,

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

JUDGE SCHWEBEL: Is she testifying as an
expert?

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

JUDGE SCHWEBEL: As a fact witness?

MR. DeGRAMONT: Yes, sir.

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

THE WITNESS: I do.

JUDGE SCHWEBEL: Thank you so much.
1 DIRECT EXAMINATION

2 BY MR. DeGRAMONT:

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

6 JUDGE SCHWEBEL: Louder please.
7 THE WITNESS: Elizabeth Anne Williams.

8 BY MR. DeGRAMONT:

9 Q. Did you submit the witness statement that
10 you will find behind tab 1 of your witness binder?
11 A. Yes, I did.
12 Q. And do you confirm that it is true and
13 accurate to the best of your knowledge?
14 A. Yes.
15 Q. Is there anything that you would like to
16 add or change?
17 A. No, thank you.
18 Q. Dr. Williams, where do you currently work?
19 A. I live in the United Kingdom.
20 Q. And can you tell us a bit about your
21 educational background?
22 A. Yes. I have a bachelor's degree from the
Australia National University of international affairs and political science. I have a master's degree in communication on internet regulation and privacy from the University of Camden, also in Australia, and I have a Ph.D. in information technology and law from the Queens University.

JUDGE SCHWEBEL: Speak up a bit more.

BY Mr. DeGRAMONT:

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

A. I'm an international management consultant.

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

A. I had my own company since 1999.

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

A. My clients fall into three different categories. Commercial clients like the -- Medical Corporation in Canada, which is an ICANN-credited registrar, Nustar which is an ICANN registry in Virginia. My work is also with academic institutions
like the City University in London and I also work for not-for-profit or public sector organizations like the Asian Development Bank and ICANN.

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

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

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

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

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

A. Yes. That's correct.

Q. Now are you familiar with the December 2003 RFP for the 2004 round?
A. Yes, very.

Q. Did you write portions of it?

A. Yes, I did.

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

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

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

A. Yes.

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

A. Okay.

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

A. No.

Q. Were there any criteria that related to offensive conduct?
A. No.

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

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

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

A. No.

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

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

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

A. No.

Q. How many applications were submitted?

A. 10.

Q. And how many did your committee pass?

A. 2.

Q. Would you please take a look at tab 9 of your binder? And that is appendix A from ICANN's
opening memorial. Can you briefly explain what it
represents?

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

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

A. Yes, that's true.

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

A. Yes.

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

A. It did.

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

A. We submitted our initial report which had
been drafted. I was principally responsible as the
chair for the drafting of that report. We submitted
that report to the ICANN staff, and we were asked if
we would accept supplementary questions for each of
the applicants which extended that portion of our
evaluation.

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

A. No, we did not.

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

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

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

A. Yes, I am.

Q. And what did that vote mean to you?

A. It signified to me that the evaluation
process had completed, and that given that the
evaluation process had completed, then the applicants
would move forward to commercial and technical term
support, establishing a contract.

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

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

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

A. In effect, yes.

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

A. Each applicant had been provided with a draft registry agreement as part of the application process and that's exactly -- exactly the same in terms of conditions that were provided with the existing registries, like .COM, and .net and .ORG, so applicants were very familiar with the base terms of the conditions, and negotiations beyond those base
terms and conditions were done on a one-by-one basis.

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

A. Yes, that's right.

Q. What does that mean?

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

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

A. Yes.

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

A. Yes, I have.

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

A. Yes, it does.

Q. Would you turn to tab 11 of your binder, please. And that's appendix E to ICM's memorial.
Can you describe briefly what it depicts?

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

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

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

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

A. That's correct.

Q. And did the process set forth in the RFP contemplate that -- strike that. Did the process set forth in the RFP contemplate that new criteria could be added after the criteria had already been satisfied?

A. No.

Q. Now let's take a look briefly at the sponsorship community issue. And you are familiar with all of the other applications?
A. Yes, I am.

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

A. I don't believe so.

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

A. Exactly.

Q. I have nothing further.

CROSS-EXAMINATION

BY MS. WALLACE:

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

(Off-the-record discussion.)

BY MS. WALLACE:

Q. Do you have a binder?

A. Yes, I do. I just don't have much space.
JUDGE SCHWEBEL: Please speak up, both questions and answers, so we can hear you clearly.

MS. WALLACE: We will try our best.

BY MS. WALLACE:

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

A. That is correct.

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

A. Yes.

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

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

Q. Now did the -- and isn't it true that the questions that were posed by the sponsorship team reflected concerns that you had about ICM's ability to satisfy the sponsorship criteria?
A. Yes, as we did for all of them.
Q. Why don't we take a look at the supplemental questions that you posed to ICM?
A. This is Exhibit CX in your binder and we are going to try to bring it up on the monitors as well. What is this document, Dr. Williams?
A. It's a note from Lillian Shapiro, the project manager, as a covering letter for the supplementary questions that were sent to each of the applicants.
Q. Were you involved in drafting this?
A. No.
Q. Did you review it before it was sent?
A. No.
Q. Are you familiar with the supplemental questions about the sponsorship team posed?
A. Yes.
Q. Were you involved in drafting the sponsorship team's questions to ICM?
A. Yes, the committee did it together.
Q. If we could turn to page 5. The first --
1 would create a new and clearly differentiated space,
2 didn't you?
3 A. That's correct.
4 Q. And how ICM would satisfy needs that would
5 not be readily met through existing TLDs?
6 A. Yes.
7 Q. Isn't it true that these questions
8 reflected the sponsorship team's concerns that
9 the .XXX sTLD did not add new value to the internet
10 domain space?
11 A. It also reflected that other applicants
12 did not do that either.
13 Q. But as to ICM, it was one of your
14 concerns?
15 A. One of my concerns yes.
16 Q. That there was not new value being added
17 to the name space?
18 A. And the nature of what you could say was
19 new value was a very subjective criteria to be asking
20 in the first place, because adding a new value to the
21 internet was a highly subjective personal view that
22 could be interpreted differently by any person who
was reading the question.

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

A. That's correct.

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

A. Yes, that is correct.

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

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

Q. But that was one of your concerns --

A. We had the --

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

THE WITNESS: Sorry.

THE REPORTER: Thank you.
BY MS. WALLACE:

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

A. That's true.

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

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

We were not asked to analyze, you would have ten people, 50,000 names, 21 key organizations -- we were not asked to do the matrix like that and many of the applicants did not do that and could not do that, because they were talking about the development a community that was
futuristic, and it is not until after the fact that
you could analyze whether there was support or not or
whether indeed the business was going to be
successful.

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

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

Q. And ICM submitted maybe 20 letters of
support?

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

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

A. Yes, they did.

Q. And despite these letters didn't the
sponsorship team ultimately conclude that there was
not broad based support?
A. That's correct.

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

A. (Nods).

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

A. Yes.

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

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

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

A. That's true.

Q. And in July of 2004, the evaluation team
submitted its final report to the board of ICANN?

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

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

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

A. Yup. Yes, I do.

Q. What is it?

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

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

JUDGE TEVRIZIAN: 110 of 110?

MS. WALLACE: Correct.

BY MS. WALLACE:

Q. Do you recognize this?

A. Yes, thank you.

Q. And does this constitute the sponsorship team's final recommendations to ICANN staff about
the .XXX TLD?

A. Yes, it does.

Q. Did you draft this document?

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

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

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

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

A. Along with many of the other applicants,
yes.
Q. Isn't it true that the independent evaluation team recommended that ICANN not consider .XXX any further?
A. That's correct.
Q. In particular, the sponsorship team which you chaired, determined that ICM did not meet the sponsorship criteria?
A. That's correct.
Q. The sponsorship team, you found that .XXX did not present a clearly defined community, is that right?
A. Correct.
Q. And a clearly defined community was a specific requirement of the RFP which I believe you stated in your direct you were responsible for drafting; is that right?
A. That's correct. The measurement of a clearly defined community was never determined. So what did it look like, what shape was it, it was a very loose ends, new process and we learned from that experience that subjective terms like "clearly defined" and "adding value" do cause problems for
1 evaluations, and they do cause problems depending on
2 where they come from and what their experience is.
3 Q. Isn't it true if the sponsorship team --
4 if we could direct your attention to the middle of
5 the first paragraph starting with the "extreme
6 variability" -- the sponsorship team concluded that
7 "the extreme variability of definitions of what
8 constitutes the content which defines this community
9 makes it difficult to establish which content and
10 associated persons or services would be in or out of
11 the community." Is that right?
12 A. That's correct.
13 Q. And you recognized that adult-oriented
14 information as described in ICM's application is
15 simply not susceptible to an objective, globally
16 applicable definition, is that right?
17 A. I think we understood that different
18 countries and different national jurisdictions took
19 different views about what adult content was. And
20 they also took different views about how old one
21 ought to be before we ever see it, where that contact
22 be would be available, and under what conditions.
Q. Just to be clear, in this application, ICM defined the community to be served by dot XXX as the global responsible online adult entertainment community?

A. That's correct.

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

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

Q. Let me rephrase my question a little bit. Did any of the other applicants have the
1 word "responsible" in the actual definition of their
2 proposed community?
3      A. I can't answer you precisely, because
4 having read thousands of pages, I would have to
5 search specifically on the word "responsible."
6      Q. Okay. Now didn't you, Dr. Williams,
7 believe that there was actually no preexisting
8 community for .XXX?
9      A. That's correct.
10      Q. And the proposed community had no shared
11 interests other than putting a certain type of
12 information on the internet in a certain space.
13      A. They had shared interests that were
14 certainly beyond a territorial stake-out. They had
15 shared interests with respect to categorizing content
16 and putting it in a particular place to enable them
17 to exclude users who did not want access to the
18 content; that was somehow a good way of managing
19 access to adult entertainment.
20      They also had very specific ways of
21 thinking about improving the way in which content was
22 paid for; and there was a number of other initiatives
that were included in the ICM application that were
designed to improve the way in which the industry
worked, that was identified by a particular place.
And if you are in that place, then you are allowed to
be in that place, then there were standards of
behavior that were associated with that, which were
desirable characteristics of establishing a new way
of doing things.

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

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

A. That's correct.

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

A. Like other applicants, yes, indeed.
Q. And the IET -- independent evaluation team determined that the interests of ICM's proposed dot XXX community were unclear, is that right?
A. That's correct.
Q. And you ultimately concluded that the application lacked support from the constituents it intended to represent; is that right?
A. Like the other applications; they all suffered from similar deficiencies; and determining levels of support was one of the key pieces of that puzzle.
Q. And let's turn back to the evaluation report which is Hearing Exhibit 110. On page 111, subsection D, which is Level of Support From the Community: "The sponsorship team ultimately concluded that there was inadequate evidence both in the application and from the supplementary material of the community even assuming that it is clearly defined, speaks to services that the sponsor intends to offer" -- "proposes to offer."
"There was considerable support from North American representatives of the adult entertainment
industry. However, virtually no support was available from the rest of the world or from users or other members of this community." Is that what the independent evaluation team concluded?

A. Yes, it is.

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

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

As an Australian, we don't look like we fit with Asia, but the definition of support for that particular community was "Pan Asia and Asian Pacific," a Pacific regional community into which
Australia fits. But hardly any outreach was done,
for example, in the dot Asia example, for support
from potential users outside of the Chinese speaking
diaspora in Hong Kong, Singapore and Taiwan.

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

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

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

Q. So based on all of these conclusions, that
the .XXX community was not clearly defined, that ICM
did not have the requisite broad based support,
that .XXX did not add new value to the Internet name
space, based on all of these conclusions by the
sponsorship team, you recommended to the ICANN staff
that they not proceed with the .XXX application,
right?
A. Along with the others that did not pass
for the same reasons.
Q. And isn't it true, Dr. Williams, that
after the board received the independent evaluation
team's report, it could have properly rejected ICM's
application at that time?
A. It could have, but it didn't.
Q. Now Dr. Williams, you testified on direct
with respect to the June 1, 2005, board meeting.
Isn't it true that you were no longer
formally involved in the process of evaluating the
sTLD applications, after the evaluation team
submitted its report in July 2004?
A. Yes, but by the first of June 2005 I was
on my way to Brussels to take up a new post as a
1 policy development lead on the new top level domain
2 issue. I had remained very involved in what I had
3 been doing as an ICANN follower from 1999. This is a
4 very important piece of work. So even though you are
5 right, the evaluator jobs were all completed, each of
6 the evaluation team's jobs were completed.
7 I certainly maintained my very direct
8 interest, most particularly because I had been
9 working with Nustar, who was doing a .net rebid for
10 the content of registry services between VeriSign and
11 other potential -- on the net.
12 Q. But you weren't present at the June 2005
13 meeting, were you?
14 A. I wasn't a board member.
15 Q. Thank you, I have nothing further.
16 A. Thank you.
17 Mr. DeGRAMONT: Mr. Chairman, I will have
18 a few more questions, may we just take a short break
19 before redirect?
20 JUDGE SCHWEBEL: Yes, let's take a break
21 for 10 minutes, we will resume at 8 minutes after
22 12:00.
(Recess 11:58 a.m. - 12:08 p.m.)

REDIRECT EXAMINATION

BY Mr. DeGRAMONT:

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

A. Yes.

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

A. That's true.

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

A. That's correct.

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

A. Yes.

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

A. In effect that's what happened, yes.
Q. In undertaking that re-evaluation, was the board obligated to apply the stated criteria fairly and neutrally?

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

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

A. That's correct.

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

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

A. Yes. That's correct.

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

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

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

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

Q. Now by contrast was there other applicants that received registry agreements that you found did not have a new and clearly differentiated space?
A. Yes, most. Yes.

Q. Can you identify those?

A. Dot Asia, dot MOBI, travel.

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

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

At the time also, internationalized domain names, which enabled the production of content and scripts other than English script, for example, English or French or Spanish, were not so heavily used, and the dot Asia proposal did not propose
having an internationalized domain name method for delivering differentiated content, so it was all going to be English anyway.

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

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

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

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

So for example, in the JOBS case, we felt that whilst there may well have been a community of
human resource management professionals that their
needs could have been met in the existing domain name
space.

Q. And Ms. Wallace also asked you about your
finding that .XXX was a self-selecting community.
Were any of these other communities self-selecting?
A. Indeed, anyone had a choice to register a
name wherever they wished. So the selection nature
of it was making a proactive decision, that you
either wanted to have a duplicate identity in the
existing registry or a new identity or a new idea,
for example in .CAT.

Q. Ms. Wallace also asked you about
whether -- whether it was a problem that the sponsor
was created solely for the purposes of the sTLD
round. For any of these others that received
contracts, had the sponsor been created solely for
the 2004 round?
A. Yes, and the clear distinction is for
example, in the jobs and travel case, there were
already existing internationally recognized
organizations, but they had only come together with
the registry services provider to put together the organization, and the idea that they could create a new registry.

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

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

A. No.

Mr. DeGRAMONT: No further questions.

MS. WALLACE: No questions, Your Honor.

JUDGE SCHWEBEL: Thank you so much,

Dr. Williams.

THE WITNESS: Thank you.
JUDGE SCHWEBEL: What next?

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

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

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

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

MR. ALI: Thank you.

(Recess is taken at 12:18 p.m.)
1 **AFTERNOON SESSION.**

2 (2:15 p.m.)

3 MR. ALI: Good afternoon. We have our
4 third witness of the day is Becky Burr.
5 Whereupon,
6                   J. BECKWITH BURR,
7 was called as a witness on behalf of the Claimant,
8 and being duly sworn by the Chairman, was examined
9 and testified as follows:
10                   DIRECT EXAMINATION
11 BY MR. ALI:
12 Q. Ms. Burr, could you please state your full
13 name for the record.
14 A. Yes, Justina Beckwith Burr.
15 Q. But you go by Becky Burr?
16 A. Yes.
17 Q. Now, you submitted a witness statement in
18 these proceedings, is that right?
19 A. Yes, I have.
20 Q. Any part of your testimony that you would
21 like to amend?
22 A. There is a typo on page 3. At the top of
Q. Thank you. We will make sure that is appropriately corrected.
A. Thanks.

Q. Ms. Burr, could you please describe for the panel your current employment?
A. Yes, I'm an employee at Wilmer Cutler Pickering Hale and Dorr.

Q. What is your area of practice?
A. My practice is internet regulation, electronic commerce, data security and information technology.

Q. And when did you join Wilmer?
A. I was in the government during the Clinton Administration, and I returned to Wilmer, where I had been an associate, in October of 2000.

Q. Could you please describe for the panel the position you held while you were in the government?
A. Yes, in 1995, I began working for Christine Barney at the Federal Trade Commission, I was an attorney advisor specializing in competition
and consumer protection issues related to information technology in particular. In the course of that job, I began to participate in the Clinton Administration's interagency task force on electronic commerce.

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

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

A. Yes, at NTIA, after the E commerce framework was rolled out, I was responsible for the privatization of the domain name system that was identified as a goal of the administration in the framework paper.
In that capacity, I edited both the green paper and the white paper which were policy papers, I think we will probably talk about -- I also was involved in reviewing proposals that came in to create a private sector coordinating body. And after ICANN was formed, I served on the Government Advisory Committee until I left in October of 2007.

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

A. Sure. In 1996, '97, when we were beginning to create the framework for global E commerce, the domain name system was operated under two contracts with the U.S. government agencies. One was a contract between the Defense Advanced Research Products Agency and the University of Southern California, where various policy elements of the DNS management function were conducted, at least were run by John Postell, who was sort of a legacy in the community. And more consumer facing aspects of the
domain name system, and specifically the big top
level domains, com, net, org, gov, were operated
under a cooperative agreement between Network
Solutions And the National Science Foundation.

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

And for every two-year registration they
would charge $100 and hand $30 over to the U.S.
government for the Intellectual Infrastructure Fund.
As that was happening, it was sort of a monopoly --
not sort of a monopoly, it was a monopoly, the
international community became quite unhappy about
the fact that the U.S. government was controlling
this. In fact, a publicly traded U.S. company was
I remember once I got a note from a friend of mine in Canada that said, dear Becky, there are X-million Canadians who have registered domain names in .com, the United States government owes Canada X times 30 dollars.

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

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

So after talking with individuals who were involved in the -- in the domain name system and with
governments, our trading partners, we came up with the idea that what we would do is transition the management function for the domain name system to a private not for profit corporation that would have a very light-handed, non-regulatory mandate to coordinate a specified, narrow set of functions.

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

First and foremost it was -- the prime directive was to maintain the stability and security of the DNS. Second, it was intended to increase competition in the domain name space where possible. Third, it was intended to make decisions on a sort of bottom-up consensus basis. And fourth, it was intended to be representative of the diversity in the internet community -- and by diversity, I mean both
geographic diversity, people from all over the world, but also a functional diversity, so bringing engineers, together with, you know, large brands that rely on the domain name system and sort of every flavor in between together to create this organization.

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

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

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

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

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

THE WITNESS: Bill Daley.

BY MR. ALI:

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

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

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

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

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

2 So what we came up with was a system --
3 after we issued the green paper, we got comments back
4 from all over the world, including from governments
5 all over the world, and we digested those comments.
6 And for the most part, they said, we like the
7 mandate, we like the private sector leadership, we
8 like the principles, but don't do anything in the
9 interim, United States government, leave it to that
10 body, don't create top level domains. Let that body
11 create -- come together and let it do its -- make
12 those decisions.
13   
14 So we reissued the green paper in the form
15 of the white paper, which sort of got rid of the U.S.
16 government would do the following things in the
17 meantime. And we essentially called on the private
18 sector to come together to create a private sector
19 organization that would take up this mandate.
20   
21 And over the course of the summer -- in
22 fact, there were meetings all over the world. And at
23 the end of the process the Commerce Department
24 received four proposals for this entity, the
not-for-profit entity that we were calling New Co at that time.

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

So I wrote a letter saying, we are prepared to begin discussions with you to recognize you as that private sector body. We have some concerns based on our review of your proposal and the public comments on that, but we would like to initiate discussions that would lead to a memorandum of understanding by which -- under which this new organization, which is now going to be called ICANN and the United States government would agree to work together for a two-year transition period to develop a process and procedures and a structure for the organization that would enable the transition to private sector development.
Separately, there is also a contract with ICANN for a very sort of specific set of technical functions which involve essentially receiving requests or proposals to change the top level domain. The domain name system is hierarchical and there is a server at the top that is sort of the written authority here. And so changing the authoritative root was the way you eventually -- and I'm vastly over-simplifying -- change registrations -- change the way people find them -- find registrations in the DNS.

So we -- the United States government had the authority and only the United States government had the authority at that time to approve changes in the top level -- in the authoritative root which was operated by VeriSign under contract with the U.S. The government contracted with ICANN to receive requests to change the root, consider them, provide recommendations back to the U.S. government about whether they should be implemented or not, at which time the U.S. government would, if it agreed, direct VeriSign to implement the changes. And that
functions contract is important in this setting because that's the way that new top level domains get into the authoritative root. So -- yes?

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

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

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

In any case, so there are these two contracts between the United States and ICANN. But the more technical one I described is called the IANA functions contract, and the policy oriented contract was a memorandum of understanding initially. So it's
called the MOU. Over time it was revised and extended, became the joint project authority -- joint project agreement. And I think as of October 1st will have yet another name, an affirmation of responsibilities -- something like that.

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

BY MR. ALI:

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

A. Well, it has changed over time. So I can give you a high level description. A description of what ICANN is going to bring to the table in this cooperative undertaking and what the government is
going to bring to the table in terms of expertise.
And then commitment to work together to develop
policies and procedures designed to -- and then there
are -- serve a specific set of things. Add new top
level domains has been in there from the beginning.
Create competition at the retail level in this space,
create mechanisms for ICANN to be accountable to the
community that -- the ICANN community and the
internet community. Those kinds of things, but
basically they are undertakings about what policies
ICANN was going to develop.
Q. So early on, you basically said that ICANN
recommends and the U.S. government decides.
A. With respect to the top level
authoritative root, that's correct.
Q. So does it really matter what ICANN says
at all?
A. If the United States government disagreed
with what ICANN said, then the United States
government has to affirmatively act to make a change.
It doesn't have an affirmative -- it doesn't have a
role other than as part of the government advisory
committee with respect to the policy development, but ultimately those policies are implemented through changes in the authoritative root. So the United States government has a significant role which it has by and large exercised in a fairly hands-off way.

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

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

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

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

JUDGE SCHWEBEL: Has it ever used that power?

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

BY MR. ALI:

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

A. Well, the ICANN was intended to be a private sector-led, private sector decision making body. But it was clear that governments did have views on the DNS, and they did have interests in the DNS. They certainly had interests in the country code top level domains, but in security and stability related matters, there needed to be a place for
the -- for governments to express their views and
have their views considered with all of the
seriousness that governments generally deserve.

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

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

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

There was a little bit of tension because
there wasn't any other place that existed for
governments to really come together and discuss internet policy issues like spam, like Consumer Protection, like those kinds of things that were outside of ICANN's mission, but certainly where there could be policy views and where international cooperation was valued. The OECD had developed an interest in this and was very useful, but that just re-created the problem of are the developing countries sitting at the table?

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

And the other thing that I would say, is that initially the government -- the government representatives in the GAC were fairly senior as it was starting out. It was something that the governments were paying attention to in what's important. Over time the level of the delegates has
varied quite a lot. And some countries like France always send an ambassador. And other countries send a very low level, you know, civil servant. So it's a difficult place to turn into the United Nations of the internet.

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

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

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

It's a multi-stake holder undertaking where private sector and government and civil society representatives get together and talk about issues of concern globally on the internet. So, actually a
week from Friday, the IGF U.S. meeting will take place here in Washington. And in preparation for the next real IGF meeting, there will be panels on security-related issues in the DNS, consumer protection related issues, intellectual property issues, all of it, policy issues that can benefit from discussion.

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

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

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

JUDGE PAULSSON: How would it drift away?

THE WITNESS: It just terminates by its terms.

JUDGE PAULSSON: What would happen then?

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

My understanding, and I think this is widely being discussed by the Commerce Department, is that there will be a new agreement called an affirmation of responsibilities that will cover sort
of four areas where ICANN will undertake to do
certain work related to accountability and
intellectual property protection. And I'm sure that
the ICANN folks actually know what's in it as opposed
to my acting informed, but not firsthand knowledge.
And there will be some international oversight
mechanism, so some bodies, review boards set up
within ICANN to monitor progress on those. So the
bottom line is, it's a different kind of name but
it's the same kind of cooperative agreement with
respect to policy to be developed.

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

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

THE WITNESS: Well, I think that a number
of countries have sort of signed on. I think that
the view of the developing world will depend a great
deal on how the United States government handles this
transition that's coming up. But there are still
countries that very much believe that this should be
a U.N. function. And that gets debated every five
years at the IT with a great deal of energy and enthusiasm.

            BY MR. ALI:

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

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


Q.    And what were you retained to do?

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

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

A.    I also represented a consortium of companies that proposed the .mobi top level domain. .mobi is now in the root and operating.
Q. You didn't think there was a conflict of interest here?

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

Q. Thank you.

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

A. Let me start on what it is not. There is a term called generic top level domains. GTLDs. Those are top level domains like com, net, org, is, and info. To the extent that there is policy related to legislation it is very much limited to security and resolution of disputes about registration. And policy for those top level domains is made by ICANN through the bottom-up policy development process. In contrast, in a sponsored top
level domain, the needs of a particular community are
identified. And the authority to develop policy that
fulfill the needs of that sponsored community are
delegated down to the sponsoring organization.

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

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

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

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

And in the 2004 round, all of the applications were self-identified communities. Meaning that of course it was voluntary. Every registration in a top level domain is voluntary, and the members of that community identified themselves by registering in a top level domain.

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

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

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

Q. In that meaning for a gTLD?
A. For a gTLD.

Q. Okay. Well, let's turn to the 2004 very
specifically. Are you familiar with the RFP issued
for the 2004 round?
A. Yes I am.

Q. Could you summarize for the panel the
different criteria that had to be satisfied in order
for an applicant to be accepted?
A. Yes. The going-in conception was we are
going to have articulated criteria for eligibility.
And those criteria are going to relate to technical
issues, is the applicant able to deliver the services
that they say in a way that is stable and that
doesn't put registrants or the domain name system at
risk. Financial and business. Is there a business plan, is it sufficiently funded? Do the applicants have the requisite business skill sets.

And then the third was a set of criteria called sponsorship. And that's a big term. But it kind of breaks down into the following things: Can you identify a community -- a community -- a specific community to be served that has needs that are not being met by the current DNS. Do -- are you going to bring some new value and diversity to the DNS space. So a generic top level domain .xxx wouldn't -- as I said, wouldn't be different from .com. Do you have the -- are you able to demonstrate the support of the community you propose to serve, and have you put together a policy making process that makes sense?

And finally, what steps are you going to take to protect the rights of others? To prevent abusive registrations, trademark violations, to ensure that registrants in the domain are -- belong in that -- are part of that community and to ensure that you were getting accurate information so that
individuals who need to protect their rights can get in contact with the registrant.

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

A. No.

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

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

First, you submitted an application and that application was evaluated against the criteria that had been published and adopted by the board with input from the ICANN community as a whole. Once a determination was made about the -- about whether you satisfied those criteria, if you satisfied those criteria, you would move into contract or what were called commercial and technical negotiations. Basically contract negotiations with ICANN. So there
are two steps. First, does it meet the criteria, second, can you negotiate a contract. And those were the two steps.

Q. Thank you.

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

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

Q. Over the technical and commercial terms?

A. Yes.

Q. What does that mean, negotiation of a commercial and technical terms. We have talked a lot about that. I would like you to explain it to the panel, please?
A. It is a standard template and again it may be changing. But in the 2004 round, the contract for commercial and technical terms involved three sections. The first section is a kind of standard business and legal terms. How much is the registry operator going to pay ICANN, what's the term of the agreement, what are grounds for termination, what are the choices of law, what's the dispute resolution mechanism.

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

JUDGE PAULSSON: What's to negotiate?
THE WITNESS: So far we only negotiated the commercial terms, price.

JUDGE PAULSSON: What's the second.
THE WITNESS: Nothing.
JUDGE PAULSSON: It is what it is.
THE WITNESS: Yes, other than these are
ICANN supplied and not negotiable -- we didn't have any desire to negotiate them but --

JUDGE PAULSSON: So why mess with part?
THE WITNESS: It's part of the contract, so it goes into it so they are obligated to comply with it.

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

What are your specific plans for building the registry, testing it, and launching it. What are your IT protection plans and the like and how are you going to pick your registrars.
Now, again, that was laid out in terms of what the specific sections were, and they were filled in by importing -- you know, text that had been provided to ICANN in the registry application in supporting documents throughout the process.

BY MR. ALI:

Q. And you handled the negotiations for ICM?
A. Yes, I did.

Q. And who handled negotiations on behalf of ICANN?
A. John Jeffrey, the General Counsel, and Esme Smith, then at Jones Day, outside counsel for ICANN.

Q. And you also negotiate the .mobi agreement?
A. That's correct.

Q. And the ICANN side?
A. John Jeffrey, Esme Smith, and also Paul Twomey was also involved in that.

Q. During the course of the negotiations of the ICM agreement, what did Mr. Jeffrey say to you about the time frame during which all of this would happen?
A. Well, I had just -- we had just finished negotiating the .mobi agreement. So it was very clear to me what was negotiable and what wasn't. It also occurred to me that we had sort of reached the limits of the negotiation. So my expectation was that it would be pretty straightforward having just negotiated these.

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

Q. Thank you. Before we proceed any further, given that we are going to be discussing these various drafts of the registry agreements, I would like to ask -- excuse me -- the panel to turn to what was tab 19 in the opening binder, where you will see a chart that looks like the one that I am holding up, and we have some extra copies that Ms. Hacque can
hand out, just to make it easy, if that's all right?

A. We are looking at this?

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

A. Yes, I do.

Q. Did you prepare it?

A. I did.

Q. In what context?

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

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

A. Yes.

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

A. Okay. I talked about the three components of the contract. First, the commercial and legal terms in which the only negotiable pieces of that were the fee arrangement. Then the ICANN appendices
1 1 through 7. Then the appendix S, that had 7 and in  
2 the case of ICM 8 subcomponents. Those, because  
3 that's where the negotiation was, are broken out by  
4 individual piece.

5 Q. And you testified earlier that very soon  
6 after the June 1st, 2005 vote, you sent Mr. Jeffrey a  
7 draft of the agreement, and that he circled back to  
8 you and there was an agreed draft?
9 A. No. What happened was I sent it to him  
10 and he said okay, we will look it over and get back  
11 to you. He and I met in Luxembourg at the next  
12 meeting. We talked through some issues. I went --  
13 we both went back home, and brought Esme Smith into  
14 negotiations and agreed on a draft on the first of  
15 August.

16 Q. And was this draft posted?
17 A. Yes, it was posted on the ICANN web site  
18 on the 9th of August.

19 Q. What does posting mean exactly?
20 A. Well, ICANN's rules require it to post  
21 for -- so that everybody knows what's going on,  
22 posting agreements or actions that ICANN is going to
take. At the time, ICANN did not have specific procedures about how much time needed to be posted. But it was basically notice that at some point the board was going to be considering this.

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

A. Yes, that's correct.

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

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

Appendix S-2 is the delegated authority. Here is the authority that ICANN is delegating to the
sponsored organization.

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

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

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

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

And then there was an appendix S-7 which was additional provisions. And in the case of this agreement, on the 1st of August, it had two very general comments. 1 that was for ICANN, you required ICM to demonstrate that it was different from what's out there on the internet when we applied. And when you put in new top level domains, please keep in mind that you made that requirement. That was essentially what was in it.
Q. So, negotiated with Mr. Jeffrey?
A. That's correct.
Q. Agreed draft with Mr. Jeffrey?
A. That's correct.
Q. Posted on ICANN site on August 9th?
A. Correct.
Q. Why doesn't this get signed?
A. It was scheduled to be discussed at the ICANN board meeting on August 15th.
On August 12th, I got an emergency call from Mr. Jeffrey saying that ICANN had received a letter from Michael Gallagher, the Assistant Secretary at the Department of Commerce saying that the Commerce Department had received a lot of letters about the xxx top level domain, and requesting ICANN to defer consideration of .xxx until anybody who had comments had an opportunity to make those comments and a proper process could be had.
Q. Now, the next column over, the one that says 19th of March 2006. Why do we have such a long period of time between August 1, 2005, and 19 March 2006?
A. So when Mr. Jeffrey called me on August 12th, I -- as you could imagine, it had already been over a year since the application was submitted, and I was dismayed and my client was very dismayed. And I asked John if he could get Paul Twomey, the CEO, to call me. Paul called me later. I was on vacation and it was very dramatic. All of my family was around.

And Paul and I had talked about what had happened. Paul told me that he was extremely concerned about how this unilateral intervention of the U.S. government was going to be perceived by the board and by the international community, given the tensions that were in there. Thank you very much. That he had been given a heads-up from NTIA that this letter was coming. He had asked NTIA not to send this letter directly, but to work through the Government Advisory Committee, and that when the NTIA, the Department of Commerce had declined to do that, he had reached out to the chairman of the Government Advisory Committee, Sharil Tarmizi, and had asked him to provide a letter describing sort of
a more generalized concern, so that when the U.S.
government's letter appeared, it would not appear to
be tied to nothing that the GAC was doing. It would
sort of be a follow-up to the letter that Sharil had
provided.

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

And you know, Paul and I talked through
that at great length. He told me on our call that in
fact the Commerce Department had threatened not to
put xxx in the root. In other words, not to tell
VeriSign to put it in the root if ICANN proceeded at
that time. And after lengthy discussions, this was a
problem for all of us. We were kind of all together
in this uncomfortable situation.

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

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

Q. So four days after it had been sent?
1      A.    Yes.
2      Q.    And likely received.
3      A.    It was dated the 11th. John Jeffrey read it to me on the 12th and it was stamped received on
4 the 15th and posted that day.
5      Q.    Okay. So why not just stop. If that's what you have been told by Mr. Twomey that the U.S.
6 is opposed to this, why not just stop. Why go forward and then have the 19th March 2006 round?
7      A.    Well, ICM certainly did not agree to cease its application. And it had completed the first step
8 of the process. The U.S. government had said we want more process and Mr. Twomey said, we just need to,
9 you know, postpone this for a while, and then we will get on with it. We will move forward.
10      Q.    So why didn't the 19th of March 2006 draft then get executed?
11      A.    So, what happens, the board met on September 15th and discussed the xxx contract.
12      Q.    September 15th, when?
14      It may have been the 16th. I'm getting the 15th and
1 16ths -- but about a month after the first time it
2 was scheduled. John called me after the board
3 meeting and said, good discussion, you know, the
4 board was -- had two concerns. The first was they're
5 comfortable with Stuart Lawley, but they are
6 uncomfortable about what would happen if there was a
7 change of controls, what if Larry Flynt bought out
8 ICM.

9 So we said, well, we can address that by
10 providing some advanced notice of change of control
11 and giving ICANN the opportunity to determine whether
12 that creates enforcement problems for them. The
13 other thing that the board asked for was a more
14 specific articulation of the commitment of ICM's
15 obligation to fulfill its commitments that were in
16 the application and various documents submitted in
17 the process of that, and ICM was quite happy to
18 provide that since it intended to be obligated.
19
20 I drafted those provisions for John's
21 review and sent them off on the 27th of September.
22 Got an acknowledging e-mail saying he would get back
23 to me if there were questions and then we were sort
of overtaken by events, and I was never able to get on the schedule to discuss the specific terms that we had proposed until March when we were preparing for the Wellington meeting, where the expectation -- ICM's expectation, but also expectation of the press in Wellington, having, you know, discussed this with Dr. Twomey and Dr. Cerf was the xxx contract was going to be considered there.

John and I spoke and he said, yeah, we got to do this, but I am really busy getting ready for Wellington, will you talk to Esme Smith directly. The Jones Day counsel and I worked through the changes that I had proposed in September. We added one other change, which was when we met with the Government Advisory Committee in the interim they had expressed a concern about names of cultural and religious significance. And they didn't want those names to be taken and used in the .xxx top level domain.

So Mr. Lawley said, fine, that's no problem, we will sort of before we even launch anything, we will give opportunities for governments
to identify any name of cultural or religious significance that they don't want to be registered, and we will put it on a reserve list, and those names won't be available, it will be available free of charge to the government. So those were the three provisions that Esme and I worked through. We agreed on them. She said, okay, great, we need to get this to John and then we will get it out. She said I need to get this to John, and I will try to get his attention in the next few days.

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

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

Q. Just so I can be clear here, did the 19 March version of the contract get considered in
A. Actually, what happened is we got to Wellington. The Commerce Department had intervened yet again with another letter saying, by the way, ICM promised all of these things, all of these policy commitments, made all these policy commitments, but we don't see where they are listed in the contract. And we think that before you sign a contract with ICM you should make sure that all of these commitments are in the contract, so you can enforce them.

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

And so the -- in Wellington, the Government Advisory Committee, taking into
consideration the letter that the United States government had said about you promised all of these things, they are not specifically referenced in the agreement, issued a communique saying, with respect to xxx, first, and this is not really the advice, but they complained and said you, ICANN, didn't answer these questions.

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

Q. Okay. But is that what you are referring to as the Wellington communique?
A. Yes, that's the Wellington communique.
Q. Let's take a look at the Wellington communique, if we might. This is hearing Exhibit 181.

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

A. Yes.

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

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

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

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

At the end of the Wellington meeting, John Jeffrey and I met together and went over that agreement, walked through it. Remember we were not changing the substance. ICM from the beginning was committed to doing what it had said it would do. So this was a more fulsome articulation. I did not get comments back from John. We had, you know, some
exchanges during the next couple of days, once we
returned home and the contract that I had provided
and walked through in Wellington with some small nits
being corrected along the way was posted by ICANN on
the 18th of April as an ICM proposal.

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

A. Correct.

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

A. I knew going into the board meeting on the
18th, John told me what he thought would happen and
what the board had liked to do was to take a board
meeting to discuss the contract and then move, act on
it at the next meeting. So when the board met on the
18th of April, I did not expect them to vote on it.
There was no -- there were no votes so there were no
voting transcripts or resolutions related to it
published and the minutes of the April 18th meeting
weren't posted at the time, but I spoke to John, who
said that there had been a good discussion, but
Chairman Tarmizi had participated in the discussion
actively, and there were no particular issues. So
the contract was posted for 21 days for public
comment and scheduled for board consideration on the
10th of May in its board call on that day.

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

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

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

That is not what the letter said, but you can imagine that what was described was ICM has agreed to enforce pornography laws of all the countries in the world and if ICM fails to do that, then the governments are going to be looking to you,
ICANN, to do that. The board members, most of whom are not lawyers, were understandably concerned about that. It would have been -- it was a completely reasonable concern, if that had been what the U.K. government letter said, or what the U.K. government letter meant. That was not the case.

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

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

THE WITNESS: Well, we didn't have a contract that -- the contract had -- the proposed contract -- it was definitely a proposed contract had to go back to the board for the board's approval and authorizing the staff to execute it. I'm sorry if you misinterpreted what I'm saying.
What I'm saying is that we negotiated with staff and reached agreement on the 1st of August. I negotiated with outside counsel, and I'm not representing that John Jeffrey, the General Counsel, affirmatively signed off on that. I met with John and walked him through the terms of the next contract in Wellington. I'm not representing and I don't mean to say that he affirmatively agreed to that. But we walked through all of it, and so, there was no contract until the board agreed that the staff could sign a contract. And I'm sorry if that was unclear.

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

THE WITNESS: That was the next time they vote, that is in Lisbon. But in the board call on the 10th of May, they voted no, and in the voting transcript they said this doesn't contain the structural guarantees that we were expecting. The one exception to that, to be fair, was that Dr. Twomey said that he had always had doubts about whether this was a sponsored top level domain after all. And he voted against that.
Now, in the press conference following that vote, Dr. Twomey said, the majority of the board thought that the sponsorship criteria had been met, the problem was with the contract. But I want to be clear that Dr. Twomey on the 10th of May did articulate in his voting record, concern about sponsorship.

BY MR. ALI:

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

A. Well, frankly --

Q. Let me rephrase. Strike that. Did you get the feeling that you were being jerked around?

A. Well, certainly when the U.S. government letter came on the eve of the Wellington meeting and the GAC was not told that in fact the board had raised those issues with us and we had endeavored to address them. Then when we didn't see the minutes of
the April 18th meeting until after the vote on the 10th.

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

Q. So then what happened?

A. ICM promptly filed a request for reconsideration which is a procedure in the ICANN bylaws where somebody affected by the board's action can request reconsideration on very specific grounds. The reconsideration committee requested some extensions. There is a timeline for that which ICM granted. In the meanwhile, I started thinking about a petition for independent review because I certainly was not at all sanguine that reconsideration would have an outcome that was appropriate. And at the end of October, the board met at a retreat, and I got a call from the General Counsel saying -- and he was
very careful with his words, and I do not remember his exact words. So I want to make sure that everyone's clear. I am trying to be as faithfully representing John's words to me as I can.

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

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

Q. What was different from the 5th of January 2007 draft with the April 2006 draft?
A. Again, substantively there was no difference, except that we rearranged things. We took all the commitments that had been scattered through various parts of appendix S and we created a new appendix S-8 that included a comprehensive listing of ICM's policy commitments.

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

It was -- we were working quickly and it was over the Christmas holidays and Esme was probably spending way more time than her family would have liked in the office during Christmas week. But because of the way I had compiled the list and basis
for it, it was repetitive, but that was what got
posted. Again, it's much longer, much more detailed
but we have incorporated by reference the documents
that contained those policy commitments in a previous
draft, so there was no substantive commitments about
that commitment.

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

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

So what we did was we took every single
commitment that was contained in any of the
documents, and listed them. That was included in the
contract. And -- you know, we wanted to make sure
that it was as easy as possible for ICANN to convey
to the Government Advisory Committee that it had
heard their concerns and responded to their concerns.

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

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

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

I also added a description after each set
of commitments that said here are the safeguards that
are in place that are going to enable ICANN to know
whether ICM is fulfilling its commitments. There
will be a contract with a monitoring agency for the
tagging requirements. There will be a contract for
crawling the web for child pornography. There will
be the following check points. And in addition,
under each section, here are the enforcement
mechanisms available to ICANN in the event that ICM
doesn't fulfill this.

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

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

    A. Absolutely everything.

    Q. Why didn't this agreement get signed?
A.  (Chuckles.) I'm sorry. The board met again on the 12th of August. There was a discussion about the contract.

Q.  The 12th of August.

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

Now, I have to say, I have the greatest amount of respect for Rita Rodin. Rita is a partner at Skadden, she is a very talented person and if anybody had suggested 2 1/2 years after a decision had been made -- actually, 1 1/2 years after a decision had been made, that the people had satisfied the sponsorship criteria, that that was open again, she would have taken my head off on that. It was
honestly shocking. I saw that. John and I discussed the meeting.

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

John responded to me, and I felt at the time -- and I continue to believe, that he was earnest. He said that he was okay. They are just going to demonstrate a sponsorship support that you have already demonstrated before, and then we will be able to move on, it's okay. Now, I mean -- I believed that he was being genuine, and I do believe that he was being genuine when he said that to me.
But for that, I would have, you know -- I would have persuaded Stuart that the best thing for everybody was to engage in a civilized dispute resolution over this rather than continue on with the charade that was clear to me had -- this had become.

Q. A charade.
A. Yes.

Q. And you still believe it was a charade?
A. Yes, I do.

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

JUDGE SCHWEBEL: We will adjourn until 4:00.

(RECESS.)

MR. ALI: Judge, if I may.

BY MR. ALI:

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

Who, in your view, was the architect or architects of this charade?
A. I believe that Dr. Twomey had determined that this should not go forward. I don't know the degree to which that was vocalized, but my view based on the information and what was happening also what was happening in Australia, maybe I should pause for a minute just to describe that.

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

And that is how he would stop children from being exposed to inappropriate material in Australia. This was a big issue. The Minister of Communications, Helen Coonan, responded first on the 21st of March, that's ridiculous, that will slow down the internet on some enormous percent, which was true. But on the 23rd of March, she had cited maybe this wasn't such a bad idea. In fact this was such a politically hot issue in Australia, this adult
content that she had changed her mind and said she
would consider this filter. So the headlines in
Australia read, Coonan flips on --

JUDGE PAULSSON: You said March of what
year?

THE WITNESS: This is March of 2006.

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

The government of Australia, rather than
filtering at the ISP level had permitted to roll out
$117 million filtering program, providing filtering
for every home, and the software was not there. It
hadn't been delivered. There were problems with it.
And so the opposition party, again, made a huge noise
about, you know, she's not delivering on her promise,
our children are being ruined, all of these things.
I can't quite describe to you how big an issue this
was in Australia, but it was a very significant
partisan politics issue. Significant in the same way
that when the Bush Administration gets 200,000
postcards from the forum -- Focus on Families or
Family Research Council, that is a significant
domestic political -- I'm not demeaning the
positions, I'm just saying it's not ignorable. And
that was the same thing that was happening in
Australia.

JUDGE PAULSSON: What was the name.

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

BY MR. ALI:

Q. So other than the fact that Mr. Twomey is
also Australian, why should he care?
A. Well, the Australian government clearly had a strong and vested interest in him. He had worked for the government of Australia. He knew those people. They were capable of picking up the telephone and calling him. And if he left the job at ICANN, he would go home to Australia and certainly very high on the list of his likely jobs would be a job in the government.

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

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

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

A. That's correct.

Q. Now, do you recall the reasons that were given by the board for rejecting the ICM application?
A. Well, there was a resolution in -- in Lisbon that described the board's reasons for rejecting it, and I remember them generally, but would prefer to either look at that.

Q. Oh, sure, of course.

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

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

A. Yes.

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

A. No.

Q. And why not?

A. First of all, only the first bullet point which relates to sponsored community was among the elements of the RFP criteria. And in that respect, ICM had demonstrated over and over and over again that it had fulfilled the requirements for the sponsorship community -- sponsorship criteria for the
Even after the February 12th board meeting where I really did think the fix was in, and even though the sponsorship issues were clearly asked and answered, ICM nonetheless came forward and offered current evidence of support in the form of 2,000 unsolicited e-mails from webmasters from 71 countries around the world saying we support this and we would like to be in this and in the form of 76,000 pre-reservations that were made by members of the adult industry, saying, "I'm an adult webmaster. I would like to pre-reserve my name in .xxx."

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

Q. So as a result of those pre-reservations it did give you the sense that you had a viable
1 business model?

2 A. Oh, well, more than that. It exceeded
3 even their sort of medium projections, and this was
4 of course at a time when the, you know, word on the
5 street was that ICM was dead. So, absolutely. This
6 confirmed that there were a group of adult webmasters
7 who thought there was value in being a clearly
8 delineated space, and being able to participate in a
9 policy development process that involved input from
10 stakeholders like child safety experts and free
11 expression advocates.
12
13 The second point cited in the board
14 resolution is "based on the extensive public comment
15 and from the GAC's communique, this agreement raises
16 public policy issues."
17
18 Well, I take the point that governments
19 have public policy concerns and those are legitimate.
20 The GAC expressed its public policy concerns in the
21 Wellington communique, and it says we want to make
22 sure that if you go forward with this, you have
23 enforceable contract terms to ensure that ICM
24 delivers on what it says. We had provided those. We
1 had clearly provided those. So we knew what the
2 GAC's public policy concerns were. They had
3 expressed them and we had responded to them in a
4 compelling manner.

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

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

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

So largest, most respected sort of
internet technology companies were essentially
saying, we will take on -- our organization will take
on this obligation. And if ICM had not made good on
its commitment, there is no doubt in my mind that in
37 seconds, the head of the Internet Content Rating
Association would have been on the phone going crazy
because his board members would have been harassing
him. So the -- so to describe this as the board's -- or the GAC's concern about offensive content simply is misleading as to what the GAC said in its communique.

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

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

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

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

This is sort of incredibly clever in the sense that the board is acknowledging something in the GAC's communique which acknowledges Paul Twomey's reading of the U.K. letter from the previous May in
which he said, the U.K. government letter demonstrates that if ICANN does not enforce its contract terms, the governments of the world who expect ICANN to enforce those directly. Not that it will enforce the contract with ICANN, but it will take -- or ICM out of the root, that it will terminate the contract name, that it will enforce the contract with individual registrants. Now that is just, I'm sorry, preposterous. And it wasn't -- wasn't what the U.K. letter said, and it was not what any of the governments responded to.

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

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

A. 2, 3, 4, and 5.

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

A. Yes, there is no basis in any of the discussions over the three years for these.
Q. And 2, 3, 4, and 5, do they appear anywhere in any remote sense in the RFP criteria?
A. I mean, I think that at some level, you might say that, you know, the value proposition in the criteria goes to public policy. I think that's arguable. But I do think that, I'm not going to discount that. I think that to the extent in this one case you could make an argument that 2, 3, 4 and 5 have any bearing with the RFP criteria, that's where it would be. And ICM clearly demonstrated head and shoulders above any of the value brought to the DNS space by most of the other sTLD applicants that it was going to add value to the internet.

Q. And you think that what you have just described as your understanding or what might be the broad public policy interpretation was something that the board also understood?
A. Honestly, I have no idea what the board understood from this.

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

The first reason they give is as follows:

I'm quoting from the ICANN response here at paragraph 270. First the RFP required applicants to "demonstrate that the sponsored TLD community is precisely defined so it can readily be determined which person or entities make up their community."

Several board members determined that ICM could not satisfy this criteria despite having ample opportunity to do so throughout the contract negotiations. That's what, as its first -- what ICANN states as its first criteria not being met.

A. First of all, I think that sponsorship criteria both established on the 1st June 2005 that those were met. Having said that, ICM had a definition of a sponsored community that was in the
contract on the 1st of August, agreed with ICANN
staff that was posted on the board. That was those
adult webmasters who believed that they would benefit
from being in a clearly delineated space and would
benefit from participating in policy-making around
best practices involving input from stake holder
communities. That was the definition in the first
contract, in the second contract, in the third
contract, in the fourth contract and in the fifth
contract.

Not only was ICM never asked to change
that, at one point, John reported that some board
members were concerned that ICM might try to get out
from under its obligations by changing the definition
of the sponsored community. So they affirmatively
did not want it to be changed.

Q. Thank you.

The second criticism, if you will,
contained in the ICANN memorial comes from 272.
Second, that the RFP required that the community be
comprised of persons that have needs and interests in
common which are differentiated from those of the
general internet community. While on its face, ICM's sponsored community appears to have common needs and interests, some agree that the revised agreement in 2007 failed to make this portion of the RFP specification because of its selective membership. Could you please comment?

A. The membership of the sponsored community did not change from day 1. So to the extent that it was a self-identified community, those adult webmasters who registered were members of the community, that's the same thing on 2001 as it was in 2007. So I don't actually understand that reference. Moreover, of all the sponsored top level domains xxx was really the application that couldn't be made in the DNS structure. They needed a clearly delineated space. That's what they were after. It was not like jobs, where the sponsorship evaluator said, "why don't they just go to jobs.com and look up the job company that they are looking for?" The nature of the application was we want a clearly delineated space where we can impose best practices, agreed by the industry that community members on
Q. And in fact, in the chart we were looking at early on the definition of sponsored community never changed?
A. Never.
Q. And you were never asked to change it by ICANN?
A. No, we were told that board members would be concerned if we tried to.
Q. Third reason, paragraph 273. The RFP required ICM to demonstrate broad based support from the community it is intended to represent. The RFP was phrased in the present tense such that to satisfy the RFP criteria, ICM had to show broad based support from the sponsored community for the sTLD, the sponsoring organization and for the proposed policy formulation process at all times. Is that correct?
A. Well, the RFP requirements did require the applicant to demonstrate broad based support from the community intended to be served by the sTLD. And ICM did that. This present tense description is a new one to me, since all of the top -- all of the
applicants were self-identified. That is to say, the community would be identified by their registration.
.tel, I just looked back, the public forum comments, both in the initial comments when it was first posted and in the comments when the contract was posted. There was 1 comment in support of it. The independent evaluator said that most of the support came from either TELNET itself, or its employees or contractors.

And in fact, the European telephone network operators, 41 European telcos had objected to it, Telephonica had objected to it and JP had objected to it. So notwithstanding the support demonstrated by ICM, both in the June 2005 time frame and again in February of 2007, which was present, you cannot square the requirements that were imposed on .tel with the requirements that were imposed on .xxx.

Q. I only have two more questions.
The next reason from 278, paragraph 278, ICM could not demonstrate that it was adding new and valuable space to the internet name space as required
by the RFP. Is that in fact correct?

A. No. The new and valuable space means it's differentiated, it's providing a need that's not otherwise being provided. All of that had been demonstrated in the application in June of 2005. And this particular -- to the extent that sponsorship ever came up in 2007, it was only about the community support. So this is new. If that was a concern, we never ever heard it.

MR. ALI: I think the panel and the witness will be glad to hear that I will end here.

JUDGE PAULSSON: The episode of the U.K.

THE WITNESS: Yes it is. It is. And I'm sure it's in there.

(Off-the-record discussion).

CROSS-EXAMINATION

BY MR. LeVEE:

Q. Ms. Burr, members of the panel. Let me just start by saying that the last hour or so had involved significant accusations with respect to
charades and the preposterous, pretextual, et cetera.

A lot of opinions. ICANN believes that the easiest approach and most appropriate approach would be to have the panel hear from the individuals who are alleged to have been conducting the charade and so forth. And you will hear from those individuals tomorrow and Thursday.

So, I am going to keep my cross-examination extremely short. I don't agree with many of Ms. Burr's opinions. But I think it would be better to have someone who is testifying rather than an examiner provide for you a contrary view. So we will let Dr. Cerf, Dr. Twomey, and Dr. Pisanty, tomorrow and Thursday, express their views and I will ask them specific questions about Ms. Burr's testimony and ask them to respond. And I'm sure if I don't, opposing counsel will do so for me.

I just have a few questions. Do you understand that ICM's taking the position that this proceeding is governed by international law?

A. I do understand that.
Q. And when you were counsel to ICM, did you take the position that any dispute between ICANN and ICM with respect to ICANN's bylaws would be governed by U.S. law?

A. With respect to the contract, yes, because the choice of law imposed by ICANN on the contract terms was California law. I never had occasion to consider whether ICANN's actions in a more general sense in the context we are discussing here were governed by international law. That was not --

Q. I'm going to ask the panel and Ms. Burr to look at Exhibit 241. I have copies, rather than distributing a binder since Mr. Ali did not do so, I felt inclined not to give you one as well.

Do you recognize Exhibit 241?

A. Yes, I do.

Q. Looks to me as if there is an e-mail at the top from you to Mr. Jeffrey of ICANN, correct?

A. That's correct.

Q. And then at the bottom there's an e-mail to you -- from you, I apologize to, among others, members of the GAC, is that correct?
A. That's correct.

Q. And you entitle it Sharil because that's Mr. Tarmizi; is that correct?

A. That's correct.

Q. So let me ask you to turn the page?

A. Yes.

Q. Last long paragraph beginning with the word "finally," why don't you read that?

A. Finally, I would not presume to offer the GAC legal advice but you may want to consider whether the approach advocated by the Australians puts GAC in the awkward situation of recommending to ICANN that it violate the nondiscrimination provisions of its bylaws. Any dispute between ICANN and ICM on this point will be decided under U.S. law and you may want to seek input from ICANN's General Counsel on this question. It would be unfortunate indeed for the GAC to recommend that ICANN act in a way that contravenes its bylaws.

Q. So isn't it what you were saying that if there was an allegation that ICANN was violating its bylaws, that that dispute would be decided under U.S.
1 law?

2      A. Yes, it appears that I did say that here. But I need to tell you this was in the context of the
3 Australia government saying that ICM should come forward with all of the policies and procedures and
4 that ICM could not be moved forward and ICANN should treat ICM in an entirely different way without
5 justification, and I think that under anybody's laws the -- interpreting the antidiscrimination provisions
6 of the bylaws in this way would have been problematic. But finally, I am not an international
7 lawyer, and I probably -- I made an assumption and
8 spoke hastily. I have no idea what the right answer
9 to that is.

10      Q. Let's go back to 2002. You were involved
11 with ICANN's committee on evolution and reform?
12      A. Actually, that's not correct. I was not
13 involved in the committee on evolution and reform.

14      Q. You were involved in recommending changes
15 to ICANN's structure and processes, correct?
16      A. What actually happened was the evolution
17 reform committee -- the evolution and reform
committee in 2002 worked on evolution reform proposals. They came up with something called a blue print. One of the elements of the blueprint was an accountability framework. They established in the blueprint the parameters of that accountability framework, and then after that Joe Simms asked me if I would volunteer to draft up some articulation of that blueprint. So I was not on the committee, I was not interacting with the committee. I was interacting with ICANN's outside counsel on that behalf, and responding to a circumscribed task.

Q. So let's take a look at Exhibit AC, which is the blueprint. Is this the blueprint that you referred to?

A. Yes, it is.

Q. Let me ask you to take a look at page 12. And then just in front of paragraph 6, do you see where it says bylaw amendments and alleged infringements?

A. Yes, I do.

Q. Could you read that, please?

A. The highlighted area says, the board
1 should create a process to require nonbinding
2 arbitration by an international arbitration body to
3 address any allegation that board had acted in
4 conflict with ICANN bylaws.
5 Q. So you understood, did you not, that the
6 procedure involving an independent review panel was
7 nonbinding?
8 A. The blueprint clearly said that and the
9 implementation description that I provided also said
10 nonbinding.
11 Q. Why don't we take a look at Exhibit V as
12 in Victor. Do you recognize this document?
13 A. Yes, I do.
14 Q. What is this document?
15 A. It's the recommendations regarding
16 accountability which was the final work product of my
17 undertaking from Joe. It was the second in two. I
18 had initially given him a draft which didn't please
19 him very much. You know, Joe, he made it clear that
20 I had exceeded the scope of my assigned authority and
21 directed me to return to my work and give him
22 something that complied with the blueprint. This was
that product.

Q. So that the panel understands, she is referring to Joe Simms who is my law partner. And that's why she refers to him as "I know Joe." And she is correct.

A. Just to say I love Joe.

Q. Let me ask you to turn to page 3. And the very first bullet at the top of the page?

A. Yes.

Q. Where it says under the ERC proposal. And the ERC proposal was the document that you just looked at previously, correct?

A. The blueprint, yes.

Q. It says "under the ERC proposal, nonbinding arbitration will be available exclusively to address allegations that the board has acted in conflict with ICANN's bylaws?"

A. That's correct.

Q. And you wrote that because you understood that that's what the ERC had recommended, correct?

A. That's what was in the blueprint, yes.

Q. And in the second sort of subbullet, it
s fits that the ERC considers that the expanding of the
range of issues appropriate for independent review
will create a costly unworkable Supreme Court or
super board with the ability to nullify decisions
reached by the ICANN board. Do you see that?
A. That is an articulation of what's in the
blueprint.
Q. Okay.
Now, you are aware that the -- let me
actually show you one more document. Exhibit B is
dated 23 August 2002. And now I want to show you
something posted on 2 October 2002, which is
Exhibit AE.
A. Yes.
Q. And do you recognize Exhibit AE?
A. This appears to be the evolution and
reform committee's final report.
Q. And do you understand that the board
especially adopted the blueprint that we referred to
earlier and that you wrote about in previous
exhibits?
A. I have not made a comparison. That would
be my assumption, but I honestly hadn't compared the
blueprint and the final report. I have no reason to
doubt that.

Q. And do you understand in this proceeding
that ICM has taken the position that the panel's
recommendations shall be binding?
A. Yes, I do understand that, they were put
in that position.

Q. And did you ever discuss with ICM or its
counsel that you had been involved in this ERC
process and had written a report indicating that the
process would be non-binding?
A. Yes. I mentioned earlier that in the
summer of 2006, after we had submitted the
reconsideration petition, we started work on an
independent review petition. I'm not an
international arbitration lawyer, but I consulted my
partner Gary Born and Rachael Kent, who are. And I
involved them in the initial drafts that Wilmer
prepared. I gave them the information and they came
back to me and they said, you know, we think this is
binding arbitration. And I said, that can't be
right. I wrote the implementation stuff and it said
non-binding. That can't be right. And Gary and
Rachael walked me through it.

I then called John Jeffrey or emailed him
and said, I just want to make sure -- the ICANN web
site points to these rules. Are those the rules? Am
I missing anything is that what governs the -- that
independent review? John confirmed that it was. And
so, do I -- do I think that it was intended by the
evolution and reform committee to be binding?
Absolutely not. Do I think it is conceivable that
ICANN implemented it in a way that created binding
arbitration, based on Gary Borne's analysis, I do
believe that they could have implemented it in that
way.

MR. LeVEE: Then we will leave it at that.
Thank you.

MR. ALI: No redirect.

JUDGE SCHWEBEL: Do you have any
questions?

JUDGE TEVRIZIAN: No, I don't have any.

JUDGE SCHWEBEL: Thank you very much.
THE WITNESS: Thank you very much.

(The witness steps down.)

MR. ALI: Well, we have no further witnesses today from claimant's side, Judge Schwebel.

JUDGE SCHWEBEL: How do you plan to proceed tomorrow?

MR. LeVEE: I'm coming closer since there is no microphone. The first witness will be ICM's expert witness, and we are hoping he is not taking any more than an hour. At that time, Dr. Cerf will testify. And I expect he will take more than an hour. And following Dr. Cerf will be Dr. Pisanty. We are hoping to finish those three witnesses tomorrow.

Thursday morning, Dr. Twomey will begin the day. And after Dr. Twomey testifies, Professor Caron will testify. Likely in the afternoon on Thursday. At which point, the evidence will close.

Now, counsel and I, Mr. Ali and I have discussed over the lunch break a little bit more of closing argument and we have a proposal. We had originally allocated a total of four hours, two to
each side. We still think that four hours of closing argument is appropriate, however, what we would propose is that Mr. Ali give 75 minutes of closing argument. And that I give 75 minutes of closing argument. At which point we will take the lunch break. We would then return so that the panel could ask questions as long as they wish to ask questions and when you are done asking questions. We will go home.

Certainly if you want to provide us with some direction of what may be of interest to you, given there is so much information that has been presented and of course with the flexibility that we address those points that we believe are important for our respective cases. But some direction of the panel would be most appreciated.

JUDGE SCHWEBEL: We'll try. Thank you so much.

MR. LeVEE: Thank you, have a very nice evening.

JUDGE SCHWEBEL: Thank you then we will meet tomorrow morning at 10:00 a.m.
(The panel was then adjourned for the evening at 4:53 p.m.)