

1 BEFORE:

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3 JUDGE STEPHEN SCHWEBEL, Hearing Chairman

4 JAN PAULSSON

5 JUDGE DICKRAN TEVRIZIAN

6

7 APPEARANCES:

8

9 On behalf of ICM:

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13 AMY STATHOS, ICANN

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

2 JUDGE SCHWEBEL: Good morning.

3 MR. ALI: Good morning.

4 MR. LeVEE: Good morning.

5 JUDGE SCHWEBEL: We meet this morning in
6 the matter of an independent review process for the
7 International Centre For Dispute Resolution of the
8 American Arbitration Association in the case of ICM
9 Registry LLC as claimant versus the Internet
10 Corporation for Assigned Names and Numbers as
11 respondent.

12 You are all very welcome. This courtroom
13 is perhaps not ideal, Judge Tevrizian and I have been
14 criticizing its odd lines of vision, its seats and so
15 on, but nevertheless we hope that they are adequately
16 comfortable. And in the first place, that you can
17 all hear; the microphones up here are concealed. I
18 don't know how well I'm coming across. Can you all
19 hear me?

20 MR. ALI: Yes.

21 MR. de GRAMONT: Yes.

22 MR. LeVEE: Yes, Your Honor.

1 JUDGE SCHWEBEL: Good. That's a good
2 beginning. I see we do have a podium in which
3 counsel can address the panel. Witnesses will be
4 discreetly concealed on the witness stand --

5 (Laughter.)

6 JUDGE SCHWEBEL: -- and you shall be able
7 to see them as they speak. I'm not sure. I think we
8 will be able to hear them because there is a
9 microphone there.

10 Now counsel have been good enough to
11 confer between themselves and agree on arrangements
12 for the hearing and that is much appreciated. And my
13 understanding is that we will begin with a
14 presentation of an hour each by way of opening
15 argument. And therefore I would like to call upon
16 counsel for the claimant, Mr. Ali, to address the
17 panel.

18 OPENING ARGUMENT BY COUNSEL FOR CLAIMANT

19 MR. ALI: Thank you very much, Judge
20 Schwebel. Standing behind this podium, I now know
21 how John McCain or Mike Dukakis must have felt. I
22 hope you can see me, and hopefully you will be able

1 to hear me.

2 And I would like to start off, if I may,
3 introducing my colleagues. I have with me my
4 partner, Alex de Gramont. You have received many
5 e-mails from John Murino, who -- and Erica Franzetti,
6 Dave Bell, Ashley Rivera.

7 Mr. Chairman, Judge Tevrizian, Judge
8 Paulsson, good morning again. My colleague Mr. LeVee
9 and I, together with our respective teams, are to
10 help you decide whether ICANN should be held
11 accountable for its failure to act consistently with
12 its bylaws and articles of incorporation, including
13 relevant principles of international law and
14 applicable local law.

15 It is my client's position that there can
16 be little doubt based on the evidence that ICANN
17 failed to consistently with its articles and bylaws
18 in the way in which it evaluated ICM's applications
19 and the grounds upon which it relied, ultimately,
20 rejecting that application. If I may, you are not
21 here to decide whether the decision ICANN reached is
22 right or wrong in the abstract, but rather whether

1 ICANN acted consistently with its articles and bylaws
2 in ultimately denying ICM's application.

3 Members of the panel, this case represents
4 the first time that a party affected by ICANN action
5 has invoked the independent review process, which is
6 effectively the only viable protection that the
7 internet community has against arbitrary and
8 discriminatory conduct by ICANN. As you can
9 appreciate, therefore, this is a case of great
10 importance, not only to ICM, but also to the global
11 internet community.

12 Indeed, in many, many significant
13 respects, this case will test whether the ICANN
14 experiment in self-governance and accountability can
15 actually work and is actually working. Let me also
16 say, and say so emphatically, this case is not about
17 pornography or adult content or sex on the internet.
18 It is about whether a very special body, a private
19 California corporation acting under a very specific
20 delegation of authority of the United States
21 government to oversee the technical stability of, and
22 develop related policy for, one of the world's most

1 truly global public resources, the internet, violated
2 the commitments reflected in its articles and bylaws.
3 Commitments to act transparently, neutrally,
4 objectively, not discriminatorily, equitably, and
5 with due process, fairness and integrity.

6 I'm not making these words up. They are
7 all here in black and white, in ICANN's articles and
8 bylaws. If this case is about ICANN's right or
9 discretion to reject the proposed top level domain or
10 TLD because it finds pornography distasteful, then
11 the next IRP may have to deal with ICANN's distaste
12 for a dot gay TLD or a dot muslim TLD.

13 Now before I proceed any further perhaps I
14 could just deal with couple of housekeeping matters.

15 We have handed out various binders and
16 there is one binder that's called ICM opening
17 statement. Counsel, respondent, should have at least
18 two. Or if not -- okay.

19 MR. LeVEE: Yes.

20 MR. ALI: And they should have been
21 handled out to the panel. I will be referring to
22 various documents in this binder by tab number and

1 you will find under various tabs highlighted portions
2 of the documents to which I will be referring and I
3 would appreciate it if you could go through the
4 binder with me as I -- as a guide.

5 In terms of my opening, the way in which I
6 am going to structure this is that I am first going
7 to lay out who our witnesses are, and suggest to you
8 why their testimony is important. In other words,
9 why should you care about their testimony?

10 Then I will turn to your -- and in this
11 connection I will be asking you to review ICANN's
12 articles of incorporation and bylaws with me. And I
13 will then summarize the key facts and do my best to
14 identify for you where the parties are in agreement
15 and disagreement, and then finally I will pose a
16 series of questions that we ask you to keep in mind
17 as we progress through this week.

18 Now I should stress that in structuring my
19 opening remarks, I have made an assumption and I know
20 I am not incorrect in this, that the panel has tried
21 its best to digest the volumes of materials that we
22 have submitted to you, so I'm going to stay away from

1 a summarized regurgitation of everything in those
2 materials. But if there is a particular point that
3 you would like me to stress or a particular
4 clarification that you need, I will try to clarify
5 the point immediately; if not I will do so on Friday
6 within the immediate context of my closing remarks.

7 Now in the course of my opening, I will
8 not be dealing in great substance with the debate
9 that we have been having with ICANN regarding the
10 binding or non-binding nature of these proceedings,
11 nor regarding the relevance of international law or
12 over the standard of legal review. Which is not to
13 say that we in any way concede these points. Rather
14 I believe that these points are far better addressed
15 in closing once you have had the benefit of the
16 debate and discussion that is going to take place
17 over the course of this week.

18 Now insofar as the closing is concerned,
19 Mr. LeVee and I conferred very briefly this morning
20 and we would ask that perhaps on Thursday, if you
21 could consider what it is you would like us to do in
22 closings, whether to address particular legal and

1 factual points or any other guidance that you can
2 provide in assisting us to structure our presentation
3 so it could be of interest and use to you. That
4 would be most helpful.

5 So enough of the preliminaries, let me
6 turn to the first of the points I indicated earlier,
7 the witnesses. Who are ICM's witnesses and what is
8 so relevant about their testimony? How will ICM's
9 witnesses assist you in deciding this dispute?

10 If you'd please turn to tab 1 in your
11 binders. There are some nice photographs there with
12 a brief summary of who our witnesses are. The first
13 witness you will be hearing from later today is
14 Dr. Milton Mueller. Dr. Mueller is one of the
15 foremost authorities on ICANN and is an author of an
16 excellent book entitled "Ruling the Root" which
17 addresses ICANN and internet governance issues. His
18 expertise is universally recognized and is relied
19 upon by the National Science Foundation and U.S.
20 Department of Commerce.

21 We have important questions for
22 Dr. Mueller and I'm sure that Mr. LeVee and his

1 colleagues do as well, but really Dr. Mueller is here
2 for you. We believe that his testimony is crucial
3 for understanding how ICANN works, its processes and
4 procedures, and how those processes should have been
5 applied to ICM's TLD application.

6 I have no doubt, no doubt whatsoever that
7 you will find what Dr. Mueller has to say about the
8 special relationship between ICANN and sovereign
9 governments and especially the United States
10 government most illuminating.

11 Next and quite likely today, I imagine,
12 you will hear from Mr. Stuart Lawley, the chairman
13 and president of ICM Registry. We believe it is
14 important for you to hear why Mr. Lawley applied for
15 the .XXX TLD, and about the investment in time and
16 money during the process. You will also hear about
17 Mr. Lawley's expectations and understanding of how
18 the application process and subsequent contract
19 negotiations were conducted, which were based on
20 conversations that Mr. Lawley and his counsel had
21 with Mr. John Jeffrey, ICANN's General Counsel, Kurt
22 Pritz, ICANN's Senior Vice President who was

1 entrusted to manage the 2004 TLD round, as well as
2 the upcoming 2010 TLD round. Paul Twomey, ICANN's
3 president and CEO, and Vint Cerf, the chair of
4 ICANN's board during the pendency of ICM's
5 application and the so-called father of the internet.

6 Of course Mr. Twomey and Mr. Cerf are
7 witnesses on behalf of ICANN in these proceedings and
8 will be appearing before you later this week.

9 Messrs. Jeffrey and Pritz are not.

10 After Mr. Lawley you will hear from
11 Dr. Elizabeth Williams who served as the chair of the
12 sponsorship independent evaluation team that was
13 tasked with assessing and evaluating applicants in
14 2004. ICANN has taken the position that its decision
15 with respect to ICM's application was justified
16 because of the findings of Dr. Williams' evaluation
17 team.

18 You will have an opportunity to discuss
19 this assertion directly with Dr. Williams and to
20 learn about why she disagrees with this assertion.
21 To use a phrase that I picked up in Texas, she ain't
22 got no dog in this fight. She is here because she is

1 convinced, based on all that she saw and was told by
2 Mr. Twomey and others, that ICANN treated ICM
3 unfairly and inequitably.

4 You will then hear testimony from Ms.
5 J. Beckwith Burr or Becky Burr who served as ICANN's
6 counsel during the 2004 round of applications.
7 Ms. Burr has a remarkable resume and should be able
8 to provide you with valuable insight about nearly
9 every aspect of this case from the formation of ICANN
10 and its processes and procedures to what's happened
11 with ICM's application. As a very senior official in
12 the Clinton administration's interagency task force
13 on E commerce, she was responsible for development
14 and implementation of administration policy on
15 internet governance and privacy, and chaired the task
16 force on privatization of the internet domain name
17 system. So she can tell you about ICANN really from
18 its very inception.

19 Finally you are going to hear from
20 Professor Jack Goldsmith, a tenured professor at
21 Harvard Law School, where he teaches among other
22 subjects, international law, foreign relations law,

1 conflicts of law and internet law. He is the author
2 of many publications on international internet law
3 and if most relevance to these proceedings, a book
4 entitled "Who Controls the Internet?" "Who Controls
5 the Internet?"

6 Professor Goldsmith is also a director at
7 the Berkman Center, a research program at Harvard Law
8 School founded to explore and understand cyberspace,
9 to study its development, dynamics and standards and
10 to assess the need or lack thereof for laws and
11 sanctions. He is here this week to discuss the
12 principles of international law relative to ICANN's
13 conduct in these proceedings and why ICANN's actions
14 were inconsistent with those principles.

15 So there you have it. Those are our
16 witnesses and now I would like to turn to the second
17 of my topics, which is your remit. What is your
18 remit? What are you charged with doing by virtue of
19 the parties' consent and participation in this
20 process?

21 Now I'm going to get a little technical
22 here, but I believe what I'm about to discuss is

1 very, very important and I hope you will indulge me
2 and I will try my best, of course, not to bore you.
3 Your remit is set out in ICANN's bylaws and in the
4 ICDR supplementary rules. If you will turn with me
5 please to tab 2, allow me to quote from Article 4,
6 Section 3, paragraph 3 of ICANN's bylaws. And I
7 quote?

8 "Requests for independent review shall be
9 referred to an independent review panel" -- that's
10 you -- "which shall be charged with comparing
11 contested actions of the board to the articles of
12 incorporation and bylaws and with declaring whether
13 its board has acted consistently with the provisions
14 of those articles of incorporation and bylaws."

15 Now ICANN has made a big deal of the fact
16 that much significance should be draw with respect to
17 the standard of review, which it claims should be one
18 of "substantial deference." Substantial deference.
19 From the fact that in accordance with paragraph 8,
20 article 4, section 3 of the bylaws, the IRP, and here
21 I quote again, "shall have authority to declare
22 whether an action or inaction of the board was

1 inconsistent with the articles of incorporation or
2 bylaws." Frankly I must say I am somewhat stumped as
3 to how that language in any particular way has any
4 bearing on your remit or the standard of deference,
5 but I imagine that my colleague Mr. LeVee will be
6 clarifying this for all of us shortly.

7 What I will point out is that article 4,
8 section 1, which addresses the purpose of
9 accountability and review, the purpose of
10 accountability and review laid out in Section 4,
11 states in part -- and I quote again: "In carrying
12 out its mission as set out in these bylaws ICANN
13 should be accountable in the community for operating
14 in a manner that is consistent with these bylaws and
15 in due regard for the core values set forth in
16 article 1 of these bylaws."

17 And what is it that the core values say
18 specifically with respect to accountability? That
19 ICANN should remain, and I quote "accountable" --
20 "accountable to the internet community through
21 mechanisms that enhance ICANN's effectiveness."

22 Please remember that language.

1 Accountable to the internet community
2 through mechanisms that enhance ICANN's
3 effectiveness.

4 So you were charged pursuant to the
5 parties' consent to compare whether ICANN acted
6 consistent with its articles of incorporation and
7 bylaws in the manner in which it dealt with ICM's
8 application to run the .XXX STLD registry. Allow me
9 to be more specific and here may I ask you to turn to
10 tab 3 in your binder.

11 We are asking you to compare whether in
12 the manner in which it treated ICM's application to
13 run the .XXX STLD registry, ICANN acted consistent of
14 Article IV of the articles of incorporation which
15 states and I quote:

16 "ICANN shall operate for the benefit of
17 the internet community as a whole, carrying out its
18 activities in conformity with relevant principles of
19 international law and applicable international
20 conventions and local law, and, to the extent
21 appropriate and consistent with these Articles and
22 Bylaws, through open and transparent processes that

1 enable competition and open entry in internet-related
2 markets."

3 Open and transparent processes, open
4 entry, relevant principles for international law.
5 That's from Article IV of the articles of
6 incorporation.

7 Now as I mentioned earlier there is a
8 significant difference between us and our opponents
9 regarding the relevance of international law in these
10 proceedings. I will come back to de-bunking ICANN's
11 impressively creative but I would suggest equally
12 erroneous arguments about the irrelevance of
13 international law later on this week.

14 Now while we are looking at this document
15 and if you could, it's actually right after the blue
16 sheet; if you could look at the document that has
17 yellow and orange highlighting.

18 So while we are looking at the articles of
19 incorporation, I would also ask you to look at
20 language highlighted in Article III. It's a fairly
21 long quote, so I will only pick and choose a couple
22 of points here but I do think this is important.

1 I quote here from the articles of
2 incorporation, paragraph 3: "The corporation is
3 organized and will be operated exclusively for
4 charitable, educational and scientific purposes. In
5 furtherance of the foregoing purposes and in
6 recognition of the fact that the internet is an
7 international network of networks, owned by no single
8 nation, individual or organization" -- "owned by no
9 single nation, individual or organization" -- "the
10 corporation shall except as limited by Article V
11 hereof pursue the charitable and public purposes of
12 lessening the burden of government and promoting the
13 global public interest and operational stability of
14 the internet."

15 And there are a variety of activities that
16 are enumerated which I won't read out but we will be
17 exploring those later on. As I said this is very
18 important language. I'm going to come back to it
19 later on, and we will certainly be exploring the
20 articles and bylaws with some of the witnesses who
21 will be before you.

22 Second, we are also asking you to compare

1 whether in the manner in which it treated ICM's
2 application to run the .xxx STLD registry ICANN acted
3 consistently with Article II, section 3 of ICANN's
4 bylaws which states, and I quote: "ICANN shall not
5 apply its standards, policies, procedures or
6 practices inequitably or single out any particular
7 party for disparate treatments unless justified by
8 substantial and reasonable cause, such as the
9 promotion of effective competition." End quote.

10 We are also asking to you evaluate ICANN's
11 actions with respect to Article III, Section 1 of
12 ICANN's bylaws which states, and I quote again:
13 ICANN and its constituent bodies shall operate to the
14 maximum extent feasible -- "to the maximum extent
15 feasible" -- in an open and transparent manner and
16 consistent with procedures designed to ensure
17 fairness. "Designed to ensure fairness."

18 Finally we submit to you that you should
19 also examine ICANN's actions in light of Article I,
20 section 2, paragraph 8, which states that in
21 performing its mission, ICANN's actions and decisions
22 shall be guided by the core value of -- and I think

1 this is very critical language, and I quote, "making
2 decisions by applying documented policies neutrally
3 and objectively with integrity and fairness."

4 Now ICANN has made much of core values
5 again in support of its position that you must accord
6 substantial deference to the board's decisions. So
7 allow me to pause to address the core values and how
8 they should be applied by this panel.

9 By their terms the core values were
10 defined and developed to serve as and I quote "useful
11 and relevant guidance," end quote. No one of the 11
12 core values is mandatory. Rather, they individually
13 and collectively are intended to serve and I quote
14 again, "as statements of principle." Statements of
15 principle. As such they might be likened to the
16 preamble of a treaty.

17 But even principles can be breached and as
18 we will demonstrate to you there can be little
19 question here that ICANN did not act consistently
20 with its own core values, that it make decisions by
21 applying documented policies neutrally and
22 objectively with integrity and fairness.

1 Now ICANN is going to say to you, hold on.
2 Mr. Ali is forgetting about core value 11, which
3 states that ICANN recognize that governments and
4 public authorities are responsible for public policy.
5 And as such ICANN must, and I quote, "duly take into
6 account governments' or public authorities'
7 recommendations." End quote.

8 Mr. Paulsson? All right.

9 Well, that's all well and good but it
10 still doesn't trump in any way the obligation that
11 ICANN make decisions by applying documented policies
12 neutrally and objectively with integrity and
13 fairness, or for that matter to act
14 non-discriminatorily, equitably and with openness and
15 transparency. These are all words that I am calling
16 out to you from the articles of incorporation and
17 bylaws.

18 Now, while there may be a unique
19 relationship between ICANN and sovereign governments,
20 especially the United States government, the reality
21 is that the ICANN governance and policy structure
22 contains a specific mechanism, namely the

1 Governmental Advisory Committee, or GAC, through
2 which the advice of government is to be provided.

3 And as for the United States government,
4 it specifically delegated to ICANN by contract, broad
5 ranging policy development and technical authority
6 with respect to the management and development of the
7 domain name system. So even if the United States
8 government still has the ultimate decision making
9 authority with respect to which TLDs can enter the
10 authoritative root zone file, this can in no way
11 vitiate or condition ICANN's clear and absolute
12 obligation to act strictly and precisely in
13 accordance with its articles of incorporation and
14 bylaws.

15 JUDGE SCHWEBEL: So even if -- are you
16 acknowledging that the U.S. does have this residual
17 power?

18 MR. ALI: Well, indeed the U.S. does claim
19 to have continuing residual power as to what goes on
20 to the authoritative root zone file, so what actually
21 goes into the box where somebody pulls the lever and
22 then you have a .com, or dot-net, or dot-XXX or

1 dot-biz. However, that doesn't mean -- delegation of
2 authority to ICANN, that ICANN still can avoid the
3 obligation that it has undertaken in the articles of
4 incorporation and bylaws.

5 So no way does the United States
6 government's residual authority in any way impact the
7 manner in which ICANN is supposed to function, and
8 you will be hearing quite a bit about what was
9 intended when ICANN was set up and how ICANN is meant
10 to function under that delegation of authority with
11 Dr. Mueller, Ms. Burr and no doubt from Mr. Twomey,
12 who may very well be submitting their opinions.

13 So just to tie up this part of my
14 presentation if I may. On the screen and in front of
15 you just under tab 3 is a document that we have
16 created, a summary document where in our respectful
17 submission lies your remit, your charge. These
18 particular articles are the ones we will be talking
19 about.

20 Now we turn to the facts. What are the
21 facts that we believe are relevant to demonstrating
22 that ICANN does not act consistently with the various

1 provisions of the articles of incorporation and the
2 bylaws that we just explored together? Now before I
3 turn to provide you with an overview of critical
4 facts, we believe -- well, allow me to make one
5 fundamental point that differentiates us from our
6 opponents.

7 Members of the panel, as you know far
8 better than I, cases are not won on empty advocacy.
9 In any dispute what matters is evidence that is
10 material and relevant, and in this dispute we submit
11 that all of the proof is on our side, all of the
12 bluster on theirs. The evidence that we have
13 presented consists of documentation
14 contemporaneous -- contemporaneous to the events as
15 they occurred. I might add that this evidence is
16 primarily comprised of ICANN's own official
17 documents.

18 ICANN on the other hand, has resorted to
19 what I might best describe as flimsy, after-the-fact
20 explanations where it said nothing about much of
21 ICM's evidence, which it finds inconvenient, or
22 perhaps it's hoping that if it don't mention it you

1 will forget about it or disregard it in making your
2 decisions. Well, unfortunately, we are not going to
3 allow that.

4 Our hope is that as we progress through
5 this week and as you scrutinize the papers that we
6 submit to you, once we part company, you
7 will very, very quickly see the difference between
8 our evidentiary submissions. You will certainly see
9 the difference between stories that our respective
10 fact and expert witnesses have to tell you with
11 reference to the documents.

12 Now members of the panel, as you know this
13 dispute centers around ICANN's administration of what
14 we are calling the 2004 TLD round, an application
15 process that ICANN held to increase the number of top
16 level domains or TLDs being entered onto the
17 authoritative root zone files. Now let me say
18 parenthetically I am referring to the zone file, I'm
19 referring to TLDs and I am referring to a number of
20 terms of art. Rather than spend my time here talking
21 about how the internet functions and how it is that
22 the domain name system is structured, I am going to

1 leave that to Dr. Mueller. He can do far more
2 justice to how the DNS works than I can.

3 So if you can just bear with me as I use
4 these terms, to the extent that I am causing
5 confusion with what I'm saying, I can pause and
6 certainly give you a clarification.

7 Because the parties are in agreement about
8 the main events that led to the introduction of the
9 new TLDs, I will quickly summarize some of the
10 background. The selection criteria for the 2004 TLD
11 round was set out in an ICANN request for proposal
12 issued in December 2003.

13 Now if you would like to follow along with
14 some of these dates, right at the back of your binder
15 is a very nice timeline, and I know from past
16 experience that panels and tribunals like timelines,
17 and we put this in the back so you can fold it out
18 and make reference to the dates as I go through this
19 description of the facts.

20 So we had the RFP issued in December of
21 2003. This RFP was developed using a very open and
22 collaborative process. In fact from November 2002

1 through October of 2003, the proposed RFP criteria
2 were presented to governments posted for public
3 comment at least twice and discussed by ICANN's board
4 on 12 separate occasions, at least. On 12 separate
5 occasions.

6 There was never a single point throughout
7 this entire process that the board even once
8 considered including a content or morality
9 restriction in the RFP criteria.

10 The final RFP was published on
11 December 15, 2003. The part that contains the
12 sponsorship criteria can be found under Tab 4 of your
13 binder. And I am going to turn to that. If you
14 could, too, please.

15 Now there is no disagreement between the
16 parties that these criteria were meant to be applied
17 objectively, transparently, and in a
18 nondiscriminatory manner to all applicants. In fact,
19 the RFP criteria states as much. We've highlighted
20 the relevant language for you. However, the parties
21 do disagree on what the RFP criteria ultimately
22 included.

1 It is our position that the RFP criteria
2 contained no public policy or morality-based criteria
3 and in this regard I submit to you that the RFP
4 criteria are most notable for what they did not
5 require. Specifically, they are devoid of any
6 reference to controversial web site content, morality
7 issues or other nonspecified public policy
8 considerations.

9 This omission was absolutely intentional.
10 Why? Because ICANN knew that an adult content or
11 other controversial type of TLD application might be
12 forthcoming. They had the experience of the 2000
13 round, and they knew -- they knew full well that
14 there might be an adult content TLD application
15 forthcoming. Nonetheless, notwithstanding all of the
16 consideration of the RFP criteria, the public comment
17 and the open and transparent processes, they didn't
18 include any public policy, morality-based restriction
19 in those criteria.

20 Now in the context of these proceedings
21 for the first time, ICANN has taken the position that
22 the morality considerations were, and here I quote

1 from their brief, or memorandum, "squarely embraced
2 by the community value component," end quote. Well,
3 we think not. But it's precisely this kind of
4 stretch that exemplifies the case that ICANN has
5 presented to you. Here's the language that ICANN
6 relies upon.

7 And this is from -- probably if you go in
8 about six pages, well, page 4 of what is --
9 hearing -- in Exhibit 4 under Tab 4. Here is the
10 language they are relying upon. "Represents an
11 endeavor or activity that has importance across
12 multiple geographic regions."

13 "Represents an endeavor or activity that
14 has importance across multiple geographic regions."

15 I fail to see how public policy or
16 morality considerations can be squeezed into this
17 language in any way. If anything, there can be
18 little doubt that ICM's application squarely fits
19 this requirement. Can anyone really question that
20 pornography is not an endeavor or activity that is
21 pervasive across multiple geographic regions or that
22 it is not a multibillion dollar industry?

1 Importance, the word that is used in that
2 particular criterion, was never meant to be a value
3 judgment. ICANN's efforts to make it so should be
4 completely rejected.

5 Now this sort of tortured effort that
6 ICANN has made to bring morality considerations into
7 the plain language of the sponsorship criteria is all
8 the more untenable when you take into consideration
9 the common understanding -- there is no debate about
10 this -- the common understanding that ICANN's limited
11 technical mandate in no way encompasses any form of
12 content regulation.

13 Turn with me, please, if you would, to tab
14 number 5. Here you are going to find statements of
15 various ICANN board members repeatedly confirming
16 that content regulation is well outside of ICANN's
17 purview. Let's just take a look at the couple.

18 Dr. Vint Cerf, you are going to hear a lot
19 about him as the father of the internet who is
20 ICANN's chairman: "The XXX proposal at this time met
21 the three main criteria," etc., etc. I are going to
22 come back to this language. "There were doubts

1 expressed about the last criteria which were
2 discussed extensively and the board reached a
3 positive decision considering that ICANN should not
4 be involved in content matters. "Considering that
5 ICANN should not be involved in content matters."

6 Joichi Ito, another ICANN board member:
7 "ICANN is not in the business and should not be in
8 the business on making judgment on content." Susan
9 Crawford, another ICANN board member -- well, you can
10 read what she has to say.

11 But I will also ask you to take a look at
12 ICANN's bylaws, particularly Article I, section 1
13 which sets out ICANN's mission. Is there any mention
14 of content regulation in Article I, section 1 of the
15 bylaws? Anywhere in ICANN's articles of
16 incorporation, the document we looked at earlier with
17 the orange and yellow highlighting? None whatsoever.

18 None whatsoever.

19 The parties also disagree about the
20 selection process that ICANN implemented for the 2004
21 TLD round. It's our position that ICANN adopted a
22 non-overlapping two-step process for evaluating TLD

1 applications.

2 Once again our position is supported by
3 contemporaneous written and oral statements from
4 ICANN's staff. Some of these -- and I stress only
5 some -- can be found under tab 6. And I appreciate
6 it if you could turn to tab 6 and look at some of
7 this evidence with me.

8 You've got a board resolution leading to
9 the final RFP criteria dated October 2003 and you
10 have an ICANN progress report on TLD applications
11 from March 2004; you have multiple statements from
12 Kurt Pritz, ICANN's Senior Vice President, who was in
13 charge of the 2004 TLD round; and you have as well
14 some other material that is not in here but is in our
15 evidentiary submissions.

16 Well, what do we have? You have an ICANN
17 board resolution, 31 October 2003, resolved: That
18 upon the successful completion of the sTLD selection
19 process, an agreement reflecting the commercial and
20 technical terms shall be negotiated."

21 Kurt Pritz, 4 March, 2004. "We have
22 identified those sTLDs that completed the first round

1 and met the criteria and we'll go on to the round of
2 technical and commercial negotiations."

3 ICANN announcement regarding infusing new
4 sTLDs: "The criteria for evaluation were posted with
5 the RFP. All applicants that are found to satisfy
6 the posted criteria will be eligible to enter into
7 the technical and commercial negotiations with ICANN
8 for agreements for the allocation and sponsorship of
9 the requested TLDs."

10 And there are a couple of others, at least
11 three others, which I really would suggest you read
12 as evidence of this particular point as to what was
13 the process that ICANN announced to the world back in
14 2004. And compare that to what ICANN is saying in
15 2009.

16 All of the evidence we submit to you,
17 members of the panel, shows that the applicants were
18 first required to show that they had satisfied the
19 RFP criteria and only after it was fully and finally
20 determined by the board that they had satisfied all
21 three components of the RFP criteria, could an
22 application then go on to commercial and technical

1 contract negotiations.

2 But this is not, as I said, what you are
3 going to hear from ICANN. Certainly not what you
4 would hear from ICANN in the context of this dispute.
5 ICANN now asserts that it never intended for the
6 sponsored TLD evaluation process to be divided into
7 concrete and inflexible phases, notwithstanding all
8 of these statements.

9 According to ICANN's memorial and I quote:
10 "The relevant question is whether ICANN's bylaws
11 required these two steps to be non-overlapping in
12 time such that contract negotiations could not
13 commence until the satisfaction of the RFP criteria
14 was finally and irrevocably determined."

15 I would submit to you that this assertion
16 is as absurd as it is irrelevant. We are not arguing
17 that the bylaws required ICANN develop a two-step
18 evaluation process. Rather it is our position that
19 ICANN's repeated descriptions of the two-step process
20 led ICM and other internet stakeholders to reasonably
21 believe that these two steps were non-overlapping in
22 time. Having repeatedly described the RFP process to

1 the applicants and all internet stakeholders, ICANN
2 was obligated by its bylaws -- obligated by its
3 bylaws to act consistently with these
4 representations. Representations that are required
5 by so many principles and commitments in articles --
6 in its articles and bylaws, including openness,
7 transparency, nondiscrimination, objectivity,
8 neutrality, fairness, integrity: That's what we
9 believe. That's what the evidence we will submit to
10 you confirms. We hope you will agree.

11 So now let me turn to how the RFP criteria
12 were specifically administered with respect to ICM's
13 application, culminating ultimately in ICANN's final
14 determination that ICM met the RFP criteria in its --
15 by virtue of ICANN's June 2005 board resolution.

16 As you will likely hear from Mr. LeVee in
17 a short while, ICANN asserts that no determination
18 was ever made that ICM conclusively satisfied the
19 RFP. ICANN's position is contradicted not only by
20 the unconditional language of ICANN's own board
21 documents but also again by contemporaneous
22 statements made by various ICANN board members

1 including Messrs. Cerf and Twomey whom you are going
2 to hear from later on this week.

3 So as you know, by now there were 10
4 applications that were submitted. We have summarized
5 these 10 applications for you under tab 7 in your
6 repository deliberations; you may want to have a look
7 at those various applications. And what we put into
8 that document is the way in which applicants
9 described the community they were purporting to
10 sponsor.

11 These applications went to a sponsorship
12 evaluation committee. The sponsorship evaluation
13 committee determined that only two of the
14 applications would go forward and that the other
15 eight remaining applications failed on a variety of
16 grounds. ICM's application was only failed on ground
17 of sponsorship.

18 Now given the political backdrop about
19 which you are going to hear some over the course of
20 this week, ICANN needed to have more TLDs going
21 forward. So the board took over the process itself,
22 okay? So it said, "sponsorship evaluation team,

1 thank you very much. All the evaluation teams, thank
2 you very much, the board is no going to take over the
3 process itself." And it does so, and it invites the
4 applicants that had failed to submit additional
5 information, clarifying information in order for the
6 board to be able to conduct further evaluations
7 itself.

8 And ICM, of course, does submit additional
9 information, specifically associated with the
10 question of sponsorship, the only criterion on which
11 it was failed by the sponsorship evaluation team.

12 Now the board engaged in very broad
13 discussions of ICM's application at its January 2005,
14 April 2005, and May 2005 meetings. Three separate
15 meetings. In May -- and here I will take you to tab
16 10 -- the board gave further, very careful
17 consideration to ICM's application, but they decided,
18 and here I will read to you the board's discussion,
19 particularly related to whether or not there was a
20 sponsored community and the board agreed that the
21 topic should be carried over to the next meeting in
22 June of 2005.

1 So they are talking about ICM, they are
2 talking about the sponsored community and that's what
3 they are focusing on in all of their various
4 deliberations. Well, what happens next?

5 At the June 1 board meeting for which you
6 will find minutes under tab 11, board members,
7 various supporting organization liaisons, and ICANN
8 staff all discussed ICM's ability to satisfy the
9 sponsorship criterion.

10 Now ICM's application has been under
11 consideration for 11 months. After all of the
12 consideration, including at four different board
13 meetings, the board voted to allow ICM and ICANN
14 staff to, and I quote here, "negotiate a set of
15 proposed commercial and technical terms for a
16 contractual arrangement," end quote. Commercial and
17 technical terms, full stop.

18 The board did not impose or include any
19 additional conditions, contingencies or caveats in
20 its resolution, nor did it include a position
21 remotely suggesting that sponsorship criterion
22 associated with ICM's application was still

1 unresolved.

2 Now what I would like you to do please, if
3 you would, is turn to tab 12 and pull out the charts
4 that we prepared for you. The unconditional text of
5 the June 2005 vote is particularly apparent and may I
6 say significant, when you compare the .XXX resolution
7 with the resolutions adopted by the board for some of
8 the other applications, such as .JOBS, .MOBI
9 and .CAT.

10 Okay. So you have .TRAVEL, unconditional.
11 Dot JOBS, look at the highlighted language. "During
12 these negotiations the board requests that special
13 consideration be taken as to how broad-based
14 policy-making would be created for the sponsored
15 community and how this sTLD would be differentiated
16 in the name space." Look at the language for .MOBI,
17 look at the language for .CAT; then look for
18 the .XXX.

19 Any contingencies? Any caveats? Any
20 further conditions from the board to Mr. Jeffrey and
21 his team? None whatsoever.

22 So notwithstanding the text of the board's

1 resolution, ICANN is shortly going to tell you that
2 there was still numerous concerns regarding ICM's
3 ability to satisfy the sponsorship criteria.

4 You are going to be told that the board
5 only allowed ICM to proceed to contract negotiations
6 in order to determine whether ICM's sponsorship
7 shortcomings could be resolved in the contract. What
8 is ICANN's evidence in support of its position? I
9 would suggest to you that you take a look at the
10 citations and footnotes in -- in the footnotes to
11 paragraphs 40 and 41 at least of its reply
12 memorandum, to provide context and support for an
13 event that took place in 2005 -- in June of 2005,
14 okay?

15 ICANN's main evidence is a May 2006 letter
16 authored by Mr. Twomey, and the transcript of an
17 ICANN board meeting that took place in March 2007.
18 Hardly contemporaneous, I submit.

19 In contrast, what does our evidence show?
20 It shows that the contemporaneous comments made by
21 senior ICANN executives and members of the board
22 confirm that the June 1 vote was an unconditional

1 determination that ICM had satisfied the RFP
2 criteria. As with other inconvenient facts that we
3 have put forward for your consideration, ICANN simply
4 ignores, simply ignores all of this evidence.

5 Please turn with me if you would to tab
6 13. And if you could take a look at the highlighted
7 language under tab 13. There you will see that in
8 July 2005, Dr. Vint Cerf, then the chairman of the
9 ICANN board, informed the GAC that ICM's application
10 had satisfied the selection criteria, stating that
11 the .XXX proposal, and I quote, "this time met the
12 three main criteria, financial, technical,
13 sponsorship." Financial, technical, sponsorship.

14 "There were doubts expressed about the
15 last criteria which were discussed extensively and
16 the board reached a positive decision considering
17 that ICANN should not be involved in content
18 matters." Unsurprisingly or perhaps very
19 surprisingly, Dr. Cerf completely ignores his
20 comments in the course and context of his witness
21 statement. You might want to ask him why. We
22 certainly will be.

1 Likewise, at tab 14, you will see that
2 during ICANN public forum in July 2005, a vote held
3 June 2005, public forum, July 2005, Mr. Kurt Pritz,
4 the guy in charge of this whole process, stated and I
5 quote, this is under tab 14, highlighted language
6 again:

7 "There's four applicants that have been
8 found to satisfy the baseline criteria, and they're
9 presently in negotiation for the designation of
10 registries. Dot cats, dot post and Telnic and .XXX."
11 It certainly would have been very helpful to have
12 Mr. Pritz here to ask him what he meant, but
13 unfortunately ICANN is not going to present him as a
14 witness in these proceedings.

15 At around the same time, ICANN's General
16 Counsel, Mr. John Jeffrey approved a press release
17 which you will find at tab 15 referring to the
18 board's position that ICM had satisfied the criteria.
19 Now, if you take a look at that press release, here's
20 what Becky Burr sent to John Jeffrey: ICANN's board
21 of directors today determined that the proposal for a
22 new top level domain submitted by ICM Registry meets

1 the criteria established by ICANN."

2 Becky Burr to John Jeffrey: "John, does
3 this do it?" John to Becky: "Yes, thanks, just
4 don't want this to be the sticking point."

5 Contemporaneous statements.

6 There is additional evidence, but I will
7 leave that for you to review at your leisure, because
8 I don't want to run out of time and I probably am
9 getting well into my allotted time. So I am going to
10 skip through 16 and 17, but there you have under 16,
11 you've got another board member, Joichi Ito, who also
12 confirmed that the dot triple X sTLD application had
13 met all the criteria. And under tab 17 you have an
14 ICM Registry letter sent to Mr. Jeffrey, addressing
15 the criteria, or sorry, the satisfaction criteria --
16 excuse me.

17 Now, in any event, with all of this
18 evidence, with all of this evidence, not only
19 regarding the two-step process, contemporaneous
20 documentation supporting the two-step process, the
21 language in the resolutions, the evidence following
22 the resolutions -- I really do find it quite

1 astonishing that an organization that is supposed
2 to -- to conduct its activities with integrity and
3 fairness should be denying that any of these events
4 actually in fact took place. They did. The evidence
5 supports it.

6 So following the board's June 2005 vote
7 ICM and ICANN entered into contract negotiations.
8 ICANN is going to try very hard to convince you that
9 the focus and purpose of these contract negotiations
10 was to resolve the sponsorship issues that were
11 supposedly unresolved by the June 2005 board vote.

12 This is squarely contradicted by the
13 substance of the contractual terms and the testimony
14 of Ms. Burr and Mr. Lawley. You are going to hear
15 from them on this subject today and later this week.
16 Curiously again, Mr. Jeffrey, the lead negotiator of
17 ICANN, has not offered any testimony on this subject.
18 Again, why?

19 Now I'm not going to get into the details
20 of the contract negotiations. You are going to be
21 hearing ad nauseam about these contract negotiations
22 this week. All I will say for now is the following:

1 First, the contract negotiations were never about the
2 definition of the sponsored community, the support of
3 the community, or the composition of the sponsoring
4 organization. As you can see at tab 18 in your
5 binder, highlighted language again, from ICM's first
6 proposed registry agreement, which is the top
7 document -- first, the first proposal that it put
8 forward in its registry, August of 2005, to the final
9 proposal that was put forward in February of 2007 --
10 the definition of a sponsored community never
11 changed.

12 This is because ICANN never asked for it
13 to be amended. And lastly there remain some very
14 complexing questions about why ICANN failed to post
15 certainly agreed drafts of ICM's proposed registry
16 agreement. Rather than my delving into these
17 contract negotiations, let me just tell you that if
18 you could on your own time and perhaps as homework
19 for the lunch break and this evening, we have given
20 you two charts under tab 19.

21 The first charts lays out the facts in a
22 timeline with respect to the contract negotiations

1 and the second chart is a technical analysis if you
2 will, of those negotiations and lays out what did and
3 did not change and what was and was not subject to
4 negotiation while this contract registry was being
5 negotiated between ICM's counsel and Mr. Jeffrey.

6 So the question you may be asking yourself
7 is if at you had the board resolution, you had the
8 two-step process, you had Mr. Cerf out there saying,
9 they satisfied all the criteria, there were all these
10 negotiations that took place, what on earth happened?
11 Why didn't they sign a contract?

12 Now ICANN's going to tell you -- their
13 answer will be that despite the best efforts of many,
14 ICM could not cure the continuing sponsorship
15 defects. Well, that assumes a particular fact that
16 there were any continuing sponsorship defects, given
17 what we just heard about the board resolution.
18 Nonetheless, what they are going to tell you is that
19 "we were working so hard. We really were working
20 with ICM to do everything that we could to try and
21 resolve the issues."

22 This remarkably self-serving explanation

1 omits a critical part of the story, and a part of the
2 story, might I add, that you won't see in ICANN's
3 timeline.

4 Now this I think is very important, and
5 this is where I believe the debate is going to center
6 at the end of this week. So I am going to spend a
7 little time on these facts and I would beg your
8 indulgence in this regard.

9 You will recall my mentioning that the GAC
10 sent ICANN a letter on April 3, 2005, two months
11 before the June 2005 vote about the .xxx sTLD. This
12 letter which you will find under tab 20 made it clear
13 that and I quote, "no GAC members have expressed
14 specific reservations or comments in the GAC, about
15 the applications for sTLDs in the current round."
16 That's what the GAC said just before its vote.

17 Notably, ICANN omits any discussion of
18 this letter which constitutes the GAC's only timely
19 advice on the subject. GAC, Government Advisory
20 Committee. So I think it's important that you also
21 take a look in light of this letter at what's under
22 tab 21, which are the two provisions of the GAC's

1 operating principles, the ICANN bylaws which relate
2 to how the GAC should provide timely advice. Now
3 there are several other provisions which I will in
4 fact get for you as to what happens if the ICANN
5 board doesn't agree with the GAC and what is the
6 interaction between the GAC and the ICANN board in
7 the event that is disagreement.

8 So it's not the government dictatorial
9 committee, or government acquiescence committee; it's
10 government advisory committee, to the board, the
11 board can take on that advice or not. And this will
12 be significant later on and we will talk about this
13 some later on after we have gone through this week.

14 JUDGE TEVRIZIAN: I have a question.

15 MR. ALI: Yes, sir?

16 JUDGE TEVRIZIAN: In your timeline you
17 have not indicated whether or not the complexion of
18 the board changed, the membership of the board
19 changed. Is that a consideration that is going to be
20 before us today?

21 MR. ALI: Judge Tevrizian, a very good
22 question. We certainly can amend our timeline to do

1 that. I'm not sure ultimately, what would be the
2 relevance of that, because it is the board.

3 JUDGE TEVRIZIAN: The board is the point
4 of reference and my question really is, does that
5 point of reference change along the way?

6 MR. ALI: I think it does. And I'm glad
7 you asked that question, because it's something that
8 has -- it has troubled me, and I do think that as I
9 am speaking and as I hear your question articulated,
10 a great clarity descends, because you had a board and
11 a composition of a board that was very engaged in
12 this entire process. And then as board members came
13 off the board and others came on, they may have been
14 less educated, they may have been less familiar, they
15 may have been driven by other considerations as to
16 how they ultimately may have voted.

17 But if you would allow me to think about
18 that a little bit more and get back to you, I will.
19 But we will certainly ensure that whatever timelines
20 we put forward in the future will include that
21 information.

22 JUDGE PAULSON: Did that light descend

1 upon you as possibly a useful way of putting your
2 case or is there some evidence in this respect?

3 MR. ALI: Well, the board's composition
4 did change. And so it is indeed, and it may have
5 some relevance on what was the ultimate perhaps
6 underlying rationale, the realpolitik of what
7 happened, but it doesn't in any way deviate or
8 vitiate the fact that the board did not comply with
9 the -- with the articles of incorporation and bylaws.
10 As far as we are concerned, it is the ICANN board.

11 JUDGE PAULSON: You were surmising or
12 saying that this is plausible as a --

13 MR. ALI: It may be plausible but it is a
14 matter that I would like to look more closely at, if
15 I may.

16 Okay. So, where was I?

17 I was on tab 20 and I just focused you on
18 the language about the GAC's timely advice.

19 So if you could turn with me to tab 22.
20 These are the minutes of the GAC meeting that took
21 place shortly after the board's June 2005 vote. They
22 are dated July 2005. Look at what Mr. Twomey says on

1 the second page. "He also noted that no comments had
2 been received from the government regarding .xxx."

3 Take a look at what Mr. Cerf says. "Dr.
4 Cerf added that taking the example of .xxx there were
5 a variety of proposals for TLDs before including for
6 this extension but this time the way to cope with the
7 selection was different. The proposal this time met
8 the three main criteria: Financial, technical and
9 sponsorship. There were doubts expressed about the
10 last criteria which was discussed extensively and the
11 board reached a positive decision considering that
12 ICANN should not be involved in content matters."

13 So what changed? Shortly after the
14 June 2005 vote, the U.S. government came under
15 significant political pressure from domestic
16 conservative religious groups opposed to adult
17 content TLD. All of the relevant evidence relating
18 to the United States government's abject paranoia
19 regarding the political consequences of a dot-xxx TLD
20 can be found under tab 23. It makes for very
21 interesting reading.

22 So if you would please turn with me to tab

1 23, I would just like to take you through some of
2 what the evidence shows.

3 2 June 2005, just after the vote.

4 Department of Commerce official Michael Gallagher,
5 also of Department of Commerce and John Kneuer, of
6 the Department of Commerce, asking if ICANN's vote
7 on .XXX may, quote "cause us any problems." 14
8 June 2005, Meredith Atwell, e-mails -- at DOC, and
9 Suzanne Sene who was the U.S. GAC representative at
10 the time, asking: "Can we please get some talking
11 points on why this .XXX is a good thing and why we
12 support it?"

13 15th June 2005, e-mail from Atwell noting
14 that the DOC is "getting hammered by the religious
15 community to not approve dot xxx." 16 June, 2005,
16 Fred Schwein sends another e-mail to Mr. Gallagher
17 and Ms. Atwell stating: "Who really matters in this
18 mess is Jim Dobson. What he says on his radio
19 program in the morning will determine how ugly this
20 really gets. If he jumps on the bandwagon our mail
21 server may crash." Who is Jim Dobson? He's head of
22 Focus on the Family and founder of the Family

1 Research Council, two very conservative religious
2 groups here in the United States.

3 20 June 2005, an e-mail from Clyde Ensslin
4 to Michael Gallagher and others: "As of midnight
5 Sunday night June 19, by my count, the public
6 affairs, etc., etc., e-mail account set up on Friday
7 June 16 to accept e-mails regarding .XXX had received
8 2,567 messages. Most have an identical text and come
9 from an alert on the Family Research Council
10 homepage, the campaign."

11 20 June 2005, e-mail from DOC official to
12 Pat Truman of Family Research Council confirming a
13 meeting that is going to take place with Deputy
14 Assistant Secretary of Commerce, John Kneuer. 5
15 August 2005, a memorandum attached to an e-mail from
16 Ms. Atwell at the Department of Commerce to a
17 colleague states, and I quote: "If the international
18 community decides to develop a .XXX domain for adult
19 material, it will not go on the top level domain
20 registry if the U.S. does not wish for that to
21 happen."

22 I ask you, should the -- whatever might be

1 the prevailing morality considerations in the United
2 States, which of course are not immutable or
3 consistently held, will they be the determinant of
4 what does or does not go on the internet?

5 Not at all. In fact, allow me to read to
6 you a very telling excerpt from a U.S. government
7 document dated June 5, 1998 sending out a blueprint
8 for the establishment of ICANN, what you will hear
9 referred to as the white paper. In addressing the
10 model and principles for ICANN's governance, the
11 Clinton administration provided the following
12 guidance and I quote -- this language is under tab
13 24:

14 "The organizing documents, that is
15 chartered bylaws, et cetera, shall provide that the
16 new corporation is governed on the basis of a sound
17 and transparent decision-making process which
18 protects against capture by a self-interested
19 faction." Which protects against capture by a
20 self-interested faction. "And which provides for
21 robust, professional management of the new
22 corporation."

1 It would appear that the Bush Two
2 administration didn't feel very compelled to follow
3 this guidance, nor for that matter Mr. Twomey nor
4 Mr. Cerf. And you will recall the words I read out
5 to you from ICANN's articles of incorporation.
6 Remember my quote: "The internet is an international
7 network of networks, owned by no single nation,
8 individual, or organization."

9 The U.S. government provided guidance to
10 how this was going to all be set up. And that's how
11 ICANN was in fact set up, to answer a question you
12 raised a little earlier, Judge Schwebel. So
13 continuing with the story, you will recall what Ms.
14 Atwell had to say on August 5th: "If the
15 international community decides to develop a .xxx
16 domain for adult material it will not go on the top
17 level domain registry if the U.S. does not wish for
18 that to happen."

19 Well, on August 11, 2005 approximately
20 18 months after ICM's application was publicly posted
21 on ICANN's web site, Mr. Michael Gallagher, a
22 high-ranking Department of Commerce official sent

1 ICANN a letter. This letter is under tab 25 in your
2 binder and it referenced vague concerns about the
3 impact of adult entertainment web sites on families
4 and children and urged the board to delay any action
5 on ICM's contract negotiations.

6 Now you are going to be hearing from
7 Dr. Mueller about some of the political backdrop in
8 play, and it's very, very important to understand
9 what is going on here.

10 Other than some of the morality
11 considerations that were quite prevalent in the Bush
12 Administration which I will not address and make no
13 comment on, there is a backdrop in internet politics,
14 internet governance politics that is going on right
15 now. There is a movement, a very strong movement to
16 push or remove power over the internet from ICANN and
17 to place it under the purview of the United Nations
18 at the time.

19 This movement known as the World Summit on
20 Information Systems or WSIS was largely caused of the
21 international community's discomfort about the U.S.
22 government's influence over ICANN. So any

1 intervention by the United States into ICANN's
2 internal processes at that time in particular, would
3 have been a significant threat to ICANN's global
4 legitimacy and survival.

5 So, on the one hand ICANN could not ignore
6 the demands of the U.S. government for fear of being
7 exposed as impotent if it made a decision the U.S.
8 refused to accept; and on the other hand ICANN could
9 not appear to acquiesce too readily to the United
10 States' demands for fear of empowering the WSIS
11 debate and losing its authority over the root.

12 Now ICANN denies that any of this
13 political backdrop was relevant in any way, that any
14 of this political backdrop impacted in any way the
15 ultimate decision to kill the dot triple X
16 application. Really?

17 Tab 26. Here's a press piece from the
18 Congressional Quarterly, which I'm sure you are
19 familiar with and it is a well reputed publication.
20 The highlighted language that you will find on tab 3,
21 sorry at page 3, is very interesting. It shows that
22 Dr. Cerf at the time was fully appreciative of the

1 difficulty of the situation although surprisingly he
2 does not address any of this in his testimony. Why
3 not? Because it's not convenient, and because what
4 we are saying is true. I would strongly recommend to
5 you that you read this entire article, but let's just
6 take a look at the highlighted language.

7 "The flap over .XXX has put ICANN in an
8 almost impossible position. It is facing mounting
9 pressure from within the United States and other
10 countries to reject the domain, but if it goes back
11 on its earlier decision, many countries will see that
12 as evidence of its allegiance to and lack of
13 independence from the U.S. government."

14 The quote from Cerf: "The politics of
15 this are amazing ... we're damned if we do and damned
16 if we don't." Well, external politics should not in
17 any way condition ICANN's obligations under its
18 bylaws and articles of incorporation to act
19 objectively, transparently, openly, fairly and with
20 integrity.

21 So what happens? In light of this
22 prevailing political environment, what does ICANN do?

1 To deflect criticism away from the United States'
2 unilateral intervention into the ICANN process, the
3 evidence -- the evidence shows that Mr. Twomey asked
4 the head of the GAC, Mr. Tarmizi, to write a letter
5 asking the board to delay its consideration of .XXX.

6 Mr. Tarmizi agrees. You can find his
7 response to Mr. Twomey's request under tab 27. What
8 is most interesting about this letter is it is a
9 letter from Mr. Tarmizi in his personal capacity and
10 not a formal statement of advice from the GAC. This
11 is confirmed in the document that you will find under
12 paragraph 28. He says: "The statement was mine and
13 not really speaking on the GAC's behalf." No GAC
14 position on this issue.

15 Now notwithstanding the fact that the
16 letter was sent by Mr. Tarmizi in his personal
17 capacity, the letter was widely misinterpreted to be
18 an opinion from the GAC as a whole. You are going to
19 hear testimony shortly and later this week as to why
20 this happened and ICANN's gamesmanship with these two
21 letters.

22 ICANN says, we need -- in order to

1 prevail, we need to show bad faith. Of course we
2 don't agree with this assertion, but stay tuned.

3 We believe we have got more than enough to
4 show bad faith, if that's what they want.

5 So members of the panel, put plain and
6 simply, ICM's protracted contract negotiations did
7 not fail because of ICM's failure to satisfy any
8 sponsorship criteria, but rather because of the
9 intervention of the U.S. government and a few of its
10 allies.

11 The evidence supporting what I just stated
12 is clear and has not been rebutted by ICANN in any
13 respect. I would strongly urge you to press ICANN to
14 demonstrate which of its requirements ICM failed to
15 accept. We found a way -- and you will hear this
16 from Ms. Burr -- we found a way to give effect to all
17 of ICANN's requirements in a commercially sensible
18 and reasonable manner. Can they really deny that?
19 What did they then do? Turn around and reject us for
20 being so accommodating.

21 Nemo auditur -- turpitudinem alegans. Or
22 perhaps, venire contra factum proprium. I will come

1 back to those two points later this week along with
2 others.

3 Denied us a chance to at least try to
4 perform. They didn't even let us enter the game.

5 Now as you are aware, ICANN's board
6 eventually voted to reject ICM's application. The
7 board's resolution rejecting ICM's application is
8 located at tab 29. The board's stated reasons for
9 rejection were that 1, ICM failed to meet sponsorship
10 criteria of the RFP; 2, the application raised public
11 policy concerns related to offensive content and
12 protection of vulnerable members of the community; 3,
13 ICM did not address the concerns raised in the GAC
14 communiques and public comments.

15 Not just the GAC's communiques but every
16 public comment that could come from anywhere in the
17 world -- that's the standard we were held to. The
18 application raised law enforcement compliance issues
19 which would obligate ICANN to require responsibility-
20 related content. I guess they don't have that
21 problem in dot com or anywhere else, but anyway we
22 will come back to that later.

1 If the .XXX were approved, ICANN would be
2 forced to assume an ongoing management and oversight
3 role regarding internet content.

4 I don't have time to go into why each of
5 these reasons are wrong but I promise you I will come
6 back to them on Friday.

7 What is the bottom line? ICANN's excuses
8 for rejected XXX were arbitrary, discriminatory, in
9 violation of the RFP process, unfair, lacking
10 objectivity, neutrality and integrity, and wholly
11 outside the scope of the ICANN's limited technical
12 mission and authority. That's what we firmly
13 believe. And that's what Susan Crawford, at the time
14 an ICANN board member, also believes. You might want
15 to take a look at what she has to say which you find
16 under tab 30.

17 Very interestingly, if the political
18 environment is of any relevance here, Ms. Crawford is
19 now President Obama's Special Assistant For Science,
20 Technology and Innovation Policy and sits on the
21 National Economic Council. Please do take a look at
22 what she had to say when the ICM application was

1 rejected.

2 Now Ms. Crawford has her reasons. How did
3 we reach our conclusions? By examining the evidence
4 and carefully reviewing ICANN's articles of
5 incorporation and bylaws. In this regard, I would
6 like to lay out for you a road map which I hope will
7 bring you to the same undeniable conclusion that we
8 have reached. And I am going to lay out that road
9 map in the form of a series of questions which we
10 reproduced for you under tab 31.

11 Again, having worked as an arbitral
12 secretary and as an arbitrator, I have hopefully
13 given you something that will serve as a road map for
14 your deliberations.

15 These are a series of questions which are
16 based on the articles of incorporation and bylaws.
17 Just to read out a couple because I think it would be
18 more effective if you read them yourself.

19 Did ICANN act consistently with its
20 obligation under Article IV of its articles of
21 incorporation to carry out its activities in
22 conformity with relevant principles of international

1 law?

2 Did it act consistently with its
3 obligation to carry out its activities in conformity
4 with California law or through open and transparent
5 processes? Did ICANN act consistently with its
6 obligations under Article II, section 3 of its bylaws
7 to not apply its standards, policies, or procedures
8 or its practices inequitably, or to single out ICM
9 for disparate treatment?

10 Did ICANN act consistently with its
11 obligation under Article III, section 1 of the bylaws
12 to operate to the maximum extent feasible in an open
13 and transparent manner?

14 Did ICANN act consistently with core value
15 number 8 requiring it to make decisions by applying
16 its documented policies neutrally, by applying its
17 documented policies objectively, by applying its
18 documented policies with integrity, by applying its
19 documented policies fairly?

20 Did ICANN act consistently with its
21 obligation under Article I of its bylaws not to
22 engage in content regulation?

1 I'm not going to answer any of these
2 questions, as I said, because I don't have the time
3 and I think you will benefit from this week's
4 testimony and debate, and I hope you will come to
5 your own conclusions in our favor.

6 I will also be addressing on Friday,
7 whether the outcome of these proceedings is binding
8 on the parties, whether there is -- what is the
9 relevance of international law to these proceedings
10 and what is the standard of review that you should
11 apply in arriving in a decision, one of deference or
12 de novo?

13 I would like to address one final topic:
14 ICANN's position that you must not accord just
15 deference but substantial deference in the way in
16 which the board treated ICM's application, the right
17 to run the dot xxx registry. I do so only because I
18 know that my colleague Mr. LeVee is probably going to
19 be spending quite a bit of time on this issue of
20 deference, and why? Because the facts are not on
21 their side.

22 First, ICANN confuses two concepts:

1 Deference with respect to the position that it is
2 arguing this arbitration, and the deference that is
3 arguably due to the decisions of a corporate board.
4 That is, of the ICANN board, not viewed with
5 hindsight but in the contemporary context.

6 Deference also does not mean subservience
7 or acquiescence to the wishes of the United States
8 government or any government for that matter. Nor is
9 there any basis for ICANN to argue that its
10 discretion was somehow widened or the deference that
11 you must pay to its decisions somehow deepened
12 because of the political, moral, social and cultural
13 agenda of the administration that was in the office
14 at the time.

15 Second, ICANN will tell you that there is
16 incontrovertible evidence that the outcome of these
17 proceedings should not be binding on ICANN. As I
18 said, Mr. LeVee will tell you you must accord
19 substantial deference to the decisions of the board.

20 To accept ICANN's position, members of the
21 panel, would be to gut these proceedings of any
22 meaning whatsoever and make ICANN answerable to

1 nothing and nobody. What then are ICANN's core
2 value, number 10 which provides that ICANN must
3 remain accountable to the internet community through
4 mechanisms that enhanced ICANN's effectiveness? How
5 would ICANN's effectiveness be enhanced by an IRP
6 process that requires substantial deference to the
7 board's decisions, and in this case politically
8 driven decisions, and a decision which is not in any
9 way binding on the board? I leave that for you to
10 answer.

11 Third, the bylaws say nothing about a
12 standard of deference or deferential review let alone
13 substantial deference. The ICDR supplementary rules
14 say nothing about a standard of deference, or
15 deferential review, let alone substantial deference.
16 Find me the specific words in the articles of
17 incorporation and the bylaws, the ICDR rules or the
18 ICDR supplementary rules requiring to you apply a
19 standard of deference, and then perhaps I will
20 relent. But I don't have to; they don't exist.

21 So members of the panel, I apologize for
22 getting somewhat impassioned, perhaps it's too much

1 coffee. I will end on those remarks. I believe I
2 that have said enough and our position is clear. It
3 simply remains for me to thank you for your attention
4 and of course to wish Mr. LeVee and his team, the
5 best of luck, obviously not as much luck for my side,
6 given where we are, but thank you again.

7 JUDGE SCHWEBEL: Thank you so much,
8 Mr. Ali. I hope that someone is keeping time.

9 MR. LeVEE: Judge Schwebel, the parties
10 each are keeping time in order to reconcile their
11 time keeping at the end of each day.

12 JUDGE SCHWEBEL: Very good. May I suggest
13 that before you proceed we take a ten minute break?

14 MR. LeVEE: Of course.

15 JUDGE SCHWEBEL: We will resume at
16 25 minutes after the hour.

17 (Recess 11:18 a.m. - 11:25 a.m.)

18 OPENING ARGUMENT BY COUNSEL FOR RESPONDENT

19 MR. LeVEE: Thank you. Judge Schwebel and
20 members of the panel, as you know my name is Jeff
21 LeVee, on behalf of ICANN. We are pleased to be with
22 you this week to present ICANN's position with

1 respect to the dispute with ICM.

2 Before I open this morning, I would also
3 like to introduce you to the members of the ICANN
4 team who will be with us for some if not all of the
5 week. First, I would like to introduce to the general
6 counsel of ICANN, Mr. John Jeffrey. Seated to
7 Mr. Jeffrey's left is Amy Stathos, deputy general
8 counsel of ICANN. My colleagues from Jones Day who
9 will be joining me this week, Eric Enson, Kate
10 Wallace, Cindy Reichline, Valerie Crawford.

11 On behalf of all of us, we thank you for
12 serving as the very first ICANN independent review
13 panel.

14 Interestingly, Mr. Ali and I structured
15 our opening statements along very similar lines,
16 although not surprisingly we disagree on the
17 conclusions you should draw. But the structure of
18 our opening statements will sound familiar, and so I
19 will do my best in the next hour to avoid redundancy.

20 ICANN's view and I think Mr. Ali and I
21 agree, is that this entire week can be narrowed down
22 to a single question: Did ICANN's board act

1 inconsistent with its bylaws or articles of
2 incorporation in conjunction with its consideration
3 of ICM's application for the .XXX sponsored top level
4 domain?

5 That is the only issue before this panel,
6 because that is the nature of the proceedings that
7 ICM itself initiated pursuant to ICANN's bylaws. And
8 because ICANN's challenge is to the ICANN Board of
9 Directors' conduct, we have asked three of the
10 members of ICANN's board who were integrally involved
11 in evaluating ICANN's application to testify. Let me
12 introduce to you at least by picture to those members
13 as well as ICANN's first witness.

14 Our first witness will be the former
15 chairman of the board of the ICANN board of
16 directors, Dr. Vinton Cerf. Dr. Cerf is universally
17 acknowledged as one of the true founding fathers of
18 the internet. He has been honored numerous times for
19 his public service including being awarded the Medal
20 of Freedom. ICANN is extraordinarily privileged to
21 have Dr. Cerf serve on ICANN's board for eight years,
22 the last seven of which Dr. Cerf served as ICANN's

1 chairman of the board. Dr. Cerf presided over the
2 board throughout the entire period of time that is
3 relevant to these proceedings. He led every single
4 board meeting at which ICM's application was
5 considered. He carefully considered the views of ICM
6 and others on the .XXX application. He voted in June
7 of 2005 to proceed with contract negotiations and he
8 later voted twice against ICM's proposal.

9 As one of ICM's 14 volunteer board members
10 or directors, I should say, Dr. Cerf spent an
11 extraordinary amount of time on the ICM application
12 as well as the scores of other matters that the ICANN
13 board was working on at the very same time. Once the
14 panel hears from Dr. Cerf, we submit it will be
15 extremely difficult to find that ICANN's board
16 violated its bylaws or articles.

17 ICANN's next witness will be Dr. Alejandro
18 Pisanty. Dr. Pisanty is a professor of chemistry at
19 the National Autonomous University of Mexico in
20 Mexico City which is one of the leading universities
21 in Mexico. Dr. Pisanty also served on ICANN's board
22 for eight years, the last seven of which as its vice

1 chair and he was one of the architects of this
2 independent review process. We have noted in our
3 papers that two thirds of ICANN's board directors
4 typically are from outside of the United States and I
5 hope that Dr. Pisanty will give you a sense of the
6 international nature and approach of the ICANN board,
7 which results as you might expect in the members of
8 the board viewing issues from very different
9 perspectives, which is exactly how it should be in a
10 corporation which is acting on behalf of the global
11 internet community.

12 Next you will hear from Dr. Paul Twomey
13 who was ICANN's chief executive officer from
14 March 2003 until June 2009 and in that capacity, also
15 was a member of ICANN's board. A resident of Sydney,
16 Australia, Dr. Twomey was integrally involved in the
17 early years of ICANN because he was a government
18 official in his home country working on internet
19 matters. He then became chairman of ICANN's GAC
20 committee, a committee you have heard much about, the
21 Governmental Advisory Committee, the committee that
22 the ICANN bylaws established and that Dr. Twomey was

1 chair of before becoming ICANN's chief executive
2 officer.

3 As a result of wearing so many hats over
4 the past 11 years, Dr. Twomey has a unique view of
5 the ICANN process, including the role of governments,
6 including the United States government in that
7 process.

8 Finally you will hear from Professor David
9 Caron from the University of California at Berkeley.
10 I believe Professor Caron is well known to at least
11 two of you, so I will not dwell on his impressive
12 credentials. As his witness statement indicated
13 Professor Caron strongly disagrees with ICM's expert
14 Professor Goldsmith with respect to the applicable
15 law for this proceeding, and whether ICM can import
16 into this proceeding claims other than whether ICANN
17 has acted inconsistent with its bylaws or articles
18 under California law. Like Mr. Ali, I will reserve
19 my remarks in this respect, primarily for closing
20 argument, although you will of course hear from the
21 two witnesses this week.

22 When you evaluate the testimony of the

1 three ICANN board members you will hear from, I
2 expect that you will find that those board members
3 took their fiduciary duties very seriously, worked
4 extremely hard with the other members of the board to
5 assess ICM's controversial application, and treated
6 ICM more fairly and more openly than one could
7 possibly imagine.

8 In fact the evidence will show that ICANN
9 could have rejected ICM's application at four or five
10 different times during the course of 2004 through
11 2007, but instead elected each time to give ICM
12 another chance.

13 Maybe the process took longer than ICM and
14 ICANN would have hoped, but this can hardly be a
15 basis to find a violation of the bylaws or articles.
16 Nor does the length of time involved make ICM a
17 victim of some sort, although clearly that is the
18 impression that ICM has attempted to convey. ICM
19 knew that its proposal would be controversial and you
20 will hear the witnesses testify to that. It's in
21 their witness statements.

22 ICM knew that members of its own so-called

1 community would oppose ICM's application and ICM knew
2 that obtaining a top level domain with the letters
3 XXX would not be an easy task.

4 The fact that ICM spent a lot of time and
5 money in this process is not a basis to find that
6 ICANN's board acted inconsistently with its bylaws or
7 articles. The evidence will show that at the end of
8 the day ICANN's board was not satisfied that ICM had
9 cured the problems that plagued ICM's application for
10 a sponsored TLD from the very outset. Problems that
11 a neutral evaluation panel identified in great detail
12 in 2004 and that were based on ICM's failure to meet
13 ICANN's very specific requirements for a sponsored
14 top level domain.

15 ICANN's board hoped that ICM would find
16 solutions to those problems and it allowed ICM
17 numerous opportunities to attempt to do so.

18 What you will also hear this week is some
19 of the proposed solutions generated numerous other
20 concerns on the part of board members of ICANN, which
21 ultimately turned down ICM's application in 2007.

22 Now the unusual procedure that brings us

1 here today is set forth in ICANN's bylaws which
2 permit a party that has interacted with ICANN to
3 request an independent review panel, evaluate whether
4 ICANN's board acted inconsistent with its bylaws or
5 articles. Under section 3.2 of the bylaws which
6 Mr. Ali also read: "Any person materially affected
7 by a decision of the board that he or she asserts is
8 inconsistent with the articles of incorporation or
9 bylaws may submit a request for independent review of
10 that decision or action."

11 Under section 3.3 of the bylaws:
12 "Requests for such independent review shall be
13 referred to an IRP" -- the three of you -- "which
14 shall be charged with comparing contested actions of
15 the board to the articles of incorporation and bylaws
16 and with declaring whether the board has acted
17 consistently with the provisions of those articles of
18 incorporation and the bylaws."

19 So as I said at the outset, we are simply
20 here to evaluate whether ICANN's board acted
21 consistent with its bylaws and articles. We are not
22 here to determine, for example, whether the panel

1 agrees or disagrees with the ultimate decision of the
2 board to reject ICM's application for the .XXX
3 sponsored TLD. Likewise we are not here to determine
4 whether the panel agrees or disagrees with the notion
5 that a TLD with the letters XXX would have been good
6 or bad for the internet, whether the concerns of
7 ICM -- ICANN's board with respect to the application
8 were in hindsight, reasonable concerns, or whether a
9 top level domain with those letters should have
10 created legitimate questions or concerns on the part
11 of governments across the world.

12 Those are all interesting questions, but
13 they are not questions that ICANN's bylaws ask you to
14 decide this week. Instead you are simply asked to
15 decide if ICANN board acted inconsistent or
16 consistent with its articles and bylaws. Indeed as
17 several witnesses will testify this week, including
18 the witnesses who constructed the very proceeding
19 that brings us here today, including incidentally one
20 of ICM's witnesses, Ms. Burr, independent review
21 panels do not sit as a supreme court of ICANN to
22 determine whether everything that ICANN is doing is

1 right or wrong.

2 Now when you make your decision, as the
3 bylaws make clear, you shall issue a declaration in
4 writing. You will consider whether to allocate half
5 of the costs to the prevailing party, and you will
6 then have completed your task, as provided for in
7 section 3.15 of ICANN's bylaws: Where feasible, the
8 board shall consider the IRP declaration at the
9 board's next meeting.

10 ICM has encouraged you to do more than the
11 bylaws provide, to issue some sort of affirmative
12 relief, such as a declaration awarding ICM a top
13 level domain. With all due respect to the members of
14 this panel, the bylaws do not provide this panel with
15 the authority to make that decision. But when ICANN
16 pointed that out in its papers leading up to the
17 hearing, ICM argued, and even again this morning,
18 that ICANN was somehow indifferent to the outcome of
19 this proceeding. I hope that the extent of ICANN's
20 participation in this proceeding including the fact
21 that you will hear this week from three of ICANN's
22 most senior and experienced board members has put

1 that issue to rest.

2 Of course Mr. Ali and I agree that the
3 starting point for any independent review proceeding
4 must be the language from the bylaws and articles
5 that ICM contends have been breached. There are six
6 main provisions of ICANN's bylaws and articles that
7 ICM has identified, and there is a related dispute as
8 to whether Article IV of the articles of
9 incorporation is a choice of law provision that
10 imports into this proceeding various principles of
11 international law.

12 Again, that's a matter for the legal
13 experts, they will address it, they have addressed it
14 and we will address it again.

15 Mr. Ali covered most of these in his
16 opening statement, so I again will shorten my
17 discussion of these to the extent I can.

18 First, ICM alleges that ICANN's board did
19 not conform to the bylaws provision that requires
20 that ICANN shall operate to the maximum extent
21 feasible "in an open and transparent manner and
22 consistent with procedures designed to ensure

1 fairness."

2 ICM also alleges a violation of Article
3 IV, of ICANN's articles which provides that "ICANN
4 shall operate for the benefit of the internet
5 community as a whole, carrying out its activities...
6 to the extent appropriate and consistent with these
7 articles and bylaws through open and transparent
8 processes that enable competition and open entry in
9 internet related markets."

10 During the course of this week, it will be
11 abundantly clear that ICANN acted openly and
12 transparently with procedures that were designed to
13 ensure fairness. Virtually everything associated
14 with ICM's application was posted on ICANN's web site
15 for all to see, including board resolutions,
16 correspondence, communications to and from
17 governments and the GAC, and drafts of ICM's proposed
18 registry agreements.

19 Frankly, it is hard to imagine a process
20 more open and transparent, and ICANN's board
21 certainly acted more open and transparent than any
22 other corporate board with which I am familiar.

1 We believe you will easily conclude that
2 ICANN's conduct was 100 percent consistent with its
3 bylaws and articles in this respect.

4 Second, ICM alleges that ICANN's board did
5 not conform to the bylaws provision that requires
6 ICANN to apply documented policies "neutrally and
7 objectively, with integrity and fairness." Again,
8 during the course of this week the evidence will show
9 that ICANN's board did just that. It did apply its
10 policy neutrally and objectively and undoubtedly with
11 integrity and fairness.

12 It is true that ICM's proposed sponsored
13 TLD application was at the end of the day, the one
14 sponsored TLD that was extensively considered, and
15 ultimately rejected. But the rejection of one TLD
16 application is hardly a basis to conclude that the
17 board violated its bylaws, particularly where that
18 proposed TLD was by far the most complicated and
19 controversial sponsored TLD that ICANN seriously
20 considered and the only sponsored TLD that had
21 generated significant concerns from governments
22 across the world, and the only sponsored TLD that had

1 generated significant opposition from members of its
2 own proposed community.

3 ICM's witnesses acknowledge in their
4 statements that they knew that the XXX TLD
5 application would generate controversy, and they were
6 right. And as you will hear during this week, there
7 is no way that ICANN's board could have ignored this
8 controversy.

9 Third, ICM alleges that ICANN did not
10 conform to the bylaws provision that requires that
11 ICANN shall not apply its standards, policies,
12 procedures, or practices inequitably or single out
13 any particular party for disparate treatment unless
14 justified by substantial and reasonable cause such as
15 the promotion of effective competition.

16 You will hear this week that ICANN did not
17 single out ICM. To the contrary, many in the ICANN
18 community believe that ICM's application for .XXX
19 should have been rejected in 2004 once the
20 independent evaluation panel determined that the
21 application did not satisfy the sponsorship
22 requirements for a sponsored TLD, requirements that

1 ICANN had very clearly laid out in the request for
2 proposals to which ICM responded.

3 Had ICANN simply rejected ICM's
4 application in 2004 which it clearly had the right to
5 do, there could not possibly have been a basis for
6 ICM to complain, much less a basis to file an
7 independent review proceeding. But ICANN's board
8 elected to give ICM the opportunity to proceed in the
9 process, to allow ICM opportunities to present
10 information directly to the board, and to allow ICM
11 to propose and to revise terms for registry
12 agreement.

13 As a result ICANN's board wound up
14 considering ICM's application and draft registry
15 agreements at a total of 7 ICANN board meetings.
16 This does not sound like a board that is shirking its
17 responsibilities. To the contrary, this sounds like
18 a board that has tackled these issues head-on despite
19 the controversies presented by ICM's application.
20 ICM was upset at the length of time associated with
21 and of course the ultimate outcome of the process,
22 but these are not bases to argue that ICANN's board

1 violated its bylaws or articles.

2 And I know as I said before -- I know that
3 ICM invested heavily in this process, but that was
4 ICM's decision and it knew the risks associated with
5 that decision. Mr. Lawley knew that .XXX application
6 would be controversial and the fact that ICM spent a
7 lot of money which Mr. Lawley repeats numerous times in
8 his witness statement, and that we will discuss with
9 him today or tomorrow, does not mean that ICANN's
10 board violated its bylaws or articles.

11 Fourth, ICM alleges that ICANN's board
12 violated its bylaws provision that specifies that
13 ICANN's Governmental Advisory Committee, the
14 committee created by ICANN's bylaws for the very
15 purpose of allowing governments across the world to
16 participate in the process, is to have an advisory as
17 opposed to a mandatory or decision making role with
18 respect to ICANN's activities.

19 So let's look at the first bylaw. It says
20 that GAC "should consider and provide advice on the
21 activities of ICANN as they relate to concerns of
22 governments, particularly where there may be an

1 interaction between ICANN's policies and various laws
2 and international agreements or where they may affect
3 public policy issues."

4 So obviously the question of whether to
5 add a sponsored top level domain devoted exclusively
6 to web sites that carry so-called adult entertainment
7 content, known to many of us as pornography, was a
8 matter that the GAC properly considered and provided
9 advice on. Pornography undoubtedly is a matter that
10 concerns many governments. I doubt ICM really is
11 arguing otherwise. As a result there is no
12 conceivable way ICM could take the position that the
13 GAC should not have expressed its views on the .XXX
14 TLD.

15 In fact the evidence will show that when
16 members of the GAC began to express concerns way back
17 in 2005, ICM immediately understood the importance of
18 trying to resolve those concerns, because ICM knew
19 that the ICANN board would consider the views of the
20 GAC. Why? ICANN literally had no choice but to
21 consider the views of the GAC. Specifically the
22 bylaws state: "The advice of the GAC on public

1 policy matters shall be duly taken into account both
2 in the formation and adoption of policies. In the
3 event that the ICANN board determines to take an
4 action that is not consistent with the GAC advice, it
5 shall so inform the committee and state the reasons
6 why it decided not to follow that advice. The GAC
7 and the ICANN board will then try in good faith and
8 in a timely and efficient manner to find a mutually
9 acceptable solution."

10 In short, under no conceivable
11 circumstance did ICANN's board violate its bylaws or
12 articles by listening to the GAC. The GAC spoke in
13 2006, and it expressed views. Mr. Ali did not
14 discuss those during his opening statement. So you
15 will hear that when the GAC spoke, the ICANN board
16 listened.

17 But you will also hear that the board did
18 not view the GAC as having a veto of some sort over
19 the board's decisions. To the contrary, even after
20 the GAC expressed concerns about the .XXX application
21 in the registry agreement, the board still gave ICM
22 additional chances to try to address those concerns.

1 Fifth, ICM alleges that ICANN's board
2 violated Article III of the articles of incorporation
3 and Article I, section 1 of its bylaws by acting in
4 excess of its purpose and mission, namely that ICANN
5 went beyond its technical mandate and made decisions
6 that relate to the content of internet web sites.

7 I must confess that this assertion is odd
8 to me, because you will hear later today from one of
9 ICM's witnesses, Professor Mueller that he believes
10 ICANN should have been willing to go beyond its
11 technical mandate by agreeing to regulate content on
12 the internet. But you will also hear, probably during
13 cross-examination, that most of Professor Mueller's
14 very strongly held opinions about ICANN have been
15 uniformly rejected over the past 11 years, when
16 Professor Mueller has commented on ICANN matters.

17 But the more important point is that
18 ICANN's board did not want to go beyond its technical
19 mandate because its bylaws don't let it. Its bylaws
20 limit the scope of ICANN's activities and nearly all
21 of those who participate in ICANN believe it would be
22 inappropriate for ICANN to get involved in

1 content-related issues. And so the board was quite
2 careful to avoid content-related issues with respect
3 to the .XXX application, it could not possibly have
4 violated its bylaws in doing so.

5 Specifically, Article III of ICANN's
6 bylaws and this is long so I'm not going to read it,
7 but it's in evidence as Exhibit 5, limits ICANN's
8 role to "coordinating the technical parameters of the
9 internet domain name system; overseeing functions
10 related to the coordination of that domain name
11 system and developing policies for circumstances
12 under which new top level domains will be added to
13 the internet."

14 The bylaws do not permit ICANN to get
15 into the business of regulating internet content,
16 which became one of the big problems with ICM's
17 application when ICM proposed that it would do just
18 that: regulate content.

19 And if ICM was going to be regulating
20 content, complaints about ICM's performance would go
21 straight to ICANN, which became a great concern
22 expressed by several members of ICANN's board in

1 voting to reject ICM's proposal ultimately.

2 Now again the panel might agree or
3 disagree that these concerns were appropriate, or
4 agree or disagree as to whether ICANN should be
5 willing to get into the content regulation business.
6 The fact of the matter is that members of the board
7 wanted to adhere to ICANN's technical mandate as set
8 forth in its bylaws and doing so could not have been
9 a violation of the bylaws.

10 Sixth and finally, ICM alleges that the
11 ICANN board violated Article I, section 2 of its
12 bylaws, which sets forth ICANN's core values. You
13 heard Mr. Ali this morning speak of ICANN's core
14 values. These are the values and Kate has put them
15 up on the screen. They are long and of course I
16 won't read them all. But they essentially declare
17 ICANN's mission, which is to preserve the stability
18 and security and the global interoperability of the
19 internet, to recognize the public policy role of
20 other entities that reflect the interests of affected
21 parties; to seek geographic and cultural diversity in
22 decision making; to promote competition in the

1 registration of domain names where practicable and
2 beneficial in the public interest; and to be "open,
3 fair, neutral and objective."

4 We really are to cover these core values;
5 they are the base principles by which ICANN operates;
6 and there is no doubt that the board honored these
7 principles with respect to the .XXX application.

8 In sum as this panel listens to the
9 testimony this week, ICANN asks that you consider how
10 any of the actions ICM has complained about can
11 reasonably be characterized as being inconsistent with
12 ICANN's bylaws or articles.

13 In response to Mr. Ali's statement that
14 we're concerned about the facts, we welcome the
15 facts. We are extremely comfortable with the
16 evidence, and we look forward to having that evidence
17 put forth. Because ICANN believes that the evidence,
18 including all of the contemporaneous evidence is
19 quite clear in its support of ICANN's position. The
20 truth is that the ICANN board undoubtedly acted
21 consistently with its articles and bylaws with
22 respect to ICM and in many respects exceeded its

1 obligations to be open, transparent and fair.

2 Let me now also turn to a timeline of the
3 events. Our timeline is on boards and we will
4 present them later with the witnesses, because many
5 of our witnesses find it convenient to have timelines
6 in front of them. And as you will also see many of
7 our witnesses think of ICANN events in terms of where
8 those events occurred at the time. Portugal, New
9 Zealand, et cetera. And we also provided copies to
10 the panel of the timeline.

11 ICANN was formed in September of 1998 as
12 part of the privatization of the internet's domain
13 name system, which previously had been operated by
14 the United States government.

15 JUDGE PAULSON: I'm sorry, are these
16 online?

17 MR. LeVEE: Yes. We have added to them.

18 JUDGE PAULSON: Here.

19 MR. LeVEE: Yes, correct.

20 One of ICANN's purposes was to foster
21 competition in the domain name system and it quickly
22 succeeded in doing that as it eliminated the monopoly

1 position of the company that was selling domain name
2 registrations to consumers. And so today you can
3 register a name in the .com registry for less than
4 \$10 with hundreds of companies that sell domain name
5 subscriptions, while back in 1998, you had no choice
6 but to pay one single company, Network Solutions, \$35
7 a year for a domain name subscription.

8 Another one of ICANN's early tasks which
9 it completed in 2000 was to approve a handful of new
10 top level domains as a so-called "proof of concept,"
11 to ensure -- what was the concept? We needed to
12 ensure that adding new TLDs to the internet would not
13 basically break the internet and would be a good
14 thing overall for competition.

15 Back in the 1990s there were only three
16 top level domains that were generally available to
17 the public .com. .net, and .org, but in 2000 they
18 approved a total of seven new TLDs, and they were
19 added to the internet over the course of these two
20 years. Now in conjunction with this first proof of
21 concept round, ICM, then under different ownership,
22 submitted an application for .XXX to be what we call

1 a generic or unsponsored TLD, but the ICANN board did
2 not select ICM's application in 2000, and expressed a
3 number of concerns about the proposal as noted in the
4 slide before you, including the fact that a TLD with
5 the letters XXX would be extremely controversial.

6 Let me pause for a minute to discuss the
7 difference between a generic top level domain or
8 unsponsored top level domain, and a sponsored top
9 level domain, because this difference is extremely
10 important to this proceeding. There will be an
11 extensive amount of testimony this week concerning
12 whether ICM's proposal for .XXX truly met ICANN's
13 requirements for a sponsored top level domain.

14 But a generic or unsponsored top level
15 domain is a top level domain that accepts all
16 subscribers. It's intended to be used basically by
17 anyone who wants to use that top level domain.
18 Dot-com of course is the most well known of the
19 unsponsored top level domains, and of course it was
20 the top level domain that is associated with the
21 explosion of the commercial internet in the late
22 1990s. Other -- sure?

1 JUDGE PAULSON: The proposition that ---
2 the notion of a sponsored TLD a developmental
3 distinction is not common ground, is that right?

4 MR. LeVEE: I don't know if it's common
5 ground among the parties, if that's what you're
6 asking.

7 JUDGE PAULSON: That's what I don't know
8 because the experts seem to have strong views on
9 this, so sometimes the authorities to which they
10 refer, and what I'm interested in of course is --

11 MR. LeVEE: I believe there is some
12 disagreement among the parties as to this
13 distinction. But -- and I will get into this in
14 about five minutes -- the board of ICANN decided to
15 accept only sponsored top level domain applications
16 in 2003, and that decision while some disagreed with
17 it, that was the decision of the board, and so as we
18 moved forward from that decision the board was
19 considering only sponsored top level domains.

20 Now I should also mention that at the same
21 time it made that decision, the board understood that
22 the round following, that is, after the sponsored top

1 level domain, the next round would be for unsponsored
2 top level domains, and in fact ICANN is working hard
3 as we speak to initiate that round and have new
4 unsponsored top level domains take part in the
5 internet.

6 So a sponsored -- an unsponsored excuse
7 me, a sponsored top level domain, basically in answer
8 to your question, Judge Paulsson, is a very different
9 animal. A sponsored top level domain is a
10 specialized TLD that has a sponsor representing a
11 narrow, clearly defined community that is
12 specifically affected by the top level domain. The
13 sponsor must identify that narrow community in
14 advance of applying for the TLD and have a charter
15 that describes the purpose for which the sponsored
16 TLD has been created and will be operating.

17 The sponsor is responsible for developing
18 policies so that the TLD is operated for the benefit
19 of that specifically defined group of stakeholders,
20 which is known as the sponsored TLD community.

21 Now, as I mentioned, in November of 2000,
22 ICANN approved seven new top level domains. Four of

1 those TLDs were unsponsored, including dot biz, BIZ,
2 dot info, dot name, while three were approved for
3 sponsored. They included, for example, dot museum --
4 which as its name suggests was limited to entities
5 that operate in museums.

6 So beginning in 2002, ICANN's board began to
7 debate fairly extensively what the next roll out of
8 TLDs should look like. Some people wanted a very
9 broad expansion of in the number of new gTLDs with no
10 sponsorship requirements at all, while others wanted
11 to proceed more cautiously. The decision by the
12 board was to proceed more cautiously. And it decided
13 in October of 2003 that the next round of new TLDs
14 would be for sponsored TLDs and only for sponsored
15 TLDs. And that, as I said, thereafter the board
16 would permit a much greater expansion in the number
17 of unsponsored TLDs.

18 This decision by the board in 2003 to
19 accept in the next round applications only for
20 sponsored TLDs ultimately proved fatal to ICM's
21 application. In December 15, 2003, ICANN issued the
22 application criteria for the sponsored new top level

1 domains. So these were the criteria that all
2 applicants would have to meet if they wished to get a
3 domain.

4 Exhibit 45, and you will see the
5 exhibit during the course of the week, the third and
6 fourth pages of the explanatory notes to Exhibit 45
7 address the question of what is sponsorship, and how
8 could an applicant satisfy the sponsorship criteria?

9 In part A of the notes, ICANN defined a
10 quote, "sponsored TLD community" closed quote, as
11 follows: The proposed sTLD, sponsored top level
12 domain, must address the needs of a clearly defined
13 community ("the sponsored TLD community") which can
14 benefit from the establishment of a TLD operating in
15 a policy formulation environment in which the
16 community would participate.

17 Now in conjunction with this process, the
18 ICANN board created three evaluation committees to
19 conduct neutral evaluations of each sponsored TLD
20 application. These committees were a technical
21 committee, a financial committee and a sponsorship
22 committee. Under the guidelines that the board

1 adopted, if any of these evaluation committees
2 rejected a proposed sTLD, that rejection alone
3 constituted a basis for immediate rejection of the
4 TLD application without further consideration by the
5 board.

6 In March 2004, ICANN received a total of
7 10 sponsored TLD applications, each of which was then
8 evaluated by the committees. Mr. Ali mentioned this
9 morning eight of the ten were rejected due to their
10 failure to satisfy the guidelines for an sTLD,
11 and .XXX was one in which the sponsorship evaluation
12 was rejected. There were numerous reasons for the
13 sponsorship committee's rejection of the dot XXX TLD.
14 Again you will see this document frequently and it
15 has been marked as Exhibit 110. But the sponsorship
16 evaluation panel found first, that ICM had not
17 identified a clearly defined community as
18 specifically required in the application; second,
19 that ICM did not appear to have support from that
20 community, particularly outside of the United States;
21 and third, that ICM had not sufficiently explained
22 how its new proposed TLD would add value to the

1 worldwide internet community. Again, a very specific
2 requirement of the application.

3 Now, as I said ICANN's board could have
4 rejected ICM's application at that point, but the
5 board was disappointed that so many of the proposed
6 sTLD applications had been rejected. So the board
7 decided to allow many of those applicants to submit
8 further information directly to the ICANN board. ICM
9 took advantage of that opportunity, and the board
10 even allowed ICM to deliver a live presentation to
11 the board to explain why it believed that its
12 application should be allowed to proceed. That live
13 presentation occurred on April 3, 2005.

14 Two months later on June 1, 2005, the
15 ICANN board conducted telephonically a meeting and it
16 is this meeting that forms the heart of ICM's claims.
17 Dr. Cerf presided over the meeting and 11 of the 15
18 ICANN board directors were present on the phone. The
19 minutes of the meeting which were posted on the
20 internet shortly thereafter reflect that the .XXX
21 application was the very first topic. As the minutes
22 indicate Dr. Cerf introduced the discussion and noted

1 that the main issue concerned quote, "the adequacy of
2 the application with particular focus on the
3 sponsored community issues among others." After much
4 further discussion, the board then passed the
5 following resolution by a 6-3 vote with two
6 abstentions. Dr. Cerf and Dr. Twomey, who you will
7 hear from this week voted in favor, and Dr. Pisanty
8 voted against. There were two resolutions. ICANN's
9 board adopted both. ICM this morning highlighted
10 only the first resolution, but I'm going to read both
11 to you, because both are important.

12 Resolved: The board authorizes the
13 President and General Counsel to enter into
14 negotiations relating to proposed commercial and
15 technical terms for the .XXX sponsored TLD
16 application, sponsored top level domain, with the
17 applicant.

18 The second resolution: Resolved: If
19 after entering into negotiations with the .XXX sTLD
20 applicant, the President and General Counsel are able
21 to negotiate a set of proposed commercial and
22 technical terms for a contractual arrangement, the

1 President shall present such proposed terms to this
2 board for approval and authorization to enter into an
3 agreement relating to the delegation of the sTLD.

4 Now, ICM's position in these proceedings
5 is that these two resolutions passed by the board
6 during the teleconference on June 1, 2005, found
7 ICANN to award ICM the .XXX sTLD irrespective of
8 anything that happened after that date. And
9 irrespective of the fact that the resolutions
10 themselves could not be more clear, that they merely
11 authorized the President and General Counsel to
12 proceed to contract negotiations and then return to
13 the board for another vote.

14 ICM's position in these proceedings is
15 wrong. There was no binding two-step process, and
16 yes, the contemporary documentation makes that
17 utterly clear. In fact all three of ICANN's board
18 members who will testify this week participated in
19 that telephonic meeting, and they will testify that
20 those resolutions meant what they said, and did not
21 amount to a final authorization of the .XXX sTLD.
22 Much further work had to be done before the board

1 could give or would give its final approval. And you
2 will hear no evidence that any members of the ICANN
3 board ever argued after June 1, 2005, that the board
4 had approved the XXX application that day, because
5 everyone on the board knew that they had not done so.

6 And just as importantly, ICM knew that the
7 board had not approved the .XXX TLD on June 1st and
8 it did not take the contrary position until much,
9 much later, only when the lawyers got involved in
10 this proceeding.

11 Now as you've heard, within weeks of the
12 board's 1 June 2005 vote several governments began to
13 express concern. Prior to the June 2005 board
14 meeting, the GAC had been silent on the .XXX
15 application and Dr. Cerf and Dr. Twomey will give you
16 their perspective as to why the GAC had not yet
17 expressed a view. Frankly, it appears that several
18 governments simply assumed that ICANN would reject
19 ICM's application, because the board had turned down
20 the unsponsored TLD application in 2000 and then the
21 sponsorship committee in 2004 had strongly rejected
22 ICM's proposal.

1 But whatever the reason that the GAC had
2 not spoken prior to June 2005, the board's decision
3 in 2005 to proceed to contract negotiations caused
4 certain governments to express concerns both about
5 the process and about the application itself.

6 As Mr. Ali showed you this morning, the
7 evidence will show that within weeks of the board's
8 June 2005 vote, the United States government as well
9 as governments -- government officials from other
10 countries contacted ICANN to express concern
11 regarding the .XXX application. Those governments
12 asked ICANN to proceed slowly in order to allow input
13 from the GAC and others.

14 ICM this morning tried to cast aspersions
15 on the motives of those governments, but the fact of
16 the matter is that those governments had contacted
17 ICANN. ICANN's board clearly acted prudently in
18 giving governments time to assess the situation.

19 Even so, ICANN's staff and ICM were doing
20 what the board told it to do on June 1st, which was
21 to draft the proposed TLD agreement for .XXX. At the
22 board's September 15, 2005, meeting, the board did

1 consider the draft registry agreement, and it voted
2 11-0 in favor of a resolution authorizing further
3 negotiations with ICM. The minutes of the meeting
4 indicate that there was again a lengthy discussion
5 among the board members with respect to the
6 sponsorship issues and whether the proposed registry
7 agreement addressed the board's concerns on that
8 issue.

9 And I will note again that not a single
10 board member said in effect, "hey, you can't reject
11 this agreement because we have already voted to
12 approve it." Final approval simply had not occurred
13 and everyone in the room and ICM knew that.

14 Now in the interest of time, I'm going to
15 skip over some of the activity that occurred the last
16 three months of 2005 and the first couple months of
17 2006. We will, of course, address that time period
18 during testimony. But the evidence will show a
19 substantial amount of communications with the GAC and
20 others.

21 So on March 28, 2006, the GAC met in
22 Wellington, New Zealand and devoted considerable

1 attention to the proposed .XXX TLD. Mr. Ali gave you
2 a lot of evidence this morning, but did not give you
3 this important document. On March 28, 2006, the GAC
4 issued what is referred to as the Wellington
5 communique, in which the GAC took the position that
6 ICM had not overcome several of the deficiencies that
7 the sponsorship evaluation panel had identified.

8 The GAC had asked that ICANN address these
9 issues in a proposed registry agreement with ICM
10 which the GAC did not believe had yet occurred.
11 Notably at the end of the communique, the GAC states:
12 "Nevertheless without prejudice to the above, several
13 members of the GAC are emphatically opposed from a
14 public policy perspective to the introduction of a
15 .XXX sTLD.

16 Now ICM will tell you during the course of
17 this week that the GAC was misinformed, politically
18 motivated, somehow driven by improper motives. The
19 fact of the matter is, once the GAC had issued this
20 statement, ICANN's bylaws require that the ICANN
21 board pay attention to this statement, and it would
22 have been a violation of the bylaws not to do so.

1 So on May 10, 2006, the board voted on a
2 revised draft of the proposed registry agreement for
3 the .XXX sTLD. There was a lengthy discussion of the
4 issues and the board voted against the draft by a 9-5
5 vote.

6 Each of the three ICANN board members who
7 are testifying this week voted against ICM's
8 application and they are here to tell you why. They
9 had several concerns including that ICM still had not
10 adequately defined a sponsorship community as the
11 request for proposal that ICANN at issue had
12 required. In essence ICM basically was saying that
13 those who subscribed to the dot XXX sTLD would be the
14 community, and that those who subscribed would
15 consist entirely of quote, unquote "responsible"
16 adult entertainment web sites. The problem of course
17 is that this is defining the community after the fact
18 with no way of knowing whether those entities were
19 responsible or not.

20 The board simply was not comfortable
21 proceeding on the basis that ICM had proposed and it
22 was cognizant of the GAC's concerns as well. ICM was

1 now proposing to monitor allegedly offensive conduct
2 globally, but what was offensive in one part of the
3 world might or might not be offensive in another part
4 of the world. And ICANN's board became concerned
5 that it, ICANN, would get dragged into this
6 discussion which as I noted earlier was absolutely
7 contrary to ICANN's technical mandate as expressed in
8 its bylaws.

9 Now frankly, many thought that ICM's
10 proposal was at that point dead. ICM thought that,
11 and it delivered to ICANN shortly thereafter a
12 request for reconsideration which is a mechanism also
13 set forth on ICANN's bylaws, to ask that a matter
14 receive further consideration by a special committee
15 of the board.

16 But ICANN decided that it would give ICM
17 one more opportunity to try to persuade members of
18 the board that its application was viable. It's hard
19 to imagine that ICANN's Board of Directors violated
20 its bylaws by giving ICM another chance. And ICM
21 accepted the opportunity, withdrew its request for
22 reconsideration and continued to work on revising the

1 draft registry agreement. But at the same time that
2 ICM was trying to resuscitate its proposal it was
3 encountering another very important problem, again,
4 not discussed this morning in Mr. Ali's opening.

5 Whatever support ICM once had from its
6 proposed community was starting to evaporate. As the
7 evidence will show, many of ICM's initial supporters
8 abandoned ICM during the course of 2006 to 2007 and
9 others who were extremely influential in the adult
10 entertainment industry also expressed opposition.
11 Further, ICM had never been able to generate any
12 meaningful support from outside of the United States,
13 an issue that had been of concern in the sponsorship
14 evaluation committee way back in 2004.

15 So now we have a TLD application that has
16 significant objection from members of the community
17 that ICM was proposing to create. So all of this
18 sets the stage for the board's meeting in Lisbon,
19 Portugal on March 30, 2007. The board devoted an
20 enormous amount of time to ICM's application at this
21 meeting. Exhibit 201 is the transcript of the
22 board's debate, and you will see that the debate was,

1 shall I say, spirited.

2 We heard this morning that Susan Crawford,
3 one of ICANN's board members, strongly supported
4 ICM's application. There were others who supported
5 ICM's application. And as Dr. Cerf asserts in his
6 witness statement, the board considered the .XXX
7 application for over six hours during the course of
8 the board's meetings that week. In part -- to
9 address Judge Tevrizian's argument earlier this
10 morning -- several new board members had been seated,
11 and they needed to get up to speed, and that's what
12 they were doing.

13 Now in response to your question, Mr. Ali
14 said he wanted to think a little further about the
15 impact of these new board members, but I can tell you
16 that in ICM's papers and in Ms. Burr's witness
17 statement, ICM is extremely critical of these board
18 members. ICM says they are not legally trained,
19 which in part was false and largely irrelevant, and
20 ICM says that they didn't put in sufficient time.

21 JUDGE PAULSON: What time frame?

22 MR. LeVEE: I'm sorry?

1 JUDGE PAULSON: What time frame?

2 MR. LeVEE: March 2007.

3 JUDGE PAULSSON: When you say new, what's
4 new in the time frame?

5 MR. LeVEE: March 2007. So new is that in
6 March 2005, and we will provide the panel with a
7 chart that we have created which we are going to use
8 with Dr. Cerf, shows you who was on the board in
9 2005, who was on the board in 2006, who was on the
10 board in 2007.

11 ICANN's bylaws require board turnover --
12 not uncommon. And so we had, almost half the board
13 was new in 2007 as compared to June 1, 2005. Does
14 that answer your question?

15 JUDGE PAULSON: Yes. Ms. Crawford for
16 example, was she in 2005?

17 MR. LeVEE: She was not a member in
18 June 2005. She joined after that.

19 JUDGE PAULSON: Late 2005?

20 MR. LeVEE: I don't have the exact, but
21 she was a member at the critical votes in 2006 and
22 2007.

1 JUDGE PAULSON: I'm just wondering if
2 somebody in that time frame would be considered new.

3 MR. LeVEE: Under my definition that would
4 be new, anyone who is not on the board in 2005.

5 JUDGE PAULSON: But during 2005.

6 MR. LeVEE: Correct. Correct.

7 Now, at the end of the March 30 meeting,
8 five members of the ICANN board including Susan
9 Crawford were prepared to authorize ICM to operate
10 the .XXX sTLD, but nine members of the board were
11 not; and they voted to pass a resolution rejecting
12 the proposed agreement and the entire XXX
13 application.

14 The board's resolution explains the
15 board's thinking. First, after setting forth a
16 lengthy history of the application, nine members of
17 the board decided in favor of a resolution that
18 declared first that ICM's application and the revised
19 agreement failed to meet among other things the
20 sponsored community criteria of the RFP specification
21 that the board had passed in 2003.

22 Second, that the agreement raised public

1 policy issues. And from the GAC's communiques --
2 which ICANN knew from the GAC's communiques.

3 Third, the board did not believe that the
4 public policy concerns could be credibly resolved
5 with the mechanisms that ICM had proposed.

6 Fourth, ICM's application raised
7 significant law enforcement compliance issues because
8 of countries' varying laws related to internet
9 content, which ultimately would require ICANN to
10 acquire responsibility related to content and
11 conduct.

12 And fifth, that there were credible
13 scenarios in which ICANN, a technical organization,
14 would be forced to assume an oversight role regarding
15 content on the internet, and this was inconsistent
16 with ICANN's technical mandate as set forth in
17 ICANN's bylaws.

18 Each of these issues had been addressed
19 multiple times by the board during the course of
20 2005, 2006, and 2007, and at the end of the day ICM
21 could not persuade a majority of the board to support
22 its application.

1 The passage of the March 30, 2007,
2 application -- the resolution brings us back to the
3 beginning of my opening statement where I posed the
4 question that is before this panel.

5 Did ICANN's board act inconsistent with
6 its bylaws or articles of incorporation in
7 conjunction with its consideration of ICM's
8 application for the .XXX sponsored top level domain?

9 Perhaps by the end of the week some of you
10 will find yourself agreeing with the five members of
11 the ICANN board who voted to support the .XXX
12 proposed registry agreement in March of 2007, but
13 that of course is not the issue before the panel.
14 Reasonable minds can differ on almost everything
15 ICANN does. And so much of what ICANN does involves
16 what us lawyers like to refer to as issues of first
17 impression.

18 But differences in points of view do not
19 mean that the majority of the board violated ICANN's
20 bylaws or articles, and they certainly do not mean
21 that the board treated ICM unfairly or arbitrarily or
22 discriminatorily. Instead ICANN is confident that at

1 the close of this proceeding you will find that the
2 answer to the question that I have posed is
3 unequivocally no, and that the board acted fully
4 consistent with its bylaws and articles.

5 You will find that the board struggled
6 with a difficult, controversial issue, an issue that
7 involved a subject matter that many people are not
8 even comfortable talking about, much less debating
9 openly in public, and that the board addressed these
10 issues head-on and in good faith at seven different
11 ICANN board meetings.

12 You will find that the board gave ICM
13 multiple opportunities to make its case, because the
14 board understood that these issues were difficult and
15 the board knew that ICM had invested considerable
16 time and effort into the process.

17 On behalf of ICANN, we thank you for your
18 attention this morning and throughout this week. We
19 are honored to have the three of you serving as
20 ICANN's first independent review panel. Thank you.

21 JUDGE SCHWEBEL: Thank you so much,
22 Mr. LeVee. It's now 12:30. We have had excellent

1 opening statements from counsel of both parties. Do
2 you wish now to proceed to present the first witness?

3 MR. ARI: Judge Schwebel, direct
4 examination of Dr. Mueller will last probably about
5 an hour, so we may end up having to break in the
6 midst of that. I think perhaps if we take our lunch
7 break now at 12:30, and start earlier, that would
8 allow us to continue straight on through the
9 afternoon without interruption.

10 JUDGE SCHWEBEL: Right. Well, let's
11 adjourn now and we will meet again at 2:30. I
12 believe that it has been arranged for a simple lunch
13 to be available in your breakout rooms. We will meet
14 again at 2:30 p.m. this afternoon.

15 (Whereupon, the proceedings were recessed
16 until 2:30 p.m. this same day.)

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1 A. I am Dr. Milton L. Mueller.

2 Q. And in the binder that is in front of you
3 and hopefully in front of all the panelists, you will
4 find the expert report you submitted in this case
5 behind tab 1. Is it complete and accurate to the
6 best of your knowledge?

7 A. Yes. For the most part. There is a minor
8 copy editing error I noticed, if you want to go into
9 that.

10 Q. Would you identify it for us?

11 JUDGE SCHWEBEL: Excuse me. Could you
12 speak up a bit more loudly?

13 THE WITNESS: Yes. How's that? Is that
14 better?

15 JUDGE SCHWEBEL: Yes, loudly and clearly.

16 THE WITNESS: Oh, so, apparently in my
17 notice when I was invited to speak before the United
18 Nations, somebody put in General Assembly, and it was
19 not the General Assembly, it was the internet
20 consultation working group under internet governance.

21 BY MR. De GRAMONT:

22 Q. Thank you for that clarification. Are

1 there any other corrections would you like to make?

2 A. No.

3 Q. Professor, how are you currently employed?

4 A. I am a full professor at the Syracuse
5 University School of Information Studies, and I am a
6 professor at the Technology University at Delft.

7 Q. And where is Delft?

8 A. In the Netherlands.

9 Q. Do you conduct research as well as teach?

10 A. Yes.

11 Q. And what is the focus of your research?

12 A. My research is communication and
13 information public policy with a special focus on
14 global governance and ICANN.

15 Q. Have you published any books on the
16 subject?

17 A. Yes, I have.

18 Q. Could you identify?

19 A. I published a book in 2002 called Ruling
20 the Root, published by the MIT Press.

21 Q. And what is that book about?

22 A. That book is about the early history of

1 the domain name system, and the conflicts over naming
2 that led to the creation of ICANN and some analysis
3 of the ICANN regime as it evolved up to about 2001.

4 Q. Sorry, did you want to interject?

5 Professor, have you written any other books on the
6 subject?

7 A. Yes, I just completed a manuscript for a
8 new book on internet governance, called Networks and
9 States, the Global Politics of Internet Governance.
10 And that has been sent off to the MIT Press and
11 probably will come out spring next year.

12 Q. And what is that book about?

13 A. It takes a broader look at internet
14 governance, and includes an analysis of the WSIS --
15 the World Summit on Information Society, and the post
16 World Summit evolution of internet governance.

17 Q. In addition to your books, have you
18 written any peer reviewed articles on these subjects?

19 A. Yes. I have at least 14 peer reviewed
20 journal articles or peer reviewed journals on
21 academic publications.

22 Q. Have you ever participated in internet

1 governance at the request of the U.S. government?

2 A. Yes. In 2001 and through 2005, I was
3 asked to be on a committee formed by the National
4 Academy of Sciences Computer Science and
5 Telecommunications Board to do a study that was
6 mandated by legislation and funded by the Commerce
7 Department and the National Science Foundation on
8 internet navigation and the domain name system.

9 Q. And have you ever participated in ICANN
10 activities?

11 A. Yes. I have been a very active
12 participant in ICANN. If you want me to list some of
13 the things I have done, I was one of the founders of
14 one of the constituencies that forms the policy
15 making apparatus for generic domain names. I chaired
16 a task force setting policy for the reassignment of
17 the .org domain. I have been on several different
18 working groups dealing with who is the new top level
19 domains. And I have been elected several times to
20 the council of the generic names supporting
21 organization.

22 Q. And do you attend ICANN's quarterly

1 meetings?

2 A. Yes. I've attended many of these
3 meetings, probably about half of them in all.

4 Q. Professor, on what do you base your expert
5 statement in this case?

6 A. I base it on my extensive research into
7 the history, politics, and economics of ICANN and the
8 domain name system. I base it on my personal
9 knowledge and experience of the events as they
10 transpired, and also on my extensive review of the
11 record of this case at the request of your firm.

12 BY MR. De GRAMONT:

13 Q. Professor, before we get into the
14 substance of your report, I would like to ask you
15 about some of the basic concepts and definitions that
16 are at issue in this case. I know your definitions
17 have helped me understand the issues. What is a
18 domain name?

19 A. A domain name is an alphanumeric stream of
20 characters that usually has semantic meaning, and
21 it's used as an address of a computer on the
22 internet, but it has to be translated into a numeric

1 address to work properly.

2 Q. Would you please turn to tab 2 of your
3 binder. And can you tell us what that chart depicts?

4 A. This depicts a domain name and IP address
5 or internet protocol address underneath it. As you
6 can see, the domain name is icsid.worldbank.org,
7 which is semantically relatively meaningful, and the
8 IP address consists of four separate numbers
9 separated by dots.

10 Q. So the computers have different numbers
11 and they use names icsid.worldbank.org, so people can
12 remember it?

13 A. Yes, there is a little more to it but
14 basically that's right.

15 Q. Is a domain name a computer or network of
16 computers?

17 A. A domain is a group of computers or it
18 could be a single computer under a single name.

19 Q. This represents the group computers at the
20 ICSID organization at the World Bank?

21 A. That's right.

22 Q. Would you take a look at tab 3 in your

1 binder?

2 A. Okay.

3 Q. And would you tell us what that chart
4 depicts?

5 A. This represents the hierarchy, naming
6 hierarchy or the named space of the domain name
7 system.

8 Q. And again, what is the domain name on this
9 particular chart?

10 A. This again is showing you how the domain
11 icsid.worldbank.org is organized in the name space.

12 Q. And to get to that domain, how many
13 domains do you have to go through?

14 A. Well, there is three levels to this
15 domain, and if you count the root, then you are going
16 to four levels.

17 Q. Could you identify each of the three
18 levels below the route?

19 A. Yes, the top level domain, in this case,
20 is .org. And as you can see, there are many other
21 top level domains, this diagram only shows five of
22 them. And the second level domain is World Bank.

1 And of course, under .org, there are over 5 million
2 second level domains. And the third level domain is
3 ICSID, which would be some department under World
4 Bank. And of course, I have no idea how many actual
5 domains are under that.

6 Q. Now, at the top of the chart, we have the
7 root. Would you tell us what the root is?

8 A. The root is the starting point for finding
9 computers or domain names on the internet.

10 Q. What does it consist of?

11 A. It basically consists of a list of all the
12 top level domains that exist, and another list of the
13 IP addresses, the numbers that they are associated
14 with.

15 Q. Would you turn to tab 4 of your binder?
16 And let's talk about how this works in practice.
17 Let's assume a student in Shanghai wants to visit the
18 ICSID site, and that's her computer in the lower
19 left-hand corner. What has to happen?

20 A. Well, let's suppose this person is running
21 a web browser, so he or she types the domain,
22 icsid.worldbank.org, although you have econ there on

1 that diagram. He types it into his browser and the
2 first thing that happens is that the browser software
3 sends a message to the root saying, where can I find
4 the name server or the computer that runs the .org
5 domain?

6 And the root answers that query with the
7 IP address of the .org top level domain name. So
8 next the software asks the .org domain, where can I
9 find the worldbank.org domain, and the .org registry
10 has a list of all the domains registered under .org
11 and looks up World Bank and finds the associated IP
12 address and returns it back to the computer.

13 Now the computer knows where worldbank.org
14 is, and it sends a query to that domain asking where
15 in this case econ.worldbank.org is, and it returns
16 it, the IP address to the web site. And then the
17 computer requests that IP address and it gets the web
18 site information and it appears on the screen.

19 Q. And how long does this process take?

20 A. A lot less than my explanation.

21 Q. So the entrance point to the internet is
22 the root, and to move beyond that, one has to proceed

1 through one of the TLDs?

2 A. Correct.

3 JUDGE TEVRIZIAN: How do you get the
4 numerical numbers that are assigned to the names?

5 THE WITNESS: How do you get them?

6 JUDGE TEVRIZIAN: Yes.

7 THE WITNESS: They are stored in a list.
8 Each of these registries is like a phone book, so you
9 say where is worldbank.org, and worldbank.org has a
10 resource record that maps that domain to a particular
11 IP address.

12 JUDGE TEVRIZIAN: Who assigns the numeric
13 number? Looking at the root 145.96.822.164, how do
14 you get that numerical number designation?

15 THE WITNESS: Whoever is managing that
16 domain puts it in there. So, for example, the -- for
17 the root, ICANN, through the Department of Commerce
18 ICANN would be the manager of the domain. And they
19 would be the ones about what IP address is associated
20 with what top level domain. And they would keep that
21 root zone file, as it's called, carefully accurate to
22 make sure that it's accurately reflecting the IP

1 address associated with every top level domain.

2 JUDGE TEVRIZIAN: Initially who makes that
3 determination, that 145.96.882.164 should be used?

4 THE WITNESS: Uh -- so that is handled by
5 the regional address registries, and they assign
6 blocks of addresses or blocks of numbers to
7 organizations that need them. And so, for example,
8 ICANN probably has a block of addresses, and whoever
9 is running the root server also has to have a block
10 of addresses which they are assigned through a
11 different process, but one that's also connected to
12 ICANN as an institution.

13 BY MR. De GRAMONT:

14 Q. And Professor, to get to one of those
15 numbers and one of those computer domains, the point
16 of entry has to be through the root, there is no
17 other way to go?

18 A. Strictly speaking, yes. You can store the
19 information. If you already queried the root and you
20 know where that information is, you can store the
21 information. But eventually you have to go through
22 the root if you want it to be current and you want to

1 maintain local compatibility.

2 Q. So anyone anywhere in the world is first
3 going to have to go through the root and then into
4 the TLDs to get through the internet?

5 A. Yes, that's true. The root is like a
6 gateway to global connectivity.

7 Q. So if somebody in Shanghai wants to visit
8 the Red Cross site in Geneva, she will still have to
9 go through this root system?

10 A. Right.

11 Q. By the way, if the Chinese government for
12 some reason wanted to keep that student from visiting
13 ICSID, or for that matter any other site on .org,
14 could the Chinese government do that as a matter of
15 technical ability?

16 A. Yes. For better or worse, the Chinese
17 government can block a particular domain. Or it can
18 block a particular IP address by interfering with the
19 communications of its residents in various ways.

20 JUDGE PAULSON: Are they particular in
21 this respect, or can any government do it?

22 THE WITNESS: Any government can do it,

1 but depending on how leaky or air tight it is would
2 depend on how much control you have, control over the
3 telecommunications infrastructure. So for example,
4 China has a very centralized international gateway so
5 it's easier for them than a highly decentralized
6 telecom industry like the United States.

7 JUDGE PAULSON: It's a matter of
8 telecommunications infrastructure?

9 THE WITNESS: It makes it easier to
10 control. It's a matter of the software and internet
11 protocol in recognizing and programming addresses and
12 domains you want to block. And there are various
13 ways to try to circumvent it. So it's never perfect.
14 But certainly if it was tibetworldbank.org, you can
15 bet that the Chinese would probably flag that as a
16 domain that they would block. And for most ordinary
17 users and uses and for most ordinary search engines,
18 they would be able to block that domain.

19 JUDGE PAULSON: While we are on the
20 subject, is it some capability like that that
21 Australia was contemplating?

22 THE WITNESS: Yes.

1 BY MR. De GRAMONT:

2 Q. Similar thing?

3 A. Exactly.

4 JUDGE TEVRIZIAN: Is there a difference if
5 you block, for example, if you are using a telephone
6 as the hook up or broadband as the hook up or WiFi as
7 the hook up, is there a difference?

8 THE WITNESS: Not inherently. It may be
9 if, for example, you were using a satellite that is
10 unauthorized by the Chinese, and they don't know
11 about it, somehow bypasses their system, that's why I
12 say there is leaks and circumventions. But for the
13 ordinary user, there could be -- if you have a
14 centralized infrastructure, you can block it more
15 easily.

16 JUDGE TEVRIZIAN: You block it by words or
17 do you block it by numerical identification or both?

18 THE WITNESS: That's one of the -- one of
19 the more sophisticated things about the Chinese
20 system of censorship is that they combine character
21 recognition with IP addresses and URLs.

22 JUDGE TEVRIZIAN: How would they get the

1 IP addresses if they are not registered in their
2 country?

3 THE WITNESS: Because in order to send
4 packets to them, you know -- well, through the domain
5 name system, for example, they would simply retrieve
6 the resource records and they would know that this
7 particular domain is at this IP address. And that's
8 all actually carried in the packets that are moving
9 over the internet. So it can be essentially
10 automated if they decide this domain they want to
11 block, then their software would tell them what IP
12 address was associated with that.

13 BY MR. De GRAMONT:

14 Q. When you say packet, could you tell the
15 panel what that means?

16 A. When the internet communicates, it breaks
17 information down into packets which are little chunks
18 of information that have a header on them that says
19 this is the originating address, this is the
20 terminating address, and here's some information
21 about what's going to come next. And then there is
22 something called the payload which contains let's say

1 a lot of the web site information.

2 Q. Now, Professor, are there -- let's talk
3 about the different types of TLDs and would you take
4 a look at tab 5 of your binder.

5 A. Yes.

6 Q. And can you briefly explain the different
7 types or categories of TLDs that are listed there?

8 A. Yes. As an initial preamble, I would say
9 that all this technical stuff we talked about, the
10 internet doesn't care about these types of top level
11 domains. They all work the same. In a technical
12 sense, they all serve the exact same function.

13 But human policy and human agreements have
14 created these distinctions such as country code top
15 level domains, which are two letter codes derived
16 from international standards set by the international
17 standardization organization. And that is a way of
18 giving each country or territory in the world its own
19 top level domain.

20 And then there is the so-called generic
21 unsponsored top level domains and these are the ones
22 that we in the United States are most familiar with,

1 such as .com, .org, .net, and .info. And these refer
2 to categories of registrants, but are open. And then
3 there is the sponsored top level domains, the generic
4 sponsored top level domains and these are restricted
5 to a certain type of community, such as .museum. If
6 you are a museum, you were eligible to register in
7 .museum, and if you are not, you are not supposed to.

8 Q. And again, this case deals with sponsored
9 TLDs, the category at the bottom of the chart?

10 A. That's right.

11 Q. And the case also deals with registries.
12 Can you explain to us what a registry is?

13 A. We actually already discussed it. It's
14 basically the organization that keeps a list of who
15 has registered at a particular domain. So in this
16 case, we have .xxx wanted to be a registry. They
17 wanted to sell people domain names under the .xxx
18 domain. The .org is a large registry that keeps all
19 the people in the .org domain.

20 Q. To get a registry, ICANN would have to
21 award you a contract?

22 A. Yes, to be a registry in the top level

1 domain space, you have to get a contract from ICANN.

2 Q. And ICANN is the only entity that awards
3 those types of contracts?

4 A. Yes.

5 Q. And what does one have to do to register a
6 name on .com, for example?

7 A. Well, with .com, it's easy. You go to a
8 registrar's web site and you type in the domain you
9 want, and it automatically checks the registry
10 database and says this is registered. If it is a
11 .com, it probably has been registered or it has not
12 been registered. If it is not registered, you can
13 fill out a form and give them your credit card number
14 and pay for it and the domain will be yours.

15 Q. How does one register a name on a
16 sponsored TLD like .cat, for example?

17 A. In that case, it would be more complicated
18 because .cat would say, are you really Catalan or are
19 you offering content that is Catalan in character.
20 And if you qualify for this restricted or sponsored
21 domain, then you would be awarded domains. So
22 presumably they would do some back-office

1 verification or checking of your qualifications.

2 Q. So I am clear .cat is a sponsored TLD
3 dedicated to the Catalan culture or --

4 A. Right.

5 Q. And TLD has input on who gets in?

6 A. Yes, the sponsor does, yes.

7 Q. The fact that an sTLD registry makes a
8 decision on content has never been an issue for ICANN
9 except for .xxx?

10 A. Yes, that seems to be the case.

11 Q. Do these registries appear to be a
12 substantial global business?

13 A. Yes, I think the domain name market is
14 somewhere over \$3 billion, and registries constitute
15 a pretty big chunk of that.

16 Q. And again, the only way to get into that
17 business is ICANN?

18 A. Yes.

19 JUDGE TEVRIZIAN: A moment ago, you were
20 asked a question that ICANN regulated content in this
21 particular case by denying the domain level of xxx,
22 was that your testimony.

1 THE WITNESS: No, I'm sorry. Yeah, we
2 went through that pretty fast. What he was asking me
3 was when you give out a sponsored domain to either
4 xxx or .cat, the sponsor is essentially making
5 decisions about what content is suitable for that
6 domain.

7 BY MR. De GRAMONT:

8 Q. I'm sorry, I didn't mean to cut you off.

9 A. I think what you asked me was, is that a
10 routine thing, it's not unique to .xxx.

11 Q. I think Judge Tevrizian's question was, is
12 it your position in this case that ICANN can denied
13 the application based on content?

14 A. Well, I think that was a big factor, yes,
15 I think that was a big factor.

16 Q. And we will get into that more in a little
17 bit. Professor, let's discuss who has control over
18 the root and the DNS. First of all, who controls the
19 root?

20 A. Control of the root is fundamentally in
21 the hands of the United States Commerce Department.
22 However, they had delegated the policy authority, the

1 ability to make policy over what goes into the root
2 to ICANN.

3 Q. And can you take a look at tab 6 of your
4 notebook?

5 A. Okay.

6 Q. And can you tell us what this chart
7 depicts?

8 A. This is a representation of the control of
9 the root. So it shows you that ICANN on the left is
10 basically setting the policy, and they are passing it
11 through the United States Commerce Department for
12 sort of auditing and verification. And then the
13 Commerce Department, after it's authorized, gives it
14 to the operator of the root, which is one of the big
15 registries, a company named VeriSign which is under
16 contract to the United States Department of Commerce
17 to operate the root, the master root zone file in
18 accordance with its instructions.

19 Q. Okay. So ICANN decides what TLDs are
20 going to go on the root as a matter of policy.

21 A. Right.

22 Q. It provides those TLDs to the Department

1 of Commerce, and then the Department of Commerce is
2 supposed to put them on the root via its contractor
3 VeriSign?

4 A. Right. And VeriSign once it puts it into
5 the other root servers will be distributed to the
6 other root servers serving the internet.

7 Q. Is the Department of Commerce supposed to
8 have any policy making decision authority over which
9 TLDs get into the root and which do not?

10 A. No, it's not supposed to. That's why it
11 created ICANN, to delegate that authority.

12 Q. So ICANN has the authority to decide which
13 TLDs go on to the root. And ICANN decides who gets
14 registry contracts, is that correct?

15 A. That's right.

16 Q. And how would you characterize ICANN's
17 influence on the internet by virtue of those two
18 capabilities?

19 A. Well, it's a very powerful position to be
20 in, and it can be used more or less extensively. But
21 I think I tried to explain in my statement that there
22 is a spectrum of leverage. You could either really

1 try to exploit that power for all kinds of things or
2 you can use it in a more limited fashion. And ICANN
3 is supposed to be on the more limited side of that
4 spectrum.

5 Q. Professor, when was ICANN created?

6 A. ICANN was created in 1998.

7 Q. And did you have any involvement in the
8 formation of ICANN?

9 A. Yes. I was actively following this
10 process of domain name evolution from 1996. And when
11 the Commerce Department solicited public comments on
12 the ICANN situation, what became ICANN, I
13 participated in those public comment periods.

14 Q. And were you also a member of the Boston
15 working group?

16 A. Yes, I became a member of the Boston
17 working group sometime in 1998.

18 Q. And what did the Boston working group do?

19 A. The Boston working group filed comments in
20 connection with the creation of ICANN which proposed
21 some modifications in the articles of incorporation
22 that had been proposed by ICANN, the people who

1 became ICANN.

2 JUDGE TEVRIZIAN: Did Al Gore have
3 anything to do with the development of the internet?

4 THE WITNESS: He did in terms of funding
5 support of some early technologies.

6 JUDGE TEVRIZIAN: Let's mark that.

7 THE WITNESS: You should ask Vint Cerf
8 that. He likes to be asked that.

9 BY MR. De GRAMONT:

10 Q. Were some of the proposals that you
11 offered into the Boston working group incorporated
12 into the bylaws of ICANN?

13 A. Yes. Again, there were four or five
14 different proposals floating around, and I think the
15 Commerce Department and Ira Magaziner took some of
16 our suggestions very seriously. They talked with us
17 on the telephone and in the end insisted that ICANN
18 include a membership as part of its articles, and
19 that's what ICANN ended up doing for the first two
20 years of its existence.

21 Q. And by the way, did your group include any
22 current senior ICANN officials?

1 A. Well, BWG was not my group. As I said, I
2 joined it after it was formed. And one of the key
3 people who formed it was Peter Dengate Thrush, who is
4 now the chairman of the board of ICANN.

5 Q. Now, whose decision was it to create
6 ICANN?

7 A. Basically the Commerce Department, the
8 U.S. Commerce Department.

9 Q. Under the Clinton administration?

10 A. Under the Clinton administration.

11 Q. Would you please turn to tab 8 of your
12 binder.

13 JUDGE SCHWEBEL: May I ask before you do
14 that, has there ever been a case in which the
15 Department of Commerce has declined to add to the
16 group an entity recommended by ICANN?

17 THE WITNESS: Well, xxx is on the
18 borderline of that. I think -- I think what we will
19 explain later is that they decided they didn't want
20 to add it, and we have a document that shows that
21 they were discussing whether they could or should
22 actually refuse to add it if ICANN added it, but I

1 think what happened is they succeeded in getting the
2 ICANN board to vote it down for them.

3 BY MR. De GRAMONT:

4 Q. And maybe I can ask just a couple of
5 follow-up questions to clarify Judge Schwebel's
6 question. Did DOC refuse to put .xxx on the domain?

7 A. They didn't have to.

8 Q. Did the Department of Commerce threaten
9 ICANN that if .xxx was attempted to be on the root,
10 the Department of Commerce wouldn't allow that to
11 happen?

12 A. They wrote memos that suggested that would
13 happen, yes.

14 Q. And again, we will look at those more
15 closely.

16 Now, looking at the document you have in
17 front of you with tab 8, can you identify it, please?

18 A. This is the white paper, the 1998 white
19 paper that was the final statement of policy creating
20 ICANN.

21 Q. And the highlighted language reads on
22 July 1, 1997, as part of the Clinton Administration's

1 framework for global electronic commerce, the
2 President directed the Secretary of Commerce to
3 privatize the domain name system in a way that
4 increases competition and facilitates international
5 participation in its management.

6 Now, as a scholar of internet governance,
7 what was your understanding as to why the Clinton
8 Administration wanted to privatize the domain names
9 list?

10 A. Yes, there were three very good reasons
11 for going down this road. One of them was that there
12 was the jurisdictional problems. Basically, the
13 internet is supposed to function in an interconnected
14 global manner, and they were afraid that if domain
15 name policy was not also globally administered, that
16 all the different governments would start fragmenting
17 the internet and rip the system apart on
18 jurisdictional lines.

19 There was another reason, and that was
20 that the U.S. was afraid of some of the policy
21 pronouncements of some of the other governments and
22 intergovernmental organizations. In particular, they

1 wanted to keep this away from the International
2 Telecommunications Union.

3 And a third reason was that the internet
4 technical people who had basically established the
5 internet in its early stages were in favor of this
6 approach. They had been used to working through the
7 internet society and the internet engineering task
8 force, and they wanted those kinds of organizations
9 to operate ICANN and not be an intergovernmental
10 organization.

11 Q. As a scholar of internet governance, did
12 you support the principles that the DNS should be
13 privatized?

14 A. I did, yes.

15 Q. Are there any cons to turning over
16 regulatory authority over a global resource to a
17 private entity?

18 A. Yes. The -- the problem or the challenge
19 of doing that, which was evident to everybody at the
20 time was that you -- how do you deal with
21 accountability? How do you establish some kinds of
22 checks and balances on the authority of this private

1 corporation. So the issues of ICANN's governance
2 structure, of its accountability, its transparency
3 and reputational procedures became something that we
4 all were debating for the first three years.

5 JUDGE SCHWEBEL: Does the international
6 community now regard ICANN in terms of alternatives
7 such as the ITU or other mechanisms?

8 THE WITNESS: I think the idea of the ITU
9 taking over ICANN has been pretty soundly rejected by
10 the international community. And everybody -- well,
11 not everybody, but large developing countries such as
12 China, Russia, several others, would actually still
13 like to put it in ITU. And the Europeans and others
14 sort of more liberal countries support the private
15 sector management of the DNS, but are uncomfortable
16 with the U.S. supervision, the unilateral U.S.
17 supervision. So that is still an issue and the
18 European Union is still actively debating that. The
19 problem of unilateral U.S. control.

20 BY MR. De GRAMONT:

21 Q. Now, Professor, did the white paper
22 address any of the dangers that you mentioned about

1 turning over control of the global resource to a
2 private entity?

3 A. Absolutely. The white paper was very firm
4 about certain good governance principles, and they
5 wanted to have a representation. They wanted to have
6 bottom-up policy making structure. They wanted to
7 have transparency and fairness in its decision-making
8 process.

9 Q. And did ICANN's bylaws and articles
10 reflect those concerns?

11 A. Yes. They tried to.

12 Q. And in fact, there were numerous
13 provisions on transparency, fairness,
14 nondiscrimination, well documented policies applied
15 objectively, and so forth?

16 A. Yes.

17 Q. And we will look at some of those later.
18 Can you briefly describe how ICANN is organized?

19 A. ICANN is organized basically as a board
20 and they have a lot of authority, and then they have
21 supporting organizations under the board.

22 Q. And perhaps, why don't you turn to page 9

1 of your binder, and that may help us follow your
2 explanations.

3 JUDGE TEVRIZIAN: Page 9 or tab 9?

4 BY MR. De GRAMONT:

5 Q. I'm sorry, tab 9.

6 A. You see these three supporting
7 organizations are responsible for making policy
8 within particular domains. The address supporting
9 organization deals with the IP addresses. The
10 question that one of the panelists was asking about,
11 who gives out addresses. The generic names
12 supporting organization, which is where I have been
13 most active deals with generic domain names. And
14 there is a relatively new supporting organization for
15 country codes.

16 And then you have these advisory
17 committees which are free-standing entities that give
18 advice to the board, including the Governmental
19 Advisory Committee, the at large, and the root
20 service system and security and stability advisory
21 committees.

22 Q. What is the difference between the

1 supporting organizations and the advisory committees?

2 A. The supporting organizations are supposed
3 to be the places where policy is formulated and made
4 in the bottom-up fashion, and then it's passed up to
5 the board. The advisory committees could intervene
6 in that policy making process, and give advice or
7 directions or memorandums saying how they think the
8 policy making should go. But fundamentally, the
9 policy making is supposed to be made in the
10 supporting organization.

11 Q. Now, the government advisory committee or
12 GAC is one of the advisory committees as you said.
13 What is the role of individual governments in ICANN?

14 A. Well, there is no role, really. They are
15 members of GAC, and advice is transmitted to the
16 board via the GAC. Obviously individual governments
17 can participate in various capacities. They can
18 speak into microphones at open forums. But they
19 can't be on the Board of Directors. And they are
20 required to funnel their advice through the GAC.

21 Q. And under the bylaws, who was responsible
22 for making recommendations on substantive policies

1 regarding GTLDs?

2 JUDGE PAULSSON: Beg your pardon?

3 BY MR. De GRAMONT:

4 Q. GTLDs?

5 A. I'm sorry, I missed the first part.

6 Q. I think you actually said it's the generic
7 name supporting organization that is responsible for
8 providing policy advice?

9 A. Right.

10 Q. Is there any government representation in
11 that organization?

12 A. No, they don't have a constituency, they
13 don't formally vote on the council of the supporting
14 organization, but they can participate and they have
15 liaisons who sometimes participate in working groups.

16 JUDGE PAULSSON: This drawing may give the
17 impression -- you may be right that the GAC makes
18 representations or gives advice to the Board of
19 Directors coordinate with other advisory organizations.

20 THE WITNESS: No, that would be
21 unintended. The two lines there. There should be
22 basically four independent lines coming up from each

1 of these advisory committees. Good call.

2 BY MR. De GRAMONT:

3 Q. Now, the bylaws provide that the GAC gives
4 advice to the board, are there any timing
5 requirements as to how that advice was provided?

6 A. The bylaws specify that the advice has to
7 be timely, and I think you can understand why that is
8 the case. You are not to have a chaotic process and
9 with respect to the policy making structure, you
10 would have to have advice in a time that is
11 coordinated with the other policy making entities.

12 Q. And the GAC has its own operating
13 principles, is that correct?

14 A. Yes, it does.

15 Q. And would you turn to tab 26, please?

16 A. Yes.

17 Q. And if you look at principle 30 on page
18 30, it states that GAC shall report its findings and
19 recommendations in a timely manner to the ICANN board
20 through the GAC?

21 A. Yes, it does.

22 Q. So GAC has a similar requirement in its

1 own bylaws to provide timely advice. Would you take
2 a look at principle 46 on page 10.

3 And principle 46 reads, advice from the
4 GAC to the ICANN board shall be communicated through
5 the chair. And principle 47 says the GAC shall work
6 to achieve consensus; however when consensus is not
7 possible, the chair shall convey the full range of
8 views expressed by members to the ICANN board.

9 So, the chair expresses the views of the
10 GAC and if there is a difference of opinion within
11 the GAC, the chair is obligated to pass those on to
12 the board.

13 A. That's right.

14 Q. And how does GAC provide advice to ICANN?

15 A. Basically, there is two ways. They issue
16 communiquees at the end of each meeting which
17 summarizes a bunch of policy positions or statements
18 that they might want to make. And if there's a more
19 focused area that they want to make advice, they
20 would issue what is now called a policy advice.

21 Q. Okay. Now, Professor, we heard in opening
22 statements this morning about the 2000 TLD round.

1 Are you familiar with that?

2 A. Yes.

3 Q. And can you briefly describe what that
4 was?

5 A. The 2000 round was a -- the initial
6 attempt by ICANN to add new top level domains. It
7 was framed as an experiment or what they called proof
8 of concept. And I was on the working group that set
9 the basic policy parameters for this round. One of
10 the big decisions that we made is that there were
11 somewhere between 6 and 10 new top level domains.

12 Q. So there was a limited number of TLDs to
13 be awarded?

14 A. That's right.

15 Q. And was there a competition for
16 sponsorship for TLDs?

17 A. It was not specified. You could be any
18 kind of top level domain to be in that round.

19 Q. Do you know if ICM submitted an
20 application for .xxx in the 2000 round?

21 A. Yes, they did.

22 Q. And do you know if it differed from the

1 one it submitted in the 2004 round which was at issue
2 in this case?

3 A. Yes, it differed in that the first round
4 it was considered to be a restricted, but unsponsored
5 top level domain. And in the second round, it was a
6 sponsored top level domain.

7 Q. Did the fact that the application was not
8 successful in 2000 have any bearing on the
9 application in the 2004 round?

10 A. No, ICANN made it explicit that when it
11 did not select one of these seven new top level
12 domains, that none of them were necessarily dead,
13 that they had simply not been selected in this round.
14 In this 2000 round.

15 Q. In terms of the procedures that were
16 applied in 2004, how did those differ from the
17 procedures applied in 2000?

18 A. There was a night and day difference.
19 Basically in the 2000 round, ICANN had almost no real
20 procedures for selecting top level domains and no
21 well defined criteria. And they got into a lot of
22 trouble for that. They embarrassed themselves by

1 trying to parade 40 different applications before the
2 board, giving three minute presentations to each of
3 these people who had spent hundreds of thousands of
4 dollars preparing their applications.

5 And then the board members would sort of
6 randomly react and say things like, "oh, I don't like
7 the way that sounds." And ultimately they made a
8 selection of seven based on some idea of mixing the
9 different types. And they were widely criticized for
10 that.

11 So in the next round, they did a very good
12 job of tightening up their procedures. Trying to
13 come up with objective criteria and defining them
14 very clearly and defining a process for evaluating
15 applications that was much more robust than the first
16 one.

17 Q. Would you please look at tab 12 in your
18 binder. And can you identify that document for us?

19 A. Explanatory notes. So this is the -- a
20 draft of the request for proposal sent -- I guess
21 it's the final one, right?

22 Q. It is the final RFP for the 2004 round

1 issued in December of 2003.

2 A. Yeah.

3 Q. And would you read the first highlighted
4 paragraph?

5 A. Applicants must read the selection
6 criteria carefully and structure their responses
7 according to the instructions for each section. The
8 selection procedure is based on principles of
9 objectivity, nondiscrimination, and transparency. An
10 independent team of evaluators will perform the
11 evaluation process. The evaluation team will make
12 recommendations about the preferred applications if
13 any applications are successful in meeting the
14 selection criteria.

15 Q. Is there anything in the RFP that says
16 that the applications will be assessed on criteria
17 not specified in the RFP?

18 A. No. It doesn't sort of have an -- I guess
19 an escape clause that says we might decide to do
20 something else.

21 Q. Do the criteria in the RFP say anything
22 about offensive content?

1 A. No, they don't.

2 Q. Anything about morality or public order?

3 A. No.

4 Q. Anything about public policy?

5 A. No.

6 Q. Could you read the second highlighted
7 paragraph?

8 A. The second paragraph says, based on the
9 evaluator's recommendation, ICANN staff will proceed
10 with contract negotiations and develop an agreement
11 reflecting the commercial and technical terms to be
12 agreed, although such terms maybe subject to further
13 amendment as appropriate.

14 Q. And what sort of procedure does that
15 describe?

16 A. That describes what we'll call this
17 two-step procedure, in which first they are saying
18 are you eligible, are you actually -- have the proper
19 business qualifications, the technical
20 qualifications. Are you actually a sponsored domain
21 and are you actually adding value to the internet.
22 And the second phase, once you have been deemed

1 eligible, you will negotiate the actual terms and
2 conditions of the contract.

3 Q. That's the technical and commercial terms?

4 A. Technical and commercial terms, yes.

5 Q. Now, did ICANN describe the process as a
6 two-step process in other official communications?

7 A. Yes, it did.

8 Q. And would you look at tab 10 in your
9 binder?

10 A. It looks like some meeting minutes from
11 Rome.

12 Q. And also it's March 2004, so a few months
13 after the RFP had been issued in December of 2003?

14 A. Yes.

15 Q. And by the way, do you know who Kurt Pritz
16 is?

17 A. Yes, he's one of the senior policy staff
18 members of ICANN. And I remember I was at Rome. He
19 was introducing the RFP to the public forums.

20 Q. And he begins speaking on page 11. And
21 I'd ask you to read the highlighted language on page
22 13.

1 A. Okay. Page 13: "This first round of the
2 process is to demonstrate involvement in the
3 community, technical competence, financial viability
4 and robust business model. After that, as I stated
5 before, we will enter into this commercial and
6 technical negotiation phase."

7 Q. It goes on to say, "as we said when we
8 launched the process that the sTLDs is not limited."
9 What does this language mean?

10 A. Again, it goes back to the determination
11 being made about eligibility first, and then
12 negotiation of technical and commercial terms second.

13 Q. Who was originally supposed to evaluate
14 those four sets of criteria, technical, business,
15 sponsorship and community?

16 A. There was to be expert evaluation teams,
17 if you don't mind another acronym, we call them ETs,
18 not because they are aliens, but because it's too
19 complicated to say evaluation teams, so they created
20 three of these evaluation teams. And they were
21 independent, their identity was kept secret so they
22 could not be lobbied and unduly influenced and they

1 would go off and evaluate the specific aspects of
2 each of those eligibility criteria.

3 Q. The idea was that once those criteria had
4 been deemed to be met, that the application would
5 then go on to technical and commercial contract
6 negotiations?

7 A. Yes.

8 Q. And by the way, once a contract has been
9 approved for technical and commercial negotiations,
10 is it the GAC's role to get involved in those
11 technical and commercial negotiations?

12 A. No. That's not public policy. The GAC's
13 role is very particularly limited to public policy.
14 And the proper way for them to get involved is to put
15 their policy constraints into the RFP, which is
16 what's happened with ICANN's new top level domain
17 policy which is being finalized now.

18 Q. And going back to the original committees
19 that are supposed to evaluate the criteria. Do you
20 recall how many applications were submitted to those
21 committees?

22 A. I think it was ten.

1 Q. And how many got past the independent
2 review committee on sponsorship?

3 A. The ET on sponsorship failed all but two
4 of the applications.

5 Q. They failed eight of the ten?

6 A. Yes.

7 Q. And what was ICANN's reaction to that?

8 A. The ICANN management, I think, was not
9 pleased that so many people had failed. They were
10 looking to open up the name space a bit more, and
11 they basically discarded the results of the
12 evaluation teams.

13 Q. Now, we heard Mr. LeVee, counsel, say that
14 ICANN could have stopped the process then and there.
15 Could it have stopped the process as to xxx and
16 proceed with the other TLD applicants that failed the
17 committee?

18 A. That would have been discriminatory
19 treatment. If they had at that point simply taken
20 the ET at its word and say you failed all these
21 comparable domains so they were out, I wouldn't be
22 here today, I wouldn't be supporting or in any way

1 involved in this case. But they didn't.

2 Q. In fact, they undertook to evaluate all of
3 the eight applicants that had failed based on
4 criteria that were applied in the same fashion to
5 each of those applicants?

6 A. Yes, essentially they took it out of the
7 hands of the ET and the board looked at each of these
8 applications and listened to them some more and
9 basically liberalized their approach to the
10 sponsorship criterion and went on to pass all of
11 them.

12 Q. And in fact, ultimately the board
13 concluded that the ICM application met the
14 sponsorship criteria; isn't that true?

15 A. That's right.

16 Q. Would you turn to tab 17 of your binder.

17 A. Okay. This is the June 1st -- the minutes
18 of the board meeting of June 1, 2005.

19 Q. And would you read the highlighted
20 paragraphs?

21 A. Resolved: The board authorizes the
22 president and General Counsel to enter into

1 negotiations relating to proposed commercial and
2 technical terms for the .xxx sponsored top level
3 domain with the applicant. Resolved: If after
4 entering into negotiations with the xxx TLD, the
5 president and General Counsel are able to negotiate a
6 set of proposed commercial and technical terms for a
7 contractual arrangement, the president shall present
8 such proposed terms to this board for approval and
9 authorization to enter into an agreement relating to
10 the delegation of the sTLD.

11 Q. Now, in your expert statement, you state
12 that that represents a decision that the board had
13 determined that ICM met the criteria. How did you
14 know that?

15 A. Yes. First of all, that was the process
16 as it was understood and by many different
17 applicants. And I was talking to, for example, the
18 .mobi people and .jobs people, and both of them went
19 through this process and when they were deemed
20 eligible and started negotiating contract terms, they
21 said that that was the end of the eligibility issue.

22 But in particular, their statements from

1 board members which very clearly state that this
2 June 1 vote was perceived by the board members
3 themselves as resolving the debate over the
4 eligibility of the xxx application.

5 And in particular, Vint Cerf made a
6 statement before the GAC when he was defending the
7 decision to authorize or to deem xxx eligible, and so
8 did board member Joi Ito in his blog. I think the
9 critical issue is that there had been a vigorous
10 debate about whether ICM qualified as a sponsored
11 domain. Nobody questions that. And the board vote
12 was taken to resolve that issue. If they thought
13 that xxx was not a sponsored domain at that time,
14 they could have and should have voted it down.

15 Q. Let's take a look at a couple of the
16 statements that you referred to and let's start first
17 with Mr. Ito's blog which is at tab 29 of your
18 binder.

19 A. Okay.

20 Q. And who is Joi Ito?

21 A. He is an entrepreneur who was on the board
22 at the time of this June decision.

1 Q. And the blog is dated June 3, so it's two
2 days after the vote, and would you read the
3 highlighted language on page 2?

4 A. Yes, it says, "our approval of .xxx is a
5 decision based on whether it met the criteria, and
6 does not endorse or condone any particular type of
7 content or moral belief. This is not the role of
8 ICANN."

9 Q. And you also mention Dr. Cerf's comments
10 in Luxembourg, would you turn to tab 18?

11 JUDGE TEVRIZIAN: What was that last
12 Exhibit?

13 THE WITNESS: 29, was it?

14 MR. de GRAMONT: You mean the blog, Judge?
15 The blog is tab 29.

16 JUDGE TEVRIZIAN: Page 2, all right.

17 BY MR. De GRAMONT:

18 Q. Professor, do you have tab 18?

19 A. Yes, I have it.

20 Q. And can you identify that document?

21 A. That is the minutes of the GAC meeting in
22 Luxembourg.

1 Q. And would you turn to page 5, please?

2 A. Okay.

3 Q. And would you read the first highlighted
4 paragraph -- yeah, the first highlighted paragraph
5 quoting Dr. Cerf?

6 A. It says, Dr. Cerf added taking the example
7 of .xxx that there was a variety of proposals for
8 TLDs before, including for this extension, but this
9 time the way to cope with the selection was
10 different. The proposal this time met the three main
11 criteria, financial, technical sponsorship. There
12 were doubts expressed about the last criteria which
13 were discussed extensively and the board reached a
14 positive decision considering that ICANN should not
15 be involved in content matters.

16 Q. So he says, "the proposal this time met
17 the three main criteria, financial, technical,
18 sponsorship criteria. Do you see any ambiguity in
19 that statement?

20 A. No.

21 Q. This was more than a month after the vote?

22 A. Yes, this was in mid July.

1 Q. Was there any statement that ICM needed
2 more time to work through the various sponsorship
3 issues with ICANN?

4 A. No. There is no statement about that.

5 Q. And any caveats or conditions whatsoever?

6 A. No.

7 Q. Now, could you read the second highlighted
8 quote by Dr. Cerf?

9 A. Dr. Cerf replied that in practice there is
10 no correlation between the top level domain string
11 and the content. The TLD system is neutral, although
12 filtering systems could be solutions promoted by
13 governments. However, to the extent that governments
14 do have concerns they relate across top level
15 domains. Furthermore, one cannot slip into
16 censorship.

17 Q. What does that -- what do those words
18 mean?

19 A. To the best of my ability to interpret
20 them, I think he's saying that you can't really get
21 rid of pornography on the internet by censoring or
22 stopping a top level domain, the TLD system should be

1 a neutral coordinating role and ICANN should
2 basically manage the technical uniqueness of these
3 domains and not concern itself with the content, and
4 that governments could take some action to deal with
5 illegal or objectionable content on their own.

6 Q. And would you take a look at the top
7 highlighted paragraph quoting Mr. Twomey?

8 A. Yes. Mr. Twomey -- do you want me to read
9 it again?

10 Q. Yes, please.

11 A. Mr. Twomey replied that there might be key
12 policy differences due to learning experiences, for
13 example, it is now accepted not to put a limit on the
14 number of new top level domains. He also noted that
15 no comments had been received from governments
16 regarding xxx.

17 Q. And in fact, GAC had had many
18 opportunities to offer comments on ICM throughout the
19 entire process; isn't that true?

20 A. That's definitely true, yes.

21 Q. And would you turn to page 3 of the
22 exhibit that we have at tab 18? And would you read

1 the highlighted language starting with USA?

2 JUDGE SCHWEBEL: I need that tab of which
3 you just were. May I draw the witness's attention to
4 paragraph that follows, the quotations of Dr. Cerf's
5 remarks which reads, "Chile and Denmark asked about
6 the availability of the evaluation of the report for
7 .xxx and wondered if the process was in compliance
8 with the ICANN bylaws." Do you have any idea what
9 they were wondering?

10 THE WITNESS: Yes, I do, actually. The --
11 the evaluation reports there was some confusion and a
12 lot of contention between the board and the -- excuse
13 me, between Twomey, Dr. Twomey, the president of
14 ICANN and the GAC over the availability of these
15 evaluation team reports. I'm not sure of the details
16 here, but I think the applicants thought that these
17 reports were supposed to be kept secret and the GAC
18 was asking for these reports to be made public.

19 BY MR. De GRAMONT:

20 Q. And while we are on that point, just very
21 briefly, do you recall at some point much further
22 down in the process, the board ultimately issued the

1 evaluation reports for xxx, even though many of the
2 other contracts had been approved?

3 A. That's one of the reasons why this became
4 a contentious issue, was because once .xxx was
5 singled out as this big controversial matter the GAC
6 was demanding that the report for it be released, and
7 of course, it was a negative report. In the
8 meantime, three or four other top level domains who
9 also had negative evaluation team reports and a
10 sponsorship issue and had already been put into the
11 root. So there was an issue there with respect to
12 uniformity of procedures and so on.

13 JUDGE PAULSSON: To be pedantic, in your
14 answer to the Chairman, you stated that your view or
15 your knowledge is that the compliance with bylaws
16 issue being raised by Chile and Denmark were the
17 foundation for the reports?

18 THE WITNESS: Yes, and I think Chile and
19 Denmark had actually -- didn't -- well, I'm not
20 sure -- they should have understood that the original
21 plan in the RFP was to keep these reports not
22 displayed until they were applied uniformly to all of

1 the others, but I think there was some debate about
2 that issue even within ICANN, come to think of it,
3 whether they were going to be public or whether they
4 were going to be withheld because of some of the
5 commercial sensitivity in some of the information.

6 BY MR. De GRAMONT:

7 Q. The essential complaint between Chile and
8 Denmark was that in not making the report public
9 violated the transparency parameter?

10 A. Yes, that's correct.

11 Q. Going back to page 3, I will read the
12 language, it says, USA remarked that GAC had several
13 opportunities for its questions, namely at the
14 working group level and the process has been open for
15 several years. Can you tell us what that statement
16 means and what was made in response to that?

17 A. This is a very interesting statement
18 because it shows at this period the United States
19 government was actually trying to scare the GAC away
20 from blocking the .xxx application. The government
21 of the United States was basically telling the GAC,
22 "look, you guys had all kinds of opportunities to

1 comment on this and to make your desires known, and
2 you didn't. So we simply shouldn't be paying any
3 more attention to this issue," is the way I read
4 that.

5 Q. And in your expert statement, you observe
6 that there were, in fact, numerous opportunities for
7 GAC to comment; is that correct?

8 A. Absolutely. There were -- there were more
9 than a year's worth of public comment capabilities.

10 JUDGE TEVRIZIAN: Doctor, going back to
11 page 5, after the Chile and Denmark paragraph, there
12 was remarks by Brazil, Mr. Twomey, share, and it went
13 on and on, and it appeared this was not a dead issue.
14 Am I reading something in here that I shouldn't be
15 reading?

16 THE WITNESS: No. I think one of the
17 things you have to understand about the background of
18 this, is what's going on at the same time as this
19 discussion in ICANN is the World Summit on the
20 Information Society. And this, as I explain in my
21 statement, was for the rest of the world who didn't
22 like the ICANN model and didn't like the United

1 States to sort of gang up on ICANN and try to somehow
2 bring it under intergovernmental control or at least
3 to eliminate the unilateral U.S. position over it.

4 And the leader of that movement within the
5 World Summit was the government of Brazil. The
6 government of Brazil was the one that was complaining
7 most loudly about the ICANN model and about ICANN's
8 supervision by one government. So what Brazil is
9 doing here is saying, look, here's a perfect example
10 of how this ICANN model is no good, it's being
11 abused. You are going to make a decision with public
12 policy consequences, and we really would -- don't
13 want to be associated with that. The Brazilians were
14 very interested in using this issue to embarrass the
15 United States government, and put it on the defensive
16 going into the WSIS negotiations.

17 JUDGE TEVRIZIAN: My point is regardless
18 of that atmosphere going on and that discussion going
19 on there was also a discussion that the GAC,
20 Governmental Advisory Committee, was still providing
21 input into the process, unless I am reading something
22 wrong here.

1 THE WITNESS: No, I think you are reading
2 it. Basically, they were providing untimely input.
3 They are saying, "now that you've already made a
4 decision, and now that we've been silent all during
5 the formulation of the RFP and all during the comment
6 process, somehow we want to interfere here." And
7 what I'm suggesting is that this has to do with the
8 politics of the World Summit in part.

9 BY MR. De GRAMONT:

10 Q. And just following up on that question,
11 Professor, of the GAC's 60 or so members, how many
12 actually expressed any reservations during the
13 Luxembourg meetings in July?

14 A. It would be a handful, four or five.

15 Q. Were they criticizing xxx per se or were
16 they criticizing procedural issues by which -- or
17 found that the xxx application had met the criteria?

18 A. They were not talking about the criteria
19 at all, the governments. They were talk about
20 whether or not it's good or bad to have a domain
21 devoted to pornography. I think it's an important
22 distinction, that once the GAC intervenes like this,

1 you are not talking about the RFP anymore, and you're
2 not talking about defined procedures, you are talking
3 about whether or not people like the idea of an xxx
4 domain.

5 Q. I would like to go back in time and talk
6 about the opportunities that GAC did have to provide
7 timely advice well before Luxembourg. And would you
8 take a look at tab 38 of your binder which is a
9 timeline. Now, when did the process for the 2004
10 round begin?

11 A. Depending on how you define "beginning of
12 the process" you can trace it all the way back to the
13 fall of 2002 when the GNSO was asked to make certain
14 decisions about the basic policy regarding governing
15 to the additions to the name space. And then based
16 on some policy decisions by the GNSO and the
17 chairman, the staff drafted an RFP and that was
18 posted in March of 2003.

19 Q. And those were posted for public comment?

20 A. Definitely, yes.

21 Q. And did GAC make any public comment?

22 A. Not that I know of.

1 Q. And then on June 24, 2003, ICANN posted a
2 draft of the RFP, and that was posted for comment?

3 A. Yes, that was posted for comment also.

4 Q. And were you aware of any input offered by
5 GAC on the criteria?

6 A. No.

7 Q. And then on December 15th, ICANN posts the
8 final version of the RFP. Is there any response by
9 GAC to that?

10 A. No.

11 Q. And then on March 19, ICANN posts the 10
12 applications it received and it posted those for
13 public comment; is that correct?

14 A. Yes, the ten applications were all posted
15 on the web and there were links to all of their plans
16 that were not commercially sensitive, and there was a
17 formal public comment period in the spring of that
18 year that followed this.

19 Q. And that announcement can be found at tab
20 13 of your binder. Let's take a look at that.

21 JUDGE TEVRIZIAN: Which did you say?

22 MR. de GRAMONT: It is tab 13, Judge.

1 BY MR. De GRAMONT:

2 Q. And that's the announcement and is .xxx
3 listed there for all to see?

4 A. It is.

5 Q. And the highlighted paragraph reads, "the
6 applications will be reviewed by an independent
7 evaluation panel beginning in May 2004. The criteria
8 for evaluation were posted with the RFP. All
9 applicants found to satisfy the posted criteria
10 would be eligible to enter into technical and
11 commercial negotiations." Again, is that another
12 affirmation of the two-step process?

13 A. I think so.

14 Q. Now, going back to the timeline. Did
15 ICANN's president send a letter to GAC asking about
16 the 10 applications on December 1, 2004?

17 A. Yes, he did.

18 Q. And when did the GAC president respond?

19 A. He responded basically four months later.
20 The GAC chair, that is, Tarmizi. And he said that I
21 think summarizing any discussions that had been going
22 on, he said no -- no member of GAC has expressed any

1 reservations in the GAC about any of the
2 applications.

3 Q. Let's look quickly at that document at tab
4 15. And the highlighted language says, "no GAC
5 members have expressed specific reservations or
6 comments in the GAC about the applications with the
7 sTLDs in the current round. Is that what you were
8 referring to?

9 A. Yes.

10 Q. And going back to the timeline on June 1,
11 ICANN finds that xxx meets the RFP criteria. On
12 July 2005, we have the Luxembourg meetings where
13 Dr. Cerf says that ICM met the criteria. And then
14 what happened next?

15 A. There was a complete change in the
16 process. On August 11, 2005, the U.S. Commerce
17 Department, Michael Gallagher, sent a letter to Vint
18 Cerf and Dr. Twomey asking them to delay any approval
19 of the xxx top level domain.

20 Q. Who is Mr. Gallagher?

21 A. Mr. Gallagher was the Assistant Secretary
22 of Commerce who was the head person in the NTIA,

1 which is the department of the Commerce Department
2 that supervises ICANN.

3 Q. And do you know how this letter came to be
4 sent?

5 A. Well, I think what happened is documented
6 by the Freedom of Information Act requests, and
7 essentially the June 1 vote that triggered a bunch of
8 lobbying campaigns by conservative religious groups
9 in the United States, and they sent the very large
10 number of e-mails to Commerce protesting a decision
11 and asking ICANN -- asking the Commerce Department to
12 stop ICANN from doing this.

13 Q. And before you are documents that were
14 obtained pursuant to the Freedom of Information Act
15 by ICM?

16 A. Yes.

17 Q. Would you take a look at tab 21.

18 And the e-mail with the date line of
19 June 20, 2005, at 7:32 a.m. is from Clyde Enslin. Do
20 you know who he is?

21 A. I think he's a public relations person
22 within the Commerce Department. I'm not sure.

1 Q. That was Mr. Gallagher who then writes the
2 letter in August?

3 A. Yes, including several staff members and
4 higher level people in the department.

5 Q. And it says, "as of midnight Sunday,
6 June 19th, by my count, the public affairs at
7 NTIA.com got the account set up on Friday June 16th
8 to accept e-mails regarding xxx had received 2,567
9 messages." It goes on to say, if you go to
10 www.FRC.org, go to the story of stop the porn
11 industry from expanding, and fill in the names and
12 address fields, FRC will automatically send messages
13 to both ICANN and Congress with the subject line
14 "stop the establishment of the xxx domain." Let's
15 look at the next e-mail which is tab 22. This is
16 several hours after the e-mail we just looked at.
17 And what's happening there?

18 A. This is about a meeting being set up
19 between the second ranking person in the Commerce
20 Department and some of these conservative groups, the
21 representatives of these conservative groups. The
22 Family Research Council, and concerned -- I can't

1 remember what CWF is.

2 Q. Concerned Women for America?

3 A. For America, that's right.

4 Q. And would you look at tab 20? And that's
5 an e-mail from a Mr. Schwein to Mr. Gunderson, and
6 Mr. Gallagher is copied. And that's a few days
7 earlier on June 16, and it says, "who really matter
8 in this mess is Jim Dobson, what he says on his
9 radio program in the morning will determine how ugly
10 this really gets. If he jumps on the band wagon, our
11 mail server may crash. My suggestion is that someone
12 from the White House ought to call him ASAP and
13 explain the situation, including that the White House
14 doesn't support the porn industry in any way, shape
15 or form including giving them their own domain." Who
16 is Jim Dobson?

17 A. Jim Dobson is a radio talk show host who
18 is known to hold conservative -- socially
19 conservative views.

20 Q. Did Mr. Dobson in fact jump on the band
21 wagon?

22 A. I think he did, yeah.

1 Q. Would you turn to tab 23?

2 And that's an e-mail dated August 5 from
3 Meredith Atwell to R. Leighton both at NTIA. And it
4 attaches a short document which is on the next page
5 and it's entitled, "United States control of the
6 domain name system."

7 A. Yes, this is a memo that Meredith Atwell
8 prepared. Margaret Atwell was one of the people at
9 NTIA directly responsible for supervising ICANN. I
10 think the interesting thing here is not the content
11 of his memo, but the position of the Commerce
12 Department clearly changing. If you look at the
13 e-mails exchanged in June and even in July, you find
14 that some of the Commerce Department and people in
15 the NTIA saying, we really have to explain to these
16 conservative activists that we don't tell ICANN what
17 to do.

18 And after this point, what she is doing is
19 basically preparing a memo saying, well, we can tell
20 ICANN what to do, and just to quote her here she
21 says, "for example, if the international community
22 decides to develop an xxx domain for adult material,

1 it will not go on the top level domain registry if
2 the U.S. does not wish for that to happen."

3 Q. And a few days after that, Mr. Gallagher
4 sends his letter asking for delay of the vote; is
5 that correct?

6 A. That's correct.

7 Q. Now, would it have been proper for ICANN
8 to delay its vote based on the request of a single
9 government?

10 A. No. The concept of policy advice from the
11 GAC indicates that the advice should come from the
12 Governmental Advisory Committee as a whole through
13 formal policy advice or communique.

14 Q. And would there have been any perception
15 issues for ICANN with respect to U.S. control if it
16 had simply acceded to the U.S. demand?

17 A. Would there have been perception issues,
18 you asked?

19 Q. Yes, how would ICANN have been perceived
20 in the international community if ICANN had simply
21 delayed the vote based solely on the U.S.
22 government's request?

1 A. Well, it would have been -- undercut its
2 legitimacy, it would have been a devastating blow to
3 ICANN's legitimacy, even by itself. But remember
4 again, this is right in the middle of the World
5 Summit on Information Society. The final
6 negotiations are going to take place in Tunisia in
7 November of 2005, and prep-cons that are
8 negotiating the final agreement are taking place
9 literally the next month in September. So for the
10 U.S. to simply step in and tell ICANN what to do
11 would have totally embarrassed ICANN and really
12 undercut the U.S. bargaining position in Tunisia.

13 Q. So did ICANN ask the GAC chair to also
14 write a letter requesting a delay?

15 A. Yes, it did.

16 Q. How do you know that?

17 A. I spoke with Sharil Tarmizi at the
18 Marrakesh meeting, and I asked him point blank if he
19 had been asked to do that and he admitted that he
20 had.

21 Q. And would you turn to tab 25? And is that
22 the letter that Mr. Tarmizi wrote the day after the

1 Gallagher letter?

2 A. Yes, it comes a day after the Gallagher
3 letter.

4 Q. Why would ICANN ask Mr. Tarmizi to write
5 that letter?

6 A. Well, as I explained before, it would be
7 very embarrassing and indeed devastating to ICANN's
8 legitimacy for it to be seen as simply acceding to
9 the demands of the U.S. government on a policy
10 matter. So I think what this letter did was it
11 provided a cover for the U.S. Commerce Department
12 letter.

13 Q. And do you know which letter was posted
14 first on the ICANN web site?

15 A. Yes, the Tarmizi letter posted first and
16 not only was it posted first, it was highlighted on
17 the front page of the ICANN web site, so that anybody
18 who entered that web site would see that the GAC
19 chairman had requested a delay of xxx. By way of
20 contrast, the U.S. Department of Commerce letter was
21 buried in the correspondence of the web site and no
22 mention was made of it on the web site, so in order

1 to find it, you would have to be looking for it.

2 Q. Was Mr. Tarmizi's letter a communication
3 on behalf of the GAC?

4 A. No. It was not.

5 Q. How do we know that?

6 A. Because Tarmizi himself wrote a subsequent
7 letter saying that.

8 Q. Would you turn to tab 27? And this is an
9 e-mail from Mr. Tarmizi to the GAC. It begins "some
10 of you may be approached by reporters wanting to know
11 your reactions about a statement I made to the
12 board." Several paragraphs later, it goes on to say,
13 "there is no GAC position on this issue. Therefore,
14 no statements from the GAC but only the GAC
15 chairman." And this is a month after the Luxembourg
16 meeting that we looked at earlier?

17 A. Yes. And it's four days or three days
18 after his August 12 letter to the Commerce
19 Department.

20 Q. And when had ICANN's -- I'm sorry, when
21 did ICM's application -- or rather when had its
22 contract been scheduled for a vote?

1 A. August 9.

2 Q. And in fact --

3 A. Wait a minute. I'm sorry, the contract
4 was posted on the 9th, and I think they were having a
5 vote on the 15th or 16th.

6 Q. And as a result of these letters, the vote
7 never happened?

8 A. Obviously, yes.

9 JUDGE PAULSSON: If I could interject just
10 -- part of my learning experience here today in the
11 explanation by -- Ms. Atwell's explanation for the
12 memorandum on the back of the e-mail, this is just a
13 question about the function of the internet she set
14 forth, fifth line from the bottom, the other
15 countries in the world do have an option of taking
16 control from the U.S., but it would require
17 redirecting all of the TLD sites to a different
18 development server. I'm struggling with what they
19 call it. Does that mean to different route servers?
20 Couldn't be one route server?

21 THE WITNESS: It shouldn't be the word
22 route, it should be root. R-O-O-T.

1 JUDGE PAULSSON: Okay. That's the
2 question, thank you.

3 BY MR. De GRAMONT:

4 Q. Professor, would you look at tab 28 of
5 your binder. And this represents page 94 of ICANN's
6 reply. And at paragraph 236, it says, "within days
7 of ICANN posting the proposed registry agreement,
8 Dr. Tarmizi wrote Dr. Cerf a letter expressing the
9 GAC's diverse and wide ranging concerns with the xxx
10 TLDs, concerns of those of the board, and requesting
11 that the board provide additional time for
12 governments to express their public policy concerns
13 before the board reached the final decision on the
14 proposed registry agreement." Now, based on the
15 e-mail we just saw that says GAC has no position on
16 this issue, this assertion is demonstrably false,
17 isn't that true?

18 A. That is definitely true. It's not a
19 letter from the GAC.

20 Q. And footnote 359, it says, the GAC
21 statements in August 2005 -- the GAC statements --
22 disprove ICM's contention that the GAC convened in

1 April 2005, an affirmative statement that the GAC was
2 declining to take a position on the xxx or any other
3 application. Again, Mr. Tarmizi's e-mail saying that
4 there is no GAC position shows that that assertion is
5 demonstrably false?

6 A. It is.

7 Q. So even in this proceeding, ICANN is still
8 adhering to the ruse that this was a communication of
9 GAC and not from Mr. Tarmizi?

10 A. They are.

11 Q. Okay. After the U.S. government
12 intervened and the ICANN board postponed the vote on
13 ICM's contract, what happened to ICM's application?

14 A. I'm sorry, you say, after this
15 intervention by the U.S. government, what happened to
16 the application?

17 Q. Yes.

18 A. Well, basically, it was deferred and let's
19 just put it simply, the whole process went off the
20 rails. The whole process as basically defined in the
21 RFP was thrown out the window and the new process was
22 improvised. Public comments were reopened, the

1 information that we had discussed earlier about the
2 evaluation teams was released for xxx and the process
3 of negotiating the contracts was actually put in
4 front of the GAC, rather than with the staff and you
5 know, in a variety of other ways, the whole RFP
6 process simply broke down. There was no more real
7 process.

8 Q. And ultimately, on March 30, 2007, the
9 ICANN board rejected the application?

10 A. That's right.

11 Q. Would you turn to tab 33 in your binder.
12 And could you identify that document?

13 A. Yes. This is the adopted resolutions for
14 the board meeting in Lisbon where xxx was finally
15 voted down by the board.

16 Q. And on page 2, it sets forth five bullet
17 points which were the asserted reasons for rejecting
18 the application?

19 A. Yes, I see that.

20 Q. What relation do these five bullets have
21 to the criteria set forth on the RFP?

22 A. There is almost no relationship. The

1 first comment about sponsorship is really the only
2 one that relates to criteria.

3 Q. We will come back to that. I want to pick
4 up on a question that Judge Tevrizian asked this
5 morning. Does the composition of the board allow the
6 board to retroactively change the criteria as set
7 forth in the RFP?

8 A. No, because the approval of new top level
9 domains is supposed to be governed by the policies
10 and procedures within the RFP, not by the personal
11 opinions of the board members. So the fact that the
12 board composition changed, the board members were
13 supposed to continue to apply the same criteria to
14 the applications as the RFP that binds it.

15 JUDGE TEVRIZIAN: Clarification. I didn't
16 ask if the criteria changed, I asked if the votes
17 could change.

18 THE WITNESS: If the votes could change --
19 well, the votes did change, yeah.

20 BY MR. De GRAMONT:

21 Q. I guess could the votes -- could ICANN
22 have reversed its earlier determination that the

1 criteria had been satisfied, because new members of
2 the board had come on to the board?

3 A. Well, I don't think it could do that and
4 remain consistent with its process and its bylaws.
5 What I think happened here is that the new board
6 members were basically put into a completely
7 different environment and they were asked a different
8 question than what they were supposed to be asked.
9 They were asked, do you like the idea that .xxx
10 domain, do you support it. And they weren't asked,
11 has this met the criteria.

12 Q. Is there any evidence that the board as it
13 was making this vote had the audit criteria in front
14 of it?

15 A. No, actually there was none. I don't know
16 if you want to go into this detail, but if you look
17 at the statements the board made when they were
18 voting in Lisbon, it's quite remarkable, because only
19 three or four of the comments that the board members
20 made as they voted down xxx mentioned sponsorship.
21 The majority of the comments talked about content
22 regulation and other issues, and did not specifically

1 mention xxx not meeting the sponsorship criteria.

2 JUDGE TEVRIZIAN: Was this done
3 universally at -- for example, if there's a pending
4 matter before the board supervisors and a new -- one
5 or two new supervisors come aboard and the vote
6 changes, how do you count the votes at the end
7 matters, not how you count the votes along the way.

8 THE WITNESS: I think you are assuming
9 that the process was still open. So, if you are a
10 board of county supervisors, and you decided to award
11 a contract to a garbage removal firm, and you deem
12 that, you know, three applicants are eligible, and
13 then you decide after you voted that this person is
14 suddenly noneligible. I think that's what the
15 complaint is here.

16 BY MR. De GRAMONT:

17 Q. Mr. Tevrizian, a procedural question, do
18 the panel's questions count against our time?
19 Because if they do, I will try to wrap up pretty
20 quickly in any event, but it would be helpful for our
21 time keeping purposes.

22 JUDGE TEVRIZIAN: I didn't mean to cut

1 into your time.

2 BY MR. De GRAMONT:

3 Q. No, I don't --

4 JUDGE SCHWEBEL: Do you have a comment on
5 this?

6 MR. LeVEE: I understood that the parties
7 had allocated a specific amount of time for the week.
8 I knew that the panel would be asking questions, so I
9 certainly anticipated that while Dr. -- Professor
10 Mueller was on direct that time counts against ICM,
11 and while he's on cross that time counts against
12 ICANN. And if the panel asks questions at any point
13 in time, it's counted against whoever is at the
14 lectern because we have a specific amount of hours to
15 meet.

16 JUDGE SCHWEBEL: Does that strike you as
17 fair enough, Mr. Ali?

18 MR. ALI: Yes, it does.

19 JUDGE PAULSSON: Unless the tribunal is
20 being abusive.

21 MR. LeVEE: I withdraw any motion that
22 might have been made by anyone in that respect.

1 BY MR. De GRAMONT:

2 Q. Dr. Mueller, you testified that you were
3 following the process at the time. Why?

4 A. Which process?

5 Q. The whole xxx process.

6 A. Yes. Yes. I was interested in xxx not
7 because I really cared if there was a xxx top level
8 domain, but because I viewed it as a very important
9 test of ICANN's independence, that I knew this was an
10 interesting and controversial stance for it to take,
11 and I was very pleased when this June vote was held,
12 because it showed to me that they were indeed
13 functioning the way they were supposed to, you know,
14 which was apply your criteria in a neutral and
15 objective fashion. And I was very upset when the
16 U.S. government intervened and reversed that
17 decision.

18 Q. Did you write about that on your blog?

19 A. Yes, I wrote about it in many different
20 places.

21 Q. And did you put together a letter and
22 petition to send to ICANN?

1 A. I did. Immediately after the Commerce
2 Department letter was sent, I assembled a group of
3 people that were experts in internet governance, and
4 got them to sign on to a letter. And at that time,
5 we were assuming that ICANN was sort of being -- was
6 unwilling to go along with this, and needed some
7 support to maintain its independence, so we thought
8 that it would help to have a letter sent to them
9 saying, you know, we support the decision you made in
10 June, we think you should resist external
11 interference and that was a very sort of pro-ICANN
12 move at the time.

13 Q. Were you paid to take those positions at
14 that time?

15 A. No.

16 Q. Why did you take them?

17 A. Again, I am an expert in internet
18 governance. I followed this process closely and if
19 people who don't -- the people who understand what's
20 going on don't stand up and inform the public about
21 some major wrong turn being made, who will?

22 So as an academic who studies in this

1 area, it seems to me at first I was the only one who
2 understood the significance of this. Many people
3 were deceived by the Tarmizi letter, this is a formal
4 GAC action. He is being requested by the GAC not by
5 the U.S. So I thought it incumbent upon me to make a
6 point of this.

7 MR. de GRAMONT: Nothing further. Thank
8 you.

9 MR. ALI: Judge Schwebel, may we take a
10 short break and allow the witness to take an
11 environmental break and come back.

12 JUDGE SCHWEBEL: Let's have a break for
13 ten minutes.

14 (Recess.)

15 CROSS-EXAMINATION

16 BY MR. LeVEE:

17 Q. Professor Mueller, when were you first
18 retained by ICM with respect to any aspect of
19 this .xxx proposal?

20 A. I think just recently in connection with
21 this proceeding, I was asked to be an expert witness
22 by Crowell & Moring, not by ICM.

1 Q. So you are testifying today as an expert
2 witness, correct?

3 A. Yes.

4 Q. And you are giving your opinions in many
5 respects with respect to meetings you did not attend,
6 correct?

7 A. Yes.

8 Q. And so, for example, you did not attend
9 the GAC meeting in Luxembourg?

10 A. I did attend the open public meeting.

11 Q. But not the closed meeting?

12 A. No.

13 Q. And you were not personally involved in
14 the NTIA e-mail exchange that you testified about --

15 A. No, of course not.

16 Q. So, let me start with tab 18 of the book
17 that your counsel gave you.

18 A. Okay.

19 Q. These are the GAC minutes from Luxembourg
20 July 11 and 12, 2005, and you interpreted those
21 minutes during your direct examination. And just to
22 be clear, you were not in attendance in this meeting,

1 correct?

2 A. Yes, as I said.

3 Q. All right. So when we looked at page 5,
4 there was some highlighted text, and then Judge
5 Tevrizian asked you to take a look at what Mr. Twomey
6 said and what Dr. Cerf said, portions, that is, that
7 were not highlighted. Wouldn't it be a fair
8 characterization of what Dr. Twomey said and what
9 Dr. Cerf said is that the issues weren't over and
10 that the GAC could still have time to communicate
11 with ICANN its views on the .xxx application?

12 A. No, I wouldn't accept that interpretation
13 at all. I think that what Cerf and Twomey are trying
14 to tell the GAC is that they had a chance to, you
15 know -- here's a quote, with reference to the
16 procedure in the GAC bylaws, GAC could bring matters
17 to ICANN's attention. Dr. Cerf invited GAC to
18 comment in the context of the ICANN public comments
19 process. So the public comments process was a year
20 over.

21 Q. So your interpretation of that paragraph
22 is that the GAC could not, according to Dr. Twomey

1 and Dr. Cerf, it was too late for the GAC to get
2 involved?

3 A. It was too late for them to get involved
4 in the xxx -- actually, in the 2004 round. It was
5 not too late and indeed much of the discussion in
6 Luxembourg, if you read this material carefully,
7 centers on future processes for new top level
8 domains.

9 Q. But the context of what we are reading
10 here and I'm trying not to argue with you, because we
11 are both just reading the text ourselves, but when I
12 read the text, it looks to me like Dr. Twomey and
13 Dr. Cerf are saying, if the GAC has issues,
14 Mr. Twomey is saying that bylaws could work both
15 ways, the GAC could bring matters to ICANN's
16 attention. Dr. Cerf invited the GAC to comment in
17 the context of the public comment process. Looks to
18 me like they are saying, you still have time to
19 comment on the .xxx application. You are saying you
20 disagree with me?

21 A. I still don't agree. And when Dr. Cerf
22 brings xxx into the discussion, he says taking the

1 example of xxx, and he goes on to how they met the
2 criteria. So what I interpret this discussion as and
3 remember the GAC is in process of initiating a policy
4 advice on new top level domains and this came out in
5 2006.

6 So what I think the subtext of the
7 conversation, and I have to agree with you it's a
8 matter of interpretation, but my interpretation is
9 the GAC is saying, we are not very happy with this
10 xxx thing -- not the GAC maybe but some governments
11 in GAC, and they are talking about next time how can
12 you fix this process?

13 Q. Let me ask a bigger picture question,
14 Dr. Mueller. Wouldn't it be fair to say that you
15 have been one of the more vocal ICANN dissenters
16 since ICANN was formed?

17 A. I would be better able to answer that if
18 you explain what you mean ICANN dissenter.

19 Q. Can you think of anyone who has been more
20 critical of ICANN than you in the last ten years?

21 A. Yes, I can think of several people.

22 Q. Who?

1 A. For example, Carl Auerbach, a former board
2 member and Dr. Froomkin, Dr. Michael Froomkin who is
3 another law professor who has been much more critical
4 of ICANN and actually much less participating in this
5 process.

6 Q. Anybody else?

7 A. Yes, I can name people, but they are not
8 very prominent.

9 Q. You have written frequently on ICANN since
10 1998, right?

11 A. Yes.

12 Q. And wouldn't it be fair to say that the
13 overwhelming majority of those articles have in fact
14 been critical of ICANN?

15 A. Yes, I would say that many of them are
16 dealing with the same issues.

17 Q. Well, let's cover a couple of them. Let's
18 start back in the summer of 1998, you covered it a
19 little bit in your direct examination. The United
20 States Department of Commerce adopted a plan to enter
21 into an agreement with some new entity to privatize
22 the domain name system, correct?

1 A. Yes.

2 Q. And you mentioned that you were a member
3 of a group called the Boston working group, correct?

4 A. Uh-huh.

5 Q. But what you didn't mention in your direct
6 was that the Boston working group actually submitted
7 a proposal to be the new entity, right?

8 A. No, that is incorrect. Nobody in the
9 Boston working group wanted to be ICANN. What the
10 Boston working group submitted was an alternative
11 approach to the articles of incorporation. That's
12 very clear. I can state without any qualification
13 that none of the people involved in Boston working
14 group, least of all myself wanted to incorporate and
15 be recognized as the new co in the white paper.

16 Q. You submitted a form of bylaws and
17 articles for the new proposed corporation, right?

18 A. Yes.

19 Q. And at that time you submitted those
20 bylaws and articles, the person you were submitting
21 them to actually was Becky Burr, correct?

22 A. Again, I did not submit the bylaws, Peter

1 did, and Karl Auerbach did, but I imagine they sent
2 them to Becky. What they sent them to, if I recall,
3 was an open public comment process which Becky Burr
4 was responsible for.

5 Q. Let me ask you to take a look at
6 Exhibit CQ in your binder?

7 A. In your --

8 Q. The one that I -- yes.

9 A. CQ. Okay.

10 Q. Why don't you tell the panel what that
11 document is?

12 A. Yes. This is an e-mail that was sent out
13 in this case I think by me to a discussion list. And
14 this is an analysis and critique of the ICANN
15 proposal by the Boston working group.

16 Q. Now, it says -- it's written from your
17 e-mail address, right?

18 A. It was sent from my e-mail address.

19 Q. And it is addressed to Becky Burr?

20 A. Yes. The letter is addressed to Becky,
21 uh-huh.

22 Q. And in this letter, you urged Ms. Burr on

1 behalf of the Boston working group to reject the
2 bylaws and articles that ICANN had proposed as part
3 of the new entity to privatize the internet, wouldn't
4 that be fair to say?

5 A. We proposed specific -- specific critiques
6 and I think they proposed specific amendments that
7 needed to be made.

8 Q. Okay. Let's look at the second page.
9 About three paragraphs down, you say -- "we continue
10 to strongly oppose reserving half the board seats or
11 SO nominees." SO is supporting organization?

12 A. Correct.

13 Q. "We oppose making SOs the sole initiator
14 of policy and allowing the same people who are making
15 policy to review and vote upon their own proposals."
16 Did you write that?

17 A. No.

18 Q. Who wrote that?

19 A. Probably Karl or Peter.

20 Q. Did you disagree with it?

21 A. Another person involved, another lawyer
22 was Tamara. And basically I agreed with that at the

1 time, but I think today I might not agree with that.

2 Q. But at the time, your view was that the
3 supporting organizations of ICANN should not nominate
4 board directors, correct?

5 A. That was the position, yes.

6 Q. And the Commerce Department rejected your
7 position, correct?

8 A. Yes, they did.

9 Q. Okay. And so even today, ICANN's
10 supporting organizations nominate board directors?

11 A. Yes, uh-huh.

12 Q. Now, a year later, in 1999, you wrote an
13 article that assessed ICANN's first year. Let's take
14 a look at Exhibit CR. And by the way, when I say
15 Exhibit CR, Judge, these are the exhibits as we
16 marked them in evidence.

17 A. Uh-huh.

18 Q. With me?

19 A. Yeah.

20 Q. And what is this article, Professor
21 Mueller?

22 A. This is the first article I think

1 published about ICANN that I published about ICANN.

2 It was published in "Info" which was a new journal,
3 very new journal at the time.

4 Q. Let me ask you to take a look at page 498,
5 as the third sheet of paper.

6 A. Okay.

7 Q. About 2/3 of the way down, you say, "this
8 paper is an attempt to assess one year after the
9 formation of ICANN, the so-called privatization of
10 internet administration." Do you see where I am?

11 A. Yes.

12 Q. Another sentence later you say the white
13 paper -- that's the paper that the Department of
14 Commerce issued, right?

15 A. Yes.

16 Q. "The white paper and ICANN were not
17 products of a coherent philosophy of regulation but
18 poorly thought out improvisations." That's what you
19 wrote at the time, right?

20 A. Yes.

21 Q. Do you still believe that today?

22 A. Yes.

1 Q. Now, in that same paper, let's go to page
2 499, you state, "by abdicating --" I'm in the first
3 paragraph, I will ask Kate to highlight it. "By
4 abdicating its responsibility to define the scope and
5 the limits of the rights involved and the assets that
6 were being transferred to ICANN, the U.S.

7 government's 'self-regulation' policy has engendered
8 confusion, conflict and delay." Did you write that?

9 A. Yes, I did.

10 Q. So what you were saying is you thought the
11 Department of Commerce had done a terrible job with
12 respect to ICANN. Isn't that what you were thinking
13 at the time?

14 A. What I was thinking at the time is right
15 there in the words, you don't have to add words like
16 "terrible job." I think it's very clear what I'm
17 saying.

18 Q. Okay. Do you disagree with my
19 interpretation.

20 A. Yes, I do. I think it's not as precise as
21 I formulated it in the article.

22 Q. Now, one of the things that you wrote in

1 the article is that you were not happy that ICANN had
2 even created the Governmental Advisory Committee,
3 isn't that right?

4 A. Yes.

5 Q. And you were not at all happy that
6 governments were being given any channel into ICANN,
7 right?

8 A. I'm not sure about that. But definitely I
9 was a critic of the creation of the Governmental
10 Advisory Committee. I viewed that as a problem and I
11 think my predictions that it would create problems
12 have proven to be quite true. And I would also add
13 that the opinions that I had about ICANN's structure
14 in its early formative phase are not really relevant
15 to the question of how ICANN behaved in the ICM
16 situation.

17 In other words, the fact that let's say I
18 don't believe there should be an ICANN at all. Does
19 this alter the issue as to whether ICANN behaved in
20 the nondiscriminatory and fair manner in this
21 particular proceeding? Or I think that my comments
22 and my statements tried to evaluate the actions of

1 ICANN and the GAC within the framework of the
2 existing bylaws. So I'm a little bit concerned here
3 that I see this discussion of ancient history as not
4 really reflecting my views about the matter before
5 us.

6 Q. Obviously that's ultimately going to be
7 for the panel's determination. You are here as an
8 expert witness. I think you are biased. I think you
9 hate ICANN. And so my job is to show the panel what
10 I think. So let's keep going, and you are certainly
11 entitled to express your opinions.

12 JUDGE TEVRIZIAN: I think we should stay
13 away from --

14 MR. LeVEE: That was too strong. That was
15 too strong.

16 BY MR. LeVEE:

17 Q. I think generally you were disappointed
18 with the way ICANN performed. Let's look at page 20
19 of the article that you have in front of you.
20 Paragraph beginning "finally". It says, "finally
21 ICANN has failed to avoid an even more direct form of
22 government involvement: The sovereignty claims of

1 country code TLDs advanced by national governments.
2 Governments were given a direct channel in ICANN via
3 its Government Advisory Commission, GAC, and the GAC
4 has been used as the point of departure for declaring
5 the name space in a public resource." Did you write
6 that?

7 A. Yes, I did.

8 Q. And part of what you were doing is being
9 critical of the existence of the GAC, correct?

10 A. Yes.

11 Q. Okay.

12 A. Do you want some further elaboration on
13 the argument being made there?

14 Q. If you wish.

15 A. Yes. The theme of the article is the idea
16 of self-regulation which was a big issue of debate in
17 the scholarly literature on regulation at the time.
18 And the idea of self-regulation was to hold the
19 government back from directly controlling things. So
20 one of the themes of this article is that ICANN had
21 not succeeded in keeping governments out. That the
22 U.S. government was still there in a very powerful

1 role that it had pulled back a bit from its promise
2 to let go after two years, and that they were making
3 concessions to governments in respect to sovereignty
4 claims with respect to CCTLDs, and that they had
5 created this advisory committee which I predicted
6 would turn into essentially an organization that
7 would lobby for making governments more and more
8 powerful within ICANN, a prediction that I think has
9 been clearly borne out by the facts.

10 Q. Okay. Let me ask you to take a look at
11 Exhibit AN, which is in the same binder. This
12 appears to be an article entitled "What to Do about
13 ICANN: A Proposal for Structural Reform." Did you
14 write this article, Professor Mueller?

15 A. I wrote that with Hans Klein, I think.

16 Q. It is dated April 5, 2005, is that
17 correct?

18 A. Yes.

19 Q. And that is before any of the boards vote
20 on .xxx, correct?

21 A. Yes.

22 Q. And in that paper, you propose that the

1 memorandum of understanding, the document that
2 created ICANN that existed between the Department of
3 Commerce and ICANN which gave the Department of
4 Commerce an oversight role be replaced by a new
5 multilateral agreement with an international body,
6 correct?

7 A. Can you point me to where I say that?

8 Q. Sure. Why don't we look at page 5?

9 I will read, "these limits" and this is
10 your proposal, "these limits would be enforced by a
11 higher oversight body comprised of national
12 governments. The United States government's
13 supervision authority would be replaced with an
14 internationalized supervisory and dispute resolution
15 process that is minimal and light-handed. ICANN
16 would continue to administer internet resources, but
17 governments would have authority to make sure that it
18 does not abuse a carefully defined and delimited
19 mission." Is that what you wrote?

20 A. That's what we wrote, yes. Hans Klein and
21 I wrote that.

22 Q. Then in the next sentence, you say, "such

1 a system of top-down accountability would render
2 ICANN's Governmental Advisory Committee unnecessary."

3 A. Yes.

4 Q. Wouldn't it be fair to say that throughout
5 the time that you have been writing on ICANN, you
6 have opposed the existence of the GAC?

7 A. Yes. I think it's a -- it's a bad way for
8 governmental authority to mingle with the private --
9 private authority of ICANN, yes.

10 Q. And you understand that today ICANN's
11 bylaws require ICANN to consider the views of the GAC
12 on matters affecting public policy?

13 A. Yes, it's fully recognized within my
14 expert statement and you also need to remember that
15 the word "timely" is in that public policy advice
16 requirement.

17 Q. Yes. Now, specifically with respect to
18 the .xxx proposal, your view was that you do not
19 consider adult content to be a legitimate public
20 policy concern on which governments should be able to
21 comment on the GAC. Wasn't that your view?

22 A. I'm sorry, is that in this paper or are we

1 moving --

2 Q. I'm sorry, we are moving on.

3 A. Okay. So you --

4 Q. Repeat the question?

5 A. Repeat the question, please.

6 Q. Is it your view that adult entertainment
7 is not a legitimate public policy concern on which
8 governments should comment through the GAC?

9 MR. ALI: Excuse me, Judge Schwebel, if I
10 may. Previously when you asked the question you were
11 referring to the statement and now you are asking the
12 question in the abstract. Could you please clarify
13 to the witness which you are referring to.

14 MR. LeVEE: I apologize, I never was
15 referring to the statement. If I said so, I didn't
16 mean it.

17 BY MR. LeVEE:

18 Q. Just as a general matter, Professor
19 Mueller, is it not your view that you do not consider adult
20 content to be a legitimate policy concern on which
21 government should be able to make a comment
22 throughout GAC?

1 A. Adult content in general -- you understand
2 that ICANN is concerned with the domain name system
3 so it's not about a domain name, it's definitely true
4 that the GAC should not be addressing matters of
5 general content regulation. They should be
6 addressing that through their own national regulatory
7 processes of internet and mass media content.

8 To say that the governments should use the
9 GAC as a forum for expressing their views on content
10 regulation is a strange idea, because you have 200
11 governments all of them with completely different
12 policies about content regulation, all of them with
13 sovereignty over their own national
14 telecommunications infrastructure and their own
15 internet service providers. So of course, it would
16 be not legitimate. And I don't think even the GAC
17 members would use the GAC now as a forum for
18 expressing their views about content regulation in
19 general.

20 Q. You understood that the GAC's
21 responsibility was to address matters of public
22 policy to communicate the GAC's views to ICANN, that

1 is what the GAC was set up to do in the bylaws.

2 A. Let me correct you. The GAC's authority
3 is to deal with matters of public policy in the
4 domain name system. The GAC is not an international
5 treaty organization to regulate the internet. It is
6 an advisory committee within ICANN that gives them
7 advice about public policy pertaining to the domain
8 name system and internet addresses.

9 Q. Let me ask you to take a look at
10 Exhibit AO in the binder we gave to you. Could you
11 tell the panel what this document is?

12 A. This is, as I say, is the POLITECH. It's
13 an e-mail that is run by Declan McCullah, a
14 journalist. And as I say in the e-mail, it's a
15 screen.

16 Q. And is this a document you wrote?

17 A. Yes.

18 Q. Let me ask you to read the first, after it
19 says the see below, let me ask you to read the first
20 two paragraphs.

21 A. For those of you who hate ICANN, the flap
22 of the recall of the xxx domain ought to give you an

1 idea of how much worse the alternative is and will
2 be.

3 Now you want the entire second paragraph?

4 Q. Please.

5 A. You've got to know something is terribly
6 wrong with governments -- with governments as
7 governments -- when Brazil, France and the Bush
8 Administration agree on something this silly and
9 arbitrary. And agree they did. They agreed to turn
10 the internet's domain name administration into a
11 political football and milk it for all the political
12 capital they could, without giving the public the
13 tiniest benefit. They agreed that, five years after
14 the idea of an xxx domain was first proposed, we
15 needed more time to consider it.

16 "Just as ICANN seemed to be bringing some
17 rationality and impartiality into its selection of
18 top level domains, they agreed to trash all pretense
19 of having a defined process and objective criteria
20 and turn it all into a game of behind-the-scenes pull
21 and last-minute reversals based on arbitrary
22 assertions of power."

1 Q. So obviously your view was that these
2 governments should not have spoken at all, correct,
3 on this issue?

4 A. No. I think that they should have
5 followed the process and that they didn't, and that
6 they intervened outside of the process in a way that
7 was indeed arbitrary.

8 Q. Well, is that what you wrote here? That
9 the way that they went about it was silly and
10 arbitrary or that the governments got involved at
11 all?

12 A. I think it was about the way they got
13 involved.

14 Q. And what exactly was it about the way that
15 they got involved that you were objecting to?

16 A. Okay. Once again, it was not timely, it
17 was based on an attempt to make ICANN into a content
18 regulator. It was based on domestic politics. It
19 was based on exploiting the passion and politics of
20 the World Summit. Many things like that. That's the
21 way they got involved.

22 Q. And how did they express their

1 involvement?

2 A. How did they express their involvement?

3 Q. How did you know that Brazil and France,
4 just as an example, had expressed some type of
5 involvement that you characterized as silly and
6 arbitrary?

7 A. They spoke out at the World Summit of the
8 Information Society meetings. They spoke through the
9 press. They spoke through ICANN and ICANN meetings
10 and they discussed it.

11 Q. Was it clear to you in 2005 the question
12 of whether the xxx top level domain was going to go
13 forward? If that question was not clear --

14 A. I'm sorry, I didn't catch the --

15 Q. When you wrote this on August 15, 2005,
16 was it clear to you at the time that it was not clear
17 whether ICM would receive the .xxx top level domain?

18 A. Agree that it was not clear? Did I think
19 that it was not clear.

20 Q. Correct.

21 A. Did I think that the June 1 decision was
22 overturned? Yes, I obviously thought that this was a

1 very serious set back to the possibility of the xxx,
2 yeah.

3 Q. Okay. Let me ask you to take a look at
4 one of ICANN's -- one of the core values in ICANN's
5 bylaws. If you can bring that up, Kate, it's hearing
6 Exhibit 5. Probably on the next page.

7 JUDGE TEVRIZIAN: This is where the
8 confusion comes up. Exhibit 5?

9 MR. LeVEE: The reason is that ICM marked
10 this document as Exhibit 5. So ICANN just adopted
11 the Exhibit. So anything that ICM introduced
12 originally that ICANN was going to use, we used their
13 numbers.

14 JUDGE TEVRIZIAN: Those numbers originally
15 don't correspond with what we see here because in
16 Dr. Mueller's trial notebook, the use of the
17 Exhibit 5 there is a document entitled top level
18 domain.

19 MR. LeVEE: Yeah. I think that -- are you
20 referring to this document (indicating).

21 JUDGE TEVRIZIAN: Yes.

22 MR. LeVEE: This document is a

1 demonstrative exhibit. I don't know that ICANN has
2 given it an exhibit tab.

3 MR. de GRAMONT: Judge, when we present
4 the witnesses with binders, we use tab numbers and
5 then we identify the particular Exhibit number
6 assigned to it. So tab 5 might represent Exhibit 37.

7 JUDGE TEVRIZIAN: Okay.

8 MR. LeVEE: As an example, if you look at
9 tab 13, that ICM's counsel gave to you, at the very
10 bottom of the page, it says here in Exhibit 82. So
11 they are putting a book with tab numbers.

12 JUDGE TEVRIZIAN: I was using those
13 exhibits as a tab number.

14 MR. LeVEE: Yes, and we were not doing
15 that. Leave it at that.

16 JUDGE PAULSSON: Just by unfortunate
17 accident, 37 doesn't have corresponding --

18 MR. LeVEE: Exhibit 37 from the original
19 direct examination?

20 JUDGE PAULSSON: Yes.

21 MR. LeVEE: At the bottom it says hearing
22 Exhibit 277.

1 JUDGE PAULSSON: Most of the other ones
2 dutifully contain a C number. This unfortunately
3 doesn't.

4 MR. LeVEE: Yes.

5 MR. de GRAMONT: I'm sorry -- the ones
6 with the C were part of the claimant's memorial.
7 Exhibits that we added are simply called hearing
8 Exhibit. They continue where the memorial exhibits
9 stopped.

10 JUDGE PAULSSON: So the first number of
11 the hearing exhibit happens to be what?

12 MR. de GRAMONT: For example, if there is
13 an Exhibit C 37, that was Exhibit 37 to our memorial.
14 We added some exhibits beyond our memorial, and let's
15 say the last exhibit of the memorial was 300,
16 Exhibit 301 would be the newest one.

17 JUDGE PAULSSON: Thank you.

18 JUDGE TEVRIZIAN: For example, you have
19 tab numbered 12, that is hearing Exhibit 45.

20 MR. de GRAMONT: Yes, Your Honor.

21 MR. LeVEE: I don't know if we have
22 cleared it up, but may I continue?

1 JUDGE TEVRIZIAN: Yes. I apologize.

2 MR. LeVEE: Oh, no, good questions.

3 BY MR. LeVEE:

4 Q. So we are looking at ICANN's bylaws. And
5 let me ask you to take a look at core value number
6 11. And it says, "while remaining rooted in the
7 private sector"?

8 A. In the private sector.

9 Q. Kate's bringing it up for us. "One of
10 ICANN's core values is while remaining rooted in the
11 private sector, recognizing that governments and
12 public authorities are responsible for public policy
13 and duly taking into account governments' or public
14 authorities' recommendations." In your view, should
15 core value 11 simply be eliminated from ICANN's
16 bylaws?

17 A. Well, if you are asking me how to rewrite
18 ICANN's bylaws to tailor my own personal views and
19 opinions, I wouldn't eliminate it, I would amend it.
20 I would say something about how the governments
21 should provide a rule-bound oversight over ICANN.
22 We've talked in the internet governance project about

1 a framework convention. That's one idea. Some of us
2 have debated that idea, maybe pulled back from it a
3 little bit.

4 We talked about ending the JPA and various
5 plans for internationalizing or getting rid of the
6 governmental oversight authority. We talked about
7 having governments integrate into the supporting
8 organizations into the supporting process rather than
9 have their own little silo and sit there and talk as
10 governments. So I would make many structural changes
11 if I were God, and could redesign ICANN with a tip of
12 a wand.

13 Q. Now, you understand that the GAC did issue
14 a communique in March of 2006 concerning the .xxx
15 domain, correct?

16 A. Is that the Wellington communique?

17 Q. Yes.

18 A. Yes, it is.

19 Q. And I take it from your testimony that
20 that communique was untimely?

21 A. Yes, excuse me, considering that it came
22 after the board had voted for the eligibility of the

1 xxx, and had put up a negotiated contract on
2 August 9, 2005, I would say that it was a bit
3 untimely.

4 Q. And you understood that people disagreed
5 with your views?

6 A. Yes.

7 Q. Let me switch topics.

8 A. Excuse me, which people, I mean you
9 disagree obviously.

10 Q. If you understood that many of ICANN's
11 board members disagree with your views?

12 A. I'm not sure about that. I don't think
13 many board members were tremendously happy about the
14 intervention of the U.S. government and the GAC. And
15 I'm sure that there were people who -- particularly
16 the board members who voted against .xxx the first
17 time may have been happy that the governments
18 intervened.

19 But I think everybody understood that the
20 late and somewhat unordered intervention of the GAC
21 in this process was not a good thing for ICANN. Even
22 Vint Cerf has expressed his exasperation with how

1 long this process dragged out, and I would not agree
2 with the blanket statement that the board disagreed
3 that that wasn't a timely intervention.

4 Q. Well, the panel will hear from Dr. Cerf on
5 Wednesday and presumably will ask him that question.
6 Let me switch topics. You understood that some of
7 ICANN's board members were concerned that ICM's
8 proposed registry agreement would require ICANN to
9 get into the business of regulating content on the
10 internet, correct?

11 A. Yes, some of them expressed those
12 concerns, definitely.

13 Q. And in your report on page 21, you said
14 there is a strong consensus within ICANN that the
15 regulation of the content of web sites or e-mail
16 communications is far outside of its mandate. Now,
17 do you agree with that consensus?

18 A. Absolutely.

19 Q. Now, are you aware that ICM proposed in
20 its registry agreement that the registry would engage
21 a third party to monitor compliance with the
22 sponsored TLD?

1 A. If you don't mind me asking, was that part
2 of the contract before or after the GAC intervened
3 and insisted on the stronger content regulation
4 measures?

5 Q. After.

6 A. Okay. So, yes, I am aware of that.

7 Q. And in fact, let me ask you to take a look
8 at hearing Exhibit AM.

9 A. M as in.

10 Q. Mary?

11 A. Mary. Okay. There it is. Yes.

12 Q. And would you describe to the panel what
13 this document is?

14 A. This is one of the occasional papers
15 issued by the internet governance project addressing
16 the xxx issue written under the mistaken assumption
17 that ICANN was actually going to approve it.

18 Q. And you were the drafter?

19 A. I was the drafter, yes.

20 Q. Okay. So there is some italics and then
21 there is a first paragraph that begins with the
22 words, "let's begin." Do you see that?

1 A. Uh-huh.

2 Q. And it says, let's begin with the most
3 direct implication. .xxx contract sets an important
4 precedent by giving ICANN policy making and
5 enforcement responsibility over web site content.

6 Did you say that?

7 A. I did.

8 Q. Okay. And you understood, did you not,
9 that as we just discussed, that many people in -- at
10 the ICANN board thought that ICANN should not be
11 involved in web site content, right?

12 A. Yes.

13 Q. Okay. In fact, you wrote in this article
14 and I think it's on the next page. You say, and
15 things could be worse. Some might argue that
16 regulation of content is not something that should be
17 delegated to a private sector entity to begin with.
18 Content regulation, they might contend, is a public
19 policy issue that should be decided in a democratic
20 manner, not on the basis of ICANN's bottom-up
21 processes. And you go on to say that you disagree.
22 Correct? So you wrote that.

1 A. Yes, I wrote that.

2 Q. Wouldn't you say at the time, Professor
3 Mueller, that the consensus in the internet community
4 was that ICANN should not be regulating content?

5 A. Okay. I'm -- I'm clear about the bullet.
6 No, the internet community is a very broad term. I
7 don't know who the internet community is. If you are
8 saying that there was a consensus in ICANN, perhaps
9 among its board or others, probably there was a very
10 strong feeling that ICANN should not be involved in
11 content regulation.

12 What I think you are missing here is that
13 the reason the ICM contract was involved in content
14 regulation was because they had effectively been
15 forced to by the GAC's and U.S. government's
16 intervention to impose these conditions on the
17 contract which leads to the conclusion, number 1, if
18 you remember the reasons for rejecting the ICM
19 registry contract, one of them was that it didn't
20 effectively regulate content, and another one was
21 that it did regulate content.

22 So it seems to me that at this stage in

1 the game, this is more evidence of a totally broken
2 process. Not only has the GAC intervened and
3 completely changed the criteria. We have completely
4 lost sight of the original four criteria for
5 eligibility, but the ones they impose are
6 self-contradictory. They are saying you must
7 regulate content and you can't regulate content. How
8 can anybody fulfill these criteria?

9 Q. Isn't it the case, Professor Mueller, that
10 ICANN's bylaws prohibited it from regulating content?

11 A. I would not want to answer that question,
12 not as a, you know -- I certainly think as a policy
13 matter, I don't want them to regulate content. I
14 think most people at ICANN don't want to regulate
15 content, but I'm not sure its policy, its bylaws
16 prohibit it from doing so. Because in many respects,
17 the new TLD round is regulating content in various
18 ways. And again, the staff and the GAC seem to be
19 demanding that ICM regulate content. So I'm not sure
20 that it is prohibited by its bylaws.

21 MR. LeVEE: Then I'm going to end there.
22 Thank you very much.

1 THE WITNESS: Thank you.

2 MR. ALI: Mr. Schwebel, can we take a
3 couple minutes to see if there was a short redirect?

4 JUDGE SCHWEBEL: You would like a short
5 adjournment?

6 MR. ALI: A very short adjournment.

7 (Recess.)

8 MR. de GRAMONT: Just a few questions for
9 redirect, Mr. Chairman, if I may.

10 REDIRECT EXAMINATION

11 BY MR. De GRAMONT:

12 Q. Doctor, you were following up on the end
13 of your cross-examination.

14 What do you mean by content regulation?

15 A. I mean permitting certain kinds of images
16 or texts or videos being displayed on the internet.

17 Q. Now, ICANN's bylaws don't explicitly state
18 "thou shall not regulate content"?

19 A. As far as I know, they don't. I think one
20 of the core values implies it, but the bylaws don't.

21 Q. But their mission as stated in the bylaws
22 clearly does not encompass content regulation?

1 A. Right. Right.

2 Q. And its mission as articulated in the
3 articles clearly do not encompass content regulation?

4 A. Right.

5 Q. I want to make sure that we are very clear
6 on this two-step process and what happened before
7 June 1, 2005, and afterwards.

8 On June 1, 2005, the board found in your
9 view that the application met the criteria?

10 A. Yeah.

11 Q. And that was the end of phase 1?

12 A. Yes.

13 Q. And then came phase 2, where the technical
14 and commercial contract terms were supposed to be
15 negotiated?

16 A. Yes.

17 Q. And is it the GAC's responsibility to be
18 involved in the technical and commercial
19 negotiations?

20 A. No, the GAC -- again, public policy advice
21 does not mean vetoing applications, it doesn't mean
22 negotiating the prices or terms and conditions in

1 specific contractual terms. By any definition of the
2 concept of public policy, it means that the GAC sets
3 broad guidelines or rules, and ICANN is supposed to
4 follow them if it agrees to follow them.

5 Q. So as of June 1, 2005, under the
6 procedures that ICANN had established, the period for
7 evaluating sponsorship had closed and the board had
8 determined that ICM had satisfied those?

9 A. Yes, that's what the June vote was about.

10 Q. Mr. LeVee testified, I think, that you
11 hate ICANN -- it sounded like testimony, I think, to
12 me. I would like to read a few statements and tell
13 me if you recognize them. "ICANN has made major
14 improvements in its transparency, most notably
15 through the release of more detailed timely minutes
16 of board meetings and through some improvements in
17 the accessibility of information on its web site. It
18 has also made a good faith effort to implement some
19 of the advice of the One World Trust report. It has
20 taken steps to implement recommendations made by the
21 London School of Economics report on the
22 representative structure of the generic name

1 supporting organizations. There some of the most
2 important examples of ICANN's good faith efforts to
3 improve its processes and transparency." Do you
4 recognize those words?

5 A. Yes.

6 Q. Where do they come from?

7 A. They come from the internet governance
8 project's comments in an NTIA proceeding in which we
9 were asked to evaluate ICANN's progress, and I wrote
10 those words.

11 Q. And you wrote those words in
12 February 2008?

13 A. February 2008.

14 Q. "The root server agreement between ICANN
15 and the IC was published yesterday. As agreements
16 go, this is a good one." Do you recognize those
17 words?

18 A. Yeah, the ICANN's approach to the root
19 server system operators was something that we were
20 quite happy to see, how flexible and non-hierarchical
21 their approach was to that. So we praised them in
22 our blog.

1 Q. "From the ICANN does good department:
2 ICANN has released a report from Charles Rivers
3 Associates on the economic relationship between
4 registries and registrars. All in all, the report
5 takes a fairly cautious approach to its
6 recommendations and it's main benefits lie in
7 introduction of more vigorous analysis into the ICANN
8 policy dialogue." Do you recognize those words?

9 A. Yes, I wrote that in a blog. And we had
10 been criticizing ICANN for being a regulator of the
11 domain name industry without using expertise in
12 economics. And in that case, they were actually
13 doing some good reports on how to possibly
14 restructure the economic regulation of the domain
15 industry.

16 Q. And I asked you on direct, do you think
17 the notion of ICANN as a private regulator over this
18 space is a good principle?

19 A. Not only do I think it's a good principle,
20 I want to make it clear that I have spent ten years
21 of my life building the noncommercial constituency
22 within ICANN, and finally other people have been able

1 to take it over and make it run without my assistance
2 in the last two years.

3 You don't participate and build a part of
4 the organization if you believe that it's
5 fundamentally illegitimate and you want to tear it
6 down. And I'm constantly engaging in debates with
7 people who say that by participating in ICANN, I am
8 legitimizing it. And there are people who believe
9 that this model is fundamentally wrong, but I'm not
10 one of them.

11 Q. And why do you offer criticism of ICANN
12 from time to time?

13 A. Because it makes so many mistakes and --
14 and that's justifiable in the sense that it's an
15 experiment. It's a new thing under the sun and it's
16 potentially very important and potentially dangerous
17 thing, so it's important for people with expertise to
18 scream bloody murder when they think things are going
19 in the wrong way and to praise it when it's doing the
20 right thing.

21 Now, maybe the balance in my case is more
22 on the critical side than on the praiseworthy side,

1 but you need to be aware of the fact that ICANN
2 meetings are full of criticism of people, you know,
3 standing up at the microphone and just reading the
4 board the riot act. And there are bloggers and there
5 are people discussing things. There are lawsuits,
6 there are registrars.

7 Now, registrars are creatures of ICANN,
8 they wouldn't exist without ICANN accreditation, but
9 there are registrars that are suing, litigating
10 because of ICANN decisions regarding VeriSign and so
11 forth. So everybody is playing hard ball but
12 fundamentally they are part of the regime, part of
13 the system and their activities are intended to make
14 it better rather than to tear it down.

15 MR. de GRAMONT: Thank you.

16 MR. ALI: No further questions for this
17 witness.

18 JUDGE SCHWEBEL: Professor Mueller, we
19 want to thank you very much for your testimony which
20 has been most interesting. I'm so sorry, my
21 colleagues may have some questions to put. I should
22 ask them and I look first to Dr. Paulsson.

1 JUDGE PAULSSON: I will attempt a
2 philosophical question, and hope I get my
3 nomenclature straight. It's something that I was not
4 able to understand at the end. I thought there was
5 something unresolved at the end in my own mind trying
6 to figure out this point of view.

7 If we take -- if we simplified the social
8 issues of pornography by disregarding the darker
9 sides of it, questions about exploitation of weak
10 people and the like, but just imagined it as an
11 activity involving consenting adults, there still
12 would be a social debate as to whether between on one
13 side prohibitionists and non-prohibitionists and
14 there would be social values involved whether of the
15 existence of this kind of thing degrades social
16 values and some such. That you want to take out of
17 the ICANN process because it's a general social
18 debate which I understood from your report and your
19 testimony today you think belongs in the sovereign
20 purview of the governments who indeed regulate this
21 in various ways and can do so. It would be difficult
22 to do it universally. That I understand.

1 Now we look at what the internet itself as
2 an infrastructure space can do to social values
3 because of its inherent characteristics. And there
4 we have seen in this debate all sorts of positions
5 taken by various social activists and very frequently
6 strange bed fellows, where some of the opponents of
7 xxx include conservative social groups and people who
8 exploit X-rated.com sites. They seem to both want to
9 -- have combatted xxx. Where on the pro xxx side,
10 you have potentially conservative groups who believe
11 it might be easier to regulate if you can point to an
12 entire domain area where everything is X or xxx.
13 Well, that seems to me to channel an important social
14 debate about how the internet functions which
15 inherently cannot be the object of country-by-country
16 legislation because it's the internet which is
17 global.

18 How would you propose that that global
19 debate of the global community would be carried out
20 if ICANN governance is not able to do it or shouldn't
21 do it? Where is the situs of that particular debate?
22 You see I'm struggling with distractions but I hope

1 it's passing your --

2 THE WITNESS: No, it's a very good
3 question and certainly one that is pertinent to the
4 broader questions of ICANN policy as well as internet
5 governance. So I have two responses to your
6 question.

7 Number 1, xxx was an interesting way of
8 dealing with precisely that problem. You delegate to
9 a private actor that says, I'm going to have this
10 content under this domain, and I'm going to verify
11 that anybody who uses this domain is of age, and I'm
12 going to make sure that they conform to certain
13 standards of behavior.

14 So this private actor then is responsible
15 for admitting people into this circle. And it is
16 clearly demarcated, so people can easily block an
17 entire topical domain and deal with the whole thing.
18 They can monitor it for conforming to international
19 law. But it's an interesting experiment. I'm not
20 endorsing it and I'm not rejecting it. I think it is
21 wholly consonant with the ICANN model in dealing with
22 some of these things through the contractual

1 governance approach.

2 And I don't think that it requires any
3 special actions on the part of ICANN. I think the
4 premise of GAC and others was false. I think they
5 were using xxx as a proxy for the idea of pornography
6 in the abstract and saying if we beat on this enough,
7 we are showing the world that we are against
8 pornography, and you should vote for us, and isn't
9 that great?

10 Now, there is another response to you,
11 which is something I just wrote a chapter about in
12 the new book that I mentioned, and it's called
13 content regulation by network governance, and that's
14 where groups like the Internet Watch Foundation in
15 U.K. create their own block lists. And this block
16 list could then be transmitted to internet service
17 providers around the world who choose to use it. You
18 can advertise to the world, I'm an internet service
19 provider who adopts a list that's developed by the
20 Internet Watch Foundation that blocks, you know, most
21 of the world's child pornography, maybe not all of
22 it, maybe not all the time, doesn't stop all the

1 other things that child pornographers do underground,
2 but at least could be picked up and could be a
3 voluntary relationship between the ISP and their
4 customers, because you wouldn't have to subscribe to
5 this ISP, right?

6 So in those two ways, you have the problem
7 of global governance being solved -- not solved but
8 handled through delegation of private actors which
9 makes it more flexible in its approach and more
10 diverse in its approach.

11 JUDGE PAULSSON: Well, if -- let's imagine
12 that there is some type of global notion of what is
13 the proper balance of freedom and prohibition in this
14 area, as complicated as it might be, then the
15 question becomes, whether or not in seeking to
16 further the social policy, through the medium of the
17 internet, which can only be apprehended globally, is
18 the idea of a xxx domain conducive to achieving the
19 balance which has been arrived at politically or not?
20 Where is that debate ever going to be had under your
21 concept of internet governance?

22 THE WITNESS: Internet governance?

1 JUDGE PAULSSON: I don't think you
2 answered that question.

3 THE WITNESS: You are asking where the
4 debate takes place, not where the implementation of
5 the policy -- so the debate could take place in the
6 internet governance forum. This is something that
7 emerged on the World Summit on the Information
8 Society debates. In fact, the debate is taking place
9 in the IGF, the Internet Governance Forum. It has an
10 annual meeting and the child protection advocates and
11 the anti-censorship advocates are all there. They
12 haven't done the greatest possible job in terms of
13 getting those two groups to mesh their views, but
14 there is a forum that was created which is
15 non-binding and therefore everybody can come and
16 speak their mind, but that is one clearly demarcated
17 arena, it's the Internet Governance Forum. That's
18 where you talk about these things.

19 JUDGE PAULSSON: And what authority do
20 they have?

21 THE WITNESS: No, it doesn't have
22 authority because the creation of a hierarchical

1 topdown authority level for content regulation is not
2 feasible at this stage. There is no way you can get
3 China and the Netherlands and U.S. to agree on giving
4 an entity content regulation authority at a global
5 level.

6 JUDGE PAULSSON: Thank you.

7 THE WITNESS: If I could, I would just
8 supplement that with one other point. And you talk
9 about when a global community can agree on something.
10 Basically they have agreed on child pornography.
11 There is an international treaty on the rights of the
12 child and various minor differences in approach
13 country-to-country, but fundamentally child
14 pornography is transnationally illegal. And the
15 issue is just the enforcement resources, do they have
16 the ability to enforce the rules.

17 JUDGE SCHWEBEL: Well, if there are no
18 further questions, my colleagues, and no further
19 comments from counsel, I think we can move on.
20 Professor Mueller is discharged. We thank you very
21 much for your testimony.

22 THE WITNESS: Thank you.

1 (The witness is excused.)

2 JUDGE SCHWEBEL: It's now 5:30. Do you
3 wish to proceed to the next witness?

4 MR. ALI: Mr. Chairman, to start at 5:30,
5 we would need about an hour with direct. So we would
6 like to complete the direct examination if we do
7 start with it. Alternatively, we could perhaps start
8 a half an hour earlier tomorrow, if that would be
9 feasible, therefore we wouldn't have to have
10 Mr. Lawley sequestered over the evening.

11 JUDGE PAULSSON: That would only arise if
12 cross-examination is done.

13 MR. ALI: We would be going a half an
14 hour, if we are going to end at 6:00 unless we are
15 going until 6:30.

16 JUDGE PAULSSON: The question is whether
17 we extend 30 minutes. I think it has nothing to do
18 with sequestering.

19 JUDGE SCHWEBEL: Are you agreed?

20 JUDGE TEVRIZIAN: I would like to finish
21 him and get direct examination tonight, if that's
22 possible from 5:30 until 6:30.

1 MR. ALI: Okay. We will give it our best
2 shot.

3 JUDGE SCHWEBEL: Okay. Let's go from 5:30
4 to 6:30, please.

5 MR. ALI: We will just go get Mr. Lawley.

6 STUART LAWLEY,
7 was called as a witness and took the stand,
8 testifying as follows:

9 DIRECT EXAMINATION.

10 BY MR. MURINO:

11 Q. Please state your full name for the
12 record?

13 A. Stuart John Lawley.

14 Q. Where do you currently reside?

15 A. Palm Beach, Florida.

16 Q. What is your citizenship?

17 A. United Kingdom.

18 Q. What is your current position within the
19 ICANN registry?

20 A. President and CEO.

21 Q. Is that currently how you make your
22 living?

1 A. No, it's not.

2 Q. How do you make your living?

3 JUDGE SCHWEBEL: Could you speak a little
4 louder, please?

5 BY MR. MURINO:

6 Q. How do you make your living?

7 A. I have a significant investment portfolio,
8 property and investments. And I also run some
9 internet and technology related businesses. My
10 primary income from business at the moment is an
11 entity called Stimulus Medical, that deals with web
12 based electronic medical records for physicians.

13 Q. Please turn to tab 1 in your binder. This
14 is the witness statement you filed in this
15 proceeding.

16 A. Yes.

17 Q. Do you confirm the substance of this
18 written statement?

19 A. Yes, I do.

20 Q. Is there any part of this written
21 testimony you would like to amend here today?

22 JUDGE SCHWEBEL: Mr. Murino, would you

1 please speak up, as well as the witness.

2 BY MR. MURINO:

3 Q. Would you describe your educational
4 background?

5 A. Yes, I have a degree in mechanical
6 engineering from Imperial College, part of London
7 University.

8 Q. Could you describe for the panel your
9 professional background?

10 A. Yeah, I started, founded and run a
11 selection of technology-related businesses starting
12 from a small one man business, building it right way
13 through local, regional and national businesses in
14 the U.K. Probably my most significant business
15 venture to date was a company called Oneview.net
16 which was a business-to-business internet service
17 provider in the U.K. that ended up with 450
18 employees, and did a listing on the U.K. stock
19 exchange back in 1999.

20 Q. When did you move to the United States?

21 A. Late in 2001.

22 Q. Why?

1 A. Family reasons. I had by that time just
2 had a young son and I wanted to pursue business
3 opportunities here in the United States.

4 Q. In addition to your expertise successfully
5 growing tech companies, have you been involved in any
6 way in any businesses related to the adult
7 entertainment industry?

8 A. No.

9 Q. When did you first learn about ICANN?

10 A. Back in 1999, when I was running One View,
11 ICANN had recently been formed, and we considered
12 making an application to become part of their initial
13 registrars, but we decided against it at the time.

14 Q. When did you first start thinking about
15 submitting an application for the 2004 TLD realm?

16 A. Late in 2002. I had a chance meeting in
17 my son's preschool Halloween party parade, and I
18 bumped into a fellow named Michael Palage, who was
19 then one of the constituent members of ICANN. He
20 subsequently went on to become a board member. Then
21 he explained to me that ICANN was considering a
22 forthcoming TLD round.

1 Q. And you mentioned in your witness
2 statement that you researched proposals for the 2000
3 round and discovered the ICM registry application for
4 xxx. Why did this proposal stand out to you?

5 A. Two main reasons, one it was clear that
6 top level domain targeted adult content was going to
7 be very commercially successful, and secondly, the
8 application was very well written and very well put
9 together with some innovative ideas built into it.

10 Q. What did you learn about ICM's application
11 from the 2000 round?

12 A. That they had applied at the time. It was
13 a very short timeframe to apply, around six weeks, so
14 they had applied at the time as a restricted gTLD so
15 it was targeted at the community and they were asking
16 for ICANN for delegated policy making ability.

17 Q. Why did you later apply for a sponsored
18 TLD in .xxx?

19 A. Because that was really a natural
20 extension of the 2000 application. Obviously due to
21 time limiting factors in 2000, there was no time for
22 the company at that time to arrange a sponsored

1 organization and gather the support needed. So it
2 was clear that the application really was an sTLD and
3 really only as an sTLD could it be a win-win, a win
4 for targeted community and a win for the parents and
5 for the wider internet community as a whole.

6 Q. When did you decide to pursue the
7 application with the ICM Registry?

8 A. That would have been mid 2003.

9 Q. And what activities was ICM engaged in at
10 the time?

11 A. ICM was basically in hibernation. Jason
12 Hendeles, the original founder, was attending all of
13 the ICANN meetings, the regional meetings they hold
14 about three a year all around the world. And he had
15 been pretty much to everyone since 2000. And Jason
16 was all continuing his three year outreach campaign
17 to the adult industry, attending trade shows and
18 conferences and having face-to-face meetings with
19 members of the adult industry.

20 Q. And once you became involved in the
21 business in 2003, what role did you take with the
22 company?

1 A. I became chairman, CEO and president.

2 Q. And what were some of your first steps as
3 president of ICM?

4 A. The first steps were two-fold. One to
5 sort of beef up the management team in anticipation
6 of submitting a bid, and secondly to get Jason to
7 formalize the support from the target community that
8 he'd been garnering for the last three years.

9 Q. Under your direction, with whom did ICM
10 consult with to assist it with its 2004 application?

11 A. Range of groups and individuals. We went
12 out and hired outside counsel, Becky Burr of Wilmer
13 Hale, Wilmer Cutler at the time who was a very
14 prominent attorney in the ICANN space. She
15 previously worked for the DOC, the Department of
16 Commerce and she had been involved in creating ICANN
17 and putting it together and she was now in private
18 practice. So we thought there would be no one better
19 placed to help us craft the application and she was
20 very well known and respected by ICANN as well.

21 We consulted with Bob Corn-Revere, a noted
22 free speech attorney here in Washington, D.C. Davis,

1 Wright, & Tremaine. Lawrence Gordon, a major adult
2 industry attorney. Parry Aftab of "Wired Safety",
3 probably the largest child protection group in the
4 world. Steven Balkam, the CEO and founder of the
5 Internet Content Rating Association, which was in the
6 business of labeling for web sites. That is now
7 renamed the Family On Line Safety Institute, the
8 Center Of Democracy and Technology here in D.C. who
9 are very much into free expression on the internet.
10 The Progress and Freedom Foundation, another
11 Washington, D.C. think tank on internet matters.

12 Q. .xxx is intended to serve providers and
13 consumers of adult entertainment. Why did ICM engage
14 with experts outside the adult entertainment
15 industry?

16 A. Because the whole essence of the sTLD was
17 self-regulation and it was clear for that
18 self-regulation to be credible, that it would have to
19 be done in conjunction with the other impacted
20 stakeholders.

21 Q. What were your goals as you put together
22 ICM's new management team?

1 A. The combination of getting the best people
2 we could to submit the best application we could to
3 satisfy the criteria and to get a team that would
4 work with ICANN and be acceptable to ICANN.

5 Q. Have any members of ICM's team ever been
6 owners, investors, or providers of adult content
7 entertainment?

8 A. No.

9 Q. Mr. Lawley, in your witness statement, you
10 noted that although ICM had no direct connection with
11 the adult entertainment industry, ICM engaged in
12 consultation with the industry before beginning the
13 application process. Could you please describe these
14 consultations?

15 A. There was a series of three years we
16 attended the adult industry trade shows. We met with
17 many leaders in the adult industry, and we gathered
18 letters of support for them, for not only the
19 establishment of the sponsored top level domain
20 itself before the establishment of the policy making
21 full body being the sponsoring organization.

22 Q. What was the reaction of the industry to

1 this concept of voluntary self-regulation?

2 A. Many in our experience. Most of them
3 supported it. Some of them didn't like it at all.

4 Q. From the time ICM started preparing to
5 apply to the time ICM filed its application in March
6 2004, what costs had ICM incurred in its preparation
7 efforts?

8 A. Up to the point that we submitted the
9 application, we would have spent around \$500,000.

10 Q. Mr. Lawley, you spent a lot of time in
11 this case talking about sponsored top level domains.
12 What is your understanding of what a sponsored top
13 level domain is?

14 A. A sponsored top level domain is supposed
15 to serve the needs of a specific community and
16 develop policies for that community. And members
17 that join that community have to adhere to the
18 policies of the top level domain to retain the
19 membership of the top level domains. It's very much
20 like an association or club that people decide to
21 join or not to join and abide by the rules of the
22 club if they go ahead and join.

1 Q. What is your basis for understanding what
2 an sTLD is?

3 A. ICANN's definition is available on the web
4 site within the RFP itself and various announcements
5 and discussions of sTLDs by ICANN's executives.

6 Q. Can you briefly describe for the panel
7 what your proposal was for .xxx?

8 A. .xxx was intended to serve the needs of
9 the adult entertainment community, only those members
10 of the community that believed that a system of
11 self-identification would be beneficial, and that
12 were willing to enter into self-regulation in
13 conjunction with the other impacted stakeholders.

14 So they want -- the members of the adult
15 industry wanted to self-identify and self-regulate in
16 conjunction with the other stakeholders.

17 JUDGE TEVRIZIAN: I have a question.
18 What's the difference between the concept as you just
19 stated and a web site where people could basically
20 advertise through your web site.

21 THE WITNESS: What would the difference
22 be? The difference would be in the attraction to

1 people who were going to join our community that the
2 other web masters were going to join our community
3 and the reason many of them supported this is that it
4 would give the would-be surfer, the would-be consumer
5 of adult content before they decide to go to an adult
6 web site, they can decide to go to one in .com or
7 they can decide to go to one in .xxx.

8 And the advantage to the industry would be
9 that the consumer would know in advance that the web
10 sites under .xxx would be operating to a code of
11 conduct with, you know, a set of best business
12 practices and those sites would be labeled, et
13 cetera, et cetera, where as in .com, you would have
14 no knowledge whatsoever of what you were going to
15 find when you landed on the page.

16 JUDGE TEVRIZIAN: What happens if you had
17 a xxx web site, and in order to be displayed on that
18 xxx web site, you had a code of conduct, how would
19 that differ from a top level domain that you were
20 seeking to establish?

21 THE WITNESS: I'm not sure I understand
22 the question.

1 JUDGE TEVRIZIAN: Let's assume that you
2 wanted to establish the Lawley web site for adult
3 entertainment in which you had a code of conduct
4 before you could get on the Lawley web site. What's
5 the difference between that and a xxx sponsored top
6 level domain?

7 THE WITNESS: There would be no clear
8 identification. This was just a purposeful
9 identification, so that somebody when they were
10 deciding what web site to type in, they would know
11 that a .xxx would be abiding by the code of conduct.
12 Whereas StuartLawley.com which may be an adult
13 entertainment web site and may be operating to a code
14 of conduct, you have no surfer or the would-be surfer
15 would have no knowledge of that before going to the
16 site. And it was very much the idea for the adult
17 entertainment providers to be able to attract more
18 customers by indicating in advance that they were
19 complying with best business practices and then
20 hopefully retain those customers.

21 BY MR. MURINO:

22 Q. According to your statement, you reviewed

1 the RFP criteria before deciding to submit the
2 application. Could you please briefly describe an
3 understanding of the RFP criteria?

4 A. Three broad categories, business and
5 financial, technical, and sponsorship and other
6 issues, and what was most important to us, that it
7 was explained in the RFP and before the RFP was
8 issued that these criteria were going to be -- were
9 objective criteria, and they were going to be applied
10 in a nondiscriminatory way. Obviously we have relied
11 on those statements.

12 Q. Did you ever understand there to be an RFP
13 criterion that discussed the content or morality
14 aspects?

15 A. There clearly was no such criteria.

16 Q. How would it have affected your desire to
17 invest if you knew that the success of the
18 application would depend on whether a particular
19 board member thought the content of the domain was
20 appropriate or not?

21 A. I simply wouldn't have done it. You know,
22 the 2000 round was not selected based partly upon the

1 controversy around such a new TLD. But it was clear
2 that this round was different from the 2000 round,
3 that was very much a beauty parade, lots of
4 applicants who were only going to pick a few. So
5 ICANN was never going to pick a controversial one.
6 This time it was explained differently. A set of
7 objective criteria, if you check the boxes, you get
8 the domain.

9 JUDGE SCHWEBEL: I think you both need to
10 speak up.

11 BY MR. MURINO:

12 Q. Who was to evaluate whether the
13 applications met the RFP criteria?

14 A. Yeah, initially it was supposed to be a
15 team of evaluation panels. Independent evaluation
16 panels and then their findings to be reviewed by the
17 board.

18 Q. With respect to the business and financial
19 aspects of the application, when the independent
20 evaluators reviewed it, what did they conclude about
21 the qualifications of ICM's management team?

22 A. They stated very clearly that we had a

1 very strong management team, a very well thought out
2 plan. They commented specifically that we
3 demonstrated enough support to make it economically
4 viable and basically they would pass the application
5 with flying colors.

6 Q. What type of revenues would you provide in
7 the application?

8 A. We provided three examples. After a five
9 year period, the low case was 70,000 registrations,
10 the middle case was 125,000, and the top end case was
11 250,000 registrations.

12 Q. Would the business and financial
13 evaluation team have reached this conclusion if there
14 was no support or demand for the xxx TLD?

15 A. No, clearly they were tasked with deciding
16 whether the applicant had a business plan, a
17 financially viable business plan and to say they
18 specifically commented that we had, you know,
19 demonstrated strong demand for the top level domain.

20 Q. What percentage of these numbers, high or
21 low, if you had to apply your mind to it or studied
22 it did you imagine would be migrations from .com or

1 elsewhere?

2 A. Not necessarily. We didn't think people
3 would migrate. We didn't think for a long time
4 anyone would give up their .com, but we probably
5 thought that nearly all of our registrations would
6 also have registrations in .com. So not many of the
7 providers would be new start-up businesses, just
8 coming to .xxx. They would be holding top level
9 domains in both, and the general long-term plan, an
10 idea was that if .xxx became the preferred location
11 of choice, and they got more business, more recurring
12 revenue and sustainable revenue stream, that that
13 would become their primary domain of choice.

14 Q. It was not to expand the market or was
15 it?

16 A. It was to offer choice.

17 Q. Why would an applicant choose the .xxx
18 TLD?

19 A. Hopefully as I just explained to Judge
20 Tevrizian, a range of commercial benefits or likely
21 commercial benefits to a registrant that they could
22 demonstrate to would-be customers that their sites

1 could be trusted, and that they were not engaging in
2 you know, fraudulent credit card practices, spam,
3 breaching of consumer privacy, that kind of stuff.

4 At the same time, they were trying to show
5 that credible self-regulation would work by their
6 community, and hopefully avoid governmental top-down
7 dictated regulation. And by doing that in a group,
8 it could be credible and it could only be credible if
9 they were doing it in conjunction with the other
10 stakeholders. And there was one other -- but it has
11 slipped my mind.

12 Q. Turning back to the RFP, what was the
13 conclusion of the technical evaluation team?

14 A. That we had a very technically solid
15 application and that it should be recommended.

16 Q. Please turn to tab 3 in your binder and
17 please review pages 3 through 6.

18 A. Yes.

19 JUDGE TEVRIZIAN: Do you mean Exhibit 45?
20 Tab 3 of Exhibit 45.

21 BY MR. MURINO:

22 Q. Could you demonstrate to the panel what

1 applicants were required to demonstrate under the
2 sponsorship criteria?

3 A. The definition of the sponsored TLD
4 community, you then have to show convergence of
5 support from the sponsoring organization and that the
6 sponsoring organization itself was appropriate to be
7 delegated with the policy formation role and finally
8 the level of support from the community.

9 Q. How did ICM meet the requirement of a
10 clearly defined sponsor community?

11 A. We have defined our community as the
12 members of the adult entertainment industry, who
13 believed a system of self-identification would be
14 beneficial and that wished to work together with the
15 other impacted stakeholders to develop a set of
16 policies and business practices within that top level
17 domain. And along those lines, we then submitted
18 many letters of support for not only the
19 establishment of the top level domain but the policy
20 formation environment too.

21 Q. Would all adult content providers have to
22 join .xxx?

1 A. Absolutely, clearly not. The adult
2 entertainment industry is a wider group and this top
3 level domain was designed to serve the narrow group
4 that wished to clearly identify themselves as such,
5 adopt a set of standard business practices, label
6 their content clearly so filters could be used for
7 people who didn't want to see this stuff, and protect
8 their children from it, and develop this set of
9 policies with the other stakeholders to engage in
10 credible self-regulation.

11 Q. And was it your understanding that ICM had
12 to define its community in a regulatory sense?

13 A. No, we made that very crystal clear in the
14 application. That along with many of the other
15 applicants that such regulatory definition was nearly
16 impossible. It couldn't be done. This is a
17 voluntary arrangement, a self-selecting voluntary
18 arrangement very similar to the inability for say the
19 applicant at .cat or .asia which were designed to
20 serve members of the Catalan community or the Asian,
21 so similarly it's not impossible to define what is
22 Asian or what is Catalan.

1 Q. ICANN alleges in this proceeding that the
2 fact that membership was voluntary makes it clearly
3 impossible to determine which persons or services
4 would be in or out of the community. What do you
5 think of that statement?

6 A. We somewhat -- somewhat baffled by it.
7 One, that's a complete departure from any of the RFP
8 criteria. Two, the fact that the community is
9 self-selecting means it is clearly identifiable who
10 is in the community because it's the people who
11 register. And thirdly, they are applying this
12 discriminatory because many of the other applicants,
13 and Paul Twomey wrote to the CEO of .mobi to confirm
14 exactly the same that .tel, there are probably 3
15 billion people in the world with telephones and I
16 assume everybody in this room has a telephone, but
17 how many of us in this room have a .tel name. It's a
18 self-selecting community.

19 Q. Is there anything in the RFP that
20 prohibited a community to be defined through
21 self-selection?

22 A. No, absolutely not.

1 Q. What is your understanding of what a
2 sponsoring organization is and what it's supposed to
3 accomplish?

4 A. Sponsored organization, largely but not
5 universally in our case is a separate entity from the
6 registry operator, and that receives from ICANN
7 delegated formational authority that governs the
8 rules of registration within the top level domain and
9 all people that want to be in the domain have to
10 abide by those rules.

11 Q. And what was the sponsoring organization
12 for .xxx.

13 A. IFFOR, the International Foundation For
14 Online Responsibility. A Canadian nonprofit entity.

15 Q. Were IFFOR policies to be geared to the
16 laws of any particular jurisdiction?

17 A. No, just like any club, or worldwide club
18 or association, the club's rules and policies are
19 their rules and policies. Just like .jobs which was
20 another applicant that got passed, the policies they
21 adopted were not governed by the United States
22 employment law or European employment law which are

1 obviously diverse. They got their own sets of rules
2 for registration and that's exactly the same as
3 how .xxx would be operated.

4 Q. Turning to the next component of
5 sponsorship criteria, how does ICM demonstrate it has
6 support from the community?

7 A. We sent in detailed letters of support,
8 like I say, not only supporting the establishment of
9 the domain name itself, but their willingness to
10 participate in the policy formation group and the
11 establishment of IFFOR, and those were from many of
12 the major providers around the world which reflected
13 the geographical spread of the adult industry, so
14 mainly providers from the United States, Canada, the
15 United Kingdom, continental Europe, Australia,
16 Caribbean.

17 Q. Later as ICM's application progressed, did
18 you gather additional evidence of community support?

19 A. Yes, I mean, throughout this whole process
20 after the June 1 vote, we had over 1500 individual
21 web masters come to our web site and affirmatively
22 register support. And they were from 71 different

1 countries, and even more later in the process, we
2 opened a pre-reservation service which by the time of
3 the June -- March 2007 vote had 75,000 registrations
4 pre-reservations, and today it's got about 103,000
5 and people are still pre-reserving to date.

6 Q. I'm sorry, can you explain to the panel
7 what is pre-reservation?

8 A. Pre-reservation service was something we
9 opened after the May 10, 2006 vote that allowed
10 members of the community to come forward and
11 pre-reserve names in two different counts. There was
12 a list of names that they already owned in other top
13 level domains like .com, .uk, and a second basket of
14 names that they didn't currently own in any other top
15 level domain, but if no one else reserved them they
16 would like to be considered for them. It was a
17 pre-reservation service to say, I like this idea, I
18 want to participate. And these are the names we
19 would like to register and I would say we began with
20 100,000 of those.

21 Q. What was the final conclusion of the
22 sponsorship evaluation team?

1 A. They decided that we did not meet the
2 sponsorship criteria.

3 Q. Why did they make that decision?

4 A. My view and obviously the view of ICANN's
5 board was that they were flawed in their analysis.
6 They took a very narrow view on the sponsorship
7 criteria. And very similar to the many applicants
8 that failed, eight out of ten of the original
9 applicants failed, they took the very narrow view
10 that if you couldn't do a brighter line definition of
11 adult content, that wasn't subject to clear
12 regulatory universal accepted definition, then you
13 basically failed the first four criteria that I
14 repeated to you earlier.

15 If you couldn't define the community, you
16 couldn't get the support of it, and you couldn't have
17 a sponsoring organization that did policy for it,
18 fail, fail, fail, and in eight out of the ten
19 original applicants failed on basically the same four
20 issues.

21 Q. And what was the board's reaction to the
22 sponsorship evaluation team's high rejection rate?

1 JUDGE TEVRIZIAN: Which board are we
2 talking about now? His board or ICM?

3 BY MR. MURINO:

4 Q. What was the reaction of the ICANN board
5 of the response to the team's high failure rate?

6 A. They clearly weren't happy with the result
7 and they basically -- well, actually they disbanded
8 the sponsorship evaluation team and took over the
9 remainder of the evaluation themselves.

10 Q. And what type of information did ICM
11 provide to ICANN board at that time?

12 A. We sent them -- we had been provided a
13 copy of the sponsorship evaluation reports. We wrote
14 in great detail back to ICANN explaining that the
15 comments of the sponsorship evaluation were flawed.
16 We didn't change a single thing in the application we
17 just laid out clearly where these people had gone
18 wrong, where in our opinion they applied the criteria
19 too narrowly.

20 Q. And did there come a time where ICM gave a
21 presentation to the ICANN board?

22 A. Eventually about three or four months

1 later, we were asked to travel down to Mar del Plata in
2 Argentina in April of 2005 where ICANN was holding
3 one of its regional meetings. We went down with a
4 whole management team, myself, Stuart Duncan our COO,
5 Becky Burr went with us, Bob Corn-Revere, the free
6 speech attorney, Lawrence Walters, the adult industry
7 attorney, we had Parry Aftab from the child safety
8 group on the teleconference and we did a full
9 hour-long presentation to the entire ICANN board.

10 Q. What was the focus of that presentation?

11 A. Sponsorship issues because that was the
12 only thing that the report had failed us on.
13 Sponsorship. So we were explaining what our
14 community was, as I am hopefully doing to you
15 gentlemen today, and how we got the support. And we
16 showed them -- one of their leading publications in
17 the adult space as a group called X-biz with a news
18 web site. They had run a poll amongst the wider
19 industry to say, what do you think of, you know, .xxx
20 and 22% of the respondents said -- 22% said horrible
21 idea. Hate it. About 57% said, yeah, we think it's
22 a good idea, and 17% said really we don't give two

1 hoots either way.

2 Q. Between August of 2004 and June 2005
3 during which ICANN conducted its own evaluation of
4 ICM's application, did you communicate with any ICANN
5 executive or board members?

6 A. Sure. I mean, we were in contact mainly
7 with John Jeffrey, General Counsel of ICANN, Kurt
8 Pritz who is the senior V.P. in charge of the sTLD
9 round, and Vinton Cerf, the chairman of the board of
10 ICANN and Paul Twomey, CEO. And we probably met with
11 each of them at least two or three times and had
12 teleconferences with John Jeffrey and Kurt Pritz as
13 well during that time.

14 Q. And what was the substance of these
15 communications?

16 A. The substance of the communications was
17 that they were aware that there were problems in the
18 sponsorship evaluation report team that they
19 effectively had gone off message and delivered the,
20 you know, not an accurate result. And that all we
21 had got to do is answer -- you know, put our case
22 forward and in due course we would be considered

1 along with everyone else.

2 Q. And did any of those ICANN executives or
3 board members ever indicate to you at that point that
4 there were major problems with ICM's application
5 regarding the RFP criteria?

6 A. No.

7 Q. Mr. Lawley, in your witness statement you
8 indicated that the 2004 round was a two-step process.
9 Can you describe the two step process?

10 A. Yes, I have been in business for many,
11 many years and this RFP system was working the same
12 as most other RFP systems I ever conducted that you
13 have an RFP that goes out with a selection criteria
14 and the selection process is undertaken.

15 And if you qualify or you are the winning
16 bid, then you enter into contract negotiations to
17 memorialize the terms that you made your bid on. And
18 ICANN's process was exactly the same, and they said
19 it in the RFP. They said it in the board
20 announcement when the RFP was coming out three months
21 before. In the board meeting, Vint Cerf said the
22 same, the RFP said the same, and Kurt Pritz who was

1 the guy who was running the round said exactly the
2 same, it was a two-step process in each and every one
3 of the seven board meetings -- regional board
4 meetings that were held in public -- sorry not the
5 board meetings, the ICANN meetings -- the public
6 forum when he was giving his update of the process.
7 At least seven different times throughout the
8 process.

9 Q. And were you aware of these statements
10 before you submitted your application?

11 A. Yes. And I relied on them.

12 Q. Please turn to tab 11 in your binder.
13 Hearing Exhibit 89. Do you recognize this document?

14 A. Yes. This is the letter from Kurt Pritz,
15 like I say the senior V.P. who was running the sTLD
16 round, and he was notifying us of the evaluation
17 report to say that we failed the sponsorship
18 criteria, but we were going to be allowed to continue
19 to clarify that, and I guess you asked me to read the
20 highlighted text?

21 Q. Please.

22 A. It goes on to say that "if it is

1 determined that the sponsorship criteria have been
2 met, the application will proceed immediately into
3 technical and commercial negotiation." So that was
4 again confirming the two-step process. You are
5 judged against the criteria and if, and only if you
6 satisfy the criteria, you go into contract
7 negotiations.

8 Q. This is a direct contact from the vice
9 president?

10 A. Yes. Yes. It was written directly to me.

11 Q. So did you have any reason to believe that
12 the 2004 round would be anything other than a
13 two-step process?

14 A. None whatsoever, no.

15 Q. What type of information did the board ask
16 ICM to provide once it took over the process before
17 the June 1 vote?

18 A. Clarifying information just on
19 sponsorship. You know, how we define our community,
20 the existence of that community, and reaffirmation of
21 the support from that community. And a lot of the
22 other things they then asked us was, you know, how we

1 were going to implement this if it were granted.

2 Q. And as ICM was presenting this information
3 to ICANN's board, did you receive any feedback from
4 the GAC regarding the ICM's application?

5 A. Yes, in April of 2005, that is a couple or
6 three months before the eventual criteria decision,
7 the GAC chair wrote to Paul Twomey in response to a
8 letter from Paul Twomey soliciting comments on the
9 new round he wrote to say that GAC had no comments on
10 any of the applicants in the current sTLD round.

11 Q. And did the chairman of the GAC have any
12 comments directly to ICM's team?

13 A. No, we offered to meet with Sharil Tarmizi
14 who was the chair of the GAC in Capetown in December
15 of 2004 and he said everything was fine and there was
16 no need to do that.

17 Q. And on June 1, 2005, the board voted on
18 ICM's application; is that right?

19 A. Yes.

20 Q. Please turn to tab 12 in your binder.

21 A. Yup.

22 Q. Do you recognize this document?

1 A. Yes, I do.

2 Q. And what is it?

3 A. It's the -- the minutes -- notes of the
4 minutes of the meeting of June 1, 2005.

5 Q. And please turn to the highlighted text?

6 A. Uh-huh.

7 Q. What do you understand this text to
8 indicate?

9 A. That we had clearly and unequivocally
10 satisfied the application criteria, particularly the
11 sponsored criteria which was the only one remaining
12 from the evaluation round. And it's mentioned higher
13 up in the resolution. And that we were through to
14 the second phase of contract negotiations.

15 Q. And would this vote mean that your
16 application had been approved?

17 A. No, it meant that we satisfied the
18 criteria as laid down in the RFP.

19 Q. And you already answered that it was
20 an unqualified recognition, is that correct?

21 A. Yes, a couple of the previous applicants,
22 particularly if I recall correctly .jobs and .mobi

1 had also been deemed to meet the criteria, but the
2 ICANN board had directed staff to discuss specific
3 provisions in their contracts, so we were overjoyed
4 that our resolution came out without any caveats or
5 qualifications in any such shape or form, clear and
6 unequivocal.

7 Q. Does this vote indicate that ICM's
8 application was then going to be put on the root?

9 A. No.

10 Q. What did it indicate?

11 A. That we were going to enter into contract
12 negotiations for commercial and technical terms that
13 we believed would be very straightforward.

14 Q. In the weeks after the June 1 vote, what
15 did ICANN board members or executives say to you
16 personally about the resolution?

17 A. Well, I was telephoned by one board member
18 more or less immediately after the vote, Michael
19 Palage, who congratulated me and said
20 congratulations, you are through. And when I next
21 met with Dr. Twomey and Dr. Cerf, the chairman and
22 CEO of ICANN in Luxembourg about four or five weeks

1 later, they both shook my hand, congratulated me, and
2 basically said, you know, we told you we would get it
3 through, as long as you left it to us, which is what
4 we had done.

5 Q. And what about ICANN's General Counsel?

6 A. Both John Jeffrey and Kurt Pritz who were
7 really the staff members running the round were
8 congratulatory, everybody was very pleased that it
9 had come through.

10 Q. Did any ICANN board members or executives
11 say anything to you or your counsel about outstanding
12 related concerns related to RFP criteria?

13 A. None whatsoever.

14 JUDGE SCHWEBEL: Mr. Lawley, how did you
15 understand the meaning of the last phrase of the
16 resolution reading "for approval and authorization to
17 enter into an agreement relating to the delegation of
18 the sTLD."

19 THE WITNESS: Yes, I mean, it was
20 explained to us in the RFP as well that all
21 applicants once they had been deemed to satisfy the
22 criteria would enter into these contract

1 negotiations. But the contract negotiations would be
2 very straightforward and most applicants would sign
3 pretty identical contracts. It was like a base
4 contract in existence.

5 So I interpret that, that the assumption
6 was that as long as we agreed to pay ICANN the right
7 price per domain per year and we agreed not to break
8 the internet that there was an assumption of
9 approval. So in my mind, even though the resolution
10 doesn't state that our application is approved, we at
11 that stage only met the criteria, I think the further
12 text that you point out had this assumption that a
13 contract would be executed, and that view was shared
14 by many other people.

15 In particular, ICANN has a registry
16 constituency within itself that you are only allowed
17 in that if you are a registry. And as soon as this
18 vote came out, we were invited to join that
19 constituency by the chair, Marie Zitkova, sends me an
20 e-mail congratulating me on the result and asking me
21 to join the constituency.

22 So definitely there was an assumption that

1 eventually a contract would get done. I was even
2 written to by the Council of Europe, some division on
3 human rights in the information society, and invited
4 to speak to 32 country leaders over in Strasbourg as
5 a result of the anticipation that this was going
6 to -- and that was non-solicited that this was going
7 to end up in proper delegation of a top level domain.

8 Q. Did any ICANN board members make any
9 public statements about the June 1 vote?

10 A. Yes, particularly Vinton Cerf, who I
11 believe will be appearing here later as a witness
12 later in the week. The chairman of the board stated
13 in open meeting on the record to the Government
14 Advisory Council in the July 2005 meeting
15 unequivocally that the board vote was a vote that we
16 had met the three criteria: Business, technical and
17 sponsorship.

18 Q. Were there any other board members who
19 said publicly that you had met the criteria?

20 A. The Japanese board member, Joi Ito, had a
21 very well read internet blog site and he posted a day
22 or two after the board vote that he wanted to explain

1 the vote, and he made it clear this was not a vote by
2 ICANN on endorsing any particular kind of content,
3 that this was just simply a vote on the fact that we
4 have met the three main criteria.

5 Q. What did ICANN say publicly to their staff
6 about the June 1 vote?

7 A. Kurt Pritz, the V.P. who was running
8 around in the Luxembourg open session on sTLDs said
9 clearly that we had met the criteria and we were into
10 contract negotiations and that we had satisfied the
11 criteria. Kurt Pritz said that. And Kieren Baker,
12 ICANN's PR person was telling the press and the world
13 because this was released to the press that names
14 should be available in a couple of months within the
15 fall at the latest, depending on ICM's plans.

16 Q. Please turn to tab 22 in your binder.

17 A. Uh-huh.

18 Q. Please read aloud the highlighted text?

19 A. ICANN is pleased to announce that the
20 independent evaluation process which began last year
21 has resulted in a further sponsored top level domain
22 application moving to the next stage. ICANN has now

1 entered into commercial and technical negotiation
2 with an additional candidate registry, ICM registry,
3 in bracket, .xxx. Further down it says, discussions
4 continue among ICANN board and staff regarding the
5 evaluation of four additional proposed sTLDs, .asia,
6 .mail, and the two .tel applicants.

7 Q. What did you glean about that?

8 A. This was ICANN's own press release, so
9 this clearly says that we had gone through the
10 discussions of whether we met the criteria were
11 finished. It points out that we were continuing with
12 these other four that hadn't been decided on. And
13 this press release was issued with ICANN's express
14 permission and at the same time we had our own press
15 release which John Jeffrey had affirmatively, the
16 General Counsel of ICANN had affirmatively signed off
17 on that stated explicitly that we had met the
18 criteria.

19 JUDGE SCHWEBEL: Mr. Lawley, what
20 interpretation do you give to the last phrase of the
21 first sentence of this statement, moving to the next
22 stage?

1 THE WITNESS: The next stage being
2 contract negotiations for technical and commercial
3 terms, being the two-stage process that I described
4 before, the initial process, stage 1, did you meet
5 the criteria, yes or no. Only if it's yes do you go
6 into the second stage contract negotiations.

7 BY MR. MURINO:

8 Q. And after the result of the June 1 vote,
9 what did ICM begin to do?

10 A. We began to gear up for operation. We
11 started hiring people. The management team who had
12 been working while still doing other jobs quit their
13 jobs and started on the payroll with ICM. We hired
14 inside staff, PR people, an outside PR company. We
15 began getting ready for business.

16 Q. And how much did ICM spend following this
17 June 1 vote preparing this business?

18 A. Just on preparing the business in the next
19 12 months we probably spent a total of including
20 legal fees probably a million dollars of which half a
21 million was directly related to establishing the
22 business, you know, operationally.

1 Q. And after June 1, did contract
2 negotiations begin?

3 A. They did.

4 Q. And what was your expectation regarding
5 the contract negotiations?

6 A. That they would be brief and straight
7 forward.

8 Q. And what led you to believe that?

9 A. Two things. ICANN's General Counsel, John
10 Jeffrey, wrote on the 13th of June to Becky Burr to
11 say that he expected negotiations to be
12 straightforward. We had already seen two or three
13 other registries go through the process quite rapidly
14 and execute contracts that were largely identical.
15 So we had no reason to think it wasn't going to be
16 speedy and straightforward.

17 Q. And what was your role in the contract
18 negotiations?

19 A. I am not a lawyer. That's why I was
20 paying Becky Burr of Wilmer Hale to do it. So she
21 was left to go at it, and kept me apprised of any
22 high level issues that came up.

1 Q. Please turn to tab 24 in your binder.
2 This is hearing Exhibit 229, and is the first agreed
3 upon draft?

4 A. Yes.

5 Q. Please turn to page 61.

6 A. Okay.

7 Q. Please read the highlighted text.

8 A. The sTLD, this is the definition of the
9 community, will serve the responsible global on line
10 adult entertainment community generally defined as
11 those individuals, business entities that provide on
12 line sexually oriented adult entertainment intended
13 for consenting adults or for other community members.
14 The organizations that represent such providers, and
15 their vendors, service providers and contractors. It
16 then goes on to state clearly that the term adult
17 entertainment is intended to be understood broadly
18 for a global medium to include those web sites that
19 provide adult entertainment as defined above operated
20 by web masters who have voluntarily determined that a
21 system of self-identification would be beneficial.

22 Q. So this was the definition of your

1 community?

2 A. This was the definition from day 1 to our
3 last day.

4 Q. And this was a sponsorship criteria, the
5 definition of your community?

6 A. Yes.

7 Q. And please turn to tab 25.

8 A. Yes.

9 Q. Page 63.

10 A. Yeah, I mean, this is the last version of
11 the -- and last version and the definition of the
12 community is exactly the same. At no time during the
13 process were we ever asked to amend or change the
14 definition of the community.

15 Q. Have you reviewed the witness statements
16 of Dr. Paul Twomey and Dr. Cerf in preparation for
17 your testimony here today?

18 A. Yes, I have.

19 Q. As you know, they both state that they had
20 concerns regarding sponsorship criteria after the
21 June 1 vote and they were hoping contract
22 negotiations would clear those up, isn't that

1 correct?

2 A. That's what they state.

3 Q. Did they ever ask you to address the
4 definition of your community?

5 A. No. And I'm particularly surprised by
6 their comments. Because during that timeframe we met
7 with them regularly and in detail to discuss the
8 application and at no time did they ever raise any
9 issues about the sponsorship definition of the
10 community. Not to Dr. Twomey, not to Dr. Cerf.

11 Q. How about their General Counsel?

12 A. No. We were never asked to change the
13 definition of sponsored community.

14 Q. Please turn back to tab 24. The first
15 draft registry agreement?

16 A. Yes.

17 Q. Where in this agreement does it reflect a
18 level of community support?

19 A. It doesn't.

20 Q. Doesn't?

21 A. It can't. You know, this contract is to
22 govern the operation of the sponsored top level

1 domain itself. The issue of community support was a
2 qualifying criteria. And we had already got over
3 that hurdle and that's why we would negotiate the
4 contract on how this top level domain was going to be
5 operated.

6 Q. In tab 25 the final draft registry
7 agreement?

8 A. It doesn't appear there either. It's not
9 a contract term and hasn't been placed in there.

10 Q. How would you be notified if there was any
11 outstanding sponsorship criteria issues during these
12 contract negotiations?

13 A. It would have been very easy for ICANN to
14 do that. They could have picked up the phone and
15 called us, they could have sent us e-mails, they
16 could have made some proclamation in one of their
17 meetings on their public web site or ask for a board
18 resolution. And they did none of the above.

19 Q. They did none?

20 A. None.

21 Q. Once ICM and ICANN and staff reached
22 agreement on the first draft and posted it for public

1 comment, what would you expect would happen?

2 A. That the contract would be ratified very
3 quickly thereafter.

4 Q. And is that what happened?

5 A. No, it's not.

6 Q. What happened?

7 A. Politics intervened. The United States
8 Department of Commerce, Mr. Michael Gallagher sent a
9 letter to ICANN requesting a delay. And further to
10 that letter, Sharil Tarmizi, the chairman of the GAC
11 wrote a similar letter.

12 Q. And what was ICM's reaction to these
13 letters?

14 A. We were completely shocked. We didn't
15 know these were coming. We had no idea. They were
16 completely out of the blue. We were particularly
17 surprised at both letters. One, the United States
18 Department of Commerce letter because this was August
19 the 11th, this letter was dated 2005, less than a
20 month earlier than the ICANN meeting in Luxembourg,
21 the U.S. representative to the Government Advisory
22 Council was stating on record that this application

1 had been public for many, many, many months and
2 really it was too late to comment. And the GAC could
3 have plenty of opportunity to comment.

4 So this was a complete volte-face on the
5 part of the United States government in the period of
6 three weeks and similarly we were surprised at
7 Mohammed Sharil Tarmizi's letter because less than
8 four months' earlier, three or four months earlier in
9 April of 2005, he had written specifically to Paul
10 Twomey to say that no GAC member had any -- the
11 GAC -- sorry, the GAC had no comments on any of the
12 sponsored top level domain applicants. So once again
13 this was a complete turn around.

14 Q. And after you learned of these letters
15 what contact did you have with the U.S. government?

16 A. I went to see Michael Gallagher at the DOC
17 and his team of people in September of 2005.

18 Q. And what did you learn from that meeting?

19 A. Not a lot. He was basically stonewalling.
20 And his comment to me was, "listen, you are dealing
21 with the United States government now. We spend
22 years like you spend dimes." To which I assumed he

1 said to me that they, the United States government
2 spend years like I spend dimes.

3 JUDGE SCHWEBEL: Meaning what?

4 THE WITNESS: Meaning I was to be for a
5 long delay. I spend a lot of dimes, so they spend a
6 lot of years. So he was basically saying, look, this
7 is going to be very much delayed.

8 BY MR. MURINO:

9 Q. Did he say why he wanted to delay the
10 process?

11 A. Not specifically, no.

12 Q. Did ICM meet with anyone at ICANN to
13 discuss this U.S. government intervention?

14 A. Yes, I believe later in September, I met
15 face-to-face with Dr. Twomey here in Washington, D.C.

16 Q. And what did you learn at that meeting?

17 A. He was very angry at the time. You know,
18 he was obviously embarrassed by the United States
19 government intervention which for ICANN couldn't have
20 come at a worse time because they were in the middle
21 of this whole World Summit on Information Society,
22 this big row about who should be running the internet

1 and whether the United Nations should try and wrest
2 power of the government of the internet from ICANN.

3 So this was the last thing he could have
4 done with at the time. So he indicated to us that
5 the timing wasn't good for ICANN now and this was a
6 bit of a nuisance and we would have to wait for a
7 more politically opportune time to progress.

8 Q. And did you learn later more about this
9 U.S. government intervention?

10 A. Yes, because we wanted to get to the
11 bottom of exactly what had happened, we filed a
12 Freedom of Information Act request against the DOC,
13 which eventually churned up about 1600 pages of
14 pretty heavily redacted information. But that was
15 clear -- what it did show clearly was that initially
16 prior to and just after the June the 1st decision
17 that we met the criteria, the Department of Commerce,
18 the United States government actually thought xxx was
19 a good idea and they positively supported it, and
20 then after a flood of e-mail complaints from
21 organized groups like the Family Research Council,
22 very Christian conservative groups here in the U.S.,

1 they basically changed position.

2 Q. And do you know if the documents indicate
3 whether the U.S. threatened to take any action
4 regarding --

5 A. Yes, there was a notable
6 memorandum included in the documents that stated
7 clearly that if ICANN -- basically, if ICANN entered
8 into a contract with us, an agreement with us, that
9 if the United States government didn't want to put it
10 into the root, they wouldn't put it into the root.

11 Q. And do you know if ICANN was aware of the
12 possibility that the U.S. would not add it to the
13 root?

14 A. Yes, subsequently I learned that Paul
15 Twomey had admitted the same threat to Becky Burr,
16 that the United States government had indicated that
17 they may not put this into the root which would have
18 been politically very devastating for ICANN.

19 Q. What did ICM do in response to the letters
20 from Mr. Tarmizi and Mr. Gallagher?

21 A. Well, like I say, I had been to see -- I
22 had been to see Mr. Gallagher about that, and

1 eventually at ICANN's behest. We made a presentation
2 to the GAC in November of 2005, in Vancouver.

3 Q. Why did ICM reach out to the GAC if the
4 board had already found that ICM had met the RFP
5 criteria?

6 A. Well, the meeting has nothing to do with
7 trying to prove we met the criteria. We were just
8 trying to be good citizens, and we knew that ICANN
9 needed to try and keep the GAC happy. And ICANN were
10 ultimately going to be our landlords, I guess you
11 would describe it, so we were trying to be good
12 tenants or prospective tenants by showing ourselves
13 to be happy to talk to anyone. So we gave the GAC a
14 full presentation as to how the top level domain
15 would be implemented, and the benefits that it would
16 bring so they could explain it to their respective
17 governments when they went home.

18 Q. So prior to the 10 May 2006 board meeting,
19 what would you expect would happen when the board
20 voted on the first draft resolution?

21 A. They would approve it.

22 Q. Why?

1 A. Two reasons, as late as March 2006 the
2 last one time I met him, Dr. Cerf told me, don't
3 worry, Stuart, we will pull this out for you, we will
4 get this done. And so he -- Paul Twomey was -- I met
5 with Paul Twomey in Wellington, too, he was a lead
6 negotiator through the whole process with ICANN,
7 meaning the CEO. He had never expressed any
8 displeasure with the contract that we negotiated with
9 his staff. He didn't ask for extra terms that we
10 refused to put in the contract. In fact, we put in
11 everything that ICANN asked us to do. And we knew
12 that, you know, Paul and Vint were particularly
13 influential on the board so we knew who our other
14 supporters were so we strongly believed we were going
15 to get passed.

16 Q. In this meeting in Wellington with
17 Dr. Twomey, when was that again?

18 A. Very late March 2006.

19 Q. And he didn't mention anything about
20 sponsorship problems?

21 A. No, he told me he supported -- he is on
22 record in the New Zealand press saying he thought

1 this was a good idea and intended to vote for it. He
2 went as far as to say that to the press.

3 Q. And when was the first time you learned
4 there were residual sponsorship criteria concerns?

5 A. On that day or the day after whenever
6 ICANN published the preliminary minutes on that
7 day -- I think it was that day or the next day
8 May 2006, maybe a whole year after the June 1st vote.

9 Q. And turning to the minutes of that
10 meeting, who raised any concerns regarding
11 sponsorship?

12 A. That was purely and solely Paul Twomey,
13 the CEO.

14 Q. Did anyone else?

15 A. No.

16 Q. Alejandro Pisanty, did he mention
17 sponsorship?

18 A. No.

19 Q. Vint Cerf?

20 A. No.

21 Q. What did ICM do in response to the
22 surprise of the May 2006 vote?

1 A. We did two things. We immediately filed a
2 reconsideration request to a subcommittee of the
3 ICANN board who dealt with unfair decisions. And
4 secondly, because of this preposterous suggestion of,
5 you know, reopening the criteria and questions of
6 community support which was long since settled, and
7 we had been constantly demanded by the members of our
8 community, when is this happening, when is this
9 happening, we opened the pre-reservation service that
10 we discussed earlier which literally within a couple
11 of weeks we garnered 75,000 registrations.

12 Q. So what was the result of your request for
13 reconsideration then?

14 A. It never got eventually decided on. On a
15 couple of days before they were -- the
16 reconsideration panel was due to render its decision,
17 we were advised that it would be beneficial for us to
18 withdraw the application on the basis that ICANN
19 would -- I forget the exact words -- would look at
20 the new contract in more positive terms and
21 particularly this was very late October 2006, and
22 once again, it was a very politically inopportune

1 time for ICANN, the international telecommunications
2 community had gotten their plenary meeting in a
3 couple of weeks and the Internet Governance Forum
4 which had come out of the WSIS process earlier had
5 their first meeting as well.

6 So the whole idea, so if ICANN's
7 reconsideration committee had at that time decided
8 that ICANN had made a mistake and announced that, it
9 would have been very politically damaging for them,
10 so we pulled the reconsideration request, and sat on
11 it for a month while these two meetings went past and
12 popped it up in December with a new contract that we
13 negotiated with ICANN on the assumption, the natural
14 assumption that this time it was going to go through.

15 Q. And approximately how much money had ICM
16 invested in its application at this time?

17 A. Wow, probably in total 1 and a half
18 million or perhaps 50 or \$100,000 more for the cost
19 of the pre-reservation system.

20 Q. Did you make any additional personal
21 investments to ICM following the recontract
22 negotiations after your request for reconsideration

1 was put off?

2 A. Literally two days after ICANN suggested
3 that we would -- we should pull the reconsideration
4 request because they would look at a contract more
5 friendly in the future, two days after I invested
6 another \$200,000 into the company personally.

7 Q. So after ICM withdrew its reconsideration
8 request at ICANN's request what types of changes did
9 ICANN request in the contract negotiations?

10 A. Not many, these were further assurances
11 and guarantees that we would do what we said we were
12 to do in the application, so these were just very
13 operational matters, how it was going to run. They
14 did ask us some strange things, they asked us to
15 executed contracts with some of the third-parties
16 that we were going to do business with, which had
17 never been asked of other applicants, but we went
18 ahead and did it, you know, it was in our power to do
19 that, so we went ahead and did it. So they just
20 asked for a lot of belts and braces around the
21 operation, and we said okay, we're going to do that.
22 They kept asking and we kept complying on the natural

1 assumption that if we did what they asked us for they
2 would approve the contract.

3 Q. Did they ask for any changes in the
4 registry agreement with regard to the sponsorship of
5 a dedicated community?

6 A. No, we discussed that from start to
7 finish, it stayed the same not a single request to
8 change it.

9 Q. Please turn to tab 38. Page 2, hearing
10 Exhibit 121.

11 A. Yup. Page 2.

12 Q. Do you recognize this document?

13 A. Yes, I do.

14 Q. Do you recognize the highlighted language?

15 A. Yes, the fateful board meeting of the 30th
16 of March 2007, the minutes thereof.

17 Q. And what do you -- did you think of the
18 reasons for rejection?

19 A. Well, to be frank, I was aghast at them.
20 I mean, the very first one saying that we had failed
21 to meet the sponsorship's criteria and the RFP
22 specification was clearly wrong, that matter had been

1 decided a long time before. It was settled.

2 The next four or five excuses, as I will
3 call them -- they probably call them reasons -- had
4 nothing to do with the original preselection
5 criteria. And the last -- the last one that they
6 mentioned, that there were credible scenarios that
7 would lead ICANN into ongoing management and
8 oversight of internet content, particularly
9 infuriated me, because it was ICANN themselves in the
10 preceding weeks that had asked us to put those extra
11 belts and braces around and assurances and guarantees
12 into the contract itself and now they were using it
13 as an excuse to reject the contract.

14 Q. Who at ICANN was requesting you to add
15 those additional assurances?

16 A. ICANN staff which would be John Jeffrey
17 and led by Paul Twomey.

18 Q. Did all the board members agree with that
19 final vote?

20 A. No, they most certainly did not. There
21 were several that dissented. There were a couple of
22 particularly scathing dissents made by Peter Dengate

1 Thrush who is the chair of ICANN and Susan Crawford
2 as well.

3 Q. What do you think ultimately motivated the
4 board to reject your application?

5 A. Politics. You know, this ultimately was a
6 political decision and the -- the U.S. government and
7 more laterally the Australian government who have
8 particular ties to Paul Twomey had a bigger influence
9 here. Ultimately, ICANN was overly deferential to
10 the GAC. And then finally there were just simply
11 some of the board members that were uncomfortable
12 with the subject of adult content. Board members
13 like vice chair Alejandro Pisanty said that clearly
14 he didn't vote anything to do with the criteria, he
15 just thought it was a bad idea and ICANN shouldn't be
16 doing it. I believe he mentioned that to Becky Burr
17 as well.

18 Q. At the time of the board's vote to reject
19 your application in March of 2007, how much had ICM
20 invested in the application?

21 A. At least 2 and a quarter million dollars.
22 \$2.5 million.

1 MR. MURINO: No further questions.

2 JUDGE SCHWEBEL: Well, gentlemen, it's
3 6:45. Do we agree we should call it a day and
4 reserve further proceedings for tomorrow?

5 MR. LeVEE: Fair enough.

6 MR. ALI: I think it would be a very good
7 idea.

8 JUDGE SCHWEBEL: We will meet then
9 tomorrow morning at 10:00 a.m.

10 MR. ALI: Thank you.

11 MR. LeVEE: Thank you.

12 MR. ALI: Judge, are there any
13 instructions to Mr. Lawley just for the record.

14 JUDGE SCHWEBEL: We will assume,
15 Mr. Lawley, that you will not confer with counsel or
16 anyone else about your testimony while you are in the
17 midst of it.

18 THE WITNESS: Okay. Understood.

19 (Whereupon the proceedings adjourned at
20 6:42 p.m.)

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22