

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

12 Washington, D.C.

13 Wednesday, September 23, 2009

14 Independent Review Process in the case of
15 ICM Registry LLC as Claimant versus the International
16 Corporation for Assigned Names and Numbers as
17 Respondent, held at the law offices of Sidley Austin
18 LLP, 1501 K Street, N.W., Washington, D.C., at
19 10:00 a.m., Wednesday, September 23, 2009, and the
20 proceedings being taken down by Stenotype by MARY
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22 direction.

1 BEFORE:

2 JUDGE STEPHEN SCHWEBEL, IRP Chairman

3 JAN PAULSSON

4 JUDGE DICKRAN TEVRIZIAN

5

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C O N T E N T S

WITNESS	EXAMINATION BY COUNSEL FOR
PROF. JACK GOLDSMITH	CLAIMANT / RESPONDENT
By Ms. Walter	507
By Mr. Enson	540
DR. VINT CERF	
By Mr. LeVee	584, 795
By Mr. De Gramont	656

Afternoon Session - Page 656

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

2 MR. ALI: Judge Schwebel, members of the
3 panel, we have Professor Goldsmith as our final
4 witness on behalf of claimant and Ms. Walter will be
5 conducting the direct examination.

6 JUDGE SCHWEBEL: Thank you.

7 MS. WALTER: Good morning, Judge Schwebel
8 and members of the panel.

9 JUDGE SCHWEBEL: Good morning.

10 MS. WALTER: We have a couple of binders
11 that we're going to pass out before we get started.

12 Whereupon,

13 PROFESSOR JACK GOLDSMITH,
14 was examined and testified as follows:

15 DIRECT EXAMINATION

16 BY MS. WALTER:

17 Q. Good morning, Professor Goldsmith. My
18 name is Marguerite Walter, I'm counsel for the
19 claimant, and I would like to ask you about your
20 expert report filed in this case. Could you first
21 please state your name and your professional
22 position?

1 A. Jack Goldsmith, Henry L. Shattuck
2 professor of law at Harvard.

3 Q. And could you please tell us your
4 expertise in Internet law?

5 A. Yes, I have written a book and several
6 articles about Internet governance and in particular
7 jurisdictional conflicts, conflicts of law issues
8 that arise on the Internet. I've written op eds in
9 the Financial Times and the New York Times on those
10 topics. I am a director of -- faculty codirector of
11 the Berkman Center on Internet and Society at
12 Harvard, a member of the National Science Foundation
13 study on offensive information warfare and am
14 currently teaching a class in cyber war and cyber
15 crime -- excuse me, a seminar.

16 Q. Thank you. And could you also describe
17 your expertise in public international law, please?

18 A. I've written a book on public
19 international law, a case book that has large
20 elements of customary international law in it as well
21 as many articles on public international law. I've
22 taught the course many times. I've taught courses in

1 public international law and courses that involve
2 public international law. I was involved in
3 interpreting public international law in my jobs in
4 the Justice Department and the Defense Department as
5 well as the Iran-U.S. Claims Tribunal. And I'm on
6 the State Department Advisory Committee on
7 International Law.

8 Q. And you also have expertise in conflicts
9 of law and private international law, is that
10 correct?

11 A. Yes. I'm the co-author of a case book
12 with Lee Brilmeyer on conflicts of law, I've written
13 several articles about conflicts, I've taught the
14 course many times, including the private
15 international elements and the international
16 management of conflicts. I have a diploma from the
17 Hague Academy of Private International Law. I
18 practiced those subjects on the Iran-U.S. tribunal
19 and private practice.

20 Q. You should have there a binder of
21 materials that I've prepared that I'll be referring
22 to in our discussion today, and if you could first

1 please take a look at the document at tab 1 and
2 confirm that it is a copy of your expert opinion
3 filed in this case?

4 A. Yes, it is.

5 Q. And do you have any amendments that you
6 would like to make to that opinion today?

7 A. No.

8 Q. And could you just tell me what materials
9 you reviewed to prepare your report?

10 A. I reviewed ICM's application for review,
11 ICANN's response, many cases, articles and books.

12 Q. And in your report, you discuss article 4
13 of ICANN's articles of incorporation so I would like
14 to discuss that with you and at some length, I think.
15 Let's take a look at that article, which is at tab 2
16 of the binder?

17 A. Right.

18 Q. And that is Hearing Exhibit 4. Ashley, if
19 you could put that on the screen, please. Just take
20 a minute to look that over and could you read the
21 first half of that first sentence for us, please?

22 A. Article 4, "The corporation shall operate

1 for the benefit of the Internet community as a whole,
2 carrying out its activities in conformity with
3 relevant principles of international law and
4 applicable international conventions and local law."

5 Q. In your report, you discuss the drafting
6 history of this particular part of article 4 and
7 could you please describe for us how this language
8 came about?

9 A. Yes. First off I'll give you a bit of
10 background and then I'll explain how the language
11 came in three stages.

12 The background, the relevant background in
13 brief -- I talk about this obviously at more length
14 in my report -- was that when ICANN was in the
15 process of being created, it was a very controversial
16 institution, especially internationally. Because it
17 would, everyone realized, have power to -- over the
18 name and numbering system in the Internet,
19 essentially an enormously important global public
20 good and an enormously important communication
21 technology.

22 And the U.S. Government devolved its two

1 -- its powers ultimately to ICANN in part because of
2 the perception that the United States had too much
3 control over ICANN. But in any event, the devolution
4 of ICANN from greater and more obvious U.S. control
5 proved controversial, because it was going to be a
6 California corporation, it would amass these enormous
7 public powers, public good powers, and it was very
8 controversial, especially in the international
9 community, many other countries outside the
10 United States, because it was worried that ICANN
11 wouldn't be a legitimate institution, that it would
12 be under the thumb of the U.S. Government, that it
13 wouldn't -- they were especially worried about the
14 lack of administrative process and sort of the
15 administrative review and basic due process concerns
16 about ICANN.

17 So this language was, in the narrative
18 that I tried to lay out, was a response to that and
19 it captured it in three stages. The first draft of
20 the ICANN articles of incorporation did not include
21 any reference to international law. The fifth
22 iteration draft, which I think was circulated in late

1 September of 1998, in that draft ICANN assumed -- I'm
2 paraphrasing now -- an obligation to -- it said it
3 would give due regard to international law.

4 And then there was a couple of months in
5 which the negotiations were still going on, still
6 ongoing, for the creation of ICANN involving many
7 players and many actors, many interests relevant in
8 this process. It was still controversial.

9 The final draft in response to this
10 controversy included the language you see today which
11 is that ICANN will carry out its activities in
12 conformity with relevant principles of international
13 law and applicable international conventions and
14 local law.

15 Q. And just to confirm, this is the change
16 that you describe in paragraph 9 of your report where
17 the fifth iteration was with due regard for
18 applicable international law?

19 A. I'm sorry, due regard for applicable
20 international law, that's right. That was in the
21 fifth iteration. And the final draft said in
22 conformity with relevant principles of international

1 law and applicable international conventions and
2 local law.

3 Q. Okay. And in your view, what import does
4 this change have?

5 A. The change from the fifth iteration to the
6 final draft, it seems to me, had three changes. One,
7 it made clearer -- if there was any ambiguity -- that
8 general principles apply here. They use the word
9 principles. Second --

10 JUDGE SCHWEBEL: I'm sorry, could you
11 repeat that, please?

12 THE WITNESS: I apologize, I'll speak
13 slower. Three things in my opinion changed between
14 the fifth iteration of the draft and the final draft.
15 The first one was that they added the word principles
16 before international law. And in my opinion, as I
17 explain in my report, that makes even clearer than it
18 would have otherwise would have been that general
19 principles of law were included with that.

20 The second change was from due regard to
21 international law, to international law principles,
22 due regard to in conformity with. And I read that as

1 something of a discretionary attitude towards
2 international law, to give it due regard, to a more
3 binding obligation, the change from due regard to in
4 conformity with.

5 And the third change was they changed
6 applicable to relevant, and they moved applicable to
7 apply to conventions in local law, and they said that
8 the word relevant applies to general principles of
9 law and I view that as a somewhat broader scope than
10 applicable.

11 BY MS. WALTER:

12 Q. And if you could look again at paragraph 9
13 of your report which is tab 1, you discuss there some
14 comments that were made by Esther Dyson who was the
15 interim chair of ICANN's board at the time this
16 language was adopted. And this is in a letter, I
17 believe, that was sent around that time. Could you
18 please take a look at that part of your report?
19 There is some highlighted language there that you
20 quote and just remind us what she said?

21 A. The bottom of page 4. "As ICANN's interim
22 chairman of the board explained to the Department of

1 Commerce, these and other changes made to its
2 articles" -- this is the changes made to the final
3 version -- "reflect emerging" -- excuse me. Those
4 changes reflect "emerging consensus about our
5 governance and structure." She added that article 4
6 in particular, quote, "makes it clear that ICANN will
7 comply with relevant and applicable international and
8 local law."

9 Q. And what do you take that language to
10 mean, particularly that last quote?

11 A. Well, she's interpreting the in conformity
12 language to mean, to impose an obligation to comply
13 with relevant international law.

14 Q. Thank you. And so based on this drafting
15 history, what in your view is the function of article
16 4?

17 A. Article 4 in general lays out some of the
18 powers of ICANN and in particular some special
19 obligations that it incurred and imposed upon itself
20 and it assumed voluntarily and, in particular, an
21 obligation to act in conformity with relevant
22 principles of international law.

1 Q. And what's the relationship, in your view,
2 between these provisions in article 4 and the
3 responsibilities of this independent review panel?

4 A. The independent review panel is charged
5 with determining whether the articles and bylaws --
6 whether the ICANN actions in question are consistent
7 with the articles and bylaws. And I take that to
8 mean that this panel has to determine what the
9 relevant principles of international law are and
10 whether ICANN acted consistent with them.

11 Q. Thank you. If you could take a look now
12 at paragraph 12 of your report which is at page 6.
13 You talk about the genesis of the provisions in
14 ICANN's bylaws that establish the IRP in the context
15 of another statement that was made in that same
16 letter that Esther Dyson wrote in November 1998, and
17 I'll just read that.

18 What you said there was, "This review
19 process emerged from what ICANN's first chairman of
20 the board described as the 'need for a way to obtain
21 recourse in the event that someone may believe ICANN
22 or its staff has broken our own bylaws or otherwise

1 not followed the rules that we have set up for
2 ourselves and our successors.'" What do you think
3 she meant by that language?

4 A. I think it means what it says, that this
5 is a way to establish accountability for ICANN, the
6 way it was described by Mr. Twomey as well and in my
7 report, and to make sure that if the staff or if the
8 board has broken or not acted consistent with the
9 bylaws and articles, including the provision in
10 article 4 to act in conformity with international
11 law, that that IRP was there to ensure that ICANN
12 acted consistent with those principles.

13 Q. Thank you. Now, you also say in your
14 report that relevant principles of international law
15 are a part of law designated by the parties. Why do
16 you say that?

17 A. Yes. I believe that the laws referenced
18 in article 4 are best deemed as the law designated by
19 the parties within article 28 of the rules of the
20 panel for the following reasons. I mean, it's very
21 typical in arbitrations and in international
22 arbitrations and in arbitrations generally for the

1 parties to have tacitly or implicitly designated the
2 law to govern the arbitration and to be applied in
3 the arbitration. And I think that's pretty
4 straightforwardly what happened here.

5 ICANN assumed this obligation under
6 international law, it offered this process to any
7 person denied something by the board to arbitrate for
8 consistency with these principles, and I think the
9 sum total of that is that the parties in effect
10 designated the laws designated in article 4 as the
11 governing law in this proceeding.

12 Q. And if you could take a look at tab 3 of
13 the binder now, we have a copy of Professor Caron's
14 report. I don't recall if you said you had a chance
15 to review that?

16 A. I did.

17 Q. If you turn now to paragraphs 21 and 22 of
18 that report which is at page 10, there is some
19 highlighted language there that he wrote and I'll
20 read that for you.

21 He says, "Neither ICM nor Professor
22 Goldsmith, however, offers an analysis of why article

1 4 in particular is such a choice of law clause" and
2 goes on to say, "I observe that article 4 is not by
3 its language a choice of law clause and thus its
4 characterization as such must be implied." So,
5 first, do you think article 4 is a choice of law
6 provision?

7 A. No, and I didn't say that in my report. I
8 wouldn't view it as a choice of law clause at all.
9 As I said, on its face, it doesn't operate as a
10 choice of law clause. It's in combination with the
11 IRP, is a binding obligation with the IRP and article
12 28 of the rules that it becomes the designated law.

13 That's what I said and I did explain it in
14 my report. I did offer an analysis of why article 4
15 was relevant in that way. But I have to say that
16 whatever it's called, choice of law clause or
17 designated law under article 28, I think it's clear
18 straightforwardly that the panel, in determining
19 consistency with the articles, has to determine
20 consistency with the laws set forth in article 4.
21 And in that sense, article 4 comes in and has to be
22 interpreted by the panel.

1 Q. And what about local law?

2 A. Local law as well is included within
3 article 4.

4 Q. So how then should principles of
5 international law and local law be applied together?

6 A. Well, I can't speak to every possible way
7 in which it might happen but this happens a lot in
8 arbitrations where there is more than one law
9 designated by the parties, and the challenge for the
10 panelists to sort out the hierarchy and how they
11 relate to one another.

12 It's often the case, and I believe it's
13 the case here, that there is no conflict between the
14 two and both can be applied and I haven't heard
15 anyone suggest that there is a conflict between
16 California law and the general principles of law that
17 ICANN assumed in article 4.

18 And I'm not an expert on California law
19 but I did note in my report that the California law
20 of nonprofit corporations does permit nonprofits to
21 assume additional obligations over and above
22 California law. That seems to be what they did here.

1 And the final point I would say is that essentially
2 in my report I believe that the obligation assumed
3 in -- the obligation to act in conformity with
4 principles of international law, the main obligation
5 assumed is an obligation to act in good faith and it
6 would be very surprising if California law didn't
7 allow a corporation to assume the obligation to act
8 in good faith.

9 So for those reasons, I don't believe
10 there is any conflict at all and I don't believe
11 anyone has suggested that there is.

12 Q. I would like to take a closer look at some
13 of the specific language in article 4 now. So if you
14 don't mind turning back to tab 2?

15 A. Tab 2?

16 Q. Yes. And Ashley, if you could put article
17 4 back up on the screen again, I think that would be
18 helpful. So within that clause, carrying out its
19 activities, the first keyword that I would like to
20 focus on is the word activities.

21 So it says, "Carrying out its activities
22 in conformity with relevant principles of

1 international law and applicable international
2 conventions and local law." What are the activities
3 at issue there in your opinion?

4 A. In this circumstance quite clearly
5 activity is assessing and doling out top level domain
6 names.

7 JUDGE TEVRIZIAN: Could I interrupt a
8 minute? We use the word article 4 a lot in our
9 discussions. We have article 4 of the articles of
10 incorporation and then we have article 4 of the
11 bylaws which talk about accountability and review,
12 and it can be confusing.

13 THE WITNESS: I apologize.

14 JUDGE TEVRIZIAN: So I think when we talk
15 about these two articles, that we should really --

16 THE WITNESS: So we're talking now about
17 the articles of incorporation. Sorry about that.

18 MS. WALTER: Thank you. We apologize for
19 any lack of clarity.

20 BY MS. WALTER:

21 Q. So in article 4 of the articles of
22 incorporation, the activities there in your view

1 include the activities at issue here?

2 A. Yes.

3 Q. And as you say, doling out domain names?

4 A. Yes.

5 Q. What about the word relevant. You talked
6 a little bit about that before but I would like you
7 to take a look at what Professor Caron had to say
8 about that. Sorry, what ICANN had to say about that.
9 And that's at tab 4 of your memorial and I think you
10 said you had a chance to look at ICANN's memorial
11 here?

12 A. I did.

13 Q. So the highlighted language is at
14 paragraph 150. Could you read that aloud, please?

15 A. Yes, this is paragraph 150 from ICANN's
16 memorial. The last sentence, "The principles" --
17 excuse me, the last two sentences. "The principles
18 of international law relied upon by ICM in this
19 proceeding -- the requirement of good faith and
20 related doctrines -- are principles of general
21 applicability, and are not specially directed to
22 concerns relating to the Internet, such as freedom of

1 expression or trademark law. Therefore, those
2 principles are not among the class of relevant
3 principles directed to ICANN's particular function
4 and activities."

5 Q. Do you agree with this?

6 A. No, I don't agree with that for many
7 reasons. First of all, the purpose of article 4 was
8 this concern -- one of the central purposes of
9 article 4 grew out of this concern about the
10 legitimacy of ICANN, its conformity with
11 international laws and the concerns of the
12 international community. And the fairness concerns
13 were directly relevant to the creation of ICANN and
14 those are precisely the fairness concerns that I
15 think are implicated by general principles of law.

16 ICANN interprets relevant to mean
17 specially directed to. And I don't read relevant to
18 be that tight. I think that's more what the phrase
19 applicable means. I think the phrase applicable
20 means specially directed to. And article 4 itself
21 distinguishes between relevant and applicable. And
22 relevant, as I said earlier, is a somewhat looser

1 relationship.

2 Moreover, I would say just two more
3 things. I don't think that trademark law or freedom
4 of expression law is any more relevant to ICANN's
5 activities than general principles of law. As I
6 said, ICANN has this administrative stage, it's
7 doling out these very important public goods and the
8 first thing that occurred to me when I read general
9 principles of law was the good faith requirement that
10 applies here and related -- like abuse of right. I
11 think that applies straightforwardly here. And I
12 think if it doesn't apply here, then I don't know
13 what content you would give to general principles
14 that apply here.

15 And of course there is a canon of
16 construction that says you don't give interpretation
17 to a term that renders it meaningless. So for all
18 those reasons, I think the relevant principles of law
19 include the good faith criteria.

20 Q. And you just mentioned again that you
21 consider principles of international law to refer to
22 general principles of international law and can you

1 explain why?

2 A. Yes. I don't believe this is
3 controversial in this case. One is that they use the
4 word principles and they change the -- the earlier
5 drafts didn't have principles. The phrase principles
6 of international law, as I explained in my report, is
7 frequently used to include among them general
8 principles of law. And I cited other institutions
9 and other treaties that use the phrase principles of
10 international law to include -- excuse me, that use
11 the phrase principles of international law to include
12 general principles of international law.

13 Q. And you and Professor Caron, though,
14 appear to disagree as to how general principles are
15 to be identified. Do you think that debate is
16 material to this case?

17 A. We do appear to have a disagreement about
18 how one identifies general principles. I thought I
19 gave a fairly straightforward interpretation of it.
20 There is some definitional debate in the academy and
21 there is some implicit disagreement among the various
22 institutions about precisely how you identify general

1 principles but it's beyond controversy. It's
2 completely uncontroversial in my opinion that the
3 good faith principle, which is what I relied on, is a
4 general principle of law.

5 So I don't believe that for our purposes,
6 at least for the purposes of my report, that the
7 definitional debate matters because I think it's
8 uncontroversial that the good faith and related
9 doctrines are general principles of international
10 law.

11 Q. And just to be clear, would you say that
12 Professor Caron says that this is a customary
13 international law principle and you don't necessarily
14 agree with that?

15 A. Well, he's -- and I don't understand why
16 Professor Caron did this. He says that -- I think he
17 says that general -- he says that good faith should
18 be a principle of customary international law and not
19 a general principle. I don't think that's standard
20 usage in international tribunals. I think it's
21 generally thought of -- good faith is generally
22 thought of as a general principle of law. But again,

1 I don't think it's material. It sounds like we agree
2 that good faith is included within article 4 and
3 that's what matters, in my opinion.

4 Q. And I just want to ask a follow-up
5 question on the customary international law question
6 because Professor Caron took issue with that in his
7 report. If you would look again at tab 3 which is
8 Professor Caron's report at paragraph 48 which is at
9 page 19 of his report. There is some language
10 highlighted there and I'll just read that aloud.

11 A. I haven't found it yet.

12 Q. I'm sorry?

13 A. Page 19?

14 Q. Yes, page 19?

15 A. Okay.

16 Q. He says, "It is astounding to me that in
17 asking for an opinion on the meaning of Article 4
18 that ICM in Professor Goldsmith's words 'has not
19 asked me to address issues of customary international
20 law in this report.' I find this limitation
21 incomprehensible and disabling of any opinion."

22 Now, I take it that you disagree with

1 Professor Caron on this and can you just explain why?

2 I think you've given us some idea but explain why?

3 A. I would like to explain first why I didn't
4 discuss custom and then I'll explain why I don't
5 think that my refusal to discuss custom is disabling
6 my opinion.

7 The reason I didn't discuss custom is that
8 I concluded early on after a preliminary analysis that
9 there wasn't any relevant customary international law
10 that applied here and I informed ICM of that and they
11 asked me not to address it.

12 JUDGE SCHWEBEL: A little louder.

13 THE WITNESS: I apologize. Louder and
14 slower.

15 The reason I did not address customary
16 international law, the way it happened was that in my
17 preliminary analysis of this case, I determined that
18 there was no relevant customary international law,
19 that there was no continuous and systematic practice
20 that states followed from a sense of legal obligation
21 that was relevant to this case and I informed ICM of
22 that and they asked me not to address it. So that's

1 how that came about.

2 I don't think it's disabling though in the
3 opinion and I don't know why Professor Caron said
4 that because, first of all, the only customary
5 international law principle that I believe he
6 identified that might be relevant in this case is the
7 good faith principle, and I don't know what other
8 customary international law he has in mind or really
9 he doesn't explain why he thinks it's disabling of
10 the opinion.

11 But the important point, once again, that
12 is relevant/related to what I said before is that he
13 thinks that good faith is a principle of customary
14 international law. I think it is a general principle
15 of law. But we both agree it's included within the
16 terms of Article 4 whether it's included as customary
17 international law or general principles of law, and
18 so I don't think that it amounts to anything
19 material.

20 BY MS. WALTER:

21 Q. Thank you. Professor Caron also takes
22 issue I think with your treatment of the word

1 principles, your interpretation of that word, and so
2 I would like to look at what he says about that at
3 paragraph 67 of his opinion which is at page 28. And
4 he takes a particular view of principles in his
5 opinion. Could you read the highlighted language
6 there, please?

7 A. "The significance of the use of the term
8 principles turns on the fundamental distinction in
9 form and obligation between principles and rules and
10 the choice of ICANN to use the former rather than the
11 latter term."

12 Q. And again, would you agree with Professor
13 Caron on this?

14 A. I'm not quite sure what his point is here.
15 I think he's trying to suggest that principles are
16 somehow looser than rules and by ICANN's using the
17 terms principles of international law, they weren't
18 adopting something that was binding and concrete and
19 I disagree with that for a number of reasons. The
20 first is that as the phrase is used, relevant
21 principles of international law, on Caron's own
22 account it includes treaties, custom and general

1 principles, that phrase, and therefore it would
2 include what Caron calls rules.

3 The second point I would make is that
4 general principles of law often have precise content.
5 A general principle of law is res judicata, for
6 example. So to the extent he is suggesting that
7 general principles of law don't have binding effect
8 or aren't concrete enough to be applied by a
9 tribunal, I disagree with that.

10 And there are hundreds, thousands probably
11 of tribunals that have applied the principle at issue
12 here, the principle of good faith, in a variety of
13 ways. So to the extent that he's suggesting the
14 principles are somehow too vague to be applied by a
15 tribunal, I would definitely disagree with that, if
16 that's what he's suggesting.

17 Q. You've mentioned a number of times now the
18 principle of good faith so I would like to talk about
19 that a little bit more and if you could turn now to
20 paragraph 32 of your report at tab 1. Paragraph 32
21 is at page 18. And if you could please just remind
22 us of how the good faith principle operates in your

1 view?

2 A. Well, I quote Shaw here and I think this
3 is a fine description of how it operates. "Good
4 faith operates as a background" -- this is paragraph
5 32 of my report. "Good faith operates as a
6 background principle informing and shaping the
7 observance of existing rules of international law and
8 in addition constraining the manner in which those
9 rules may legitimately be exercised."

10 Now, as I say, he was talking there about
11 the good faith principles as it applies to states but
12 it is settled that it can be applied, especially by
13 incorporation, as it has been done here, to private
14 parties.

15 Q. And Professor Caron gives a definition of
16 good faith in his report at tab 3 of your binder so
17 let's take a quick look at that. This is paragraph
18 84 which is on page 36. He says there -- talking
19 about your discussion of good faith and says that he
20 finds that your explanations for these general
21 applications, not to mention the related principles
22 of fairness, estoppel and transparency, do not truly

1 provide more beyond the broad requirement of
2 reasonableness, honesty and conformity with the
3 spirit of the law. Would you agree with this
4 definition of good faith?

5 A. I do agree with the last part of that. I
6 think if we're giving a very shorthand definition of
7 the principle, I think to say that it requires
8 reasonableness, honesty and conformity with the
9 spirit of law captures pretty well what the good
10 faith principle requires.

11 I would disagree with him to the extent
12 that, in the surrounding paragraphs, he suggests that
13 this principle doesn't have much bite and is not a
14 terribly important principle. But yes, I think that
15 is a fair definition, as a compressed definition.

16 Q. And then in your report, you say that
17 three related good faith principles apply in this
18 proceeding and can you tell us what those are?

19 A. So I described three that I think were
20 most obviously applicable here. One is the principle
21 of good faith in applying legal rules. The second is
22 the principle of good faith called -- that prohibits

1 abuse of right. And the third is good faith in
2 contractual negotiations.

3 Q. Why did you talk about how those
4 principles might apply here?

5 A. Why did I talk about how they apply in
6 this case?

7 Q. Yes, sorry?

8 A. I believe that it was -- the good faith
9 principle has many applications and I thought it was
10 important to try to explain to the tribunal how it
11 applied to this proceeding.

12 Q. But assuming the facts to be true?

13 A. Assuming the facts to be true. I'm sorry.
14 So I didn't -- I made quite clear in my report that I
15 wasn't trying to prejudge the facts. I was simply
16 trying to state in my view, assume the facts to be
17 true without prejudging them, how these principles
18 apply to the circumstance.

19 Q. So taking the facts as alleged by ICM to
20 be true, what do you think the central violation of
21 the principle of good faith is here?

22 A. As I said in my report, I mentioned three

1 but the one that jumped out at me the most was,
2 again, accepting the facts as alleged, was abuse of
3 right and that is -- the abuse of right principle is
4 basically -- I mean, it too has several definitions
5 and several related definitions but the one I had in
6 mind was the exercise of good faith and the exercise
7 of discretion.

8 When an entity has discretionary power,
9 the good faith principle, as applied to that
10 discretionary power, is basically what abuse of right
11 is. And among the many other things that it
12 prohibits is the exercise of a power in a way that's
13 not honest, not fair, that departs from an end for
14 which the power was created.

15 That's an important part of the definition
16 of good faith, of abuse of right. And also that the
17 power is exercised in a pretextual way for an end not
18 related to that power.

19 Q. And how would this principle apply to
20 ICANN in this case, again, just assuming the facts --

21 A. Assuming the facts to be true, the things
22 that jumped out to me were the reasons that it

1 gave -- two of the reasons that it gave for denying
2 the application. One, that it would basically -- I'm
3 paraphrasing -- that it would raise conflict of law
4 issues, that it would have an adverse effect on
5 ICANN. That struck me as pretextual because, as I
6 explained, that would apply to any top level domain,
7 including sponsored top level domain or nonsponsored
8 or generic top level domain. So that struck me as
9 pretextual because it would have that reason for
10 denying an application, would have a much broader
11 application.

12 And the same with the other one that they
13 gave, that they worried how they would be hauled into
14 the day-to-day management of these issues. And for
15 reasons again I stated in my report, I found that to
16 be implausible because it would apply to so many
17 other top level domain names, the same reasoning.

18 Q. Finally, I just have a couple of questions
19 on an issue that Professor Caron's report raises that
20 you did not touch upon which is his suggestion that
21 ICANN can or should be analogized to an international
22 organization. In your opinion, can or should ICANN

1 be seen as fulfilling the functions of an
2 international organization?

3 A. It certainly can be seen as fulfilling the
4 functions of an international organization. That was
5 some of the language in article 3 about it performing
6 this important public service, this being a global
7 public good, and I do think it could be analogized to
8 an international organization for that reason, but
9 technically it's not an international organization.

10 It's a California organization. It's not
11 created by international law. It is a California
12 corporation that has assumed obligations under
13 international law and because it has assumed those
14 obligations and because it has the powers to
15 distribute and affect global public goods, I think it
16 can be deemed as analogous to an international
17 organization. But to be clear, it's not one.

18 Q. And then last question, taking ICANN to be
19 analogous to an international organization, if you
20 did that, would that change your analysis as to the
21 principles of international law that are relevant to
22 it in this dispute?

1 A. It wouldn't for two basic reasons. There
2 are lots of reasons but it's well settled in the law
3 of international organizations that the principle of
4 good faith applies. And in fact, it applies in the
5 context very much like the ones I've talked about
6 here in checking and guiding the exercise of
7 discretion by international organizations that
8 exercise discretionary power. There is a long
9 jurisprudence on abuse of right and related doctrines
10 in international organizations.

11 And the second reason that I don't think
12 it would affect my analysis is that I've relied a lot
13 on Article 4 and its constituent document and, again,
14 it's an important principle of international
15 organizations, an important element of the
16 jurisprudence of international organizations that the
17 constitutive documents have particular salience and
18 importance in the governance of the institution.

19 Q. Thank you very much, Professor Goldsmith.
20 That's all the questions I have for right now.

21 CROSS-EXAMINATION

22 BY MR. ENSON:

1 Q. Good morning, members of the panel,
2 Professor Goldsmith.

3 A. Good morning.

4 Q. My name is Eric Enson and I will be
5 conducting Professor Goldsmith's exam this morning.
6 Professor Goldsmith, I want to start with the point
7 that you left off on in your direct examination. In
8 your report, you identify three sources of
9 international law, conventions, international custom
10 and the general principles of international law
11 recognized by civilized nations, is that right?

12 A. Right.

13 Q. And according to your report, you do
14 believe that customary international law is included
15 in Article 4 of the articles of incorporation's use
16 of the phrase "principles of international law,"
17 correct?

18 A. I think what I said was that it probably
19 was but it was certainly less clear than general
20 principles of international law. And said it was
21 possible that since the articles specify
22 international conventions, since they were being

1 specific about that, that it's possible that general
2 principles of international law could just refer to
3 general principles of international law and exclude
4 custom. But I said I couldn't think of any reason
5 why ICANN would want to do that.

6 Q. And I think -- correct me if I'm wrong --
7 you testified earlier that you determined that
8 customary international law was not applicable to the
9 situation here, is that right?

10 A. I said I couldn't discern any relevant
11 law, customary international law which I define as a
12 generally consistent practice of states followed from
13 the sense of a legal obligation that was relevant to
14 this suit, to this matter.

15 Q. Professor Goldsmith, I think we delivered
16 a binder for you there?

17 A. If you have, I don't see it.

18 Q. I apologize. Let me get the binders. I
19 apologize for that. Professor Goldsmith, isn't it
20 true that no comprehensive theory of international
21 law can ignore customary international law?

22 A. Could you please clarify what you mean

1 about a comprehensive theory of international law?

2 Q. Sure. Let's try to do that. Why don't
3 you turn to tab 2 of your binder there, please. Tab
4 2 I believe is a book you co-authored in 2005
5 entitled The Limits of International Law?

6 A. Correct.

7 Q. Is that right? If you flip to page 4.
8 I'm sorry, I apologize, page 21 in your book. There
9 towards the bottom of the third paragraph, you state,
10 "Even in areas where treaties have proliferated (such
11 as the laws of treaty interpretation, the laws of
12 war, and human rights), customary international law
13 plays an important role. It provides interpretative
14 presumptions, it extends treaty norms to
15 nonsignatories, and it influences efforts to expand
16 treaty regimes. For these reasons, no comprehensive
17 theory of international law can ignore it." Is that
18 right?

19 A. Certainly in the terms of my book in which
20 we were trying to provide a comprehensive rational
21 choice account, positive descriptive rational choice
22 account of international law, that's true.

1 Q. But here you determined that customary
2 international law did not apply?

3 A. No, I did not determine that. I make
4 quite clear in my report that I thought general
5 principles of law included -- possibly included
6 customary international law. What I said was I could
7 not discern any relevant customary international law
8 that applied in this proceeding.

9 Q. Do you have a sense of why you could not
10 discern any customary international law that had
11 application here?

12 A. The reason is because I looked for state
13 practices followed from the sense of legal obligation
14 that would be relevant here and I didn't find any.

15 Q. Professor Goldsmith, let's move on and
16 let's talk about the international law that you do
17 discuss in your report. And in doing that, I'm going
18 to refer to states. And by that I mean national
19 states or sovereigns or the like, if that's
20 acceptable to you?

21 A. Whatever you like. It's your cross.

22 Q. Okay. Thank you. It's true, isn't it,

1 that almost all international law imposes obligations
2 on states, not private actors like corporations?

3 A. It's true of most international law, yes.
4 As I explain in my report, international law does not
5 come through here and doesn't apply here on its own
6 terms. It comes through because ICANN can
7 voluntarily assume and refer to it. And it's settled
8 that private entities can do that.

9 Q. And I apologize for cutting you off there.
10 We're going to get to that.

11 A. Okay, great.

12 Q. We're going to talk about that. At this
13 point I want to talk about international law a little
14 more in the abstract if that's acceptable. The point
15 that all international law imposes obligations on
16 states rather than private corporations is --

17 A. Excuse me, I'm sorry, not all
18 international.

19 Q. Almost all international law?

20 A. Most international law, I would say.

21 Q. And this is a point that you made very
22 recently in a brief you recently filed with the

1 Supreme Court in the Pfizer litigation, correct?

2 A. Correct.

3 Q. Why don't we turn to tab 3 of the book in
4 front of you, please. Does this appear to be the
5 brief that you recently filed as counsel of record
6 for the Chamber of Commerce of the United States of
7 America?

8 A. Yes.

9 Q. Would you please turn to page 3 of the
10 brief?

11 A. Yes.

12 Q. At the bottom of page 3, you state that
13 the alien tort statute litigation against
14 corporations for alleged wrongdoing outside the
15 United States has exploded in recent years. These
16 cases are based on the legal novelty of extending
17 international law -- which usually applies to states
18 but not private actors -- to private corporations.
19 That's a quote from the brief you submitted to the
20 Supreme Court, correct?

21 A. Correct.

22 Q. And if you turn to page 6, please, in the

1 middle of the page there, you note that the
2 exceptions to the rule that almost all international
3 law applies to nations and not to private actors or
4 corporations are rare and limited, correct?

5 A. Correct. But there's all the difference
6 in the world between what I was saying here and what
7 I said in my report. And I would be surprised if you
8 were denying that ICANN has voluntarily as a
9 corporation assumed obligations under international
10 law. There is all the difference to me in the world.

11 The point I was making in this brief is --
12 and this is not controversial. Neither of these
13 propositions is controversial -- the first one is
14 that international law does not by its terms -- most
15 of international law does not by its terms regulate
16 private entities. There is an exception to that and
17 they're growing but for the most part, that's the
18 case.

19 However, it is also settled in
20 international arbitrations that private entities are
21 allowed to voluntarily assume obligations under
22 international law and at least controversially under

1 general principles of international law. So I want
2 to make clear that I don't think international law
3 becomes relevant on its own terms. I think it
4 becomes relevant because ICANN assumed those
5 obligations in the charter. So that's why these are
6 entirely different.

7 Q. Oh, I understand. And again, we're going
8 to get to that point of the report in a moment.

9 Before we do that, given the discussion we
10 just had, let's make it clear, it's true that the
11 international law principle of good faith applies to
12 states only, correct?

13 A. The international law principle of good
14 faith applies to states only? I wouldn't say that at
15 all. That's actually not true.

16 Q. Why don't you explain that, please?

17 A. It applies -- the principle of good faith
18 applies to international organizations which are not
19 states. That happens all the time, as I said. It
20 applies to private parties that have incorporated in
21 their contracts general principles of law. It
22 applies in mixed cases between states and private

1 parties. So I wouldn't agree with that proposition
2 as you stated it.

3 Q. I want to make clear, though, the
4 international law principle of good faith imposes
5 obligations on states by its own terms, correct?

6 A. The international law principle applies --
7 the general principle of international law in cases
8 where it applies does impose obligations on states in
9 cases where it applies to states, but not to the
10 exclusion of other entities.

11 Q. Let's move on. Let's move on and talk
12 about a little bit more of your report, then. And as
13 you noted I believe on direct examination, ICANN is a
14 private not-for-profit corporation organized under
15 the laws of California, correct?

16 A. Correct.

17 Q. And although the good faith principles
18 we've just discussed virtually always only apply to
19 states, you --

20 A. Just for the record, I don't agree with
21 that.

22 Q. Well, let me rephrase it. Let me rephrase

1 it. You conclude in your report that the
2 international law principle of good faith applies to
3 ICANN despite its status as a nonprofit corporation,
4 correct?

5 A. Yes. ICANN assumed that obligation quite
6 clearly in Article 4.

7 Q. And when you say assumed, I believe you
8 say that, in your report, ICANN voluntarily subjected
9 itself to international law in all its forms,
10 correct?

11 A. That's what I meant when I -- that's how I
12 interpreted general principles of law, to include the
13 three forms.

14 Q. And when you say that ICANN voluntarily
15 subjected itself to the international law principle
16 of good faith, that's the international principle
17 that you then abstract three related applications,
18 correct? You take three related applications from
19 the good faith principle, correct?

20 A. Yes.

21 Q. And I believe -- and I'm going to
22 paraphrase here and I apologize.

1 A. As long as you allow me to correct it if I
2 don't agree with your interpretation.

3 Q. Absolutely.

4 A. Thank you.

5 Q. I believe in your report and as you
6 testified this morning, you argue that ICANN intended
7 to transform itself in this way, making itself
8 subject to the international law that is imposed upon
9 states due to pressure from the United States
10 Government and forces within the Internet community,
11 is that right?

12 A. Could you ask that again so I could make
13 sure I understand exactly what you said, please?

14 Q. Sure. You argue that ICANN voluntarily
15 assumed the international law obligations of a state
16 due to pressure from the U.S. Government and others
17 within the Internet community --

18 A. I don't believe I said international law
19 obligations of a state but please go ahead. I said
20 international law obligations.

21 Q. Well, the international law obligations
22 that traditionally impose obligations on states,

1 correct?

2 A. Among other things, yes. Listen, the good
3 faith principle, just to be clear, this won't be news
4 to many people, it is a principle that -- and the
5 reason it's such an uncontroversial principle of law
6 is because it emerges across nations, it comes in
7 international law, it appears in all international
8 relations. It really cuts across the distinctions
9 you're trying to make.

10 I don't mean to be noncooperative. I just
11 want to be clear about how I think the principle of
12 good faith operates.

13 Q. Well, it is true, isn't it, Professor
14 Goldsmith, that all of the authorities you cite
15 within your report for the -- to define and apply the
16 international law principle of good faith, they all
17 are talking about the application of that principle
18 to states, correct?

19 A. That's not correct.

20 Q. Would you point out for me where in your
21 report --

22 A. I talk about the UNIDROIT principles which

1 apply to good faith principle. I think I quote Ben
2 Cheng who says it applies to international -- to
3 states as well as other entities and I believe I cite
4 the nuclear test cases which talk about the good
5 faith principle applying no matter what its source.

6 Q. Let's look at your use of the Professor
7 Cheng quote, if we can. If you turn to tab 4 in your
8 binder, I believe there is a portion of that
9 treatise, at least the portion that you cited to, you
10 quote Professor Cheng for the notion that good faith
11 is equally applicable to relations between
12 individuals and the relations between states,
13 correct?

14 A. Not on this page. Could you show me where
15 I say it?

16 Q. In your report. I apologize.

17 A. I would have to look at it to make sure
18 that's exactly what I said.

19 Q. Let's turn to page 105 of Professor
20 Cheng's treatise. Isn't it true that here Professor
21 Cheng is talking about or merely referring to the
22 fact that the international law principle of good

1 faith that applies to states arose from national law
2 principles of good faith that apply to individuals?

3 A. Which line are you talking about?

4 Q. Sure, the top of 105 and actually to the
5 first paragraph of 105?

6 A. He says, "There was little doubt in the
7 mind of the arbitrator as to the binding character of
8 the principle of good faith upon individuals living
9 under the rule of law and he held that it was equally
10 binding upon nations."

11 Q. So isn't Professor Cheng noting that the
12 international law of good faith that's applicable to
13 states arose from the good faith principle that is
14 applied to individuals?

15 A. That is what he's saying here, yes, and
16 that's evidence of the fact that good faith -- again,
17 as I say, it cuts across all legal relations. And
18 this is I think a settled proposition in
19 international jurisprudence.

20 Q. But in the rest of Professor Cheng's
21 chapter on good faith, he's only referring to the
22 principle's application to states, isn't that right?

1 A. I would have to go back and read the whole
2 chapter but I would actually doubt that, that he
3 doesn't make reference to cases that draw on
4 principles that apply to individuals.

5 Q. Let's get back to what we were talking
6 about earlier and that is your position that ICANN
7 voluntarily assumed these international law
8 obligations, particularly the principle of good
9 faith, in its drafting and adoption of Article 4,
10 correct?

11 A. Right.

12 Q. Now, you would agree with me, wouldn't
13 you, that given your position, ICANN's intent in
14 drafting and adopting Article 4 is key to your
15 analysis, is it not?

16 A. Depending on what you mean by intent. I
17 mean, what I did was I looked at the drafting history
18 and the historical context of how ICANN came about
19 and what the controversies were and how the language
20 changed in response to the controversies and what
21 Professor Dyson and others said about the language
22 that they adopted.

1 Q. Let's talk a little bit about that, about
2 the support for the notion that ICANN did these
3 things with the intention of voluntarily assuming
4 international law principles of good faith. I've
5 reviewed your report a number of times.

6 A. May I please say that, again, I'm sorry
7 but I don't agree with your characterization.

8 What I said was that ICANN voluntarily
9 embraced general principles of international law and
10 then I said that the most obvious and central general
11 principle of international law is good faith. I
12 don't actually know if any of the ICANN lawyers
13 drafting this document knew anything about
14 international law or whether they had good faith on
15 the front of their heads and I'm not making a claim
16 about that. I'm reading the language in its best
17 light and giving meaning to the terms that they put
18 in their binding obligation.

19 Q. So what you're saying, then, is that what
20 you have done is you have merely interpreted Article
21 4, correct, rather than looking at ICANN's intention
22 and actually drafting and adopting that, is that

1 right?

2 A. No.

3 Q. What are you saying, then, Professor
4 Goldsmith?

5 A. I'm saying that I interpreted the terms in
6 light of all the factors I just mentioned.

7 Q. But you did interpret Article 4, is that
8 right?

9 A. Yes, I did.

10 Q. And what law did you follow in
11 interpreting Article 4?

12 A. What law did I follow in interpreting
13 Article 4? I didn't follow any particular law in
14 interpreting Article 4. I believe that Article 4, as
15 I said, constitutes a governing law by the parties.

16 Q. But don't you note in your report that
17 ICANN's articles of incorporation should be
18 interpreted consistent with California law?

19 A. Yes.

20 Q. Because it's a California corporation?

21 A. Yes.

22 Q. But you didn't follow California law in

1 interpreting Article 4?

2 A. I didn't feel it necessary to because I
3 thought that ICANN, as I've explained, adopted
4 international and California law together. I'm not
5 an expert on California law. I did look at the
6 California law enough to satisfy myself that there
7 was no inconsistency that I could find briefly. But
8 I note that California law allows corporations to
9 embrace extra obligations over and above what
10 California law itself provides.

11 Q. And let me just make a request on behalf
12 of the court reporter. Please let me finish my
13 questions before answering so the court reporter can
14 get both of us down.

15 A. I apologize.

16 Q. And I apologize for cutting you off as
17 well and I'll do my best to not do that.

18 You must know that in interpreting
19 articles of incorporation under California law,
20 California courts apply the common rules of statutory
21 interpretation, is that right?

22 A. As I say, I'm not an expert on California

1 law. But that wouldn't surprise me.

2 Q. Well, you're not saying, then, that
3 Article 4 is an express assumption of the
4 international law principles that are generally
5 applicable to states, are you? You're implying it?

6 A. I don't understand the question.

7 Q. Sure. In your analysis of Article 4 and I
8 think what I've heard you say was you looked at
9 Article 4, you didn't follow any sort of rules of
10 statutory interpretation in interpreting it; but my
11 question is, do you believe that this assumption of
12 international law principles applicable to states
13 generally is an explicit assumption or an implicit
14 assumption?

15 A. An explicit assumption of what?

16 Q. Of the international law principles
17 generally applicable to states only?

18 A. I'm sorry, I'm not trying to be difficult
19 but I don't understand the question.

20 Q. Well, we've discussed a little earlier
21 that generally international law principles, general
22 principles of international law apply only to states,

1 correct?

2 A. As I said, I didn't agree with that.
3 That's not true. General principles of law apply
4 across the jurisdictions, they apply in international
5 organizations all the time, they apply in private
6 contracts, they apply in cases between private
7 parties and states, so I wouldn't agree with that.
8 I'm sorry.

9 Q. Professor Goldsmith, that's not what you
10 said in the brief that you just recently filed with
11 the Supreme Court. What you said there was generally
12 international law only applies to states with a few
13 rare exceptions, correct?

14 A. That is true.

15 Q. And the exceptions are genocide, war --

16 A. You were just talking about the good faith
17 principle. That's what I was talking about.

18 Q. I'm sorry, would you say that one more
19 time?

20 A. You weren't talking about international
21 law earlier. You were talking about the principle of
22 good faith.

1 Q. I'm talking about international law that
2 is generally only applicable to states?

3 A. It is.

4 Q. And what you're saying is that ICANN, in
5 drafting and adopting Article 4, voluntarily assumed
6 the international law principles that are generally
7 only applicable to states, correct?

8 A. Well, again, the good faith principle --
9 in the brief and in general, I wasn't talking about
10 good faith. I was talking about custom and treaties
11 there. The good faith principle that I believe was
12 incorporated here applies in lots of legal relations
13 but I don't have any trouble saying that I can
14 voluntarily adopt the principles of international law
15 here. That's exactly what they did, that's clear in
16 Article 4, that's what Professor Dyson said.

17 Q. I'm glad you brought up Professor Dyson
18 because I know that you in your direct examination
19 referred to the statements that Esther Dyson made in
20 1998 and I believe you read or you quoted from your
21 report on that issue but why don't we go ahead and
22 take a look at the actual letter --

1 A. Good.

2 Q. -- in which Ms. Dyson refers to the
3 revised articles. And I don't have this in your
4 binders. I apologize. But Kate will put it up on
5 the screen for us. It's Exhibit 207. And that's
6 Hearing Exhibit 207.

7 JUDGE TEVRIZIAN: While you're putting
8 that on the board, just so the record is clear, both
9 of you have been talking about Article 4. You're
10 talking about Article 4 of the articles of
11 incorporation and not Article 4 of the bylaws?

12 THE WITNESS: Yes, sir.

13 MR. ENSON: That's correct, Judge
14 Tevrizian.

15 BY MR. ENSON:

16 Q. Can you see that there, Professor
17 Goldsmith?

18 A. Barely, yes.

19 Q. That is the letter I believe you were
20 referring to from Ms. Dyson to J. Beckwith Burr at
21 the United States Department of Commerce. And if we
22 could turn to I believe page 3 is the language you

1 were referring to earlier and there, underneath
2 geographic diversity, there is a paragraph that
3 begins with, "In addition" and we'll blow that up for
4 you.

5 A. Thank you.

6 Q. Ms. Dyson says there, "In addition, we
7 have made some minor changes to the specifics of some
8 other bylaws, including the insertion of some general
9 language in the articles of incorporation making it
10 clear that ICANN will comply with relevant and
11 applicable international and local law." Is that
12 right?

13 A. That's right.

14 Q. In your report, Professor Goldsmith, you
15 don't discuss the word relevant, do you?

16 A. I don't believe I do.

17 Q. Why is that?

18 A. I don't know why I didn't discuss it. I
19 think it seemed too obvious to me that good faith
20 principle was relevant to ICANN's -- the obligations
21 of good faith that ICANN assumed was relevant to its
22 central task of doling out domain names. It seems

1 obvious to me.

2 Q. You would agree with me, wouldn't you,
3 that the word relevant, at least as used in Article 4
4 of the articles of incorporation as well as this
5 letter, was included for some reason, correct?

6 A. Yes, and indeed I said that they
7 changed -- they used relevant instead of applicable.
8 And as I said in my testimony, I believe that that
9 change means something -- the relationship is
10 somewhat looser than applicable.

11 Q. Well, whether it's looser or not, the word
12 relevant, you would have to agree with me, and given
13 its placement in Article 4 of the articles of
14 incorporation, acts as some sort of limitation on the
15 phrase "principles of international law," correct?

16 A. It's in Article 4 and it demands
17 interpretation, yes.

18 Q. But you didn't do that?

19 A. I did not, in my report. I did in my
20 analysis.

21 Q. I'm sorry?

22 A. In the process that led me to the report.

1 I didn't talk about it in the report because I said
2 it was too obvious.

3 Q. Let's move back, then, to your discussions
4 or your belief that ICANN voluntarily assumed these
5 general principles of international law. In all its
6 forms, those --

7 A. I apologize. I'm sorry. Go ahead. I'm
8 sorry to interrupt.

9 Q. I believe you use that phrase in your
10 report. You say ICANN has voluntarily assumed
11 international law in all its forms, correct?

12 A. Yes, that's what I said.

13 Q. And that includes those principles that
14 are applicable to states only, correct?

15 It doesn't include that?

16 A. Not applicable to states only. It would
17 include that but not exclusively, yes.

18 Q. So it includes -- what you're saying is
19 that in the statement in Article 4 of the articles of
20 incorporation, ICANN has assumed, voluntarily assumed
21 the international law obligations that are only
22 applicable to states?

1 A. Can we look at Article 4 instead of
2 Dyson's letter about Article 4?

3 Q. Sure. Would you pull that up, Kate? I
4 believe it's Exhibit 4?

5 A. I said, and I think, that ICANN assumed an
6 obligation to carry out its activities in conformity
7 with relevant principles of international law and
8 applicable international conventions and local law.

9 Q. Let me ask you, is it your opinion that in
10 drafting and adopting Article 4, ICANN has assumed
11 the international law obligations applicable only to
12 states?

13 A. No.

14 Q. That is not your testimony?

15 A. Not the way you're putting it. I believe
16 that ICANN assumed the obligation to act in
17 conformity with relevant principles of international
18 law.

19 Q. Including those applicable only to states?

20 A. Including those, but not limited to that.
21 To the extent that they're relevant.

22 Q. So if the international law principle of

1 good faith applied only to states, if that's a true
2 premise, you're saying that ICANN voluntarily assumed
3 that obligation, correct?

4 A. I disagree with your premise, but I am
5 saying that ICANN voluntarily assumed the obligation
6 to act in good faith.

7 Q. And let's talk about the support for or
8 the authorities that you rely on for that notion.
9 And you referred to Ms. Dyson's letter. What else
10 did you rely on?

11 A. I'm sorry, for which proposition?

12 Q. The proposition that ICANN voluntarily
13 assumed the international law obligations applicable
14 only to states?

15 A. Again, you're putting words in my mouth.
16 I'm sorry, that's not what I said. I'm a little -- I
17 just don't understand the line of questioning.

18 It says right here in Article 4 that ICANN
19 shall operate for the benefit of the international
20 community carrying out its activities in conformity
21 with -- which Esther Dyson thought meant in
22 compliance with -- relevant principles of

1 international law and applicable international
2 conventions and local law.

3 You in your brief said that that included
4 trademark law and free speech law under international
5 law which are no less applicable to states than the
6 good faith. In fact, the good faith principle
7 applies more broadly. So I don't understand -- yes,
8 I do think that ICANN voluntarily assumed those
9 obligations. And I thought you agreed with that in
10 your memorial when you said that trademark law,
11 international trademark law and international free
12 speech law would apply.

13 Q. Well, the point I'm trying to get at,
14 Professor Goldsmith, is I think you and I are not
15 going to agree on whether or not the international
16 law principle of good faith applies to states only,
17 is that right?

18 A. If you think it only applies to states,
19 then we're not going to agree.

20 Q. Okay. I'm talking about the international
21 law principle of good faith, not good faith in the
22 abstract?

1 A. I'm talking about general principles of
2 law, that's one of the three sources of international
3 law, and I'm saying that the general principle of
4 law, it's uncontroversial. I think I cite Redfern
5 and Hunter, the prominent commercial arbitration
6 book, for the proposition that parties can
7 voluntarily assume obligations under general
8 principles of international law and that's what I'm
9 saying.

10 Q. Okay. And in saying that -- and this is
11 going to be the last time --

12 A. I'm sorry, I don't agree with you. I
13 apologize.

14 Q. Okay but -- and that's fair. You and I
15 are not going to agree.

16 And when I say the international law
17 principle of good faith, I'm talking about the
18 principle that arises under international law. Not
19 good faith in California law or good faith in any
20 other national law. I'm talking about international
21 law. Is that understood?

22 A. I would put it that the principle of good

1 faith that arises under general principles of
2 international law, yes.

3 Q. Okay.

4 A. Which is, you know, principles inherent,
5 using the shorthand, in all legal relations. And as
6 I said in my direct testimony, again, I don't think
7 this is a controversial proposition. I mean, good
8 faith applies in public relations and private
9 relations and it's been voluntarily assumed here.
10 It's not applying by its own force.

11 Q. And I understand. I understand that. And
12 all I want to discuss -- and I will move on -- is
13 that you and I, I think, will disagree on whether or
14 not the general principle of international law of
15 good faith applies to states only, correct?

16 A. As I said --

17 Q. Well, assuming it does, it doesn't matter
18 for your analysis because you are saying that ICANN
19 voluntarily assumed those international laws that
20 apply only to states by adopting Article 4, correct?

21 A. No, sir. You keep trying to get me to say
22 that and that's not what I'm saying. I'm sorry.

1 Q. This is the last time.

2 A. Okay.

3 Q. Maybe I'm confused and I want to make sure
4 that I understand what you're saying.

5 A. Could I get some more water, please?

6 Q. Sure. Go ahead.

7 A. I'm ready.

8 Q. Professor Goldsmith, you were not involved
9 in the ICANN board discussions regarding the drafting
10 of Article 4, were you?

11 A. Most definitely not.

12 Q. And you weren't involved in the November
13 21st, 1998 board meeting when the ICANN board adopted
14 Article 4, correct?

15 A. I was not.

16 Q. Before reaching your conclusions regarding
17 ICANN's adoption of Article 4, did you interview any
18 of the ICANN board members involved in that process?
19 Did you interview any of the ICANN staff members
20 involved in that process?

21 A. No.

22 Q. Did you interview any of the members of

1 the United States Government who you claimed were
2 involved in that process? Did you interview any of
3 them?

4 A. They were involved in the process. There
5 were letters going back and forth. I did not
6 interview them.

7 Q. Do you know who J. Beckwith Burr is?

8 A. I know who she is, yes.

9 Q. And Ms. Burr has I think indicated in at
10 least this exhibit worked for the Department of
11 Commerce, correct?

12 A. She did.

13 Q. And she received the revised articles of
14 incorporation with the new Article 4 directly from
15 ICANN, correct?

16 A. Correct.

17 Q. And are you aware that Ms. Burr after
18 leaving government service became the attorney for
19 ICM?

20 A. I think I knew that, yes.

21 Q. Do you know that she's a witness in this
22 proceeding?

1 A. I do.

2 Q. So it's fair to say that Ms. Burr was a
3 resource available to you before drafting your
4 report, correct?

5 A. No. I mean, I don't know what you -- I
6 don't even think I knew she was a witness until late
7 in the day.

8 I looked at -- I'm a lawyer and I'm
9 interpreting legal documents. I'm not an
10 investigator of facts in this sense and my job, my
11 charge was to interpret these documents and to figure
12 out what was the meaning of this phrase by ICANN to
13 adopt relevant to, as Mr. Dyson said, act in -- I
14 think she said must comply with relevant principles
15 of international law.

16 And as any lawyer would do, I looked at
17 the language, I looked at the structure of the
18 document, I looked at the drafting history, I read a
19 lot about the history of ICANN which I knew something
20 about. I had written something about that before.
21 And on the basis of those materials, I made the
22 interpretation I did. I did not interview people

1 involved in the process.

2 Q. Professor Goldsmith, you authored a book
3 entitled Who Controls the Internet in 2006, correct?

4 A. Correct, I co-authored the book.

5 Q. And you reference that book in your
6 report, correct?

7 A. I think I did.

8 Q. If you turn to tab 8, please, in your
9 binder, I believe there are some excerpts there. If
10 you turn to page 168 there, there is a few pages that
11 are from the book, if they look accurate to you?

12 A. 168 or 169?

13 Q. 168. I just want to make sure this looks
14 accurate to you. I apologize.

15 A. It's my book, yes.

16 Q. Then let's -- in this book, you have a
17 chapter or at least some discussion dedicated to
18 ICANN, correct?

19 A. Yes. I talk about ICANN in two places.

20 Q. And you also discuss the displeasure some
21 within the international community raised, especially
22 the EU and the United Nations, because the domain

1 name system was being managed by a private U.S.
2 corporation, correct?

3 A. Would you show me the language you're
4 referring to?

5 Q. Sure. Page 171, please. I believe it's
6 the second full paragraph?

7 A. This was the controversy in 2005. Not at
8 the time of the drafting seven years earlier. There
9 was controversy at the time of the drafting.

10 Q. Sure. I'm just talking about some of the
11 general controversy within the international
12 community regarding the fact that a not-for-profit
13 California corporation had involvement in managing
14 the Internet?

15 A. There was controversy about that, yes.

16 Q. And you discuss some of that here in your
17 book?

18 A. The page you talk about, I'm discussing
19 controversy in 2005.

20 Q. Correct. And you talk about some of the
21 interplay between national governments and ICANN
22 going back and forth on certain resolutions about how

1 the domain names should be managed, correct?

2 A. Yes.

3 Q. Professor Goldsmith, in your discussion
4 here of international criticism of ICANN and the
5 interplay of international governments, you do not
6 present the theory that you present here, which is
7 that ICANN is subject to the general principles of
8 international law, correct?

9 A. Are you saying that in my book, I did not
10 discuss Article 4 of ICANN's articles of
11 incorporation?

12 Q. I'm saying that you did not discuss the
13 theory that you presented here, which is that ICANN
14 is subject to the general principles of international
15 law.

16 A. I don't believe I discussed that in my
17 book.

18 Q. And indeed, the first time that you've
19 raised this theory is here in this proceeding,
20 correct?

21 A. It's the first time I've been asked to
22 look at it.

1 MR. ENSON: Thank you, Professor
2 Goldsmith. That's all I have for right now.

3 THE WITNESS: Thank you. Am I done?

4 JUDGE TEVRIZIAN: I have a question.

5 THE WITNESS: I'm sorry, I'm not done.

6 JUDGE TEVRIZIAN: I have a couple of
7 questions. I'm assuming that you did not, in your --
8 did not opine as to Article 4 of the bylaws, is that
9 correct?

10 THE WITNESS: You'll have to remind me
11 what Article 4 of the bylaws say. I'm sorry. I
12 should know that.

13 JUDGE TEVRIZIAN: Talking about
14 accountability and review.

15 THE WITNESS: Oh, I do talk about -- I do
16 interpret the meaning of -- if that's the articles, I
17 would need to look at the bylaws if someone has a
18 copy of it. If those are the articles that
19 established the IRP process --

20 JUDGE TEVRIZIAN: Yes.

21 THE WITNESS: I do talk about that in my
22 report.

1 JUDGE TEVRIZIAN: In your report, do you
2 opine as to the binding or nonbinding effect of a
3 decision rendered by this panel?

4 THE WITNESS: No, sir.

5 JUDGE TEVRIZIAN: Pardon?

6 THE WITNESS: No, I did not.

7 JUDGE TEVRIZIAN: I have no further
8 questions.

9 MR. PAULSSON: If you could say so in a
10 few sentences, what illusions were you talking about
11 in your book?

12 THE WITNESS: What are the illusions of a
13 borderless world? The book is about how nations --
14 the Internet -- in a few sentences, the Internet was
15 to defy national borders and the book is about how
16 nations -- the various tools nations have used to
17 reassert control over the Internet within its
18 borders. That's essentially what that book was
19 about.

20 MR. PAULSSON: The illusion is?

21 THE WITNESS: The illusion was that when
22 the Internet -- in the 1990s, there was a widespread

1 conventional wisdom that the Internet was going to
2 defy governments and would be nonregulable and the
3 book is about the process of why that turned out not
4 to be true.

5 MR. PAULSSON: So was the illusion the
6 belief that something would eventuate that was
7 mistaken, or something that was intentionally
8 fostered as illusion?

9 THE WITNESS: Let me answer this way and I
10 hope I'm answering your question. The illusion of a
11 borderless world was the view among scholars, many
12 Internet activists, that the Internet and the
13 communication technology of the Internet, because of
14 its global nature and because you could send bits
15 across borders and escape territorial regulation, the
16 illusion was that sovereignty was not going to be
17 effective in this space and that governments could
18 not regulate this space.

19 When I say it was an illusion, maybe --
20 now that you say it, maybe that wasn't the right
21 word. What I meant was this was widespread
22 conventional wisdom and it was still the belief at

1 the time we wrote the book and I thought it was an
2 illusory aspect of the Internet, that it was beyond
3 government regulation.

4 MR. PAULSSON: Because?

5 THE WITNESS: Because states have many
6 tools to regulate the Internet within their borders
7 and I talked about many. I could tell you if you
8 would like to know some of them.

9 MR. PAULSSON: No, I think I've got the
10 point.

11 THE WITNESS: States can -- the basic
12 point was that by exercising authority within their
13 borders -- and this grows out of basic -- exercise --
14 power within borders is a way to affect activity
15 outside your borders. And that basic principle has
16 played out in a number of ways.

17 MR. PAULSSON: So that requires -- to
18 reach that conclusion, legal theory is not
19 sufficient. You actually have to have some
20 understanding of how effectively one can impact the
21 particular industry.

22 THE WITNESS: And the book talked about

1 that. Yes, sir, and the book talked about that.

2 MR. PAULSSON: In your discussion of good
3 faith, it seems that abuse of right is an element of
4 your second category.

5 THE WITNESS: Yes, sir.

6 MR. PAULSSON: I haven't looked at Ben
7 Cheng for a while. But -- this is dangerous, but
8 from memory, there is a chapter on good faith and
9 there is a different chapter on abuse of right?

10 THE WITNESS: There is and I believe that
11 he said that abuse of right is a particular
12 application of the principle of good faith, and
13 that's generally the way that it's understood in my
14 experience.

15 MR. PAULSSON: Again, just from memory,
16 but would you read the chapter on abuse of right is
17 in a way one of the weaker chapters in his book?
18 Because there is case after case after case where, on
19 the facts of a particular dispute, the pattern of
20 conduct is held not to be an abuse of right. So you
21 can cite all these cases for the proposition that
22 there is such a thing, but it seems never to happen.

1 That's my recollection of that chapter. I was quite
2 disappointed not being able to find the holding.

3 THE WITNESS: So I can't think -- I don't
4 know whether that's true. I'll defer to you on that.

5 And it is true that a lot of abuse of
6 right doctrine comes from cases where the courts have
7 said there was no abuse of right because the exercise
8 of power was honest and reasonable. There is a
9 fairly vigorous jurisprudence within international
10 organizations of applying the abuse of right
11 principle and I do think that is analogous here
12 because it is about the exercise of administrative
13 power and the -- ideas related to abuse of right
14 obviously. And that is a powerful principle in
15 international organizations which is directly
16 relevant here. And of course there are arbitrations
17 that turn on abuse of right.

18 But I mean, you might be right. I would
19 agree with you generally that a lot of the abuse of
20 right precedents are cases, especially in the earlier
21 period are cases in which the Court found no abuse of
22 right because the power had been exercised honestly.

1 There was of course a lot of jurisprudence in the
2 years after Cheng.

3 JUDGE SCHWEBEL: Professor Goldsmith, are
4 there any applicable international conventions to
5 ICANN's operations?

6 THE WITNESS: The one I could think of was
7 the one discussed in the -- I didn't look into this
8 in great detail but to satisfy myself that the word
9 had meaning, the white paper -- there was the green
10 paper -- I'm going to get this backwards. Was it the
11 green paper? The last Commerce Department paper, I
12 think it was the white paper, when it was talking
13 about transferring to ICANN, it mentioned that it
14 wanted ICANN to coordinate with the World
15 Intellectual Property Organization, WIPO, which is of
16 course constituted by treaty.

17 So I assumed something like that is what
18 it was talking about with international conventions.
19 But I didn't look further. And there might well be
20 more. And then the main principle that I could think
21 of for general principles is the one that seemed
22 obvious was good faith, to give meaning to those

1 words.

2 JUDGE SCHWEBEL: Well, if there are no
3 further questions --

4 MR. ALI: No further questions from
5 claimant. Thank you so much, Professor Goldsmith for
6 your testimony.

7 THE WITNESS: Thank you very much.

8 MR. LEVEE: Members of the panel, our next
9 witness, who I believe -- ICM has now concluded?

10 MR. ALI: Our case in chief, yes.

11 MR. LEVEE: Our next witness is Dr. Cerf.
12 He is here and if I might suggest a short break, I'll
13 go get him.

14 JUDGE SCHWEBEL: Thank you. Let's have a
15 break until 11:30.

16 (Recess.)

17 Whereupon,

18 VINT CERF,
19 was examined and testified as follows:

20 MR. LEVEE: Members of the panel.

21 DIRECT EXAMINATION

22 BY MR. LEVEE:

1 Q. Good morning, Dr. Cerf.

2 A. Good morning.

3 Q. Could I ask you to state your full name
4 for the record?

5 A. My name is Vinton J. Cerf. And let me ask
6 the panel whether I am audible to all of you.

7 JUDGE SCHWEBEL: Happily.

8 THE WITNESS: Very good.

9 BY MR. LEVEE:

10 Q. Where are you currently employed,
11 Dr. Cerf?

12 A. I work for Google and my basic location is
13 Reston, Virginia but I have offices elsewhere.

14 Q. And what do you do at Google?

15 A. Do you want a long answer or a short
16 answer?

17 Q. I suppose we'll start with the short
18 answer?

19 A. The short answer, my title is Vice
20 President and Chief Internet Evangelist for Google.
21 An unusual title, I'm sure.

22 Let's say just generally speaking that I

1 do a lot of public relations, I speak at universities
2 to open up research issues that haven't been resolved
3 that would be beneficial to everyone on the Net, I
4 spend time helping to get more Internet built by
5 encouraging investment on a global scale.

6 I spend a lot of time with our engineering
7 organizations, reviewing their activities and trying
8 to be helpful in assisting them to identify problems,
9 basis and solutions. One could call this the
10 intellectual bumblebee part of my job because it's
11 taking ideas from one engineering center and bringing
12 them to other engineering centers that may not yet
13 have encountered that particular problem or solution.

14 I spend a fair amount of my time also
15 evaluating proposals that come to Google of the form,
16 "I've just patented this, would you like to license
17 it?" "Would you like to buy my company?" "I have an
18 idea, could you help us pursue it?" And things along
19 those lines. And that's sort of generally summarizes
20 the kinds of things I do for the company.

21 Q. How long have you been at Google?

22 A. I joined the company in October of 2005 so

1 I am coming up on my fourth year.

2 Q. Could you explain to the panel your
3 educational background?

4 A. I have a bachelor's in mathematics from
5 Stanford University and a minor in German. I have a
6 master's and a Ph.D. from UCLA in computer science
7 and about 18 honorary degrees in varying subjects,
8 sometimes law, most often engineering and computer
9 science.

10 Q. When did you first start working on the
11 development of Internet technologies and protocols?

12 A. The precise answer to that is the spring
13 of 1973 with my colleague, Robert Kahn. I was at
14 Stanford and he was in the U.S. Defense Department,
15 specifically the Defense Advanced Research Projects
16 Agency. However, both of us worked on a predecessor
17 network which was called the ARPANet which stood for
18 Advanced Research Projects Agency Network. That
19 network was initiated or inaugurated in September of
20 1969 and it is now having its 40th anniversary of
21 inauguration this year.

22 Much of our experience with that network,

1 whose technology is very relevant to the Internet
2 design, our experience with that network informed our
3 research and our ultimate design of the Internet.

4 Q. Professor Mueller -- do you know Professor
5 Mueller?

6 A. Yes, I do.

7 Q. He was the first witness in this
8 proceeding and he referred to you as one of the
9 founding fathers of the Internet. Was that because
10 of the work you did at Stanford and UCLA?

11 A. Yes, I believe so.

12 Q. Have you received any awards for your work
13 on Internet technologies?

14 A. Yes, I have.

15 Q. Did you receive, from President Clinton,
16 an award involving the U.S. National Medal of
17 Technology?

18 A. Yes, I did, together with Robert Kahn. In
19 fact, many of these awards recognized our
20 contributions together.

21 Q. And have you also been awarded the
22 Presidential Medal of Freedom?

1 A. Yes, I was, by President George Bush in
2 2005.

3 Q. I'm going to skip now to ICANN and ask how
4 you were first involved with ICANN?

5 A. I actually have to think a little bit
6 about that.

7 I was not party to the formation of ICANN.
8 Jon Postel engaged Jones Day, specifically Joe Sims,
9 as an attorney, to help him -- among others, to help
10 him formulate a response to the need to
11 institutionalize his work, which for some 25 years
12 performed the work that ICANN does now.

13 But I have to say that the scope of the
14 work when Jon Postel was doing it was quite limited
15 by comparison. There were no commercial interests in
16 the network. It was all academic or military and so
17 his job I think was rather easier.

18 In any event, I didn't participate
19 directly in any of that. I was invited by the
20 inaugural board to participate in their first
21 meeting. My participation was merely as let's say an
22 advisor. I was not named a member of the board. I

1 was simply asked to come and express an opinion about
2 candidates for the first CEO or executive director.
3 I actually don't remember the title that was chosen.
4 And so I participated in that meeting and made my
5 recommendations to the then-sitting board.

6 Q. Was there a point in time when you became
7 a member of the board?

8 A. Yes. In November of 1999, I was appointed
9 to take a seat on the board of ICANN, which I
10 accepted.

11 Q. And was there a point in time when you
12 became the chairman of the board?

13 A. A year later in November of 2000, at the
14 end of the ICANN annual general meeting, I was
15 elected chairman of the board of ICANN.

16 Q. And how long did you serve as the
17 chairman?

18 A. I served in that role until November of
19 2007.

20 Q. And did you leave the board at that time?

21 A. I did. There are term limits imposed in
22 the bylaws of the ICANN board and I had exceeded or I

1 would have exceeded my term limits had I not stepped
2 down in November of 2007.

3 Q. Are you familiar with ICM Registry?

4 A. Yes, I am.

5 Q. And did you submit a written statement in
6 connection with this proceeding?

7 A. Yes, I did.

8 Q. Were the contents of your witness
9 statement true and correct at the time you executed
10 it last May?

11 A. To the best of my knowledge, they are true
12 and correct.

13 Q. And do they remain true and correct to the
14 best of your knowledge?

15 A. Yes, they do.

16 Q. We are here this week in something called
17 an independent review proceeding. Are you familiar
18 with that phrase?

19 A. Yes, I am.

20 Q. Were you on the board when the concept of
21 an independent review proceeding was adopted by the
22 board?

1 A. Yes, I was.

2 Q. You were the board chair at that time?

3 A. I was the board chair at that time.

4 Q. And was the independent review panel meant
5 to be able to essentially nullify decisions of the
6 ICANN board?

7 A. That was not my understanding of the scope
8 and agreement of the independent review panel. It is
9 an advisory panel. It makes recommendations to the
10 board but the board has the ultimate responsibility
11 for deciding policy for ICANN.

12 Q. And would the panel's recommendations be
13 binding on ICANN?

14 A. Not in the sense that a recommendation
15 that the board did not agree with would be binding on
16 the board. The board is bound to accept and respond
17 to recommendations by the panel in a prompt manner
18 but it does not necessarily have to adopt the
19 recommendations made by the panel. At least that's
20 my understanding of the agreement of the independent
21 review panel.

22 Q. I take it, since this is the first IRP,

1 there were no IRP proceedings while you were board
2 chair?

3 A. That's correct.

4 Q. Had there been such a proceeding while you
5 were board chair, would the board have taken the
6 declaration of any panel seriously?

7 A. Yes, because under the terms that we
8 adopted through the creation of the IRP, we
9 incorporated a requirement that the board act
10 promptly on the recommendations coming from the
11 review panel. The motivation for having the review
12 panel was to allow another avenue for parties who
13 believed that there were issues associated with board
14 decisions that specifically violated the bylaws of
15 the organization, for those issues to be aired,
16 considered and recommendations made with regard to
17 the complaint.

18 Q. Was there a point in time where ICANN
19 selected an arbitration provider, the ICDR, to govern
20 the process of an IRP?

21 A. Yes. Staff investigated possible
22 alternatives and made recommendations to the board

1 for the adoption of a party to carry out these
2 proceedings.

3 Q. And did ICANN then supplement the ICDR
4 international arbitration rules?

5 A. Yes.

6 Q. And did you understand at any time during
7 this process that ICANN intended to change its
8 original plan that the IRP panel's declarations would
9 not be binding?

10 A. During the time of my chairmanship, I'm
11 not aware of any plan to make such a change.
12 Certainly I'm not aware of any action that made any
13 such change.

14 Q. Now, after you joined the board in 1999,
15 were you involved in what the parties and I think
16 ICANN called something called a proof of concept
17 round for new top level domains in 2000?

18 A. Yes, I was.

19 Q. Generally what was the purpose of having a
20 proof of concept round?

21 A. Up until that time in 2000, there had been
22 no additional top level domains put in place other

1 perhaps than country code top level domains, and I
2 don't honestly remember whether any new countries
3 were formed during that period leading up to the year
4 2000.

5 But no general top level domains had been
6 added since the original seven that Jon Postel
7 established plus one other called ARPA, dot ARPA,
8 which is used for internal purposes. Not used by the
9 general public. So this was a fairly major change to
10 the domain name system because it's the first time
11 any new generic top level domains were contemplated.

12 So the question was, can we do this in a
13 useful way? What rationale should go along with the
14 creation of such new top level domains? What utility
15 would those top level domains bring to the users of
16 the network? And so it was called a proof of concept
17 round in part because it was in some ways an
18 experiment, the first time that we made any new
19 additions to the generic TLDs since the creation of
20 the domain name system.

21 Q. At that time did the board also accept
22 applications for something called a sponsored top

1 level domain?

2 A. I don't believe that we identified a
3 specific opportunity then. My understanding was that
4 we had the set of top level domain proposals but I
5 don't recall that we identified a class of top level
6 domain during the proof of concept round. Now, this
7 may be -- I may not be remembering correctly but
8 that's what I recall, that we made no distinctions at
9 that time.

10 Q. What is the difference -- we've had a lot
11 of testimony this week but just so we are on common
12 ground, what's the difference between a sponsored top
13 level domain and a generic or unsponsored top level
14 domain?

15 A. So when the concept of sponsored top level
16 domain arose, the difference is actually quite
17 important because in the sponsored TLD, it is the
18 intent of ICANN to remand to the operator of the
19 sponsored TLD more policy-making authority than would
20 normally be remanded to the operator of the generic
21 top level domain. So a substantial degree of
22 autonomy and authority is transferred to the sponsor

1 of a sponsored TLD.

2 The dot museum is an example. An
3 organization of museums is responsible for making
4 decisions about which entities had museums and should
5 be part of or can apply for registrations in dot
6 museum. ICANN doesn't get involved in any of those
7 decisions. We remand that authority and
8 responsibility to the sponsor.

9 So there is a substantial degree of
10 screening, in my opinion, needed in the
11 implementation of the sponsored TLD to assure that
12 the party that will operate it is capable of and is
13 prepared to undertake those additional
14 responsibilities.

15 Q. Now, after this proof of concept round,
16 did ICANN again decide to accept applications for new
17 TLDs within a few years after that?

18 A. Yes. In 2003, if I remember correctly, we
19 issued an opportunity or announced an opportunity for
20 additional top level domains, specifically sponsored
21 top level domains.

22 Q. And why did ICANN at that time only accept

1 applications for sponsored top level domains?

2 A. I think that my motivation anyway -- and I
3 can't necessarily speak for all the rest of the board
4 but my motivation in favoring a round of sponsored
5 TLDs was a belief that it would be less complex to
6 evaluate the proposals because presumably they would
7 come along with entities that represented a specific
8 and identifiable class of potential registrants and
9 to whom we would be able to remand additional
10 authority.

11 I think I was probably wrong in my
12 estimate as to simplicity because it was a fairly
13 complex proceeding for a number of the different
14 proposals. I can't say what it would have been like
15 if we had generic top level domains included but in
16 any case, this turned out to be more complicated than
17 I thought. So perhaps we were lucky to have kept it
18 as sponsored top level domains because it might have
19 been even more complex with gTLDs.

20 Q. So did ICANN issue a request for proposal
21 in conjunction with the sponsored top level domain
22 round?

1 A. Yes, it did.

2 Q. And we've heard testimony this week about
3 independent review panels in conjunction with that
4 proposal. What do you recall of that?

5 A. ICANN established -- this term independent
6 review panel should not be confused with this panel.
7 They were evaluation teams to assess the technical,
8 financial and sponsorship aspects of the proposed
9 sponsored top level domain. So parties who submitted
10 their proposals would be evaluated by these
11 independent teams and the evaluations would be made
12 available as advice and recommendations to the board.

13 Q. Now, ICM's position in this proceeding is
14 that if the board voted to proceed to contract
15 negotiations, the board was at that time making a
16 finding that a particular applicant had satisfied the
17 technical, financial and sponsorship criteria and
18 that that issue was closed. Is that consistent with
19 your understanding of how the process worked?

20 A. No, it's not. This matter was discussed
21 very explicitly with the board during our
22 consideration of the ICM proposal. The ICM proposal

1 evaluators returned with positive results on
2 financial and technical means for operating this
3 sponsored top level domain. They responded that they
4 did not believe that the sponsorship criteria had
5 been adequately met by ICM.

6 The board discussed this at length more
7 than once and, generally speaking, we say, discussed
8 the ICM proposal at length more than once. At the
9 point where the question arose whether we should
10 proceed or could proceed to contract negotiation, in
11 the absence of having decided that the sponsorship
12 criteria had been met, the board consulted with
13 counsel and my recollection of this discussion is
14 that we could leave undetermined and undecided the
15 question of sponsorship and could use the discussions
16 with regard to the contract as a means of exposing
17 and understanding more deeply whether the sponsorship
18 criteria had been or could be adequately met.

19 JUDGE SCHWEBEL: By consulted the counsel,
20 you mean the general counsel --

21 THE WITNESS: The general counsel of
22 ICANN. So this was an important question because

1 prior to the board vote on the question, should we
2 proceed to contract, this question was raised, and it
3 was my understanding that we were not deciding the
4 question of sponsorship. We were using the contract
5 negotiations as a means of clarifying whether or not
6 such a -- the sponsorship criteria could be or had
7 been met or would be met, and that this was not a
8 decision that all three of the criteria had been met.

9 I believe -- and this is speculation on my
10 part but I believe that the board would not have
11 proceeded to contract negotiation if it had been the
12 case that this implicitly implied that we had decided
13 the question of sponsorship.

14 BY MR. LEVEE:

15 Q. I'm going to show you the resolution in a
16 moment. Let me ask a couple of preliminary
17 questions. Could the board, in early 2005, have
18 rejected ICM's application based on the sponsorship
19 team's recommendations?

20 A. Yes. The board could have simply accepted
21 the recommendation of the evaluation teams and
22 rejected the proposal on the grounds that the

1 sponsorship criterion had not been met.

2 Q. What instead did the board do?

3 A. The board chose to continue the
4 discussions with ICM or to recommend to the staff
5 that discussions continue on the grounds that it
6 wasn't clear to the board yet whether this criterion
7 had been or could be met.

8 So I would like to suggest to the panel
9 that the board went out of its way to accommodate
10 this uncertainty and to continue discussions. It
11 could have decided against the proposal on the basis
12 merely of the recommendations of the evaluation team.

13 Q. And did the board act similarly with
14 respect to other top level domain applications that
15 had been rejected?

16 A. Yes. There were others that were
17 uncertain and the board continued the discussions to
18 attempt to resolve the questions raised by the
19 evaluation teams. And in many of those cases, the
20 issues that were raised by the evaluation teams were
21 ultimately resolved and the board proceeded and staff
22 proceeded to endorse those new top level domain

1 operators.

2 Q. Was there any sort of specific time frame
3 adopted as to how quickly ICM and the other
4 applicants' applications would be evaluated?

5 A. No. And in fact, we were very -- I recall
6 saying very clearly that we intended to process each
7 of these proposals independently, that there was no
8 particular timetable for all of them to proceed in
9 parallel. We knew that each one of them might have
10 different issues arising and that we saw no reason to
11 tie them all to a specific timetable. We wanted to
12 allow board and staff actions to take place at
13 whatever pace they could. So there wasn't any
14 particular series of deadlines for any of them.

15 Q. Was ICM at some point permitted to make a
16 live presentation to the board?

17 A. Yes. In Mar del Plata in 2006, we invited
18 ICM to present directly to the board their arguments
19 for the top level domain and for their proposal, and
20 I have to say that this was unusual in the sense that
21 no other proposal that I remember was granted the
22 amount of time and direct access to the board that

1 ICM was. That this was, I would submit to you,
2 evidence of the board's serious desire to understand
3 and to evaluate the proposal.

4 Q. Now, you said 2006. Did you mean prior to
5 the June 2005 vote?

6 A. Well, if I've forgotten when Mar del Plata
7 was, then you need to help me because Mar del Plata
8 is the one I remember having this fairly large and
9 lengthy event. But is that 2005 or --

10 Q. I believe so.

11 A. I'm sorry, I misstated it.

12 Q. Why don't I use the word decision on June
13 5 as the reference point. So let me turn to that
14 meeting. Were you on the phone for the June 1, 2005
15 board meeting at which ICM's application was
16 considered?

17 A. Yes. This was a telephonic board meeting,
18 not a face-to-face meeting.

19 Q. And did the board discuss the .XXX
20 application on that call?

21 A. Yes, at length.

22 Q. Was there controversy on the phone as to

1 whether ICM had satisfied the sponsorship
2 requirements for an sTLD?

3 A. Yes.

4 Q. And so -- I'll let you elaborate -- what
5 was the nature of the discussion?

6 A. The board members, some of them anyway,
7 continued to feel that the evaluation team results,
8 which asserted that sponsorship criterion had not
9 been met, some of the board members believed that was
10 still the case and that we could not -- they did not
11 think that the board could proceed without resolving
12 that question.

13 In the course of the subsequent
14 discussions, particularly regarding ways in which
15 this question of sponsorship could be resolved, one
16 of the questions that arose was could we uncover and
17 understand more deeply the sponsorship question if we
18 were to proceed to contract negotiations. And that's
19 when the question of implication of such a step was
20 raised with general counsel.

21 And as I said earlier, counsel advised
22 that we did not have to decide the sponsorship

1 criterion. We could use the contract negotiations as
2 a means of further understanding the proposal
3 primarily on the grounds that the board ultimately
4 has to decide whether to accept the contract or not.
5 And so regardless of the question of sponsorship, in
6 the end the board decides whether it accepts or it
7 does not accept the staff's negotiated contract.

8 So we agreed narrowly to proceed to
9 contract discussions without specifically deciding
10 the sponsorship criterion.

11 Q. There is a book next to you of exhibits or
12 there will be.

13 A. There is no book next to me.

14 Q. I apologize. Dr. Cerf, let me ask you to
15 take a look at Exhibit 120?

16 A. This is the June 1, 2005 minutes of the board
17 meeting.

18 Q. And do you see the resolutions that the
19 board adopted that day?

20 A. Yes, I see it.

21 Q. In your understanding, did these
22 resolutions reflect a decision by the board that ICM

1 had in fact satisfied the selection criteria for the
2 .XXX sponsored top level domain?

3 A. If you'll pardon me for a moment, I'm
4 going to read the entire resolution and then I'll
5 respond.

6 Q. Thank you.

7 A. This resolution does not speak explicitly
8 in any way to the question of sponsorship criteria.
9 It speaks to authority to enter into negotiations.
10 So I don't think that there is anything in this
11 resolution that should necessarily imply that the
12 board had concluded anything about the sponsorship
13 criterion.

14 Q. In fact, had such language been in the
15 resolution, that is, that ICM had satisfied the
16 criteria, would you have voted in favor of the
17 resolution?

18 A. That's a hypothetical, Counsel.

19 Q. Let me go on.

20 A. I don't know what I would have done if
21 that had been in here. I will say that it was
22 important to me, in the discussions with general

1 counsel, that this resolution specifically did not
2 state that the sponsorship criterion had been met.

3 Q. What were your concerns regarding
4 sponsorship specifically with respect to ICM's
5 application?

6 A. Well, there were two. One of the problems
7 of course is the definition of the community that the
8 sTLD represents. The most commonly used term is
9 adult entertainment and to first order, I think
10 that's a reasonably well characterized description.
11 The problem, however, is knowing which parties and
12 what fraction of the adult entertainment community
13 was in fact interested in and endorsed the creation
14 of this top level domain. And that question remained
15 murky throughout the entire history of this
16 particular proposal.

17 I believe -- although I'm not sure, I'm
18 speculating here -- that the evaluation team found
19 that a troublesome area in their recommendations and
20 during the course of the many years, literally, of
21 consideration of this proposal, it was difficult to
22 ascertain whether the adult entertainment community

1 was largely in favor of and willing to participate in
2 this particular sponsored top level domain. That
3 problem remained with us for most of the time that we
4 considered this proposal.

5 Q. Did you believe that allowing ICM to
6 proceed to contract negotiations would shed light on
7 whether ICM could satisfy the sponsorship criteria?

8 A. I hoped that it would and that's part of
9 the reason I voted in favor of this particular
10 resolution, which again I pointed out to the panel
11 was narrowly accepted, with 6 to 3 and one
12 abstention, if I remember correctly. I believed that
13 in the course of contract negotiation that ICM would
14 have to characterize more accurately the community
15 that they would serve, and I hoped that staff's
16 negotiation would in fact reveal that and provide
17 information to the board to make its final
18 determination.

19 Q. Now, I'm going to stick with this time
20 period but let me just ask you a couple of questions
21 first. I know you attended subsequent board meetings
22 at which ICM's application was considered, correct?

1 A. Yes.

2 Q. And at any time did members of the board
3 state in effect that the board should not be
4 discussing the sponsorship issue because that issue
5 had already been resolved on June 1st, 2005?

6 A. To the best of my recollection, no board
7 member made such a statement.

8 Q. And to the best of your recollection, did
9 ICM ever tell you that it believed that the June 2005
10 vote obligated ICANN essentially not to revisit the
11 question of sponsorship? And obviously I'm referring
12 to prior to the time this proceeding was initiated?

13 A. I don't recall having heard either orally
14 or in written form from ICM such an assertion. That
15 doesn't mean that it wasn't made. It just means I
16 don't remember such an assertion.

17 Q. So let's go back to 2005. Was ICM the
18 only applicant that was allowed to proceed to
19 contract negotiations despite unresolved concerns
20 about the applicant's ability to meet the criteria of
21 the RFP?

22 A. No. There were other top level domain --

1 sponsored top level domain proposals that had
2 questions about sponsorship which had to be resolved.

3 Q. One of the proposals that's been discussed
4 in the last couple of days was for dot jobs. Do you
5 recall that sponsored top level domain?

6 A. Yes, I do.

7 Q. And in the resolution for dot jobs, there
8 is a sentence that says, "During these negotiations,
9 the board requests that special consideration be
10 taken as to how broad based policy making would be
11 created for the sponsored community and how this
12 sponsored TLD would be differentiated in the name
13 space."

14 A. Yes.

15 Q. There is no similar sentence in the
16 resolution I just showed you with respect to .XXX.
17 Why was that?

18 A. Well, please keep in mind the amount of
19 time and hours of discussion the board and the staff
20 had about the ICM proposal. There were many, many
21 issues that we hoped would be resolvable by entering
22 into contract negotiations.

1 Quite frankly, trying to incorporate them
2 into this resolution on a telephone call would have
3 been impossible and also inadvisable. Modifying
4 resolutions in the middle of a meeting is generally
5 not a really good practice. We've done it from time
6 to time and discovered that this is never a good
7 thing. It's very time-consuming, it's wordsmithing.

8 If I could mention another top level
9 domain that required additional effort and which we
10 put off on the grounds of sponsorship criteria
11 certainty, dot travel is a top level domain and they
12 exhibited to the board a list of the parties and
13 institutions that were supporting this top level
14 domain proposal. One of them was strongly opposed.
15 It was the International Air Travel Association,
16 IATA, and my recollection is that we resisted the
17 award of that top level domain until such time as the
18 dispute, if I can call it that, with IATA was
19 resolved and that IATA also endorsed the proposal.
20 And it took some months, I believe, before that was
21 resolved. But that's another example of a rejection
22 of the proposition until such time as the sponsorship

1 criteria could be established.

2 Q. Now, in your judgment as the chairman of
3 ICANN's board in 2005, was the board's decision on
4 June 1st, 2005 to allow ICM to proceed to contract
5 negotiations in order to determine whether ICM could
6 satisfy the sponsorship criteria in any way contrary
7 to ICM's bylaws?

8 A. I cannot understand any interpretation of
9 the June decision, the June resolution, that in any
10 way contradicts the bylaws of ICANN. Counsel, if
11 there is a proposal that this represents a violation,
12 I would like to see the specific portion of the
13 bylaws that are violated by this resolution.

14 Q. Let me ask you the same question with
15 respect to the articles of incorporation. Did
16 ICANN's decision that day to allow ICM to proceed to
17 contract negotiations violate ICANN's articles of
18 incorporation?

19 A. Now, let me respond in two ways, Counsel.
20 First of all, the invariable preamble in the
21 United States is, "I am not a lawyer." So if you are
22 asking me a legal question about either the articles

1 of incorporation or the bylaws, I can't respond as an
2 attorney. I will respond, however, as chairman of
3 the board and say that I do not detect, have not
4 detected and did not detect any indication that we
5 had violated either the bylaws or the articles of
6 incorporation and, in fact, I believe all of our
7 proceedings and particularly those related to ICM
8 were well within the ambit of both of those
9 documents.

10 Q. Dr. Cerf, let me ask you to take a look at
11 Exhibit 139 in your book?

12 A. Okay.

13 Q. Let me ask first if you recognize the
14 document. It was an exhibit yesterday during at
15 least Ms. Burr's examination?

16 A. Yes, these are minutes submitted or
17 actually published by the Governmental Advisory
18 Committee chair of their meeting in Luxembourg.

19 Q. And did you attend this meeting in
20 Luxembourg?

21 A. I participated in part of the meeting.
22 Not all of that meeting was open.

1 Q. And does ICANN publish these minutes?

2 A. No, these -- well, ICANN makes the minutes
3 available on its website but the minutes are composed
4 by the secretariat of the Governmental Advisory
5 Committee.

6 Q. Let me ask you to turn to page 5 of
7 Exhibit 139?

8 A. I am at page 5.

9 Q. In the fourth paragraph, there is a
10 paragraph that begins, "Dr. Cerf added."

11 A. Yes.

12 Q. Why don't you just read that to yourself?

13 A. I will read it. Okay.

14 Q. Did you tell the Governmental Advisory
15 Committee in Luxembourg that the board had made a
16 final decision with respect to the criteria financial
17 and technical sponsorship with respect to .XXX?

18 A. So let me point out to the panel that the
19 minutes here specifically assert that I claimed or
20 said that the proposal met all three criteria. I
21 don't remember saying that. I don't believe it was
22 the case at the time and I don't believe it now.

1 These are not minutes that I had access to or had
2 opportunity to read and opine on their accuracy but I
3 don't remember saying specifically that all three
4 criteria had been met.

5 But what's important about this particular
6 minuted item is the last sentence. The last sentence
7 speaks about a positive decision but solely with
8 regard to content.

9 Q. So explain why that's important?

10 A. Well, it's important because it doesn't
11 speak to anything else other than the board's
12 conclusion that it should not base its decisions with
13 regard to sponsored top-level domains or any
14 top-level domains on the basis of content. The basis
15 for the decisions are otherwise than that.

16 Q. Now, if you scan down in the document,
17 you'll see that the representative from France made a
18 comment and you responded, Chile and Denmark made
19 comments, Brazil made a comment and then Paul Twomey
20 and you then make a comment. I'm going to ask Kate
21 to blow up the paragraph where it says, "Mr. Twomey
22 referred to."

1 A. Yes. Okay, I see that.

2 Q. Now, what was happening there? And for
3 the record, the portion that refers to you says,
4 "Dr. Cerf invited GAC to comment in the context of
5 the ICANN public comments process. Spain suggested
6 that ICANN should formally request GAC advice in such
7 cases."

8 A. So this is interesting. I think that the
9 members of the GAC had not made such comment at all
10 about this particular proposal and it was only after
11 we had voted to proceed to contract discussions that
12 we began to hear from the Governmental Advisory
13 Committee members.

14 I don't know -- I can't speculate about
15 why they didn't react earlier but I will say that
16 their reactions in their meetings as minuted and
17 their comments during the time that I was in the
18 meeting as you see from the minutes suggested to me
19 that they should, if they had issues, public policy
20 issues associated with this top level domain, that
21 they should make these known to the board and
22 preferably through the public comment process so that

1 their comments would be available to everyone.

2 Spain's suggestion that we should
3 explicitly ask for comment struck me as a little odd
4 because the GAC's primary responsibility is to raise
5 public policy issues to the board if there are issues
6 that the GAC believes should be drawn to the board's
7 attention. And so I didn't see a need necessarily to
8 ask them specifically to comment on this but in the
9 proceedings, I asked them very explicitly to make
10 their comments known and suggested it be through the
11 public comment process.

12 Q. And that was with respect to .XXX in
13 particular?

14 A. Yes, because this is a discussion that
15 arose around that particular sTLD proposal.

16 Q. And mindful of the fact that you're not a
17 lawyer, do you have an understanding as to what
18 ICANN's board is required to do if the GAC makes its
19 views known on matters of public policy?

20 A. So there are provisions in the bylaws in
21 the creation of the GAC that require the board to
22 respond to GAC recommendations in some ways, in the

1 same sense that we are required to respond to this
2 panel's recommendations. The board does not have to
3 adopt proposals or recommendations coming from the
4 GAC but the board has to explain to the GAC why -- if
5 we do not adopt their recommendation, we have to
6 explain why we did not adopt their recommendations.
7 And we have to do so in a timely way.

8 Q. Let me ask you, Dr. Cerf, to turn to
9 Exhibit 163 in your binder?

10 A. Okay, I'm at 163.

11 Q. Could you describe what Exhibit 163 is?

12 A. If you'll give me a moment, I will read
13 it.

14 Q. Absolutely.

15 A. I have to draw the attention of the panel
16 to something amusing about this particular letter.
17 You'll notice that at no time in this text do you see
18 the string XXX. There is a reason for that. In
19 fact, you'll notice that in the first paragraph after
20 Dear colleagues, it reads -- part of the sentence
21 reads, "Contract for a new top level domain intended
22 to be used for adult content."

1 The reason that you don't see the letters
2 .XXX in here is that many of the mail programs would
3 have filtered this out and the message would have
4 ended up in the junk pile and so we discovered that
5 we weren't able to communicate with each other about
6 this top level domain thanks to the filters in the
7 e-mail programs, and so we found it necessary to
8 speak our way around that particular string. That's
9 not relevant to anything other than telling you that
10 computers seem to be more in charge than we are these
11 days.

12 Anyway, this letter specifically addresses
13 the GAC -- let me put it this way. Let me be careful
14 about this. This letter draws attention to the fact
15 that members of the GAC, country representatives to
16 the GAC had concerns about this particular top level
17 domain. This is not a statement of the GAC as a
18 whole. It is specifically drawing attention to the
19 fact that some members of the GAC have issues and
20 concerns.

21 So this led us, let me especially to be
22 interested in hearing from the specific members on

1 the presumption that the GAC itself either was unable
2 to or chose not to render specific GAC level
3 guidance.

4 So we don't see a communique, which is the
5 formal means of communication between the GAC --
6 written communication between the GAC and the board.
7 We didn't see any specific recommendations coming in
8 that form but we had a letter telling us that there
9 were some members that were concerned.

10 Q. And did you respond to the letter?

11 A. No, I didn't. I didn't understand that
12 there was an action required. This isn't a
13 recommendation that I have to respond to as board
14 chair. Also I should point out to you that the
15 chairman of the GAC is also a member of the board and
16 as a consequence, he had more than ample opportunity
17 to point out to us and draw attention to things so I
18 didn't see a need to have a formal written response.

19 Q. We'll come to it in a moment but just to
20 be clear --

21 A. I'm sorry, Counsel, I would like to point
22 out to you that the last sentence in this letter

1 says, "I believe the board should allow time for
2 additional governmental and public policy concerns to
3 be expressed before reaching a final decision."

4 You'll note that the date is 2005 in
5 August. We did in fact allow substantial amount of
6 time and continued to consider this matter for almost
7 two more years.

8 Q. Let me ask you to take a look at Exhibit
9 172?

10 A. I am at 172.

11 Q. Do you recognize this document, Dr. Cerf?

12 A. Yes, I do.

13 Q. The document appears to be written by
14 Peter Zangl. Who is Mr. Zangl? I'm not sure I'm
15 pronouncing his name correctly.

16 A. He is the deputy director general of the
17 Information Society and Media Directorate.

18 Q. And it appears -- well, I won't testify.
19 What did you understand was the purpose of
20 Mr. Zangl's letter?

21 A. Well, let me read the letter and refresh
22 my memory. So Peter, in his second paragraph, is

1 concerned that the GAC did not have an opportunity to
2 comment on this matter prior to the publication of
3 the evaluation reports on the particular proposal.
4 And so he's arguing that the GAC would have had
5 concerns or wished to have time to consider and to
6 respond to this particular top level domain. In the
7 second paragraph, he points out public policy issues
8 arising, in his opinion.

9 Q. And in the final paragraph?

10 A. So they wondered why we had proceeded
11 without waiting until after publication of the
12 evaluation reports. And he's asking us to reconsider
13 the decision to proceed with the application. And we
14 responded, as I recall.

15 Q. Let me ask you to take a look at Exhibit
16 AJ. It will be toward the front of your binder?

17 A. I'm sorry, is that at the --

18 Q. Apple John?

19 A. Yes, I see. Here we go. This is our
20 response in January 2006.

21 Q. I know it's a long letter so let me just
22 ask you to look at the last page.

1 A. Okay. That would be page --

2 Q. That would be page 7?

3 A. Page 7, yes. Here we go.

4 Q. And rather than reading it into the
5 record, just read the conclusion and then perhaps
6 summarize it for the panel.

7 A. Do you want me to read the conclusion out
8 loud or do you want me to read it to myself?

9 Q. To yourself.

10 A. Thank you. Just checking. Well, in
11 summary, we pointed out to Peter Zangl that all of
12 the proceedings had been very open, that all of the
13 negotiations and discussions and everything else
14 were -- all the intermediate drafts of the contract
15 and the like had been made publicly available and
16 that the GAC of course had ample opportunity along
17 with everyone else to comment using the public
18 comment mechanisms of ICANN's procedures.

19 So it seemed to me that the GAC not only
20 had but continued to have ample opportunity to make
21 its concerns known, particularly considering that the
22 contract negotiations were continuing and were --

1 it's still in progress in January of 2006. There was
2 plenty of time even then for the GAC to raise any
3 issues that it thought were appropriate.

4 Q. Now, to your understanding, were the
5 various letters that we've just looked at made
6 available to ICM?

7 A. These were all made public.

8 Q. And how were they made public?

9 A. Published on the ICANN website.

10 Q. So I'm sorry to jump around a little but I
11 wanted to go back now to September 15th of 2005 and
12 let me ask you to take a look at Exhibit 119.

13 A. I'm sorry, would you say the number again?

14 Q. Yes, 119?

15 A. Oh, 119. Okay. I am there.

16 Q. These appear to be minutes of a telephonic
17 meeting of the board dated September 15, 2005, is
18 that correct?

19 A. I would agree with that, yes.

20 Q. And toward the bottom of the first page
21 there is discussion of the .XXX agreement, correct?

22 A. If you'll hold on, I'm going to read this.

1 The most important part of the minutes here is the
2 resolution 0575 and, in particular, directing the
3 staff to discuss additional contractual provisions or
4 modifications to the draft .XXX registry agreement.
5 The concern here had to do with effective provisions
6 requiring development and implementation of policies
7 consistent with the principles in the ICM
8 application.

9 And here the board is essentially saying
10 please put into the contract a more explicit
11 description of mechanisms through which ICM would
12 execute its obligation as described in its proposal.

13 Q. Let me also ask you to take a look at the
14 previous page.

15 A. Okay.

16 Q. The first paragraph at the bottom below
17 the caption Review of Proposed .XXX Sponsored TLD.
18 Do you see that?

19 A. Yes, I see it.

20 Q. It says Kurt Pritz and John Jeffrey
21 described the current status of the registry
22 agreement and the terms contained therein. "After a

1 lengthy discussion involving nearly all of the
2 directors regarding the sponsorship criteria, the
3 application and additional supplemental materials,
4 and the specific terms of the proposed agreement, a
5 resolution was put on the table," and so forth.

6 Do you recall that there was in fact
7 further discussion by the board on September 15th of
8 the question of whether ICM was meeting the
9 sponsorship criteria?

10 A. Yes. The point about this summary is the
11 fact that we continued to discuss this question of
12 sponsorship. It had not been resolved and an
13 interpretation of the vote in June to the effect that
14 we had concluded that the sponsorship criterion had
15 been met is refuted by the fact that we were
16 continuing to discuss this question three months
17 later. And I would also point out that nowhere in
18 the resolution of the 15th of September is there any
19 indication that the board directly concluded that the
20 sponsorship criteria had been met.

21 Q. And to your recollection, did any of the
22 board members object and say, wait a second, we've

1 already resolved that issue, let's move on?

2 A. No one to my knowledge made such an
3 objection.

4 Q. And the resolution to proceed with further
5 contract negotiations was approved by a vote of 11 to
6 zero?

7 A. I beg your pardon. Say again?

8 Q. 11 to zero?

9 A. Yes, according to these minutes. Counsel,
10 I feel obligated to point out to you and to the panel
11 that even if the sponsorship criterion had been met
12 or had been judged to have been met, that this top
13 level domain would not be adopted by the board unless
14 and until it concluded that a satisfactory contract
15 had been negotiated. So the emphasis on sponsorship
16 criteria, while I think relevant, is not dispositive,
17 to use a legal term, because the ultimate decision
18 about engaging with ICM to operate .XXX was
19 contingent on a satisfactory contract.

20 Q. Thank you, Dr. Cerf. Now, there was
21 another question that I was going to ask you that was
22 pretty open-ended and I don't exactly know how to ask

1 it but one of the -- in focusing on ICM's application
2 during the course of this week, I've worried that the
3 panel has had the impression that this was the only
4 matter on ICANN's plate at the time.

5 What types of things was ICANN working on,
6 and were there lots of things or just a couple of
7 sponsored TLD issues?

8 A. I'm not sure I know how to answer that
9 succinctly. I can tell you that there were always
10 ample items for the board to work on. ICANN as a
11 whole and the staff as a whole were historically
12 overloaded with things to do. Keep in mind that
13 setting aside the question of top level domain
14 allocations, new ones, and contract negotiations,
15 there are daily changes to the top level -- the root
16 zone file.

17 I may be dropping into geek here so you
18 need to tell me if I've said something that's not
19 interpretable. But the Internet assigned numbers
20 authority part of ICANN is dealing always, daily,
21 with changes to the root zone file, with updates to
22 the parameter tables associated with the Internet

1 standards developed by the Internet engineering task
2 force, dealing with allocations of Internet address
3 space to the regional Internet registries.

4 The staff has to deal with complaints that
5 come in from people who feel they haven't been
6 properly treated by various registries or registrars.
7 They have to deal with the possibility of a registry
8 or registrar failing. They have to deal with things
9 like the world summit of the Information Society and
10 debates about the legitimacy of ICANN as a
11 responsible party for dealing with these matters.
12 There is just a lot that's on the table well beyond
13 this particular question.

14 Q. Let me ask you to take a look at Exhibit
15 181?

16 A. Okay. I'm at 181.

17 Q. The panel has seen this before. Do you
18 recognize the exhibit?

19 A. Yes. This is an additional communique
20 from the GAC in March of 2006.

21 Q. And I'll just point out -- I'm not going
22 to ask you to read it but I'll point out on page 3,

1 the reference in particular to the .XXX application?

2 A. Yes. Here we are. I'm there. On page 3.

3 Q. And do you recall that the GAC had in fact
4 issued this Wellington communique in late March of
5 2006?

6 A. Yes. And I note in their comment that
7 they are now responding to the letters that we sent
8 back with regard to their queries concerning .XXX.

9 Q. So let me ask you to locate Exhibit T, as
10 in Tom?

11 A. Yes, I am in Exhibit T.

12 Q. I believe May 10, 2006, there was a vote
13 on the pending .XXX application. Do you recall that?

14 A. Yes.

15 Q. And does Exhibit T reflect that vote?

16 A. Yes, it does.

17 Q. So we're looking at the bottom of the
18 first page and then it continues over?

19 A. On page 2, yes, I see that.

20 Q. Now, there are only two or three
21 paragraphs here. Do you recall that there was
22 considerable discussion -- I don't know how to define

1 the word considerable but was there discussion on the
2 .XXX application?

3 A. Yes, there was, I would say considerable
4 discussion again as there had been in the past, for
5 several years.

6 Q. The minutes indicate that the board voted
7 9 to 5 against the proposed agreement. You voted
8 against?

9 A. That's correct.

10 Q. Why?

11 A. If you will look at the opening paragraph
12 of the minutes, you'll see the substance of what was
13 discussed. The terms of the agreement --
14 specifically we are looking at the proposed contract
15 between ICM and ICANN. We entered into a detailed
16 discussion of the following points: "Agreement terms
17 against the application statements and promises made
18 by ICM in support of their proposal; concerns
19 regarding ICANN's ability to enforce the promises
20 made by ICM through a contractual framework and the
21 potential harm if such enforcement could not be
22 maintained."

1 Here our concern is that the obligations
2 that ICM undertook in its proposal, if it failed to
3 successfully meet those obligations, then any issues
4 arising would then redound to the responsibility of
5 ICANN and the board.

6 We discussed again the sponsorship
7 criteria in the RFP and materials submitted in
8 support of their proposal and all the community input
9 and so on as well as the GAC advice. So we covered
10 the waterfront of all of the inputs that had been
11 received regarding this proposal and then brought the
12 question to decision. And after all of that
13 discussion, which I point out went far beyond simply
14 the sponsorship question, the vote was 9 to 5 against
15 adopting this contract.

16 Q. Ms. Burr testified yesterday --

17 A. I'm sorry, may I also point out that the
18 minutes mentions that the director statements
19 regarding their votes are set out in the voting
20 transcript dated 13 May 2006. And so ample
21 opportunity was given to each director to make any
22 statements they wished regarding their motivations or

1 rationale for the votes that they took.

2 Q. Yesterday Mr. Burr said that the ICM's
3 proposed definition, which I believe involved
4 responsible online adult entertainment, never changed
5 throughout the period that the contract was being
6 proposed. Do you have any thoughts about that?

7 A. Well, one question that arises is what's
8 the definition of responsible adult entertainment
9 member or member of the community.

10 Q. Was that a concern that was discussed by
11 the board?

12 A. Repeatedly, because it wasn't clear
13 exactly what was meant by that and what obligations a
14 responsible member would undertake. It also never
15 was clear what fraction of the adult entertainment
16 community would be reasonably defined as responsible.
17 And this is not an attempt to slander or libel that
18 collection of entertainment providers. It's merely a
19 question of which of them and what significant
20 fraction of them, or was a significant fraction of
21 them considered to be responsible.

22 This gets back again to one of the

1 questions about sponsored TLDs. Could we determine
2 whether a preponderance of participants in this
3 particular grouping in fact wanted to support a top
4 level domain of .XXX and would undertake the
5 obligations associated with it? We never got, in my
6 opinion, a very clear sense of what portion of that
7 community was in fact interested in undertaking these
8 obligations.

9 Q. Who is Susan Crawford?

10 A. Susan was a member of the board of ICANN.
11 I'm sorry, I don't remember her exact term. She was
12 a professor, a law professor at university. She now
13 is Assistant to the President For Science, Technology
14 and Innovation in the White House.

15 Q. And did she support ICM in its proposal?

16 A. Yes, she did. Well, let me say she
17 supported the -- yes, she supported and voted in
18 favor of adopting the contract which had been
19 negotiated.

20 Q. And did the majority agree or disagree
21 with Ms. Crawford?

22 A. Well, plainly the majority disagreed

1 because the vote was 9 to 5.

2 Q. Again, in your judgment as chairman of the
3 board, did ICANN violate either its bylaws or
4 articles by voting on May 10th, 2006 to reject ICM's
5 draft registry agreement?

6 A. No. In my opinion, we didn't violate any
7 of our bylaws. In fact, it's the responsibility of
8 the board to consider propositions of this kind and
9 to decide whether it will or will not adopt these
10 contracts. Ultimately the board is responsible for
11 the policy of the organization and contractual
12 obligations fall within its agreement.

13 Q. There has been discussion during the
14 proceeding thus far that there was political pressure
15 placed on ICANN. In your judgment, did members of
16 the board yield to political pressure in making their
17 votes?

18 A. The short answer is no. And as I recall,
19 during the lengthy and public commentary in this
20 board meeting, board members specifically asserted
21 that they did not feel political pressure or they did
22 not feel that their decisions were based on or were

1 not arrived at as a consequence of political
2 pressure. The statements by the board members in
3 fact, I would submit to you, speak otherwise, to
4 different rationales for having reached the
5 conclusions they reached.

6 Q. Now, the board's next vote or next
7 consideration of the .XXX application doesn't occur
8 until February of 2007 so we have a gap between May
9 10 and February of 2007. What happened during that
10 period of time?

11 A. Well, it would appear that there were
12 continued discussions between the staff and ICM given
13 that this particular -- the proposed contract as of
14 the date of this vote, 10 May 2006, was not adopted.
15 Therefore, there was a continuing negotiation between
16 ICANN and ICM.

17 Q. Did ICM file a request for reconsideration
18 at some point?

19 A. Yes, it did.

20 Q. And what is a request for reconsideration?

21 A. There is a procedure in the ICANN process
22 whereby a party can request reconsideration of a

1 board action primarily on the basis of new
2 information arising that was not available or was not
3 timely made available to the board at the time that
4 it made its decision.

5 Q. And at some point did ICM withdraw its
6 request?

7 A. Yes, it did.

8 Q. And then a new contract was proposed at
9 some point?

10 A. Yes.

11 Q. During this process, was ICANN receiving
12 additional input from members of the adult
13 entertainment community as to their thoughts on a
14 possible .XXX sponsored TLD?

15 A. Well, I want to be careful in responding,
16 Counsel, because I'm not sure that I can associate
17 times exactly with the receipt of various comments
18 made by parties in the adult entertainment community.
19 I will say that I came away, as of now, looking back,
20 with the sense that there was an increasing
21 disaffection in the adult entertainment community
22 with regard to this proposal, and that while we had

1 heard not very much at the beginning other than
2 assertions by ICM about the interest of the adult
3 entertainment community in this proposal and also, I
4 will say, some members of the child protection
5 community who were favorable to the proposal, as the
6 years went by, we heard increasingly from the adult
7 entertainment community that some of the players,
8 some significant ones were in fact not favorable to
9 this proposal. I can speculate about why that is but
10 I don't know that that's helpful to you, Counsel.

11 Q. I think we'll avoid speculation at this
12 point. Let me ask you to take a look at Exhibit 199
13 which is the minutes of the special meeting of the
14 ICANN board on February 12?

15 A. I'm at 199, minutes of 12 February 2007.

16 Q. And you'll see at the bottom of the first
17 page a reference to consideration of proposed triple
18 X registry agreement and recent public comment
19 period. Do you see that?

20 A. Yes, I see that.

21 Q. There has already been testimony on the
22 first few paragraphs but let me ask you to take a

1 look at the next page?

2 A. Okay.

3 Q. And Kate, if you could highlight the
4 paragraph that begins with, "Vint Cerf asked." Do
5 you see that paragraph, Dr. Cerf?

6 A. Yes, I do.

7 Q. You asked, according to this, if it was
8 possible to determine what fraction of adult online
9 content community supported the creation of the
10 domain. Mr. Jeffrey -- that's the John, right? John
11 is Mr. Jeffrey, the general counsel?

12 A. Yes, that's correct, he's general counsel.

13 Q. -- noted that the support of the adult
14 online content community was an issue raised in
15 various comments but it would be difficult to measure
16 the participation. And then there is a reference to
17 Rita Rodin. Do you see that?

18 A. Yes, I do.

19 Q. Who is Ms. Rodin?

20 A. Ms. Rodin is an attorney or at the time
21 was an attorney with Skadden, Arps and also a member
22 of the board. At that point, a recent new member of

1 the board.

2 Q. And yesterday Ms. Burr testified that -- I
3 can't remember the word so I won't try to remember it
4 but that she was disappointed, charitably, that
5 Ms. Rodin was considering in February of 2007 the
6 sponsorship issues again. Do you recall Ms. Rodin
7 was looking into sponsorship and did you have any
8 questions as to whether she should be doing that?

9 A. First of all, as a new member of the
10 board, Rita felt an obligation to familiarize herself
11 with matters that had been discussed and were still
12 pending prior to her appointment to the board. And
13 so as I had said earlier, questions of sponsorship
14 continued to dog this particular proposal throughout
15 its existence, and so Rita went out of her way, as I
16 understood it, to familiarize herself with the
17 previous testimony, with the various contract
18 versions which had been negotiated and I think also
19 informal discussions with other board members.

20 Q. In your judgment as chair of the board,
21 was Ms. Rodin violating the laws by doing what she
22 did?

1 A. I would have thought that this showed due
2 diligence as a new board member to sustain the bylaws
3 and to undertake, as a board member, to the best of
4 her ability to carry out her obligations.

5 Q. Let's turn, then, in the interest of
6 time -- and I do think I'll conclude by 1 o'clock.
7 That's my goal anyway. Let's turn then to the
8 board's March 30, 2007 vote and let me ask you to
9 take a look first --

10 A. I'm sorry, this would be -- this is 201?

11 Q. 201 would be the transcript.

12 A. Okay, yes.

13 Q. Now, it's a lengthy transcript and we
14 would be well into the lunch hour if we were reading
15 it but --

16 A. May I ask whether the panel has had access
17 to this transcript prior to today?

18 Q. They have. I don't know the extent to
19 which the panel has reviewed but I know that there
20 have been specific references to it.

21 A. I would like to draw the panel's attention
22 to the length of commentary and discussion undertaken

1 by the board on this particular matter and on this
2 particular vote.

3 Q. So it looks as if -- unless I'm reading it
4 incorrectly, it looks as if the discussion by the
5 board goes from page 1 to page 13?

6 A. That's correct.

7 Q. And your vote and explanation for your
8 vote is on page 6. Do you see that?

9 A. Yes, I do.

10 Q. Would it be fair to say during the week of
11 the board meetings -- and perhaps you could explain
12 to the panel, when the board travels to, in this
13 instance, Lisbon, Portugal, it's not just for a
14 couple of hours, correct?

15 A. No. This is anywhere from 5 to 7 days of
16 fairly heavy work. Not only by the board but by
17 various committees and supporting organizations that
18 meet three times a year to discuss policy matters to
19 inform the board, in fact, in order for the board to
20 make its decisions.

21 Q. And then the board's actual meeting is
22 held on the last day?

1 A. That's correct, after all of the various
2 preliminary meetings have been completed and issues
3 raised and presumably discussed. These meetings, by
4 the way, are fully public. They're held in an
5 auditorium. The participants in the ICANN meeting,
6 which could be anywhere from a thousand to 1,200
7 people, are in the audience and there are
8 opportunities for public comment prior to the
9 informal board meeting. So this is a fairly
10 elaborate and fairly open -- not fairly, very open
11 procedure.

12 Q. In your witness statement you estimated
13 that six hours or so were devoted to the XXX
14 application during that week?

15 A. During that week, yes.

16 Q. And can you estimate at all how long the
17 board considered the application that last day?

18 A. I honestly don't recall exactly but it
19 seems to me that Susan's statement alone took almost
20 15 minutes. At least it seemed like that. So surely
21 a half an hour to 45 minutes.

22 Q. Now, in my opening statement, I

1 characterized the board's discussion as spirited.

2 How would you characterize the board's discussion
3 that day?

4 A. I would say that it was thoughtful, it was
5 animated and it was substantive.

6 Q. And in your view, did members of the board
7 take their responsibilities seriously in evaluating
8 the .XXX application?

9 A. I couldn't come to any other conclusion
10 than that, Counsel.

11 Q. How did you vote that day?

12 A. I voted against the adoption of the ICM
13 agreement.

14 Q. And why did you vote that way?

15 A. Well, if you will turn to page 6, you'll
16 see what my statements were during that time frame.

17 JUDGE TEVRIZIAN: You voted against the
18 application but in favor of the resolution.

19 THE WITNESS: In favor of the resolution
20 but against the application. Thank you very much.

21 This is always a source of difficulty because the
22 resolution statements often are such that if you're

1 voting for the resolution, you're voting against
2 something else. Thank you.

3 BY MR. LEVEE:

4 Q. Now, there have been questions about the
5 various board members and so one of the things we've
6 done, if you could look at the very back of your
7 binder, it says demonstrative of board votes?

8 A. Yes, I see.

9 MR. LEVEE: And for members of the panel,
10 this is an exhibit we created in response to the
11 panel's question this week.

12 BY MR. LEVEE:

13 Q. Do you see that some of the members of the
14 board were members throughout the three main votes
15 while others were on the board and left and others
16 weren't on the board and joined?

17 A. So five members were on the board for all
18 three of those primary votes.

19 Q. Yes?

20 A. And let's see, one, two, three -- I'm
21 sorry, I'm double counting. So the ones who were
22 present for 2006 but not 2005 and persisted are --

1 oh, actually, Demi Getschko was there. He was there
2 all three times. So there were six of them that were
3 there for all three of the votes.

4 JUDGE TEVRIZIAN: Is this misleading?
5 This says March 30th, 2007 vote and then you have a
6 Dr. Cerf against but he voted for the resolution.

7 MR. LEVEE: Yes, in the footnote, we
8 explained that voting for is in favor and voting
9 against means opposed. And it's exactly to your
10 point, your question to Dr. Cerf before, just to be
11 clear, that in this case, on March 30, 2007, the
12 board's resolution was somewhat in the negative.

13 THE WITNESS: The resolution was the
14 inverse of this so the for and against in this
15 exhibit, as the footnote says, means favoring the
16 adoption of the contract and against means not
17 favoring the adoption of the contract.

18 BY MR. LEVEE:

19 Q. So let me turn back, then, to Exhibit 201,
20 page 6?

21 A. Okay.

22 Q. Looking at your statements, you say, "I

1 had" -- this is the second paragraph. "I had been
2 concerned about the definition of responsible, as
3 Raimundo" -- Raimundo was one of the board members?

4 A. Yes, correct.

5 Q. -- "and it seemed to me that part of that
6 definition was behavioral and that it wasn't clear
7 what behavior patterns one would anticipate of this
8 community because they wouldn't be defined until the
9 IFFOR structure was put in place and that rules would
10 be adopted." It goes on. Summarize for the panel
11 what you were saying there?

12 A. Well, there were implicit and maybe even
13 explicit in the ICM proposal were a description of
14 obligations that they thought the participants in the
15 .XXX top level domain would undertake and they
16 summarized this as responsible adult entertainment
17 providers. The question of definition and clarity as
18 to what that actually meant was raised and I think in
19 the course of contract negotiations, many attempts
20 were made to clarify.

21 And by the time we reached this particular
22 vote, ICM had created this set of structures which

1 interestingly were similar to the kinds of structures
2 that ICANN used in order to carry out its work.
3 Policy making structures, advisory groups, groups
4 that could make recommendations to the operator of
5 .XXX.

6 The problem is that none of those bodies
7 that ICM proposed to create had been created. We
8 didn't know who the parties would be who would serve
9 on them. But more specifically, until those bodies
10 were created and until they created a clear statement
11 of what constituted responsible behavior of a
12 participant in .XXX, we couldn't tell. I couldn't,
13 anyway, tell from just the contractual language that
14 we would expect of and what obligations the members
15 would undertake in the way of responsibility.

16 So even at this point in 2007, for me it
17 was not clear exactly what we would expect of
18 behavior of these members, nor was it clear exactly
19 what enforcement mechanisms would be in place short
20 of becoming a nonmember, which means you're out of
21 the club. And it wasn't clear that that necessarily
22 was beneficial because if you're out of the club,

1 then you aren't obligated to do anything. You could
2 go on and do whatever behavior caused you to be
3 evicted from the club.

4 So the question in my mind is are we in
5 fact in the process of adopting this whole idea, are
6 we in fact benefitting the community that was looking
7 towards this particular proposal to help protect
8 children and to deal with abusive behavior in the
9 adult entertainment industry.

10 Q. One last exhibit. Exhibit 121?

11 A. Okay. I'm at 121, Counsel.

12 Q. These are the actual resolutions adopted
13 by the board on March 30. Do you recognize them?

14 A. Yes, I'm there.

15 Q. Let me ask you, in the interest of time,
16 to read the -- on the second page, the "therefore"
17 clause portion of the resolution?

18 A. Thank you, Counsel. This is clearly
19 extremely relevant to this proceeding and I will --
20 do you want me to read for the record or just draw
21 attention of the panel to these items?

22 Q. What I would like for you to do is just

1 read them yourself for the moment. The panel has
2 seen these already, I think, with at least three
3 witnesses, maybe more.

4 A. Good, because this is a very important
5 entry in this whole discussion. Yes, I've read
6 these, Counsel.

7 Q. I believe it's fair to say that the
8 accusation has been made that some of these reasons
9 that the board listed for denying the application
10 were not consistent with the request for proposal
11 that ICANN had issued in 2003 for sponsored top-level
12 domains and so my question to you first is, do you
13 view these bullets as consistent with the request for
14 proposal?

15 A. Yes, I do, Counsel. Is there a specific
16 proposition as to which of these items are somehow in
17 contradiction to the request for proposal?

18 Q. I believe the last three are the ones
19 particularly in controversy that -- regarding -- the
20 third one is regarding the GAC communique and that
21 the board does not believe the public policy concerns
22 can be credibly resolved. I believe ICM's position

1 is that public policy issues were not part of the
2 request for proposal.

3 A. Well, that's interesting. Counsel, the
4 ICANN bylaws specifically appoint the GAC to draw
5 attention to the board and ICANN to public policy
6 issues arising in its policy decisions. The decision
7 about this particular contract is a board policy
8 question.

9 Implicit in everything that ICANN does is
10 responsiveness to public policy issues raised by the
11 GAC. And as I pointed out earlier, we are obligated
12 to respond to the GAC, to any recommendations they
13 make or observations they make, particularly if we
14 choose to ignore or to reject their advice.

15 The fact that this wasn't explicitly in
16 the RFP, in my view, is immaterial because all of our
17 activities require or let's say obligate us to
18 respond to any GAC issues raised and I think that you
19 already demonstrated, Counsel, that the GAC did raise
20 a number of issues with regard to this particular
21 proposal.

22 Q. The fourth and fifth bullet points, I'm

1 going to summarize them, refer to law enforcement
2 compliance issues and credible scenarios that could
3 lead to circumstances in which ICANN would be forced
4 to assume ongoing management and oversight role
5 regarding Internet content. Again, were those
6 matters that were implicitly addressed in the RFP?

7 A. They probably were not implicit in the
8 RFP. They are a consequence of the proposal. The
9 RFP could not anticipate, in fact, did not explicitly
10 say which top-level domains were to be proposed. It
11 simply opened the door up and said, if you have a
12 sponsored TLD you would like us to consider, please
13 respond, here are the various criteria about which we
14 would like you to respond.

15 This particular proposal opened up, as you
16 could tell and as counsel has demonstrated, a wide
17 range of commentary and concern from a wide range of
18 different groups, some of which reasonably fall into
19 these categories and bullets that are shown here. We
20 couldn't have anticipated that in the RFP, Counsel.

21 Q. Dr. Cerf, let me ask you one more
22 question.

1 A. You said that that other one was the last
2 one but please go ahead.

3 Q. I apparently lied. ICM has taken the
4 position in these proceedings that it was treated
5 unfairly and that the board discriminated against it.
6 Could I just ask you to comment on those allegations?

7 A. Well, I am surprised at an assertion that
8 ICM was treated unfairly. I would remind the panel
9 that the board could have simply accepted the
10 recommendations of the evaluation teams and rejected
11 the proposal at the outset. The fact that we didn't,
12 in my view, says that the board went out of its way
13 to try to work with ICM through the staff to achieve
14 a satisfactory agreement. We spent more time on this
15 particular proposal than any other -- and as of this
16 date, we have spent more time because here we are
17 still discussing the matter.

18 So as to unfairness, I am surprised and a
19 little puzzled by an assertion like that. We
20 repeatedly defended our continued consideration of
21 this proposal. We defended it in the face of
22 rejections or issues raised by the GAC and we

1 continued to consider this proposal all the way up
2 until the vote in 2007.

3 So I don't understand the rationale for
4 unfair treatment. If the ICM believes that it was
5 treated in a singular way, I would agree we spent
6 more time and effort on this than any other proposal
7 that came to the board with regard to sponsored TLDs.

8 MR. LEVEE: I have no further questions
9 and would propose the lunch break at this point.

10 JUDGE SCHWEBEL: Thank you so much. Thank
11 you so much, Dr. Cerf. We will adjourn for lunch.
12 Please don't discuss your testimony with counsel over
13 the lunch or in the meantime and you will be
14 cross-examined after lunch.

15 THE WITNESS: Very well. Thank you, Your
16 Honor. I look forward to return to this setting in
17 two hours.

18 (Whereupon, at 1:06 p.m., the Independent
19 Review Process in the above-entitled matter was
20 recessed, to reconvene at 3:00 p.m., this same day.)

21

22

1 AFTERNOON SESSION
2 (3:00 p.m.)
3 Whereupon,
4 VINT CERF,
5 the witness testifying at the time of recess, having
6 been previously duly sworn, was further examined and
7 testified further as follows:
8 MR. ALI: Judge Schwebel, Mr. De Gramont
9 will be conducting the cross-examination and he's
10 being located. We'll find him in cyberspace.
11 THE WITNESS: Maybe we should Google him.
12 (Laughter.)
13 MR. DE GRAMONT: My watch must be slow. I
14 apologize.
15 JUDGE SCHWEBEL: That's all right. You're
16 just on time.
17 MR. DE GRAMONT: Oh, good.
18 CROSS-EXAMINATION
19 BY MR. DE GRAMONT:
20 Q. Good afternoon, Mr. Cerf.
21 A. Good afternoon.
22 Q. My name is Alex de Gramont, and I

1 represent ICM and I'm going to speak as slowly and
2 loudly as I can. If you don't understand me, please
3 let me know.

4 A. You're quite clear. Loudness is not
5 necessarily the issue for me anyway. It's clarity.
6 And so I appreciate your attention to that.

7 Q. I will try to be as clear as I can. Now,
8 Dr. Cerf, in preparing the statement that you
9 submitted in this case, did you draft it yourself?

10 A. I had assistance in drafting this
11 document.

12 Q. Now, did ICANN provide you with a first
13 draft to review? Did you tell them your
14 recollections in your own words and did they then
15 incorporate them? How did the process work?

16 A. We discussed the matter, they produced the
17 first draft and I made comments on it.

18 Q. And did you review it before signing it?

19 A. Yes, I did.

20 Q. Did you coordinate your testimony in any
21 way with Dr. Twomey?

22 A. No, I did not.

1 Q. Did you review Dr. Twomey's witness
2 statement in connection with preparing your own?

3 A. No, I did not.

4 Q. And I asked because there were extended
5 passages in your statement that are either verbatim
6 or nearly verbatim to Dr. Twomey's. Are you aware of
7 that?

8 A. I'm not, because I haven't looked at
9 Dr. Twomey's statement. However, considering that I
10 was assisted in the preparation, perhaps the
11 preparers used similar terms in both documents.

12 Q. Just for example, in asserting that the
13 contract negotiations were meant to test whether the
14 sponsorship criteria could be met, you wrote, "In
15 other words, during contract negotiations, the board
16 was able to continue to focus on the relevant issues
17 and concerns with the application, and to determine
18 whether those concerns could be satisfied in
19 real-world operations via the registry agreement."
20 Do you see that?

21 A. Yes, I do.

22 Q. And is it virtually verbatim to the same

1 statement by Dr. Cerf?

2 A. Yes, it is. But your point, Counsel?

3 Q. Well, we're going to test your testimony
4 against some of the contemporaneous documents. First
5 I would like to compare your testimony to
6 Dr. Twomey's.

7 A. Okay.

8 Q. Could we see the next one, please? And in
9 asserting that there was no two-step process, you
10 wrote, "An sTLD evaluation process divided into two
11 concrete and nonflexible phases would have been
12 unworkable in practice." "For example, with respect
13 to ICM, the board could not know if ICM's application
14 was able to satisfy the RFP criteria, including
15 sponsorship, until it was shown how ICM's ideas would
16 be implemented in the contract." And again, that's
17 virtually identical to Dr. Twomey's testimony?

18 A. I don't disagree with that.

19 Q. And in asserting again that the June vote
20 had -- and if I'm confusing you with Dr. Twomey
21 occasionally, you'll forgive me. I'm well aware that
22 you're not Dr. Twomey.

1 A. Thank you. That's all right. I took full
2 note of that.

3 Q. In asserting that the June 1st vote had
4 nothing to do whether ICM had satisfied the
5 sponsorship criteria, again, you can see that the
6 text is almost identical?

7 A. Yes. I don't disagree with that either,
8 Counsel.

9 Q. Now, I realize that you're a very busy man
10 but how much time did you spend on your witness
11 statement?

12 A. You'll recall, Counsel, that I described
13 the process by which my statement was produced. We
14 discussed my recollections. The staff, legal staff
15 at ICANN or their outside attorneys produced a draft
16 statement for me. I reviewed that draft statement
17 and made some modifications, as I recall, but the
18 statement, when I signed it, represented my
19 understanding in view of the situation.

20 Q. Well, did it represent your actual
21 recollections or is it based on what ICANN's lawyers
22 told you?

1 A. Let me try to characterize this. I'm sure
2 that I would not have been able to produce in the
3 level of detail that the document shows on my own
4 without benefit of records, which I did not have a
5 document with that specificity. It was helpful to me
6 for the staff, for the attorneys to produce that
7 draft. It was not inconsistent in any way with my
8 recollections.

9 Q. Did you review any of the contemporaneous
10 documents in working on the draft?

11 A. Let's see. In my examination of the
12 draft, after it had been produced, I did look at some
13 of the materials, but as I mentioned earlier, I
14 didn't have copies of every document that had been
15 produced during the time of my chairmanship. I
16 didn't retain every single document because I assumed
17 that they were available to counsel. Or could be --

18 Q. Did counsel show you any of the documents?

19 A. Say again?

20 Q. Did counsel show you documents as you were
21 preparing your statement?

22 A. We had access to documents during the

1 preparation.

2 Q. And did you review them?

3 A. Some of them.

4 Q. Do you remember how many?

5 A. No, I'm sorry, Counsel, I don't remember
6 how many.

7 Q. Let's take a look at some of the
8 assertions in your statement. Have we provided
9 Dr. Cerf with a cross-examination binder?

10 A. I have something here.

11 Q. I believe that's from ICANN's counsel,
12 Doctor. And Dr. Cerf, your statement is behind tab A
13 of the binder we just handed you.

14 A. Yes, I have that.

15 Q. And at paragraph 15, the statement asserts
16 that the process of evaluating the criteria -- and
17 then moving to contract negotiations, was, quote,
18 intended to be a fluid process and there were two
19 overlapping phases in the evaluation of the sTLDs.
20 Do you see that?

21 A. Yes, I see that.

22 Q. Are there any contemporaneous documents

1 that use the terms "overlapping phases"?

2 A. Probably not, but this describes what
3 actually happened.

4 Q. That's not my question, sir. Have you
5 seen any contemporaneous documents that use the
6 phrase overlapping phases?

7 A. I have not.

8 Q. And are you aware that Dr. Twomey also
9 uses the phrase overlapping phases in his statement?

10 A. I'm not because I haven't seen his
11 testimony, but if you tell me that it is, I'll accept
12 your proposition.

13 Q. In fact, there are numerous
14 contemporaneous documents by ICANN officials that
15 state that this was a two-step process, isn't that
16 correct?

17 A. That's the way it was described in the
18 RFP.

19 Q. As a two-step process?

20 A. Yes.

21 Q. And once the process of evaluating the
22 criteria was completed and it was determined that an

1 applicant had satisfied the criteria, the applicant
2 would then go on to contract negotiations?

3 A. That's one half by which this process
4 could complete. But, Counsel, I would remind you
5 that in my earlier testimony, which I think you
6 heard, and in my written testimony, the question of
7 sponsorship criteria was not resolved, at least not
8 in my view, and it continued to be an issue, as you
9 could see from the board minutes, over a very long
10 period of time. However, the board chose to continue
11 the discussions or it asked the staff to continue
12 discussions with ICM in spite of that.

13 Q. And we're going to test some of those
14 propositions.

15 A. That's fine.

16 Q. Now, originally the criteria were going to
17 be evaluated by evaluation committees, is that
18 correct?

19 A. Say again? I didn't hear you.

20 Q. I'm sorry. Originally the applications
21 and the sponsorship criteria were going to be
22 evaluated by independent committees?

1 A. That's correct. And in fact, when you say
2 originally, the fact is that's exactly what happened
3 in all cases. There were evaluations, and reports
4 were provided to the board of those evaluations.

5 Q. And the sponsorship committee failed 8 of
6 the 10 applicants?

7 A. That's correct. At least I think --
8 honestly, I don't remember the number, to be quite
9 frank with you, but I know that a number of them did
10 not meet, according to the evaluation teams, the
11 sponsorship criteria.

12 Q. And under the procedure in the RFP, if the
13 evaluation committees approved an applicant based on
14 the substantive criteria, the applicants would then
15 go on to negotiations?

16 A. The only thing I would ask you, Counsel,
17 is about your use of the word "approve." Remember
18 that the evaluation committee's results were
19 recommendations. They didn't have the authority to
20 make an approval. That wasn't decision-making
21 authority, at least not as I understood it.

22 Q. So if an evaluation committee had decided

1 that an applicant had met all the criteria, could the
2 board reverse that determination?

3 A. Ultimately, the board gets to decide
4 whether or not to engage with a particular party.
5 The weight given to the evaluation team was
6 significant, as I think the outcomes indicate. But
7 the board has the ultimate authority to decide what
8 to do with the recommendations coming from the
9 evaluation teams.

10 Q. So if the evaluation committees had
11 decided that all the applicants passed, could the
12 board have decided to reverse that determination with
13 respect to two or three of the applicants?

14 A. It could, but it would have to have pretty
15 solid grounds for doing so, and it would have to have
16 explained what those grounds were.

17 Q. And could the board have applied different
18 sets of criteria to different applicants after the
19 sponsorship committee had approved them?

20 A. After the -- you used the term again
21 "approved" and I want to say that this is really not
22 an approval process. This is a recommendation

1 process. After the board decides to proceed to
2 contract negotiation, the specifics of those contract
3 negotiations I expected would vary depending on the
4 specific proposal. So your question is whether the
5 criteria themselves would be changed?

6 Q. Could the board apply different criteria
7 to different applicants?

8 A. To the extent that we get to criteria that
9 are a consequence of the contract negotiation, I
10 think the answer is yes, that once you get into the
11 contract discussions, you're into specifics about
12 that particular party.

13 Q. So as you get into the contract
14 negotiations, you could make up new criteria to apply
15 to one applicant that might not apply to the other.
16 Is that your testimony?

17 A. Let me distinguish between criteria and
18 the RFP. Those criteria were acted upon by the
19 committees, by the evaluation teams, and based on
20 those criteria, recommendations came to the board.
21 The board takes those recommendations and makes a
22 determination, first of all, whether the -- how to

1 evaluate or how to accept or whether to accept the
2 evaluation team's results.

3 And, second, what to do in the event that
4 the criteria have not been met in the eyes both of
5 the evaluation team and the board. So in this
6 particular case, once we got into contract
7 negotiation -- and I tell you, Counsel, the
8 motivation for getting into contract negotiation was
9 to deal with the specifics of the ICM proposal.

10 Q. And the seven others, the sponsorship
11 committee?

12 A. And the others, yes.

13 Q. Is it your view in this case that the
14 board applied the same RFP criteria to all of the
15 applicants in the 2004 round?

16 A. In the assessment of the evaluation team's
17 results, the answer is yes. Once we get into
18 contract negotiation, the answer is the specifics of
19 the contract are the determining factors.

20 Q. So then the issue of the criteria should
21 be deemed final once the contract negotiations are
22 underway?

1 A. No. That's not true. And the reason I
2 say that is that at least in the case of ICM, at no
3 point in our discussions did the board ever conclude
4 that the sponsorship criterion had been met.

5 Q. Isn't it a fact, Dr. Cerf, that you and
6 numerous other board members and officers said that
7 the June 1st, 2005 vote meant that the application
8 criteria had been met?

9 A. I don't recall making such an assertion
10 except for the assertion that's been made in the
11 minutes of the GAC meeting, and I do not recall
12 making that specific statement.

13 Q. Well, let's take a look at that and that's
14 at tab 13 of your binder. It's hearing Exhibit 139.

15 A. I'm sorry, would you tell me which tab it
16 is again?

17 Q. Yes, sir. It's tab 13.

18 A. Thank you.

19 Q. And the language that your counsel read to
20 you, and I'll read it to you again, states, "Dr. Cerf
21 added, taking the example of .XXX, that there was a
22 variety of proposals for TLDs before, including for

1 this extension, but this time the way to cope with
2 the selection was different. The proposal this time
3 met the three main criteria, financial, technical,
4 sponsorship. They were doubts expressed about the
5 last criteria which were discussed extensively and
6 the board reached a positive decision considering
7 that ICANN should not be involved in content
8 matters."

9 Now, is there any ambiguity about the
10 statement "the proposal this time met the three main
11 criteria, financial, technical, sponsorship"?

12 A. So now let me remind the panel that the
13 text that you're reading is from the minutes of the
14 Governmental Advisory Committee meeting. These are
15 not ICANN board minutes. These are not minutes that
16 I had any opportunity to review. They were simply
17 presented.

18 And I assert once again that I do not
19 recall making such an explicit statement that the
20 sponsorship criterion had been met because it's
21 pretty clear from this statement, and from subsequent
22 discussions in the board, that there were continuing

1 uncertainties and doubts about whether this criterion
2 had been met. And in spite of that, the board
3 proceeded to recommend contract negotiations in the
4 hope that that would clarify this uncertainty.

5 Q. Well, in fact, Dr. Cerf, numerous board
6 members stated shortly after the June 1st vote that
7 they believed that the criteria had been met. And
8 we're going to look at those statements in a moment,
9 but for now let me ask you this. Do you have any
10 reason to dispute that this is what you said at the
11 Luxembourg meeting?

12 A. I do not recall the precise wording in
13 this statement.

14 Q. Would you take a look at tab 14 which is
15 hearing Exhibit 140 at page 28.

16 A. Yes, I'm there.

17 Q. And this is Mr. Pritz speaking. And by
18 the way, who was Mr. Pritz?

19 A. Mr. Pritz is one of the vice presidents of
20 ICANN.

21 Q. And was he in charge of the TLD process?

22 A. He was responsible for much of the

1 registry negotiations, registry/registrar
2 negotiations, yes.

3 Q. And there are four other applicants --
4 this is what he says. "There's four other applicants
5 that have been found to satisfy the baseline
6 criteria, and they're presently in negotiation for
7 the designation of registries, .cat, .post, Telnic
8 and .XXX." He then goes on to say, "And then
9 applications where it has not yet been determined
10 whether the application meets the criteria are still
11 there, .mail, Telnic and .asia." Do you see any
12 ambiguity about Mr. Pritz's statements?

13 A. No, but may I ask again the timing of
14 this? This is July, right?

15 Q. Yes, this is July 14th, so it's
16 approximately six weeks after the June 1st vote.

17 A. Understood.

18 JUDGE TEVRIZIAN: We're in the year 2005?

19 MR. DE GRAMONT: Yes, Judge.

20 THE WITNESS: This is Kurt Pritz's
21 expression, that's correct?

22 BY MR. ALI:

1 Q. Yes, sir.

2 A. I do not have, though, any statement by
3 the board, any resolution by the board to this
4 effect, is that correct?

5 Q. Well, we'll get to that.

6 A. All right.

7 Q. But my question for you right now is, is
8 there any ambiguity in Mr. Pritz's statement that
9 .XXX, quote, was found to satisfy the baseline
10 criteria?

11 A. No, I won't dispute that there is any
12 ambiguity there.

13 Q. Do you know who Joichi Ito is?

14 A. Yes.

15 Q. And who is he?

16 A. Joichi Ito is an entrepreneur and was, for
17 a time, a member of the board of ICANN.

18 Q. And in fact, he was a member of the board
19 of ICANN as of June 1st, 2005. Do you recall that?

20 A. I would actually have to sit down and
21 think about the period of time when he served on the
22 board, but yes, the answer is I do recall he was on

1 the board at that time.

2 Q. And will you take a look at tab 11 which
3 is hearing Exhibit 142, and this is from Joichi Ito's
4 log. Have you seen this before?

5 A. Well, if this is -- what is this document?

6 Q. This is from Joichi Ito's blog --

7 A. This says, "Some notes on the .XXX top
8 level domain."

9 Q. Yes.

10 A. I don't recall seeing this specific
11 document, no.

12 Q. I will represent to you that this was
13 posted on Mr. Ito's blog on June 3rd, 2005.

14 A. Okay.

15 Q. And he said, in the highlighted portion,
16 "Our approval of .XXX is a decision based on whether
17 .XXX met the criteria and does not endorse or condone
18 any particular type of content or moral belief. This
19 is not the role of ICANN." Is there any ambiguity
20 about Mr. Ito's statement that the approval of .XXX
21 was a decision based on whether .XXX met the
22 criteria?

1 A. No, there is no ambiguity in Joichi Ito's
2 statement there.

3 Q. And do you recall that ICANN's spokesman,
4 Kieran Baker, was quoted in the press immediately
5 after the June vote as stating that adult-oriented
6 sites could probably begin buying .XXX as early as
7 fall or winter, depending on ICM's plans? Do you
8 have any recollection of that?

9 A. I don't, but obviously you have evidence
10 that he said it, so I accept that.

11 Q. And you see that down at the bottom of the
12 screen. Why would ICANN's spokesman say that
13 adult-oriented sites could begin buying .XXX
14 addresses as early as fall or winter if there were
15 still contingencies as to whether they met the
16 criteria?

17 A. Well, clearly this is speculation by
18 Kieran as to when this whole process would be
19 resolved because there is no way anybody could buy
20 anything until the contract had been agreed.

21 Q. And do you recall that John Jeffrey
22 approved a press release to be released after what

1 was originally scheduled to be the May vote,
2 postponed to June, and John Jeffrey approved the
3 press release stating that the criteria had been met?

4 A. Do you have a copy of that press release,
5 Counsel?

6 Q. Can we hand Dr. Cerf Exhibit 221? And
7 let's start at the second page?

8 A. Second page?

9 Q. The second page, yes, sir, which is an
10 e-mail from John Jeffrey to Becky Burr dated May 3rd,
11 2005. And he says, "I have concerns regarding the
12 way that the press release is written. It seems to
13 intentionally set out that an agreement to move
14 forward with negotiations is the same as approving
15 (or sanctioning) .XXX to move forward. It also
16 asserts that ICANN is making the decision for the
17 societal good instead of as an approval of having met
18 RFP criteria, technical capability, et cetera."

19 Then if you look at the next page -- the
20 first page, rather.

21 A. Okay.

22 Q. The press release --

1 A. Excuse me, Counsel. This press release is
2 the one that was actually -- this isn't the one under
3 discussion. This is the one that actually relates --

4 Q. This is the one that was proposed.

5 A. Proposed, thank you.

6 Q. Okay. And Ms. Burr sends it to
7 Mr. Jeffrey on May 3rd and the first sentence says,
8 "ICANN's board of directors today determined that the
9 proposal for a new top level domain submitted by ICM
10 Registry meets the criteria established by ICANN."
11 And if you look up at the top, Mr. Jeffrey approves
12 that press release for release. Do you see that?

13 A. So this is interesting because my
14 recollection is -- my testimony indicates we had not
15 approved movement to negotiation on the basis of the
16 sponsorship criterion, but rather on the principle
17 that we wanted to explore whether that criterion and
18 other obligations proposed by ICM could be satisfied.

19 JUDGE TEVRIZIAN: I'm a little confused.
20 This Exhibit 221 is a proposed press release of
21 5/3/05, May 3rd, '05. My understanding is that the
22 meeting didn't occur until June 1st of 2005.

1 MR. DE GRAMONT: That's correct, Judge.
2 The meeting was originally scheduled for early May
3 and this press release was prepared in anticipation
4 of that. It was then postponed for a month until
5 June. And my colleague just handed me a note
6 correcting me. This press release did, in fact, go
7 out after the June vote.

8 THE WITNESS: Thank you. And the text of
9 this then is the final one, is that your
10 understanding?

11 BY MR. DE GRAMONT:

12 Q. Yes, sir.

13 A. Thank you.

14 Q. Now, again, is there any ambiguity in the
15 assertion that ICM Registry meets the criteria
16 established by ICANN?

17 A. No, there isn't.

18 Q. Now, after June 1st, when the approval to
19 move to contract negotiations commenced, Mr. Jeffrey
20 sent out an e-mail to Ms. Burr, and I would like you
21 to take a look at that. It's Exhibit 150.

22 A. Exhibit 150 and which tab is that?

1 Q. We're going to hand it to you, sir.

2 A. I see. Do you want the other ones back?

3 Q. We're going to go back to the binder.

4 A. I see.

5 Q. And you can set those aside. And you
6 testified that Mr. Jeffrey told you that you could
7 approve ICM's contract or negotiations while still
8 keeping the issue of sponsorship open. Did I
9 understand that correctly?

10 A. That was my understanding, yes.

11 Q. And yet on June 13th, 2005, he sends to
12 Ms. Burr an e-mail that says, "Thanks for forwarding
13 your proposed draft of the agreement. We will need a
14 few days to look it over and we will get back to you
15 later in the week with a markup and issues list of
16 any matters that we would like to discuss further.
17 We anticipate that this should be a fairly
18 straightforward negotiation, and also look for a
19 quick conclusion to any required discussions relating
20 to the agreement." Do you see that?

21 A. Yes, I do.

22 Q. And there is no mention whatsoever of

1 sponsorship, is there?

2 A. No, there isn't.

3 Q. And in fact, there is nothing in the June
4 1st resolution approving ICM to proceed to
5 negotiations that provides any caveats about whether
6 ICANN has met the RFP criteria, is that correct? And
7 it's at tab 8 of your notebook.

8 A. I stipulate that the resolution didn't
9 mention anything about -- in fact, it doesn't mention
10 anything about the various caveats and concerns that
11 the board had because there were a lot of them. They
12 materialized in the form of discussions and
13 negotiations with ICM undertaken by staff after we
14 approved their moving forward with the contract
15 negotiations.

16 Q. Well, you testified that this was done on
17 the phone and that's why there were no caveats added.
18 Why not add them later?

19 A. That would have required another board
20 meeting and it wasn't necessary to establish them in
21 resolution.

22 Q. Well, isn't it important to know, Doctor,

1 for applicants to know whether there are any caveats
2 to their negotiations?

3 A. Of course. And it was the assumption by
4 me anyway, if not the rest of the board, that staff
5 would undertake to represent any issues that the
6 board had raised with staff in the course of the
7 negotiations.

8 Q. And are you familiar with Ms. Burr's
9 testimony and Mr. Lawley's testimony that the issue
10 of sponsorship was never raised with them in the
11 months following the June 1st vote?

12 A. No, I'm not aware of that.

13 Q. Do you have any --

14 A. But could I simply point out to you that
15 independent of the matter of sponsorship, the end
16 result of the entire process had to be a contract
17 that was approved by the board. So even if we were
18 to stipulate that the question of sponsorship was no
19 longer at issue, despite the fact that it continued
20 to be discussed by the board, as is evidenced by the
21 minutes, ultimately the decision about this
22 particular top level domain centered on the

1 successful negotiation of a contract.

2 Q. And I would be happy to enter into that
3 stipulation, but I think your counsel might disagree
4 with it.

5 A. I did not suggest that I am stipulating
6 that. I'm simply pointing out that if we were to
7 stipulate that, it would still be the case that the
8 ultimate outcome is dependent on the agreement by the
9 board to the contract that had been negotiated
10 between ICM and ICANN.

11 Q. And we'll talk about the negotiations in a
12 little bit. Right now, we're just talking about
13 whether everyone at the time believed, as of June
14 1st, that the board had determined that the
15 sponsorship criteria had been met.

16 A. And the answer to that, Counsel, is not
17 everyone because I did not. But in any case, at
18 least I don't remember believing that, but it doesn't
19 matter.

20 Q. Well, you don't remember believing it, but
21 in fact, the minutes of the meeting indicate that you
22 so stated?

1 A. (Witness nodding.)

2 Q. You have to answer yes or no.

3 A. I have to answer yes or no?

4 Q. You have to give an audible answer for the
5 record.

6 A. Yes, Counsel, I agree that the text that
7 you showed us shows that I said -- or someone
8 believed I said that.

9 Q. Now, other resolutions approving certain
10 sTLDs to move to negotiations had specific caveats,
11 isn't that true?

12 A. Some of them did, yes.

13 Q. And what was the purpose of providing
14 those caveats in the resolutions?

15 A. For clarity and to direct the staff as to
16 carrying out the wishes of the board.

17 Q. And for clarity for the applicant as well,
18 right?

19 A. Yes, that's fair.

20 Q. Because the applicants, after all, are
21 hiring employees, starting businesses, investing
22 millions of dollars based on what the words of the

1 resolutions and the words of the ICANN officials are,
2 right?

3 A. Well, that would be speculation on my
4 part, so I don't know what they were doing. But if
5 you say so, I accept your statement. I would point
6 out, however, that no matter what, again, that until
7 you have a contract, you are investing at risk.

8 Q. Now, ICANN's bylaws require ICANN to act
9 according to documented policies applied neutrally
10 and fairly. Why is that in the bylaws?

11 A. Because that sounds like a very sensible
12 basis on which to do business.

13 Q. Let's take a step back and talk a little
14 bit about ICANN's mission and what ICANN is. Is
15 ICANN an instrumentality of the United States
16 Government?

17 A. First of all, I don't know whether you're
18 calling for a legal opinion here, because I believe
19 the question can only be answered by looking at its
20 legal structure. It is a corporation incorporated in
21 the State of California. It's been granted federal
22 status as a 501(c)(3) nonprofit organization, not for

1 profit. It was created as a consequence of actions
2 by the White House during the Clinton Administration.

3 But to characterize it as an
4 instrumentality of the United States Government is an
5 interesting one. There are, as you know, two
6 formalized relationships between the Department of
7 Commerce and ICANN. One of them what is currently
8 called the Joint Project Agreement, and the second
9 one is a formal contract to carry out certain
10 functions called the IANA functions, or the Internet
11 Assigned Numbers Authority's functions.

12 So to the extent it's acting as contractor
13 to the United States Government, it is serving the
14 U.S. Government. But to call it an instrumentality
15 of the U.S. Government imbues it with something that
16 I don't think is accurate. It's not a government
17 organization. It's not like the Superfund or
18 something like that.

19 Q. And ICANN is not supposed to act at the
20 behest of any particular government, is that a fair
21 statement?

22 A. It is bound by the incorporation

1 statements, it's bound by its bylaws, it's bound by
2 its practices and processes, the advisory committees
3 and all those other things. It's intended to act on
4 behalf of the interests of the users of the Internet.

5 Q. And in fact, ICANN's articles of
6 incorporation specifically recognize that, quote, the
7 Internet is an international network of networks
8 owned by no single nation, individual or
9 organization?

10 A. That's correct.

11 Q. And in that role, is it important to
12 ICANN's credibility to be perceived as not being
13 controlled by any particular government?

14 A. Yes, it is.

15 Q. And if ICANN were perceived as being
16 controlled by the United States Government, that
17 would be a bad thing for ICANN's credibility in the
18 global Internet community, right?

19 A. Counsel, I would not answer that yes or
20 no. I would say that it's a much more complex thing
21 than that. For the most part, I agree with the
22 statement that if ICANN is seen as an independent,

1 internationally oriented organization that is serving
2 the interests of the Internet users, and not beholden
3 to any one government, for the most part, that's
4 beneficial.

5 Surprisingly, you will find that there are
6 some people who actually like the fact that there is
7 a relationship between ICANN and the U.S. Government
8 because it acts as a kind of defensive shield in the
9 event that ICANN becomes engaged in some
10 international dispute. So there are actually
11 different views of the utility and helpfulness of the
12 official relationships that it has.

13 But to come back to your original
14 question, on the whole, it's better for ICANN to be
15 perceived as a nonaligned international organization.

16 Q. And if ICANN decided that a particular
17 sTLD should go on to the root that the U.S.
18 Government told it, you can't do that, would that be
19 bad for ICANN's credibility in the global community?

20 A. You are using the word bad, and so I
21 struggle a little bit with that because good and bad
22 are such deep concepts. I'm sorry, I don't mean to

1 arm wrestle with you over that.

2 In fact, if ICANN could not act -- how do
3 I want to say this? Could not appear to act as an
4 independent agent. And if it appeared to be
5 controlled by one government, that would be difficult
6 for ICANN's credibility. So I agree with that.

7 I will also point out, if I could, to the
8 panel that at no time has ICANN ever been forced not
9 to do something, no recommendation of ICANN to the
10 Department of Commerce, which has the opportunity to
11 opine on any changes to the root zone file, at no
12 time has ICANN failed to prevail with regard to its
13 recommendations for additions and changes to the root
14 zone file.

15 Q. We'll talk about that, too, in the context
16 of this particular case.

17 A. All right.

18 Q. Let's do this. Let's take a look at
19 ICANN's bylaws. And I would like to ask you to help
20 me understand exactly what they mean and why they're
21 important. And would you turn to tab 32 which is
22 Hearing Exhibit 5?

1 A. Yes, I'm at tab 32, Counsel.

2 Q. And ICANN is a private corporation that
3 wields considerable influence over one of the world's
4 most important resources, is that a fair statement?

5 A. I'm sorry, are you quoting?

6 Q. No, no. Just before we look at the
7 bylaws, I'm just asking you.

8 A. I see. You're just making an assertion.

9 Q. Yes.

10 A. Yes, it is responsible for managing of
11 some very important -- resources that have become
12 very important.

13 Q. And that's why ICANN holds itself to such
14 high standards, isn't that true?

15 A. That's correct.

16 Q. Let's take a look at page 2, and we'll
17 start with Article II, section 3, nondiscriminatory
18 treatment. And let me just read that: "ICANN shall
19 not apply its standards, policies, procedures, or
20 practices inequitably or single out any particular
21 party for disparate treatment unless justified by
22 substantial and reasonable cause, such as the

1 promotion of effective competition." Now, what does
2 that mean?

3 A. I think it means what it says, Counsel.
4 Do you need elaboration?

5 Q. I just want to make sure that it's clear
6 on its face to you.

7 A. Yes.

8 Q. There is no ambiguity?

9 A. I don't believe there is any ambiguity.

10 Q. And Article III, transparency, section 1,
11 "ICANN and its constituent body shall operate to the
12 maximum extent feasible in an open and transparent
13 manner, and consistent with procedures designed to
14 ensure fairness"?

15 A. That's also correct, and I believe that
16 more than one party has observed that ICANN's
17 practices and processes are as transparent or more
18 transparent than any organization anywhere in the
19 world. And I would put its practices up in
20 comparison with others to that effect.

21 Q. And I've heard that, too, although mostly
22 from ICANN officials. Let's take a look at Article

1 IV, accountability and review on page 4 which says,
2 "In carrying out its mission as set out in these
3 bylaws, ICANN should be accountable to the community
4 for operating in a manner that is consistent with
5 these bylaws, and with due regard for the core values
6 set forth in Article I of these bylaws." Do you see
7 that?

8 A. Yes, that's correct. I don't have
9 anything to add to that.

10 Q. And the IRP is part of this Article IV?

11 A. Yes, it is. That's why we're here today.

12 Q. And you testified that this IRP process is
13 nonbinding, is that correct?

14 A. That is my understanding.

15 Q. And do the words nonbinding appear
16 anywhere in ICANN's bylaws with respect to the IRP?

17 A. This doesn't speak to anything other than
18 the name of -- or reference to the process. There
19 are other -- I assume that there are other specifics
20 that you might want to refer to in describing the IRP
21 process.

22 Q. Are you familiar with any provision in any

1 of those documents that state that this is a
2 nonbinding process?

3 A. I'm not familiar with any provision that
4 says it is a binding process.

5 Q. Well, you would think that if someone was
6 going to initiate an IRP and spend a lot of money, it
7 would want to know whether it's binding or
8 nonbinding, right?

9 A. Possibly.

10 Q. And to inform the participants, given that
11 ICANN is open and transparent and works according to
12 the well documented policies, you would think that
13 ICANN would want to specify if it's going to be
14 nonbinding, that it is nonbinding?

15 A. What about the other way around, Counsel?
16 Would it not want to specify if it were binding, and
17 if it did not specify so, then it must not be?

18 Q. You don't think that the presumption of
19 someone going into an elaborate and expensive
20 proceeding like this would actually have some sort of
21 binding effect?

22 A. Well, I can't speak for any presumptions

1 made by your client, but I would say that depending
2 on something that isn't specified is an interesting
3 proposition, isn't it?

4 Q. ICANN is supposed to work according to
5 well documented policies. It establishes a panel --

6 A. Yes.

7 Q. -- to decide, to make a declaration as to
8 whether ICANN has acted consistently with its bylaws.
9 Let me ask you this. If this panel issues a
10 declaration that the board didn't act consistently
11 with its bylaws, can the board say, no, in fact, we
12 did act consistently and thank you very much, panel,
13 we reject your declaration?

14 A. Since there does not appear to be any
15 document that says that the declaration of the panel
16 is binding on the board, and since the board has the
17 ultimate responsibility for actions of the
18 organization, it's my opinion that the board could,
19 in fact, dispute the recommendations of the panel.
20 But in the same way that we have to justify and
21 provide a rationale for a disagreement as we do with
22 the GAC, I presume the same thing would happen with

1 the independent review panel.

2 I guess I should also point out, Counsel,
3 and you know this, as do others in this room, this is
4 the first time we have gone through the independent
5 review process. It won't surprise me if we've
6 discovered there are things that either should have
7 been specified or better spelled out than they have
8 been. And I hope that the ICANN members who are
9 present will take note of any deficiencies in the
10 specifications of the IRP process.

11 Q. As do we all. Let's go back to the facts
12 of this case.

13 A. Okay.

14 Q. And in June 2005, the board votes for ICM
15 to proceed to contract negotiations, right?

16 A. (Witness nodding.)

17 Q. And in early August 2005, ICM and ICANN
18 reach agreement on a draft registry. Do you recall
19 that?

20 A. Do you have a reference that you would
21 like to draw?

22 Q. Well, let's take a look at your witness

1 statement at paragraph 27.

2 A. I'm sorry, tab 27?

3 Q. I'm sorry, your witness statement is at
4 tab A, and I would like to direct your attention to
5 paragraph 27.

6 A. Tab A, paragraph 27, is that right?

7 Q. Yes, sir.

8 A. Yes, I am there. I am there, Counsel.

9 Q. And so we have the June 1st vote, and I
10 will represent to you that in August of 2005, ICM and
11 ICANN staff reached agreement on a draft registry
12 agreement. Do you recall that?

13 A. I don't specifically recall the date,
14 Counsel, but I'll accept the date as you propose it.

15 Q. And between the June 1st vote and early
16 August, are you aware of any documents to suggest
17 that ICANN informed ICM that sponsorship was still an
18 open issue?

19 A. I don't know of any documents that raise
20 that issue.

21 Q. And do you recall the board was scheduled
22 to vote on the registry agreement in mid-August 2005?

1 A. Yes, I do. My recollection is that we
2 didn't vote, though, on that date.

3 Q. That's correct. And do you recall that on
4 August 11th, 2005, Michael Gallagher of the NTIA sent
5 you a letter asking ICANN to postpone the vote?

6 A. Yes, I do. Well, he specifically asked us
7 to assure that we gave all due consideration to the
8 issues that were before us. I don't recall whether
9 the letter specifically -- unless you have it in
10 front of me, I don't recall whether the letter
11 specifically said, please delay the vote or rather
12 simply reminded us of making sure we had done due
13 diligence on the matter.

14 Q. It's at tab 5. I'm sorry, it's at tab 16,
15 Hearing Exhibit 162, and down at the --

16 A. Yes, I see it, adequate additional time.
17 So yes, the letter explicitly asks us for a delay.

18 Q. Now, why didn't you mention the Gallagher
19 letter anywhere in your witness statement?

20 A. Probably because I didn't remember that
21 one at the time that the witness statement was being
22 produced.

1 Q. Instead, paragraph 31 of your witness
2 statement speaks of Mr. Tarmizi's letter that your
3 counsel --

4 A. I'm sorry, Counsel, I'm still catching up
5 with you. Tab A, paragraph 31, did you say?

6 Q. Yes, it says, "On August 12th, 2005, not
7 long after ICANN posted ICM's first draft/proposed
8 registry agreement, the chairman of the GAC, Mohamed
9 Sharil Tarmizi, sent me a letter expressing the GAC's
10 diverse and wide ranging concerns (concerns that
11 echoed those of the ICANN board) with the .XXX sTLD,
12 and requesting that the board provide additional time
13 for governments to express their public policy
14 concerns before the board reached a final decision on
15 the proposed registry agreement."

16 Now, why did you mention Mr. Tarmizi's
17 letter, but not Mr. Gallagher's?

18 A. Pure oversight, Counsel.

19 Q. And in paragraph 33, you go on to say,
20 "Mr. Tarmizi's August 12th, 2005 letter was the first
21 communication I received from the GAC where the GAC
22 expressed concern with the .XXX application." Do you

1 see that? Do you see that, sir?

2 A. Yes, and that's a correct statement, I
3 believe.

4 Q. Let's take a look at tab 18 in your
5 binder, which is Exhibit 282 and it's an e-mail from
6 Dr. Tarmizi to the GAC several days later.

7 A. Yes.

8 Q. And he writes, "Dear colleagues, some of
9 you may be approached by reporters wanting to know
10 your reactions about the statement I made to the
11 board. In the first place, the statement was mine
12 and not really speaking on the GAC's behalf, but
13 merely indicating a view from the chairman of GAC, in
14 my capacity as a liaison to the board which I am
15 required to advise."

16 A couple of sentences down, "There is no
17 GAC position on this issue, therefore, no statements
18 from the GAC, but only the GAC chairman." Do you see
19 that?

20 A. Yes. And that's correct. And in my
21 earlier testimony, I pointed out that the
22 interactions that we had with the GAC on .XXX were

1 not held in the -- or not couched in the form of a
2 formal GAC communique, but made reference to specific
3 members of the GAC raising issues.

4 Q. Your witness statement unambiguously says
5 that this was a communication from the GAC, right?

6 A. Yes. In fact, that probably would have
7 been better stated where the GAC members or the GAC
8 chair expressed concern.

9 Q. Are you aware that Dr. Tarmizi's letter
10 was posted prominently on ICANN's home page while the
11 Gallagher letter was put in the less prominent
12 correspondence file?

13 A. I was not aware of that, no.

14 Q. Do you know whether Dr. Tarmizi sent that
15 letter on his own initiative or did someone at ICANN
16 ask him to?

17 A. I don't know. I assume that he sent it on
18 his own, but I don't know.

19 Q. Are you aware that there is testimony in
20 this case that Dr. Tarmizi says he was asked by ICANN
21 to write that letter as a cover for the U.S.
22 Government intervention?

1 A. I'm not aware that there is such
2 testimony, but if you tell me that there is, I accept
3 the statement.

4 Q. Do you know what prompted the Gallagher
5 letter?

6 A. What prompted the Gallagher letter?

7 Q. Yes.

8 JUDGE TEVRIZIAN: That's Exhibit 162?

9 MR. DE GRAMONT: The Gallagher letter
10 is --

11 JUDGE TEVRIZIAN: August 11th, 2005?

12 MR. DE GRAMONT: Yes, sir.

13 THE WITNESS: It's tab 16, Counsel.

14 BY MR. ALI:

15 Q. Thank you. Tab 16, Exhibit 162?

16 A. Yes, item 162.

17 Q. Do you know what prompted Mr. Gallagher to
18 write that letter?

19 A. Well, it's in the text of the letter, I
20 think. It says specifically in the second paragraph,
21 "The Department of Commerce has received nearly 6,000
22 letters and e-mails from individuals expressing

1 concern about the impact of pornography on families
2 and children, and opposing the creation of a new top
3 level domain devoted to adult content." So I assume
4 that his letter was prompted in part by that public
5 expression to the Department of Commerce,
6 specifically to NTIA.

7 Q. Were you ever told that conservative U.S.
8 political groups had lobbied the Commerce Department
9 to kill XXX?

10 A. I'm sorry, you asked whether I was told
11 that.

12 Q. Yes. Were you aware that conservative
13 political groups were lobbying the Commerce
14 Department to kill .XXX?

15 A. I'm actually trying to think back to what
16 I knew at the time. I think the answer is yes,
17 because I think I remember a letter writing campaign
18 that was instituted by a particular advocacy group
19 which may have produced some of these letters.

20 Q. And do you know who Jim Dobson is?

21 A. Say again?

22 Q. Do you know who Jim Dobson is?

1 A. I don't. I'm sorry, if I did, I don't
2 recall.

3 Q. Did you ever hear that political
4 conservative groups met with Karl Rove at the White
5 House to specifically ask the White House to make
6 sure that XXX was killed?

7 A. No. That's news to me.

8 Q. Did anyone tell you that Department of
9 Commerce officials took the position that if ICANN
10 tried to put .XXX on the root, the U.S. Government
11 would refuse to do so?

12 A. No, I was unaware of any such
13 communication from the Department of Commerce.

14 Q. Would you turn to tab 21?

15 JUDGE SCHWEBEL: Could I ask a question
16 about this?

17 MR. DE GRAMONT: Absolutely.

18 JUDGE SCHWEBEL: Something the Doctor just
19 said. In respect of the question Mr. De Gramont just
20 put to you, is it your understanding that in
21 practice, the United States Government retained the
22 power to refuse to add to the root XXX, even if ICANN

1 approved it?

2 THE WITNESS: Under the agreement and
3 particularly under the contract that the government
4 had with ICANN to manage the root zone file, any
5 proposal to make changes to the root zone file went
6 to the Department of Commerce, specifically to NTIA,
7 and NTIA had to agree to any proposed changes,
8 including an addition, before the root zone file will
9 be compiled by another company that's also under
10 account, VeriSign. So at the time, the government
11 had the ability to refuse to make such a change. So
12 they were in a position to not accept and not
13 authorize a particular change to the root zone file.

14 JUDGE SCHWEBEL: And this being a matter
15 of contract, and ICANN and its related organizations
16 operating publicly, what you say would have come as
17 no surprise to anybody who was a student of ICANN
18 affairs?

19 THE WITNESS: That's correct. The
20 existence of the contract and its terms and the
21 process by which the root zone file was modified and
22 updated was well-known by the community.

1 JUDGE SCHWEBEL: Thank you.

2 THE WITNESS: In fact, if I might add,
3 Counsel, the earlier questions from counsel regarding
4 the relationship between ICANN and the U.S.
5 Government and the sensitivity of ICANN's
6 independence has been a long-standing issue for
7 governments other than the United States. And so
8 your question that goes to the heart of that issue
9 is, well, as to the fact that the U.S. Government did
10 and still does have the ability to -- what's the
11 right word -- intercede in any proposed change in the
12 root zone file.

13 MR. PAULSSON: So unsurprisingly to me
14 that the U.S. Government de facto would be in a
15 position to say, no, we don't like this change?
16 That's what you --

17 THE WITNESS: That's correct. They could
18 refuse to authorize VeriSign to make the change to
19 that root zone file.

20 MR. PAULSSON: And then it wouldn't
21 happen?

22 THE WITNESS: That's correct. And I don't

1 know what -- by the way, this never has happened, so
2 I don't know what would happen -- there might be a
3 lot of other consequential results. I hope that the
4 committee or the panel has been told that there are
5 multiple root zone server organizations. Not all of
6 them are under the control of the U.S. Government.

7 So if the U.S. Government did something
8 that other people objected to, it's speculation but
9 there could be quite a lot of turmoil resulting from
10 a decision like that. But as I say, it's never
11 happened and so we don't know what the actual outcome
12 would be.

13 MR. PAULSSON: So the other question, that
14 was the question about the de facto power to stop it,
15 to block it.

16 THE WITNESS: It has the power to do that.

17 MR. PAULSSON: The second question, then,
18 in your view, would it be right in principle for it
19 to intervene, the government to intervene in this way
20 in a case where ICANN had given the green light?

21 THE WITNESS: If ICANN had approved it --
22 well, you use the word "right," Your Honor, and

1 that's --

2 MR. PAULSSON: Would it be right in
3 principle, as you understand Internet governance?

4 THE WITNESS: I want to be very careful
5 how I respond to you, Your Honor. First of all, I
6 accept that the U.S. Government had the authority to
7 resist the change because this is a contractual
8 matter. Then the question will be, if ICANN had
9 approved a change and the U.S. Government resisted
10 it, this would not be a good thing, in my opinion,
11 for the Internet because it would place a single
12 government in a position to intercede. It is for
13 that reason that many governments object to this
14 close relationship, contractual relationship between
15 ICANN and the U.S. Government.

16 JUDGE TEVRIZIAN: But a signatory to that
17 contract could then leave and go to one of these
18 other root zone terminals that you spoke about.

19 THE WITNESS: I'm sorry, would you ask the
20 question again? I'm not hearing you.

21 JUDGE TEVRIZIAN: But a signatory to that
22 contract enabling the United States Government to

1 refuse to place someone on the root zone terminal
2 that they control could not prevent that person who
3 was refused or that entity that was refused to go to
4 another root zone terminal?

5 THE WITNESS: No, because the mechanism by
6 which the root zone is distributed is that it must
7 come from VeriSign and is replicated and distributed
8 to the other root zone operators. We could dive a
9 little deeper, Your Honor, if you want to, into the
10 details of how this actually works.

11 The only reason that the domain names
12 resolve to their corresponding Internet addresses the
13 same everywhere in the world is that everyone goes to
14 the same collection of root zone servers. It's
15 technically possible for someone to announce that
16 they have a different root zone and that you can
17 point to them and go to their resolution process.
18 This would fragment the Internet and there is a wide
19 separate belief that that would not be a good thing.
20 So there is a substantial built-in inertia towards
21 anything like that and the preference is to retain a
22 common single root zone which resolves identically

1 everywhere. Otherwise, a lot of bad things could
2 happen, including your e-mail going someplace you
3 didn't intend it to go.

4 So while a party who has failed or ICANN
5 had failed to get a change to the root zone file that
6 it had requested, ICANN itself would not be well
7 served by attempting to go elsewhere to accomplish
8 its goal, especially given the great embedding of
9 knowledge of the addresses of all the root zone
10 servers in the software of the Internet. So it would
11 be quite hard to effectively change the current
12 system. As a result, the contractual agreement
13 between IANA and ICANN has some teeth in it when it
14 comes to specific changes to the root zone file.

15 JUDGE SCHWEBEL: Professor Cerf, forgive
16 my ignorance of these matters, which is profound. I
17 have had the impression from a diagram distributed to
18 the panel at the outset of this hearing that there
19 was a single root from which all derived. But I
20 gather from what you say now that that's not so?

21 THE WITNESS: No. Let me elaborate.
22 Counsel, I hope you don't mind my responding to panel

1 questions.

2 MR. DE GRAMONT: No, not at all.

3 THE WITNESS: So specifically there is a
4 single copy of the root zone file which is produced
5 by VeriSign, upon authorization by the Department of
6 Commerce, and upon recommendation by ICANN for
7 changes to it. Once that root zone file is produced,
8 it is then distributed to literally 13 different
9 servers. These are computers that are on the
10 network. And those servers are the ones that respond
11 to queries that translate the domain name into an
12 Internet address.

13 So there is only one initial copy, but it
14 is replicated and in fact, it is replicated at least
15 100 times. There are at least 100 different copies
16 of the root zone file available on the Internet for
17 what is called resolution, when you look up a domain
18 name like www.google.com and when you get an answer
19 back, you get an Internet address. It's a numeric
20 address. And your computer uses that numeric address
21 to go to, in my case, the Google servers.

22 So the process of translating a domain

1 name into an Internet address is called resolving the
2 domain name or resolution or domain name lookup. So
3 it's one file which is replicated. And when changes
4 are made, the changes are propagated to all the root
5 zone servers. There is a single source for that root
6 zone file and that source is VeriSign and that file
7 is generated only upon the authorization of the
8 Department of Commerce.

9 JUDGE SCHWEBEL: But if X government found
10 itself dissatisfied with the process of -- so far
11 hypothetical process of the United States Government
12 not approving an addition to the root, could it take
13 action which would add a domain?

14 THE WITNESS: The short answer to this
15 question is, sort of. So let me try to explain. I
16 want to think of a good analogy here. I don't know
17 if this is a very good analogy, but let's try. Let's
18 imagine there are 13 libraries in the United States.
19 There are only 13 of them. And you know, as a
20 scholar, that if you want to get to a library, you
21 have these 13 addresses and whenever you want to look
22 something up, you go to one of them. And let's even

1 assume for the moment they are identical. But
2 someone decides, counsel over here decides that these
3 libraries don't have information in them that satisfy
4 him. I hope you don't mind my using you as a prop,
5 as it were. You've been called worse before, I
6 suppose.

7 So counsel decides that he isn't satisfied
8 with the information in those libraries and so he
9 would like to build a 14th library, which he does,
10 and he populates it with a lot of the information
11 which is the same as the other libraries, but he puts
12 in some additional information in that 14th library
13 which he believes is important for everyone. His
14 problem now, having gone to this trouble, is to get
15 everyone else in the world to know about the 14th
16 address. This is not very easy in the Internet world
17 because those addresses are literally burned into the
18 software of most of the computers that do domain name
19 lookups. So changing those addresses is hard.

20 A government could decide to make all of
21 the resolver problems in its jurisdiction change but
22 it would have great difficulty forcing that change on

1 the entire world of Internet users, of which there
2 are now 1.6 billion. There are in excess of 600
3 million computers on the Internet today and that
4 doesn't count laptops and things that we see in the
5 room here. Probably a billion devices are on the
6 Net. Getting every single one of those to change its
7 addresses to refer to the preferred -- this
8 hypothetical government preferred root zone file is
9 mechanically extremely hard. So there is great
10 inertia to doing so.

11 MR. PAULSSON: And yet one understands why
12 from time to time a firebrand will say in Europe,
13 where I live, that's the European Internet. It
14 happens.

15 THE WITNESS: Yes. I won't speculate,
16 Your Honor, on any of the motivations or sanity of
17 your colleagues in that great European continent.

18 MR. PAULSSON: Who said colleagues?

19 THE WITNESS: Counsel?

20 BY MR. DE GRAMONT:

21 Q. Thank you, Doctor. Just to clarify, as a
22 practical matter, there is a single root that is

1 physically controlled by the U.S. Government?

2 A. There is a single root and its contents
3 are determined really conjointly by ICANN, which
4 makes the proposals for any additions and changes and
5 the Department of Commerce and the NTIA, which
6 approves or not those changes. The physical control
7 of the root is actually in the hands of VeriSign.

8 Q. Pursuant to a contract with the U.S.
9 Government?

10 A. Under contract to the U.S. Government,
11 that's correct, again with NTIA at the Department of
12 Commerce.

13 JUDGE SCHWEBEL: In point of fact, neither
14 VeriSign nor the Department of Commerce have ever
15 declined to add to the root an addition recommended
16 by ICANN?

17 THE WITNESS: That's correct. Nor have
18 they ever opposed any changes to the root which might
19 involve changes of the addresses of the various
20 servers and so on.

21 BY MR. DE GRAMONT:

22 Q. Let's take a look at the next exhibit

1 because that bears on the discussion we've been
2 having. And if you'll look at tab 21 which is
3 hearing Exhibit 284, it's a November 11th, 2005
4 article from Congressional Quarterly, and this is a
5 few months after the letter from Mr. Gallagher to you
6 on August 11th. Have you ever seen this article or
7 do you recall seeing it?

8 A. Actually, I have not. But I can tell you
9 that there is an enormous amount of information on
10 the Internet about the Internet, so no, I hadn't seen
11 this one before.

12 Q. Let me read the first paragraph, "The U.S.
13 Government's hands-off approach to the Internet has
14 its limits. Last summer, when the nonprofit
15 corporation that manages the Internet's address
16 system tentatively approved the creation of a .XXX
17 domain for pornography websites, an uproar among
18 social conservatives prompted the Bush Administration
19 to voice its opposition to the plan. As a result,
20 the final decision was delayed." Do you see that?

21 A. So I would like to respond to this, if I
22 might, Counsel.

1 Q. Absolutely.

2 A. My first observation is the phrase
3 "approved the creation of" does not comport with what
4 actually happened. The board approved the entry into
5 negotiation of contract. That's not the same as
6 approving its creation, because I repeat again no
7 creation would happen until a contract was agreed.

8 Q. Do you agree that the final decision was
9 delayed as a result of the Bush Administration's
10 voicing its opposition to the plan?

11 A. I would agree that the decision was
12 delayed for more than one reason. One of them was a
13 letter from Gallagher simply stating, please assure
14 that due diligence is done, but also you will note
15 the note from Sharil Tarmizi, the GAC chairman, also
16 citing the need to be attentive to issues that may
17 not yet have been resolved.

18 Q. Yes, which we have been told was written
19 at the behest of ICANN to cover for the Gallagher
20 letter.

21 A. I don't dispute, Counsel, that someone
22 told you that. I did not tell you that because I

1 don't know that.

2 Q. Would you take a look at the fifth
3 paragraph on the first page? It reads, "The
4 possibility of U.S. interference in the approval of
5 new domains, which are a vital part of how the web
6 functions, has exacerbated already-simmering concerns
7 about U.S. control of ICANN." And that relates to
8 the discussion we've been having about whether the
9 Internet should be controlled by an international
10 body or rather by the U.S. Government?

11 A. Counsel, I would like to take this
12 opportunity, if I could, to now intervene and comment
13 on that highlighted -- on the segment that you
14 highlighted.

15 Q. Please.

16 A. First of all, let's take into account that
17 this is written by someone, a reporter, so it's an
18 expression of opinion. Second, the phrase U.S.
19 control of ICANN is an interesting one. The
20 contractual relationship between ICANN and the
21 Department of Commerce is limited to IANA functions
22 and the most visible function is, in fact,

1 modifications to the root zone file. There is a
2 great deal of other activity which ICANN undertakes
3 which, for all practical purposes, is not
4 specifically under the control of the Department of
5 Commerce nor subject to the contract. It has to do
6 with all the policies, procedures and practices of
7 ICANN, including the one that we're in today.

8 I would not agree -- if you were saying
9 this, I would not agree that all of those processes
10 were under the control of the U.S. Government.

11 Q. We're simply talking about whether an sTLD
12 gets on the root in this particular case.

13 A. Right.

14 Q. And would you take a look at page 3 of the
15 exhibit?

16 A. Sorry, page 3?

17 Q. Yes, sir, page 3.

18 A. Of the same exhibit, 284?

19 Q. Yes, Doctor.

20 A. Okay, I'm with you.

21 Q. And the first full paragraph reads, "The
22 flap over .XXX has put ICANN in an almost impossible

1 position. It is facing mounting pressure from within
2 the United States and other countries to reject the
3 domain. But if it goes back on its earlier decision,
4 many countries will see that as evidence of its
5 allegiance to and lack of independence from the U.S.
6 Government."

7 A. I see the statement. Again, I point out
8 this is a statement of opinion by the writer of this
9 article.

10 Q. Do you disagree with it?

11 A. Well, I would have to say that the writer
12 chooses to characterize this as mounting pressure.
13 That's the writer's opinion. I didn't see it that
14 way. In fact, every communication that we had -- the
15 two communications that were relevant here, the one
16 from Sharil Tarmizi and the one from Michael
17 Gallagher, in particular only said, please look
18 carefully and evaluate carefully what you are doing.
19 That's all it said. And I would say that asking the
20 board to perform due diligence before it comes to a
21 decision comports well with the bylaws and the high
22 level of standards that the organization attempts to

1 achieve.

2 Q. Well, the article goes on to quote you as
3 saying, "'The politics of this are amazing,' says
4 Cerf. 'We're damned if we do and damned if we
5 don't.'" Do you recall saying that?

6 A. Absolutely. And the reason I said that
7 was simply the articles like this one and others
8 which I was made aware of -- I didn't see this one in
9 particular, but I know I must have talked to someone
10 because he's quoting me here. And I can easily
11 imagine myself saying that, even if I didn't remember
12 it exactly.

13 But the point was simply that there was a
14 lot of controversy over this particular top level
15 domain. And the parties who were favoring it and
16 parties who didn't favor it were pretty vocal in
17 their opinions and that's what I meant by the
18 politics of this are amazing.

19 Q. Well, on the one hand, if ICANN approved
20 .XXX and the U.S. Government refused to put it on the
21 root, that would damage ICANN's credibility
22 internationally, isn't that true?

1 A. Yes, it would. And on the other hand, if
2 we refused to put it in, it would damage our
3 credibility among those parties who believe it should
4 be in the root.

5 Q. And it would damage your credibility
6 particularly given that the board had repeatedly
7 stated or members of the board and ICANN officials
8 had repeatedly stated that the RFP criterion had, in
9 fact, been met?

10 A. Yes. But again, I would point out that
11 the ultimate conclusion of this particular matter
12 turned on the conclusion of an agreement between -- a
13 contractual agreement between ICANN and ICM.
14 Independent of all the other matters, ultimately a
15 contract has to be approved and until that happens,
16 there isn't any final result.

17 Q. We're going to talk about the contract.
18 Before we do, would you turn to tab 15 in your
19 notebook which is Hearing Exhibit 166?

20 A. Okay, I'm at tab 15.

21 Q. And this is an e-mail from Meredith Atwell
22 to R. Layton both at the NTIA. Have you ever seen

1 it?

2 A. No, I haven't. This is all new to me.

3 Q. And a memo is being forwarded that was
4 apparently drafted within the NTIA. And if you look
5 at the second page, it's titled United States control
6 of the domain name system.

7 A. So this is page 2 of 166?

8 Q. Yes. And the highlighted text says, "For
9 example, if the international community decides to
10 develop a .XXX domain for adult material, it will not
11 go on the top level domain (TLD) registry if the U.S.
12 does not wish for that to happen."

13 A. And that's a correct statement given our
14 earlier discussion about the contractual authority
15 that the Department of Commerce holds.

16 MR. DE GRAMONT: Mr. Chairman, we've been
17 going for over an hour and 15 minutes. I still have
18 a number of questions. Would this be a good time to
19 take a break?

20 JUDGE SCHWEBEL: Yes. Let's adjourn until
21 4:30.

22 MR. PAULSSON: During the pause, one

1 question. In the question you just put to the
2 witness, you refer to this press statement as
3 apparently emanating from NTIA.

4 MR. DE GRAMONT: Oh.

5 MR. PAULSSON: Is there a way to connect
6 them? Will we see them on -- is there an internal
7 reference?

8 MR. DE GRAMONT: The e-mail says, "History
9 of the Internet. I left you a voice mail and, if you
10 could, call me back, that would be great. But I
11 wanted to run this by you as well. I have to put all
12 this on less than a page, which is a daunting task as
13 you well know. My only request would be that you
14 tell me if anything is inaccurate." And then this is
15 the attachment to that e-mail.

16 MR. PAULSSON: So it may be a draft?

17 MR. DE GRAMONT: It could be a draft.

18 JUDGE SCHWEBEL: We don't know if it ever
19 was published, is that right?

20 MR. DE GRAMONT: We do not know.

21 JUDGE SCHWEBEL: And it came to light by a
22 Freedom of Information process?

1 MR. DE GRAMONT: That's correct, Judge
2 Schwebel.

3 JUDGE SCHWEBEL: Thank you.
4 (Recess.)

5 MR. DE GRAMONT: May I proceed, Judge
6 Schwebel?

7 JUDGE SCHWEBEL: Please.

8 BY MR. DE GRAMONT:

9 Q. Dr. Cerf, you testified that after the
10 events of August 2005, there was a board meeting in
11 2005 when the issue of sponsorship was discussed. Do
12 you recall that?

13 A. I'm sorry, you're saying the meeting in
14 August?

15 Q. Let me rephrase it. You testified that in
16 September of 2005, there was a board meeting at which
17 sponsorship was discussed?

18 A. Yes. I think the minutes show that.

19 Q. And we'll talk about that.

20 A. Okay.

21 Q. In your witness statement, that September
22 15th meeting is the first time after the June 1st

1 vote that you cite to a document that cites
2 sponsorship?

3 A. Okay.

4 Q. Now, are these board meetings closed?

5 A. The board meetings are -- the telephonic
6 board meetings are not open to the public. We don't
7 have an arbitrarily large number of people coming
8 into the conference calls. The minutes of the
9 meeting are distributed publicly and any statements
10 that the board members wish to make, especially in
11 conjunction with decisions, are also made public.
12 The thrice annual meetings, however, are in fact open
13 and the entire board meeting is observed publicly.

14 Q. Do you know when the minutes for the
15 September 2005 meeting were actually posted by ICANN?

16 A. I don't remember, Counsel.

17 Q. Would you take a look at tab 29 in your
18 binder which is Hearing Exhibit 276?

19 A. This is the 14 June minutes, is that
20 correct?

21 Q. Of 2006, yes, sir.

22 A. 2006, yes, sir, I'm there, Counsel.

1 Q. And the highlighted language reads,
2 "Resolved (06.36), the minutes of the board meeting
3 of 15 September 2005 are hereby approved and should
4 be posted." Do you see that?

5 A. Yes, I do, Counsel.

6 Q. And in reading that, do you recall that
7 the September 15th meeting minutes were not, in fact,
8 posted until June of 2006?

9 A. So it would appear.

10 Q. And I will represent to you that we've
11 done an archival search and -- do you know what an
12 archival search is?

13 A. Well, I know what some things that are
14 called archival searches are, but you might have a
15 special term of art here, so what do you mean by
16 that?

17 Q. I will represent to you that we did an
18 archival search that determined that these board
19 meeting minutes of 15 September 2005 were first
20 posted in June 2006.

21 A. I believe that. And if I could add some
22 color for the panel, this was an area of considerable

1 unhappiness on the part of the board that minutes
2 were not being posted in a timely way, as counsel has
3 evidenced here. And subsequently, the board
4 repeatedly argued for much more prompt response. And
5 I think if you were to look forward in time, you
6 would see a much better practice than this. So if
7 counsel's point is these were unduly delayed, the
8 former chairman of the board would agree with you.

9 Q. And I'm also trying to establish when the
10 first time was that ICANN put notice -- put ICM on
11 notice that sponsorship was an issue if indeed it was
12 still an issue at that time.

13 A. This is presuming, Counsel, that there was
14 no other communication, no other interaction with
15 ICANN staff that might have raised that as a concern.

16 Q. And we've seen none and ICM's witnesses
17 have testified that there is none.

18 A. Okay.

19 Q. Now, the minutes weren't posted until June
20 2006 which was after the May 2006 vote to reject the
21 contract. But what was published nearly
22 contemporaneous with the September 15th meeting was a

1 preliminary report. Do you recall that?

2 A. I'm sorry to interrupt you, Counsel.

3 Those preliminary reports were intended to show at
4 least what resolutions were treated and what their
5 outcomes were.

6 Q. And let's take a look at tab 20 which is
7 hearing Exhibit 272.

8 A. I'm at tab 20, Counsel.

9 Q. And this is September 15th, 2005. And at
10 the bottom, it says, "Resolved, that the ICANN
11 president and general counsel are directed to discuss
12 possible additional contractual provisions or
13 modifications for inclusion in the .XXX registry
14 agreement, to ensure that there are effective
15 provisions requiring development and implementation
16 of policies consistent with the principles in the ICM
17 application. Following such additional discussions,
18 the president and general counsel are requested to
19 return to the board for additional approval,
20 disapproval or advice."

21 Is there any mention of sponsorship?

22 A. There is none in that text.

1 Q. And in fact, Mrs. Burr testified that
2 those particular contractual provisions were the only
3 one that ICANN's staff had raised with her in that
4 time frame?

5 A. I'm sorry, say again, please.

6 Q. Ms. Burr testified that the particular
7 contractual provisions referenced here were the only
8 provisions that the ICANN staff had raised with her
9 at that time. Do you have any reason to dispute
10 that?

11 A. I have no reason to dispute Ms. Burr's
12 statement.

13 Q. Would you take a look at tab 23 which
14 is --

15 A. I am at tab 23.

16 Q. You got there very quickly. Which is
17 ICANN Exhibit AJ which you discussed with your
18 counsel. And again, this is a letter that Mr. Zangl
19 had sent you, I believe, in September of 2005. And
20 you go through great lengths to describe all the
21 numerous opportunities that GAC had had to weigh in
22 up until this point. Do you recall that?

1 A. Yes.

2 Q. And if you look at page 6 and the heading
3 is extensive review of ICM application.

4 A. Yes, I'm there.

5 Q. And if you look at the bottom, it refers
6 to the September 15th meeting. "On 15 September
7 2005, following additional, extensive review of the
8 proposed registry agreement, the board expressed
9 concerns about proceeding with .XXX. First, the
10 board expressed concerns regarding issues relating to
11 the compliance with the proposed .XXX registry
12 agreement." I'll skip over a little bit of the text.

13 "Second, the board noted the importance of
14 private registry agreements in creating a contractual
15 means of affecting registries and other actors of the
16 Internet community for the public interest." Is
17 there any mention of sponsorship in this letter?

18 A. Not in the highlighted part, no, Counsel.

19 Q. Anywhere else?

20 A. I don't believe so, Counsel.

21 Q. And if you turn to tab 25, which is
22 Hearing Exhibit 175 --

1 MR. LEVEE: Not in my binder.

2 THE WITNESS: Oh, I'm sorry. Tab 24.

3 BY MR. DE GRAMONT:

4 Q. Yes, thank you, Doctor. It is tab 24.

5 MR. LEVEE: Thank you.

6 BY MR. DE GRAMONT:

7 Q. And this is a letter from Dr. Twomey to
8 Dr. Tarmizi that is almost identical to the letter
9 that you had sent in January. Do you recall this
10 letter from Dr. Twomey?

11 A. Yes, I do, Counsel.

12 Q. By the way, who wrote these letters?

13 A. I beg your pardon?

14 Q. Who authored the letters? I mean, I know
15 that you and Dr. Twomey signed the respective letters
16 but when actually -- did you each actually write the
17 text or work on the text together?

18 A. Counsel and staff prepared drafts of the
19 letters both to Tarmizi and to Zangl.

20 Q. And again on page 7, there is a reference
21 to the same September 15th, 2005 board meeting and
22 there is no mention of sponsorship.

1 A. I agree.

2 Q. And the point of both of these letters is
3 that GAC had had ample time to weigh in on this
4 process, is that right?

5 A. That was my view, yes.

6 Q. And that there had been numerous notice
7 and comment periods?

8 A. That is also true because every time a new
9 version of the contractual agreement appeared to be
10 stable, it was put up for public comment.

11 Q. And that Dr. Tarmizi was at all the
12 various meetings where .XXX was discussed. You point
13 that out.

14 A. I actually don't know whether he was at
15 every single one of them, but as a liaison to the
16 board, he would have participated in these
17 discussions, yes.

18 Q. And yet the conclusion of the letter is
19 essentially, keep on going, GAC, you can intervene
20 and express your comments to us for as long and as
21 often as you like? Isn't that the conclusion?

22 A. Yes.

1 Q. Why is there no finality as to when the
2 GAC can weigh in?

3 A. I'm sorry, Counsel, I actually don't
4 understand. Are you saying that you are expecting a
5 kind of date or a milestone or some other statement
6 of, you must respond by a certain date? Is that your
7 point?

8 Q. Well, the GAC is required to provide
9 timely advice.

10 A. Yes.

11 Q. And timely, is that 10 years, 20 years?

12 A. I don't know whether the review panel has
13 been given a summary of how the GAC operates. Could
14 I assume that you have some knowledge of that, or may
15 I make an observation about it?

16 JUDGE SCHWEBEL: Please do.

17 THE WITNESS: The GAC is made up of a
18 number of representatives from countries around the
19 world. They tend not to work very much between their
20 face-to-face meetings. The face-to-face meetings
21 occur approximately every three to four months.

22 So the rate at which the GAC can prosecute

1 its agenda is in part limited by the frequency of
2 their meetings. The consequence of that -- and an
3 item of considerable debate between the ICANN board
4 and the GAC had to do with the difficulty of having
5 timely interactions and obtaining timely input from
6 the GAC, because of the fact that there were
7 frequently not very many interactions in the
8 interim between their face-to-face meetings.

9 This was an item of concern for both
10 groups because we understood that the ICANN
11 organization, particularly the board, would meet on a
12 monthly basis to deal with issues arising. But if
13 there were GAC matters, we wouldn't necessarily have
14 an opportunity for their inputs until they had met
15 face-to-face.

16 Question? Yes, Your Honor.

17 JUDGE TEVRIZIAN: What's the composition
18 of the GAC members that you talked about? Are they
19 high-ranking diplomats, low-ranking diplomats, NGOs?
20 Who are these people?

21 THE WITNESS: Good question. There were a
22 small number of NGO representatives. For example, we

1 had a representative from the International
2 Telecommunications Union. We had a representative,
3 if I remember right, from the European
4 Telecommunications Standards Institute. The bulk of
5 the representation, I would say, were moderate level
6 members of each government, usually not from the
7 diplomatic community, but rather from some part of
8 the government involved in information technology,
9 economic development and IT policy and things of that
10 sort.

11 As a side observation, sometimes that was
12 a -- what shall I call it? A deficiency because the
13 positions taken by the government members who were
14 concerned with IT policy didn't always align with the
15 positions taken by their corresponding members of the
16 diplomatic corps. In a few cases, we actually had
17 very high level representation. France comes to mind
18 as having an ambassador level person who participated
19 at least part of the time.

20 So on the whole, these were, I would say,
21 median level members of government who participated
22 in the GAC.

1 BY MR. DE GRAMONT:

2 Q. Now, you refer in your testimony,
3 Dr. Cerf, to the Wellington communique and let's take
4 a look at that. It's tab 25, Exhibit 181.

5 A. Yes, I'm at that location.

6 Q. Dated March 28th, 2006. And I'm at page 3
7 with the heading new TLDs, .XXX. It reads, "The GAC
8 appreciates the efforts of ICANN to clarify the
9 process by which the board approved the entry into
10 negotiations by ICANN staff and ICM Registry, the
11 applicant for the .XXX sponsored top level domain, as
12 reflected in the ICANN President's letter to the GAC
13 chair on February 11th, 2006." And do you understand
14 that to be a reference to Dr. Twomey's letter to
15 Dr. Tarmizi?

16 A. Yes, because Dr. Twomey was the president
17 of ICANN at that time.

18 Q. And it goes on to say, "However, the GAC
19 does not believe the February 11 letter provides
20 sufficient detail regarding the rationale for the
21 board determination that the application had overcome
22 the deficiencies noted in the evaluation report."

1 And I want to stop there. And the GAC is assuming
2 that the board had determined that the application
3 had overcome the deficiencies and met the RFP
4 criteria, is that correct?

5 A. It would appear so. Even if it is not so,
6 that may have been the assumption that led to this
7 letter.

8 Q. And it went on to say that "GAC would
9 request a written explanation of the board decision,
10 particularly with regard to the sponsored community
11 and public interest criteria outlined in the
12 sponsored top level domain selection criteria." Now,
13 how did GAC learn that ICM had not gotten past the
14 independent review committee on sponsorship?

15 A. I actually don't know a precise answer to
16 that question, Counsel, but as I testified earlier,
17 it was my belief that the organization had not fully
18 passed the sponsorship criterion, and that my vote in
19 favor of moving to contract was based on the belief
20 that more light would be shed on that question in the
21 course of contract negotiations. And we've also
22 heard from you and others that there is disagreements

1 about the meaning of moving to contract negotiation.

2 Q. And that wasn't exactly my question but we
3 discussed that at length and I won't debate it with
4 you any further. The question is -- well, let me ask
5 this. Do you know --

6 A. I'm sorry, could I interrupt counsel for
7 just a moment?

8 Q. Certainly.

9 A. To respond to your earlier question. If
10 you look at the text of this paragraph that you drew
11 my attention to, it reads, "The GAC would request a
12 written explanation of the board decision,
13 particularly with regard to the sponsored community
14 and public interest criteria outlined in the
15 sponsored top level domain selection criteria."

16 So it is clear that -- two things. First,
17 that the GAC is implicitly concerned about the
18 sponsorship criteria. As this is a communique, it
19 means that the GAC agreed that the chair should raise
20 this sponsorship question to the board. At the time
21 I received this, I wasn't disturbed by the query
22 because it is my belief at the time that they had not

1 yet satisfied that criterion and that we had not
2 concluded so.

3 Q. Well, first of all, the board decision
4 referred to appears to be a decision that the
5 application had overcome the deficiencies noted in
6 the evaluation report. Is that a fair reading of
7 this?

8 A. That's the quote from Mr. Pritz, is that
9 right?

10 Q. No, I'm reading this language here, sir.

11 A. Where are you?

12 Q. I'll read it again. "The GAC does not
13 believe that the February 11th letter provides
14 sufficient detail regarding the rationale for the
15 board determination that the application had overcome
16 the deficiencies noted in the evaluation report. The
17 GAC would request a written explanation of the board
18 decision."

19 A. Yes. And I would suggest to you, Counsel,
20 that one interpretation of the origin of this
21 statement is an assumption by the GAC that we would
22 not have gone into contractual negotiations without

1 having concluded that the ICM had met all the
2 criteria. And as it has been testified repeatedly, I
3 don't believe that we had to have made that decision.
4 I don't believe we did make that decision. I believe
5 that we proceeded to contract negotiation without
6 having come to a conclusion on the matter of
7 sponsorship.

8 Q. And that's your position notwithstanding
9 the numerous documents we've looked at?

10 A. It is.

11 Q. Stating that the sponsorship criteria had
12 been met?

13 A. It is.

14 Q. Do you know when the independent
15 evaluation reports were released to the public by
16 ICANN?

17 A. I do not know when they were released, or
18 I don't remember anyway when they were released.

19 Q. Do you recall that it was in November of
20 2005?

21 A. Counsel, I have no specific memory of the
22 dates and so if you have documentation to that

1 effect, I'll accept the proposition.

2 Q. And do you recall that they were released
3 when many of the sTLD contracts had already been
4 approved?

5 A. Oh, I'm sure that that's a very reasonable
6 proposition because, as I said earlier, we prosecuted
7 these independently.

8 Q. So many of the sTLD applicants, including
9 those who had failed the sponsorship committee, were
10 able to conclude their contracts before the negative
11 evaluation reports were ever published, right?

12 A. Yes, if the timing is as you say it is,
13 but I'm not sure I understand what the point was.

14 Q. The point is that many applicants were
15 able to get through this process without the negative
16 evaluation reports out in the public, whereas ICM had
17 to confront the negative evaluation reports that were
18 released by ICANN in the middle of the process in a
19 manner that seems totally arbitrary?

20 A. Okay.

21 Q. Is that fair? Is it fair that the release
22 was to ICM, but not to other applicants?

1 A. As I say, the timing of this is not
2 something that I was controlling so I didn't have any
3 specific -- I don't have anything to help you reach
4 any conclusions about the timing of that release.

5 Q. Is the timing fair?

6 A. Say again?

7 Q. Is the timing fair?

8 A. Is the timing fair?

9 Q. Is it unfair --

10 A. Help me understand why you would think it
11 unfair. It's information that should be and was made
12 available to the public.

13 Q. After many of the contracts had already
14 been completed.

15 A. But I don't understand why you're tying
16 the other contracts to this particular matter because
17 they were treated independently.

18 Q. Because GAC was able to seize upon those
19 evaluation reports and raise sponsorship, as far as I
20 can tell, for the first time in 2006. There is no
21 document that indicates that sponsorship had ever
22 been raised in 2005. It was only after the

1 independent evaluation reports were released.

2 A. Well, I'll accept as statement of fact the
3 sequence that you described, but I'm not sure that
4 that represents an unfairness.

5 Q. Well, the tribunal will decide that. Now,
6 the second paragraph of the communique goes on to
7 read, "In its application supporting materials and
8 presentation to the GAC in November 2005, ICM
9 Registry promised a range of public interest benefits
10 as part of its bid to operate the .XXX domain. To
11 the GAC's knowledge, these undertakings have not yet
12 been included as ICM obligations in the proposed .XXX
13 registry agreement negotiated with ICANN." Do you
14 see that?

15 A. Yes, I see that.

16 Q. Are you aware that in fact ICM had
17 provided a proposed registry agreement that did
18 address those concerns but ICANN simply failed to
19 post it?

20 A. I'm not aware of that.

21 Q. Now, while you were in Wellington, you
22 gave an interview to the New Zealand Herald. Do you

1 recall that?

2 A. Only vaguely. I do a lot of these.

3 Q. I'm sure you do. It's at tab 26 of your
4 binder. It's hearing Exhibit 285.

5 A. Yes, I'm on that, on page 2, which is
6 where I suspect you would like me to go.

7 Q. Yes, sir. And let me read you some of the
8 highlighted paragraphs. I'm going to start a little
9 bit higher. "ICANN's nature and role have been
10 coming under increased scrutiny. The United Nations
11 has suggested that because ICANN administers domain
12 names on behalf of the U.S. Government, the Internet
13 is under American control. Cerf says it sounds far
14 more sinister than it is, as the U.S. Government has
15 historically taken a very hands-off approach with
16 ICANN." Do you see that?

17 A. Yes, I do, and that's a correct statement.

18 Q. Well, in fact, the U.S. Government had
19 convinced the board to postpone the original vote on
20 ICM that was scheduled for August 2005?

21 A. It asked for us to review and do due
22 diligence on this particular proposal. I couldn't,

1 for any good reason, refuse to do that. Due
2 diligence is due diligence.

3 Q. And in the meantime, the independent
4 evaluator reports which had been kept confidential
5 for many of the applicants were released?

6 A. Was there anything confidential in the
7 reports that were released?

8 Q. They were confidential for many of the
9 applicants that received contracts.

10 A. If there were confidential materials, it's
11 my understanding that ICANN undertook not to release
12 any proprietary information. Does counsel argue that
13 the released material contained proprietary
14 information?

15 Q. No, sir. I argue that for many of the
16 applicants that received contracts, the negative
17 evaluations had been kept confidential from the
18 public. They preceded the contract. Whereas with
19 ICM, the negative comments were used as fodder by
20 several members of GAC to slow down these
21 proceedings.

22 A. So if I could suggest to counsel that a

1 reason that the others managed to get to contract
2 apparently is that any issues associated with the
3 criteria must have been resolved to the board's
4 satisfaction in order to reach contract. And in the
5 case of ICM, that wasn't the case.

6 Q. Let's go on to the next several paragraphs
7 in Exhibit 285. It reads, "One of the items on
8 ICANN's Wellington agenda that may be settled is a
9 resolution on a domain name for porn websites. The
10 group is considering a proposal to place porn sites
11 under the .XXX domain name. Cerf is in favor of the
12 move as it would likely help to block minors from
13 such sites. However, he is cognizant of the opposing
14 argument -- free-speech advocates say it's a slippery
15 slope to create the notion that certain websites can
16 be forced into a blockable domain. It's an idea that
17 could be used to sensor other types of sites," et
18 cetera, et cetera. And then it goes on to say,
19 "Still, Cerf says that if the ICANN board puts
20 forward a vote on the XXX domain, he would be for
21 it."

22 A. Yes, I remember saying that and it's true.

1 I was for it at the time.

2 Q. But I thought you said that you had had
3 reservations about the sponsorship issues.

4 A. That's correct. I was still hoping that
5 by the time we got through all the contract
6 negotiations, that this would have a positive
7 outcome. I have to point out that in the end, I
8 voted against this in part because the details in the
9 contract didn't satisfy me.

10 Q. And we're going to ask you about those
11 details.

12 A. That's fine.

13 Q. At what point did you decide to vote
14 against the application?

15 A. Counsel, I honestly don't recall a
16 specific date and time. I would have made a decision
17 at the time that the vote was taken. I may have come
18 to a conclusion before that but the important time is
19 when did I vote and how did I vote.

20 Q. The vote to reject the contract took place
21 in May of 2006. Do you recall that?

22 A. It was one of them, yes.

1 Q. Let's distinguish between the contract and
2 the application. This May 2006 vote was a vote to
3 reject the contract without necessarily rejecting the
4 application?

5 A. That's correct.

6 Q. And you recall that you voted against it
7 at that time?

8 A. I do recall that.

9 Q. And incidentally, of the people who voted
10 against it, the only person to mention sponsorship
11 was Paul Twomey?

12 A. Okay.

13 Q. So did you think that sponsorship had been
14 resolved at that time?

15 A. No. In fact, part of the rationale for my
16 vote was related to the contract provisions. The
17 issue of sponsorship was a lot less a problem than
18 the contract provisions in the end.

19 Q. When did you think that sponsorship -- was
20 it your position that sponsorship was still a
21 problem?

22 A. Sponsorship was always a murky topic with

1 this proposal because it was not clear to me anyway
2 what portion of the adult entertainment community
3 supported the proposal. I couldn't tell whether we
4 had a small, tiny fraction of the community
5 interested in it or 95 percent of the community
6 interested in it, because we never were able to
7 figure out who they were and what fraction of them
8 were in fact in support. So it was always a
9 background issue.

10 But in the end, it was the contract
11 provisions that our attention was focused on as we
12 were looking at specific requests by the staff to
13 either approve or disapprove or not approve the
14 proposed contract.

15 Q. On the level of support issue, what
16 percentage of support was shown for .asia?

17 A. I'm not sure I can give you a percentage
18 but my recollection is that we insisted that the
19 .asia ccTLD participants show their endorsement and,
20 in fact, they did so.

21 Q. Was there a numerical requirement?

22 A. There wasn't a numerical requirement, but

1 we wanted to be assured that there were no
2 significant objections to the creation of .asia since
3 its geographical footprint would overlap many of the
4 top-level domains, country code top-level domains,
5 and could theoretically be seen as in competition
6 with it. The end result, as I recall, is that no one
7 that was in the .asia footprint objected.

8 Q. And numerous major telephone carriers
9 objected to .tel, for example?

10 A. Yes, they did, and I think they objected
11 out of misunderstanding of what the .tel top level
12 domain was intended to do.

13 Q. Telefonica objected to .tel. Do you
14 recall that?

15 A. I actually don't recall which of the
16 telcos objected, but I believe in almost all the
17 cases I can remember, the objections were based on a
18 misunderstanding of the intent of and the mechanisms
19 of .tel.

20 Q. Most of the major European carriers
21 objected to .tel?

22 A. I'm not disputing the objections. What

1 I'm saying is that the basis of the objections, in my
2 view, were based on misunderstanding of what that top
3 level domain was intended to do.

4 Q. And before the June 1st, 2005 vote, in
5 fact, ICM had provided substantial evidence of
6 support from the community including a survey that
7 showed something like more than 55 percent supported
8 the idea. Do you recall that?

9 A. I don't recall the specific statistics but
10 I do recall that there were several communications
11 coming from ICM describing support. What I have to
12 tell you, though, is that it was not ever exactly
13 clear to me who the participants were, what fraction
14 of the adult content community were represented. I
15 don't know how big that community is, to be honest
16 with you, and that's part of the problem.

17 Q. There are 4.2 million .XXX -- I'm sorry,
18 there are 4.2 million adult content sites on the
19 Internet.

20 A. But that doesn't tell us what fraction of
21 those sites are operated by particular entities. So
22 the real issue here is what entities are in support.

1 Q. And there was a survey that ICM provided
2 you with that indicated very substantial support?

3 A. And do you also recall, counsel, that as
4 time went on during the course of this lengthy
5 discussion on the question of .XXX, that we were
6 receiving communications from significant parts of
7 the community objecting to the creation of this top
8 level domain?

9 Q. I recall that Larry Flynt opposed .XXX
10 because he was worried that governments would force
11 all adult content sites into the .XXX top level
12 domain.

13 A. Yes.

14 Q. And a handful of other letters. What did
15 you do to test the proposition that the support was
16 eroding in any sort of significant manner?

17 A. I don't recall that we performed tests.

18 Q. Let's take a look at tab 30 which is
19 Hearing Exhibit 199. It's the minutes of the meeting
20 of February 12th, 2007 and if you look at the very
21 bottom of the page, it starts, "John noted a summary
22 of the most recent public comments on the revised

1 agreement posted from 5 January 2007 to 5 February
2 2007 was provided to the board and was to be posted
3 publicly. John reported that staff received over 600
4 public comments and approximately 55,000 e-mails."
5 He goes on to say that most of that was spam
6 generated by conservatives.

7 A. Yes, I see that.

8 Q. Then it goes on to say Vint Cerf asked
9 whether in the breakdown of comments it was possible
10 to determine what fraction of the adult online
11 content community supported the creation of the
12 domain.

13 A. This is evidence, Counsel, that I was
14 interested in that answer.

15 Q. It is. And it's also -- well, let me read
16 the response, "John noted that the support of the
17 adult online content community was an issue area that
18 had been raised in various comments, but indicated it
19 would be difficult to measure the participation of
20 the larger community in this manner, since only those
21 that wished to participate in the forum would do so."

22 Then Kurt Pritz goes on to say, "In

1 relation to the issue of establishing whether there
2 was support for domain creation amongst a sponsorship
3 community, that ICM had provided extensive evidence
4 for a sponsored community and that documentation of
5 this could be found in the application. Kurt also
6 pointed out that, at the board's request, additional
7 information had been presented to them during ICANN's
8 Mar del Plata meeting."

9 Now, was there anything other than a few
10 letters from Larry Flynt and a spam e-mail campaign
11 that refuted the extensive evidence for a sponsored
12 community that Mr. Pritz referred to?

13 A. So let's suppose for the sake of argument
14 that this places in perspective support for this top
15 level domain. I hope to get to some of the other
16 provisions of the contract so that we can discuss
17 what led the board, at least in my estimation, to
18 reject the contract.

19 Q. Is it fair to say that there was no real
20 evidence of diminishing support for .XXX from the
21 time it submitted its application and the criteria
22 were deemed met in June 2005 through the rejection of

1 the application in 2007?

2 A. I'm sorry, but if you look at the
3 unhighlighted text, what you see here is that 88
4 commentators identified themselves as web masters of
5 adult content of whom 65 were opposed to the
6 development. So as the discussions about .XXX
7 proceeded over time, it's my perception that we began
8 getting resistance from members of the community. In
9 the early stages, there was no indication of
10 disagreement or lack of support, although it wasn't
11 clear exactly what fraction of the community was in
12 fact supportive. But as time went on, we started to
13 see things like that statistic which --

14 Q. 65? Were you aware that there were
15 100,000 pre-registrations for this sTLD?

16 A. Yes, I am, but I have to point out to you
17 two things about those registrations. The first one
18 is that it isn't clear how many different parties
19 made those registrations. I'm sure you're aware that
20 there are some registrants of domain names that hold
21 between 500,000 and a million domain names that --
22 single registrant. So these kind of statistics

1 doesn't tell you how many different parties are
2 involved and it doesn't tell you what fraction of the
3 community is involved.

4 The second observation I would make is
5 that these registrations were made in advance of any
6 existence of the top level domain. Many of them
7 could have been considered what I would call
8 defensive registrations. If you had a registration
9 in .com or .net or some other top level domain, you
10 might very well have wanted to preserve that in the
11 potential new top level domain. So once again, it's
12 not clear whether that's a supportive action or
13 whether it's simply a reaction to the possibility
14 that a working domain name would be unavailable to
15 them in this proposed new one.

16 Q. Were you aware that ICM had provided a
17 thousand, over a thousand letters of support for .XXX
18 or evidence of support from over a thousand web
19 masters?

20 A. What I'm recalling, counsel, is it wasn't
21 clear who the parties were that produced those
22 letters. This is an unclear part for me. I do

1 remember that the ICM provided letters of support. I
2 don't remember who the parties were who signed the
3 letters.

4 Q. Were any other applicants required to
5 prove who their supporters were and their bona fides?

6 A. Yes. In particular, for example, .travel
7 had to demonstrate representation, .co-op had to
8 establish representation, .museum. All of these
9 top-level domains were asked to show evidence of
10 community support.

11 Q. And was there anything to contradict the
12 information that ICM had provided that 57 percent of
13 the community in fact supported the application?

14 A. At the time, there wasn't any evidence to
15 show that, but my sense is that as time went on, we
16 began to see disagreement or at least lack of support
17 from some members who had been supportive in the
18 past.

19 Q. And there were three or four letters plus
20 the 65 comments referred to by Ms. Rodin?

21 A. Among others, yes.

22 Q. What are the others?

1 A. I beg your pardon?

2 Q. What others? I mean, was there any
3 attempt to -- I mean, your sense is there was
4 opposition. Was there any attempt to quantify it?

5 A. Nothing beyond what you see in the record.

6 Q. Now, ultimately, ICANN voted to reject the
7 application in March of 2007.

8 A. That's correct.

9 Q. And let's take a look at the five reasons
10 that were given.

11 A. And you are at tab 31?

12 Q. Yes, sir, which is Exhibit 121.

13 A. I'm sorry, say again?

14 Q. Exhibit 121.

15 A. Okay. I'm there.

16 Q. And we've reviewed the five reasons. And
17 if I recall your testimony correctly, you acknowledge
18 that the four bullet points were not explicitly in
19 the RFP, but they were somehow implicit in the RFP?

20 A. They were not in the RFP, but I believe
21 they were relevant to the decision that the board
22 took.

1 Q. Now, can you identify for me what
2 contractual provisions ICANN requested to be added
3 that ICM did not add?

4 A. No, I can't, Counsel, not chapter and
5 verse, but I can say that the concern was not so much
6 that the provisions weren't there. It was a question
7 of whether they could be executed successfully.

8 Q. Could we hand Dr. Cerf Exhibit 286? And
9 this is the final draft registry agreement and I
10 would ask you to turn to page 84.

11 A. Page 84?

12 Q. Yes, please.

13 A. Okay.

14 Q. And you'll recall that the main concerns
15 that had been expressed at Wellington were filtering,
16 identification and child pornography. Do you recall
17 that?

18 A. That's one of the concerns, yes.

19 Q. And here the registry operator -- you're
20 looking at page 84? The registry operator will, one,
21 promote the principles set forth in the United
22 Nations declaration of human rights related to free

1 expression and to prohibit child pornography as
2 defined in the United Nations convention on rights of
3 the child; two, publish a policy prohibiting child
4 pornography including practices that are designed to
5 appeal to pedophiles or suggest the presence of child
6 pornography on the site; three, require registrants
7 to accurately and clearly label their sites and any
8 site to which a user entering the registrant's site
9 into a browser is automatically redirected; four,
10 implement and enforce IFFOR best practices policies.

11 What about these provisions were not
12 capable of being implemented?

13 A. So part of the problem is that these
14 provisions only apply to parties who are willing to
15 join the .XXX top level domain. The failure to abide
16 by those practices has only one penalty, the party is
17 no longer a part of the .XXX domain. So that's
18 problem number one is what --

19 Q. Let's pause on that for a second. So
20 what? I mean, they're on .com now. Why is it not an
21 adequate punitive measure to expel them from the
22 sponsored community?

1 A. No, no, no, that's not the issue. The
2 issue is that if they're already there and if joining
3 .XXX doesn't cause them to be removed from the rest
4 of the top-level domains and if the penalty for
5 failure to follow the .XXX procedures is merely to
6 remove their registration in .XXX and expel them from
7 the group, it isn't clear that we will have done much
8 at all to deal with the problem of pornography on the
9 Net.

10 Q. Is that what you state the role of the
11 sTLD was, to solve the problem of pornography on the
12 Net?

13 A. It was clearly intended to try to
14 constrain the practices and behaviors of the -- some
15 portion of the adult content community. We all
16 understood that. The question is what fraction of
17 that community would in fact be impacted. So please
18 go ahead.

19 Q. And in order to be on .XXX, the site had
20 to be tagged so that any server could identify and
21 filter it, is that correct?

22 A. I'm sorry, I didn't understand the

1 question.

2 Q. In order to be on .XXX, the site had to be
3 tagged so that any server could identify and filter
4 it. Do you recall that?

5 A. I'm actually not seeing that in here. Is
6 it -- I'm sorry, clearly labeled. That's what you're
7 getting at. That's part number 3?

8 Q. Yes.

9 A. Yes.

10 Q. And among other things, the sites had to
11 agree to be monitored. Do you recall that?

12 A. Yes. I'm not disputing any of the
13 elements in the contract. The concern that was
14 raised for me and I think for others is whether or
15 not these things could be properly enforced and,
16 second, if they were not, what obligations would then
17 redound to ICANN to deal with the problems arising.

18 Q. Did you have any reason to believe that
19 they could not be enforced?

20 A. Say again. That they could not be
21 enforced?

22 Q. Right.

1 A. If the only enforcement mechanism was
2 removal from the top level domain, the question is
3 did that solve the problem and the answer is not if
4 they're still in the rest of the Internet.

5 Q. Did you have any doubt that if .XXX had
6 been launched, it would have been an enormous
7 commercial success?

8 A. Actually, I don't know because, to be
9 frank with you, many top-level domains that have been
10 introduced have not been as successful as their
11 promoters have expected.

12 Q. Do you have any reason to believe it would
13 not have been?

14 A. I don't have any reason to believe it
15 would be.

16 Q. The tens of thousands of
17 pre-registrations?

18 A. Those pre-registrations occurred prior to
19 any specification of what the terms and conditions
20 would be for any of the registrants.

21 Q. And is there any evidence that numerous
22 responsible providers of adult content would have

1 agreed to these terms -- would not have agreed to
2 those terms and remained on the top level domain?

3 A. There was evidence that persuasive voices
4 in that community believed that registration in or
5 creation of the top level domain was not in their
6 interest.

7 Q. By how many?

8 A. I beg your pardon?

9 Q. What, a handful of people said it was not
10 in their interest because they didn't want to be
11 possibly regulated in certain countries and this
12 would make it easier for them to be regulated?

13 A. That observation was made not only by some
14 members of the adult entertainment community, but
15 also by others who are particularly advocates of
16 freedom of speech. Their concern was that a
17 precedent would be set if censorship could be applied
18 to .XXX, that it might be applied to other political
19 matters as well and they were very concerned about
20 that precedent.

21 Q. If we go back to hearing Exhibit 285.

22 A. Can you say which tab that is?

1 Q. Tab 26.

2 A. Yes.

3 Q. And that's the interview you gave to the
4 New Zealand Herald.

5 A. I'm sorry, say again. Yes.

6 Q. And if you look at the last sentence on
7 page 2.

8 A. Okay. I've got page 1 up here. Yes.

9 Q. You're quoted as saying, "My view is that
10 I don't believe that it harms anything and, if
11 anything, it might help."

12 A. And you'll notice that this is prior to
13 our getting to the point where we're looking at the
14 last and final contract that you just handed me.

15 Q. And what convinced you that it was not
16 going to help?

17 A. I believed that this contract that you
18 just handed me would not be adequately enforceable
19 and that ICANN itself would wind up having to deal
20 with issues arising from the .XXX top level domain.

21 Q. Why do you think it would be not -- the
22 reason you think it would not be adequately

1 enforceable is because the only remedy would be
2 expulsion from the top level domain?

3 A. There were two other things. First of
4 all, the expulsion was the only remedy, near as I
5 could tell. The second one is that this is a global
6 top level domain which means that it would exist in
7 jurisdictions all over the world and have varying
8 views on the subject of adult content, which makes
9 things more complicated.

10 And third, there were organizations like
11 the IFFOR which had not yet been populated and whose
12 terms and conditions had not yet been specified. So
13 the contract proposed the creation of such a thing
14 and I don't for a moment dispute the utility of
15 creating these things. It's just that we didn't know
16 who would be involved and what their proscriptions
17 would be. So in the end, we still had a contract
18 with a lot of open questions to it. And four years
19 roughly into the process.

20 Q. Well, in fact, numerous other sTLDs were
21 approved without the same requirements being imposed
22 upon them, right? Their sponsors had not been yet

1 populated?

2 A. Yes. But you'll notice that they didn't
3 have provisions like the ones that you just read for
4 me in page, whatever it was, 85. The commitments
5 that were made by ICM were distinct from the
6 commitments made by other top-level domains. This is
7 why I said earlier, Counsel, that when you get into
8 the contracts, you're into the details and the
9 details differed from one top level domain to
10 another.

11 Q. And you mentioned the problem of different
12 government regulations. Why isn't that a problem
13 with all the adult content that's already on .com as
14 well as other TLDs?

15 A. It is except for the fact that it gets
16 very complex in terms of the content area because you
17 have different views in different jurisdictions about
18 what constitutes adult content and what's permitted.

19 Q. Now, in fact, ICANN requested ICM to sign
20 a contract with the Internet Content Rating
21 Association which is now known as the Family Online
22 Safety Institute to carry out the monitoring of

1 compliance. Do you recall that?

2 A. Yes, I do recall that.

3 Q. And ICM duly went out and got that
4 contract?

5 A. Yes.

6 Q. And do you know who the members of the
7 Internet Content Rating Association are?

8 A. I don't know the members. I know the
9 original founder of it because he continues to do his
10 work under the FOSI activity.

11 Q. And the members in fact include AOL, AT&T,
12 British Telecom, Comcast, Google, Microsoft.

13 A. That's irrelevant, by the way, to
14 this discussion.

15 Q. And why did you think that organization
16 would not be able to enforce the provisions? After
17 all, you asked ICM to go out and get the contract.
18 They did. But you still maintained the position that
19 the provisions would not have been enforceable.

20 A. The question is, what it is you're trying
21 to enforce and what you'll recall, the original
22 overarching rubric of this proposal was responsible

1 behavior by the adult content community.

2 Q. And again, the enforcement mechanism of
3 expelling the entity from the sTLD is not adequate in
4 your view?

5 A. It does not produce responsible behavior.
6 So if you have an irresponsible member, the only
7 sanction appears to be expulsion from the top level
8 domain.

9 Q. But if you have all these other members
10 that want to be responsible, you've created an sTLD
11 where people can go and know that there won't be
12 credit card fraud, that there won't be all of the
13 various ugly business practices that some adult
14 content providers engage in?

15 A. You've jumped to an interesting
16 conclusion, Counsel, which I wasn't able to get to.
17 You said specifically that there won't be any of
18 these abuses. And I cite the contract as saying the
19 terms and conditions for membership say that, but in
20 order to assure it, somebody has to create and
21 monitor all of the activities of the members. The
22 question is whether or not the proposed organization

1 was capable of doing that.

2 Q. And what did you do to conclude that it
3 would not?

4 A. It led me to conclude -- I concluded that
5 it was not possible to do that.

6 Q. Why?

7 A. Because of the scale and scope of this
8 adult entertainment community which you cited, and on
9 the presumption that this is a very successful
10 outcome, which you also propose, then the scale of
11 the operation is significant. And monitoring all of
12 the potentially irresponsible behaviors of the
13 members seemed to be extremely difficult, to say the
14 least. And one of the biggest concerns that I had
15 as a board member was what happens if this particular
16 operator is unable to undertake successfully the
17 obligations that are proposed, then those obligations
18 will then fall to ICANN to cope with because ICANN's
19 responsible ultimately for all the top-level domains.

20 Q. If it doesn't comply with the contract,
21 the remedy is termination of the contract, right?

22 A. Yes, that's one remedy. But why would you

1 decide to get into a contract if you had the belief
2 that ultimately you would have to terminate it? Or
3 you worried that that might be the outcome?

4 Q. Well, the reason you put provisions in the
5 contract is because you hoped that they would be
6 complied with.

7 A. That reminds me. Could I remind the panel
8 that one of the issues associated with top-level
9 domains especially is that once they've been
10 established and people become reliant on references
11 to things in that top level domain, if the registry
12 fails, we have to reconstitute support for those
13 top-level domains so they can continue to be
14 resolved.

15 You wouldn't want, for example, all of
16 your investment in a trademark or in another
17 registration in .com or in .XXX to be invalidated
18 because the .com registry operator went out of
19 business. ICANN has undertaken to assure that if
20 there is a failure by a registry or a failure by a
21 registrar, that ICANN will do its best to make sure
22 that either the registry or the registrar will be

1 able to operate it or someone will be able to operate
2 it. So we undertook obligations even in the case
3 that this contract was terminated, or we would be
4 undertaking these obligations if the contract was
5 terminated.

6 Q. How is that any different from .jobs, if
7 registrants in .jobs don't follow it?

8 A. It isn't. We have that obligation for
9 .jobs. We have the same obligations for the other
10 top-level domains.

11 Q. And why did you think this would be --

12 A. Well, this one was a little more
13 complicated, isn't it, because if you look at the
14 list of all the things the ICM Registry would need to
15 do in order to undertake to assure responsible
16 behavior by its members, potentially ICANN would have
17 to do that.

18 Q. How many things were there? I mean, these
19 are things that many responsible adult providers
20 already do.

21 A. If you look at the list, which you'll find
22 on page 84 of Exhibit 286 and 287, there are 12 items

1 and I would like to draw your attention to the fact
2 that it's not a question of just validating upon
3 matriculating as a member. It's continuous
4 evaluation or validation or monitoring to assure that
5 the members continue to show responsible behavior.
6 So this is a fairly significant undertaking.

7 Q. And the fact that it's significant means
8 that it can't be done --

9 A. No.

10 Q. Let me finish my question. It may not
11 have been clear that I had not finished my question.

12 A. That's all right.

13 Q. And I apologize. The fact that it was a
14 significant undertaking was a basis to conclude that
15 public policies prohibited it from moving forward?

16 A. No. It was the risk factor that ICANN
17 might have to undertake all of the obligations that
18 ICM proposed in order -- if this top level domain
19 were created.

20 Q. This was a voluntary community in the
21 proposed sTLD, correct?

22 A. Yes. And the point is?

1 Q. The point is, again, if they were not
2 satisfying the requirements, the sponsoring community
3 or the sTLDs simply could have expelled them. Why
4 would that have been so hard and why would that
5 somehow vitiate the usefulness of the space?

6 A. So we need to go back, Counsel, I think to
7 an early statement that I made describing what the
8 significance of a sponsored TLD is or a sponsored
9 community. One of the things which differentiates a
10 sponsored TLD from a generic one is a presumption
11 that a very significant fraction of the community
12 that is defined by the sponsored community, and in
13 the case of .museum, it's museums, for example. In
14 the case of .travel, it's the travel agency.

15 The presumption is that the sponsored TLD
16 will have the ability to manage the behavior of the
17 registrants because they have been imbued by the
18 community with their imprimatur, which is why the
19 sponsorship question was so important. And if the
20 only remedy to irresponsible behavior with regard to
21 .XXX is expulsion from that community, then it isn't
22 clear that this sponsorship notion is satisfied.

1 If only four people sign up for this, it
2 doesn't look like a sponsored TLD because it doesn't
3 look like the bulk of the community is party to it.
4 And so if the only remedy for responsible behavior,
5 which is a primary motivation of this sponsored TLD,
6 if the only motivation is responsible behavior and
7 the only way to deal with irresponsible behavior is
8 expulsion, then we don't have a cohesive sponsored
9 community that's supportive of this activity. And,
10 therefore, ICANN is not capable of handing the
11 authority over to this organization in the same way
12 that it could do with the other sponsored TLDs that
13 satisfy its sponsorship criteria.

14 Q. So again, are we back to the issue of
15 sponsorship criteria? I mean, is that the --

16 A. We're back to the question of how this top
17 level domain would be managed and what would happen
18 in the event that the party operating it could not
19 deliver on the commitments that it made.

20 Q. And how would ICANN have had to take over
21 responsibility? What do you mean by that?

22 A. I'm sorry, ask again.

1 Q. I'm sorry, sir. You said that if ICM
2 failed to make sure that the commitments were
3 honored, ICANN would have to take over
4 responsibility. What does that mean?

5 A. It means that we would have to -- we were
6 committed to operating the top level domain. Our
7 purpose is not to allow top-level domains to simply
8 evaporate from the domain name space. And so you can
9 see evidence of actions taken by ICANN to assure that
10 in the case of registry or registrar failure, that we
11 have undertaken to assure that those domains
12 continued to be registered and continued to resolve.

13 Q. Why wouldn't you simply cancel the
14 contract?

15 A. If we cancel the contract, it still leaves
16 open the problem of the functioning of that top level
17 domain.

18 Q. Is it your view that there is no company
19 anywhere in the world that's capable of running this
20 sTLD?

21 A. No, no, no. I didn't say that, Counsel.
22 All I said was that ICANN would be obligated to find

1 someone to run the top level domain.

2 Q. But you keep on saying that the fear that
3 you have about enforcement would be an inability --
4 that the only enforcement mechanism would be removing
5 the particular offender from the sTLD.

6 A. As near as I can tell, that's the only
7 thing that ICM could do, it's the only action that it
8 could take. Counsel, I have a question, if I'm
9 allowed to ask you.

10 Q. Ordinarily, I ask the questions and you
11 answer them.

12 A. Yes, I understand that.

13 Q. But I will --

14 A. If the panel will permit, I'm still having
15 some problem relating this line of questioning with
16 the fundamental question facing the panel, which is
17 whether or not any of the actions taken by the board
18 violated our bylaws and I'm having some trouble
19 making that connection.

20 Q. ICANN is obligated to apply well
21 documented policies neutrally and objectively. ICANN
22 varied wildly from the criteria set forth in the RFP.

1 It varied wildly from the procedures, the two-step
2 procedures. It treated some applicants in one
3 fashion applying a certain set of criteria. It
4 treated other applicants in a completely different
5 fashion.

6 In the end, the only reason that .XXX
7 wasn't applied was because of public morality issues.
8 The only reason that it wasn't granted was because of
9 pressure from the U.S. Government and a few
10 governments in GAC. Ultimately this was not a
11 decision based on criteria. Ultimately this was not
12 a decision based on any sort of reasoned principles.
13 Ultimately this was a decision based on content.

14 A. Okay. So you've now expressed your
15 opinion on this matter which I assume you'll do when
16 you wrap up.

17 Q. But you asked me the question.

18 A. Absolutely. No, I appreciate your taking
19 the time to walk through your basic arguments. I
20 guess I would point out that variations in this
21 particular case arose from two different things. The
22 first one is that the sponsorship criterion was not

1 met at the outset and the board agreed to pursue the
2 matter anyway. Maybe that was a mistake.

3 Second, when we get down into the details
4 of contract negotiation, it is not surprising that
5 every single top level domain has varying
6 requirements and they show up as part of the contract
7 negotiations. So I don't think you can argue
8 successfully -- well, that's up to the panel. I
9 would not believe that you could argue successfully
10 because there were variations in the treatment of
11 contracts, that there have -- there was some
12 unfairness or some singling out of this particular
13 top level domain. Every one of the contracts had its
14 own variations in terms and conditions. And that's
15 been true generally ever since we started introducing
16 any new top-level domains.

17 Q. Let's take those two at a time. Your
18 contention is that sponsorship had not been met. In
19 fact, the record is abundantly clear, in my view,
20 that the board had determined that sponsorship and
21 the other RFP criteria had been met. Number two, the
22 only reason that I've heard you say that ICANN was

1 concerned that the sTLD wouldn't work is because the
2 only enforcement mechanism was removal from the sTLD.
3 And I don't understand how that differs from any
4 other sTLD that has been added.

5 A. If you look at what the purpose was for
6 having a sponsored TLD, it was to affect and
7 influence and somehow engage a significant fraction
8 of the sponsored community, in this case, the adult
9 content providers. And if the only mechanism for
10 achieving responsible behavior was to simply expel
11 people from the organization, then it isn't clear
12 how, over time, you would maintain any significant
13 impact on the entire -- what should have been the
14 entire sponsored community.

15 Q. The purpose was to have a voluntary group,
16 a group of responsible adult content providers who
17 wanted to be located in the same space so that people
18 would know that they adhered to best business
19 practices. How is that different from numerous other
20 sTLDs?

21 A. And so the bottom line on this one, in my
22 view, is that there isn't much difference between

1 this proposal and having a generic top level domain.
2 The sponsored top-level domains were supposed to
3 affect and influence and be supported by a
4 significant fraction, if not all, of the participants
5 in a given community. And this one was open to some
6 serious uncertainty with regard to the total
7 community that was willing and able and would
8 volunteer to adhere to these principles. It was also
9 an open question, to my mind, to what extent ICM
10 would be able to assure the responsible behavior of
11 those who voluntarily signed up.

12 Q. Let's take a look at tab 34.

13 A. Okay, I'm at 34.

14 Q. Before we turn to that --

15 A. Are we at .cat?

16 Q. Yes.

17 A. Okay.

18 Q. And before I get to that, Dr. Cerf, right
19 now, there are numerous adult content providers on
20 .com.

21 A. Yes, I agree with that.

22 Q. Some of them allow their sites to be

1 tagged so that any server can identify and filter
2 them. Some have agreed to have their sites
3 monitored. Some have agreed that they will not
4 use -- they will not contain any child porn, virtual
5 or real. Some have agreed that their sites would not
6 be crawled. Do you know what that means?

7 A. Yes, I do. Does the panel need to know
8 what that means?

9 JUDGE TEVRIZIAN: Yes, I need to know what
10 that means.

11 THE WITNESS: The term crawl has to do
12 with indexing of the Internet. It's what Google
13 does. We have programs that go and look at every
14 single web page on the Internet and look at every
15 term, every word that's on those pages, regardless of
16 language, creates a gigantic dictionary and then
17 basically says if you search for something that has
18 these words in it, we try to find every page in the
19 Internet that has those words. And then we try to
20 order them in order to help people find information
21 that they're looking for.

22 There is a convention among the web page

1 makers that if the web page text has at the very
2 beginning a reference to something called robot.text,
3 that little mention tells us at Google, depending on
4 what's in there, that we should or should not look at
5 their web pages. So some parties who put web pages
6 up on the Net do not want all of their pages in their
7 web systems to be looked at by Google. And in that
8 case, we don't look. We follow that practice of not
9 looking at pages that have the robot.text flag in it.

10 So some of the XXX -- or, I'm sorry, some
11 of the adult content makers presumably have chosen to
12 not have their websites crawled by giving that signal
13 to Google and presumably to any other netservers who
14 follow the same practice.

15 BY MR. DE GRAMONT:

16 Q. And there are some adult content providers
17 on .com that -- and I swear I did not know this
18 before this case -- that if you visit them, you can't
19 get out of the site, right?

20 A. Counsel, you're saying that you've never
21 been trapped in that position and I guess you're
22 fortunate. Yes, it's true that there are a variety

1 of ways of causing people to either be trapped in a
2 site or inflicted with large numbers of pop-up
3 displays and other kinds of things. That's true.

4 MR. PAULSSON: There is a way out?

5 THE WITNESS: Is there a way out? Well,
6 if you turn your machine off and start up again, then
7 presumably don't go there again.

8 BY MR. DE GRAMONT:

9 Q. And the purpose of this sTLD was for all
10 of the providers of the content to adhere to the
11 better practices, who don't engage in these sorts of
12 ugly practices, to voluntarily be on their own sTLD
13 where people would know that those ugly practices
14 were not going to be practiced?

15 A. Counsel, not for a moment would I dispute
16 the motivation and good intentions of the ICM in
17 proposing this top level domain.

18 Q. Let's take a look at the community
19 definitions in the finalized sTLD registry
20 agreements. But before I do that, you said that
21 there was not evidence in the record that there would
22 be many content providers who would want to go to

1 that site and would adhere to that site and we'll
2 leave that to the panel to decide.

3 But let's look at some of the other
4 community definitions in finalized sTLD registry
5 agreements. And we'll go through them, but it seems
6 to me that all of these sTLDs consist of groups that
7 have decided that they want to adhere to certain
8 practices and policies, that agreed to do so. And
9 other than the moral content and the offensive
10 content issue of .XXX, I don't see any difference
11 between the basic concepts. Let's go through them.

12 "The .cat TLD is intended to serve the
13 needs of the Catalan linguistic and cultural
14 community on the Internet. Catalan linguistic and
15 culture community refers to those individuals,
16 groups, businesses, organizations, entities or
17 initiatives, however constituted, eligible to
18 register in the .cat TLD according to this agreement
19 and the .cat charter." It's basically a group of
20 individuals who want to dedicate a site to the
21 Catalan community. Totally voluntary, totally
22 self-selecting?

1 A. You make the point, Counsel. Could I also
2 mention that there is an institution which is already
3 pre-existing which is responsible for dealing with
4 the Catalan language and its existence and its
5 authority helped it to argue successfully for a .cat
6 top level domain, because it was a recognized
7 authority with regard to the language. So in that
8 particular case, there is a pre-existing entity which
9 has already been imbued by the community with this
10 responsibility and authority for the language.

11 Q. But there were many other sTLDs that did
12 not have a pre-existing sponsor, correct?

13 A. Yes, that's correct. I just pointed out
14 that one in particular since you mention it.

15 Q. Let's look at .jobs. "The .jobs TLD is
16 intended to serve the needs of the international
17 human resource management community. Human resource
18 management is the organizational function that
19 focuses on the management and direction of people.
20 The community consists of those persons who deal with
21 the human element in an organization -- people as
22 individuals and groups, their recruitment, selection,

1 assignment, motivation, compensation, utilization,
2 services, training, development, promotion,
3 termination and retirement."

4 Again, that's just a group of
5 self-selecting, self-defined people who want to have
6 their own space on the Internet and act according to
7 the rules and procedures of what I'll call the club?

8 A. Okay.

9 Q. Do you disagree?

10 A. No.

11 Q. .tel. "The .tel sTLD is intended to serve
12 the needs of individuals, persons, groups,
13 businesses, organizations or associations that wish
14 to store their contact information using the DNS."

15 A. Yes. No disagreement.

16 Q. Now, you said that the community should
17 have most or all of the target community. Does .tel
18 come anywhere close? Do you know what percentage of
19 individuals, persons, groups, businesses,
20 organizations that could store their contact
21 information do so?

22 A. In this particular case, no one would have

1 been excluded who wanted to put their information
2 into .tel.

3 Q. That's not the question. What percentage
4 of the target community would have been in .tel or is
5 in .tel?

6 A. I don't know the answer to that.

7 Q. And I assume that other sTLDs could
8 exclude -- I mean, for instance, if I wanted to put
9 my poetry, which is in English, on .cat, do you think
10 I could do that?

11 A. Actually, you have to go and look at what
12 their terms and conditions are. Remember that we
13 remanded to them the authority to decide that
14 question.

15 Q. And they could exclude sites based on
16 content?

17 A. They could exclude your registration in
18 .cat based on their criteria for registration because
19 they are -- the sponsor is given the authority and
20 responsibility for making the decision who can
21 register and who does not register in that top level
22 domain.

1 Q. Just as ICM wanted to, correct?

2 A. Yes.

3 Q. .travel. "The .travel TLD is intended to
4 serve the needs of the international travel industry,
5 which consists of those people, businesses,
6 organizations and entities, however constituted,
7 eligible to register in the .travel TLD pursuant to
8 the agreement and the .travel charter." Again, it's
9 a voluntary participation in a club, is that right?

10 A. It is, but prior to our approval of
11 .travel, you'll recall that I mentioned we asked for
12 evidence and received evidence that a significant
13 fraction of the travel community and, in particular,
14 those who originally opposed, and represented a large
15 portion of that community, agreed to support it.

16 Q. And again, there is abundant evidence that
17 ICM produced identical evidence. Again, the tribunal
18 will address that issue. Now, one of the issues that
19 you raised was whether ICANN would be able to
20 specifically identify the particular community that
21 was being targeted. Do you recall that?

22 A. Yes. The organizations that were in the

1 community, not their websites but the actual
2 entities.

3 Q. Take a look at the next page of this slide
4 that's the .mobi registry agreement, definition of
5 community. And I'm not going to try everyone's
6 patience by reading the entire thing. I will just
7 simply say, "We anticipate the following to be the
8 major beneficiaries and stakeholders in the
9 community. Mobile consumers, business and other
10 providers, representatives of consumers and providers
11 and other interested parties, including, without
12 limitation," I think I will read some of this,
13 "Consumer advocacy organizations, mobile technology,
14 mobile media, mobile services and mobile
15 entertainment stakeholder consortia, standards and
16 other technical bodies, trades and other
17 not-for-profit associations and entrepreneurs,
18 academia, university consortia, researchers, private
19 sector nongovernmental organizations."

20 A. Yes.

21 Q. And are you saying that the definition of
22 this sponsored community was less precise, less

1 self-selecting than that of ICM?

2 A. I'm sorry, you're saying .mobi was less
3 precise? I don't understand the question so I'll ask
4 you to --

5 Q. How was the criteria in the RFP applied to
6 .mobi in such a way that it passed, but to .XXX in
7 such a way that it failed?

8 A. Actually, .mobi engendered a fair amount
9 of debate and discussion and in the end, it was clear
10 that the primary goal of the .mobi top level domain
11 was to allow parties providing services to mobile
12 users to register in the top level domain so that
13 they could be found by consumers of mobile services.

14 MR. DE GRAMONT: It's getting late in the
15 day. Could you read that answer back?

16 THE REPORTER: "Answer: Actually, .mobi
17 engendered a fair amount of debate and discussion and
18 in the end, it was clear that the primary goal of the
19 .mobi top level domain was to allow parties providing
20 services to mobile users to register in the top level
21 domain so that they could be found by consumers of
22 mobile services."

1 BY MR. DE GRAMONT:

2 Q. Exactly. How does .XXX differ in any
3 respect from what you just said?

4 A. It doesn't differ with regard to providers
5 of adult entertainment. I'm not disputing that at
6 all. The issues having to do with the contract, on
7 the other hand -- we're back to criteria. I'm
8 concerned about the contract because that was the
9 ultimate determinant. And the issues associated with
10 the contract were what you termed the decision of the
11 board, in my opinion.

12 Q. And again, the issue with the contract was
13 that the only enforcement mechanism was expulsion
14 from this voluntary club?

15 A. That wasn't the only issue, Counsel, and
16 there were a list of five of them. The concerns were
17 whether or not all of the obligations that were
18 proposed by and offered by ICM were in fact
19 implementable.

20 Q. Because if they weren't adhered to, the
21 only remedy would be expulsion?

22 A. Yes.

1 Q. At the end of the day, the question is
2 whether the reasons the board cited to reject the
3 contract proposed by ICM were based in the RFP
4 criteria and in ICANN's articles and bylaws. Isn't
5 that the question for the panel?

6 A. Counsel, I'm not sure that that's the
7 question. The ultimate question here is whether or
8 not the board would approve the execution of the
9 contract. And that's the ultimate determining factor
10 here. The board is responsible, under the bylaws, to
11 make that determination. And it chose not to engage.
12 It rejected the contract as it was then proposed.

13 Q. And the question for the panel is whether
14 the reasons and the procedures for that vote were
15 fair, equitable, nonarbitrary, nondiscriminatory,
16 well-documented, neutral and fair?

17 A. That's correct. And I hope the panel will
18 note the amount of time and energy that the board and
19 the staff and ICM spent attempting to conclude this
20 particular contract. If you consider it to be
21 inequitable, I would say we went way out of our way
22 to try to accommodate this proposal. And I would

1 remind you again that if we had simply accepted the
2 recommendations of the original evaluation committee,
3 we would have rejected the proposal out of hand. And
4 we didn't because enough of us thought that we should
5 pursue this in fairness to ICM, and that's what we
6 did.

7 Q. And you would have rejected eight other or
8 seven other applicants?

9 A. I'm sorry, say that again.

10 Q. If you relied on the recommendations of
11 the independent evaluation --

12 A. Solely. If we had solely relied on it, we
13 could have rejected on those grounds. We did not.
14 And I would cite that as evidence that we attempted
15 to work with ICM in order to find a way to reach a
16 successful conclusion. The judge has a question.

17 JUDGE TEVRIZIAN: It's very difficult when
18 both parties are talking at the same time.

19 THE WITNESS: I apologize.

20 JUDGE TEVRIZIAN: It makes a very bad
21 record and the record in this case is, I think, of
22 paramount importance.

1 MR. DE GRAMONT: Thank you, Judge, and I
2 apologize if I've contributed to that as well.

3 BY MR. DE GRAMONT:

4 Q. If ICANN hadn't delayed the vote on the
5 original contract which Mr. Jeffrey said was going to
6 be straightforward and had voted in mid-August of
7 2005, instead of allowing the intervention of the
8 U.S. Government and a handful, at best, of GAC
9 representatives, we wouldn't have been spending all
10 this time and energy because in all likelihood, the
11 contract, which again Mr. Jeffrey characterized as
12 straightforward, would have been approved, isn't that
13 true, sir?

14 MR. LEVEE: Judge Schwebel, I've been
15 trying not to object, but where we are, it sounds as
16 if we're in closing argument and it seems as if we
17 should get the facts from the witness and not the
18 hypotheticals. But I'll sit down.

19 MR. DE GRAMONT: We're very close to my
20 last question.

21 THE WITNESS: Counsel, I cannot speculate
22 on what would have happened if something hadn't

1 happened. What happened happened, and I don't know
2 what the outcome would have been if we voted earlier.
3 And I don't think that I care to speculate on that.

4 MR. DE GRAMONT: Judge Schwebel, may I
5 have just a few minutes to review my notes and confer
6 with Mr. Ali before I conclude?

7 (Discussion off the record.)

8 MR. DE GRAMONT: Dr. Cerf, I have no
9 further questions. Thank you very much for your
10 time. It's been an honor to be able to speak with
11 you today.

12 THE WITNESS: Thank you very much,
13 Counsel.

14 MR. LEVEE: If the panel will indulge me,
15 I have two minutes of questions.

16 REDIRECT EXAMINATION

17 BY MR. LEVEE:

18 Q. I'm going to hand you Exhibit S, S as in
19 Sam.

20 A. This is in incredibly tiny type.

21 Q. It is, Dr. Cerf, and so Kate is going to
22 blow it up on your monitor in front of you.

1 A. Thank you.

2 Q. Do you recognize the document? There was
3 a lot of discussion as to who was in favor and who
4 was opposed. There was one document that I wanted
5 you to see. Do you recall receiving --

6 A. I do recognize that, although I would not
7 have -- in all honesty, I would not have recalled and
8 pulled this out of my head, but I do recognize this
9 now.

10 Q. And do you recall that the Free Speech
11 Coalition at least characterized itself as the trade
12 association of the adult entertainment industry with
13 over 3,000 members?

14 A. Yes.

15 Q. And do you recall throughout 2005, 2006
16 and 2007 that they opposed the top level domain .XXX?

17 A. Yes, I do, Counsel.

18 MR. LEVEE: I have no further questions.
19 Thank you.

20 MR. DE GRAMONT: Nothing further, Judge
21 Schwebel. Thank you.

22 JUDGE SCHWEBEL: Well, Counsel, thank you

1 very much and Dr. Cerf, thank you very much. We're
2 very grateful to you for your testimony which has
3 been most instructive.

4 THE WITNESS: If I may say, Your Honor, I
5 appreciate all three of you undertaking this
6 particular review, first because it's the first time
7 we have attempted it. I hope you will provide
8 ICANN -- since I'm no longer officially connected, I
9 hope you will provide ICANN with any observations you
10 might have about how we can make this process better
11 than it might be today in addition to rendering your
12 opinions to ICANN. Thank you.

13 JUDGE TEVRIZIAN: How are you going to
14 work the remaining time?

15 MR. LEVEE: Here is what I've done. And I
16 apologize, Dr. Cerf. We'll take one more minute but
17 you're welcome to -- I know you have a function. I
18 have calculated, and ICM's counsel can tell me later
19 today, that ICM has two hours and 15 minutes left of
20 the 11 hours that were allocated to ICM.

21 Assuming I am correct, and I think I am,
22 we would have no difficulty finishing tomorrow

1 because our direct examinations are short. We have
2 Dr. Pisanty and because Dr. Cerf's testimony lasted
3 so long, I've asked Mr. Enson, who is going to
4 provide the direct of Dr. Pisanty, to cut it back.

5 Then we have Dr. Twomey and he's an
6 important witness and I expect that I will take about
7 an hour. And then we have Professor Caron. There is
8 no chance that I would use -- that is, the ICANN
9 side -- even as much as three hours tomorrow among
10 our three witnesses. So if the panel adheres to the
11 time allocations that the parties agreed to, we don't
12 need to start early or run late tomorrow. And if
13 Mr. Ali is going to ask for more time, I would resist
14 it but that's something we should probably decide
15 now.

16 MR. ALI: Well, let me just take a couple
17 of minutes to confer with my team.

18 MR. LEVEE: Please. And I do apologize.
19 Dr. Cerf had to leave. I had told him that his
20 car -- that he could retrieve his car by 6 o'clock
21 because the person who had it said that he was
22 leaving at 6 o'clock and I was wrong and so it's my

1 fault, but that's why he was eager to leave and I
2 apologize for that.

3 (Discussion off the record.)

4 MR. ALI: Negotiations have ended
5 successfully. So in light of the fact that I wasn't
6 able to buy any further time from Mr. LeVee, I'm
7 going to stand in great efforts to do so, we will
8 have to waive cross-examination of Mr. Pisanty whose
9 testimony we believe is irrelevant anyway and reserve
10 on whether or not we need to weigh in, given that we
11 need -- we may end up going beyond our two hours 15
12 minutes.

13 MR. DE GRAMONT: I wonder if we could make
14 that determination afterward. Do we need to advise
15 the panel now whether we're going to weigh in on --

16 JUDGE TEVRIZIAN: That's your call.

17 MR. LEVEE: What I've advised counsel for
18 ICM is that Dr. Pisanty's direct examination will be
19 15 or 20 minutes, because we are now at the point
20 where we are duplicating so much of the activity. I
21 know Dr. Twomey is of interest particularly given the
22 last several days of testimony. And so I'm sure

1 ICM's counsel would like to have a reasonable time to
2 examine Dr. Pisanty. We don't think Professor
3 Caron's testimony is all that long. We finished
4 Professor Goldsmith in about an hour anyway. So I
5 think the time that's allocated tomorrow is
6 sufficient and I suggest we start at 10 o'clock.

7 JUDGE TEVRIZIAN: I have a suggestion.
8 Why don't you call the two short witnesses first and
9 then you'll know how much time you really have to
10 complete the examination when you have both direct
11 and cross of --

12 MR. ENSON: Mr. Twomey has time
13 constraints tomorrow, doesn't he? Doesn't he have to
14 go first?

15 MR. LEVEE: Well, I thought Dr. Pisanty
16 was going to go first, if he can. Dr. Twomey had
17 given us some restrictions and I had actually told
18 him he would go first tomorrow because we were going
19 to try to get Dr. Pisanty on today. I will take that
20 under advisement and see if Professor Caron can come
21 in, see if we can switch it up, if that's okay with
22 you. But I'm just not positive.

1 MR. ALI: I would prefer to stick to the
2 order of Twomey, if you don't mind.

3 JUDGE TEVRIZIAN: No, it's not my call. I
4 just made a suggestion.

5 MR. LEVEE: If you would prefer that,
6 that's easier for me. Then we'll see the panel in
7 the morning?

8 JUDGE SCHWEBEL: Cerf has left the
9 building, has he?

10 MR. ALI: Yes, with Elvis.

11 MR. LEVEE: And we are starting Friday at
12 9:30.

13 JUDGE TEVRIZIAN: Okay.

14 MR. LEVEE: Thank you, Mr. Chairman.

15 (Whereupon, at 6:13 p.m., the Independent
16 Review Process adjourned, to reconvene at 10:00 a.m.
17 on Thursday, September 24, 2009.)

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