

1 BEFORE:

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4 JUDGE STEPHEN SCHWEBEL, IRP Chairman

5 JAN PAULSSON

6 JUDGE DICKRAN TEVRIZIAN

7

8 On behalf of ICM:

9 ARIF ALI, ESQ.

10 ALEXANDRE de GRAMONT, ESQ.

11 MARGUERITE WALTER, ESQ.

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On behalf of ICANN:

JEFFREY LeVEE, ESQ.

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KATE P. WALLACE, ESQ.

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ALSO PRESENT:

JOHN JEFFREY, ICANN

STUART LAWLEY

STEVE DUNCAN, Paralegal

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

2 (9:30 a.m.)

3 JUDGE SCHWEBEL: Good morning.

4 MR. ALI: Good morning, Judge Schwebel.

5 MR. LEVEE: Good morning.

6 MR. ALI: Members of the panel, if I may.

7 JUDGE SCHWEBEL: Please. We're all ears.

8 MR. ALI: Thank you. It seems that Friday

9 got here sooner than one would expect, perhaps

10 because we are dealing with Internet time. Although

11 I think that mortal movement and human speed is, in

12 the instance of this advocate, perhaps a little

13 slower, particularly given the week that we have.

14 But it's certainly a pleasure to appear before you

15 and an honor to do so after the week that we've had.

16 And in any event, I think that it's

17 self-evident to all of us in the room that we have

18 participated in a part of history. And I certainly

19 don't want to overstate the case, given the eminent

20 members of the panel and how much history you've

21 participated in, but I do think that we have seen

22 much take place in this room and we've heard much

1 about the evolution of the Internet, about what a
2 remarkable and dynamic accomplishment this particular
3 mode of communication is.

4 I mean, I still, of course, remember the
5 time when I was growing up in Bangladesh or East
6 Pakistan that it was then, and we used to get Telexes
7 and telegrams, how exciting that was, or trunk calls.
8 And here we are now dealing with Blackberries.

9 Nonetheless, we heard a lot from a lot of
10 witnesses. From ICM's side, we started with
11 Professor Milton Mueller, an authority on the
12 Internet, on its history, evolution and governance,
13 and someone who continues to study the Internet, its
14 evolution and who has remained a watchdog and who has
15 contributed to the processes of the evolution of the
16 organization and a remarkable technological tool.

17 We heard from Mr. Stuart Lawley, the next
18 witness on ICM's behalf. Mr. Lawley, an
19 entrepreneur, a man with certainly vision, driven by
20 emotion and perhaps even one might say a commitment
21 driven by a particular philosophy, sure, to make
22 money. But what's wrong with that? Nothing

1 whatsoever.

2 But ultimately, this was not just a pie in
3 the sky dream. These were ideas that were developed
4 with the assistance of someone who many have called
5 the Godmother of ICANN, Ms. Becky Burr, partner at
6 Wilmer Hale, somebody with incredible experience, not
7 only in the legalities and the business and the
8 policy of the Internet and ICANN, but also in the
9 technologies. So this wasn't pie in the sky visions
10 of Mr. Lawley, but also technological tools that were
11 going to be brought to bear to implement that
12 particular vision.

13 We heard from Ms. Williams who
14 participated in the process for evaluating these
15 TLDs. She provided extremely valuable testimony to
16 contradict that of Mr. Twomey. And Mr. De Gramont
17 took Mr. Twomey through that testimony, and I do
18 believe that his answers were really not all that
19 reliable, all that credible, and I'll come back to
20 that shortly.

21 We heard from Professor Goldsmith, another
22 student, historian and academic who has focused not

1 only on international law, but the Internet and
2 ICANN. We then heard from the father of the
3 Internet. Indeed, it was an honor to be in his
4 presence, a man with incredible accomplishments,
5 Dr. Vint Cerf.

6 We heard from Dr. Pisanty, indeed an
7 accomplished engineer with a list of degrees and
8 credentials that are impressive. We heard from
9 Mr. Paul Twomey who came all the way from Australia
10 to participate and help us with his testimony. And
11 of course, your friend and mine, David Caron, also
12 appeared before you to educate us in certain of the
13 aspects of international law according to his belief,
14 his understanding and his academic background,
15 training, insights with respect to international law.

16 Now, credentials should not be confused
17 with credibility in any respect. And I would put it
18 to you that ultimately we have extremely eminent
19 individuals on both sides. Both sides delivered
20 testimony and that testimony was tested by counsel in
21 certain respects. I think we did more of the testing
22 than my colleague, Mr. LeVee.

1 But in the end, I think we need to find a
2 way in which we can demonstrate to you that testimony
3 is corroborated by the contemporaneous documentary
4 record. I believe that that's fundamental. To the
5 extent that we had conflicting testimony and we had
6 some conflicting testimony from Mr. Cerf and
7 Mr. Twomey between themselves indeed, but we also had
8 some conflicting testimony between the two of them
9 and Ms. Burr.

10 I submit to you that Ms. Burr's testimony
11 is corroborated by the contemporaneous documentary
12 record, and if given an opportunity perhaps in some
13 brief post-hearing submissions, we would like to show
14 that to you because there is so much, there is so
15 much in the documentary record that it has been
16 difficult for us to juice it all and present to you
17 in the short time span that we have to present
18 closing statements.

19 So as I said at the outset on Monday, I'm
20 a firm believer in the proof. I'm a firm believer
21 that the eloquence of advocacy cannot substitute for
22 the power of evidence and proof. And we would like

1 to have that opportunity today to present you with
2 that proof. I believe we have done so in the course
3 of this week. We started with our opening statement
4 and presented you with key documents. We have done
5 so in our written submissions. And I would very much
6 like an opportunity to present you with the
7 additional information that I think you will benefit
8 from in brief post-hearing submissions.

9 In any event, to get to the substance,
10 what I would first like to do is to briefly touch
11 upon what we see as ICANN's obligations under its
12 bylaws and articles of incorporation. And you'll
13 recall that on Monday, I directed you to a listing of
14 the provisions of the bylaws of the articles of
15 incorporation broken down, perhaps because I am a
16 lawyer who spent much of my time in the world of
17 contracts and bilateral investment treaties and
18 multilateral investment treaties, each word be parsed
19 out with a view towards giving you what we see as the
20 road map.

21 ICANN has spent much time parsing the
22 words of many documents, asking you to engage in all

1 sorts of interpretation. Well, guess what? I would
2 ask that you do the same. I would ask that you give
3 importance, credence and attention to every single
4 word in the bylaws and the articles of incorporation
5 and indeed California law requires you to do that, as
6 does international law.

7 So to the articles of incorporation and
8 the bylaws, you will recall that at the outset, I
9 asked you to think about what it is that the bylaws
10 require you to do. First of all, the bylaws ask
11 you -- and pursuant to Article 4, section 3, which
12 deals with the IRP -- to determine whether ICANN
13 acted consistently with its obligation under Article
14 2, section 3 of its bylaws to not apply, one, its
15 standards; two, its policies; three, its procedures;
16 or four, its practices, inequitably.

17 That same provision asks you to determine
18 whether ICANN singled out ICM for disparate
19 treatment. Article 3, section 1 of the bylaws sets
20 out additional standards and asks you to determine
21 whether ICANN operated, to the maximum extent
22 feasible, in an open and transparent manner. To

1 determine whether ICANN operated to the maximum
2 extent feasible consistent with procedures designed
3 to ensure fairness. And then we cannot forget, of
4 course, the core value, core value, core value to
5 ICANN's activities. Did ICANN act consistently with
6 core value number 8 requiring it to make decisions by
7 applying its documented policies neutrally,
8 objectively, with integrity and fairness.

9 In the final analysis, did ICANN act
10 outside of its mission to engage in content
11 regulation or impermissible censorship?

12 The bylaws are very clear. We agree that
13 they are instruments that are to be construed in
14 accordance with California law. These are, after
15 all, the governance documents of a California
16 corporation, a very special California corporation,
17 but California law governance instruments with
18 respect to a California nonprofit corporation. So in
19 the first instance, we do agree that California law
20 has a role to play in how that particular instrument
21 is construed.

22 Well, California law rules of construction

1 interpretation in the first instance would also apply
2 to the construction of the articles of incorporation
3 as well, which is not to say, in all that I'm saying,
4 that I don't believe -- because I do very much so, as
5 an internationalist and an international lawyer --
6 that international law does have a role to play even in
7 the construction of California law instruments. Why?
8 Because of what ICANN is and what it does. Perhaps
9 it has a subsidiary interpretative role, but
10 ultimately there is no difference in terms of the
11 outcome. If one were to apply canons of construction
12 in international law, the principle of FET, or one
13 would apply the principles of construction under
14 California law, I believe we come to the same
15 endpoint.

16 Now, where do we find the reference to
17 international law? We find it, of course, in the
18 much discussed articles of incorporation. Article 4
19 which provides "the corporation shall operate for the
20 benefit of the Internet community as a whole,
21 carrying out its activities in conformity with
22 relevant principles of international law and

1 applicable international conventions and local law
2 and, to the extent appropriate and consistent with
3 these articles and its bylaws, through open and
4 transparent processes."

5 Now, California law, in particular, I
6 would for the record identify the case Tycor versus
7 Santa Fe, California court of appeals case, provides
8 the following rule of interpretation. And it will be
9 very familiar to yourself, Judge Schwebel, and
10 Professor Paulsson, no doubt, where you will find
11 analogs in international jurisprudence. "As a rule,
12 the language of an instrument must govern its
13 interpretation if the language is clear and explicit.
14 If possible, the Court should give effect to every
15 provision. If possible, the Court should give effect
16 to every provision. An interpretation which renders
17 part of the instrument to be surplusage should be
18 avoided."

19 Self-evident proposition. So articles of
20 incorporation require us to look to relevant
21 principles of international law. But why is it that
22 international law is appropriate here? Why should

1 international law have relevance and be applied to a
2 California nonprofit corporation?

3 They would like to tell you that a
4 California -- this is just a California nonprofit
5 corporation, pure and simple. No different than
6 perhaps a club or a charity. Well, yes, certainly
7 ICANN does perform a charitable function, but which
8 California corporation, which private corporation, I
9 ask you, anywhere in the world is as unique as that
10 one? A corporation that has regulatory and
11 policy-making authority over one of the world's most
12 global public resources and that has policy making
13 functions and regulatory authority over the doling
14 out of public goods, domain names, the ability to
15 identify yourself in cyberspace with a little number,
16 a little word attached to that number. They have the
17 power to be able to dole those out.

18 Which private California corporation of
19 the world has a specific body called a Governmental
20 Advisory Committee? A Governmental Advisory
21 Committee, a committee that is made up of the
22 representatives of governments of varying degrees,

1 ambassadorial to perhaps technician, but nonetheless
2 the representatives of their governments, to reflect
3 the public policies of those governments, and which
4 should be, according to the bylaws, core values, be
5 duly taken into account.

6 Now, of course, Mr. Cerf told you, we are
7 bound. Mr. Twomey told you, we can't disagree.
8 There are special procedures if we disagree. Well, I
9 can't think of too many other private corporations
10 that have that particular dimension to them.
11 International law comes in simply because of how
12 they're structured, not just by what they do.

13 Well, guess what? They also have a
14 contractual relationship, which you heard much about,
15 with another government, the United States
16 Government, the memorandum of understanding, joint
17 project agreement, affirmation of principles and the
18 IANA functions contract.

19 Well, delegation of authority from the
20 United States Government and indeed it is the
21 United States Government that looms large in this
22 particular story. You've heard much about that. I

1 don't believe I'm going to need to dwell too much on
2 the statements that were made on the identity of the
3 individuals because if I were to engage in some of
4 the identification of those individuals, you might
5 consider that I'm making political commentary or
6 perhaps being pejorative with respect to the views
7 that were held by some of those individuals. This
8 case doesn't have a whole lot to do with whether you
9 like pornography or not, really, from our
10 perspective. But from their perspective, that's
11 precisely what this is all about.

12 And then beyond that, what do we have? We
13 have a corporation which, by the laws of the state in
14 which it is incorporated, is permitted, and I quote
15 from the California corporation code, Sections 5131
16 and 5140 which recognize that a California nonprofit
17 corporation's articles of incorporation may set forth
18 a further statement limiting the purposes or powers
19 of the corporation, and that such a corporation has
20 the powers of a natural person subject to any
21 limitations contained in the articles or bylaws.

22 California law says, you can limit

1 yourself in any particular way, circumscribe
2 yourself, guide yourself in any particular way
3 pursuant to the documents that you create. And they
4 created them. And what did they do? They thought
5 about international law. Certainly somebody did.
6 They may not have understood. I don't know. But the
7 terminology, for those of us who live in this world,
8 are terms of art and they have importance, relevance
9 and must be given effect.

10 So you have a California corporation by
11 virtue of its purpose, by virtue of its governance
12 structure, by virtue of what it does, by virtue of
13 its contractual relationships and by virtue of its
14 own actions in drafting its own documents has
15 incorporated international law.

16 And then Professor Caron tells us, well,
17 you know what? You might well be able to analogize
18 this particular corporation to a de facto, quasi,
19 proto international organization. We heard all sorts
20 of words. But somewhere in the background there
21 looms the world of international organization law and
22 Bowett's and Amerasinghe, and other noted scholars of

1 international organization law, and your writings are
2 far more familiar -- their writings are far more
3 familiar to you than to I.

4 But nonetheless, I think that there is
5 sufficient basis to accept that relevant principles
6 of international law must be looked at and that
7 ICANN's activities must be conducted in conformity
8 with those relevant principles of international law.
9 Now, relevant to what activities? ICANN tells you,
10 okay, fine. ICANN tells you, the relevant activities
11 are those that are in Article 3, the ones that are
12 enumerated in Article 3 of the bylaws. Sorry, excuse
13 me, the articles of incorporation.

14 Well, if you look at all of those
15 particular enumerated activities, they include the
16 doling out of domain names, they include the
17 development of policies determining the circumstances
18 under which new top-level domains are added to the
19 DNS. Well, guess what? That's at the core of this
20 particular dispute. And indeed, some of the other
21 activities are also extremely relevant to this
22 particular dispute.

1 Now, it says its activities, its
2 activities. It doesn't say the above activities. It
3 says its activities, any activities. Well, those are
4 the activities that are not only enumerated in the
5 articles of incorporation, but I submit to you all
6 activities related to those that are reflected in the
7 bylaws should also be governed by relevant principles
8 of international law.

9 And as I read these provisions here, in
10 addition to the bylaws, when I read the articles of
11 incorporation -- and again, I am approaching this
12 from my own prism, that of an international
13 arbitration lawyer who works in the world of
14 treaties, well, I see that as an autonomous
15 obligation. An autonomous obligation added to all of
16 the obligations that are enumerated in the bylaws.

17 So I think that international law has a
18 couple of different roles here. I think that
19 relevant principles of international law add an
20 additional set of autonomous obligations with respect
21 to -- or standards, excuse me. I shouldn't say
22 obligations. Standards by which ICANN's activities

1 must be judged to determine whether or not ICANN
2 acted in conformity with those particular standards.
3 And I would also accept David Caron's proposition
4 that perhaps relevant principles of international law
5 have a subsidiary and gap-filling function to perhaps
6 give further color where California law is
7 insufficient or leaves certain requirements.

8 Now, what are those principles? We have
9 written pages and pages and pages on good faith and
10 what constitutes good faith and how good faith is
11 applied to international organizations, and how good
12 faith as a principle would also apply to private
13 California corporations.

14 Now, surprising me, David Caron took the
15 view that, gosh, well, I don't think I can think of
16 any particular instance in which international law
17 might apply to -- or general principles might apply
18 in the private sphere. I've known David Caron a long
19 time. I know he knows that we need to apply UNIDROIT
20 principles. I know that. UNIDROIT principles
21 provide that each party must act in accordance with
22 good faith and fair dealing. Now, good faith in a

1 private context.

2 Judge Schwebel, your colleague and very,
3 very good friend, Judge Roslyn Higgins, confirms that
4 principles of international law may also apply to
5 individuals, legal entities and private -- and
6 persons. At page 54 of her book, *Problems and*
7 *Process: International Law and How We Use It*, she
8 writes that parties may designate the law of a
9 national legal system to govern their disputes, but
10 adds that more usually they would designate general
11 principles of law or similar formula. In this way,
12 she says, "At one bound, therefore, the private party
13 has escaped the need to have his claim brought by his
14 national government and can invoke international
15 law." She goes on to conclude that, thus even if
16 purists wish to say -- even if the purists wish to
17 say that state X owes Mr. Y no international
18 obligations, the reality is that Mr. Y can invoke
19 such legal norms.

20 Mr. Paulsson's former partners and good
21 friends -- my script here said Martin Redfern and
22 Alan Hunter, but I think my colleagues have made an

1 obvious mistake, and it is indeed the obverse,
2 although I'm not sure that Martin and Alan would
3 appreciate that. Nonetheless, they agreed with Judge
4 Higgins in much of what I just said, explaining at
5 page 119 of their treatise that, and I quote, there
6 is no reason in principle why private parties and
7 corporations should not select public international
8 law or alternatively the general principles of law as
9 the law which is to govern their contractual
10 relationship.

11 Now, of course, that's within the context
12 of contracts. But here I would say that California
13 law permits the California corporation to limit
14 itself or guide itself by whatever principles it
15 wants. To take ICANN's interpretation, you might as
16 well have put in there the relevant principles of
17 Shangri-La law. No, I don't accept that. You have
18 to give effect and meaning and purpose to terms that
19 have been put into the articles of incorporation,
20 particularly in light of what we heard was the
21 drafting history of these particular articles.

22 Now, I'm not going to spend a whole lot of

1 time discussing abuse of right and detournement de
2 pouvoir and various principles of giving content to
3 good faith, because I believe that there is not very
4 much that I can say to this panel that will
5 necessarily change your minds or give further
6 definition and delineation to what you full well know
7 is the content of the general principle of good
8 faith.

9 I will simply say that while David Caron
10 perhaps takes a view that is on the outer limits of
11 international law and general principles, that his
12 quote here is not a bad one. He directs that the
13 panel should look to the principle of good faith.
14 Now, he says playing quietly in the background. I
15 think it is far more prominent in the front of the
16 orchestra. To determine if ICANN has carried out its
17 operations for the benefit of the Internet community
18 as a whole, and David then adds, with honesty,
19 reasonableness and in conformity with the spirit of
20 law.

21 And I think that if you studied the
22 articles and the bylaws -- excuse me, the bylaws in

1 particular with the detail that I have suggested to
2 you that you should review -- with which you should
3 review the bylaws, you will find that the bylaws
4 themselves contain particular standards that have
5 their analog or are mirrored or effected within the
6 world of general principles and international law.

7 But California law also -- and I
8 apologize, Judge Tevrizian, that I may be focusing a
9 lot on international law that may reflect my own
10 particular training and background, but we have --
11 and you'll excuse me if I'm a complete neophyte in
12 this area, but we have also of course looked at
13 California law to show and to demonstrate that there
14 is a confluence here.

15 Now, there are standards and what we have
16 in the bylaws are core values, we have principles, we
17 have standards, we have obligations and we have those
18 that arise out of international law and we have those
19 that arise out of California law, but they generally
20 provide, I think, a very clear picture of how it is
21 that ICANN is supposed to function.

22 And here, under California law, a

1 corporation must make decisions that are fair, that
2 are applied uniformly and that are not made in an
3 arbitrary and capricious manner. I cite to the
4 Lamden case. And there are some other cases that are
5 in our briefings and our memorials, so I will not
6 describe them or discuss them in great detail because
7 I certainly don't want to run out of time.

8 What I would like to do right now is to
9 indicate to you or to describe to you why it is that
10 we believe that ICANN, based on the evidence, has
11 violated or failed to act in conformity with its
12 articles of incorporation and bylaws. And here I
13 would like to start out at the end of the story and
14 then relate back.

15 In our submission, the March 2007
16 resolution was inconsistent with ICANN's bylaws and
17 articles of incorporation by its very terms.

18 JUDGE TEVRIZIAN: This is the March 30th?

19 MR. ALI: Yes, March 30th of 2007 final
20 resolution pursuant to which the application and the
21 registry agreement were rejected by the board.

22 So what's the first reason? I think we

1 need to go reason by reason. Reason by reason.

2 First reason, "ICM's application and the revised
3 agreement failed to meet, among other things,
4 the sponsored community criteria of the RFP
5 application."

6 Well, Mr. LeVee said yesterday that this
7 case boils down to he said/she said, and that he
8 never heard so much he said/she said in his life.

9 Well, I have to disagree somewhat. I think this case
10 boils down to what they said first, what they said
11 later and what they say now. And perhaps even more
12 importantly, what they didn't say. Not only at the
13 time or throughout the process, but also what they
14 haven't said within the context --

15 JUDGE TEVRIZIAN: If I may interrupt, I
16 think you're looking to see Exhibit 121.

17 MR. ALI: That's right, Judge, hearing
18 Exhibit 121. And I was saying it wasn't just what
19 was said within the course of the proceedings -- or,
20 sorry, of the evaluation process from back in 2004
21 going all the way through 2007, but what they didn't
22 say, what they didn't say within the context of these

1 proceedings, most notable by their absence. Mr. Kurt
2 Pritz, about whom you heard a lot, and who indeed
3 within the course of this entire evaluation process,
4 boy, did he say a lot. He really did say a lot. But
5 where is he?

6 Indeed, we heard a lot about Mr. Jeffrey.
7 We heard -- and I know that his ears would be burning
8 and he will be blushing about what an earnest man he
9 was, what an excellent lawyer he was, what a good
10 friend he was, and what a thorough supporter he was
11 all along the way while the drafting was going on of
12 these various contracts, and I'm going to come back
13 to that. And if you disagree with any of the praise,
14 Mr. Jeffrey, please let me know.

15 Well, they say that ICM's application and
16 the revised agreement failed to meet, among other
17 things -- well, what are those other things? They
18 never specified it to ICM and they certainly didn't
19 talk about it within the course of these four days
20 that we've been here. What they focused on was the
21 sponsored community criteria of the RFP
22 specification.

1 Well, guess what? After 11 months of
2 careful deliberation with reference to an evaluation
3 report, after information had been provided by ICM,
4 presentations made by ICM, careful scrutiny by the
5 board, they made a decision. They made a decision.
6 The board resolved on June 1st, 2005 that ICM had
7 satisfied the criteria and the board resolved in
8 fairly unambiguous terms that to authorize the
9 President and general counsel to enter into the
10 negotiations relating to proposed commercial and
11 technical terms -- commercial and technical terms?
12 Not sponsorship terms. With the .XXX sTLD top-level domain
13 applicant.

14 And then resolved, if after entering into
15 negotiations with the .XXX sTLD applicant, the
16 president and general counsel are able to negotiate
17 the said proposed commercial and technical terms of
18 the contractual arrangement, the president shall
19 present such proposed terms to this board for
20 approval and authorization to enter into an agreement
21 relating to the delegation of the sTLD.

22 Well, there was no caveat, absolutely no

1 caveat, no contingency. If indeed the testimony of
2 any of the witnesses is to be believed, oh, yes, this
3 was so controversial, this was such a big deal. They
4 didn't say it. They didn't say it in the resolution.
5 And we have a lot of statements after the resolution.
6 We have a lot of evidence after the resolution as to
7 what was the contemporaneous statements and
8 Mr. Twomey, Mr. Pisanty and Mr. Cerf, for as much as
9 I respect them, could not dignify us with a response
10 that was the least bit credible. Unambiguous
11 statements about what they said at the time. Well,
12 perhaps memories failed or perhaps it was convenient,
13 within the context of this particular case, to come
14 up with a story that, Ah, yes, well, the story, the
15 GAC transcriber of the minutes may have gotten what I
16 said wrong.

17 Well, no, we really meant what we said.
18 We specifically carved out the fact that sponsorship
19 was going to be an issue and that they were going to
20 talk about sponsorship later on. Well, I submit to
21 you that's completely incorrect.

22 Well, what changed? What changed from

1 June 1, 2005 to March of 2007? Nothing, in terms of
2 the sponsorship criteria. Nothing. What changed?
3 June 1, 2005, after all of this careful deliberation,
4 the applicant unconditionally satisfies the three
5 criteria. Mr. Cerf's statement, please remember
6 Mr. Cerf's statement to the GAC, a body to which they
7 owe some type of duty per their own bylaws, says they
8 satisfy all the criteria.

9 Well, what changes? Absolutely nothing.
10 We went through with Ms. Burr and we looked at the
11 different versions of the contracts, contracts that
12 were drafted together with ICANN's outside counsel
13 and with ICANN inside counsel in collaboration. We
14 saw at the staff level that they were working
15 together, nothing changed in the definition of the
16 sponsored community.

17 Did anything change in terms of the
18 support? Well, yes, of course, maybe Mr. Larry Flynt
19 decided that this was not such a good idea anymore,
20 largely because of other political considerations
21 that were out there. Mr. Flynt -- there is a movie
22 made about him. He's fought for freedom of speech.

1 Hates the idea of any sort of regulation. But who
2 said Mr. Flynt in any way -- that he has to be duly
3 taken into account of within the course and context
4 of ICANN board deliberations? Wicked Pictures,
5 whoever they are.

6 Well, what do we have?

7 JUDGE TEVRIZIAN: Let me ask a question.
8 You're saying that the definition of sponsored
9 community really never changed. Look at Exhibit 286
10 which is the registry agreement, page 67, Appendix S.
11 It's dated February 8, 2006, but that's a mistake.
12 It should be February 8, 2008. And it's titled part
13 3, description of the sponsored top-level domain
14 community. And read that and ask yourself the
15 question, does this really define what a sponsored
16 top-level domain community really is or is this an
17 illusionary definition?

18 MR. ALI: In my submission, Judge, very
19 much so. Very much so. Certainly if you take a look
20 at one of our opening binder exhibits that we
21 presented to you, take a look at some of the other
22 communities. .tel, designed for those who seek to

1 register telephone numbers, domain names on the
2 Internet. An Internet phone book? That's a
3 community? Everybody in the world who has a phone or
4 wants to have some sort of registered telephone
5 number. What sort of community is that?

6 If the we take a look at .mail, to serve
7 the community of individuals and companies who wish
8 to receive spam free e-mails and individuals and
9 companies who wish to send spam free e-mail. I
10 actually wouldn't mind that, given what I get in my
11 e-mail box every day.

12 .asia. Well, I guess if you went to
13 Turkey and you looked at the side -- you wouldn't
14 want to go to Turkey, excuse me, yes, of course. I
15 apologize, indeed. If I were to go to Turkey, I
16 would be quite confused, depending on which side of
17 the Bosphorus I was on. Should I be in .asia, can I
18 be in .asia or should I not be in .asia? A bunch of
19 guys sitting in Hong Kong can decide who is in Asia?
20 ICANN gets to decide who is an Asian? Excuse me, not
21 at all.

22 Is there a sponsored community? Of course

1 there is. And I'm going to come to that in just a
2 second. But let me also point out -- and I thank
3 you, Judge, for a confusion which I don't know was
4 unintentionally created or intentionally with respect
5 to these agreements. Just to be clear, hearing
6 Exhibit 171 is the draft contract that was submitted
7 on 18 April 2006. This is the contract that came out
8 after the Wellington communique was issued.

9 And if you go to page 65, 64-65, Ms. Burr
10 clarified, I believe with the help of the tribunal or
11 the panel, that there was a definition of sponsored
12 community that might have been, quote, unquote,
13 dumped into this particular document. Perhaps it was
14 a definition that was more extensive. However, what
15 is important to note for the purposes of our analysis
16 here is if you go to hearing Exhibit 286, as Judge
17 Tevrizian just asked me to do, and we look at page
18 63, while it is dated at the top, the Appendix S is
19 dated February 8, 2006, it is actually associated
20 with a contract that is 5th January 2007, draft
21 number 5, and that particular definition of sponsored
22 community does not contain much of what was in the

1 earlier post-Wellington draft.

2 This was the draft -- I believe this was
3 the draft that ultimately evaluated and considered or
4 at least supposed to have been evaluated and
5 considered by the board with that shorter definition,
6 perhaps more precise definition of the sponsored
7 community. And again, please allow me to stress that
8 the only testimony that you have before you today,
9 the only evidence, not advocacy, is that of Ms. Burr
10 with respect to these contract negotiations, what
11 happened and who she collaborated with in terms of
12 drafting these agreements and defining the contours
13 of the obligations that are contained therein.

14 So what changed? Well, guess what?
15 ICANN's case, which has evolved -- first of all, they
16 said to you that, well, ICM's telling you that on
17 June 1, 2005, the application was approved and the
18 .XXX was going into the TLD. We said, huh-uh, no,
19 sorry, that's not what we're arguing. We never
20 argued that. So then they changed and said, well, we
21 accept that ICM is not arguing that, that ICM has
22 accepted that there is going to be another decision

1 down the line. So to be clear, our position is not
2 that the June 2005 vote entitled us, as a matter of
3 right, to have the .XXX TLD entered into the root.
4 We've never said that.

5 JUDGE SCHWEBEL: And your position is that
6 that resolution settled the question of sponsorship
7 in the sense that that question was answered
8 affirmatively? Is that your position?

9 MR. ALI: Yes, unconditionally and
10 affirmatively that we have satisfied the criteria.
11 Now, there are certain implications of that --
12 please, Judge, I didn't mean to interrupt you.

13 JUDGE SCHWEBEL: Sorry. Well, doesn't the
14 last phrase of the resolution, referring to
15 authorization and approval, embrace everything by
16 subjecting the ultimate approval of the contract to
17 the board's authorization and approval? Isn't that a
18 reservation that covers all issues including that of
19 sponsorship?

20 MR. ALI: I don't believe -- first of all,
21 I don't believe it's explicit. I believe that what
22 was explicit are the RFP criteria. I believe what

1 was explicit were the statements made before,
2 interpreting the RFP criteria, and what it is that
3 applicants were led to believe would be the case, and
4 the statements after the decision was made
5 interpreting the action that was taken by the board.

6 But I think, Judge, you raise another
7 important question, which is whether or not there was
8 a basis for the board to go back and take a look
9 at -- to re-examine that decision. There must be a
10 presumption associated with that initial decision.
11 And the categorical nature in which they said that
12 this applicant had satisfied the sponsored community
13 criteria. Categorically, no caveats, in the
14 immediate aftermath. They've drawn all sorts of
15 caveats to be drawn in and all sorts of rationales to
16 be given for why the sponsored community was not
17 sufficient. But the question I'm putting to you is,
18 was there a sufficient basis to go back on a
19 categorical, clear, unquestionable decision that was
20 taken in June? What changed?

21 Ms. Burr -- and we went through this
22 document yesterday, hearing Exhibit DI, their

1 exhibit. Ms. Burr took you through a memorandum to
2 the board on 13th March 2007, two weeks before the
3 decision was taken. I would suggest to you to look
4 at the data that's provided in that document. What
5 changed? Perhaps the grumblings and mumblings of a
6 few governments?

7 What changed was the United States
8 Government and particular factions within the
9 United States Government with particular agendas
10 decided to wake up and say, we don't want this.
11 That's what changed. Nothing in the objective
12 criteria -- and allow me to remind you that the
13 sponsorship criteria say that they shall be applied
14 nondiscriminatorily, objectively, transparently and
15 fairly, I may be missing some words but you get my
16 meaning.

17 So what changed? Did the definition
18 change? No. Did the online support from the
19 community change? It may have modulated some. It
20 may have diminished in some respects, expanded in
21 other respects. And guess what? Once this TLD went
22 into the root, who knows? Quite likely it would have

1 expanded considerably.

2 But the fact of the matter is that both
3 Ms. Burr and Mr. Lawley told you that even at a much
4 more diminished number of registrants, they still had
5 a viable business model. There was still a
6 community, a community defined by those who wanted to
7 self-regulate. Those who wanted to subscribe to not
8 only statements of principle against child
9 pornography, but those who are also willing to
10 subject their particular business model, these web
11 masters with whatever content that they put up there,
12 to particular technological tools.

13 Remember when I said this is not just
14 about emotion, philosophy, and vision and
15 entrepreneurialism. It was about technology tools
16 being applied to this particular business model, and
17 to which, because I, as a -- well, I shouldn't say I,
18 but for the sake of discussion, as a web master
19 providing adult content would want to subscribe
20 because I think it's a good idea, and I think that's
21 going to drive more traffic to my site. What's to
22 stop me from doing that? That's what they're

1 providing. That's what I want to be part of. And
2 there were many of them, many of them.

3 So in our submission, nothing changed.
4 This was arbitrary, this was capricious, this was
5 unfair, this was inequitable.

6 Now, my team right now is having absolute
7 kittens because I'm not going by the script at all,
8 so they don't quite know where I am in all of this.

9 MR. PAULSSON: All right, I'll make it
10 harder for you.

11 MR. ALI: Thank you. I knew you would.

12 MR. PAULSSON: What would you propose that
13 the leadership of ICANN, an organization which has no
14 precedence, let's say, faced with the fact that there
15 is a tense political push-back, misguided or not, but
16 it is there. Senator Coonan -- or Minister Coonan's
17 correspondence with ICANN, I think, has -- I'm not
18 sure I've seen it in the record of this case.

19 MR. ALI: I don't believe it's there.

20 MR. LEVEE: Actually, there was no
21 correspondence. I hate to impinge. Dr. Twomey
22 testified that there was an article by Ms. Coonan in

1 the paper, not that there was correspondence from
2 her.

3 MR. PAULSSON: Oh, my goodness. Well, now
4 we get into the area of judicial notice of things
5 that just stare you in the face, but ICANN's website,
6 it takes you about one minute to get to her letter to
7 Dr. Cerf. I don't even know how to deal with this,
8 but I will confess it's sort of a natural thing to
9 look at ICANN's website, which I find I'm actually
10 following reference to board meetings on my computer
11 using the ICANN website rather than -- it turns out
12 to be faster than looking at books. But I've read
13 it. I don't know if this creates a problem.

14 MR. LEVEE: If it's on our website, as far
15 as we're concerned, it's in evidence.

16 MR. ALI: And if it's on our website, as
17 far as we're concerned, it's also in evidence,
18 including all of these other documents.

19 MR. PAULSSON: Here is a statement of a
20 minister of government saying not we should delay and
21 think about this more, saying my government is dead
22 set against it, we're absolutely against an expansion

1 of pornography and what you're contemplating is going
2 to increase pornography and the way it is distributed
3 on the Internet. I know that that's a controversial
4 statement. There are responsible people who would
5 say that's actually illogical and the result would be
6 quite different. One way or the other, that's a
7 position which is being asserted, and it seems that
8 at the ICANN board itself, we've heard testimony that
9 certain members consistently were taking this
10 position, no matter what, they were against it.

11 My question to you is this. If ICANN,
12 having made a decision that we're going to go forward
13 with technical and commercial negotiations, knowing
14 that until those negotiations are concluded, nothing
15 conclusive has happened by definition, but you say
16 there have to be stages and to be fair, you have to
17 respect that at each stage, you've achieved something
18 and you can't go back to the beginning because that's
19 arbitrary. But what is ICANN to do if it notices or
20 if it takes cognizance of very strong political
21 opposition in governments, which I suppose if it
22 keeps going and building its strength might put into

1 question the whole principles of governance of
2 Internet? It becomes existential.

3 In your submission, is the leadership of
4 ICANN then absolutely powerless to do anything about
5 rethinking what it had decided in terms of principles
6 saying we will go forward and negotiate commercial
7 and technical conditions of the contract? Is there
8 nothing ICANN can do? Does ICANN simply have to go
9 forward and say, sorry, one government, two
10 governments, 10 governments, 50 governments, there is
11 nothing we can do. We have decided and all that's
12 left are the technical and commercial conditions of
13 the contract and that's all we can do. And if those
14 purely technical and commercial elements are
15 satisfied in the negotiations, this site is going to
16 be opened, I'm very sorry.

17 MR. ALI: Understood. Number one, they
18 have to act in accordance with the articles of
19 incorporation and bylaws. Mr. Cerf -- Dr. Cerf,
20 Dr. Twomey, Pisanty and a variety of others told you
21 that ICANN is not supposed to get involved in content
22 regulation. That's not what they're there to do.

1 Please take a look at their mission statement, at the
2 mission in the bylaws, what they're supposed to be
3 doing.

4 And of course, Professor Paulsson, you're
5 well aware of Article 1, section 1 of the bylaws. So
6 where is this that allows them to say, well, we're
7 going to -- yes, we're going to duly take into
8 account the views of governments, but which
9 governments? They have to act in accordance with the
10 bylaws.

11 Number two, Australia says this is going
12 to contribute to the growth of pornography. You
13 could have pornography in any one of the other TLDs.
14 You could have Catalan pornography, for goodness
15 sake. .XXX is not going to add anything more to what
16 is pornographic websites.

17 MR. PAULSSON: There is debate about that.

18 MR. ALI: But still, equally important,
19 local regulation. They can regulate it, as was the
20 debate taking place in Australia at the time, filter
21 locally. Try and get onto the Sun newspaper site the
22 next time you're in Dubai or Bahrain. You're not

1 going to be able to do that because on page 3, there
2 is a topless woman. So local technologies can permit
3 all types of filtering of any sort, for any type of
4 content or type of speech. That's not their job, nor
5 is it their job, their function to be captured by
6 self-interested groups or particular political
7 agendas.

8 But ultimately, if that was the reason,
9 Professor --

10 MR. PAULSSON: What reason?

11 MR. ALI: The reason was because
12 governments didn't like pornography, put it here.
13 Tell me at the outset that that's the case. Put it
14 in the bylaws. Put it in the RFP. Say be
15 transparent. They're required to be transparent.
16 Transparency, openness. Apply documented policies
17 with integrity and fairness and objectivity, openness
18 and transparency. They never said it.

19 Now, yes, we understood that pornography
20 is controversial. Guess what? In Pakistan, in Saudi
21 Arabia, in various other countries, homosexuality is
22 outlawed. Next time the Australian government

1 decides, you know what? I don't like the idea of
2 homosexuality. ICANN? We're going to write letters
3 to you. We're going to start a letter writing
4 campaign. We're going to have various organizations
5 spam your e-mail, flood Dr. Twomey's e-mail or
6 whoever else it might be.

7 Well, now, ICANN has to say, we will duly
8 take the concerns of governments into account and
9 we're not going to allow a .gay. Can you really
10 dispute that there is a gay community in the world
11 and that they might want a .gay? I make no
12 commentary of whether that's good, bad or anything in
13 between. What I do say is that you can do whatever
14 you want locally. And in any event, this is all
15 ICANN can operate in accordance with, the bylaws and
16 articles of incorporation.

17 MR. PAULSSON: My question, still, my
18 precise question, is, let us assume for the moment
19 that we accept Mr. Lawley's and Ms. Burr's testimony
20 that, in fact, the correct tenor of the discussions
21 at the time following the favorable decision of the
22 board to go forward with contract negotiations was

1 that everybody was perfectly happy and content with
2 the idea that this was going to be a contract to be
3 concluded in a very routine way, no problem on the
4 horizon, everything significant has already been
5 decided, the initial objections have been overcome
6 and this is going to be concluded very quickly. Not
7 a cloud on the horizon.

8 But for reasons we've all been hearing
9 this week, external to this group of people who are
10 now negotiating the contract, factors start to come
11 into play and before you know it, I say the
12 leadership of ICANN finds itself -- similar
13 expressions have been used this week -- between a
14 rock and a hard place.

15 And so I put to you, what happens? One
16 government, two governments, 10 governments organize
17 opposition, some of it meritorious, others perhaps
18 contrived. 20 governments, 30 governments. Is your
19 statement that ICANN simply has no margin of
20 maneuver? The decision in principle has been made,
21 we're going forward, we're following our bylaws. All
22 that is left in the process is the negotiation of

1 technical terms. And so no matter what happens, we
2 have to go forward and we have to allow this site to
3 open because there is no margin of maneuver within
4 these technical and commercial elements of it.

5 And if that is going to create such a
6 political furor that the whole world of the Internet
7 is going to be changed, well, we'll just have to face
8 that when that happens. For the time being, we must
9 stay within our governance structures because that is
10 the way the principles that apply to us operate. Is
11 there an alternative to this decision?

12 MR. ALI: Well, as I said, I think that
13 the board has to make a particular decision in
14 accordance with the articles and the bylaws. That's
15 what the law requires. California law requires that.
16 The bylaws are fairly clear. They have every
17 opportunity in the world to change them, define them,
18 create them, refine them. So otherwise, how is there
19 to be any predictability for anybody in dealing with
20 a global organization with a global remit?

21 JUDGE TEVRIZIAN: He asked a very
22 insightful question and a very learned colleague.

1 And you argue the articles and the bylaws and
2 whatever sentence were in that realm, but the
3 articles -- I'm sorry, the bylaws provide for a
4 specific advisory committee, specifically the
5 Governmental Advisory Committee. Doesn't the bylaws
6 themselves really answer my learned colleague's
7 question?

8 MR. ALI: The Government Advisory
9 Committee, we have to look at why this committee was
10 set up and who is on it. Is what is being reflected
11 in that committee really the policy statement of
12 particular sovereign governments? And how within
13 that forum, which is not United Nations, which is not
14 a body whereby international policy is being
15 developed on a global basis, to be implemented? What
16 they're doing there is they're discussing, they're
17 reflecting the views and they're advising. And the
18 bylaws don't say that they have to follow the views
19 of government. They should duly take into account as
20 a core value.

21 But I think it's important not to forget
22 that there are differing views across an entire

1 spectrum of the globe with respect to morality
2 issues. If I was to take your proposition that there
3 is unanimity, well, there wasn't in this case.
4 Unanimity that pornography is bad and pornography
5 should not proliferate on the Internet. Well, first
6 of all, say that, put that into the resolution, say
7 it at the very outset. But what you're asking me is
8 to address the question of what is the role of
9 governments within this policy-making process.
10 That's your particular --

11 MR. PAULSSON: Yes. You're entitled to
12 say that your answer is yes, there comes a point when
13 it is too late and we don't care --

14 MR. ALI: There is a point. My position
15 is that if there is a consensus that has developed
16 and it is so strong. But there wasn't. There wasn't
17 a consensus that was so strong. It was the views of
18 one government, very powerful indeed government, that
19 held sway with a number of supporters. Do you think
20 the Iraq war was a good idea just because the U.S.
21 Government thought it was good and a couple of other
22 straggler governments jumped into the fray?

1 But let me also say this. The board has
2 to do what the board has to do, and ultimately the
3 decision as to whether this was going to go into the
4 root was the decision of the U.S. Government. The
5 board has to do what it has to do. It should operate
6 according to its guidelines and then, okay, there is
7 a different issue that ICM might have with the U.S.
8 Government, Australia with the U.S. Government, Saudi
9 Arabia with the U.S. Government. Why? Because the
10 forum that they have created, Judge Paulsson, the
11 forum that they have created is an imperfect forum.
12 If it was a more perfect forum, this Governmental
13 Advisory Committee body, if it was a more perfect
14 forum with a more defined mandate, with a clearer
15 relationship, then I might be in more agreement with
16 you.

17 But within the way in which the GAC has
18 functioned, within the history of what the GAC was
19 intended to do, given who operates in the GAC, I
20 don't think that the GAC's views are anything more
21 than advisory. And ultimately, if they're going to
22 take that advice on, then be transparent about it.

1 Don't be pretextual about it.

2 Where does it say here -- let me show you
3 something. The Wellington communique. All sorts of
4 governmental advisory guidance with respect to what
5 ICM should do. I have a document here that would
6 bore you to death, but I could take you through every
7 single one of these columns. And Ms. Burr did it for
8 you in summary fashion, given the fact that we didn't
9 have much time, as to every single policy concern
10 that was listed in the Wellington communique and the
11 Lisbon communique, what the contract provision is,
12 what the performance safeguards are and what the
13 enforcement mechanism is. It was all in there.
14 Mr. Jeffrey did that.

15 Please, may I finish? Wellington
16 communique. So every concern here -- the Lisbon
17 communique reflected in that agreement one way or
18 another in a commercially sensible way with very
19 intelligence lawyers. Wellington communique, in the
20 last paragraph, "Nevertheless without prejudice to
21 the above, several members" -- not every member,
22 several members -- "of the GAC are emphatically

1 opposed from a public policy perspective to the
2 introduction of a .XXX sTLD."

3 Not here. It's not here. I mean, every
4 other aspect of the Lisbon communique, the Wellington
5 communique reflected in this resolution. You know
6 what? Say it. If that's the reason that ICANN has
7 to give deference to governments' views about
8 homosexuality, pornography or anything else that
9 might be out there, that somebody somewhere doesn't
10 like within some particular moment in history or
11 cultural evolution, then ICANN's documents need to
12 provide for that possibility and they need to be
13 transparent.

14 Because otherwise, it's unfair. That's
15 what the bylaws say. Lacking objectivity. That's
16 what the bylaws say. Lacking in integrity. That's
17 what the bylaws say. Lacking in transparency and
18 openness to the maximum extent feasible. There has
19 to be in a global organization like ICANN,
20 particularly at the earliest stages of its
21 evolution -- and we are very much at the early stages
22 of evolution -- deal with public goods, there has to

1 be some predictability.

2 And that predictability comes in their
3 bylaws and their articles of incorporation. The next
4 round of TLD applications may well include in their
5 instructions certain morality-based guidelines. Say
6 it. What you're saying is ex post facto.

7 Governments may come in with a particular view on
8 whatever subject it might be.

9 What if you were to say -- if I may, Judge
10 Paulsson, since we're debating this. What if
11 somebody were to say, well, we don't like the idea of
12 a .cat. Why? Because we're giving particular space
13 to a particular indigenous grouping. Ah, well,
14 that's going to create secessionist tendencies. That
15 may well suddenly be used in the world of whatever
16 type of territorial, maritime or other type of
17 dispute you might look at.

18 To look at the indicia of what creates a
19 particular sovereign state and say, well, look, we
20 have an Internet space, we should have a territorial
21 space. And somebody else says, hold on a second, we
22 don't like that .cat thing and now everyone is

1 shouting to you about, we don't want a .cat because
2 that's going to create a .Rhohinga somewhere else, or
3 it may create whatever other minority grouping. And
4 so now we're going to have secessionist tendencies
5 all over the place.

6 ICANN could say, okay, all right, because
7 governments are getting really upset here over the
8 fact that we created a .cat and that may lead to some
9 other secessionist tendencies elsewhere or some other
10 ethnic identification or grouping, ah, maybe we
11 should succumb to what governments are saying. If
12 there was a predominance of views, perhaps. But I
13 think that there is a different way to deal with it.

14 If you look at it, you have ICANN in the
15 middle. You have governments that can deal with
16 things locally. They can express their views, but
17 implement locally. Think globally, think in
18 cyberspace, express your views, but act locally
19 because the technology allows you to do that. Not
20 ICANN.

21 And if you're going to do it, do it
22 through a more perfect manner, through a more perfect

1 forum. Do it through WSIS, do it through the IGF, do
2 it through WIPO, do it through the ITU, do it through
3 something that is more robust than the GAC. And if
4 in fact the GAC's advice is going to be mandatory,
5 it's no longer an advisory committee, stick it in the
6 bylaws so that every player around the globe,
7 regardless of culture, regardless of language,
8 regardless of economic status, who is accessing the
9 Internet and wants to use this global medium of
10 communication as a means to communicate knows what
11 this is all about. It's not in there.

12 We're dealing with a big policy question
13 and ultimately the facts of the case indicate that
14 ICM did everything that they wanted. So here's ICM,
15 they tell us I've satisfied the criteria
16 unconditionally, and I now need to go on and
17 negotiate a contract with you. Technical and
18 commercial negotiations. All right? I participate
19 in technical and commercial negotiations.

20 U.S. Government comes and gets involved
21 and I say, fine, hold on, I understand this could be
22 politically inconvenient for you, but please put my

1 contract up for the next time around. The contract's
2 put up for the next time around, the board says
3 11-zip, we're not going to approve the contract, we
4 want to put two more things in there. Okay, fine.
5 Mr. Jeffrey, how are you, let's get together. Let's
6 drop the contract, here we go. I do that, I come
7 back, Wellington communique, we don't like that,
8 sponsorship is now all open again.

9 Well, gosh, sponsorship's open again. All
10 right. Let's sit down, let's start writing, we
11 draft, we write, we collaborate, another contract,
12 here we go. New contract. Sorry. Mr. Twomey for
13 the first time, May 2006, sponsorship is still an
14 open issue. And guess what? Guess what Mr. Twomey
15 has done the November prior to that? The November
16 prior to that, he releases the evaluation reports.
17 Boy was he stumped when Mr. De Gramont got him on
18 that point. Well, yes, no, the technical report and
19 this report and that report. Let me think, let me
20 think. What do I say here?

21 Well, guess what? He released that report
22 with respect to XXX inappropriately. The others,

1 many of the others -- I shouldn't say all of the
2 others, but some of the other TLDs have already
3 reached their contract negotiations. I'm sorry, had
4 already signed their contracts. If they didn't have
5 to deal with criticisms, opposition or whatever else
6 with respect to their contracts, neither should we
7 have. Our evaluation report should have been held
8 until the end as well, or they should have all been
9 issued at the same time.

10 Okay, well, now there is a big furor.
11 Guess what? You didn't really follow process, the
12 sponsorship is still an issue, look at the
13 sponsorship evaluation reports, Wellington communique
14 comes out, additional criteria are in there. And
15 guess what? Ms. Burr does it again. He comes out
16 with a contract and she says, there you go. No, we
17 don't like that contract. She does it again. Here
18 you go. We give them every single piece of
19 information that Mr. Jeffrey listed. He said, give
20 us this, Becky, and Becky came up and gave everything
21 that they wanted.

22 And then what happens? They come out with

1 a resolution that makes no mention of the fact that
2 there was -- that this was because the GAC and
3 certain members of the board just don't like
4 pornography. XXX -- I think the words of Mr. Cerf
5 were -- let me get this absolutely right because I
6 would hate to misquote the father of the Internet.
7 It couldn't solve the problem of pornography on the
8 Internet. His testimony. It couldn't solve the
9 problem of pornography on the Internet.

10 Well, whoever said that ICM was trying to
11 solve the problem of pornography on the Internet?
12 ICM was going to contribute as best as it could with
13 technology tools and best practices to try and
14 create, in what may be a space that is unseemly to
15 many, some type of a self-regulating function for
16 those who wanted to self-regulate.

17 No one ever said that ICM, unless you can
18 guarantee to us that you're going to solve the
19 problem of pornography on the Internet, we're not
20 going to give you a TLD. That's unfair. That's not
21 objective. That's not technical. That's outside of
22 ICANN's core mission. That's outside of ICANN's

1 bylaws and articles of incorporation.

2 I think that there are the facts and I
3 hope that you will make your decision based on the
4 facts, on the evidence that is uncontroverted. I do
5 believe that you should give effect to some questions
6 of policy because this is very important. But I
7 don't think that that policy trumps the facts, trumps
8 the bylaws, trumps the articles of incorporation and
9 trumps the undertakings under California law,
10 international law and the instruments which govern
11 this particular body.

12 We believe that there is incontrovertible
13 evidence of unfairness, lack of objectivity, lack of
14 integrity, lack of transparency, lack of openness.
15 And I wish, if I had time, I could take you through
16 an analysis that we've done that shows discriminatory
17 treatment and singling out of a particular applicant
18 in a manner that was not justified. And is this
19 binding? Should your declaration be binding? Oh,
20 you bet it should be.

21 Dr. Cerf sat up there and said, please
22 give us recommendations. Well, my response to you is

1 to give that recommendation in the binding form of an
2 outcome. We heard three witnesses, Chairman Cerf,
3 President Twomey, Vice President Pisanty. Oh, yes,
4 look at this, what we said in the document, document
5 created by Ms. Burr. It was in the documents that
6 this was supposed to be nonbinding. Why the heck
7 didn't you put it into the supplemental rules? Why
8 didn't you say it was nonbinding? Well, in my
9 submission, I learned in the most rigorous manner
10 many years ago that arbitration is presumptively
11 binding, which is why, in contracts here in the
12 United States, where people want to enter into
13 nonbinding arbitration, they say nonbinding.

14 JUDGE TEVRIZIAN: Is this an arbitration?

15 MR. ALI: It's being conducted pursuant to
16 the ICDR rules. And even if it were not an
17 arbitration, Judge, they didn't say nonbinding in
18 their supplemental rules. They drafted those
19 documents. Am I not entitled to know whether this is
20 binding or nonbinding before I go into a proceeding
21 where I'm going to be incurring a lot of expense?
22 And which part is going to be binding or nonbinding?

1 The declaration is nonbinding but the cost award is
2 binding. Hold on a second. I create the rules and I
3 also put in how I can win and how I'm going to be
4 able to get the money out of you.

5 Judge, please, I ask you, issue a
6 declaration that's nonbinding, we win at ICANN, I
7 want you to enforce -- give me a cost award that I
8 can go and collect against them, but that part is
9 binding because I stuck it into my rules.

10 But let me read to you one other
11 principle.

12 JUDGE TEVRIZIAN: Let's take a step back.

13 MR. ALI: Yes, sir.

14 JUDGE TEVRIZIAN: I'm looking at the
15 independent review of foreign actions, section 3,
16 paragraph 8. The IRP shall have authority to, A,
17 request additional written submissions from the
18 parties seeking review or the supporting organization
19 or from other parties, B, declare whether an action
20 or inaction of the board is inconsistent with the
21 articles of incorporation or bylaws, and, C,
22 recommend that the board stay any action, decision or

1 that the board take any intervention until such time
2 as the board reviews and acts upon the opinion of the
3 IRP. Where does it say it's binding?

4 MR. ALI: Where does it say it's
5 nonbinding? I don't mean to be argumentative, sir,
6 but I do think that given the legislative history, if
7 they intended to be nonbinding, they should have said
8 it. They're the drafter of the document. It should
9 be construed against them.

10 I would also say that of course one would
11 hope that the logic, the factual findings, the power
12 of the reasoning and given who you are will
13 legitimize that decision and that ICANN will
14 voluntarily comply with it. I would be surprised if
15 Mr. LeVee told you, or Mr. Jeffrey, otherwise, given
16 what we've gone through, that they will say, a-ha,
17 forget it. But that's a different point.

18 The point is that the bylaws say that
19 ICANN's accountability procedures should enhance its
20 effectiveness. Core values says that. Enhance its
21 effectiveness. How could ICANN's effectiveness be
22 enhanced by a decision that Mr. Pisanty, Mr. Twomey

1 and Mr. Cerf sat up there and told you, well, we
2 don't like it, we're going to ignore it. Sorry, nice
3 try, nice to have you here, guys, we'll send you the
4 check for the time you've spent. We'll just do
5 whatever we want.

6 MR. PAULSSON: They said that the board is
7 more representative, might be considered to be more
8 representative and more technically competent.

9 MR. ALI: Right, sure. For the technical
10 submission that ICANN is supposed to -- the limited
11 technical submission that ICANN has, sure. Mission.
12 The mission of the Internet Corporation For Assigned
13 Names and Numbers is to coordinate, at the overall
14 level, the global Internet's systems of unique
15 identifiers. And in particular, to ensure the stable
16 and secure operation of the Internet's unique
17 identified systems. In particular, ICANN -- and it
18 goes on to say a whole bunch of technical things that
19 I kind of sort of maybe understand.

20 But the point is, the person who told you
21 that was an engineer. He sat there, as you know, you
22 know, probably many engineers, many scientists think

1 that, hey, why should we have a panel of arbitrators
2 or decision makers or lawyers? What do they really
3 understand about our business? How can they really
4 make a determination that can tell us what to do?

5 MR. PAULSSON: Whether it persuades you or
6 not or anybody else, I was just suggesting that it
7 would be unfair -- I think it would be unfair to
8 characterize the testimony of these gentlemen who are
9 part of ICANN governance as arbitrarily saying, no,
10 we want to be the emperors of all this and therefore
11 the decisions are not binding.

12 There was a rationale behind it,
13 persuasive or not, at least that I heard and that had
14 to do with those two twin points, how the body which
15 is selected and operates in the way as to have input
16 which is knowledgeable about this particular
17 industry, point one, and has a degree of
18 representativeness because of its recruitment and
19 size and so forth, which is difficult to duplicate.

20 MR. ALI: I'm here to argue with Mr.
21 LeVee, Judge Paulsson. Not with you. Certainly I
22 might disagree with that particular view insofar as

1 Mr. Pisanty's testimony or Dr. Cerf's testimony is
2 concerned regarding the binding or nonbinding nature
3 of this proceeding, but I don't believe that that
4 rationale that was given that this is a technical
5 function that we perform and, therefore, you are
6 unqualified to make that determination. It's a legal
7 determination. It's a determination based on the
8 application of the bylaws and the articles of
9 incorporation and the application of international
10 law.

11 MR. PAULSSON: What difference does it
12 make if it's binding or not? I would be interested
13 to hear what Mr. LeVee has to say about this same
14 question. I can see that if we're going to get to
15 the detailed point of an award of costs, but that's
16 not really why we're here, but I can see that whether
17 or not in order to pay a certain amount of money for
18 cost of proceedings, I see the point about whether
19 it's binding or not. But to say it has not obeyed
20 its own governance principle, what difference does it
21 make if it's binding or not? If you're going to
22 treat it as an award, would you then take it to a

1 court and ask for specific performance to the extent
2 that a site has to be opened up?

3 MR. ALI: It sort of depends on what
4 you're saying in the award but --

5 MR. PAULSSON: I'm asking you.

6 MR. ALI: A declaration that they have
7 acted inconsistently with their bylaws and articles
8 of incorporation, we hope would result in the ICANN
9 board saying that, yes, we got it wrong, let's
10 revisit that determination. ICM -- we're not saying
11 that you can order and recommend that they give us
12 the TLD. ICM will come back in accordance with all
13 the requirements and in good faith, we collaborate
14 and we try and get this thing done on the basis of
15 the objectivity and the integrity and fairness that
16 the process called for and the bylaws called for.

17 Now, what would happen if we were to
18 suddenly end up a year from now with a .XXX domain?
19 That's the injury to us and we may well have a
20 different problem with ICANN. ICM didn't get it, but
21 somebody else who is going to the next round and
22 putting in -- I don't know how much it is per

1 application where they stand to make millions and
2 millions of dollars in application fees.

3 Well, we know pornography is pretty
4 lucrative. My point, sir, is that if you were to
5 categorically say that they acted inconsistently, I
6 believe that the integrity of the organization would
7 come into play and they would say, we will do what we
8 were told to do which is revisit that decision. And
9 hopefully, we would hope, come to the right outcome
10 which is to execute a registry contract which they
11 should have executed but for extraneous
12 considerations that came in to play.

13 MR. PAULSSON: So some member of the board
14 who actually technically does not believe that the
15 declaration is binding can nevertheless say, well,
16 they stuck with what they say and we better take
17 account of this decision. You seem to be agreeing
18 that it might not make a difference.

19 MR. ALI: It may not. That's the system
20 they created. I wish it were a more perfect system.

21 JUDGE TEVRIZIAN: Again, my learned
22 colleague raises an insightful point, when I look at

1 section 3, independent review board actions, section
2 15 says, where feasible, the board shall consider the
3 IRP, independent review process, declaration at the
4 board's next meeting. So it would just seem as if
5 they could say, thank you, but no thank you.

6 MR. ALI: Judge, I didn't create the
7 system. I'm asking you to give as much teeth as you
8 can based on the precision of your reasoning and
9 ultimately the findings that will be based on
10 reflecting all of the evidence and the submissions
11 that we've made on the law.

12 I believe I've run out of time, and
13 fortunately for you, I've perhaps come to the end of
14 all I had to say for now. I look forward to coming
15 back later on with Mr. LeVee to answer any further
16 questions, but I would simply like to say right now,
17 as I may not get an opportunity to later on, to start
18 out by reflecting my amazement and wonderment not
19 only at the Internet, but that a very age old
20 technology is still administered with such skill and
21 grace as court reporting, which goes back a very long
22 time; to thank Mr. LeVee and his team and the ICANN

1 staff here for their energy, their elegance and
2 certainly Mr. LeVee for his eloquence so far and the
3 eloquence that we're about to hear; my team for
4 everything that they've done. They really are a
5 remarkable lot, and I'm very proud to have been able
6 to work with them on this matter; and ultimately to,
7 of course, Judge Schwebel, to thank you and Judge
8 Tevrizian and Professor Paulsson for all the hard
9 work that you've done, for your attention this week,
10 and for agreeing to do this, and for the incredibly
11 important decision that you will be making which we
12 certainly hope we have convinced you should be in our
13 favor. Thank you.

14 JUDGE SCHWEBEL: Thank you so much. Are
15 there any further questions you would like to put at
16 this moment? Well, then let's have a break now.

17 (Recess.)

18 JUDGE SCHWEBEL: Please.

19 MR. LEVEE: Thank you, Judge Schwebel.
20 Members of the panel, I too wish to thank each of you
21 for your participation this week, for your patience
22 and for your knowledgeable and informed questions

1 which have made it clear to me this morning that you
2 have paid close attention to the proceedings.

3 I also want to thank the lawyers and
4 witnesses who are in the room for what I will call an
5 intense but a very civilized proceeding. And the
6 level of cooperation between and among the lawyers,
7 particularly leading up to the proceeding, but also
8 during the proceeding itself, was quite excellent and
9 so I wish to thank everyone and it allowed us to
10 focus on the merits, which is where we need to be.

11 I will, during my closing argument,
12 attempt to answer each of the questions that the
13 panel posed to Mr. Ali and undoubtedly, if I do not,
14 the members of the panel will ask those questions
15 again, and of course, I encourage you to ask whatever
16 questions you wish.

17 Let me start where Mr. Ali left off and
18 let me discuss an issue that I suppose in some ways
19 the least appealing argument after going through such
20 an intense proceeding for me, which is whether this
21 ruling that the panel will make, the declaration, is
22 binding or not binding. I do think the bylaws make

1 it quite clear, Judge Tevrizian, in Article 3.8 of
2 the bylaws, that the board is to declare, that it is
3 to issue a recommendation, and then in section 3.15,
4 the bylaws make it clear that where feasible, the
5 board shall consider the IRP declaration at the
6 board's next meeting.

7 The drafting history also makes it clear
8 that the IRP is a nonbinding process. Dr. Pisanty,
9 who is the chairman of the ICANN committee on
10 evolution, testified that the IRP was to be
11 nonbinding. And just so the record reflects, Kate is
12 putting up the actual trial testimony on your
13 monitor. This is from the court reporter and we will
14 do this throughout the course of my closing argument.
15 And it will say at the bottom the page numbers and
16 then we'll provide copies of course to the panel.

17 The committee on ICANN evolution and reform
18 blueprint which was hearing Exhibit AC on page 12
19 also made it clear that the board should create a
20 process to require nonbinding arbitration. And
21 indeed, Ms. Burr, who was one of the persons
22 responsible for writing a report implementing the

1 evolution and reform committee's blueprint, agreed in
2 the recommendation she wrote, Exhibit V, page 11,
3 that the independent review panel's decisions will be
4 nonbinding because the board will retain final
5 decision-making authority as set forth in the
6 blueprint and the IRP's decision will have, and
7 undoubtedly it will have, persuasive public power.

8 The final implementation report, which is
9 also hearing Exhibit AE, page 11, says that the
10 independent review process recommended in these new
11 bylaws is not the Supreme Court of ICANN. Now, let
12 me tell you why, and Professor Paulsson asked a
13 couple of questions along that line. And let me turn
14 to Dr. Cerf's testimony and his rationale. The IRP
15 was not meant to nullify decisions of the ICANN board
16 and it was not to make technical decisions associated
17 with the Internet. As Dr. Cerf testified, this
18 advisory panel makes recommendations to the board but
19 the board has the ultimate responsibility for
20 deciding ICANN's -- deciding policy for ICANN.

21 To be clear, ICM, on page 266 of their
22 memorial, asks this panel to issue a top-level domain

1 with the string XXX, and put it into the root.
2 Candidly, I don't know how the panel would do that
3 because the United States Government is the one that
4 puts strings into the root. But the point of the
5 matter is that the ICANN community knew that
6 decisions had to represent the ICANN community and
7 that putting TLDs into the root or taking them out of
8 the root or making other decisions of that kind were
9 decisions that needed to be made by the ICANN board.
10 And of course, the ICANN board will consider this
11 panel's declaration.

12 And I want to be clear, we will post on
13 our website prominently the declaration that this
14 panel issues and many in the community will read that
15 declaration with great interest and it will have
16 persuasive public power. In part, it's going to be
17 the first IRP declaration. In part, it's a
18 controversial issue and a lot of people are going to
19 want to read it. So I want to make it clear to the
20 panel that ICANN respects what the panel will be
21 doing and it will pay very, very close attention and
22 the board ultimately will give serious consideration

1 to the panel's recommendations.

2 Let me then turn to the question of the
3 deference due to the actions of the ICANN board.
4 Now, Mr. Ali in his opening statement said that I
5 would spend a lot of time talking about deference and
6 I didn't. And the reason I didn't is that I don't
7 know that substantial deference to the board's
8 decisions is really an issue you're ultimately going
9 to have to decide, because I don't think that
10 substantial deference to the board's decision is
11 outcome determinative here as to whether the board
12 violated its articles or bylaws.

13 I will say that I do believe that
14 deference is required by the provisions of the
15 bylaws, it's required by the core values which
16 explain that the core values guide the board. Kate
17 has put up the 11 core values and I'm not going to
18 read them. You've seen them before. But the gist is
19 that the board shall exercise its judgment to
20 determine which core values are most relevant and how
21 they apply. And the language explicitly requires
22 deference to the board's actions taken pursuant to

1 the core values.

2 We have the drafting history of these
3 bylaws, including the statement written by Ms. Burr,
4 Exhibit AE, which, as I mentioned before, indicate
5 that the panel is not the so-called Supreme Court of
6 ICANN. And then of course, we have what I will call
7 well-established corporate law principles that
8 require deference to the decision of a board. And
9 that's all in our brief, and I'm not going to repeat
10 it here. And the reason I'm not going to dwell on it
11 is, as I said, I don't think it's outcome
12 determinative because I think, and I hope that I will
13 make clear this morning, that the board did not
14 violate its bylaws and articles whether you give it
15 substantial deference or not.

16 Let me then turn to the question of the
17 applicable law for this proceeding, and I will be the
18 first to tell you that I am not an international law
19 attorney, but I have listened carefully to the expert
20 reports, I spent a fair amount of time with
21 Dr. Caron, and I think the panel must answer two
22 questions with respect to international law issues.

1 First, does the international law principle of good
2 faith apply to a private corporation, a not for
3 profit corporation established under the laws of
4 California such as ICANN, and, two, if so, how should
5 the panel apply that principle in this case?

6 As a starting point, I think both experts
7 conceded, although maybe Professor Goldsmith a little
8 less so, that most international law imposes
9 obligations on states rather than private
10 corporations such as ICANN. And it is clearly the
11 exception to the rule that international law would
12 apply to a private corporation. And both experts
13 agreed that exceptions to the rule are rare and they
14 are limited.

15 They both also agreed that there was only
16 one way in which the international law principle of
17 good faith applies here, was that if it was assumed
18 by ICANN -- these are ICANN's articles of
19 incorporation, so ICANN had to intentionally assume
20 them through adoption of Article 4 of ICANN's
21 articles of incorporation, which states, of course,
22 that ICANN will carry out its activities in

1 conformity with relevant principles of international
2 law and applicable international conventions and
3 local law.

4 Both the experts agreed that Article 4
5 must be interpreted initially under California law
6 because it's a California corporation. Judge
7 Tevrizian asked who would enforce that. The answer
8 would be, in a dispute, the California attorney
9 general. And California law requires tribunals to
10 look to the drafter's intent and other extrinsic
11 evidence when interpreting ambiguous terms, if they
12 are ambiguous.

13 The problem here, of course, is that we
14 really don't have terribly useful extrinsic evidence
15 in the record supporting the notion that ICANN took
16 the affirmative, intentional and unilateral step of
17 assuming international law principles for everything
18 it does, much less for an IRP proceeding. And I
19 should remind the panel that the IRP proceeding, as
20 set forth in the bylaws, was added in 2002 while the
21 articles of incorporation were signed in 1998.

22 And so one would think, if ICANN was

1 assuming, for purposes of these proceedings, the
2 obligations under international law, it might have
3 said that rather than having a situation where the
4 parties, now several years later, look to Article 4
5 and have a dispute as to its meaning.

6 Now, Mr. Ali said that the panel should
7 focus on every word in the documents. And I agree
8 and the first place I start is with the word
9 relevant, because Professor Goldsmith said he didn't
10 look at that word. There are only a handful of words
11 that we had to look at, and he decided that that word
12 was not going to aid him in the determination of what
13 the phrase meant.

14 Professor Caron did look at the word and
15 he concluded that the international principle, the
16 international law principle of good faith does not
17 apply to ICANN in this matter. Professor Caron also
18 noted -- or perhaps just as importantly, let me say
19 that the second international law question the panel
20 must answer, which is that if the panel believes that
21 the principle of good faith applies to this
22 particular proceeding, how should we apply it to this

1 proceeding?

2 As Professor Caron said in his testimony
3 yesterday, the international law principle of good
4 faith is like a target in which there is the epitome
5 of good faith in the middle and bad faith is off the
6 target. And the task for the tribunal is not to look
7 at the center of the target and ask whether they
8 acted in perfectly good faith, but rather whether
9 it's manifest that they acted in bad faith. And I
10 suggest to members of the panel an utter absence of
11 bad faith, and I suggest to the panel that ICANN
12 acted in good faith and I'm going to get to all of
13 that in a moment.

14 JUDGE TEVRIZIAN: Let me ask a question.

15 MR. LEVEE: Of course.

16 JUDGE TEVRIZIAN: This concept of
17 international law and good faith and fair dealing is
18 really not foreign to California. California law has
19 the concept of good faith and fair dealing in every
20 contract that's written in that state.

21 MR. LEVEE: Okay. I agree completely.

22 Now, I will say that the question of whether it is in

1 an RFP and the contours in California law which
2 typically -- you know better than I -- that typically
3 apply in a contractual setting as opposed to
4 independent review panel setting, which of course
5 we're not going to find any California case law in an
6 IRP setting, I think those may be distinct questions.
7 But certainly in a contractual setting, the good
8 faith principles would apply.

9 JUDGE TEVRIZIAN: I thought I was clear,
10 but it's implicit in every contract, the concept of
11 good faith and fair dealing.

12 MR. LEVEE: Absolutely. I agree with
13 that. Let me turn now to the facts, and let me ask
14 the panel to look at the slide that I started with in
15 my opening statement, in which I posed the question,
16 "Did ICANN's board act inconsistent with its bylaws
17 or articles of incorporation in conjunction with its
18 consideration of ICM's application for the .XXX
19 sponsored top-level domain?" That's what we're here
20 to decide.

21 And what I will attempt to do this morning
22 is discuss the facts and the evidence you have heard

1 this week. As I do so, I will try to address ICM's
2 version of the facts and each time that I do so, I
3 would ask the panel to consider this question. When
4 I say ICM makes an allegation that something happened
5 that they didn't like, ask yourself, did ICANN's
6 board act inconsistent with its bylaws or articles of
7 incorporation in conjunction with that particular
8 event or in the entirety, because I believe the
9 answer undoubtedly is no.

10 Now, we start in the year 2000. In that
11 year, ICM, under different management, applied for
12 the .XXX top-level domain as a generic top-level
13 domain in what was called the proof of concept round.
14 And in Exhibit 50, which is before the panel, .XXX
15 was not selected and the board of ICANN explained
16 that at this early proof of concept stage with a
17 limited number of new top-level domains contemplated,
18 other proposed top-level domains without the
19 controversy of an adult TLD would better serve the
20 goals of this initial introduction of new TLDs. And
21 it went on to say that there was significant
22 controversy concerning the application and that the

1 application adopted what it called a poor definition
2 of the hoped for benefits of .XXX.

3 So in 2003, the ICANN board decided to
4 issue an RFP for sponsored top-level domains and, as
5 I said in my opening, only for sponsored top-level
6 domains. We heard a lot of testimony this week. I
7 hope the panel now has a good appreciation of the
8 difference between sponsored top-level domain and an
9 unsponsored or generic.

10 As Dr. Cerf testified, a significant
11 amount of what were the sponsored top-level domain, a
12 significant amount of authority and responsibility
13 remanded to the sponsor for the operation of the
14 sponsored top-level domain, and the board must
15 determine whether the sponsor is capable and prepared
16 to take on responsibilities associated with the
17 sponsored top-level domain.

18 Now, there was some controversy in 2003 as
19 to whether the board should limit itself at that time
20 to sponsored top-level domains. But that's the
21 decision the board made. And you'll see when I get
22 to the hearing transcript of 2007, Susan Crawford,

1 who you heard of several times this week, she was
2 unhappy that we even had the sponsored top-level
3 domains. But the bottom line is that's the decision
4 the board made, and that's how it proceeded.

5 So we know, of course, that ICM applied
6 for the .XXX sponsored top-level domain in 2004, and
7 we know that they knew that it would be a
8 controversial application. I started out that way
9 when I asked Mr. Lawley in his cross-examination,
10 "ICM knew that its application for the .XXX sponsored
11 TLD would be controversial; you knew that, didn't
12 you?"

13 "Answer: Yes."

14 We asked Ms. Williams, "It was obvious
15 from the proof of concept round from 2000 that an
16 application for an adult content stream would be
17 controversial?"

18 "Answer: Yes."

19 So ICANN then refers the applications to
20 the three evaluation teams. Dr. Williams was the
21 head of the sponsorship panel. She testified this
22 week. And the sponsorship panel recommended

1 unequivocally that ICANN not pursue ICM's application
2 for the XXX sTLD because it did not meet the
3 selection criteria and had, quote, deficiencies that
4 cannot be remedied within the applicant's proposed
5 framework.

6 In fact, .XXX's application did not meet
7 four of the nine subparts of the sponsorship
8 criteria. Again, Dr. Williams provided the testimony
9 in which she explained that .XXX did not present a
10 clearly defined community in the sponsorship team's
11 view, that there was extreme variability, which is
12 right on your screen, extreme variability of
13 definitions of what constitutes the content which
14 defines this community makes it difficult to
15 establish which content and associated persons or
16 services would be in or out of the community.

17 She then said that the interests of ICM
18 and their proposed community, in particular, what the
19 interests of the .XXX community would be, were
20 unclear. And in the evaluation report, she concluded
21 with her colleagues -- this is Exhibit 110 -- that
22 there was inadequate support from the community.

1 Now, as we know, ICANN's board elected to
2 proceed with 8 of the 10 evaluations notwithstanding
3 that the sponsorship team had rejected that.
4 Obviously that is not a violation of the bylaws.
5 That's a decision that the board could make. And it
6 included eight applicants, including ICM. And I want
7 to emphasize this point because ICM throughout the
8 week has argued that they were singled out, treated
9 differently than the others.

10 But what I'm going to point to the panel
11 this week is that not only were they not treated
12 differently than the others, but to the extent they
13 were, they were treated better than the others
14 because they were given more chances and more
15 opportunities, and the ICANN board had multiple
16 opportunities where it could have rejected the
17 top-level domain application and simply proceeded on.
18 But instead ICANN, in good faith, hoping that it
19 would work, elected to proceed.

20 So we get then to the June 1, 2005 vote of
21 the ICANN board. Judge Schwebel, I do think that the
22 last phrase of the second resolution is unambiguous,

1 and I do think it makes it clear that if, after
2 entering into negotiations, the president and general
3 counsel can negotiate proposed commercial and
4 technical terms for a contractual arrangement, at
5 that point, and at that point only, it's presented to
6 the board which has discretion whether to approve and
7 authorize to enter into an agreement.

8 But let's suppose -- let me say this. All
9 three of ICANN's board members this week -- and we've
10 been criticized that we didn't bring more people to
11 the hearing, and I suppose I could have brought the
12 entire staff, but this is an IRP, it challenges
13 decisions of the board, we brought you three board
14 members.

15 And those three board members
16 unambiguously testified, first Dr. Cerf, "This matter
17 was discussed very explicitly with the board during
18 our consideration of the ICM proposal," referring to
19 sponsorship. And then he goes on to say that "ICM's
20 characterization of the June 1, 2005 resolution was
21 inconsistent with his understanding of how the
22 process worked." He said, "we were using the contract

1 negotiations as a means of clarifying whether or not
2 the sponsorship criteria could be or had been met or
3 would be met. And this is not a decision that all
4 three of the criteria had been met."

5 Dr. Cerf said, a couple of pages later, "I
6 hoped that contract negotiations would shed light on
7 whether ICM could satisfy the sponsorship criteria,
8 and that's part of the reason I voted in favor of the
9 resolution," which was accepted, as you know, 6 to 3
10 with an abstention in a telephone call.

11 Dr. Twomey testified that the resolution
12 was not binding. His testimony was, "I knew it was
13 not resolved. I certainly knew it was going to be
14 discussed further." He went on to say, "The board
15 saw contract negotiations as a mechanism where they
16 could find more information about the sponsorship
17 process and allow the applicant to give us more
18 information on the sponsorship-related issues."

19 Dr. Pisanty, of course, said the same thing. In the
20 interest of time, we'll go past that.

21 Now, ICM then says, well, what we were
22 ultimately negotiating really wasn't the contract and

1 commercial terms. We were doing something else. I
2 submit to you that when you look at the appendices
3 and, in particular, Appendix S which the parties
4 looked at frequently, that the parties were clearly
5 negotiating exactly what the board had told them to
6 negotiate. And ultimately, as you know, the board
7 rejected the application and the registry agreements.

8 So ICM responds that a statement by
9 Dr. Cerf at a GAC meeting in Luxembourg shows that
10 the board had made a final decision because that's
11 what Dr. Cerf is quoted as saying. Dr. Cerf said he
12 didn't remember the minutes. I agree with ICM that
13 the minutes of the GAC resolution in terms of that
14 quote, they are clear. But the rest of the text on
15 that page that shows all of the countries that said,
16 well, wait a second, we're not so sure about this,
17 and then you see Dr. Cerf and Dr. Twomey both saying
18 to the GAC, if you've got issues with .XXX, raise
19 them. That's your job. Under the bylaws, if you've
20 got a public policy issue, come to us.

21 Now, ICM also says, well, these -- the
22 board's resolution on June 1st differ from the

1 resolution of .mobi and .jobs because those
2 resolutions contained more precision as to what the
3 board was supposed to look at. But Dr. Cerf
4 testified that it wasn't necessary to add additional
5 language. The board was all over the place. There
6 had been a lengthy presentation by ICM. I think he
7 said it was four hours in April directly to the
8 board. The issue was very much alive and so Dr. Cerf
9 testified, "There were many, many issues that we
10 hoped would be resolvable by entering into contract
11 negotiations."

12 And so, again, I do think the resolution
13 is clear. But perhaps more importantly, we know what
14 the board intended because the board addressed
15 sponsorship at every subsequent board meeting. And
16 so if the board -- if there was some ambiguity on
17 June 1st, it certainly wasn't ambiguous every
18 subsequent time the board met. Mr. Twomey also
19 testified that he and staff of ICANN frequently
20 discussed sponsorship with ICM on a number of issues.

21 And as Dr. Cerf and Dr. Twomey made
22 clear -- well, let me get to what I think is the most

1 important point. Even if the panel decided that the
2 resolution was somehow ambiguous -- I don't think it
3 was, but let's say it was. Does it matter to the
4 outcome of this proceeding? Did the board violate
5 its bylaws or articles by passing a resolution that
6 says, go negotiate a contract after which point the
7 board is presented with a contract, they don't like
8 the contract and twice they reject the contract?

9 I put to the members of the panel that it
10 doesn't matter, that it could not have been a
11 violation of the articles and the bylaws. And why?
12 Because ICM always knew that there had to be a second
13 vote, that they had to negotiate a contract and that
14 the contract had to address the commercial terms.
15 And the commercial terms, which included Appendix S
16 and all the other documents that we looked at
17 somewhat extensively with Ms. Burr, included issues
18 that the board did not believe were appropriate and
19 believed that the GAC had concerns about, which I'll
20 come to in a moment.

21 MR. PAULSSON: But certainly the fact that
22 the board is ultimately empowered to decide whether

1 or not to enter into the contract, you wouldn't say
2 that that would excuse the staff members of ICANN who
3 are negotiating presumptively in good faith with the
4 applicant to ignore or tolerate elements coming into
5 the draft of the contract which they know are
6 nonstarters, just will not do and allow to be put
7 forward to the board for an ostensible review and
8 possible approval knowing that the basic proposition
9 has not been resolved and it will not be accepted.
10 And in your opponent's case, do this in five
11 iterations from August 2005 until February 2007.

12 MR. LEVEE: Excellent question. Let me
13 answer it this way. I think the testimony shows --
14 and I was planning to get into it much further --
15 that ICANN's staff worked with ICM, and ICANN's staff
16 wanted to get this done. And so ICANN's staff
17 understood the issues that had been raised by the
18 board but at the end of the day, it's not ICANN's
19 staff's responsibility to draft the contract and
20 ICANN's staff can only participate in the drafting
21 process in good faith, which I think there is no
22 question -- I don't think Ms. Burr has suggested that

1 the negotiations were not in good faith.

2 What I think she suggested is that we
3 should have drafted language that we knew the board
4 would accept. I don't accept that as a
5 responsibility on the part of ICANN. I accept the
6 responsibility on the part of ICANN that it
7 negotiates the best contract that the applicant puts
8 forward and protects ICANN's rights, and that the
9 board then makes the ultimate decision. And you
10 heard Dr. Cerf say that multiple times. And it is
11 the case that the board disagrees with staff
12 recommendations routinely and that's the board's
13 prerogative. Have I answered your question?

14 So we move past the resolution and at that
15 point, we have two significant letters. First we
16 have the U.S. Government's letter and then we have
17 Chairman Tarmizi's letter.

18 JUDGE TEVRIZIAN: August 11, 2005 and
19 August 12th, 2005?

20 MR. LEVEE: Yes, although Dr. Twomey said
21 they were actually written the same day because of
22 the international date line issue. And he testified

1 that he was actually on the phone with them at
2 essentially the same time. I think the ultimate
3 accusation is that because the United States
4 Government somehow interfered, that ICANN breached
5 its bylaws. It's a non sequitur. The board -- and I
6 think you actually asked the question, Professor
7 Paulsson.

8 The board listened to the United States
9 Government. That was prudent. It couldn't possibly
10 be a violation of the bylaws. And the net effect, as
11 Dr. Twomey testified, was a one-month delay in the
12 consideration of the registry agreement. Instead of
13 voting on the agreement on August 15th, 2005, the
14 board, because the government and Chairman Tarmizi
15 had asked for more process -- I think Dr. Twomey's
16 words were more due diligence -- the board took one
17 more month. That just can't be a violation of
18 ICANN's bylaws.

19 Now, Dr. Twomey also testified and
20 Ms. Burr testified in the -- and actually, I'm not
21 sure we had a he said/she said on this one -- that
22 there had been either a threat or a reference, I'm

1 not sure how to characterize it, by the United States
2 Government that it had the power not to include .XXX
3 in the root. That's a fact. The United States
4 Government has that power.

5 And Dr. Twomey explained why he didn't
6 take -- if it was a threat, he didn't take the threat
7 credibly because the United States Government, one,
8 has never exercised that power in the 11 years that
9 ICANN has been alive. And, second, the United States
10 Government would be terribly loath to exercise that
11 power because of the inevitable reaction by the
12 international community.

13 More relevantly -- well, I should say
14 Dr. Cerf was not aware of the communications. He
15 wasn't aware of the documents that ICM obtained as a
16 result of their FOIA request, but the fact of the
17 letter by the United States Government and even if it
18 had that influence of extending the period of time is
19 not a violation of ICANN's bylaws.

20 So then we have an accusation that in
21 order to provide cover, Dr. Twomey solicited a letter
22 from Sharil Tarmizi to the GAC chairman to get cover

1 for the fact that Dr. Twomey knew he was going to get
2 a letter from the U.S. Government.

3 Dr. Twomey's recollection, I think, was
4 quite remarkable. Remarkable in a good way, I should
5 say. He remembered being on the phone with both
6 gentlemen. They were calling and apparently
7 interrupting each other. And the point was that
8 Dr. Twomey said, look, Mr. Chairman of the GAC, if
9 you have concerns about .XXX, put them in writing
10 because that's how ICANN operates. Don't call me on
11 the phone and tell me you have a problem. Now, is
12 that soliciting a letter to get cover where
13 Dr. Twomey received the phone call? I don't think
14 so.

15 And I should also add, because Dr. Twomey,
16 in particular, was accused of perpetrating some kind
17 of a charade, once he got the call from the U.S.
18 Government, and once he got the call from the
19 chairman of the GAC, and perhaps once he got a call
20 from Secretary Coonan in Australia, that he
21 single-handedly was determined that this would fail,
22 that XXX would fail.

1 I must confess, if there was a charade, no
2 one else knew about it on the board. When you look,
3 as we will in a moment, at the board minutes and the
4 individual board members, and how they voted, it
5 couldn't possibly have been a charade. Instead,
6 Dr. Twomey, even after the board, in 2006, voted the
7 registry agreement down, Dr. Twomey and ICANN staff
8 recommended that ICM submit a new draft, even after
9 they had filed a request for reconsideration. If
10 Dr. Twomey wanted and was determined to turn down the
11 XXX application and somehow manipulate his 14 other
12 board members, why would ICANN -- he was the head of
13 the staff, chief executive officer -- why would ICANN
14 keep working, keep negotiating? If it was a charade,
15 no one knew about it.

16 We then have an accusation that ICANN
17 received Mr. Gallagher's letter first and put it on
18 the correspondence page of its website, which we now
19 know Professor Paulsson has visited, and put Chairman
20 Tarmizi's letter on the front page of the website.
21 Is that the violation of the bylaws, that we put a
22 letter on one page and put another letter on another

1 page?

2 Dr. Twomey testified that every
3 communication that came from the United States
4 Government went on the correspondence page. That's
5 what they did. So I don't think that there is any
6 truth to the claim that ICANN hid the letter, buried
7 the letter, but does it matter? There were two
8 letters and Dr. Twomey testified that those letters
9 asked for more process and that's what ICANN gave.

10 We then have the accusation that once the
11 GAC gets involved, its advice was untimely. That was
12 Dr. Mueller's main opinion, and I respect
13 Dr. Mueller, but he never really did tell you what
14 his expert opinion was based on, or at what point the
15 GAC loses its opportunity to speak, or if it ever
16 lost its opportunity to speak.

17 The GAC had been silent prior to June 1.
18 That is agreed. And Dr. Cerf and Dr. Twomey in their
19 witness statements essentially speculate as to why
20 they think the GAC was silent. They thought that
21 governments simply did not believe that ICANN would
22 move forward on the application. But ICANN did. And

1 then we received the letters and then the GAC issued
2 its communique in Wellington.

3 Once the GAC issues its communique -- and
4 I think again, Professor Paulsson, you asked this
5 question of Mr. Ali -- what was ICANN supposed to do?
6 Could ICANN ignore the GAC communique? We can
7 characterize the GAC communique lots of different
8 ways. It does say at the end that many governments
9 oppose. But not all the governments. That's clear.
10 And the governments had issues and they wanted ICANN
11 to address those issues. And could it be a violation
12 of the bylaws to proceed? Yes. If we had proceeded
13 by ignoring the GAC, then we would have been in
14 violation of our bylaws because the bylaws make it
15 100 percent clear -- ICM isn't arguing otherwise --
16 that once the GAC spoke, the board had a legal
17 obligation under its bylaws to listen. Didn't have
18 an obligation to do what the GAC said, but it had an
19 obligation to listen.

20 Kate is putting the bylaws of Article 10
21 on your screen, but I believe the panel knows it
22 well.

1 So then ICM says, well, I know you
2 considered -- I'm going to jump back to September 15,
3 2005 because at that meeting, the minutes reflect
4 that the board had an extensive discussion of the
5 registry agreement, there had in fact been a
6 one-month delay, and at that time, the minutes say
7 after a lengthy discussion involving nearly all of
8 the directors regarding the sponsorship criteria, the
9 application and additional supplemental materials,
10 the board voted 11 to nothing, with three
11 abstentions, in favor of a resolution authorizing
12 further negotiations with ICM.

13 So we know -- as I said before, we know
14 that the board didn't think that the sponsorship
15 issues were dead but -- so ICM says, well, you didn't
16 post the minutes and so you must have treated us
17 discriminatorily. And it is true, ICANN did not post
18 the minutes for that meeting and six other meetings,
19 as noted in the exhibit. There were seven meeting
20 minutes that were delayed. And Dr. Cerf said, I
21 wasn't very happy about that. This had nothing to do
22 with ICM. This had everything to do with the

1 overworked staff at ICANN. And they didn't post
2 minutes for seven meetings and Dr. Cerf wasn't happy
3 about it and he said, I got it fixed. So today, the
4 board minutes are in fact posted promptly.

5 But was that the violation of the bylaws,
6 that we didn't post the minutes on time? We didn't
7 single out ICM. We treated everyone fairly. Anyone
8 who had an issue discussed in front of the board for
9 those six meetings, none of them knew what the
10 minutes said.

11 And then Dr. Twomey testified to Exhibit
12 169 right after this board meeting that what I called
13 the government of Taiwan, and Dr. Twomey corrected
14 me, which said in ICANN speak, it's China Taipei and
15 that --

16 MR. PAULSSON: Chinese.

17 MR. LEVEE: Chinese Taipei, and it has to
18 do with making sure that the other Chinese government
19 participates in the GAC which they had concerns about
20 if the government of Taiwan was participating. There
21 was a letter saying we too have concerns. Something
22 else was happening during the course of this time

1 which the panel has noted which is that there is
2 increased opposition from the proposed .XXX
3 community, from leaders of the adult entertainment
4 industry.

5 Now, I don't know how the panel is
6 supposed to weigh the letters. Supposedly there are
7 form letters and there is postcards and there is
8 thousands of these and only a few of those. I can
9 only tell you the evidence that we introduced, I
10 thought, from the free speech association or
11 coalition, a trade association that says that they're
12 the trade association of the adult entertainment
13 industry, Exhibit S, they had strong opposition to
14 the .XXX top-level domain. This is Exhibit S, as in
15 Sam.

16 ICANN didn't solicit opposition. These
17 letters came to ICANN. Larry Flynt, you've heard a
18 lot about him, a onetime supporter of the .XXX
19 application writes a letter, Exhibit AT, retracting
20 his support. Private Media Group, a prominent member
21 of the adult entertainment industry, opposes the
22 creation. Wicked Pictures, the same.

1 The point is not to weigh who has got
2 more, although I will note how odd it struck me when
3 Mr. Lawley testified that they, ICM, had done a
4 survey, had a grand total of 55 percent of the survey
5 respondents supported the application. What about
6 the rest? If you do your own survey, I would think
7 you might come up with a better number. But the
8 point was not how many people supported it. It was
9 that the RFP made it clear that there was not
10 supposed to be substantial opposition from the
11 community you were proposing to represent.

12 ICANN had difficulty measuring whether
13 there was support and the extent of the opposition
14 just as we are having difficulty doing today. Is
15 that a violation of the bylaws, that ICANN received a
16 bunch of letters from prominent members of the
17 industry and couldn't evaluate the extent to which
18 they did or did not represent some massive community
19 of adult web masters?

20 So let me turn now to the Wellington
21 communique which is Exhibit 181. The GAC's
22 communique makes it clear that the GAC has concerns

1 and ICM attempted to address those concerns. There's
2 some disagreement about how they tried, but they did
3 try, no doubt. And as you see on your screen, some
4 members, several I think is the correct word, of the
5 GAC were emphatically opposed from a public policy
6 perspective. So what does ICANN do at this point?
7 The ICANN spoke and ICANN's bylaws obligated the GAC to
8 listen. It can't be a violation of the bylaws if
9 you're actually adhering to them by the letter.

10 Now, ICM has argued this week and I think
11 Professor Paulsson raised with Mr. Ali, well, look,
12 you say the GAC was misinformed or it has improper
13 motives or it didn't address the right issues and how
14 do we deal with that? How is it relevant? To me
15 it's clear. Once the GAC speaks, the board has to
16 listen. Now, the board may determine that the GAC's
17 views are irrelevant and the board may determine that
18 the GAC's views or the views of individual
19 governments are driven by political motives and that
20 the board doesn't want to address those, and it can
21 reject the advice of the GAC. There is no doubt. It
22 has an obligation to let the GAC know why it did

1 under the bylaws.

2 MR. PAULSSON: Timeliness.

3 MR. LEVEE: On the timeliness issue? As I
4 said before, I don't -- there is an explanation that
5 Dr. Twomey gave and Dr. Cerf gave as to why the GAC
6 waited. But by -- and Kate has put up on the screen
7 Dr. Twomey's actual testimony in which he says
8 members of the GAC do not just work on ICANN issues.
9 They have responsibilities at home, so forth. And
10 there is a natural tendency of governments to not
11 focus until the end. And that makes sense to me.
12 And it also makes sense that at some point, the board
13 has to make a decision.

14 But the board knew that the GAC was going
15 to address this issue. The GAC had made it clear it
16 was going to address the issue in Lisbon. The GAC
17 only meets quarterly. It has a private meeting, it
18 has a large public forum. The board's meeting in
19 Wellington, New Zealand was when it decided to
20 address this issue and it did. So do I think it was
21 timely? The answer is yes. Do I know at what point
22 there would be a cutoff? That's for the board to

1 decide. I would hope that the board would make that
2 decision, that if the GAC is going to say, look, we
3 requested indefinite extension, we're just not going
4 to say anything, I think the board will act. But in
5 this instance, the board knew that the communique was
6 coming and so it waited.

7 MR. PAULSSON: And you don't feel that we
8 should be impressed with what might appear to be the
9 vehemence of Mr. Lawley and particularly Ms. Burr's
10 expressions of dismay/surprise that this was still
11 open?

12 MR. LEVEE: I don't, candidly. I know
13 that's what they testified. I believe that the
14 evidence was clear that they understood that the GAC
15 would meet, they tried to make presentations to the
16 GAC both before the Wellington communique and
17 before -- I'm forgetting the city, but the communique
18 in 2007, Lisbon, Portugal, and they understood how
19 important it was to try to make a good impression.
20 They wanted to reach out. So I believe they knew.
21 Did they know the extent of what might be the
22 opposition? I have no way of knowing.

1 MR. PAULSSON: What's the evidence of what
2 they knew or should have known?

3 MR. LEVEE: The evidence, as I recall, is
4 that -- first of all, we have all the letters I
5 showed you before, Mr. Gallagher's letter,
6 Mr. Tarmizi's letter, the letter from -- I'll call it
7 Taiwan, and there are a couple of letters that I
8 haven't put up in front of you. All those letters
9 are posted on the ICANN website, just as everything
10 that I've shown you today other than the testimony
11 has been posted on ICANN's website. So it wasn't a
12 secret that governments were concerned. I think
13 that's the best evidence.

14 There is testimony from -- but it's oral
15 testimony and, frankly, it's oral testimony on both
16 sides. We don't have anything from ICM that says in
17 writing, oh, my God, I got caught by surprise. We
18 have their witness statements.

19 I should also mention, while we're talking
20 about the GAC, that you identified the letter from
21 Ms. Coonan which was posted on ICANN's website. I
22 have confirmed, which you knew to be correct, which

1 was that on February 28th, 2007, the Australian
2 government, through Ms. Coonan, expressed objection
3 to the .XXX TLD. I don't know why that wasn't in our
4 exhibits and I don't know why it wasn't in ICM's
5 exhibits. It's there on the website. I have no
6 better explanation.

7 MR. PAULSSON: It might be unusual in the
8 sense that it doesn't ask for delay. It says, we're
9 against this.

10 MR. LEVEE: Yes. And by that time, the
11 government of Canada, several other governments and
12 the government of Australia were quite clear in their
13 opposition as opposed to more process. Now, the
14 issue that Dr. Twomey was asked about or challenged
15 about by Ms. Burr, and also by Ms. Williams, was
16 whether, when he, Dr. Twomey, read about media
17 reports, which actually was in 2006, that Ms. Coonan
18 had expressed concern whether Dr. Twomey was
19 influenced by those media reports. I thought his
20 testimony was clear and persuasive as to why he was
21 not, but of course that's a matter for the panel to
22 decide.

1 But even if he was, he's one vote and of
2 course he abstained at the ultimate 2007 vote, and he
3 explained why. So it wouldn't have passed with or
4 without Dr. Twomey's vote. And I don't think that
5 there is credible evidence that he was influenced by
6 any government other than to permit some additional
7 time to pass, which he made it clear he did.

8 Now, all throughout this time, as you've
9 pointed out, ICANN and ICM are continuing to
10 negotiate contracts, and Dr. Cerf testified that he
11 was still hoping for a positive outcome, meaning that
12 ICM would get a registry agreement. ICANN's staff
13 would not have been negotiating, Dr. Twomey would not
14 have been negotiating, they would not have retained a
15 law partner to be negotiating if there was a
16 conspiracy to put all this away. They were trying to
17 resolve the concerns in good faith.

18 Now, one other accusation I wanted to deal
19 with is that prior to the Wellington meeting,
20 immediately prior, ICANN had failed to post the most
21 updated version of the contract. To be clear,
22 Ms. Burr did not accuse John Jeffrey of doing this

1 intentionally. She knew that she had sent him a
2 draft of the agreement immediately before he was
3 leaving from Los Angeles to New Zealand and probably
4 had a couple of other things on his plate. And so it
5 is the case that that particular draft was not posted
6 immediately. Is that the violation of the bylaws? I
7 don't think so.

8 Now, let me turn for a moment to the
9 issues associated with the registry agreement
10 proposed by ICM. The accusation is made that
11 Mr. Jeffrey, in 2005, said that he hoped -- thought
12 that the negotiations would be straightforward. He
13 did think that. He did hope that.

14 Now, Dr. Twomey testified that the grant
15 of a sponsored TLD is not a right and the real point
16 here is throughout this process, ICANN's staff and
17 its board worked hard with ICM to get this sponsored
18 top-level domain through the process. As I said
19 earlier, it would have been so much more easy to turn
20 down this application in June or in September of
21 2005, turn it down in May of 2006 and don't let them
22 come back. That would have been much easier than

1 what they did.

2 Was it a violation of the bylaws to keep
3 trying? I know it took a long time and I know
4 Mr. Lawley invested a lot of money. I can tell you
5 ICANN invested a lot of time and money. But is that
6 the violation of the bylaws?

7 Now, after -- let me skip ahead.

8 Dr. Twomey then was accused of mischaracterizing a
9 letter that came from Martin Boyle, U.K.
10 representative to the GAC. Do you have that? It's
11 Exhibit 182. Ms. Burr said quite clearly to members
12 of the panel that Dr. Twomey mischaracterized this
13 letter for his singular purpose of putting the TLD
14 into the dumpster.

15 And so I showed Dr. Twomey the letter
16 which, by the way, was sent to Dr. Cerf and
17 distributed to members of the ICANN board and posted
18 on ICANN's website. And Dr. Twomey explained exactly
19 what the letter said. The GAC member of the U.K. did
20 have certain expectations that ICANN would enforce
21 contract terms and his concern was that in so doing,
22 ICANN, in the last sentence of the second paragraph,

1 they want ICM to undertake to monitor all .XXX
2 content as it is proposed and cooperate closely with
3 IWF and equivalent agencies.

4 And then you heard the concern of members
5 of the ICANN board who said, well, wait a second. If
6 ICM has to -- if they're being asked, and incredibly
7 this is what people want, they want them to look at
8 content because they're worried, ICM has said, look,
9 we're not going to allow child pornography on .XXX
10 and someone buys a .XXX website and puts child
11 pornography on it so ICM's obligation is to get it
12 off.

13 Now, this wasn't a problem with .mobi,
14 this wasn't a problem with all the other sponsored
15 top-level domains. With .mobi, if you get something
16 on your mobile phone, it's not supposed to be there,
17 it's not a big deal. With .XXX, if you get something
18 on your Internet screen that's not supposed to be
19 there, that is a big deal because ICANN was concerned
20 that it would have to be monitoring content and that
21 essentially the police in various countries that
22 didn't know how to do that, that the police in

1 various countries were going to be asking ICANN why
2 did you create a .XXX that's not supposed to have
3 this material on it and it's not coming down?

4 Now, I don't know whether ICM would have
5 been able to perform. I hope they would have and
6 ICANN hoped that they would have. But the issue was
7 not a hope. The issue was what was ICM going to do?
8 What assurances could it have?

9 Dr. Cerf testified that somebody has to
10 create and monitor all of the potentially
11 irresponsible activities of the members. The
12 question is whether or not the proposed organization
13 was capable of doing that. I concluded that it was
14 not possible to do so. I'm sorry, I'm skipping
15 around on the page, page 768.

16 So then what I think is very important
17 testimony is Mr. Lawley's testimony and Judge
18 Tevrizian's questions to Mr. Lawley. And what I
19 found profound was that even in 2009, Mr. Lawley
20 really could not tell you how he was going to define
21 the community. He doesn't know who will join, he
22 doesn't know what the definition of responsible is.

1 Interestingly, what he said was -- here's
2 the transcript. Judge Tevrizian asked him, "When you
3 say it's for responsible adult entertainment, how
4 would you define responsible adult entertainment?"
5 Mr. Lawley said, we're not defining responsible. "We
6 were just letting the would-be registrants know that
7 this was a way that they could present to the world,
8 that they could show the world that they were acting
9 responsibly to a certain degree because they were
10 abiding by the terms and conditions."

11 I'm sorry, but to me that's circular and
12 that was one of the problems for the ICANN board.
13 You were letting the registrants decide whether they
14 were responsible. No, it was ICM that was supposed
15 to figure out what was responsible content and they
16 were going to have a board of this IFFOR community.
17 And Ms. Burr and I discussed yesterday that if there
18 were actually members on the board who had been
19 appointed and I won't go back to that. But the point
20 was that the definition was circular because
21 Mr. Lawley was going to let anyone who thought, as an
22 adult web master, who thought that he was responsible

1 or it was responsible or she was responsible to apply
2 for a .XXX top-level domain and get one. That wasn't
3 how it was supposed to work. That's not a sponsored
4 top-level domain.

5 Now, I did ask Mr. Lawley, well, what
6 about web masters who publicly opposed the .XXX
7 domain? And what he said was, they would not be
8 entitled to join the community. Where does it say
9 that in the application, that ICM permitted -- that
10 anyone who opposed the community publicly wouldn't be
11 entitled to join the community? The problem is not
12 the question and the answer this week. The problem
13 was that it was never satisfied from the ICANN board
14 member's perspective what the definition was, who was
15 going to apply the definition, who was going to make
16 the rules. Essentially it was give us the sponsored
17 TLD, we'll figure it out later and the board wasn't
18 comfortable doing that.

19 MR. PAULSSON: Your word circular doesn't
20 help me very much. What's wrong with the notion that
21 the community generates its own protocols? Why
22 should it be frozen as of the first moment and might

1 it not be better if the community is allowed to
2 interact with the wider world and improve its
3 protocols?

4 MR. LEVEE: There were two reasons. One,
5 the board, in part because of the GAC's
6 communications, the board felt that the applicant had
7 proposed a responsible community. That's their
8 definition. A responsible adult entertainment
9 community. And so the board kept asking who is going
10 to define the word responsible.

11 Now, you're right, I suppose we could wait
12 until after the fact, but the board didn't believe
13 that that met the definition of a sponsored top-level
14 domain because you were deciding policy that was
15 critical for determining whether to even have the
16 domain in the first instance. What if the people who
17 were determining policy decided that child
18 pornography was --

19 MR. PAULSSON: Well, they know they're
20 ringfencing a particular domain, and that is a point
21 which has been made many times that this might be
22 anti-free speech because it becomes more easier for

1 governments -- more easy for governments to block
2 that entire site. And so, therefore, maybe I'm
3 projecting, but it seems obvious to project that
4 those who are exposed to the ringfencing of such a
5 domain have a very powerful incentive to be
6 responsible in the sense that you only determine by
7 interacting with those who would want to regulate you
8 so that you will avoid that type of situation.

9 MR. LEVEE: I think that's right, but the
10 question was how was it going to be monitored? How
11 was it going to be enforced? I think there may well
12 have ultimately been some type of community, and I
13 think the community would have adopted guidelines.
14 ICM promised that. I'm not questioning the promise.
15 And they would presumably have coalesced around some
16 standards of some sort.

17 But when you read the transcript from the
18 board decisions in May of '06 and in March of 2007,
19 the members of the board didn't think that that was
20 sufficient because they felt that they were being
21 asked in essence to approve a community that they
22 didn't exactly know what it was going to be. And

1 yes, it might have happened and ICM could have told
2 us what those rules were going to be, but they
3 didn't.

4 MR. PAULSSON: It's an open question.
5 Isn't it obvious that somebody who wanted to engage
6 in the darker sides of pornography would much rather
7 been a .com?

8 MR. LEVEE: I apologize but I don't find
9 that obvious at all. I think that the darker side of
10 .com wants to be wherever people will find them. And
11 so I think one of the concerns was that the darker
12 side of .com would have had incentive to go to .XXX.
13 .XXX, after all -- when you go to .com, you're going
14 to find anything, including pornography. But when
15 you go to .XXX, you know you're only going to find
16 adult entertainment, you're going to find
17 pornography. I think one of the concerns of the
18 board was that people in .com were going to register
19 in .XXX. They wanted to. And the question was, how
20 do you make sure that those from the darker side are
21 either excluded or kicked out? And the board could
22 never get comfortable with that answer.

1 So, as I said, on May 10th, 2006, the
2 board rejected the then current draft of the
3 application. The applicant, ICM, submitted a request
4 for reconsideration. The board ultimately or the
5 staff and the board ultimately suggested, why don't
6 you try one more time and submit us a new contract.
7 Now, Dr. Cerf testified that during this time, quote,
8 there was an increasing disaffection in the adult
9 entertainment community with regard to this proposal.
10 As the years went by, we heard increasingly from the
11 adult entertainment community that some of the
12 players, some significant ones were in fact not
13 favorable to this proposal.

14 I even asked Mr. Lawley this during
15 cross-examination and he agreed that at least XXX had
16 lost some amount of support. Again, ICM disputes
17 what the level is and I'm not sure how anyone
18 ultimately characterizes that. We do know from the
19 February 12, 2007 board meeting minutes, Exhibit 199,
20 that in terms of comments posted on the public forum
21 for ICANN, there had been a new registry agreement,
22 it had been posted and the purpose, among other

1 things, of posting it is to solicit public comment.
2 And so the public comments came in, 77 percent were
3 opposed, 16 percent expressed support.

4 Now, ICM says that this was all a letter
5 writing campaign from a handful of web masters. I
6 don't know whether that's true. I know what they
7 said but I don't know how the board was supposed to
8 figure it out, although they tried. And then if you
9 go down, Kate, two paragraphs, Dr. Cerf asked, how do
10 we figure it out? And Mr. Jeffrey said, well, the
11 support was an issue that had been raised in
12 comments. It would be difficult to measure the
13 participation of the larger community.

14 And then -- and I pointed this out with a
15 couple of the witnesses -- board member Rita Rodin
16 indicated that 65 of 88 web masters had opposed. I
17 agree. It's only 88, but those are the people that
18 came forward.

19 The more salient point was that Ms. Rodin
20 was asking the question at all. She was looking at
21 sponsorship. Now, why was she doing that? She
22 wasn't on the board on June 1st, 2005. Half the

1 members of the board were not on the board by the
2 time -- beginning June 1st, 2005 weren't on the board
3 by the time of March 2007. Those board members had a
4 fiduciary duty to look at these issues independently
5 and they did so. We'll get to the transcript in a
6 moment. I've got about five or six, seven minutes
7 left.

8 Ms. Rodin, a lawyer at Skadden, Arps who,
9 by the way, has represented registry applicants, had
10 questioned and she asked the questions and she did
11 due diligence. In her witness statement, Ms. Burr
12 criticizes the new members of the board for not
13 getting up to speed. She also criticizes them for
14 not being lawyers. As it happens, Ms. Rodin is a
15 lawyer. But I will say Dr. Cerf, I think, was pretty
16 glad he didn't have more than a handful of lawyers on
17 the board. But there was no obligation for members
18 of the board to be lawyers. Quite the contrary, the
19 board members were nominated by various
20 constituencies, the constituencies knew who these
21 people were and ICANN was fortunate to have people
22 like Dr. Cerf and Dr. Pisanty on the board instead of

1 lawyers. Be that as it may, these board members
2 focused on their -- on the question before them at
3 the time. It can't be a violation of the bylaws for
4 them to have done that. That's a basic principle of
5 corporate law.

6 ICM also relied on the number of
7 pre-reservations that it had. We had a lot of
8 discussion about that. Dr. Cerf told you that these
9 kinds of statistics don't tell you how many different
10 parties are involved, and that a lot of the
11 pre-registrations could have been defensive. I think
12 that's pretty likely. And as I said, if a web master
13 has a popular .com address, it's pretty likely that
14 the web master is going to try to get the same .XXX
15 address for trademark and all those other reasons.

16 Let me move ahead then to Lisbon 2007,
17 start with the Lisbon communique by the GAC, Exhibit
18 200. So the board now is -- we're in Lisbon,
19 Portugal. As Dr. Cerf mentioned, these board
20 meetings last seven, eight, nine days. They're long
21 proceedings. The board itself, I should know,
22 doesn't exactly -- it doesn't meet that entire time.

1 Its constituencies meet. One of those constituencies
2 is the GAC and in conjunction with that board
3 meeting, the GAC made it clear that it reaffirmed the
4 Wellington communique and it didn't think that the
5 applicants -- that its concerns had been satisfied.
6 And then Dr. Twomey testified to Exhibit DJ, which
7 was from the Canadian government, which had all sorts
8 of issues and Dr. Twomey pointed out the influence of
9 the Canadian government.

10 So then two days after the GAC issues its
11 communique on March 30, 2007, the board rejects the
12 revised draft registry agreement, and once and for
13 all denies the application. We heard again the
14 accusation this morning relating to Exhibit 121, that
15 the resolution itself is the violation of the board's
16 bylaws. So Kate's going to put those five bullets
17 up. These reasons articulated by the board are
18 intrinsic to what ICANN is and what it does. It's
19 based on its bylaws. I agree, some of these words
20 are not in the RFP. That's beside the point. The
21 point is whether ICANN violated its bylaws.

22 The first bullet, that the registry

1 agreement failed, among other things, on the
2 sponsorship community. Well, we can agree or
3 disagree that that issue still should have been
4 alive, but the board felt it should have been, and it
5 had been alive throughout the entire process.

6 The second one is particularly puzzling to
7 me, that based on the extensive public comment in the
8 GAC communiques, it raises public policy issues. How
9 can that be a violation of the bylaws? We've already
10 discussed that.

11 The third one addresses the GAC
12 communiques and concerns about offensive conduct.
13 The fourth one addresses concerns about law
14 enforcement compliance issues because of content.
15 And the last one is that the board agrees with the
16 reference from the GAC that it had received two days
17 ago that there are credible scenarios that lead to
18 circumstances in which ICANN will be forced to assume
19 an ongoing management and oversight role regarding
20 Internet content which is inconsistent with its
21 technical mandate. I submit to you, members of the
22 panel, this is straight out of the bylaws. It's not

1 a violation of the bylaws.

2 Now, this was an open meeting attended by
3 hundreds, probably more individuals. Dr. Cerf
4 testified that the board considered ICM's application
5 for over six hours during that meeting. And then we
6 have Exhibit 201 which is the voting transcript of
7 the meeting. I can't devote any of my time -- I have
8 little remaining -- addressing the 13 pages of the
9 board's discussion. I have, with Kate's assistance,
10 attempted to encapsulize, summarize what the nine
11 members who voted against ICM, so in favor -- well,
12 I'm getting --

13 JUDGE TEVRIZIAN: Voted in favor of the
14 resolution and denying the application.

15 MR. LEVEE: Correct. Thank you. Dr. Cerf
16 had concerns about the definition of responsible and
17 the substantial disagreement within the adult
18 community. Board member Vanda Scartezini, "ICANN
19 would be forced to assume oversight of content which
20 is totally against the bylaws." Mr. Raimundo Beca said
21 the application doesn't meet the support, doesn't
22 meet the request for proposal, mainly on the

1 supporting community. And these are quotes, which is
2 why they're a little awkward to read. Dr. Pisanty
3 says the proposed contract fails to extricate ICANN
4 from content and conduct-related issues. In fact, it
5 does the opposite. Board member Getschko says, I
6 have consistent problems with the definition of the
7 sponsorship.

8 To separate this community from the
9 general adult community, the proposal uses the
10 adjective responsible. Then it seems that the
11 responsible adult content will be defined by
12 participating in the community, which is what I
13 argued before. Board member Rionge says the ICM
14 proposal focuses on content management which is not
15 the ICANN's technical mandate. Board member Gaetano
16 says if I were a web master of a website with adult
17 content, I would honestly be reluctant to have my
18 site in the .XXX. I'm not sure what that means.
19 Goldstein under the revised agreement, there can be
20 credible scenarios that lead to circumstances in
21 which we, ICANN, would be forced to assume an
22 oversight role. And then board member Rodin, I don't

1 believe this is an appropriate sponsored community.

2 Now, I have just summarized the two short
3 slides, 13 pages of single-spaced transcript. If the
4 panel has any doubt that this was a conspiracy, that
5 Dr. Twomey orchestrated a charade, that the board
6 wasn't operating in good faith, I would urge the
7 panel to read this exhibit, Exhibit 201, because it
8 shows a board struggling, working hard, trying to get
9 the right answer. And as I said in my opening, five
10 members agreed with ICM and they made their case, but
11 they didn't persuade the others. And that at the end
12 of the day, majority ruled.

13 The board members, not a single one, in
14 any of their statements in those pages say that they
15 were influenced by governments in the sense of any
16 kind of improper influence. Yes, they were
17 influenced by the GAC. No doubt. They were allowed
18 to. They were supposed to be. Dr. Twomey made it
19 clear. I asked him, "Did you feel" -- this is Dr.
20 Pisanty. "Did you feel that the board's decision on
21 March 30, 2007 was improperly influenced in any way
22 by governments?"

1 "Answer: No."

2 Dr. Twomey said the same thing. In fact,
3 Rita Rodin, this is Exhibit 201, I don't know if Kate
4 has it up, I want to assure the community that this
5 is not the result of some secret sort of behind the
6 scenes government action or any other inadvertent
7 pressure, but indeed a very robust and soul searching
8 debate among my fellow board members.

9 Members of the panel, the ICANN board
10 spent more time on the ICM application for .XXX TLD
11 by far than any other application for a TLD.

12 Dr. Cerf testified that the board went out of its way
13 to try to work with ICM. He testified that he has
14 spent more time on this proposal than any other.

15 Dr. Twomey testified that the board went out of its
16 way. Did any of the evidence, much of it out of
17 ICM's opening statement and their brief and their
18 testimony this week that I've just showed to you,
19 does any of that evidence rise to the level of a
20 violation of ICANN board's bylaws or articles?

21 In my opening statement, I put those
22 articles up, I put the bylaws up and I challenged

1 ICM, under which one were you treated
2 discriminatorily, were you treated unfairly? You
3 know, we posted the sponsorship team's findings in
4 December and in an effort to be open and transparent
5 and what happens? We got criticized for doing that.
6 True, some of the sTLD applications had registry
7 agreements, but some did not. .Post, an application
8 from 2003, still doesn't have a registry agreement.
9 ICANN was open, it was transparent, it was fair, it
10 treated ICM as well as or better. It was not the
11 outcome ICM had hoped for. I don't think it was the
12 outcome many of the board members had hoped for, but
13 it was the outcome. A bad outcome for ICM is not a
14 violation of the bylaws or the articles.

15 Let me say on behalf of ICANN and on
16 behalf of my law firm, Jones Day, it has been an
17 honor to present to you this week. I very much
18 appreciate your attention and we look forward to the
19 declaration of the panel. Thank you.

20 JUDGE SCHWEBEL: Thank you so much. Do
21 you have any questions? Have we concluded the
22 argument of both sides?

1 MR. LEVEE: We have concluded. What we
2 had discussed with the panel was that if the panel
3 had further questions, we could either recess for
4 some period of time so that the panel could ask more
5 questions or we could be done. That's up to the
6 panel, of course.

7 MR. ALI: I would certainly appreciate an
8 opportunity to respond to a couple of things so I
9 could do those within the context of panel questions
10 or perhaps within the context of post-hearing
11 briefing, because I do think there are some matters
12 that need to be clarified in light of Mr. LeVee's
13 presentation as well as what I referred to earlier
14 on, Judge Schwebel, which is the record is replete
15 with a variety of testimonial inconsistencies which I
16 think are very relevant and unfortunately we didn't
17 have time to bring all of those to the panel's
18 attention, but I do think that they would help inform
19 your final decision.

20 MR. LEVEE: If I might add, this process
21 has been extraordinarily expensive. I will tell you
22 on behalf of ICANN -- and I should have said this in

1 my opening statement as well -- we are hopeful that
2 the panel does not invite post-hearing briefs because
3 we think the panel has an enormous amount of paper,
4 it has or we could provide it the transcript and we
5 would like for the process to end and have finality.
6 But if the panel obviously wishes for post-hearing
7 briefs, we will submit one.

8 As to additional argument, we did not
9 discuss in advance reserving time for rebuttal but if
10 the panel wants to hear more argument today, we are
11 here and both counsel are prepared to do so.

12 JUDGE SCHWEBEL: Let us suspend for 10
13 minutes until 5 of the hour so that the panel can
14 consult among itself and we'll come back and have
15 something to say.

16 MR. LEVEE: Thank you.

17 (Recess.)

18 JUDGE SCHWEBEL: My colleagues do have a
19 few more questions so we'll put questions to counsel
20 and we would appreciate their reply. We've discussed
21 the matter of post-hearing briefs. We do not invite
22 comprehensive post-hearing briefs which would review

1 the case, restate the arguments that we've had. We
2 would be glad to receive, within two weeks, let us
3 say by Monday, October 12, statements of the parties
4 if they wish and if they think it's useful as to the
5 record before us, in particular, what points they
6 believe still divide the parties and what
7 inconsistencies they see in the record between the
8 testimonies and arguments that have been advanced.

9 So we have in mind relatively short, pithy
10 statements which nevertheless are quite specific as
11 to what one side perceives as the defects in the
12 argument of the other and vice versa based on the
13 record. Obviously we do not contemplate the
14 introduction of any new material documents or fresh
15 pleadings, new arguments and so forth.

16 Are there any comments from counsel on
17 that point before we pass to our questions? Please,
18 Mr. LeVee.

19 MR. LEVEE: Let me ask the question that
20 my colleagues are going to ask me. Is there a page
21 limitation to what you've just proposed? I would
22 suggest that one be appropriate and perhaps we just

1 have it by letter, in other words, that we send you
2 electronically a letter that sets forth the issues
3 that you've just described and I would encourage a
4 page limitation simply because it seems as if both
5 sides have had a propensity to use more words than is
6 necessarily useful and I'm to blame equally for any
7 of that.

8 MR. PAULSSON: What you have written has
9 all been very interesting.

10 MR. ALI: I think the page limits are
11 generally artificial. We will of course follow the
12 instruction that's been given and I think it inures
13 to our benefit to be as pithy and precise as possible
14 and focusing specifically on the evidentiary
15 inconsistencies rather than making legal and factual
16 submissions.

17 MR. PAULSSON: Make it look more like a
18 catalog than a novel.

19 MR. ALI: There you go.

20 JUDGE SCHWEBEL: We will not set a page
21 limit but please bear in mind that we're not looking
22 for comprehensive briefs. Rather, we would look

1 towards a pithier analysis.

2 Mr. Paulsson, did you have a question or
3 did you, Judge?

4 JUDGE TEVRIZIAN: I have no questions.

5 MR. PAULSSON: Just a couple of things for
6 each of you, perhaps if I may start with you,
7 Mr. LeVee. And this is not in the nature of the
8 kinds of questions that you would ask if you were
9 cross-examining somebody. It's not as pithy as that.
10 It's just a version of a narrative of your
11 presentation which disturbs me so I'll put it to you
12 and then you can tell me how you would like to
13 correct that.

14 I heard from your witnesses references to
15 their dissatisfaction from the beginning, it seemed,
16 with this application based on perceptions that the
17 presentation of the community was deficient because
18 it was self-defining and, therefore, I heard the
19 adjective circular used several times, and that the
20 notion of responsible was amorphous and raised all
21 sorts of possible complications depending on what
22 implications there might be in that definition.

1 If that was so, it does seem that in the
2 iterations of the contract that we have seen, those
3 elements, self-definition and responsible, were there
4 from the first to the second to the third to the
5 fourth to the fifth iteration over a period of 18
6 months while they were being negotiated -- and here
7 again, I stress the word which you yourself accept in
8 the pleadings to us just a few moments ago. You used
9 that word negotiations so it's not as though the
10 staff is there to be helpful to the applicant to
11 improve their proposal to negotiate with the board.
12 It's not just that form of helpfulness. It's
13 described as a negotiation with the staff.

14 And negotiation does seem to suggest that
15 two principals are involved, A-L-S, in developing a
16 document. And it seems possibly disturbing that
17 documents are negotiated in this way, and again and
18 again proposed after this collaborative -- not
19 collaborative. After these sequences of negotiations
20 to the board and in the very end, the fatal flaw is
21 something that was there from the beginning and never
22 changed iteration after iteration. Now, I would like

1 your comment on what might be wrong with that
2 narrative.

3 MR. LEVEE: Let me start by saying that I
4 think your characterizations of the drafts is
5 accurate and Dr. Cerf testified that he was very
6 frustrated that he kept seeing the same definition
7 and not the changes that he wanted to see. As to the
8 negotiation, I do characterize it as a negotiation
9 and it is ICANN's effort always to be as helpful as
10 it can be.

11 But what I also said and perhaps did not
12 come through well is that with an application, any
13 application for a top-level domain, it is the
14 applicant that has to put forward the fundamental
15 issues, the fundamental definitions, et cetera.
16 There is no doubt that ICANN, at least in one
17 instance, took a draft that it found to be -- I think
18 Ms. Burr's testimony is she had to do it quickly over
19 a holiday and she herself was not terribly happy with
20 it and ICANN attempted to basically reorganize it and
21 put it in a better format.

22 And I will say that ICANN's staff did try

1 to get to a point where a contract might be
2 acceptable to the board, but it was that the staff's
3 efforts ultimately are not the ultimate issue. The
4 ultimate issue is what does the applicant propose and
5 does the board question what the applicant proposes?

6 And so, for example, the board's meeting
7 in May 2006, there was transcript, there was
8 resolutions, it gets voted down. I think there was a
9 transcript. I know there were resolutions and the
10 board's meeting in Lisbon, Portugal was an open
11 meeting. I'm pretty certain Ms. Burr and Mr. Lawley
12 were there. They listened to the debate. And at
13 that point, ICANN's view held strongly is that it's
14 the applicant's responsibility to try to address
15 those issues, not the staff. Am I responsive to you?

16 MR. PAULSSON: Yes. I thank you for that.
17 That was my question for you. And Mr. Ali, it's the
18 same question as before which I must have expressed
19 very inartfully because I was trying to keep it
20 extremely boring, not to talk about any of the policy
21 merits of what one does in terms of regulating
22 pornography at all. Just sort of the -- focusing on

1 the process. So let me put the narrative to you and
2 you'll recognize I'm back at the same question which
3 I feared distracted you somewhat because it is really
4 intended to be very boring.

5 MR. ALI: No worries.

6 MR. PAULSSON: The applicant meets ICANN.
7 Ms. Burr is, as one would expect, a leading person in
8 approaching this. I have in mind the introductory
9 paragraph of the witness statement, where she
10 expresses why she took on this mission. She thought
11 about whether she wanted to get involved as the
12 champion of an application for a XXX site and it's
13 clear that she did not do this without some
14 reflection that, in her view, this was a good and I
15 might say reasonable approach to something which was
16 going to exist on the Internet and she thought it
17 would be better if it happened.

18 And then she meets ICANN and there isn't
19 necessarily a difference of views at all in this
20 respect. There is not a rejection of the idea of XXX
21 on ICANN and we have Mr. Twomey who is actually
22 voting in favor of it. So he seems to see the same

1 point. I don't see any -- there doesn't seem to be
2 any space between them that this might be a good way
3 of governance for this type of content which ICANN is
4 not interested in policing. But there are concerns
5 about the community and the other things that ICANN
6 needs to do before it decides on the registration of
7 the site.

8 So we're now only talking about process.
9 And so that we don't get into anything exciting, let
10 me just say that this is a hypothetical, so we don't
11 have to debate whether, in this case, there was a lot
12 of opposition or not really significant opposition.
13 Let me just take the hypothetical that suddenly there
14 is significant political opposition from 10, 20, 30,
15 40 governments. Let's put ICANN in a very difficult
16 decision, I would have thought, because now you're
17 really testing the tolerance of the world of this
18 form of governance through a -- this very unique form
19 of governance of an important international resource.
20 I'm using your language.

21 Now, at this stage, one might say that
22 ICANN could reflect to itself, we went too fast. We,

1 the members of the board or the majority of the
2 board, we saw Ms. Burr's point and we were attracted
3 to this but we had no idea that there are some people
4 out there, many people out there who don't really
5 understand the Internet as much as we do and they
6 think of it in a central way and they see three Xs
7 and they're against it and they're not going to think
8 further than that. We went too fast. We should have
9 really thought about this.

10 And then perhaps I can see there is a
11 discussion, very frustrating for the applicant who
12 thought this was all resolved and now we're only to
13 commercial and technical matters. There might be a
14 discussion, you know, you've spent a lot of money on
15 this and maybe we can have a -- I have no idea. We
16 can have a discussion about what's your prejudice
17 from all this and maybe we'll find a way to make you
18 whole if indeed this is a mistake that we made.

19 ICANN has never said that they accepted
20 that they made a mistake but in a hypothetical
21 situation, if this were the case, would you then say,
22 sorry, it's too late? The process is such that

1 we're -- this is like a tender for a construction
2 project and once you've gone through the qualifying
3 stages and you're a qualified contractor and now it's
4 only the price and quality, you can't come back and
5 ask whether I qualify because that's been done and,
6 therefore, no matter what, ICANN simply has to tell
7 the U.S. Government that this is to be registered and
8 if the U.S. Government wants to veto that, let them
9 do it and we'll see what happens. Is that your
10 position?

11 MR. ALI: No.

12 MR. PAULSSON: Okay. Explanation.

13 MR. ALI: You wanted to keep it boring.

14 MR. PAULSSON: There are limits.

15 MR. ALI: I was going to say, your .XXX
16 but not Judge Tevrizian's .XXX. No, that's not our
17 position at all, Professor Paulsson. There are two
18 decisions here. With respect to the first decision
19 in June, the board -- I'm sorry, the GAC was given
20 the opportunity to comment. The GAC didn't comment
21 and the board reached a considered decision on the
22 criteria. There is now going to be another decision

1 that's going to be taken down the road with respect
2 to the registry agreement. The question is, on what
3 is it at that point that the GAC must provide its
4 timely advice? Within a process, to be -- you know,
5 there is a process here.

6 I think I would dispute that if the advice
7 has to be timely, it has to be timely with respect to
8 a particular issue and it cannot just be completely
9 open-ended but even there, there may be a number of
10 debates. Now, I have no issue with the GAC coming in
11 and providing its input on policy issues as opposed
12 to on contractual issues. The bylaws specifically
13 provide that the GAC is to provide its input on
14 policy, on the development and adoption of policy.
15 Now, again, there may be significant debate there. I
16 don't see any problem with the GAC commenting but
17 it's a question of what it's commenting upon and what
18 it has been prompted to comment upon.

19 So in response to your theoretical
20 question, that's my response. But I do think that
21 one has to give effect to the notion of timeliness
22 with respect to the issue that has been raised by the

1 board on a policy issue. So in the abstract, can GAC
2 come in later on and say, yes, we're concerned and we
3 want to reflect our views? Absolutely.

4 MR. PAULSSON: So in February 2007, it was
5 too late, in your view, to act consistently with its
6 bylaws, charter and bylaws, ICANN had to approve the
7 application?

8 MR. ALI: No, it didn't. I'm not saying
9 that by virtue of -- our position is that the board
10 had to approve an application that met the criteria,
11 that had to accept an application that satisfied all
12 of the requirements that had been placed on the
13 applicant, whether those were ICANN's own
14 requirements, they were the RFP requirements or
15 whether they were the GAC requirements. So that's
16 our position.

17 MR. PAULSSON: So in February 2007, the
18 board was no longer in a position to be able to
19 reject the application, is that right?

20 MR. ALI: In the abstract, yes, of course,
21 but not if all of the requirements had been satisfied
22 that had been placed before the applicant. Not on

1 the basis of the board saying, well, political
2 considerations or political dynamic leads us to
3 reject this application. Criteria, whatever those
4 criteria might be, whether they're the public policy
5 criteria provided by the GAC subsequently, whether
6 timely or not, whether the technical criteria,
7 sponsorship criteria. Whatever criteria had been
8 laid out there, the question is whether on the basis
9 of the considered review -- and I would challenge
10 Mr. LeVee and the panel to take a look at the
11 different reasons that were given by different board
12 members.

13 He put up a demonstrative saying, take a
14 look at what these board members said. Well, take a
15 look at the five board members who disagree. They're
16 pretty technical and they do some comparisons of the
17 agreement and the Appendix S and what have you before
18 they say, no, this is wrong. Peter Thrush, the
19 current chairman of the board -- I believe that's
20 right, current chairman.

21 MR. PAULSSON: For the importance of --
22 this is no longer a hypothetical question. In

1 February of 2000, given what had happened before, is
2 it your position that the board was no longer in a
3 position to reject the application?

4 MR. ALI: When you say what had gone on
5 before --

6 MR. PAULSSON: The record as we have it.

7 MR. ALI: In terms of all the information
8 that had been provided?

9 MR. PAULSSON: Uh-huh.

10 MR. ALI: The board ultimately has to make
11 a decision. I agree. And within that decision,
12 there is a certain degree of evaluation. Absolutely.
13 The June resolution specifically provided that on
14 technical and commercial matters, there would be a
15 negotiation on the contract and there was going to be
16 another board resolution adopting the registry
17 agreement if the board found it satisfactory. We
18 cannot take any issue with that.

19 What we can take issue with is whether or
20 not the board's decision was honest, was taken with
21 integrity, in accordance with the bylaws, in
22 accordance with the criteria, given everything that

1 the applicant had to do. Every requirement that was
2 put up, the applicant met it as best as it could in
3 negotiation, in collaboration or any other way that
4 you might want to characterize what happened.

5 You have Ms. Burr's testimony as to how
6 this all came about. We have really no testimony
7 from ICANN's side. But the fact of the matter is
8 that every single thing that was asked for, including
9 information that certain board members considered,
10 the board asked for information on sponsorship and
11 the statistics and we looked at a couple of those
12 documents.

13 The board asked for and ICANN asked for a
14 summary of the agreed points with respect to the
15 Wellington communique and what was implemented. So
16 information was given, lots of information. Did they
17 evaluate it? Did they consider it? Did they look at
18 it and say, we ask you to give it to us, you gave it
19 to us, we considered it, all the background
20 information and we also looked at the contract that
21 we had asked you to put together. And did they reach
22 a decision on a rational/reasonable basis that was

1 fair to the applicant? We submit not. Not at all.

2 So I'm not saying that a June decision in
3 June 2005 binds the board subsequently.

4 MR. PAULSSON: I'm wondering at what point
5 between June 2005 and March 2007 the board is stuck.

6 MR. ALI: I think the board is stuck at a
7 point in time when an applicant has given it every
8 single thing that satisfies the objective criteria of
9 the RFP, that satisfies the technical criteria and
10 satisfies all of the additional criteria, all of the
11 additional requirements. At that point, I believe,
12 because it is an evaluative process, there is a
13 contract that is going back, you know, that's being
14 dealt with with Mr. Jeffrey, they're talking about it
15 and negotiating it, they're drafting it, it's going
16 back and forth, additional information is being
17 provided. It's an iterative process and at a certain
18 point, you get to, okay, stop.

19 MR. PAULSSON: If we were able to
20 determine somehow what that magic moment was,
21 inconvenient for ICANN, there is this moment where it
22 can no longer retract without violating its own

1 rules, principles, values, charter, bylaws but in
2 fact -- I'm really sorry for skipping. Now I'm
3 getting into a hypothetical situation. In fact at
4 that moment you have this overwhelming proof that
5 there is a storm of governmental protests against
6 what is being contemplated to the extent which is
7 going to test fundamentally the tolerance of the
8 international community of states for the way the
9 Internet is governed now, ICANN, in your submission,
10 would just have to go ahead and say, we are granting
11 the site and the chips will fall where they may?

12 MR. ALI: Yes.

13 MR. PAULSSON: That has to be your
14 position?

15 MR. ALI: Yes. I shouldn't be squeezed
16 because of that. I played by the rules of the game.

17 MR. PAULSSON: Thank you.

18 JUDGE TEVRIZIAN: I have a question. If
19 you have conceded that the board had the right to
20 final approval once all the information was before
21 the board, doesn't the board have discretionary
22 authority at that point to either approve or

1 disapprove of the complete set of documents that come
2 before the board at that given point in time?

3 MR. ALI: Judge, I don't think it is
4 absolute and unfettered. I think that that
5 discretion as a result of the process and as a result
6 of the different iterations of the agreement and the
7 different requests for information that it provided,
8 whether by the board members individually or by the
9 board or by staff -- you're talking about a process
10 that started over a very long time and requirements
11 are being presented and more and more requirements
12 are being presented. And the evidence very
13 convincingly, I believe, has demonstrated that we
14 continued to meet those requirements.

15 So to the extent that you take the
16 assumption or make the presumption that the board is
17 there as an examining board to say, well, we will
18 only pass you when you meet the passing grade, let's
19 say within the context as we see them, well, I
20 continue to meet requirements and at some point I am
21 going to pass because you imposed those requirements.
22 You've imposed those requirements either directly as

1 a matter of technical criteria, as a matter of whim,
2 whatever it might be, and you've taken the GAC's
3 criteria. And if I then satisfied all of that, I
4 believe that your discretion gets more and more
5 limited with each passing moment that you have
6 imposed a requirement and I then satisfy that
7 requirement.

8 JUDGE TEVRIZIAN: Let's assume you and I
9 are negotiating a contract back and forth. Offer,
10 acceptance, contract is formed. Do you agree with
11 that in the abstract?

12 MR. ALI: Yes, sir.

13 JUDGE TEVRIZIAN: Now let's assume that
14 you are a member of an agency that has a board of
15 supervisors that has to approve contracts. So you
16 and I agree that we have a contract but that's not a
17 contract until it's approved by the board of
18 supervisors, is it not?

19 MR. ALI: I'm going to say to you
20 government contracts are constantly going into
21 dispute and a majority of them arise out of that type
22 of scenario. Certainly there is an approval that has

1 to be given and here, given the history of what took
2 place, given the board approval in June, given
3 requirements that were presented at the Vancouver
4 meeting, that there were additional requirements that
5 were placed on the applicant. The applicant met
6 those and it gets to the point where it really ought
7 to be a rubber stamp. Why? Because the board has
8 provided the direction to staff, at least within the
9 context of what I understand government contracting
10 and the disputes that I've been involved in.

11 There is a delegation of authority to say
12 here are the general guidelines, here are the
13 technical criteria, you have the various government
14 contracting principles and rules. Now go out there,
15 staff, and get it done. Go negotiate a contract.
16 And ultimately those requirements are satisfied.
17 Then there really ought to be very limited discretion
18 for purposes of the approval.

19 Here all of those requirements were
20 consistently being satisfied. Whatever hurdle was
21 put up, whatever hoop was created, we jumped through
22 or over it.

1 JUDGE TEVRIZIAN: Do you contend that
2 there was in fact a contract or this registry
3 agreement that was agreed to and there was a meeting
4 of the minds between staff and the applicant here?

5 MR. ALI: I believe that's what the
6 evidence absolutely reflects. And in fact, I would
7 suggest to you that if you look at the comments of
8 the board members who studied the contract and the
9 registry agreements, at the very minutes that
10 Mr. LeVee pointed out, it becomes pretty clear.

11 JUDGE TEVRIZIAN: Let's assume that you're
12 correct that there was a contract for purposes of
13 this discussion. And you used the term rubber
14 stamping. I avoided using that term. But are you
15 saying that the board then has to rubber stamp that
16 contract and not exercise its discretionary
17 authority?

18 MR. ALI: Discretionary authority that
19 must be exercised in good faith and in accordance
20 with the requirements of the bylaws and articles of
21 incorporation. Good faith, fairness, equity,
22 integrity, openness, transparency. My view is that

1 at this point in time when all the technical criteria
2 have been satisfied, all of the requirements have
3 been presented and the applicant has given all of the
4 information, it is incumbent upon the board to view
5 this application through the prism of all of those
6 particular standards and values that are reflected in
7 ICANN's bylaws and that I've just articulated.

8 At that particular point, I think that
9 extraneous considerations that are not part of this
10 process should not be allowed to distort or impair
11 the board's judgment. There is a presumption and I
12 believe that that's reflected in the bylaws and
13 articles of incorporation. You've got to be a good
14 person. You've got to do this in the right way.
15 You've got to act in good faith. You have to be
16 fair. We didn't put those words in there. They put
17 those words in there and they must have some meaning.

18 And so at that particular point in time --
19 early on in the process, well, maybe I could be more
20 skeptical, I could be maybe a little bit more unfair,
21 I can be a little bit more reticent. But as you go
22 along through the process, I think then those

1 presumptions that arise out of the very standards
2 that are contained in the documents that they create
3 to govern themselves have to be given effect, and
4 that is what the board members need to do. But the
5 board members didn't. No matter what happens,
6 whether it's their own morality concerns, extraneous
7 political concerns, they need to control those
8 because there is another set of concerns. Request
9 for proposal, presentation of criteria, we invite
10 you, request for proposals. Here you go, I propose.
11 I've given you everything that you wanted. Treat me
12 fairly.

13 JUDGE SCHWEBEL: Mr. Ali, was it in accord
14 or disaccord with the proper processes of ICANN, was
15 it consistent or inconsistent with its articles of
16 incorporation and bylaws for members of the
17 Governmental Advisory Committee to oppose granting of
18 a .XXX sTLD on the ground that a pornographic site is
19 inherently offensive?

20 MR. ALI: I'm sorry, Judge Schwebel, if I
21 may understand, was it -- I don't believe -- I think
22 that certain members -- the Wellington communique

1 indicates that certain members oppose a .XXX sTLD on
2 grounds of offensive --

3 JUDGE SCHWEBEL: And my question is, were
4 they acting in disaccord with the governing
5 instruments, the articles of incorporation, the
6 bylaws or was their doing it an unobjectionable
7 exercise of the right of a state to say what it
8 thinks about whatever issue?

9 MR. ALI: States can say whatever they
10 want in whatever forum that they want. And this is a
11 forum for which, as imperfect as it might be, that
12 states might reflect policy views, morality views,
13 cultural views. There are many things that are
14 discussed in the GAC from trademark issues to
15 copyright issues to nonLatin character domain names
16 to all sorts of different things. So that is a forum
17 where they discuss and they can reflect their
18 particular views and those views are articulated in
19 these various communiques.

20 Now, the board looks at those communiques
21 and says, well, we will or will not give effect to
22 what advice has been provided and there is a process

1 for going back and forth with the GAC. So I have no
2 issue with whatever government wants to say, we don't
3 like it, we do like it, we have no view. The GAC's
4 operating principles provide for that and the ICANN
5 structure that was created established this body
6 through which governments would provide their advice
7 on the adoption of policies, development and adoption
8 of policies. I think that's the right language.

9 JUDGE SCHWEBEL: But am I right in
10 understanding the position of ICM is that
11 nevertheless, even if a government is entitled to say
12 what it thinks and it finds pornographic websites
13 offensive, it can say so? Nevertheless, a board
14 administering an organization which is concerned with
15 technical criteria is not entitled to give weight to
16 that expression of the --

17 MR. ALI: I would say that they have to
18 balance. And that's precisely what the governing
19 principles, the core values provide. And I do think
20 that the views that are expressed can be given
21 different weight at different points in time. There
22 is no such thing as a sideswipe or a blitz from the

1 sidelines at the very last minute.

2 So I think that the board has to exercise
3 its discretion because that is the board that has
4 been empowered to do this and the board has to take
5 advice from a variety of different places and the GAC
6 provides its views. But the board does not say, ah,
7 governments have spoken, particularly when the
8 governments have spoken not with one voice and in
9 varying degrees of intensity and say, oh, the
10 government spoke, so therefore we have to completely
11 knock this out. The government spoke in this
12 instance, Judge Schwebel, and the applicant complied.

13 JUDGE SCHWEBEL: Well, in your view, is
14 there room for the contention that even if quite a
15 number of governments took the position and
16 vigorously took the position that a pornographic
17 domain is inherently offensive and shouldn't be
18 there, nevertheless, given ICANN's technical
19 agreement, that it should disregard these
20 representations of governments or simply not weigh
21 them on the grounds that they're out of balance in
22 terms of what ICANN can do?

1 MR. ALI: Because ICANN does not get
2 involved in content regulation.

3 JUDGE SCHWEBEL: That's right.

4 MR. ALI: Or morality issues of that
5 nature and it's not permitted to do so. In my view,
6 and I believe that it is a view that is shared by
7 quite a number of people, including, I believe,
8 Dr. Cerf -- I hate to put myself in the same sentence
9 as Dr. Cerf -- ICANN is not the choke point. It was
10 never intended to be the choke point for dealing with
11 content, morality, cultural, linguistic issues.
12 That's very, very dangerous.

13 And I think that the ICANN staff here
14 would agree. It's not intended to be. That's why
15 the technology allows for implementation at the
16 national level. We can't have a -- it would be very
17 dangerous to create a system in which somehow a form
18 of global morality is dealt with and that ICANN
19 becomes the implementation point for that. Perhaps
20 there is a consensus on certain points. Perhaps
21 there is indeed a consensus with respect to rights of
22 the child, child pornography and various globally

1 held values that could be implemented but that's not
2 why ICANN was created. ICANN wasn't created for that
3 purpose.

4 You look at the founding documents. I
5 read to you from those founding documents in my
6 opening statement and we've had testimony during the
7 course of this week and there is a lot more in the
8 materials that ICANN was never intended to be this
9 focal point where these types of issues would be
10 regulated. Certainly not with an imperfect mechanism
11 like the GAC.

12 JUDGE SCHWEBEL: Are there any further
13 questions?

14 MR. ALI: If I may, Judge Schwebel, just
15 one very brief point. Mr. LeVee was referring to the
16 fact that his presentation -- that there was constant
17 information provided to the applicants about
18 sponsorship being an issue and you've heard lots of
19 evidence. I just want to clarify one point. As you
20 know, we did not hear anything until May of 2006 with
21 respect to sponsorship being an open issue. I would
22 just simply ask the panel to compare two versions of

1 the board minutes. We have a version that was posted
2 immediately after the September meeting on, I
3 believe, September 16, 2005, which contains
4 absolutely no reference to sponsorship. So this is a
5 document created contemporaneously, almost
6 contemporaneously with that particular meeting.

7 We then have the meeting minutes that are
8 posted in June of 2006 and recall what has happened
9 in the interim. In November of 2005, we have the
10 issuance of these evaluation reports. The dogs have
11 been let out. Now, June of 2006, there is language
12 in here that is not included in this other report and
13 this language here refers to sponsorship. I find
14 that very strange. And in May of 2006, the minutes
15 of the meeting refer to sponsorship. Who refers to
16 sponsorship? Mr. Twomey. So I find this bothersome.
17 And that's the only thing I wanted to bring to the
18 panel's attention with respect to some of the
19 remaining evidence, and I thank you for the
20 opportunity.

21 JUDGE SCHWEBEL: Then I think it simply
22 remains to thank counsel for both parties for the

1 excellence of their presentations, both in their
2 written pleadings and their oral argument, and to
3 thank the witnesses as well who have testified so
4 fully and ably. The panel fully agrees with counsel
5 that the spirit of the proceedings has been equitable
6 and we appreciate that. And in all, we're very
7 grateful to all concerned, including our court
8 reporters for doing such an excellent job. We look
9 forward to the brief post-hearing briefs which we
10 described and we will endeavor to render our
11 declaration as soon as we can within the confines of
12 the other commitments that we all carry as well.
13 Thank you so very much. We stand adjourned.

14 (Whereupon, at 1:38 p.m., the independent
15 review process was adjourned.)

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