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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD.,)	
)	
Claimant,)	
)	
vs.)	ICDR Case No.
)	01-18-0004-
INTERNET CORPORATION FOR)	2702
ASSIGNED NAMES AND NUMBERS,)	
)	
Respondent.)	
)	

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TUESDAY, AUGUST 4, 2020

ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME II (Pages 249-421)

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REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
465533



(310) 207-8000 Los Angeles	(415) 433-5777 San Francisco	(949) 955-0400 Irvine	(858) 455-5444 San Diego
(310) 207-8000 Century City	(408) 885-0550 San Jose	(760) 322-2240 Palm Springs	(800) 222-1231 Carlsbad
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FOR THE CLAIMANT AFILIAS DOMAINS NO. 3 LTD.:

DECHERT LLP
1900 K Street, NW
Washington, DC 20006-1110
BY: ARIF HYDER ALI, ESQ.
ALEXANDRE de GRAMONT, ESQ.
ROSEY WONG, ESQ.
DAVID ATTANASIO, ESQ.
MICHAEL LOSCO, ESQ.
TAMAR SARJVELADZE, ESQ.
(202) 261-3300
arif.ali@dechert.com
alexandre.degramont@dechert.com
rosey.wong@dechert.com
david.attanasio@dechert.com
michael.losco@dechert.com

CONSTANTINE CANNON
335 Madison Avenue, 9th Floor
New York, New York 10017
BY: ETHAN E. LITWIN, ESQ.
(212) 350-2700
elitwin@constantinecannon.com

FOR THE RESPONDENT THE INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS:

JONES DAY
555 California Street, 26th Floor
San Francisco, California 94104
BY: STEVEN L. SMITH, ESQ.
DAVID L. WALLACH, ESQ.
PAUL C. HINES, ESQ.
(415) 626-3939
ssmith@jonesday.com
dwallach@jonesday.com
phines@jonesday.com

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FOR THE RESPONDENT THE INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS:

JONES DAY
555 South Flower Street, 50th Floor
Los Angeles, California 90071
BY: JEFFREY A. LeVEE, ESQ.
ERIC P. ENSON, ESQ.
KELLY M. OZUROVICH, ESQ.
(213) 489-3939
jlevee@jonesday.com
eenson@jonesday.com
kozurovich@jonesday.com

FOR AMICI NDC:

PAUL HASTINGS
1999 Avenue of the Stars
Los Angeles, California 90067
BY: STEVEN A. MARENBERG, ESQ.
JOSH GORDON, ESQ.
APRIL HUA, ESQ.
(310) 620-5700
stevenmarenberg@paulhastings.com
joshgordon@paulhastings.com
aprilhua@paulhastings.com

FOR AMICI VERISIGN:

ARNOLD & PORTER
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017
BY: RONALD L. JOHNSTON, ESQ.
RONALD BLACKBURN, ESQ.
OSCAR RAMALIO, ESQ.
MARIA CHEDID, ESQ.
JOHN MUSE-FISHER, ESQ.
HANNAH COLEMAN, ESQ.
(213) 243-4000
ronald.johnston@arnoldporter.com
ronald.blackburn@arnoldporter.com
oscar.ramalio@arnoldporter.com
maria.chedid@arnoldporter.com
john.musefisher@arnoldporter.com
hannah.coleman@arnoldporter.com

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THE TRIBUNAL:

Pierre Bienvenu,
pierre.bienvenu@nortonrosefulbright.com
Richard Chernick,
richard@richardchernick.com
Catherine Kessedjian, ckarbitre@outlook.fr

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1 CALIFORNIA, CALIFORNIA, AUGUST 4, 2020

2 ---o0o---

3 ARBITRATOR BIENVENU: Welcome, everyone,
4 to Day 2 of this hearing. Can you hear me?

5 MR. LITWIN: Yes, Mr. Chairman.

6 MR. ENSON: Yes.

7 ARBITRATOR BIENVENU: Welcome, everyone.
8 We parted yesterday with Mr. Ali requesting an
9 opportunity to say a very brief word. I believe it
10 is in response to a comment by Mr. Johnston.

11 So Mr. Ali.

12 MR. ALI: Thank you, Mr. Chairman. Good
13 morning to you and to Mr. Chernick and good
14 afternoon to Professor Kessedjian.

15 Yesterday, Mr. Chairman, Mr. Johnston
16 referred to the fact that I had used the word
17 "bribery" and alluded to or, in fact, said that I
18 accused ICANN or VeriSign of bribery or that our
19 client Afilias had.

20 I think that he misspoke or misremembered
21 what was on the transcript. I would simply ask
22 that Mr. Johnston be directed to review the
23 transcript carefully to verify that I did not make
24 any such accusations or, in fact, use the word
25 "bribery" or "blackmail" or anything of that

1 nature.

2 I ask this because all of this entire
3 transcript is going to be made public, with some
4 appropriate redactions.

5 However, knowing that it will be made
6 public and that people can get up to all sorts of
7 mischief, I would be grateful if Mr. Johnston could
8 retract his statement or make whatever comment he
9 sees fit, and I'll respond thereafter. Thank you.

10 ARBITRATOR BIENVENU: My recollection is
11 that Mr. Johnston was looking for the word that you
12 had used. And if my memory serves me right, I
13 think the word he was looking for but couldn't
14 remember was the word "sinister" that Mr. Enson had
15 used during one of our procedural hearings.

16 But what I propose is that Mr. Johnston
17 take the next break to consider your request and
18 maybe ask to briefly address the Tribunal on this
19 question when we resume after the first break.

20 But your comments are noted and are now on
21 the record, Mr. Ali.

22 MR. ALI: Thank you.

23 MR. JOHNSTON: If I might comment, I have
24 looked at the transcript, and because Mr. Ali
25 raised this yesterday afternoon, and what my

1 argument related to is what I do regard as a
2 reckless accusation without any support that ICANN
3 is a regulator and specifically Ms. Willett, of
4 course, did not ask and the policy was don't ask,
5 not tell, quote, when you're getting millions of
6 dollars to not say anything.

7 And that comment by Mr. Ali was at Page
8 49, Lines 13 through 18 of the rough transcript,
9 Line 13 through Line 18 on Page 49 -- 46 of the
10 final last night, I guess, transcript.

11 The Panel Chair is also correct that
12 Mr. Ali did accuse and adopt a word used in another
13 context by Mr. Enson to accuse Mr. Enson and I of
14 having a sinister conversation, which I also
15 addressed yesterday.

16 MR. ALI: Mr. Chairman, if I may respond.
17 This is going on longer than I would have expected.
18 I would have thought that Mr. Johnston would have
19 done the right thing. Obviously I did not use the
20 word "bribery," number one.

21 Number two, Mr. Johnston might actually
22 want to read the transcript carefully because what
23 I was referring to, don't ask, don't tell, that was
24 money that was being paid to NDC rather than --

25 ARBITRATOR CHERNICK: Can you speak up,

1 please, Mr. Ali?

2 MR. ALI: I was referring to money that
3 was being paid to NDC. With respect to the first
4 point, would you like me to repeat it again whoever
5 said they couldn't hear me?

6 ARBITRATOR CHERNICK: Not necessary.

7 MR. ALI: So my second point was, again,
8 to clarify the context in which a 15 million --
9 when I was referring to the 15 million. So -- and
10 the third point in terms of the inappropriateness
11 of this phone call at a point in time when ICANN
12 didn't know -- apparently didn't know about the DAA
13 but nonetheless felt it was appropriate for
14 counsel, litigation counsel to call VeriSign's
15 litigation counsel to request information as
16 opposed to the actual applicant is something that I
17 stand by. Thank you.

18 ARBITRATOR BIENVENU: Very well. So we
19 begin, then, with the witness evidence, and the
20 first witness called is Ms. J. Beckwith Burr.

21 Ms. Burr, are you with us? I don't see
22 you on my screen.

23 Good morning, Ms. Burr, this is Pierre
24 Bienvenu. I serve as the Chair of the Panel
25 hearing in this case. I am joined by my colleagues

1 Catherine Kessedjian and Richard Chernick. Now, I
2 cannot see you on my screen.

3 JD, could you help us out here?

4 (Discussion off the record.)

5 ARBITRATOR BIENVENU: So good morning,
6 Ms. Burr, and welcome. Ms. Burr, you have filed in
7 relation to this case a witness statement dated
8 31st May 2019.

9 THE WITNESS: That's correct.

10 ARBITRATOR BIENVENU: At the end of this
11 statement, you swear that the content of the
12 statement is true and correct?

13 THE WITNESS: Correct.

14 ARBITRATOR BIENVENU: May I ask you,
15 Ms. Burr, in relation to the evidence that you will
16 give today to this panel, likewise, solemnly to
17 affirm that it will be the truth, the whole truth
18 and nothing but the truth.

19 THE WITNESS: I do.

20 ARBITRATOR BIENVENU: Thank you very much.

21 Mr. Enson, your witness. Please proceed.

22 MR. ENSON: Thank you very much. Good
23 morning, Ms. Burr.

24 THE WITNESS: Morning.

25 MR. ENSON: We are going to try to do this

1 anyway, is put a copy of your witness statement up
2 on the screen so that you can see it.

3 THE WITNESS: That looks like the
4 document.

5 MR. ENSON: Okay. Ms. Burr, do you wish
6 to make any corrections to this witness statement
7 before we proceed?

8 THE WITNESS: No.

9 MR. ENSON: I'm sorry?

10 THE WITNESS: No.

11 MR. ENSON: Okay. Then, Mr. Chairman, we
12 tender Ms. Burr for cross-examination and reserve
13 time for redirect as it stands necessary.

14 ARBITRATOR BIENVENU: Thank you,
15 Mr. Enson. I believe the cross-examination will be
16 conducted by Mr. Litwin.

17 MR. LITWIN: That is correct,
18 Mr. Chairman.

19 ARBITRATOR BIENVENU: Good morning,
20 Mr. Litwin.

21 MR. LITWIN: Good morning.

22 ARBITRATOR BIENVENU: Please proceed.

23 //

24 //

25 //

1 CROSS-EXAMINATION

2 BY MR. LITWIN

3 Q. Good morning, Ms. Burr. My name is Ethan
4 Litwin. I am from the law firm of Constantine
5 Cannon here in New York City.

6 How are you today?

7 A. I am good.

8 Q. Okay. Can you please confirm that you
9 have received the exhibit bundle in a box or a
10 package or something of that sort?

11 A. I have received it.

12 Q. Okay. Can you please open it on camera,
13 please? Thank you.

14 MR. LITWIN: While you're doing that, I
15 would ask, Mr. Chairman, that the Panel confirm
16 with counsel for ICANN that counsel has also not
17 looked at the bundle for Ms. Burr yet.

18 MR. ENSON: I have not. I'd like to open
19 it up as the witness opens it up.

20 MR. LITWIN: Please do so. Thank you,
21 Mr. Enson.

22 THE WITNESS: I have got it.

23 ARBITRATOR BIENVENU: I can confirm that
24 we have received the -- "we" being the members of
25 the Tribunal -- have received the cross-examination

1 bundle.

2 MR. LITWIN: Thank you, Mr. Chairman.

3 Q. Ms. Burr, from time to time I will direct
4 your attention to a particular document in that
5 bundle. When I do that, I will refer to the tab
6 number in the binder that you have just opened.

7 And if you just open it to a random page,
8 you'll see that we have marked each page of each of
9 those documents in the lower right-hand corner with
10 a new, unique page number. So for everyone's
11 reference, I am going to refer to those page
12 numbers in the binder, even if the original page
13 number is different. That way it is clear in the
14 transcript and to everybody here today.

15 If you have any questions as to what page
16 I'm referring to, please ask and I will clarify.

17 A. Okay.

18 Q. So before we begin, Ms. Burr, I just
19 wanted to clarify one small point in your witness
20 statement. I would direct your attention to Page 7
21 of your witness statement, and at the end of
22 Paragraph 20, at the top of the page, I think you
23 write that, you know, "which had acquired
24 VeriSign." I think what you mean is that VeriSign
25 had acquired NSI.

1 So that second reference should be NSI; is
2 that correct?

3 A. Correct, yes.

4 Q. Okay. Now, Ms. Burr, what documents did
5 you review in preparation for your testimony here
6 today?

7 A. I reviewed my witness statement. I
8 reviewed a witness statement submitted by George
9 Sadowsky and Jonathan Zittrain. I looked through
10 the various requests and responses for independent
11 review.

12 Q. Anything --

13 A. And then a couple of other -- I looked at
14 the bylaws. I looked at the 2008 bylaws and the
15 current bylaws, and I looked at a couple of letters
16 from Afilias to Akram Atallah and I think a couple
17 of other documents that counsel may have shown me
18 during prep.

19 Q. Do you recall what those couple other
20 documents were?

21 A. I think there were -- there were two
22 letters from Afilias to Akram. I think I also
23 looked at a letter from the acting Attorney General
24 for Antitrust to the associate administrator of
25 NTIA.

1 Q. That's the 2008 letter from Ms. Garza?
2 I'm sorry, I didn't get your response.

3 A. Yes, that's correct.

4 Q. Okay. Did you review the Domain
5 Acquisition Agreement that was executed between
6 VeriSign and NDC in August of 2005 -- '15, rather?

7 A. I did not.

8 Q. Okay. Have you ever reviewed it?

9 A. No.

10 Q. Now, Ms. Burr, you're an attorney,
11 correct?

12 A. I am.

13 Q. Have you ever represented Afiliias or any
14 subsidiary in any capacity?

15 A. I think in 2007 or something like that
16 Afiliias and Neustar and one other participant hired
17 me to discuss some of the vertical integration
18 issues. I don't know if I was ever paid by
19 Afiliias, but I was certainly speaking with an
20 Afiliias representative.

21 Q. When did that representation -- I'll just
22 generally call it a representation -- conclude?

23 A. Honestly, over a decade ago.

24 Q. Okay. Have you ever represented VeriSign
25 or any of its subsidiaries or any of its affiliates

1 in any capacity?

2 A. I have never represented VeriSign. When I
3 was a partner at WilmerHale, I had partners who did
4 represent VeriSign. Again, I have not been at
5 WilmerHale since 2012, and that representation
6 would have been much earlier, in any case.

7 Q. Have you ever represented NU DOT CO or any
8 of its subsidiaries or affiliates in any capacity?

9 A. No.

10 Q. And you were employed by Neustar for
11 several years ending in 2019; is that correct?

12 A. That's correct.

13 Q. And Neustar is an Internet registry
14 company much like Afilias and VeriSign; is that
15 right?

16 A. Well, it was until yesterday. It sold its
17 registry business.

18 Q. Okay. At the time that you were there,
19 though, it was an Internet registry company?

20 A. Yes. I started there as chief privacy
21 counsel. So my -- my primary job was deputy job
22 counsel, chief privacy counsel. I started there in
23 June of 2012.

24 Q. And I guess until yesterday Neustar was
25 one of the larger Internet registry companies; is

1 that right?

2 A. Yes.

3 Q. And, in fact, Neustar was identified as
4 the entity that would be providing back-end
5 registry services in NDC's .WEB application; is
6 that right?

7 A. I believe that's correct. I was not
8 involved in those contracting documents, but I did
9 come to learn that after.

10 Q. When you say "after," what do you mean?

11 A. Well, once I -- once I joined the Board, I
12 looked at all of the back end, all of the
13 registry -- actually it was before that, as I was
14 going on the Board. But there would have been a
15 list after the 2012 -- after everybody tendered
16 their applications, there was a list that came out
17 that said Afiliias is the back-end registry for
18 these applications, Neustar is for these, et
19 cetera.

20 So shortly after the submission, that list
21 would have been available to me.

22 Q. Sorry. Which submission are you talking
23 about?

24 A. Submission of new gTLD applications.

25 Q. I see. This is not your first time

1 testifying in an IRP, is it?

2 A. It is not.

3 Q. Which other IRPs have you testified in?

4 A. I testified in an IRP in 2010, I believe,
5 between ICANN and ICM Registry with respect to
6 ICM's application to operate .XXX.

7 Q. Any others?

8 A. I don't think so. Not that I recall.

9 Q. Did you review your testimony from the ICM
10 IRP in preparation for your testimony here today?

11 A. I looked briefly at it.

12 Q. You also served as an attorney advisor to
13 the United States Federal Trade Commission; is that
14 correct?

15 A. Correct.

16 Q. And the United States Federal Trade
17 Commission, or FTC, is one of the two U.S. agencies
18 authorized to enforce U.S. antitrust laws; is that
19 correct?

20 A. That's correct. I am not -- I have never
21 practiced antitrust law or competition law. I was
22 largely involved in privacy-related issues but also
23 the DNS issues and worked on competition issues
24 from a policy perspective.

25 Chairman Pitofsky in 2005 and '6 had a

1 long series of hearings on innovation economy and
2 competition and consumer protection. So I have
3 some familiarity, but I am not an antitrust lawyer.

4 Q. You are currently a member of the ICANN
5 Board; is that right?

6 A. That's correct.

7 Q. And you are also a member of the BAMC, the
8 Board Accountability Mechanisms Committee; is that
9 right?

10 A. Yes.

11 Q. That committee reviews all reconsideration
12 requests; is that right?

13 A. It reviews -- it essentially reviews all
14 reconsideration requests. During the new gTLD
15 Program, there may have been times when, for a
16 variety of reasons, largely to get people who had
17 no relationship to the new gTLD Program,
18 reconsiderations may have come directly to the
19 board as opposed to through the BAMC, but the
20 standard practice is it would come to the BAMC.

21 Q. And what about IRP decisions, is the
22 standard practice that the BAMC reviews IRP
23 decisions as well?

24 A. Yes.

25 Q. And you have been on the board since

1 November of 2016; is that correct?

2 A. Yes. I was seated at the end of the
3 annual general meeting in Hyderabad in 2016.

4 Q. And in November 2016 you were still
5 employed by Neustar; is that right?

6 A. That's correct.

7 Q. Did you participate in any Board
8 discussions regarding .WEB?

9 A. In 2016, no. I observed a Board
10 discussion at a Board workshop before I was on the
11 Board. I did not participate in that discussion.

12 Q. Is that the November 3rd, 2016, workshop
13 session?

14 A. Sounds like it.

15 Q. Okay. Did you receive or review any
16 documents regarding .WEB prior to attending that
17 workshop session?

18 A. Not that I recall.

19 Q. Did you receive any documents as a Board
20 member regarding .WEB after the November 3rd, 2016,
21 workshop session?

22 A. I don't have a specific recollection.
23 It's possible that in connection -- well, it is
24 almost certain that in connection with the DIDP
25 request, the document request, there was some

1 material that the BAMC received and I would have
2 received.

3 Q. And those were Afiliast's DIDP requests in
4 2018; is that right?

5 A. Yeah. I don't remember exactly the
6 documentation what the Board received, but I am
7 certain that we got the information we needed for
8 the reconsideration request.

9 Q. Okay. At the Board workshop session on
10 November 3rd, 2016 -- and before I ask my
11 questions, I want to instruct you not to reveal the
12 substance of anything that was discussed there
13 pursuant to the Panel's ruling regarding privilege.

14 But I would like to ask if the Board
15 members who attended that workshop session were
16 shown a copy of the Domain Acquisition Agreement
17 between VeriSign and NDC?

18 A. I honestly have no idea. I do not believe
19 that I have ever seen it, but I have no idea
20 whether Board members saw it or not. I don't
21 recall any documents being circulated.

22 Q. Okay. Now, you stated in Paragraph 31 of
23 your witness statement that you are aware of the
24 DOJ's .WEB investigation. How did you learn about
25 it?

1 A. Neustar received a CID, and I coordinated
2 the response.

3 Q. Board members have an obligation to be
4 familiar with the governing documents of their
5 organization; is that correct?

6 A. Correct.

7 Q. And that would include bylaws or articles
8 of incorporation, right?

9 A. Absolutely.

10 Q. And nonprofit Board members in particular
11 have an obligation to understand the organization's
12 mission; is that correct?

13 A. I am not going to opine on what California
14 law requires. I certainly think that members of a
15 Board should understand what the mission of the
16 organization is.

17 Q. Thank you. And to be clear, if I -- I am
18 not going to ask you for a legal opinion. I am
19 only asking you about your views as a witness here
20 today.

21 A. Okay.

22 Q. Now, in your view, again, nonprofit Board
23 members need to understand the mission because the
24 primary duty of a nonprofit Board member is to
25 protect the organization's mission; is that

1 correct?

2 A. Again, "primary duties" sounds like legal
3 terms. Let me just tell you, ICANN is an
4 organization with a specified mission and a limited
5 mission and limited authority. It is absolutely
6 incumbent on members of the Board to understand
7 that and to ensure that ICANN stays within its
8 mission.

9 Q. And, in fact, the bylaws provide that
10 directors have a duty to act in what they
11 reasonably believe are the best interests of ICANN;
12 is that right?

13 A. Yes, I believe that's correct.

14 Q. Now, Section 7 of the bylaws -- and
15 that's, for your reference, Tab 2 in your bundle.
16 Section 7 concerns the Board of Directors
17 specifically; is that correct?

18 A. Yes.

19 ARBITRATOR CHERNICK: Do you have a cite
20 to the pages?

21 MR. LITWIN: It starts on Page 42,
22 Mr. Chernick.

23 ARBITRATOR CHERNICK: Thank you.

24 ARBITRATOR BIENVENU: Which tab,
25 Mr. Litwin?

1 MR. LITWIN: This is Tab 2, and the next
2 series of questions will relate to Article 7 of the
3 bylaws that begin on Page 42 of that exhibit.

4 Q. Now, the bylaws provide that the directors
5 should be provided with notice for all Board
6 meetings; is that correct?

7 A. I'm sure that that is correct for all
8 formal Board meetings. You'd have to point me to
9 the specifics.

10 Q. So if you can look at Article 7.16, which
11 is on Page 51, that's the section on notices.

12 A. Okay.

13 Q. Again, I'll ask that the bylaws,
14 particularly Section 7.16, provides that directors
15 shall be provided with notice for all Board
16 meetings; is that correct?

17 A. Notice of time and place of all meetings.

18 Q. And that would -- I'm sorry. Is there
19 anything else that you wanted to add?

20 A. That is in turn referring back to 7.13,
21 14 and 15, annual meetings, regular meetings and
22 special meetings.

23 Q. You just obviated the next three questions
24 I had. Thank you.

25 Now, annual meetings, which are at 7.13,

1 are held for the purpose of electing officers and
2 for the transaction of any other business that may
3 come before the meeting; is that correct?

4 A. Yes.

5 Q. And regular meetings, which is Section
6 7.14, those are meetings that are held periodically
7 on dates that the Board determines, correct?

8 A. Yes, formal Board meetings where they are
9 noticed and agendas and resolutions are distributed
10 and the like.

11 Q. And the bylaws also provide for special
12 meetings at Section 7.15, which may be called at
13 any time at the request of 25 percent of the Board
14 by the Chair or by the president of ICANN; is that
15 correct?

16 A. Correct. Again, this would be for formal
17 meetings, where people are voting on resolutions
18 and the like.

19 Q. Okay. Now, turning to Section 7.17. Just
20 wait a minute to get that up on the screen.

21 7.17, which is the quorum provision,
22 provides that at annual, regular or special
23 meetings, that a quorum is comprised of a majority
24 of the total number of directors then in office and
25 that an act of the majority of the directors

1 present in any meeting at which there is a quorum
2 shall be the act of the Board; is that correct?

3 A. Yes. Again, this is referring to formal
4 meetings.

5 Q. Now, the bylaws also provide that the
6 Board is able to act without a meeting, correct?

7 A. Yes.

8 Q. I refer you to Section 7.19.

9 A. Correct.

10 Q. But the Board can only act without a
11 meeting if all the directors entitled to vote
12 thereat shall individually or collectively consent
13 in writing to such action; is that right?

14 A. Correct, at a formal meeting where there's
15 going to be resolution and votes.

16 Q. Okay. I would now refer you to Section 3
17 of the bylaws. And I'll wait a minute for that to
18 come up on the screen. We can start at, I believe,
19 Page 8, which is Section 3.1.

20 MR. ENSON: Ethan, may I ask, is this a
21 complete copy of the ICANN bylaws?

22 MR. LITWIN: I believe what is in here is
23 excerpts that I am referring to. We do have a
24 complete set of the bylaws electronically if the
25 witness would like to refer to anything I am not

1 showing her.

2 MR. ENSON: Thank you.

3 MR. LITWIN: Sure.

4 Q. So at 3.1 the bylaws provide that ICANN
5 shall operate to the maximum extent feasible in an
6 open and transparent manner and consistent with
7 procedures designed to ensure fairness; is that
8 correct?

9 A. That's what it says.

10 Q. And if you look further down in Section
11 3.1, part of ICANN's obligation to operate open and
12 transparently provides that, "ICANN shall also
13 implement procedures for the documentation and
14 public disclosure of the rationale for decisions
15 made by the Board."

16 Do you see that?

17 A. Yes.

18 Q. Now, ICANN's bylaws don't just say you
19 have to act transparently. They say you have to
20 act transparently to the maximum extent feasible,
21 correct?

22 A. That's what the words say, yes.

23 Q. You would agree that "feasible" means, in
24 general, possible, right?

25 A. Yes.

1 Q. So what the bylaws provide is that ICANN
2 must act transparently to the maximum extent if
3 it's possible to do so; is that fair?

4 A. I think that this is a general admonition
5 that goes all the way through the bylaws and all
6 the way through ICANN's operating procedures that
7 basically says you should act in an open and
8 transparent way. It doesn't mean you can't have
9 conversations and discussions that are not public.

10 Q. Well, it says to the "maximum extent
11 feasible," correct?

12 A. If you are asking me, does this stand for
13 the proposition that the ICANN should meet in
14 public at all times, the answer to that is no.
15 ICANN Board has to have the opportunity to meet in
16 workshops, for example, to get its work done. From
17 time to time we'll provide information to the
18 community before or after about the general topics
19 that we are looking at during our workshop, but I
20 have never understood the requirement to act in an
21 open and transparent way to mandate that every
22 single interaction of the Board and every Board
23 discussion be public.

24 Q. Well, let me ask you this, Ms. Burr: As a
25 member of the Board, when you understand -- what do

1 you understand the bylaw requirement that ICANN
2 should operate in the maximum extent feasible to
3 mean?

4 A. I think there's a practical -- essentially
5 ICANN should act openly. It should be informed,
6 and it should act openly and transparently.

7 Q. And that includes the disclosure of
8 rationales for the Board's decisions, correct?

9 A. That certainly includes an explanation of
10 the rationale for formal decisions for all votes it
11 takes. So that is why ICANN goes to great length
12 to publish significant, detailed documents that
13 explain what information the Board had when it
14 resolved to do one thing or another, yes.

15 We also, you know, have blogs,
16 conversations with different parts of the community
17 and the community as a whole. That is all part of
18 ensuring that there's as much information exchange
19 with the community as makes sense.

20 Q. And these bylaws are disclosed publicly,
21 correct?

22 A. Yes, they are.

23 Q. And, in fact, they are available on
24 ICANN's website?

25 A. Yes.

1 Q. And it's reasonable for members of the
2 global Internet community to expect that ICANN will
3 operate transparently, correct?

4 A. They not only expect it, they demand it,
5 and they have mechanisms to enforce that as well.

6 Q. And those are the accountability
7 mechanisms?

8 A. Accountability mechanisms, DIDP
9 mechanisms.

10 Q. So turning to Section 3.2, ICANN is
11 required to maintain a website, correct?

12 A. Correct.

13 Q. And ICANN is also required to post
14 information about its policy development
15 activities?

16 ARBITRATOR BIENVENU: Are you referring to
17 a specific provision in 3.2, Mr. Litwin?

18 MR. LITWIN: Yes, I am, Mr. Chairman,
19 sub --

20 ARBITRATOR BIENVENU: What is it?

21 MR. LITWIN: Yes, it is --

22 THE WITNESS: (b), I believe.

23 MR. LITWIN: Yes, (b), I believe, correct.

24 THE WITNESS: Of course, you understand
25 that it is the community, not the Board, that

1 develops policy at ICANN?

2 Q. BY MR. LITWIN: And yet -- but just in
3 general, the development of Internet policy, there
4 needs to be disclosure about what's going on on
5 ICANN's website; is that right?

6 A. Well, policy development matters is a very
7 specific reference to a bylaws-described provision
8 for the process for policy development. That is a
9 bottom-up community process that involves different
10 supporting organizations and sometimes advisory
11 committees. There's a very specific proposal.

12 I believe this refers to a docket of
13 pending -- what we would call PDP, Policy
14 Development Process, matters.

15 Q. In fact, part of ICANN's development of
16 policy is to allow for public comment on draft
17 policies, correct?

18 A. Yes. Again, "policies" meaning policies
19 developed by a community.

20 Q. And Section 3.2 requires ICANN to post on
21 its website public comments on draft policies?

22 A. Again, yes, on things that fall within the
23 Policy Development Process mandate for policy to
24 the community.

25 Q. And the bylaws also require ICANN to post

1 on its website notice of upcoming Board meetings?

2 A. Correct, formal Board meetings.

3 Q. And agendas for upcoming Board meetings;
4 is that correct?

5 A. Correct. And I presume -- I don't recall,
6 but we probably did have a formal Board meeting in
7 November, and it probably was -- and if we did, it
8 was noticed.

9 Q. And minutes from those Board meetings,
10 correct?

11 A. Correct.

12 Q. Those have to be posted as well?

13 A. From the formal Board meetings, yes.

14 Q. And any resolution passed by the Board at
15 a formal Board meeting also has to be produced --
16 published on the website, correct?

17 A. Yes. A resolution passed at a Board
18 meeting must be posted, yes.

19 Q. And the bylaws require these documents to
20 be publicly posted because ICANN is obligated to
21 act transparently, correct?

22 A. Uh-huh, yes.

23 Q. And it's fair to say that because it's
24 important for the public to know when the Board is
25 meeting, what the Board will be considering, what

1 the Board discussed, and what decisions the Board
2 has taken, correct?

3 A. Correct. And as I said, this very
4 specific -- yes. All of the very specific
5 procedural requirements for transparency and
6 posting and agendas and explanations and all of
7 that, yes, are applied to decisions taken at
8 annual, specific or general meetings of the Board
9 of Directors.

10 Q. And when you say "general," you're
11 referring to regular Board meetings?

12 A. Regular Board meetings, yes.

13 Q. Okay. Now, ICANN holds three public
14 meetings a year; is that correct?

15 A. Yes. They have been virtual so far this
16 year.

17 Q. Understood. And I think earlier in your
18 testimony we were referring to the Hyderabad
19 meeting in November 2016. That was one of those
20 public meetings, correct?

21 A. Correct.

22 Q. Now, the ICANN Board meets during those
23 public meetings, correct?

24 A. Yes. So there are several ways in which
25 the Board works. We have a workshop beforehand.

1 It sometimes happens that there is a Board meeting
2 at the end of the workshop before the annual
3 general meeting itself opens.

4 We then have a variety of meetings with
5 the community as a whole and with different parts
6 of the community throughout the course of the
7 meeting, and generally we will have -- if this
8 doesn't take place at one of the policy meetings,
9 then at two of the three meetings, and indeed at
10 the end of the general meeting, there is a Board
11 meeting at the end of the workshop. In fact, there
12 are two, because the new Board is seated, and
13 there's a brief meeting of the new Board as well.

14 Q. Okay. Let me just unpack that a little
15 bit. So these workshops are not regular Board
16 meetings; is that right?

17 A. Correct.

18 Q. And they are not special meetings, and
19 they are certainly not an annual meeting, right?

20 A. No.

21 Q. There's no bylaw provision that provides
22 for Board workshops; is that right?

23 A. Not that I'm aware of.

24 Q. And these workshops don't require a quorum
25 of Board members to be in attendance, do they?

1 A. No. The workshops are essentially working
2 sessions for the Board. Generally all members of
3 the Board are there, but since no -- you know, we
4 are not passing resolutions and the like, I don't
5 suppose there's a requirement for a quorum, but
6 again, that's -- yeah.

7 Q. Do you take attendance?

8 A. I do not take attendance. Certainly we
9 know who is participating, and they are in the
10 room.

11 Q. Because you can see them; is that right?

12 A. Yes, or Zoom them.

13 Q. Okay. It is a brave new world we are all
14 in.

15 There aren't minutes taken at workshop
16 sessions, are there?

17 A. I don't believe so. I mean, they are
18 really working sessions. We go through a variety
19 of discussions, you know, about the work that's
20 ongoing in the community, the work that's going to
21 be -- our discussions with the community in the
22 coming week during the meeting. It's preparing to
23 interact with the community and move forward and
24 various things and getting caught up and briefed on
25 other matters.

1 Q. So is it fair to say that the Board uses
2 these workshops to make its formal Board meetings
3 more efficient?

4 A. Well, we don't actually spend most of the
5 time at the workshop on the formal Board meetings.
6 We spend much more time on understanding policy
7 development, work that is ongoing in the community,
8 conversations that we will have with the community
9 in the coming week, topics that are important to
10 them.

11 But it is -- I would say, you know, a --
12 we get resolution, we get draft resolution in
13 advance of any formal Board meeting. And to the
14 extent that -- I think we probably review them
15 quickly, but that is a tiny percentage of the time,
16 and I don't think it happens all the time.

17 Q. Okay. I think I wasn't clear. If the
18 Board didn't have those workshop sessions, you'd
19 have to do all of what you described that the Board
20 does in a workshop session at a regular Board
21 meeting, correct?

22 A. No, that's not true. Right now we
23 basically have Board informational meetings a
24 couple of times a week. We have sort of changed
25 the workshop schedule around so that rather than

1 packing it into three days with very complex time
2 zones, because the Board of Directors is global, we
3 in the post-COVID era have spread out those
4 informational calls and discussions over the course
5 of the weeks in between the meeting.

6 It was a convenience to sort of pack them
7 into a three-day workshop, but that's not an
8 inviolate process. Really the question is what's
9 the way for the Board to work together, exchange
10 information, get up to speed on what's going on in
11 the community, take care of various Board
12 housekeeping matters and the like.

13 Q. Now, the Board doesn't vote during
14 workshop sessions, does it?

15 A. The Board does -- I think there's one
16 exception, which is we have a straw poll at the
17 September workshop on the elections for the Board
18 officers. It is not -- it is a straw poll.

19 Q. Other than the straw poll, the Board
20 doesn't actually vote during the workshop session?

21 A. The Board is not taking formal
22 resolutions, not passing formal resolutions, and we
23 work on consensus.

24 Q. Right. That's because the bylaws, I
25 think, clearly provide that the Board can only act

1 at one of the formal meetings we discussed and only
2 if a quorum is present; is that correct?

3 A. So the Board act is absolute, yes, the
4 Board can only act in a formal sense. It can only
5 adopt a resolution at a formal meeting.

6 You know, the Board can decide to follow
7 procedures that it typically follows. There's lots
8 of housekeeping issues that the Board can decide.
9 I am uncomfortable with the absoluteness of the
10 term "act."

11 Q. Okay. Let's look back --

12 A. The formal Board resolution, that must be
13 taken at a formal Board meeting.

14 Q. Okay. Let's look back at Section 7.17.

15 Chuck, if you can put that back up on the
16 screen, please.

17 This is the quorum section again. What it
18 provides here is that the act of a majority of
19 directors present at any meeting -- and I think we
20 clarified that the term "meeting" there refers to
21 the three types of formal meetings -- at which
22 there is a quorum shall be the act of the Board,
23 right? That's what it says, it uses the term
24 "act."

25 A. Yes.

1 Q. And if we look at Section 7.19 -- Chuck,
2 if you could throw that up on the screen again --
3 what it says here is that the Board can act, this
4 is action without a meeting, but it can only do
5 that if the directors entitled to vote all consent
6 in writing to the Board taking an act outside of
7 one of those formal meetings; is that right?

8 A. Yes. If the Board wants to take a formal
9 action, it can do it outside of the meeting under
10 these circumstances.

11 Q. Well, Section 7.19 doesn't say formal
12 action; it says "action," right?

13 A. Right. And I think that actions here
14 applies to formal actions that the Board takes
15 during its annual regular or special meeting or a
16 formal action without a meeting.

17 Q. Can you point me to a provision of the
18 bylaws that defines "action" as formal actions
19 limited to resolutions?

20 A. No. But if you're suggesting that every
21 time the Board decides to follow a practice that it
22 has always followed, it has to take a formal vote,
23 then we would be voting constantly. I mean, it is
24 just not practical to insist that every time the
25 Board makes a decision, including a decision to

1 follow its standard practice, that it has to have a
2 formal vote. That's -- I don't -- I don't
3 understand that to be typical of any organization,
4 of any Board of Directors.

5 Q. Do other Boards of Directors have these
6 same provisions in their bylaws regarding
7 transparency and accountability to a broader
8 community?

9 A. I suspect that there are lots of
10 California corporations that have these, but I have
11 not read all of their bylaws.

12 Q. Okay. Now, you were a member of the Cross
13 Community Working Group on Accountability, or the
14 CCWG-Accountability, right?

15 A. I was, indeed.

16 Q. Now, I am just going to --

17 MR. ALI: Ethan -- sorry, Ms. Burr.

18 Mr. Chairman, may I take a 30-second break
19 to speak with Mr. Litwin before he continues since
20 he's moving on to a different topic?

21 ARBITRATOR BIENVENU: Yes, you may. Is JD
22 available to put you in a separate room, or do you
23 have means to communicate with one another?

24 MR. ALI: We have means to communicate
25 with one another. We don't need to be put in a

1 separate room.

2 ARBITRATOR BIENVENU: We'll just pause for
3 a few seconds to let you do that.

4 (Whereupon a recess was taken.)

5 ARBITRATOR BIENVENU: Go ahead and
6 proceed.

7 Q. BY MR. LITWIN: Ms. Burr, I ask you just
8 to turn, before we move subjects, to Page 10 in Tab
9 2, which is Section 3.5(c) of ICANN's bylaws. And
10 there you'll see that the bylaws require that
11 ICANN, within seven days of concluding a meeting,
12 must post any action taken by the Board, and that
13 shall be made publicly available in a preliminary
14 report.

15 So that seems to go far beyond -- any
16 actions goes far beyond just a formal Board
17 resolution; would you agree with that?

18 A. No.

19 Q. How do you --

20 A. It is the same word, "any actions." I am
21 reading "actions" throughout this section to refer
22 to the formal decisions that the Board makes by
23 resolution during Board meetings. And that's the
24 way this has always been interpreted from the
25 beginning of time.

1 I don't know if this changed, but the
2 Board has always had an obligation to post the
3 results of its Board meeting within this period. I
4 don't know "always," but for many years.

5 Q. And how did you come to learn that the
6 Board has interpreted the term "any actions" to
7 encompass Board resolution only?

8 A. I think personally it is plain-text
9 reading of the bylaws. It is consistent with words
10 used throughout the -- when they are talking about
11 formal actions by the Board, and it is consistent
12 with ICANN's practice for many years --

13 Q. Okay. So --

14 A. -- at our Board meetings.

15 Q. So when the Panel is reviewing the bylaws
16 and they see references to actions taken by the
17 Board, they should understand that to mean only
18 action by Board resolution; is that what you're
19 saying?

20 A. I have not memorized the 250 pages of the
21 bylaws. In this section where they are talking
22 about the operations of the Board, I read this in
23 the same way that I read the provisions related to
24 regular, annual and other meetings, meaning the
25 formal action by the Board in a Board meeting by

1 resolution.

2 Q. Well, is there a reference that you are
3 aware of in the bylaws to an action, a Board action
4 that does not refer to a formal resolution?

5 A. Well, there are inactions in the IRP
6 context, which would not rise to the form of a
7 formal action, I suspect, right, because it
8 wouldn't be by resolution. These provisions of the
9 bylaws that you're talking about are about how the
10 Board operates when it is formal.

11 If you read this to say anything the Board
12 thinks about, decides to move on with in the way
13 that it, you know, decides to have another meeting
14 to discuss further, all of this has to be contained
15 on the publicly available and the preliminary
16 report seven days later, the Board would spend all
17 of its time approving these preliminary reports.

18 Q. Actually --

19 A. It is a very active Board.

20 Q. Yeah, actually, your reference to the IRP
21 is interesting. There in Section 4.3 the members
22 of the Internet community are given standing to
23 challenge ICANN actions; is that right?

24 A. And failure to act.

25 Q. Yes. In particular, ICANN Board actions

1 and failures to act, correct?

2 A. Yes, and/or, yes.

3 Q. Yes. Just focusing in on the Board
4 actions there, does that mean by using the word
5 "actions" there, that it is limited to challenging
6 a resolution of the Board?

7 A. It's -- I mean, IRPs are specifically -- I
8 want to say, I am not going to make a case that all
9 256 pages of these bylaws are absolutely
10 consistent, having had a huge role in the creation
11 of the post-transition bylaws and the fact that the
12 bylaws went from 50 pages to 250 pages.

13 I will say that with respect to the IRP,
14 the question is did the Board do something or fail
15 to do something? Did the Board do something that
16 violated the bylaws or the articles of
17 incorporation? Did the Board fail to take an
18 action that it was bound to take lest it violate
19 the bylaws and the articles of incorporation?

20 Q. Okay. So in Section 4.3, the word
21 "action," Board action, the phrase "Board action,"
22 refers to did the Board do something.

23 And then looking back at Section 3.5, it
24 says, "Any Board action has to be posted to the
25 website." So --

1 MR. ENSON: Mr. Litwin, I apologize for
2 interrupting, but if you are going to represent
3 something is in 4.3 of the bylaws, I request that
4 you point it out to Ms. Burr so she can review it.

5 Q. BY MR. LITWIN: So, for example, Ms. Burr,
6 I would direct your attention to Page 28 of Tab 2,
7 which is Section 4.3(o). And looking at little
8 Roman numeral iii, this provision gives the IRP
9 Panel the authority to declare whether a covered
10 action constituted an action or inaction that
11 violated the articles or bylaws; is that right?

12 A. Right. I think you have to refer back to
13 the definition of "covered action," which is in
14 4.3(b), which is -- includes actions or inactions
15 by the Board, individual directors, officers or
16 staff members.

17 So I do not believe that this is -- that
18 it's limited to -- I mean, the words are in
19 different -- the word "action" has a different
20 context here.

21 Q. So let me see if I can break this down.

22 Section 3.1, which we referred to earlier,
23 requires ICANN to operate in an open and
24 transparent manner, correct?

25 A. Correct.

1 Q. And open and transparent to the maximum
2 extent feasible, correct?

3 A. Correct. Which to me does not mean it has
4 to do everything in public.

5 Q. I understand what your prior testimony
6 was. I am just asking about the plain text of the
7 bylaw.

8 And Section 4.3(b)(ii), which you just
9 referred us to, maybe it is -- yeah, (b)(ii), says
10 that a covered action is an action or failure to
11 act within ICANN committed by the Board, correct?
12 So that would encompass Board actions, right?

13 A. No. If you go to (b) in the packet,
14 covered actions include the actions or failure to
15 act by within ICANN committed by the Board,
16 individual directors, officers or staff members
17 that give rise to a dispute.

18 Q. Right. It says "or." It can refer to
19 simply an action by the Board, correct?

20 A. Correct. Although I think it is in a
21 different context than the context of the Board
22 voting in the course of a formal Board meeting.

23 Q. Your testimony, therefore, is that when it
24 says "Board action" in 4.3(b)(ii), that is, you
25 know, did the Board do anything?

1 A. Well, I can't -- I don't want to
2 speculate. I believe that most of the ways in
3 which the IRP has been invoked with respect to the
4 Board is a formal action of the Board, but I do not
5 rule out the possibility that the Board could do
6 something outside of a formal Board meeting that
7 would violate the bylaws or exceed the mission.

8 Q. Well, if the Board did something outside
9 of a formal meeting and nothing was posted to the
10 website about it, how would the members of the
11 Internet community know that they had grounds to
12 bring an IRP?

13 A. Well, I am a little confused about this,
14 because it is my understanding that Afilias
15 received notice in writing about the Board's
16 decision in the November workshop to honor its
17 standard practice, so I don't understand the
18 transparency issue.

19 Q. Okay. I was talking generally, but I am
20 happy to talk specifically with you.

21 What is the basis for your statement that
22 Afilias received notice from ICANN that the Board
23 had made a decision during a November 3rd, 2016,
24 workshop session about its complaint?

25 A. I believe that Afilias received a written

1 communication from Akram saying that the matter was
2 on hold because one of the accountability
3 mechanisms had been invoked.

4 The Board in November, as I recall -- as I
5 said, I was not on the Board then, but I was in the
6 room -- continued to follow its usual practice of
7 not intervening once an accountability mechanism
8 has been invoked so as to respect the
9 accountability mechanisms themselves. That is what
10 the Board typically does. That is what org
11 typically does.

12 Q. So did you review Mr. Akram's letter?

13 A. I didn't review it in advance of this. I
14 have seen it in the past. I believe it was posted.

15 Q. Okay. Now, I'll represent to you,
16 Ms. Burr, that Mr. Atallah's letter was dated
17 September 30th, 2016.

18 Do you recall that?

19 A. I don't recall the date of the letter.

20 Q. Okay. This isn't in your binder. I
21 didn't expect to ask you about this.

22 But I would ask that Chuck put up on the
23 screen Exhibit C-61, please. If you can focus in
24 on just the date, please, so that everybody can see
25 it. Thank you.

1 You can see here, Ms. Burr, Mr. Atallah --
2 let me first ask, is this the letter that you are
3 referring to?

4 MR. ENSON: Mr. Litwin, she needs to be
5 able to see the letter.

6 Q. BY MR. LITWIN: Can you see the letter?

7 A. I can.

8 Q. You are doing better than I can. I can
9 barely see it.

10 So does this refresh your recollection
11 that Mr. Atallah's letter was sent to Afilias on
12 September 30th, 2016?

13 A. Yes. That doesn't change the fact that
14 this letter reflects what ICANN org typically does
15 when an accountability mechanism has been invoked,
16 and the Board -- the practice of the Board is to
17 respect and follow that.

18 Q. So I would --

19 A. And that would be the Board deciding in
20 November that it was going to continue to follow
21 its practice.

22 Q. Okay. So stating the obvious here,
23 September 30th is before November 3rd, correct?

24 A. Correct.

25 Q. Focusing in on the second-to-last

1 paragraph -- if you could blow that up, Chuck -- it
2 says, "We will continue to take Afiliias' comments,
3 and other inputs that we have sought, into
4 consideration as we consider this matter," correct?

5 A. That's what it says, yes.

6 Q. Did you understand that Mr. Atallah was
7 referring, when he says "Afiliias' comments," to the
8 two letters from Mr. Hemphill that you reviewed in
9 preparation for your testimony here today?

10 A. I have no basis for thinking that it's
11 limited to the two letters to Afiliias. There was
12 general noise about the auction, and Ruby Glen, for
13 example, had filed an accountability mechanism. I
14 would think that would be wrapped up in this, and
15 it would be in a larger bundle of issues.

16 Q. Well, I appreciate that, Ms. Burr, but
17 what it says, particularly here in the highlighted
18 language, is that, "We will continue to take
19 Afiliias' comments into consideration as we continue
20 to consider this matter."

21 And what my question is just very simply,
22 really yes or no, do you understand, when he says
23 "Afiliias' comments," he's referring to the two
24 letters that Mr. Hemphill had sent to him in August
25 and September of 2018 -- 2016, rather?

1 A. I would imagine that they were among the
2 things that would be Afiliias' comments.

3 Q. Is there anything else?

4 A. I don't know. I have seen those two
5 letters.

6 Q. Okay.

7 Chuck, can you pull up the first
8 paragraph, please.

9 So Mr. Atallah begins his letter by
10 saying, "Thank you for your letters of August 8th,
11 2016, and September 9th, 2016. We note your
12 comments regarding the NU DOT CO application for
13 .WEB in the ICANN auction of July 27, 2016."

14 Does that help refresh your recollection
15 that when Mr. Atallah is referring to Afiliias'
16 comments, he's referring to Mr. Hemphill's two
17 letters?

18 MR. ENSON: Mr. Chairman, this is Eric
19 Enson. I apologize for the interruption, but I
20 feel I need to make an objection at this point.

21 Ms. Burr has no way of knowing what
22 Mr. Atallah meant when he wrote this letter. She
23 didn't write it.

24 ARBITRATOR BIENVENU: Mr. Litwin, do you
25 want to respond to that objection?

1 MR. LITWIN: I think it is pretty clear
2 what I am asking is just Ms. Burr's understanding
3 based on her earlier testimony that this -- about
4 Mr. Atallah's letter, and I am just trying to
5 understand what Ms. Burr understood about it. I am
6 not asking Ms. Burr to get inside Mr. Atallah's
7 head. I am just asking on -- her understanding
8 based on reading the letter.

9 ARBITRATOR BIENVENU: I'll allow the
10 question, but I think you have gone as far -- as,
11 in my view, as useful in trying to elicit an
12 interpretation of this letter from this witness,
13 but I'll allow the question.

14 Please answer the question, Ms. Burr.

15 THE WITNESS: I am aware that in addition
16 to those two letters, we had litigation that had
17 been filed, a CEP had been filed by Ruby Glen. I
18 take this to reference to the broader matter.

19 Afilias' comments certainly include those
20 two letters that are noted, but I have no idea if
21 that's all that he's referencing with respect to
22 Afilias' comments or not.

23 Q. BY MR. LITWIN: Okay. Is there a portion
24 of this letter that, in your mind, refers to the
25 broader dispute with Ruby Glen and other comments,

1 other than what was specifically referred to in the
2 first paragraph?

3 A. The .WEB/.WEBS contention set was placed
4 on the 19th of August. That's clearly reflecting
5 the pending ICANN accountability mechanism
6 initiated by another member of the contention set.
7 So yes.

8 MR. LITWIN: I will move on, Mr. Chairman.
9 I take your point.

10 Q. So when we left off earlier, we were
11 talking about your role on CCWG-Accountability, and
12 I was about to say that CCWG-Accountability is kind
13 of a mouthful, so I am just going to refer to the
14 CCWG. I am aware that there are other CCWGs, but
15 I'd like you to understand that when I refer to the
16 CCWG, I am referring only to CCWG-Accountability;
17 is that okay?

18 A. Sure.

19 Q. Okay. Now, the CCWG was formed in
20 response to the United States government's
21 announced intention in 2014 to transition
22 stewardship of the Internet, that is, the IANA
23 functions, to the global multistakeholder
24 community; is that correct?

25 A. Yes.

1 Q. And ICANN would become the new steward of
2 the Internet on behalf of the community; is that
3 right?

4 A. Well, ICANN has throughout its life been
5 charged with responsibility for coordinating policy
6 development. It would, following the transition,
7 do that without a formal backstop agreement with
8 the United States government.

9 Q. And when you mean a backstop agreement,
10 just in lay terms, that means that the United
11 States government was no longer going to provide
12 oversight of ICANN; is that right?

13 A. Not separate from whatever role it
14 participated in in the Government Advisory
15 Committee, correct.

16 Q. So the CCWG was created to determine how
17 ICANN's then accountability mechanisms could be
18 strengthened to compensate for the absence of U.S.
19 government oversight; is that right?

20 A. Among other things, yes.

21 Q. And the CCWG submitted its recommendations
22 to the ICANN Board; is that right?

23 A. Correct.

24 Q. And one of those recommendations concerned
25 enhancements to the IRP; is that right?

1 A. That is correct.

2 Q. So the CCWG's recommendations for
3 strengthening or enhancing the IRP were contained
4 in its 2016 report; is that correct?

5 A. Yes. The CCWG was split up into two work
6 streams. One was the accountability mechanisms and
7 the mission, commitment for value statement of the
8 bylaws, and then there were other issues that
9 another work stream took. I was the rapporteur for
10 the accountability work stream.

11 Q. And the ICANN Board was engaged and had
12 monitored the development of its 2016 report,
13 right?

14 A. Yes. There were ICANN Board members who
15 were liaisons on the CCWG. I was part of the CCWG.
16 I was not on the Board at that time.

17 Q. And the Board actually provided comments
18 on two prior drafts of the 2016 report, correct?

19 A. That seems reasonable. I haven't gone
20 back and reviewed it. So I don't know.

21 Q. Fair enough. The work stream one report,
22 the one that contained the proposal to enhance the
23 IRP was presented to the Board in 2016, correct?

24 A. Yes. The final report of
25 CCWG-Accountability was in February of 2016.

1 Q. And the Board accepted by resolution the
2 CCWG 2016 report, correct?

3 A. Correct.

4 Q. And the Board actually approved the
5 transmission of the CCWG report to the NTIA to
6 accompany ICANN's proposal regarding the transition
7 of stewardship responsibilities from the U.S.
8 government to ICANN; is that right?

9 A. I actually don't know if a report went --
10 I assume the report did go along with the revised
11 bylaws that were a product of the report.

12 Q. And that's because improving ICANN's
13 accountability was an important part of the
14 transition, right?

15 A. That is correct.

16 Q. And the Board instructed ICANN to
17 implement the CCWG's recommendations that were set
18 forth in its report, correct?

19 A. I don't have firsthand knowledge of what
20 the Board did. The Board accepted them, and I
21 assume that means it directed the Board to
22 implement. There certainly were implementation
23 efforts. I don't know what the specific wording of
24 the Board's resolution says.

25 Q. Okay. Now, in the ICANN bylaws -- and I

1 would refer you, again, in Tab 2, to Section
2 1.2(a)(v).

3 Give Chuck a minute to throw that up on
4 the screen.

5 MR. ENSON: Sorry, Ethan, would you repeat
6 that?

7 MR. LITWIN: Yes, Section 1.2(a)(v), which
8 is on Page 6 of Tab 2.

9 MR. ENSON: Got it. Thank you.

10 MR. LITWIN: You're welcome.

11 Q. Do you see that, Ms. Burr? It is up on
12 the screen, too.

13 A. I do.

14 Q. Okay. Now, that require -- that bylaw
15 requires that -- or in that bylaw, rather, ICANN
16 commits to make decisions by applying documented
17 policies consistently, neutrally, objectively and
18 fairly; is that right?

19 A. Correct.

20 Q. That's because -- sorry.

21 A. No, I just was going to read the rest of
22 it.

23 Q. And that's because the global Internet
24 community needs to have confidence that ICANN is
25 going to abide by the plain meaning of its rules

1 and not treat anyone differently; is that right?

2 A. That particular language has been in the
3 ICANN bylaws, I think, since the original bylaws.
4 So I had -- I was very significantly involved in
5 rewriting Article 1 and Article 4 of the bylaws for
6 the accountability CCWG.

7 This particular language was in the old
8 bylaws. It was in a separate section. We moved
9 things around, and we split what had been core
10 values into two kinds of things, commitments and
11 core values. And we moved this, which had been in
12 neither of those places, up into the commitments.

13 So yes, it is a commitment -- continuation
14 of its commitment to apply documented policies
15 consistently, neutrally, objectively and fairly
16 without singling out any particular party for
17 discriminatory treatment.

18 Q. And I appreciate that answer, but I would
19 ask that you actually answer the question that I
20 asked, which is: ICANN makes this commitment
21 because it's important to the global Internet
22 community to have confidence that ICANN is going to
23 abide by the plain meaning of its rules?

24 A. Yes. And it has been from the beginning
25 of time, right.

1 Q. Now, the applicant guidebook for the new
2 gTLD Program is an example of ICANN's documented
3 policies; is that correct?

4 A. Well, there was a policy that the
5 community developed, the new gTLD policy.

6 The applicant guidebook, strictly
7 speaking, is implementation of a
8 community-developed policy.

9 Q. So are you aware that a previous IRP Panel
10 interpreted the guidebook's reference to itself as
11 the implementation of Board-approved consensus
12 policy, as the, quote, crystallization of
13 Board-approved consensus policy concerning the
14 introduction of new gTLDs?

15 A. I am not aware of that statement. I mean,
16 I believe you that that was the case, but I am not
17 aware of it.

18 Q. Would you also agree that ICANN must
19 implement the various procedures and rules and
20 policies set forth in the guidebook consistently,
21 neutrally, objectively and fairly?

22 A. Yes, I believe ICANN is obligated to make
23 decisions by applying documented policies
24 consistently, neutrally, objectively and fairly in
25 accordance with the bylaws.

1 Q. Now, in general, the basic procedure
2 that's set forth in the guidebook -- and I am going
3 to speak very generally -- is the applicant submits
4 an application. ICANN publishes the
5 nonconfidential parts of that application for
6 public view. ICANN evaluates the application while
7 the community is given an opportunity to comment on
8 or file objections to the application. The
9 application is then rejected or approved.

10 If it's approved and it is the only one to
11 have applied for the gTLD, then the applicant moves
12 on to execute a registry agreement with ICANN.

13 But if more than one application is
14 approved for that gTLD, a contention set is
15 created. The applicants are expected to try to
16 resolve the contention set among themselves, and if
17 they cannot, then ICANN will auction the gTLD among
18 them and the winner will proceed to contracting.

19 Is that just a fair general overview of
20 the process?

21 A. Yes, at a very high level. There are, of
22 course, many different moving parts in the
23 applicant guidebook and in the application process,
24 but yes.

25 Q. So you note in your witness statement that

1 nothing in the guidebook prevents VeriSign for
2 applying for any gTLD that it wanted; is that what
3 you -- is that a fair statement of what you
4 testified to?

5 A. Yes, the community-developed policy did
6 not impose limitations on who could apply for what.

7 Q. And, in fact, VeriSign did apply for
8 several gTLDs, correct?

9 A. I actually don't know the answer to that.
10 I know they were the back end for several of them,
11 but I don't know if they applied for independent --
12 individual ones as well.

13 Q. To the extent that VeriSign did, in fact,
14 apply for an applicant for a gTLD, its application
15 or the nonconfidential portions of its application
16 would have been published for public view; is that
17 correct?

18 A. That's correct, if it did apply to be a
19 registry operator as opposed to a back end.

20 Q. Understood. So if they apply to be the
21 registry operator, for example, for the Arabic form
22 of .COM, that application would be published on
23 ICANN's website for public view, right?

24 A. Right.

25 Q. But VeriSign did not submit an application

1 for .WEB, did it?

2 A. That's my understanding.

3 Q. So there would have been no .WEB
4 application from VeriSign for ICANN to publish,
5 right?

6 A. Correct.

7 Q. And because there was no VeriSign .WEB
8 application published, there would have been no
9 reason for anyone to believe at any time prior to
10 the .WEB auction that VeriSign was pursuing the
11 acquisition of .WEB, was there?

12 A. There was no published application. I
13 have no way of knowing what anybody believed about
14 anything.

15 Q. Now, one member of the Internet community
16 that comments routinely on new gTLD applications is
17 ICANN's Government Advisory Committee, right?

18 A. Right.

19 Q. And I am just going to refer to that as
20 the GAC; is that okay?

21 A. Yeah.

22 Q. Now, GAC members have lodged what they
23 call early-warning notices regarding various
24 applications; is that correct?

25 A. Yes. Those are expressions of individual

1 governments within the GAC as opposed to a GAC
2 statement of any kind of consensus policy or
3 anything like that. So the members had the ability
4 to raise their hand and say, "We have a problem
5 with that," very early in the process to give
6 applicants a heads-up.

7 Q. And, in fact, I'll just give you a quote,
8 what the GAC says, that, "An early-warning notice
9 is a notice from members of ICANN's Government
10 Advisory Committee that an application is seen as
11 potentially sensitive or problematic by one or more
12 governments."

13 Is that a fair statement about what an
14 early notice is?

15 A. Yes.

16 Q. I'm sorry --

17 A. Yes.

18 Q. So I'd like to direct your attention to
19 Tab 4 in your binder and to the first page of that.
20 It is a copy of the early-warning notice filed by
21 the GAC regarding Google's pursuit of .BLOG through
22 its Charleston Road subsidiary.

23 Do you see that?

24 A. Yes.

25 Q. And in this early-warning notice, the

1 government of Australia writes -- and, Chuck, if
2 you could bring up the box that's marked, "Reason/
3 Rationale for the Warning."

4 "Charleston Road Registry is proposing to
5 exclude other entities, including potential
6 competitors, from using the TLD. Restricting
7 common generic strings for the exclusive use of a
8 single entity could have unintended consequences,
9 including a negative impact on competition."

10 That's what they wrote, correct?

11 A. Yes. And I believe this was one among
12 many of the -- objections to closed generic
13 applications.

14 Q. And those objections remain on competition
15 grounds, right?

16 A. That's what the government of Australia --
17 how they described it. It was the exclusive access
18 to a common generic string that generally -- that
19 generally perturbed individual members of the GAC
20 and ultimately -- ultimately resulted in advice
21 from the GAC on closed generics and a temporary
22 prohibition on closed generics in the first round.

23 Q. So Chuck, if you could bring up the box
24 above that.

25 I'll repeat my question, Ms. Burr.

1 The basis for the government of
2 Australia's early-warning notice regarding Google's
3 proposed acquisition of .BLOG was, as it says,
4 "competition," correct?

5 A. That's how the government of Australia
6 described its concern.

7 Q. Now, it is true that every member of the
8 .WEB contention set submitted an application for
9 .WEB, correct?

10 A. Yes, yes.

11 Q. And the nonconfidential portions of those
12 applications were posted to ICANN's website,
13 correct?

14 A. Yes.

15 Q. And each of those applications were
16 evaluated by ICANN, correct?

17 A. Yes. I assume so, that would be the
18 process.

19 Q. Well, you couldn't get into a contention
20 set unless you had been evaluated by ICANN and
21 passed that evaluation, right?

22 A. Right. Which is why I said that's the
23 process.

24 Q. And the community, including the GAC,
25 would have had an opportunity to comment on each of

1 those .WEB applications during the evaluation
2 period, correct?

3 A. Yes. Individual members of the GAC -- so
4 this is not GAC advice, this is an individual
5 member of the GAC expressing a concern -- could
6 have filed an early warning. And the GAC also had
7 the ability to provide consensus advice.

8 Q. Now, you state in your witness
9 statement --

10 MR. LITWIN: Before I move on,
11 Mr. Chairman, we have been going for about an hour
12 and a half. I want to check as to when the Panel
13 and the witness want to break.

14 ARBITRATOR CHERNICK: Mr. Litwin, before
15 we do that, can I ask a question about the document
16 that's on the screen?

17 MR. LITWIN: Absolutely, Mr. Chernick.

18 ARBITRATOR CHERNICK: Is there a record
19 reference to this document, an exhibit reference so
20 that we can keep track of these things?

21 MR. LITWIN: There is. It is not on my
22 copy. I will have someone on my team email you
23 that directly.

24 ARBITRATOR CHERNICK: All right. Thank
25 you.

1 Go ahead, Mr. Chairman.

2 ARBITRATOR BIENVENU: Yes, well, I was
3 saying to Mr. Litwin that he had read my mind. I
4 was about to ask him to advise when would be an
5 appropriate time for our first break, and I take it
6 from your intervention, Mr. Litwin, that it would
7 be.

8 MR. LITWIN: This would be an opportune
9 time. I am happy that I am able to, even under the
10 small Zoom screen, ascertain when it might be time
11 for a break.

12 ARBITRATOR BIENVENU: Right. So we will
13 break for 15 minutes.

14 Ms. Burr, you, of course, are familiar
15 with a process like this one, and you would know
16 that throughout the course of your
17 cross-examination, and that includes any redirect
18 examination, you are not to discuss your testimony
19 or the case with anyone.

20 THE WITNESS: Yes, sir.

21 ARBITRATOR BIENVENU: Thank you very much.
22 So we'll take a 15-minute break.

23 (Whereupon a recess was taken.)

24 ARBITRATOR BIENVENU: Mr. Litwin, please
25 proceed.

1 Q. BY MR. LITWIN: Hello, Ms. Burr. Are you
2 ready to proceed?

3 A. I am.

4 Q. Okay. So you state in your witness
5 statement that ICANN has various ways in which it
6 holds itself accountable to the global Internet
7 community; is that correct?

8 A. Yes.

9 Q. And those are called accountability
10 mechanisms, correct?

11 A. Correct.

12 Q. And the IRP, the Independent Review
13 Process, is one of those accountability mechanisms,
14 right?

15 A. Absolutely.

16 Q. I would like to direct your attention now
17 to Tab 5 in your binder. This is a copy of Annex 7
18 to the CCWG report that we were discussing before
19 we went on break.

20 Annex 7 provides for -- Chuck, if you can
21 turn to Annex 7, please -- the CCWG's proposal for
22 the enhanced IRP?

23 A. Correct.

24 Q. So if you could turn to Page 10, and I
25 will direct your attention to Paragraph 34, and

1 I'll wait a minute for that to come up on the
2 screen here. This is under the heading "Standard
3 of Review."

4 MR. ENSON: Ethan, I am sorry to
5 interrupt. There's two sets of page numbers on my
6 copy. There's the exhibit page number and the
7 exhibit number of the actual document.

8 MR. LITWIN: Yes. Hopefully I have it all
9 correct in my notes, but I am referring to the
10 exhibit page numbers only.

11 MR. ENSON: Okay. Thank you.

12 MR. LITWIN: You're welcome.

13 Q. Ms. Burr, under "Standard of Review," the
14 CCWG states that "The IRP Panel shall decide the
15 issues presented to it based on its own independent
16 determination of ICANN's articles of incorporation
17 and bylaws in the context of applicable governing
18 law and prior IRP decisions. The standard of
19 review shall be an objective examination as to
20 whether the complained-of action exceeds the scope
21 of ICANN's mission and/or violates ICANN's articles
22 of incorporation and/or bylaws and prior IRP
23 decisions. Decisions will be based on each IRP
24 panelist's assessment of the merits of the
25 claimant's case. The Panel may undertake a de novo

1 review of the case, make findings of fact, and
2 issue decisions based on those facts."

3 Do you see that there?

4 A. I see that paragraph, yes.

5 Q. Okay. Let's just break that down. The
6 IRP Panel is supposed to decide disputes based on
7 its own independent interpretation of ICANN's
8 articles and bylaws; is that right?

9 A. I think we need to look -- I mean, this
10 is -- so Annex 7 is sort of an explication of the
11 recommendations that the CCWG-Accountability Group
12 put together with respect to those accountability
13 mechanisms. They were then translated into the
14 ICANN bylaws.

15 So this is a description where the actual
16 absolute standard of review, I would -- we should
17 refer to the bylaws. I believe it's quite -- I
18 believe it is a -- did an action or inaction
19 violate the -- exceed the mission or violate the
20 bylaws with respect to these.

21 I am just -- the official source has to be
22 the bylaws, because that's where the rules come
23 from.

24 Q. So the CCWG report, as we talked about
25 earlier today, was transmitted by ICANN to the NTIA

1 as part of the transition process; is that right?

2 A. As I said, I don't know the answer to
3 that. I think that's right, but I have no idea.
4 But bylaws certainly would have been as well. And
5 the bylaws, the language in the bylaws is the final
6 implementation of the CCWG's recommendations, and
7 those were, in fact -- I worked on the writing of
8 the bylaws as the rapporteur for this provision,
9 and those were, again, submitted to that community
10 for comment and the like.

11 All I'm saying is to the extent there's
12 any discrepancy between this document and the
13 bylaws, the bylaws is the relevant document.

14 Q. And we are going to look at the bylaws in
15 a minute, but right now I just want to ask you
16 questions about what the CCWG intended. And the
17 CCWG intended that the IRP Panel is supposed to
18 decide disputes based on its own independent
19 interpretation of ICANN's articles and bylaws,
20 correct?

21 A. That is what this says. I have no idea if
22 that particular sentence is in the bylaws itself,
23 but it is definitely --

24 Q. I am not asking --

25 A. -- a de novo review.

1 Q. I am not asking you about the bylaws. I
2 am only asking you in the context of the next
3 several questions about what the CCWG intended --

4 A. Okay.

5 Q. -- as reflected in Annex 7.

6 And the CCWG intended that the decisions
7 of the Panel should be based on each panelist's
8 individual assessments of the merits of the claim,
9 right?

10 A. Presented on the Panel's independent
11 interpretation of the bylaws and articles of
12 incorporation and examination, objective
13 examination of whether the complaint of action
14 exceeds the scope of ICANN's missions or violates
15 the bylaws, and it is based on each IRP's
16 assessment of those.

17 Q. Each IRP panelist's assessment of the
18 merits of the claimant's case, correct?

19 A. Right. And the case is if this act or
20 failure to act violated the bylaws.

21 Q. And this standard of review that the CCWG
22 provided for here says that the Panel should
23 undertake a de novo review of the case, correct?

24 A. Correct. That is in the bylaws, I know.

25 Q. And by "de novo," that essentially means

1 that the Panel should start anew, right, that's
2 what "de novo" means?

3 A. Yes. In other words, it is not acting --
4 it evaluates the facts.

5 Q. And you understand that a de novo review
6 is a nondeferential standard of review, correct?

7 A. I have to say I am not a litigator, but I
8 think this is with respect to the findings of the
9 facts about what happened.

10 Q. Well, it says here that the Panel may
11 undertake a de novo review of the case. And solely
12 as to that provision, I am saying that where it
13 says "de novo review," that means nondeferential
14 standard of review; it is not an abuse of
15 discretion standard?

16 A. That's a legal conclusion that -- I mean,
17 it may be true, but I have no idea.

18 All I'm saying is what this says to me is
19 you get to -- the IRP Panel gets to decide what the
20 facts are.

21 Q. Wait. So you were on the CCWG, right?

22 A. Yes. But you're asking me for a sort of
23 legal term-of-art conclusion. I am not a
24 litigator. I can tell you what that means to me.
25 Yes, ICANN doesn't get to say, "Here are the facts.

1 You must accept them."

2 So to that extent, they are not deferring
3 to ICANN's -- ICANN's articulation of what the
4 facts are, that's correct.

5 Q. Right. And the Panel should make its
6 decisions based on the facts as the Panel finds
7 them, right?

8 A. Yes. That is what this is saying.

9 Q. Okay. Let's turn back to Page 5 in this
10 exhibit and look at the first bullet point, which
11 starts with "Standing."

12 A. Yes.

13 Q. You see that, Ms. Burr? Here what the
14 CCWG is saying is that, "Any person, group or
15 entity that has been materially affected by" --
16 here's your language -- "an ICANN action or
17 inaction in violation of ICANN's articles of
18 incorporation or bylaws shall have a right to file
19 a complaint under the IRP and seek redress."

20 Do you see that? Ms. Burr?

21 A. Yes, I am just looking at this.

22 Q. Okay.

23 A. This is Page 5?

24 ARBITRATOR BIENVENU: It is Page 5 of the
25 exhibit, 3 of the document.

1 MR. LITWIN: Yes. So there's Exhibit C-1,
2 Page 5.

3 Thank you, Mr. Chairman.

4 THE WITNESS: Yes.

5 Q. BY MR. LITWIN: So what it says here at
6 the second bullet -- and it is up on the screen for
7 your ease of reference, Ms. Burr -- is that if an
8 entity is materially affected by an ICANN action or
9 inaction that violates ICANN's articles of
10 incorporation or bylaws, that that entity shall
11 have a right to file a complaint under the IRP and
12 to seek redress.

13 That's what it says, right?

14 A. That's what it says.

15 Q. So the CCWG is providing for those
16 entities a due-process right to file an IRP; is
17 that right?

18 A. I mean, it is saying if you have been
19 materially affected, you have a right to file a
20 complaint under the IRP.

21 Q. And to seek redress?

22 A. Yes, for the violation of the bylaws.

23 Q. Right. And "redress" means to remedy,
24 right?

25 A. The bylaws are clear, and this was always

1 the intention. I was the rapporteur for this, and
2 I was the person who wrote the -- was fundamentally
3 charged with a relevant bylaws provision.

4 This means -- and it is very clear in the
5 bylaws, and that is what the CCWG meant -- that
6 they had a right to get a decision about whether an
7 action or an inaction violated the bylaws.

8 This does not say to me, it was never the
9 intention of the CCWG, in my hearing, that the
10 Panel could prescribe a remedy. And that totally
11 makes sense in the context of ICANN IRPs, because
12 often there are many, many parties who are affected
13 by this. There are a lot of moving parts.

14 So I do not see that as a statement, and I
15 participated in both the CCWG discussions and the
16 bylaws' drafting, which was not intended to, you
17 know, damages, recovery, remedy, that kind of
18 stuff, but the -- the IRP's authority is limited to
19 finding -- making a determination about whether an
20 action or inaction violated the articles of
21 incorporation and bylaws, and that's what's binding
22 on ICANN.

23 Q. Ms. Burr, I really must ask that you
24 respond to the question that I'm asking, otherwise
25 we are just never going to get done today.

1 What I'm asking here is that in Annex 7 on
2 Page 5, at the second bullet point, the CCWG
3 provided that, "Entities shall have standing if
4 they are materially affected by an ICANN action or
5 inaction that violates ICANN's articles of
6 incorporation or bylaws, that they shall have a
7 right to file a complaint and to seek redress."

8 That's what it says, correct?

9 A. That's what it says in the annex
10 explicating the recommendation.

11 Q. That's all I'm asking.

12 If we could turn to Page 6.

13 ARBITRATOR BIENVENU: Just for the record,
14 Mr. Litwin, you were referring to the first bullet
15 point, not the second bullet point.

16 MR. LITWIN: Oh, I'm sorry about that.
17 Yes, first bullet point.

18 Q. If you could please, Ms. Burr, turn to
19 Page 6, Paragraph 9, please. And here the CCWG
20 states in its explicative Annex 7 that the role of
21 the IRP will be to hear and resolve claims,
22 correct?

23 A. That ICANN has acted or failed to act in
24 violation of its articles and bylaws.

25 Q. And that resolution of claims are intended

1 to be both final and binding, correct?

2 A. Yes, with respect to binding of a bylaws
3 violation or an action exceeding the mission.

4 Q. Okay. Now, Ms. Burr, earlier today, you
5 testified about the Ruby Glen litigation concerning
6 .WEB.

7 Do you recall that testimony?

8 A. I think I mentioned that litigation had
9 been filed and a CEP was filed.

10 Q. In that litigation, ICANN defended its
11 conduct by reference to the litigation waiver in
12 the new gTLD guidebook's terms and conditions in
13 Module 6; is that correct?

14 A. I have not read the pleadings in the Ruby
15 Glen litigation.

16 Q. Are you aware that the new gTLD guidebook
17 provides for a litigation waiver?

18 A. My understanding is that the application
19 itself includes a litigation waiver and refers to
20 the accountability mechanisms to resolve disputes.

21 Q. Okay. In fact, what the guidebook says is
22 that, "The applicant agrees not to challenge in
23 court or in any other judicial forum any final
24 decision made by ICANN with respect to its
25 application, provided that the applicant may

1 utilize any accountability mechanism set forth in
2 ICANN's bylaws for the purpose of challenging any
3 final decision made by ICANN with respect to the
4 application."

5 Is that right?

6 A. I don't have the applicant guidebook in
7 front of me. That sounds right. You read it, so I
8 assume it's correct, but I don't have it.

9 Q. I'll represent to you that I have read it.
10 In general -- let me just -- now, in terms of that
11 application waiver, is it ICANN's position,
12 therefore, that applicants are not left with any
13 form -- without any form of redress because they
14 can initiate the accountability mechanisms in the
15 bylaws?

16 A. I don't believe that is a correct
17 statement of ICANN's position. You'd have to ask
18 ICANN itself about that.

19 Here's what I think: That bylaws provide
20 accountability mechanisms for -- in order to
21 identify instances where ICANN -- either ICANN or
22 the Board has acted in violation of the bylaws, and
23 the Board must -- if there is a finding that ICANN
24 has violated its bylaws, the Board must act to
25 resolve that, to fix that.

1 Q. So I am not sure of the difference. Would
2 it be a fair statement that applicants in the new
3 gTLD Program are not left without any form of
4 redress because of the litigation waiver because
5 the litigation waiver provides that they may
6 initiate an accountability mechanism, including the
7 Independent Review Process?

8 A. Right. And the result of the Independent
9 Review Process is if the Independent Review Panel
10 finds that the bylaws have been violated, the Board
11 has to take appropriate action to fix that.

12 Q. And the IRP is effectively an arbitration
13 that is operated by the ICDR, correct?

14 A. It is operated by the ICDR, and it very
15 much follows arbitration forms, yes.

16 Q. And the IRP gives an applicant, therefore,
17 the ability to have independent third parties
18 evaluate its challenges to ICANN's actions or
19 inactions under ICANN's articles and bylaws in
20 addition to claims under the guidebook; is that a
21 fair statement?

22 A. Its claims under the guidebook that ICANN
23 has violated its bylaws. The IRP is limited to
24 claims that ICANN has -- in this context, there's
25 the IANA and different things, but in this context,

1 the authority -- the purpose of the IRP is to
2 determine whether or not, in taking some action or
3 inaction or failing to act, ICANN has violated its
4 bylaws, and that would be including in its -- in
5 its application of the rules of the applicant
6 guidebook if it's violated the bylaws somehow.

7 Q. Would you also agree that, you know, that
8 the applicants have not been left without any form
9 of redress because ICANN has provided for a robust
10 form of review in which these challenges could be
11 addressed, namely the IRP; is that a fair
12 statement?

13 A. Yes. And the point is that the violations
14 of ICANN's bylaws can be identified through an IRP.

15 Q. So just to be clear here, where the limits
16 of a court's jurisdiction for review of ICANN's
17 conduct ends because of the litigation waiver,
18 ICANN is essentially saying that the IRP Panel's
19 jurisdiction starts; is that fair?

20 A. Only if there's a question about whether
21 the way ICANN has administered the applicant
22 guidebook is in violation of the bylaws or articles
23 of incorporation or exceeds ICANN's mission.

24 Q. Let me try this another way.

25 So in light of the litigation waiver, an

1 IRP Panel's jurisdiction must cover all matters
2 that could not be addressed by a court of
3 competition -- competent jurisdiction, otherwise a
4 new gTLD applicant who was required to agree to the
5 waiver would have no effective means of redress; is
6 that fair?

7 A. So there's a contract here, right, and
8 people are applying for a new gTLD, and the
9 contract, the application, includes a provision
10 that says, "We are not going to sue you in a court.
11 To the extent we have a complaint about violations
12 of the bylaws, we'll use the -- the bylaws-provided
13 remedies."

14 You're passing this in, like -- sort of in
15 big terms, but I think the issue is there's an
16 agreement here, when you apply for a new gTLD, you
17 are agreeing that disputes related to violation of
18 the bylaws are going to be decided through ICANN's
19 accountability mechanism, and otherwise you don't
20 have a contractual right to sue.

21 Q. So when Ruby Glen sought to enforce its
22 contractual rights in court, ICANN's position was,
23 "You can't do that. You have waived your right to
24 seek judicial review. And that's okay because we
25 have provided a robust form of independent review

1 by way of the IRP"; isn't that right?

2 A. I don't know what the Court in Ruby Glen
3 said. I haven't reviewed that for this. I haven't
4 reviewed it in ages.

5 MR. ENSON: Mr. Chairman, I would request
6 that we move on. This is an area where Mr. Litwin
7 is seeking legal conclusions on topics that were
8 not in Ms. Burr's witness statement, and I think in
9 light of the time estimates for Ms. Burr's cross, I
10 think our time is best spent on matters that are
11 within her witness statement.

12 ARBITRATOR BIENVENU: Mr. Litwin.

13 MR. LITWIN: Well, I was just about to
14 move on, so that's perfectly fine with me.

15 MR. ALI: Sorry, Mr. Chairman.

16 Before you do, I'd like to consult with
17 you.

18 Secondly, Mr. Chairman, I think you made
19 it very clear in your -- in a recent procedure
20 ruling --

21 ARBITRATOR BIENVENU: Mr. Ali, I am going
22 to cut you off. You don't need to respond to that.
23 I will give you an opportunity to consult with
24 Mr. Litwin. He said he was planning on moving on.
25 So consult about that, and we'll go from there.

1 MR. ALI: Sure, but, Mr. Chairman, you
2 will understand that we will need to do this fairly
3 often because we are not in the same place.
4 Mr. Litwin is in New York, and I am in Washington,
5 D.C.

6 ARBITRATOR BIENVENU: That's fine. No one
7 has a problem with that, Mr. Ali.

8 MR. ALI: All right. Mr. Chairman, thank
9 you.

10 ARBITRATOR BIENVENU: Thank you.

11 (Whereupon a recess was taken.)

12 Q. BY MR. LITWIN: Ms. Burr, I would like to
13 direct your attention to Page 13 of the CCWG
14 report, Paragraph 57.

15 A. Yes.

16 Q. Now, here the CCWG provided -- and I will
17 again stipulate that this is in Annex 7, which was
18 an explication on the CCWG report and its
19 recommendations -- that if a Panel determines that
20 an action or inaction by Board staff violates the
21 bylaws or articles, then that decision is binding
22 and the ICANN Board and staff shall be directed to
23 take appropriate action to remedy the breach.

24 Do you see that?

25 A. Yes.

1 Q. Okay. So the CCWG intended that an IRP
2 Panel, if it were to find that ICANN breached its
3 bylaws or articles, should issue a binding
4 declaration that ICANN breached its articles and
5 bylaws and further that the Panel should direct
6 ICANN how to remedy that breach, correct?

7 A. That is not what the CCWG intended. What
8 the CCWG intended is that the Panel would issue a
9 binding determination regarding a bylaws violation,
10 and in response to that finding, ICANN must take
11 appropriate action to remedy the breach.

12 Q. Now, I guess I'm confused by this. The
13 CCWG obviously put a lot of work into preparing its
14 report in this Annex 7, correct?

15 A. Yes. We spent a lot of time doing it.

16 Q. I know, because I have been through all
17 those materials, and they are quite voluminous.

18 And here in Annex 7, the CCWG refers to
19 itself, it says, "We intend that the Panel shall
20 issue a binding decision and that ICANN's Board and
21 staff shall be directed to take appropriate action
22 to remedy the breach."

23 Did the CCWG just not mean what it says
24 here?

25 A. Well, so, first of all, I can read that

1 construction, which is passive and which was put up
2 as we were working this out. I do not read it to
3 say that the Panel is going to direct ICANN to take
4 a specific action to remedy the breach.

5 The Panel, by making a finding that ICANN
6 has violated its articles, ICANN must take -- then
7 take appropriate action to remedy the breach.

8 That is not the same as saying that the
9 Panel has the authority to say what the appropriate
10 action is to remedy the breach.

11 And the reason is there are so many moving
12 parts and parties here, imagine if this Panel said
13 "ICANN violated the bylaws, and you must award this
14 to, you know, X, Y or Z." There are going to be
15 two or three other parties who then have a cause of
16 action.

17 So ICANN must -- ICANN has an obligation
18 to take appropriate action, but the CCWG did not
19 contemplate that the Panel, the IRP Panel would
20 decide what that appropriate action was.

21 Q. Okay. Why don't we look at the bylaws.
22 So if you could turn back to Tab 2 in your binder,
23 and I would refer you to Page 30 at Section 4.3(x).
24 And there the bylaws provide that the IRP is
25 intended to be a final binding arbitration process;

1 is that correct?

2 A. Yes.

3 Q. And that IRP Panel's decisions are binding
4 final decisions to the extent allowed by law,
5 correct?

6 A. Yes. And that, of course, is subject to
7 the authority of the IRP Panel in Section (o).

8 Q. Well, I think we can all agree that
9 arbitral bodies, in fact, any judicial body must
10 act within its jurisdiction, correct?

11 A. Right. All I am saying is Section (o)
12 specifies what the IRP has authority to do, and
13 within that context its decisions regarding
14 binding -- about a bylaws violation is binding.

15 Q. Okay. So can we turn to Page 24, Rule
16 4.3(i), please. Here, much like the CCWG report we
17 just referred to earlier, the bylaws provide that
18 the IRP Panel shall conduct an objective de novo
19 examination of the dispute, correct?

20 A. Correct.

21 Q. And under Roman Numeral i, the bylaws
22 provide that the IRP Panel shall make findings of
23 fact to determine whether the covered action
24 constituted an action or inaction that violated the
25 articles of incorporation or the bylaws, correct?

1 A. Yes.

2 Q. And it says that the Panel should make
3 those findings pursuant to a de novo examination,
4 correct?

5 A. Yes. The Panel makes a finding of the
6 facts that determine whether or not the action or
7 inaction violated the bylaws. That's the fact that
8 they are determining, whether the covered action
9 constituted an action or inaction that violates the
10 articles of incorporation or bylaws.

11 Q. Well, what this says is that the Panel
12 shall make findings of fact to determine --

13 A. Right.

14 Q. -- whether or not there was a violation,
15 correct?

16 A. Correct.

17 Q. Okay. Now, let's look at Roman Numeral
18 iii that talks about claims arising out of the
19 Board's exercise of its fiduciary duties.

20 So this provision relates only to those
21 claims that arise out of a Board's exercise of its
22 fiduciary duties, correct?

23 A. Yes. Although, a Board -- it is very hard
24 for me to see that a Board can act without respect
25 for its fiduciary duties, but yes.

1 Q. Let's talk about the ICANN Board's
2 fiduciary duties.

3 Would you agree that each member of
4 ICANN's Board is accountable to the participating
5 community as a whole through his or her fiduciary
6 duties and is required to make decisions that are
7 in the best interest of the corporation and the
8 community at large; is that fair?

9 A. It is certainly true that the members of
10 the Board are each obligated to act in the interest
11 of the organization, including the organization's
12 commitment to the community. You started this out
13 by saying it has a fiduciary duty to individual
14 members.

15 I think there's a fiduciary duty to the
16 organization that encompasses staying within its
17 mission and acting in the global public interest
18 and all those other things that individual
19 participants in ICANN have an interest in.

20 But I am not sure I have a fiduciary duty
21 to an individual member of the community, if that's
22 what you're asking me, and I suspect that's a
23 matter of California law.

24 Q. Yeah, I think that's right. I think
25 ICANN, in fact, has said that the general legal

1 duties of an ICANN director are owed to the
2 corporation itself, that is to ICANN itself, and
3 the public at large, not to the individual
4 interests within the ICANN community; is that
5 right?

6 A. That's my understanding. I certainly do
7 not reflect any individual interest.

8 Q. So ICANN doesn't act as Afilias'
9 fiduciary, right?

10 A. I am not comfortable with this
11 construction because it is -- ICANN is acting --
12 the ICANN Board, when it acts, has an obligation to
13 the organization, including to the global public
14 interest, through the bylaws.

15 I don't know -- you're asking me to make a
16 legal conclusion about whether ICANN is Afilias'
17 fiduciary, and I just don't quite know what to make
18 of that.

19 Q. Okay. Well, let me ask you this, then:
20 In terms of your understanding of bylaws, and
21 particularly with respect to the bylaw that's on
22 the screen, little Roman Numeral iii, that says,
23 "For claims arising out of the Board's exercise of
24 its fiduciary duties," can Afilias or any
25 individual member of the ICANN community bring

1 claims for breach of fiduciary duty against ICANN?

2 A. Anybody can bring a claim that says that
3 ICANN, either the Board or org, violated the
4 bylaws. So if something that violated the bylaws
5 had something to do with fiduciary duties, you
6 would still be able to bring that.

7 But the fiduciary issue here doesn't
8 swallow the ultimate fact that the determination
9 about whether something violates the ICANN bylaws
10 or not is left to the IRP Panel.

11 The question is: In the course of acting
12 there are, at every step of the way, a bunch of
13 potentially reasonable courses of action. And to
14 me this says unless the Panel finds that ICANN
15 violated its -- the bylaws, it's not -- it doesn't
16 have the authority to say, you know, you should
17 have done it a different way if that -- if failing
18 to do it a different way does not amount to a
19 violation of the bylaws.

20 So this doesn't swallow anything. If
21 there's a violation of the bylaws, there's a
22 violation of the bylaws. This is only sort of in
23 the decision-making and carrying things out that --
24 activities that -- actions that do not violate the
25 bylaws that the Board should -- substitute its

1 judgment for the Board's reasonable judgment.

2 Q. Let me see if I can come across this in a
3 different way.

4 If the IRP's jurisdiction is limited in
5 the way that you have just described, do matters
6 falling outside of the IRP's jurisdiction fall
7 within the jurisdiction of a court of competent
8 jurisdiction?

9 A. There are -- in the contracts with
10 contracted parties, there are provisions for how
11 disputes are resolved. I don't -- I mean, I think
12 that calls for a legal conclusion I am not prepared
13 to make.

14 With respect to the applicant guidebook,
15 the applicant guidebook and the application
16 provided for a waiver of a lawsuit and reversion to
17 a -- these accountability mechanisms for
18 determination about whether the bylaws and articles
19 of incorporation were complied with, and that seems
20 to me it is sort of a contractual resolution.

21 Q. So I guess what I'm trying to figure out
22 is if there is a gap. Is there a gap between what
23 applicants are prevented from bringing to a court
24 and between -- and what an IRP Panel can decide?
25 Are there claims simply that an applicant can't

1 bring anywhere because it's waived its right to a
2 court hearing and the IRP Panel can't decide it?

3 A. Again, that's a legal conclusion that I
4 don't think I can make. I am telling you that with
5 respect to anything that involves an alleged
6 violation of the bylaws, the IRP is the process
7 that's available.

8 Q. Well, you were a member of the CCWG that
9 developed the process for the enhanced IRP.

10 What I'm asking is just in general terms,
11 was there an intent by the CCWG to fill the gap for
12 applicants where courts were prevented from hearing
13 a claim due to litigation waiver?

14 MR. ENSON: Mr. Chairman, if I might
15 interject for a moment. We do object to this
16 continued line of questioning. He's asking for a
17 legal conclusion from Ms. Burr that she's not
18 prepared to give, and she's said three or four
19 times she cannot do it.

20 I think it is appropriate for us to move
21 on to something else at this point in time.

22 MR. LITWIN: Mr. Chairman, if I can
23 respond to this. This is a really important line
24 of questioning. Ms. Burr talked about ICANN's
25 accountability mechanisms in her witness statement.

1 She was a member of the CCWG that drafted the
2 report that we have been referring to today. She
3 was the rapporteur for the translation of those
4 recommendations by the CCWG into the bylaws. Those
5 bylaws were discussed extensively yesterday by
6 ICANN's counsel.

7 And what I'm simply trying to get an
8 understanding of is not in a legal sense, but in
9 Ms. Burr's sense, as a member of the CCWG and as
10 the rapporteur, as she's testified here today,
11 whether she intended and whether the CCWG intended
12 there to be a gap or whether or not they saw the
13 enhanced IRP as filling that gap. It is that
14 simple.

15 ARBITRATOR BIENVENU: I'll allow the
16 question directed to Ms. Burr's understanding of
17 the intent of the CCWG insofar as the risk of an
18 existence of a gap between the litigation privilege
19 and the scope of the accountability mechanisms.
20 You can ask her about her understanding.

21 MR. LITWIN: Thank you, Mr. Chairman.

22 Q. Ms. Burr, as a member of the CCWG, did you
23 have an understanding as to whether or not the CCWG
24 intended the enhanced IRP to be a gap-filler in
25 light of the litigation waiver provided for in the

1 applicant guidebook?

2 A. No, I do not believe there was a
3 discussion about a gap-filler. The CCWG intended
4 that, and I don't recall any specific obligations
5 with the applicant guidebook, although there could
6 have been.

7 The point here was that if ICANN violated
8 the bylaws, if it exercised -- if it separated out
9 somebody for disparate treatment unfairly without
10 just cause, that the IRP would be there to provide
11 a recourse for the applicant.

12 In other words, ICANN could not immunize
13 itself from a bylaws violation through a contract.
14 That's -- to the extent that there's any
15 gap-filling, it is that -- and this is, like, so
16 central to what the IRP is about.

17 It's about saying to ICANN, no, you can't
18 make people agree that you're allowed to violate
19 the bylaws.

20 But it did not go to other issues that
21 were outside of the bylaws. The IRP is so
22 absolutely specific over and over and over again
23 about what it's intended to address. So to the
24 extent there was a gap-filling, it was, we are not
25 going to allow you to say you get to violate your

1 bylaws via a contract provision.

2 ARBITRATOR BIENVENU: Ms. Burr, was there,
3 so far as you can recollect, a discussion of the
4 fact of a gap between the litigation waiver and the
5 scope of the accountability mechanisms, including
6 any possible limitation on the remedies that an IRP
7 Panel could award? Do you recall a discussion of
8 that topic?

9 THE WITNESS: I don't recall a discussion
10 of that topic. It was several years ago, so I
11 apologize. We were -- completed nearly four --
12 maybe more than four years ago.

13 ARBITRATOR BIENVENU: Thank you.

14 Q. BY MR. LITWIN: Is it possible in your
15 view, given the litigation waiver in the guidebook
16 and the limited role of the IRP Panel that you have
17 just explained, that applicants may, in fact, be
18 left without a form of redress if their claim does
19 not rise to the level that you have discussed
20 that's appropriate for an IRP Panel's
21 determination?

22 A. All I can tell you is the exercise here in
23 the CCWG -- first of all, it wasn't a specific
24 reference to the applicant guidebook. It was in
25 reference to ICANN's overall accountability.

1 And second, I can tell you personally that
2 I was motivated by making sure that ICANN could not
3 say that it had the ability to insulate itself from
4 violations of its bylaws. That's what I was
5 thinking about as I was working on this and
6 drafting it. It is what you will recall -- well,
7 you won't recall, but Arif will recall I took
8 objection to in the ICM case.

9 But here there's no issue here. It is
10 quite clear that if there's a breach of the bylaws,
11 that's -- the IRP Panel is entitled to identify
12 that in a binding way.

13 So you're asking me a question. I don't
14 think that we ever talked about -- I don't recall
15 talking about it, but it was not intended to be --
16 it was intended to address violations of the
17 bylaws. That's what the IRP was about.

18 Q. So if a claimant -- if an IRP doesn't have
19 jurisdiction to decide a claim, then you have to be
20 able to bring it to court, right, because it is not
21 arbitral? If it is not arbitral, you have to be
22 able to bring it to court?

23 A. This is a matter of equitable law. I
24 don't know the answer to that. I don't know.

25 Q. Okay. I will move on, subject to any

1 comments from my team.

2 Okay. I am going to move on.

3 MR. ALI: No comments. Thank you.

4 Q. BY MR. LITWIN: So, Ms. Burr, you state in
5 your witness statement, and I am going to quote
6 from it, that, "ICANN'S core mission is the
7 technical coordination of the Internet's DNS," that
8 is, the Domain Name Space, "on behalf of the
9 Internet community, ensuring the DNS's continued
10 security, stability and integrity."

11 Is that correct?

12 MR. ENSON: Ethan, sorry, where are you in
13 the witness statement?

14 MR. LITWIN: I actually don't have the
15 reference to it, Eric. Let me pull it up real
16 quick.

17 MR. ENSON: Is it Paragraph 11?

18 MR. LITWIN: Yes, thank you. Paragraph
19 11.

20 MR. ENSON: Thank you.

21 Q. BY MR. LITWIN: Is that a correct reading
22 of your testimony?

23 A. It's as originally envisioned by NTIA,
24 ICANN's core mission is the technical coordination,
25 that is correct.

1 Q. Are you aware that ICANN's Board has
2 stated in one of its rationales that, quote,
3 ICANN's mission statement and one of its founding
4 principles is to promote user choice, consumer
5 trust and competition?

6 A. Yes. As somebody who was deeply involved
7 in the global international process that led to the
8 creation of ICANN, that has -- the notion that
9 increasing the table for innovation and competition
10 is that ICANN, in carrying out its DNS security
11 mission, should do so in a way that creates
12 opportunities for competition and innovation.

13 Q. Okay. I'd like to direct your attention
14 to Tab 7 of your binder. This is a copy of ICANN's
15 articles of incorporation. And if you look at
16 Section 2, Roman iii, which I think is on the
17 second page, "ICANN's articles provide that the
18 corporation shall operate in a manner consistent
19 with these articles and its bylaws for the benefit
20 of the Internet community as a whole, carrying out
21 its activities in conformity with the relevant
22 principles of international law and international
23 conventions and applicable local law and through
24 open and transparent processes that enable
25 competition and open entry into Internet-related

1 markets."

2 That's what it says, correct?

3 A. That is what it says, yes.

4 Q. It is this same open and transparent
5 processes that the bylaws talk about at Section
6 3.1, correct?

7 A. Sorry, 3.1 of the bylaws?

8 Q. Yes, that we referred to earlier today
9 that talks about open and transparent processes.

10 A. I would have to look at the words side by
11 side to know if they are exact.

12 Q. I withdraw the question, Ms. Burr.

13 Now, this paragraph of the articles states
14 that ICANN must carry out its activities in
15 conformity with principles of international law,
16 correct?

17 A. Yes.

18 Q. In your view as a lawyer, as a Board
19 member, what are the relevant principles of
20 international law and applicable international
21 conventions that are referenced here?

22 A. You know, this would be based on relevant
23 treaties, respect for trademark treaties,
24 international conventions on -- I mean, I don't
25 know in particular, but -- because I am also not an

1 international law expert, nor am I an arbitrator.

2 So I --

3 Q. Okay.

4 A. -- I am not able to say all of these, what
5 they all are.

6 Q. There's a reference to competition here,
7 and the articles clearly say "enable competition,"
8 not "comply with U.S. antitrust law," correct?

9 A. Correct. And enabling competition has
10 always from the white paper -- so just to put this
11 in context, which I think is really important, in
12 1998 the United States government actually proposed
13 to add new top-level domains to expand the name
14 space to enable competition by expanding the name
15 space by creating five new top-level domains.

16 The global community came back to us and
17 said, "Forget it. We don't want you to do that,
18 USG." We want the community to develop the
19 policies that will -- for enabling competition
20 through new gTLDs.

21 So we were asked specifically about
22 antitrust immunity in the green paper, and we said,
23 "No, we are not going to -- we think that's a bad
24 idea because all of this should be -- continue to
25 be subject to applicable law relating to

1 competition," but ICANN's role is setting a table
2 where competition can take place. ICANN's role, as
3 it says in the -- as the RSEP process with respect
4 to competition, is to refer issues where
5 competition is a concern to relevant authorities.

6 But ICANN is not a regulator, and ICANN
7 does not have competition law competence, whether
8 it is U.S. or otherwise.

9 Q. Thank you, Ms. Burr. I will ask again --
10 and I think I have been quite indulgent in letting
11 you speak your mind here today because we all do
12 want to hear what you have to say, but I would ask
13 you again to not respond to something that's a
14 yes-or-no question with a monologue that does not
15 respond to the question.

16 Because what I asked is that Article 3
17 that we are looking at here does not say "comply
18 with U.S. antitrust law," does it?

19 A. No.

20 Q. Thank you. Now, I'd like to direct your
21 attention back to Tab 2 in your binder, which is
22 the bylaws, and if you could please turn to Section
23 1.2 on Page 5.

24 Again, this is ICANN's commitment and core
25 values section. If you can turn to the next page,

1 Page 6, that's where the core values begin. And
2 what the bylaws state is that the core values are
3 intended to guide ICANN's decisions and actions,
4 correct?

5 A. Are we talking about commitments or core
6 values?

7 Q. Core values on Page 6, under (b), "Core
8 Values."

9 A. Yes.

10 Q. Okay. Now, turning to the next page, I am
11 going to direct your attention to Paragraph 4,
12 where the bylaws provide that "One of ICANN's core
13 values is the introduction and promotion of
14 competition into the registration of domain names."

15 Do you see that?

16 A. Yes. "Where practical and beneficial to
17 the public interest as identified through the
18 bottom-up multistakeholder Policy Development
19 Process."

20 Q. Correct. Now, in other words, putting
21 those two concepts together, the bylaws provide
22 that ICANN should consider how its actions and
23 decisions will help further the objectives of this
24 Paragraph 4, the introduction and promotion of
25 competition, correct?

1 A. Where practical and beneficial as
2 identified through the bottom-up multistakeholder
3 Policy Development Process, yes.

4 Q. And the competition concerns identified in
5 Paragraph 4 are those competition concerns or
6 issues or maxims as identified through the Policy
7 Development Process, correct?

8 A. I'm sorry. Could you repeat that?

9 Q. Sorry. That was a horrible question. I
10 apologize.

11 In particular, when ICANN is making its
12 decisions and taking actions and has to consider
13 and be guided by this Paragraph 4, it needs to
14 identify those competition concerns that are
15 specifically identified in ICANN's policies,
16 correct?

17 A. This is saying in the public interest
18 through the bottom-up multistakeholder Policy
19 Development Process.

20 The point here is the public interest is
21 the product. The Policy Development Process is the
22 process by which the public interest is identified,
23 and that would be -- so here, introducing and
24 promoting competition in domain name registration
25 where practical and beneficial to the public

1 interest.

2 And then it says -- and that public
3 interest, by the way, is identified through the
4 Policy Development Process.

5 Q. Correct. And there is a public interest
6 in competition, right?

7 A. Yes, of course there's a public interest
8 in competition. The question is in terms of how
9 that works into the new gTLD process.

10 Q. Okay.

11 A. One has to take into mind the
12 consideration of the Policy Development Process and
13 what public interest is identified in the Policy
14 Development Process. It is important because, of
15 course, competition is in the public interest. So
16 are 10,000 other things.

17 So the question is: In any case when
18 you're deciding what's practical and beneficial, we
19 are looking to the Policy Development Process to
20 identify that.

21 Q. Okay. I'd like to direct your attention
22 to Section 2.3.

23 Chuck, if you can put that up.

24 So here the bylaws provide that, "ICANN
25 shall not apply its standards, policies, procedures

1 or practices inequitably or single out any
2 particular party for disparate treatment unless
3 justified by a substantial and reasonable cause,
4 such as the promotion of effective competition."

5 That's what it says, right?

6 A. Yes.

7 Q. What do you understand -- strike that.

8 By "inequitably," do you understand that
9 to mean unjustly or unfairly?

10 A. Yes.

11 Q. And what this particular bylaw provides is
12 that although ICANN must in general apply its
13 standards, policies, procedures and practices
14 equitably, it does not have to do so in a
15 particular instance where justified by the
16 promotion of effective competition; is that fair?

17 A. This is an example where there might be
18 substantial and reasonable cause. I am just a
19 little bit confused because we -- we moved -- so
20 this particular 2.3 was an issue, and we moved it
21 into the commitment statement. I didn't realize we
22 had also left it in Section 2.

23 But in the commitment statement there's
24 also an obligation to apply "documented policies
25 consistently, neutrally, objectively, and fairly,

1 without singling out any particular party for
2 discriminatory treatment, making an unjustified
3 prejudicial distinction between or among different
4 parties."

5 Q. Okay. But what I'm really referring you
6 to, Ms. Burr, is Section 2.3, which says you have
7 got to treat everybody the same, but you can treat
8 one party differently if there's a substantial and
9 reasonable cause to do that, that's what 2.3
10 provides, right?

11 A. Yes, if there's a substantial or
12 reasonable cause.

13 Q. In fact, the only example provided in the
14 bylaws is the promotion of effective competition.
15 The bylaws state that the promotion of effective
16 competition is, in fact, a substantial and
17 reasonable cause to treat somebody differently,
18 right?

19 A. Yes. I have to say that I thought we had
20 moved this statement out, but apparently it is
21 still there, at least based on this document.

22 Q. Okay. I'll represent to you that this is
23 a copy of the bylaws that appears on ICANN's
24 website, and again, I would ask you to confirm, yes
25 or no, that the bylaws, Section 2.3, provides that

1 ICANN must treat everybody the same and can't treat
2 anybody differently unless there's a substantial
3 and reasonable cause to do so. The only example
4 given of that is the promotion of effective
5 competition, correct?

6 A. Yes, that is what 2.3 says.

7 Q. Okay. Now, in your witness statement you
8 state that ICANN has historically referred
9 competition concerns to the Department of Justice
10 for analysis and possible government response or
11 action, correct?

12 A. Correct.

13 MR. ENSON: Ethan, again, I just ask for a
14 cite in the declaration.

15 MR. LITWIN: I apologize, Eric.

16 MR. ENSON: 23, perhaps.

17 MR. LITWIN: 23, yes. You beat me by a
18 second.

19 Q. Now, and I'll apologize if I mispronounce
20 his name, but, Ms. Burr, do you know John Kneuer,
21 formerly of the U.S. Commerce Department?

22 A. Yes.

23 Q. Did I pronounce his name correctly?

24 A. Kneuer.

25 Q. Thank you. Are you aware that Mr. Kneuer

1 submitted an expert report in this IRP on behalf of
2 Amici?

3 A. I did see that, yes.

4 Q. Did you review it?

5 A. I did not review it in depth. I took a
6 quick look at it.

7 Q. Okay. Well, in his report Mr. Kneuer
8 opines -- this is Page 3, Paragraph 4(a) of his
9 report.

10 A. Is that in one of these tabs?

11 Q. Yes. I can give you the cite. It is a
12 pretty basic point, but if you'd like to refer, it
13 is Tab 9 on Page 3, and there at the bottom of
14 Paragraph (a), and I will read it to you. It says,
15 "ICANN is obligated to refer relevant matters of
16 competitive concern to appropriate government
17 authorities, such as the U.S. Department of
18 Justice."

19 Do you agree with that?

20 A. I am not aware of any place where it says
21 it must do that.

22 ICANN does, for example, in the registry
23 services approval process, reserve the right to
24 refer things to appropriate antitrust competition
25 authority.

1 Q. Well, if I can just summarize, what I
2 think Mr. Kneuer is saying there is that where
3 ICANN finds a competitive concern, it is obligated
4 to refer those concerns to DOJ or another
5 competition regulator; is that your understanding
6 of what ICANN is obligated to do where it finds
7 competition concerns?

8 A. That is my personal view about what ICANN
9 can do. I am not aware of a place where it says it
10 must do that.

11 Q. Okay. Now, where ICANN does do this, I'd
12 just like to get a better sense of how the process
13 works. Perhaps we can just use a recent example, a
14 recent request or referral as an example. When was
15 the last time ICANN asked the DOJ to advise ICANN
16 on a competition issue?

17 A. I don't know the answer to that question.

18 Q. Are you aware of any instances where ICANN
19 has asked DOJ to advise it on a competition issue?

20 A. The place where it is most likely to come
21 up is when somebody seeks -- when a registry
22 operator seeks authority to introduce a new
23 registry service.

24 In that case, if the registry service that
25 they were proposing raised competition concerns,

1 they have the right -- ICANN has the ability to
2 refer.

3 Q. Has ICANN ever done that, do you know?

4 A. I don't know the answer to that question.

5 Q. If ICANN was going to refer something to
6 the Department of Justice, would it use the
7 business review letter process?

8 A. I have no idea how -- I don't know what
9 ICANN would do.

10 Q. So you don't know if they would send a
11 letter, pick up the phone and call somebody?

12 A. I don't know.

13 Q. Okay. If ICANN were to ask the DOJ to
14 opine, would it ask the DOJ to opine on whether
15 something violated its obligation to introduce and
16 promote competition?

17 A. At least in the RSEP program, the question
18 is whether the service -- and I would have to look
19 at the exact words, but whether it poses -- I don't
20 know, whether it raises competition concerns. So
21 I'd have to look at that RSEP, because that's where
22 I would have to look to find out what they would
23 ask about.

24 Q. Now, a new registry service would be
25 potentially, and most likely introduced globally,

1 correct, because the Internet is global, right?

2 A. It certainly could be.

3 Q. And in the event that it was global, would
4 ICANN be obligated to take a survey of competition
5 regulators globally to determine whether or not
6 that service raised competition concerns?

7 A. I don't believe ICANN is obligated to do a
8 global survey.

9 Q. Well, how would ICANN determine whether an
10 action complied with competition law across
11 multiple jurisdictions?

12 A. I think in the RSEP context, the referral
13 is whether a proposed service or arrangement raises
14 competition concerns, and that it would be
15 reviewing it -- referring it to the relevant
16 competition authorities, which could be Europe,
17 could be the U.S., could be someplace else.

18 Q. Well, because competition law varies,
19 right?

20 A. Correct.

21 Q. By jurisdiction?

22 MR. ENSON: Mr. Litwin, the RSEP Policy is
23 attached as Exhibit D to Ms. Burr's witness
24 statement. Our staff referred to it a couple
25 times. If you want to examine her on that, I would

1 request that you would allow her to look at the
2 document.

3 MR. LITWIN: I am done with this. If you
4 want to take that up on redirect, you can be my
5 guest.

6 MR. ENSON: Very well.

7 Q. BY MR. LITWIN: So would ICANN be
8 obligated to post communications that it's had with
9 a relevant competition regulator on its website?

10 A. I am quite certain that would depend on
11 the circumstances. So general correspondence ICANN
12 posts on its website. I suspect ICANN does not
13 post CIDs on its website.

14 Q. Are you aware -- I think you said that you
15 referred, in preparing for your testimony here
16 today, to a 2008 letter that the United States
17 Department of Justice wrote to the U.S. Department
18 of Commerce, correct?

19 A. Correct.

20 Q. That's Tab 8 of your binder, and I'd ask
21 you to open that to the first page, please.

22 Now, is it fair to say that in this letter
23 the Department of Justice is opining on competition
24 concerns raised by ICANN's proposal to launch the
25 new gTLD Program, which, in fact, it did several

1 years later; is that correct?

2 A. So this is a letter from Deb Garza, acting
3 assistant Attorney General for Antitrust, to
4 Meredith Baker, who was the acting assistant
5 Secretary for Communications at NTIA, conveying to
6 Meredith Baker the Justice Department's
7 observations regarding the very earliest version of
8 the policy. I don't even know if there was an -- a
9 draft applicant guidebook out at this point.

10 But yes, this is an input to NTIA, which I
11 believe was forwarded, regarding the Justice
12 Department's recommendations at that point in time.

13 Q. Okay.

14 A. This is part of the process.

15 Q. So essentially NTIA had asked the
16 Department of Justice -- and I am referring to the
17 first paragraph of Ms. Garza's letter. The
18 Department of Commerce was simply asking advice
19 concerning competition issues raised by the draft
20 request for proposal that would govern the issuance
21 of new generic top-level domains, correct?

22 A. Uh-huh.

23 Q. I'm sorry, you need to answer "yes" or
24 "no" for the record.

25 A. Sorry. Yes. Sorry.

1 Q. No worries. We all fall into that.

2 This is a request made by the Department
3 of Commerce, not ICANN, right?

4 A. Apparently, yes.

5 Q. And I think I heard you testify a moment
6 ago that this letter was subsequently sent by
7 Ms. Baker to ICANN, correct?

8 A. That's my understanding.

9 Q. In fact, I will represent to you that
10 Ms. Baker sent this letter on December 18, 2008, to
11 Mr. Peter Dengate-Thrush, who at the time was the
12 chairman of the Board of ICANN?

13 A. Peter Dengate-Thrush, yes.

14 Q. Now, I'd like to direct you to a few
15 points in Ms. Garza's letter, just to a few points
16 because I know Mr. Enson and I are very familiar
17 with Ms. Garza.

18 Ms. Garza was the head of DOJ's Antitrust
19 Division, correct?

20 A. Yes, she's the acting assistant Attorney
21 General at the end of the second Bush
22 administration.

23 Q. Okay. So in the world of DOJ, in just
24 general parlance, she was the top dog in the
25 Antitrust Division, right, she was the one that ran

1 the show?

2 A. Yes.

3 Q. Now, Ms. Garza -- I'd like to direct your
4 attention to Page 4 of her letter in the section
5 entitled "Recommendations."

6 A. Uh-huh.

7 Q. You'll see there that under
8 "Recommendations," Ms. Garza writes that, "ICANN is
9 obligated to manage gTLDs in the interest of
10 registrants and to protect the public interest in
11 competition," correct?

12 A. That is what she says.

13 Q. This conforms to what you said earlier,
14 that there's a public interest in competition,
15 correct?

16 A. She is citing to the articles of
17 incorporation, and I want to go back to the
18 specific language about enabling competition that's
19 in the articles of incorporation.

20 Q. Now, turning to Page 6, I would direct
21 your attention to Footnote 10, at the bottom of the
22 page, obviously, and they are in quite small type.

23 Ms. Garza writes that, "ICANN has
24 consistently told us that its primary concern is
25 with DNS management from a technical perspective,

1 that it does not have the expertise or inclination
2 to protect or preserve the public interest in
3 competition and low domain costs, preferring
4 instead to allow government competition authorities
5 to take whatever action may be necessary to address
6 issues of competitive abuse."

7 This is, in fact, what you said in your
8 witness statement was ICANN's historical practice,
9 correct?

10 A. Correct. ICANN refers out -- it certainly
11 is my consistent view throughout this that ICANN
12 has neither the authority nor expertise to serve as
13 a competition regulator.

14 Q. And you state at Paragraph 23 of your
15 witness statement that ICANN was not designed to
16 and does not have specific expertise in antitrust
17 for competition law, right?

18 A. I'd have to look at Paragraph 23, but yes.

19 Q. Continuing on to Paragraph 24, you write,
20 "ICANN has historically referred competition
21 concerns to DOJ for analysis and possible
22 government response or actions," correct?

23 A. Uh-huh.

24 Q. I'm sorry. I need a "yes" or "no" for the
25 record.

1 A. Yes. I'm so sorry. Yes. I'm so sorry.

2 Q. No worries.

3 What you write in your witness statement
4 is consistent with what Ms. Garza writes in
5 Footnote 10, correct? It is the highlighted
6 portion on the screen about what ICANN has
7 consistently told the DOJ.

8 A. I don't know what ICANN has consistently
9 told the DOJ, but that's consistent with my views
10 on ICANN's expertise.

11 Q. That was, in fact, the question. Thank
12 you.

13 Continuing on in Footnote 10 in
14 Ms. Garza's letter, "The problem with ICANN's
15 preferred approach is that antitrust laws," meaning
16 U.S. antitrust laws, "do not prescribe a registry
17 operator's unilateral decisions." "And
18 accordingly," skipping to the end of the paragraph,
19 "ICANN should create rules fostering a competitive
20 environment to the greatest extent possible."

21 So in other words, the DOJ disagreed with
22 ICANN's preferred approach to handling competition
23 concerns, correct?

24 A. Well, she is certainly citing what she
25 describes as a problem with ICANN's views, yes,

1 that's what she's saying. I mean, in creating
2 rules, fostering a competitive environment to the
3 greatest extent possible, for example, in this
4 case, this is largely in 2008, this is largely
5 about trademark concerns and the implication for
6 consumers and trademark holders through the
7 introduction of new top-level domains.

8 And before the new gTLD Program launched,
9 there were any number of steps taken to address the
10 kinds of issues she is talking about in here, such
11 as the Trademark Clearinghouse and stuff. So it
12 is -- so, you know, this is a letter that ICANN
13 received and fed into the policy and implementation
14 process.

15 Q. What Ms. Garza's really getting at here is
16 there are certain blind spots in U.S. antitrust
17 law, such as the failure to proscribe a registry
18 operator's unilateral decisions, correct?

19 A. Well, she is certainly saying that the
20 antitrust laws generally do not proscribe a
21 registry operator's unilateral decisions, yes.

22 Q. And because of that, ICANN should create
23 rules for fostering a competitive environment to
24 the greatest extent possible, right?

25 A. That's what she says, yes.

1 Q. In fact, you note at Footnote 11 of your
2 witness statement, which is on Page 8, you say
3 that, "The pressure of competition is likely to be
4 the most effective means of discouraging registries
5 from acting monopolistically," correct?

6 A. I believe this is a quote -- sorry, I just
7 need to understand where this is coming from.

8 Yes, this is from the white paper, and
9 this was in response -- this was in response -- I
10 mean, this had very particular genesis because this
11 goes back to the proposal in the green paper that
12 the United States government was going to
13 unilaterally introduce five new top-level domains
14 to add competition.

15 Q. Ms. Burr, I'm sorry, I am just asking a
16 very basic question.

17 When you write at paragraph -- at Footnote
18 11 that, "The pressure of competition is likely to
19 be the most effective means of discouraging
20 registries from acting monopolistically," do you
21 agree with that statement?

22 MR. ENSON: Mr. Litwin, I have to object.
23 Ms. Burr was in the middle of a response to your
24 question.

25 ARBITRATOR BIENVENU: The objection is

1 sustained. Mr. Litwin, she does not write this.
2 She quotes from a response, as you can see. So if
3 you want to reformulate your question, you're at
4 liberty to do so, but she doesn't say that.

5 MR. LITWIN: I will reformulate. Thank
6 you, Mr. Chairman.

7 Q. Ms. Burr, you quote from the white paper
8 at Footnote 11 that, "The pressure of competition
9 is likely to be the most effective means of
10 discouraging registries from acting
11 monopolistically."

12 Do you agree with that statement in the
13 white paper?

14 A. As a general matter, the white paper was
15 saying that competition is -- more competition is
16 better, but it also goes on to say, "But we are
17 deferring to the community, who said we should not
18 be making that decision."

19 I mean, that's what this is about. It is
20 really, really, really -- yes, it was the United
21 States government's position in 1998 that the
22 pressure of competition is likely to be the most
23 effective way of discouraging registries from
24 acting monopolistically.

25 Q. Okay. Now, do you understand, as someone

1 who has some familiarity with competition laws as a
2 result of your work at the FTC, that acting
3 monopolistically is the same thing that Ms. Garza
4 writes in Footnote 10 of her letter about a
5 registry operator making unilateral decisions?

6 MR. ENSON: Mr. Chairman, again, I
7 apologize for interrupting, but I feel that I have
8 to object. We have established what Ms. Garza said
9 in the letter in 2008. We established what is said
10 in the white paper. Ms. Burr has answered these
11 questions. There's nothing more to examine her on.
12 Mr. Litwin is unfortunately seeking a legal
13 conclusion on these issues.

14 MR. LITWIN: If she doesn't have an
15 understanding, I am happy to move on.

16 ARBITRATOR BIENVENU: I think it goes to
17 weight. You can ask the question.

18 MR. LITWIN: Thank you, Mr. Chairman.

19 Q. Again --

20 A. Let me be very clear, I am not an
21 antitrust expert. She's talking about unilateral
22 decisions made under processes established by
23 ICANN. Those might or might not be monopolistic
24 behaviors. I have to know the circumstances. I
25 don't read those two sentences as saying the same

1 thing.

2 Q. Okay. When Ms. Garza writes that, "ICANN
3 should create rules for fostering a competitive
4 environment to the greatest extent possible," what
5 do you understand "to the greatest extent possible"
6 to mean?

7 A. I would go back and look at ICANN's bylaws
8 and articles of interpretation to parse that, which
9 is that where practical and feasible, consistent
10 with the global public interest as identified
11 through policy development processes.

12 Q. Is it possible that what Ms. Garza's
13 saying here is that where ICANN is faced with a
14 decision where one outcome may promote competition
15 and an alternative may harm competition, that ICANN
16 should err on the side of promoting competition
17 because antitrust laws have certain blind spots
18 when dealing with dominant entities?

19 MR. ENSON: Mr. Chairman, Ms. Burr cannot
20 answer or speculate about what Ms. Garza meant in
21 2008 with the use of that phrase. Ms. Garza wrote
22 it, not Ms. Burr.

23 ARBITRATOR BIENVENU: I'll allow the
24 question. I believe it goes to the weight of the
25 resulting evidence, but I'll allow the question.

1 Ms. Burr is a very sophisticated witness with
2 intimate knowledge of ICANN and its provenance.
3 I'll allow the question.

4 MR. ENSON: Thank you, your Honor.

5 Q. BY MR. LITWIN: Ms. Burr --

6 A. If you would, just give me a moment here.

7 Q. Sure.

8 A. To me this letter is really about
9 pressures on trademark owners who will feel
10 compelled to register in new gTLDs and that ICANN
11 should analyze that issue, the trademark issue, and
12 proceed cautiously in authorizing new gTLDs,
13 attempting to assess both the likely costs and
14 benefits of any new gTLD.

15 To me what this letter is about is -- it's
16 possible that new top-level domain operators will
17 be able to impose costs on trademark owners who
18 feel compelled to protect their marks, and you need
19 to do this analysis before you proceed with new
20 gTLDs.

21 Beyond -- this is in a very particular
22 context, and I have to respond to it in the context
23 in which it was written.

24 Q. Okay. Let's look at this from another
25 angle. So if you could turn to Tab 6 in your

1 binder, and this is a document called the
2 "Rationale for Board Decisions on Economic Studies
3 Associated with the new gTLD Program."

4 Do you see that?

5 A. Yes.

6 Q. And these are the explanatives of Board
7 resolution that the Board issues from time to time
8 to explain why it took certain actions; is that a
9 fair statement?

10 A. I actually don't know what this document
11 is. Could you give me a little bit more?

12 Q. Sure.

13 A. Could somebody tell me in what context or
14 what this was attached to?

15 Q. I can tell you that -- I'll represent to
16 you, Ms. Burr, that we downloaded it from ICANN's
17 website, and I'll also represent to you that even
18 though it is undated, it was issued in 2011, which
19 we know from the web address from it.

20 And you'll see, if you look at Page 3,
21 that refers to events that took place in 2009 and
22 2010 and was issued -- well, I won't testify to why
23 it was issued, but I would direct your attention to
24 Page 8, which is entitled "Board Determinations."

25 And there -- and the Board states that,

1 "ICANN's default position should be to foster
2 competition."

3 Do you see that?

4 A. "As opposed to having rules that restrict
5 the ability of gTLDs to innovate."

6 Q. Correct. I just want to ask this question
7 again. Because ICANN's default position, according
8 to the Board, should be to foster competition, that
9 where ICANN is faced with a choice, one of which
10 may promote competition, the other which may harm
11 competition, ICANN should act in conformity with
12 its default position to foster competition; is that
13 a fair statement?

14 A. So this is talking about a default
15 position to allow the introduction of new gTLDs,
16 set a table where competition can thrive through --
17 and innovation through the addition of new gTLDs.

18 I would read this also in the context of
19 other provisions of ICANN's bylaws that require to
20 rely on market mechanisms in the same -- you just
21 can't take this out of -- I mean, yes, foster
22 competition. Does that mean that ICANN should act
23 like a regulator? No. But it should make a choice
24 to allow competitive forces to go out and battle it
25 out and introduce innovation.

1 Q. But what I'm asking is that where ICANN
2 faces a choice, and we have already established
3 that you are not aware of any instance where ICANN,
4 in fact, has asked the advice of a competition
5 regulator and ICANN has to make a choice, isn't it
6 fair to say, based on what we have seen, that its
7 default position should be to make the choice that
8 promotes competition?

9 A. ICANN has -- ICANN must operate consistent
10 with the community-developed policies. I had not
11 seen this before. I don't know everything that it
12 goes through. I feel like I am speculating based
13 on one position. But basically this is consistent
14 with my view that in all cases, the point is to
15 allow an environment in which competition can take
16 place.

17 Q. Okay. Turning back to Page 6 of
18 Ms. Garza's letter.

19 ARBITRATOR BIENVENU: Mr. Litwin, I am
20 sorry to interrupt. We are beyond the point at
21 which the agenda provided you with a break for our
22 second break. And for planning purposes, I should
23 mention that, according to the administrative
24 secretary, you have reached and are a little bit
25 beyond your estimate of three hours for the cross.

1 So I don't want to break your flow, but
2 please bear this in mind as you proceed.

3 MR. LITWIN: Thank you, Mr. Chairman. I
4 am almost done here.

5 Q. So, Ms. Burr, are you back on Page 6 of
6 Ms. Garza's letter?

7 A. I am now, yes.

8 Q. I think I recall that you said that DOJ
9 said that -- you know, opined that ICANN should
10 consider competition as part of its evaluation of
11 each new gTLD application; is that fair?

12 I'll just turn your attention to right
13 above the Number 2 point heading on Page 6. It
14 refers to the evaluation of each new gTLD
15 application.

16 A. Yes. What they are saying there is you
17 should consider the impact of new gTLDs on
18 trademark owners and others who have marks that
19 they need to -- that they feel the need to protect.

20 Q. Okay. Now, the next section of
21 Ms. Garza's letter is captioned, "ICANN should
22 revise its RFP process and the proposed registry
23 agreement to protect consumers from the exercise of
24 market power."

25 Do you see that?

1 A. I do.

2 Q. And in that section, in fact, in the first
3 paragraph under that, Ms. Garza writes, "The RFP
4 process should require ICANN to consider and allow
5 objections for and retain authority to address any
6 adverse consumer welfare effects that may arise
7 during the new gTLD process."

8 Do you see that?

9 A. I do.

10 Q. So the view of the United States
11 Department of Justice was that ICANN had and should
12 retain the authority to address adverse consumer
13 welfare effects that may arise during its
14 administration of the new gTLD Program; isn't that
15 right?

16 A. That is what the Department of Justice
17 said in 2008, at the very beginning of the new gTLD
18 process, based on the very first applicant
19 guidebook.

20 Q. And that's consistent with what we looked
21 at earlier in Section 2.3 of the bylaws that allows
22 ICANN, in specific instances, to treat a party
23 differently to promote effective competition,
24 right?

25 A. That is what Section 2.3 says.

1 Q. Now, I'll direct your attention to the
2 last page of Ms. Garza's letter under the three
3 asterisks. She writes, "ICANN's approach to TLD
4 management demonstrates that it has adopted an
5 ineffective approach with respect to its obligation
6 to promote competition," right?

7 A. Yes, in December of 2008.

8 Q. Okay. Now, when we began discussing
9 Ms. Garza's letter, I represented to you, and I
10 think, as you recall, that the Commerce Department
11 had sent Ms. Garza's letter to ICANN.

12 Are you aware that the Commerce Department
13 also advised ICANN back in 2008 to revise, among
14 other things, its applicant guidebook, this first
15 iteration of the guidebook so that ICANN could, as
16 Ms. Garza says in her letter, "consider, allow
17 objections for, and retain authority to address any
18 adverse competitive welfare effects that may arise
19 during the approval of new gTLDs"?

20 A. I don't have the transmittal letter from
21 NTIA here, so I don't know if NTIA said that or
22 simply transmitted Deb Garza's letter. I'm sorry.
23 I don't have it in front of me.

24 Q. I'd like to direct your attention to Tab 3
25 of your binder, which is an excerpt from the

1 applicant guidebook, and if you could turn to
2 page -- I apologize. The page numbers here are
3 incredibly small -- to Pages 6 and 7, which are in
4 the upper right-hand corner. May be easier to
5 refer to the guidebook. It is A-11 and A-12 in the
6 guidebook.

7 Do you see that?

8 A. Yes, I am looking at the same chart, A-11
9 and -12.

10 Q. I will represent to you this is a section
11 from the guidebook that provides instructions on
12 how to complete the new gTLD application, and this
13 excerpt is taken out of Section 18, the
14 Mission/Purpose.

15 Do you see that?

16 A. Yes.

17 Q. And if you turn to the next page, A-12,
18 which is Exhibit Page 7, the guidebook states that
19 the answers to Section 18(b) should address the
20 following points, one of which is, "What do you
21 anticipate your proposed gTLD will add to the
22 current space, in terms of competition,
23 differentiation or innovation," correct?

24 A. I see that, yes.

25 Q. And that's exactly what DOJ asked for,

1 that ICANN should consider in each application how
2 it would affect competition, differentiation and
3 innovation, correct?

4 A. I think Deb Garza's admonition was
5 slightly different.

6 Q. Well, I will agree with you it is slightly
7 different, but it is the same concept, right, that
8 ICANN should consider competition concerns in
9 connection with its approval of new gTLD
10 applications, correct?

11 A. What it says, I think this is what you're
12 referring to, is that the letter says ICANN should
13 explicitly analyze the imposition of the possible
14 impetus -- imposition of costs on registrants who
15 feel compelled to register their names in the new
16 gTLD.

17 Q. Well, actually, what I was referring to --
18 and this is on Page 2 of Ms. Garza's letter. It
19 says, "The division makes two specific
20 recommendations. First, ICANN's general approach
21 to new gTLDs should be revised to give greater
22 consideration to consumer interests. ICANN should
23 more carefully weigh potential consumer harms
24 against potential consumer benefits before adding
25 new gTLDs and renewing new gTLD registry

1 agreements."

2 A. Yes.

3 Q. And all I am asking is that is consistent
4 with what ICANN eventually put in its guidebook to
5 require applicants to describe how their proposed
6 gTLD will add to the current space in terms of
7 competition, differentiation and innovation?

8 A. Yes. ICANN did ask for information in the
9 applicant guidebook about how it would contribute
10 to competition, differentiation or innovation, and
11 yes, in 2008, after the first of, you know, nine
12 versions of an applicant guidebook, the Justice
13 Department suggested that ICANN should look harder
14 at consumer interests and cost-benefit analysis
15 about adding new gTLDs.

16 It is really about a cost-benefit analysis
17 about new gTLDs all together. ICANN went through
18 eight more versions of the applicant guidebook, a
19 lot of policy development and practice around
20 protecting consumers and trademark holders and, you
21 know, the economic analysis that you referred me to
22 earlier.

23 So yes, that's what the Department of
24 Justice said in 2008, four years before the final
25 applicant guidebook.

1 Q. And if we could just turn briefly, again,
2 to that paragraph on Page 6 that I referred you to
3 earlier. Ms. Garza writes, "ICANN should
4 explicitly include this type of analysis as part of
5 its evaluation of each new gTLD application and
6 should proceed cautiously in authorizing new gTLDs,
7 attempting to assess both the likely costs and
8 benefits of any new gTLD."

9 So it is not just in the general, it is in
10 the specific, too, right?

11 A. And the community process calls for a
12 different approach. The community Policy
13 Development Process essentially said applicants
14 should resolve contention sets among themselves, as
15 opposed to a beauty contest.

16 Q. So in -- is your testimony here today that
17 the United States Department of Justice opined on
18 competition issues raised by the new gTLD Program
19 and then ICANN went a different route?

20 A. After four more years of community
21 development addressing a whole bunch of competition
22 issues that are raised in this letter, did ICANN
23 follow this letter to the -- did ICANN do
24 everything that Deb Garza wanted them to do? I
25 mean, I read this letter as Deb Garza essentially

1 saying, you know, you don't have the -- you have to
2 work through the cost-benefits of what this is
3 going to do to trademark holders, and then that was
4 the motivation, and ICANN spent four more years
5 working on that.

6 Q. Okay. After which they introduced the
7 language of the guidebook that instructed
8 applicants on how to complete 18(b), correct?

9 A. Yes. I saw that language as well.

10 Q. Right. And that section, Section 18, and
11 18(b) in particular is part of the nonconfidential
12 portion of the application that ICANN posted on its
13 website, correct?

14 A. Correct.

15 Q. So --

16 A. I don't know the answer to that, but I
17 assume that.

18 ARBITRATOR BIENVENU: Mr. Litwin, I hate
19 to do it, but I think there are many participants
20 looking at their watch and wondering when we are
21 going to take our break. I didn't want to break
22 your flow, but I feel indebted to others.

23 MR. LITWIN: Mr. Chairman, if I could just
24 indulge your time for two more minutes, I am
25 virtually at the end.

1 ARBITRATOR BIENVENU: Very well.

2 Q. BY MR. LITWIN: So during the evaluation
3 process, Ms. Burr, members of the global Internet
4 community would be able to see what the applicant
5 believed the applied-for gTLD would contribute
6 competitively to the DNS, right?

7 A. Yes, if that provision was part of the
8 public application.

9 Q. And that's the entire point of ICANN's
10 obligation to act transparently, right, to post
11 this stuff for public view?

12 A. It is certainly a point of ICANN's
13 transparency commitment.

14 Q. Because the global Internet community
15 needed to understand who was applying for which
16 gTLDs and why, correct?

17 A. The program -- I mean -- I think the
18 applicant guidebook speaks for itself in terms of
19 what you're required to produce and what will be
20 made public, and all of that was part of being as
21 transparent as possible in this process.

22 MR. LITWIN: Thank you, Ms. Burr. I have
23 no further questions. Thank you, members of the
24 Panel, for indulging me. And to everybody else on
25 the phone, I apologize that I went over the break

1 time.

2 ARBITRATOR BIENVENU: Thank you,
3 Mr. Litwin.

4 So we will take our 15-minute break, but
5 just before we do so, Mr. Enson, any redirect?

6 MR. ENSON: Yes, Mr. Chairman, not much,
7 but we will probably need 20 minutes or so.

8 ARBITRATOR BIENVENU: And to my
9 co-panelists, do you have questions for the witness
10 before the redirect?

11 ARBITRATOR CHERNICK: I do not.

12 ARBITRATOR KESSEDJIAN: I do not. Thank
13 you.

14 ARBITRATOR BIENVENU: I have a few
15 questions. I'll ask them before your redirect,
16 Mr. Enson, and then we'll proceed with Ms. Burr.

17 MR. ENSON: Very well. Thank you.

18 (Whereupon a recess was taken.)

19 ARBITRATOR BIENVENU: Thank you.

20 Ms. Burr, I have two questions, very brief
21 questions for you.

22 In Paragraph 23 of your witness statement,
23 you describe ICANN in relation to competition, I
24 believe, as a coordinator rather than a regulator.

25 Could I ask you to expand upon this?

1 THE WITNESS: Yes. So ICANN has very
2 specific authority in the bylaws, and with respect
3 to names, its job is to coordinate the development
4 of policy with respect to the introduction of new
5 gTLDs and other areas where stability and security
6 needs of the DNS and the Internet require
7 coordinated policy development.

8 So the ICANN Board, for example, and org
9 don't make policy. The community makes policy.
10 ICANN -- the ICANN Board gets that, accepts that
11 policy recommendation and will adopt it, but it
12 doesn't have policy authority itself.

13 And specifically in the context of the new
14 bylaws that were adopted in 2016 in anticipation of
15 the transition, there's a specific reference that
16 says ICANN -- ICANN's mission is enumerated, not
17 exemplary. So if ICANN doesn't have authority, it
18 is not articulated in here, ICANN doesn't have the
19 authority to do it.

20 And ICANN shall not regulate in certain
21 circumstances, and it specifically says that for
22 the avoidance of doubt, ICANN does not hold any
23 governmentally-authorized regulatory authority.

24 ICANN's role is policy -- coordination of
25 policy development and implementation.

1 ARBITRATOR BIENVENU: My second question
2 relates to evidence early in your testimony, when
3 you discussed participating as an observer in the
4 November 2016 Board workshop.

5 Do you remember being asked questions
6 about this?

7 THE WITNESS: Yes.

8 ARBITRATOR BIENVENU: And you said in
9 looking at Page 44 of the transcript, you said that
10 your understanding was that Afiliias had received
11 notice of the Board's decision made during this
12 November workshop, the Board's decision not to act
13 upon the claims regarding the various claims
14 regarding .WEB.

15 Do you remember that?

16 THE WITNESS: Yes, and I probably misspoke
17 a bit.

18 ARBITRATOR BIENVENU: Right. So my
19 question is this: Was it your belief that Afiliias
20 had, indeed, received a notice of the decision of
21 the Board in the course of that workshop in
22 November 2016?

23 THE WITNESS: So my reference -- what I
24 meant to say was that Afiliias had received notice
25 that because of the pendency of the accountability

1 mechanism -- and I think at a certain point the
2 litigation became a CEP filed by Ruby Glen -- that
3 a contention set had been put on hold, consistent
4 with what ICANN always does.

5 The Board didn't change that. The Board
6 just in the -- again, I didn't participate. I
7 happened to have been in the room, but I wasn't on
8 the Board yet. And the Board did not change, did
9 not deviate from the standard practice, which was
10 once there is an accountability mechanism
11 litigation, the process goes on hold, pending
12 resolution.

13 ARBITRATOR BIENVENU: Ms. Burr, are you
14 aware as a Board member and perhaps because of your
15 participation in this case as a witness, are you
16 aware of the fact that it is the contention of
17 Afiliias that it was made aware of this Board
18 decision for the first time when ICANN filed its
19 rejoinder in this IRP, were you aware of that?

20 THE WITNESS: I am not aware of that.
21 Again, the Board was simply -- agreed to continue
22 to abide by the standard practice.

23 ARBITRATOR BIENVENU: So if I were to ask
24 you, Ms. Burr, as a Board member, does it come as a
25 surprise to you, having been a witness of the

1 workshop back in November 2016, does it come as a
2 surprise to you that Afiliias was never formally
3 advised of that decision?

4 THE WITNESS: Well, so it is complicated
5 because we are referring to this as a decision,
6 where what I observed was a confirmation to
7 continue to follow the standard practice, which was
8 that the contention set was on hold, and I believe
9 that Afiliias was well-aware of the fact that the
10 contention set was on hold.

11 Now, I don't -- if you're asking me
12 whether Afiliias was surprised to learn that the
13 Board had been updated on the situation in the
14 November workshop, I mean, I don't know. I don't
15 know when they may or may not have been aware of
16 that. But they certainly were aware -- my
17 understanding is that they were aware throughout
18 this process that -- that the contention set was on
19 hold.

20 ARBITRATOR BIENVENU: Thank you. Forgive
21 me. I have another question.

22 You have stated when you were questioned
23 about the CCWG final report that the bylaws have
24 precedence over the recommendations of the CCWG.

25 Do you remember that?

1 THE WITNESS: Yes.

2 ARBITRATOR BIENVENU: Now, what is your
3 understanding -- and can you help us by pointing,
4 if one exists, to a statement of the status of the
5 CCWG report, insofar as the bylaws or their
6 interpretation are concerned?

7 THE WITNESS: So the bylaws' effort took
8 the recommendation -- and the process was over
9 several days -- the entire recommendation, all of
10 the aspects of the recommendation were reflected
11 back into the bylaws, and then those bylaws, the
12 draft bylaws were published for comment, that is my
13 recollection of those, to make sure that they
14 faithfully represented the input of the CCWG.

15 ARBITRATOR BIENVENU: Thank you. Thank
16 you, Ms. Burr.

17 So, Mr. Enson, you ready for your
18 redirect?

19 MR. ENSON: I am, Chairman.

20 ARBITRATOR BIENVENU: Please proceed.

21 MR. ENSON: Thank you very much.

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REDIRECT EXAMINATION

BY MR. ENSON

Q. Ms. Burr, thank you for the time you have given us this morning and --

(Discussion off the record.)

Q. BY MR. ENSON: Ms. Burr, several times in your testimony, you referred to ICANN org. What is ICANN org?

A. So we kind of think of this community at large as having a bit of a three-legged stool. So one leg is the Board. One leg is the community in the form of the supporting organizations and advisory committees, and one is ICANN the organization. When I refer to ICANN org, I mean the CEO, staff, the ICANN organization.

Q. Ms. Burr, what's your view of whether or not Board members exercise their fiduciary duties to ICANN outside of annual, regular, or special meetings?

MR. ALI: Mr. Chairman, this is Arif Ali here raising an objection.

This is redirect, and as I understand, the questions cannot be open-ended in a way which Mr. Enson is presenting.

ARBITRATOR BIENVENU: Mr. Enson, I think

1 Mr. Ali has a point. Perhaps you can direct the
2 witness to the part of her cross-examination about
3 which you wish to ask a clarifying question.

4 MR. ENSON: Sure.

5 Q. Mr. Litwin, Ms. Burr, asked you questions
6 about ICANN Board member fiduciary duties, correct?

7 A. Yes, he did.

8 Q. Okay. And he also asked you about certain
9 Board meetings, correct?

10 A. Correct.

11 Q. And he asked whether the Board is able to
12 take actions and make decisions in and out of
13 certain types of Board meetings, correct?

14 A. Yes.

15 Q. So what's your view of whether a Board
16 member must be within an annual, regular, or
17 special meeting in order to exercise his or her
18 fiduciary duties?

19 MR. ALI: Objection. Sorry, Eric, but you
20 have just done the same thing. This goes beyond
21 the customary practice for how redirect should be
22 conducted, Mr. Chairman.

23 ARBITRATOR BIENVENU: I'll allow the
24 question.

25 THE WITNESS: I believe I have an

1 obligation to exercise my fiduciary -- respect my
2 fiduciary obligations to ICANN in everything that I
3 do related to ICANN.

4 Q. BY MR. ENSON: Thank you, Ms. Burr.

5 I want to talk a little bit about the
6 redrafting, or the revising, I should say, of
7 ICANN's bylaws. Was the revising of the ICANN
8 bylaws in 2016 that you were involved in, was that
9 in connection with the new gTLD Program?

10 A. No, it was several years after the new
11 gTLD Program had launched.

12 Q. And would you --

13 Kelly, would you put up Exhibit C-11, and
14 in particular Page 28.

15 ARBITRATOR BIENVENU: Is that a document
16 in the document -- in the witness bundle,
17 Mr. Enson?

18 MR. ENSON: It is. It is. It is the
19 bylaws. I just have different page numbers than
20 Mr. Litwin does.

21 ARBITRATOR BIENVENU: It is in Tab 2.

22 MR. ENSON: It is 4.3(o), which is Page 28
23 of the exhibit. I believe it's --

24 ARBITRATOR BIENVENU: We are familiar with
25 the provision.

1 Q. BY MR. ENSON: Ms. Burr, were you involved
2 in the drafting of this particular provision?

3 A. Yes, I was.

4 Q. Sorry, go ahead.

5 A. I was involved in Section 4, Article 4.

6 Q. Would you describe for us what is set
7 forth here in Section 4.3(o)?

8 A. 4.3(o) is a statement of the authority of
9 the IRP Panel, and it includes the three provisions
10 that had been in the bylaws for some time, which is
11 to dismiss -- actually, that may have been a new
12 one, declare whether covered actions constituted an
13 action or inaction that violated the articles.

14 There was also an existing authority to
15 stay actions or decisions, and we then added a few
16 additional provisions relating to, for example, the
17 PTI, determining the shift of IRP costs and
18 expenses was actually moved from a different part
19 of the section.

20 So this was an attempt to gather the
21 authority of the Panel and articulate the full
22 authority of the Panel.

23 Q. Is Section 4.3(o) an exhaustive listing of
24 the IRP Panel's authority?

25 A. Of the authority which is binding on

1 ICANN, yes.

2 Q. Mr. Litwin spent a fair amount of time
3 with you with respect to Ms. Garza's 2008 letter.

4 Do you recall that?

5 A. Yes, I do.

6 Q. Do you have any idea the level of
7 familiarity Ms. Garza had of ICANN in 2008?

8 A. I really don't have any idea of her
9 familiarity with it.

10 Q. Do you know whether ICANN commissioned any
11 economic studies to evaluate some of the issues set
12 forth in Ms. Garza's letter?

13 A. Yes. ICANN did evaluate a study, I think
14 along the lines that was discussed in Ms. Garza's
15 letter. Over time that study evolved a bit, but
16 that paper that Mr. Litwin showed before that
17 discusses the -- was the basis for ICANN's
18 decision -- I can't remember which tab it is, Tab 8
19 or 6, sorry -- lists a bunch of the work that was
20 done there.

21 Q. Is it Tab 6, Ms. Burr?

22 A. Yeah, and there are -- the economic
23 studies are outlined in that on Page 4.

24 Q. Ms. Burr, in your testimony you referred
25 to the white paper several times.

1 Would you just explain for the Panel what
2 the white paper is?

3 A. Sure. In 1997 -- '6, really, when the
4 cooperative agreement between Network Solutions and
5 the National Science Foundation and a contract
6 between the University of Southern California
7 Information Sciences Institute and DARPA, the
8 Defense Advanced Research Project Agency, which had
9 provided initially the funding, but subsequently
10 the oversight for the work that was being done on
11 the Internet, those contracts were coming to the
12 end of their terms, but the National Science
13 Foundation and DARPA had indicated these -- the
14 project was no longer a research project and that
15 they did not intend to renew the contracts.

16 At that time the Clinton administration,
17 like governments around the world, was working on a
18 sort of policy statement on global electronic
19 commerce. One of the things that we heard quite a
20 lot about was the Domain Name System, the need to
21 internationalize but maintain private-sector
22 management of the system.

23 There was a proposal on the table that
24 those of us who were working in the administration
25 heard a number of concerns about. So we issued

1 essentially what we called the green paper. Here's
2 how we propose to handle this, how we propose to
3 transition this system into the private sector
4 management, tell us what you think.

5 And we got thousands of comments from
6 around the world, and we took those comments, and
7 we turned the green paper into a white paper, which
8 was the Clinton administration's policy statement
9 with respect to the process to transition
10 coordination management of the Domain Name System
11 out of the government into the global private
12 sector.

13 Q. And a copy of the white paper's attached
14 as an exhibit to your witness statement, correct?

15 A. I believe so.

16 Q. Final question, Ms. Burr. Are you aware
17 of ICANN ever taking affirmative action to block
18 potentially anticompetitive activity or
19 transactions?

20 A. No. As I said, I really believe that, you
21 know, ICANN's obligation with respect to
22 competition is to create a table in which -- and to
23 coordinate the development of policy under which
24 competition can emerge. But I am not aware of
25 ICANN blocking something.

1 I am just trying to think, and in truth, I
2 mean, as I have said, ICANN -- you know,
3 competition law, as we have talked about, is
4 highly -- requires a high degree of expertise.
5 There's a lot we don't know about these markets,
6 and the view always was that competition law and
7 competition authorities would provide a check on
8 the behavior of the organization and the players
9 that were valuable.

10 MR. ENSON: Thank you very much for your
11 time, Ms. Burr, for your time today.

12 Mr. Chairman, those are my questions. I
13 thank you for the opportunity.

14 ARBITRATOR BIENVENU: Thank you,
15 Mr. Enson.

16 Ms. Burr, there is a sequestration order
17 applicable to fact witnesses that extends to a
18 prohibition to communicate with other witnesses in
19 this case whose testimony has not yet been heard.

20 So in accordance with that order, I am
21 instructing you not to discuss your testimony or
22 this case with other fact witnesses who have not
23 yet testified before us.

24 THE WITNESS: Absolutely.

25 ARBITRATOR BIENVENU: Having said that, I

1 know that my co-panelists join me, Ms. Burr, in
2 thanking you for your evidence and for accepting to
3 participate in this IRP. We are very grateful.

4 THE WITNESS: Thank you, and thank you for
5 your service. So I'll just leave?

6 MR. ENSON: Yes, I think so.

7 MR. LITWIN: Thank you very much,
8 Ms. Burr.

9 ARBITRATOR BIENVENU: Very well. Can we
10 bring in the next witness, Ms. Samantha Eisner?

11 (Discussion off the record.)

12 ARBITRATOR BIENVENU: May I ask counsel
13 for the parties who will be introducing Ms. Eisner
14 and who will be conducting her cross-examination?

15 MR. WALLACH: This is David Wallach for
16 Jones Day for ICANN. I will be introducing
17 Ms. Eisner.

18 MR. LITWIN: Mr. Chairman, this is Ethan
19 Litwin again from Constantine Cannon. I will be
20 doing the cross-examination of Ms. Eisner.

21 ARBITRATOR BIENVENU: Welcome to you,
22 Mr. Wallach.

23 Ms. Eisner, my name is Pierre Bienvenu. I
24 serve as Chair of the Panel in this case. My
25 co-panelists are Catherine Kessedjian,

1 participating from Paris, and Mr. Richard Chernick
2 in Los Angeles.

3 First of all, welcome.

4 THE WITNESS: Thank you.

5 ARBITRATOR BIENVENU: You have contributed
6 a witness statement to this Independent Review
7 Process dated January 16, 2019, correct?

8 THE WITNESS: Yeah.

9 ARBITRATOR BIENVENU: In that statement at
10 the end you affirm that the content of your
11 statement is true and correct to the best of your
12 knowledge and belief.

13 Do you see that?

14 THE WITNESS: It is not on the screen.
15 May I open the packet of documents? I do confirm
16 that I submitted that in the declaration.

17 ARBITRATOR BIENVENU: Very well. May I
18 ask you, Ms. Eisner, in relation to the evidence
19 that you will give today to likewise solidly affirm
20 that it will be the truth, the whole truth and
21 nothing but the truth?

22 THE WITNESS: I do.

23 ARBITRATOR BIENVENU: Thank you very much.
24 Mr. Wallach, your witness.

25 MR. WALLACH: Hello, Ms. Eisner, and good

1 afternoon. I have only a couple of very brief
2 questions to ask before I will turn the floor over.

3 First, is the information in the witness
4 statement, which hopefully you have on the screen
5 in front of you, true and correct to the best of
6 your knowledge?

7 THE WITNESS: Yes.

8 MR. WALLACH: Okay. Could we turn to the
9 final page of the witness statement on the screen,
10 please.

11 Is that your signature that appears on
12 that page?

13 THE WITNESS: Yes, it is.

14 MR. WALLACH: Is there anything in your
15 witness statement that you would like to correct or
16 amend in any way?

17 THE WITNESS: No, there's not.

18 MR. WALLACH: I have no further questions.

19 ARBITRATOR BIENVENU: Thank you,
20 Mr. Wallach.

21 Mr. Litwin, your witness.

22 MR. LITWIN: Thank you, Mr. Chairman.

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1 CROSS-EXAMINATION

2 BY MR. LITWIN

3 Q. Ms. Eisner, can you please confirm that
4 you have not looked at any of the documents in the
5 exhibit bundle that was provided to you?

6 A. Yes, I can confirm. It is still sealed.

7 Q. Can you please open the bundle on camera
8 now, please?

9 MR. LITWIN: Again, Mr. Wallach, do you
10 want to open yours on camera as Mr. Enson did?

11 MR. WALLACH: Yeah.

12 Q. BY MR. LITWIN: Ms. Eisner, from time to
13 time during our discussion today, I will direct
14 your attention to a document. When I do that, I
15 will refer to the tab that's reflected in your
16 binder for that document and the binder that you
17 have in front of you right now, and you will see
18 that, generally on the bottom right-hand corner of
19 the page, we have given each page in the exhibit a
20 unique page number. So when I direct you to a
21 particular page, I will be referring to that
22 particular page number that we have provided, okay?

23 A. Yeah.

24 Q. Thank you. Ms. Eisner, you are a deputy
25 general counsel of ICANN; is that right?

1 A. Yes.

2 Q. Do you have particular areas of
3 responsibility as deputy general counsel for
4 litigation or something like that?

5 A. It is not appended to my title, but I am
6 responsible for a couple of different areas within
7 ICANN. I lead the support to our multistakeholder
8 strategic initiative team as well as our global
9 stakeholder engagement team and our governmental
10 engagement team.

11 As part of that work to the
12 multistakeholder strategic initiative team, I work
13 on many special projects that interact with the
14 community.

15 Q. And how long have you been in this role?

16 A. I have been in this role since 2014.

17 Q. How many lawyers are in the ICANN legal
18 department?

19 A. I believe we have 11 or 12.

20 Q. Do you have regular department meetings?

21 A. Yes.

22 Q. And is it fair to say -- and please do not
23 discuss the specifics of any of the discussions of
24 any of those meetings -- that you discuss sort of
25 the legal issues that the department is dealing

1 with at that time and provide status updates on
2 that; is that fair to say?

3 A. It depends -- in general, yes. We often
4 don't go into great detail about specifics because
5 we each have our own lines of discussion. So we
6 would speak about it enough to have some general
7 level of understanding amongst the deputies within
8 the department. We might not go into as much
9 detail with an all-hands departmental meeting. But
10 then each deputy also has their time with the
11 general counsel where you have much more in-depth
12 status discussions.

13 Q. Okay. You state in your witness statement
14 that you joined the IRP Implementation Oversight
15 Team -- which I will for convenience's sake refer
16 to as the IOT today because that's quite a
17 mouthful -- in November 2015; is that the right
18 date?

19 A. I believe so, yes.

20 Q. Okay. And you joined as a staff liaison,
21 correct?

22 A. Correct.

23 Q. The IOT was the committee and still is the
24 committee tasked with drafting the rules and
25 procedures and conduct for the IRP, right?

1 A. Yes.

2 Q. Please. In fact, ICANN's bylaws
3 explicitly provide for the establishment of the
4 IOT; is that right?

5 A. Yes, the bylaws that went into effect in
6 October 2016.

7 Q. So if you could draw your attention to Tab
8 2 in your binder and to Page 15 of that exhibit,
9 you'll see at the bottom Section 4.3(n)(i), which
10 it is continued on to the next page, Page 16. This
11 is, in fact, that paragraph that provides for the
12 creation of the IOT, correct?

13 A. Correct.

14 Q. And what it says is that the IOT should be
15 "comprised of members of the global Internet
16 community"; is that right?

17 A. Yes. In consultation --

18 Q. In consultation with what? You broke up.

19 A. The supporting organizations and advisory
20 committee.

21 Q. And the IOT, once the Standing Panel is
22 established, the IOT "in consultation with the
23 Standing Panel, shall develop clear published rules
24 for the IRP"; is that right?

25 A. Yes, that's what the bylaws say.

1 Q. And those rules of procedure need to
2 conform to international arbitration norms,
3 correct?

4 A. Yes.

5 Q. Now, the Standing Panel, as of today, has
6 not yet been established, correct?

7 A. That's correct.

8 Q. So the IOT did not follow the bylaws
9 provision that says that, "Once the Standing Panel
10 is established, the IOT in consultation with the
11 Standing Panel, shall develop" the rules of
12 procedure; is that right?

13 A. Well, there wasn't yet a Standing Panel to
14 coordinate with.

15 Q. The Standing Panel -- the establishment of
16 the Standing Panel is also entrusted to the IOT,
17 correct?

18 A. No, it is not.

19 Q. Is the IOT right now processing
20 applications for the Standing Panel?

21 A. No, it's not. ICANN is in the process of
22 receiving those applications and is also in the
23 process of coordinating with the more general
24 community through the leaders of the supporting
25 organizations and advisory committees to finalize

1 how those will be processed.

2 Q. So was there any discussion with the IOT
3 whether or not you should wait for the Standing
4 Panel to be created before developing rules of
5 procedure?

6 A. No, there was not. The IOT was actually
7 kicked into gear before the bylaws went into
8 effect, so that they are -- there could be work
9 done to get supplemental procedures in place that
10 would conform with the new bylaws, recognizing that
11 there was always the opportunity to update those
12 once a Standing Panel was in place, and we needed
13 to go back -- or if we needed to go back over them
14 with a Standing Panel.

15 Q. Okay. Now, the bylaws provide that the
16 rules of procedure shall conform with international
17 arbitration norms. So is that like the ICDR rules?

18 A. That surely is one example, yes.

19 Q. And the ICC rules, JAMS rules, these are
20 all norms of international arbitration, right?

21 A. Without being an international arbitration
22 provider, I assume so -- I am not a practitioner of
23 international arbitration, but yes, I assume so.

24 Q. So I'll represent that I have been a
25 frequent visitor to the IOT's Wiki page, and there

1 it shows that the IOT was provided with ten or so
2 examples of arbitration rules.

3 Do you recall that?

4 A. Yes.

5 Q. And that was for your reference in
6 drafting the rules of procedure, correct?

7 A. In part, yes.

8 Q. The U.S. Rules of Civil Procedure,
9 however, are not a norm of international
10 arbitration, are they?

11 A. Again, without being a practitioner of
12 international arbitrations, having done litigation
13 in the past, civil procedure rules go to our
14 federal court system and don't govern in
15 arbitration, right.

16 Q. And I am very much in the same boat as you
17 are, Ms. Eisner. I spend most of my time in
18 federal court.

19 At least I understand arbitration to be an
20 alternative dispute resolution to that federal
21 judicial process; is that fair to say?

22 A. Yes.

23 Q. In August of 2016, Afilias' general
24 counsel, Mr. Scott Hemphill, wrote to ICANN's Board
25 regarding Afilias' concern about the resolution of

1 the .WEB contention set. ICANN posted the letter
2 to its website.

3 Were you aware of Afilias' complaint at
4 the time?

5 A. I don't recall.

6 Q. Do you recall the first time you became
7 aware that Afilias had complained about the
8 resolution of the .WEB contention set?

9 A. It likely would have been in that period
10 of 2016, in that later period of it, but I don't
11 recall specifically what brought it to my
12 attention.

13 Q. Are you aware that ICANN sent a
14 questionnaire to Afilias, VeriSign, NDC and, as we
15 heard today, Neustar, in September of 2016
16 concerning Afilias' complaint, were you aware of
17 that?

18 A. No, I'm not.

19 Q. So you were not involved in the drafting
20 of that questionnaire?

21 A. I was not.

22 Q. Do you know who was?

23 A. No, I don't know who was.

24 Q. We have also heard about a November 3rd,
25 2016, Board workshop session where Afilias'

1 complaints were allegedly discussed. I'll
2 represent to you that that meeting -- at least the
3 testimony is that meeting took place in Hyderabad.
4 Are you aware of that meeting?

5 A. I am aware of the Board workshop that took
6 place in Hyderabad. I don't have specific
7 recollection of the specific subject matters that
8 were discussed at that meeting.

9 Q. Did you attend that meeting?

10 A. Yes. I was in Hyderabad, and I
11 participated in many, if not all, support workshop
12 sessions.

13 Q. Was there a Board workshop session that
14 specifically concerned Afiliias' complaint regarding
15 the resolution of the .WEB contention set?

16 A. I don't recall.

17 Q. Do you recall anything about -- and
18 without giving me any specifics, just a yes-or-no
19 question, Ms. Eisner, do you recall any specifics
20 about a Board workshop session in November of 2016
21 where Afiliias' complaints about the resolution of
22 the .WEB contention set were discussed?

23 A. I really don't recall specifics about it.
24 Our Board workshop sessions are basically done by
25 one- to two-hour blocks, and they go from

1 discussion to discussion to discussion, and so I --
2 without having any notes in front of me or
3 anything, and it is something -- it is a meeting I
4 haven't thought about in over three years, so I
5 really don't remember.

6 Q. Just for my edification and the Panel's
7 edification, Ms. Eisner, when you say the workshops
8 are organized into one- or two-hour blocks, is each
9 block devoted to a particular subject or to a group
10 of subjects?

11 A. Typically each block would be reserved for
12 a particular topic.

13 Q. On June 18, 2018, Afilias initiated the
14 cooperative engagement process with ICANN
15 concerning its complaints about the resolution of
16 the .WEB contention set.

17 Were you aware in June of 2018 that
18 Afilias had initiated a CEP?

19 A. I don't recall being aware at the time.

20 Q. Now, ICANN publicly discloses on a chart
21 who has initiated an accountability mechanism; is
22 that right?

23 A. Yes.

24 Q. So on that chart published after June
25 18th, there would be a section for CEPs, right?

1 A. Yes.

2 Q. Yes. And Afilias' name would have been
3 listed under it, correct?

4 A. I presume it would have been, in
5 accordance with ICANN's general practice of
6 publishing that.

7 Q. Well, is it a practice -- let me rephrase.

8 Was it your practice to review those
9 charts from time to time to keep yourself informed
10 about who had initiated accountability mechanisms?

11 A. No, it is not my practice.

12 Q. Were -- was the status of accountability
13 mechanisms discussed in your legal department
14 meetings?

15 A. At times they were. Clearly when we have
16 IRPs going or other things of a large interest, I
17 could imagine we would discuss them.

18 Q. To the best of your recollection, when did
19 you become aware that Afilias had requested CEP
20 regarding the -- its complaints about the
21 resolution of the .WEB contention set?

22 A. I'm really not sure, though I would say it
23 was some point in that latter half of 2018, but I
24 don't know when it occurred.

25 Q. Now, the CEP process is a process that's

1 voluntarily invoked by a party prior to filing an
2 IRP; is that correct?

3 A. Yes.

4 Q. And the stated purpose of a CEP is to
5 resolve or narrow issues that are contemplated as
6 issues that may be brought in an IRP; is that
7 right?

8 A. Yes.

9 Q. And the IOT from time to time has, in
10 fact, discussed the CEP and at least appears it is
11 on its to-do list to develop standards for the CEP,
12 correct?

13 A. Yes. It was a responsibility it took over
14 from a different community group.

15 Q. Now, if a complainant does not participate
16 in the CEP in good faith and ICANN prevails in a
17 subsequent IRP, the complainant is liable to pay
18 ICANN's legal fees; is that correct?

19 A. I believe that's correct. I'd have to go
20 back and look physically at the documents, but I
21 believe that's correct.

22 Q. Okay. Well, I'll represent to you that's
23 my understanding. And if my understanding's
24 correct, would you agree with me that's a pretty
25 strong incentive to initiate CEP prior to filing an

1 IRP; is that right?

2 A. Without a doubt, yeah.

3 Q. Yeah. So if you understood that someone
4 had initiated a CEP, is it fair to say that you
5 would also understand that that party was
6 considering filing an IRP in the future?

7 A. Yes.

8 Q. Now, I'll represent to you that ICANN
9 terminated the CEP that Afilias initiated on June
10 18 later that year, on November 13. Were you aware
11 that ICANN had terminated CEP on November 13th?

12 A. I don't recall specifically about that.
13 There was a period of time around there that I was
14 on vacation, too. I took a couple of weeks of
15 vacation after our ICANN meeting. So I can't
16 recall when I was back in the office.

17 Q. So that would have been the second half or
18 middle of November 2018; is that right?

19 A. My vacation?

20 Q. Yes.

21 A. Yes. It would have been directly after
22 the end of the ICANN meeting, and we traveled for a
23 period of at least ten days after that.

24 Q. Were you aware that on August 28th, 2018,
25 in the context of its CEP, Afilias offered to

1 provide ICANN with a draft of its IRP request?

2 A. No, I was not aware. The CEP discussions
3 are considered confidential, and we also consider
4 them confidential within ICANN. So as I am not on
5 the team that participates in those, I don't
6 participate in those discussions.

7 Q. Okay. Now, I'll represent to you,
8 Ms. Eisner, and I think you are aware of this
9 because of what you write in your witness
10 statement, that Afilias, in fact, provided this
11 draft IRP request to ICANN on October 10th, 2018.

12 Were you aware of that?

13 A. I became aware of that.

14 Q. When did you become aware of that?

15 A. I don't -- I don't recall when I became
16 aware of it. Can I refer back to my witness
17 statement?

18 Q. Absolutely. It is Tab 1 in your binder
19 for reference, Ms. Eisner.

20 A. Thank you. Thank you. I wanted to refer
21 back because I thought I heard you say that I had
22 mentioned that in my witness statement, but I
23 didn't recall mentioning that.

24 Q. I think you mentioned that you stated you
25 were not aware at the time; is that fair to say?

1 A. Yes, that's correct. I was not aware at
2 the time.

3 Q. Okay. And are you aware that three weeks,
4 approximately 19 days after receiving Afilias'
5 draft IRP request, ICANN terminated CEP without
6 engaging in any substantive discussion of Afilias'
7 claims?

8 A. No, I am not aware of the substance of the
9 conversations between ICANN and Afilias about the
10 CEP.

11 Q. So in general, based on your work on the
12 CEP in the context of the IOT, is it appropriate
13 for ICANN to refuse to engage on the merits of a
14 claim during CEP while at the same time dragging
15 that CEP out for five months?

16 A. Without knowing the specifics of the
17 conversation, I really can't testify to that.

18 Q. Okay. The IOT, as I understand, had a
19 meeting in June of 2018, but then did not hold any
20 meetings in July or August or September of 2018; is
21 that correct?

22 A. I know that we had difficulties bringing
23 people together for a quorum. I don't know the
24 exact dates that we did or did not have meetings,
25 but there was a significant period of time that we

1 didn't have meetings.

2 Q. Is it fair to say that when the IOT has a
3 meeting, the transcript of that meeting is
4 published on the IOT Wiki page?

5 A. Yes.

6 Q. I will represent to you that there are no
7 transcripts on the IOT Wiki page for either July,
8 August or September of 2018. If my representation
9 is correct, that would mean that the IOT didn't
10 meet during those months; is that fair to say?

11 A. Yes.

12 ARBITRATOR BIENVENU: Mr. Litwin, sorry to
13 interrupt you, but we have come to the end of the
14 scheduled time for the hearing today. As you know,
15 one Panel member is sitting in Paris, so it is
16 quite late for that Panel member.

17 So I think we will break.

18 Ms. Eisner, you are not to discuss your
19 evidence with anyone until you are completed giving
20 your evidence. So I will instruct you not to do
21 so.

22 We will resume tomorrow morning at 8:00
23 a.m. Pacific and continue with your
24 cross-examination, Mr. Litwin.

25 MR. LITWIN: Thank you very much,

1 Mr. Chairman.

2 MR. ALI: Mr. Chairman, if I can raise a
3 point. This addresses --

4 (Discussion off the record.)

5 MR. ALI: This is a point you now raised a
6 couple of times referring to the status of the
7 CCWG-Accountability.

8 ARBITRATOR BIENVENU: Sorry, I cannot hear
9 you, Mr. Ali. Can you speak a bit louder?

10 (Discussion off the record.)

11 MR. ALI: Mr. Chairman, there's a point
12 you have raised a couple times, actually a question
13 you put to, I think to us in -- during opening
14 presentations and then also to Ms. Burr, which is
15 the status of the CCWG-Accountability's reports.
16 And just as an FYI, and I don't know how you'd like
17 to handle this, but the CCWG-Accountability reports
18 were approved by the Board on 10 March 2016.

19 Now, that's not a document that is on
20 record in terms of the Board resolution, but the
21 Board resolution followed by what are known as
22 Board rationale is associated with the approval of
23 all the CCWG-Accountability and its reports and its
24 transmissions to the NTIA.

25 So if that's a document that the Panel

1 would be interested in, we can try to agree with
2 the other side that it be made part of the record,
3 given that this is a matter that seems to be of
4 interest to the Panel.

5 ARBITRATOR BIENVENU: Yeah, thank you.
6 That's helpful, especially if it addresses the
7 point I have raised.

8 I see Mr. LeVee -- Mr. LeVee, do you want
9 to clarify?

10 MR. LeVEE: All I would suggest,
11 Mr. Chairman, is that these types of things ought
12 to be addressed by counsel separately after the
13 hearing as opposed to proposing something to the
14 Panel that then should be discussed among the
15 lawyers.

16 ARBITRATOR KESSEDJIAN: Particularly
17 because the witness is still there, and I am not
18 sure she should hear all we are saying right now.

19 MR. LeVEE: I think this is something the
20 lawyers should be addressing privately and not
21 having argument about or even suggestions as to
22 what is or is not appropriate in the record.

23 ARBITRATOR BIENVENU: Okay. So that was,
24 I think, something that Mr. Ali referred to. So
25 why don't you take it up together and see if

1 something comes out of your consultations.

2 Thank you all, and we will resume tomorrow
3 morning.

4 (Whereupon the proceedings were
5 concluded at 1:05 p.m.)

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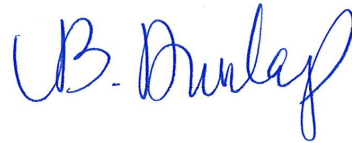
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Dated: 08/12/20



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