

I. INTRODUCTION

1. Pursuant to Article 4 of the Bylaws for Internet Corporation for Assigned Names and Numbers, the International Arbitration Rules of the International Centre for Dispute Resolution (“ICDR”), and the ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process, ICM Registry, LLC (“ICM”) hereby submits this Request for Independent Review Process with respect to a dispute between itself and the Internet Corporation for Assigned Names and Numbers (“ICANN”).

2. The dispute, as detailed below, arises out of ICANN’s improper (1) administration of its December 2003 Request for Proposals¹ (“RFP”) process for new, sponsored top-level domains (“sTLD”); and (2) rejection in March 2007 of ICM’s application to serve as the registry operator for the .XXX sTLD. ICANN’s administration of the RFP and its rejection of ICM’s application were arbitrary, lacking in transparency, and discriminatory. ICANN materially violated its Articles of Incorporation and Bylaws, as well as ICM’s rights under international law and applicable international conventions, and local law.

3. Reserving its rights to amend or supplement the relief requested herein, ICM respectfully requests the Independent Review Panel to grant the following:

- (1) Declare that ICANN’s administration of the RFP as it related to ICM’s application to serve as the registry operator for the .XXX sTLD was inconsistent with ICANN’s Articles of Incorporation and Bylaws;
- (2) Declare that ICANN’s repudiation of its previous determination that ICM’s application fulfilled the criteria for approval set forth in the RFP was inconsistent with ICANN’s Articles of Incorporation and Bylaws;

¹ ICANN’s 15 December 2003 Request for Proposals for New Sponsored Top-Level Domains, which is the underlying contract in this dispute, is attached as Claimant’s Exhibit (“C-Exh.”) 1.

- (3) Declare that ICANN's rejection of ICM's application to serve as the registry operator for the .XXX sTLD was inconsistent with ICANN's Articles of Incorporation and Bylaws, resulting in substantial, unjustifiable, and unreasonable harm to ICM;
- (4) Declare that ICANN must immediately execute a registry agreement on terms and conditions substantially similar to ICM's draft registry agreement posted to the ICANN website on 16 February 2007 within thirty (30) days from the issuance of the Panel's declaration;
- (5) Declare that ICANN must pay compensation for all costs incurred by ICM in connection with its application to serve as the registry operator for the .XXX sTLD and this Request, including attorneys' fees and costs;
- (6) Declare ICM the prevailing party in this Independent Review Process;
- (7) Declare that the Panel's determination regarding whether any of ICANN's actions were inconsistent with ICANN's Articles of Incorporation and Bylaws is binding on ICANN; and
- (8) Make such other declarations, or grant such other relief, as the Panel may consider appropriate under the circumstances.

II. THE PARTIES' CONTACT INFORMATION

A. Claimant

4. The Claimant in this dispute is ICM Registry, LLC (previously defined as

"ICM"). ICM's contact details are as follows:

Stuart Lawley, Chairman and President
ICM Registry, LLC
1097 Jupiter Park Lane, Suite 3
Jupiter, FL 33458

ICM is represented in these proceedings by:

Arif H. Ali
John L. Murino
Ashley R. Riveira
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
AAli@crowell.com
JMurino@crowell.com
ARiveira@crowell.com
Phone: 202.624.2500
FAX: 202.628.5116

B. Respondent

5. The Respondent is the Internet Corporation for Assigned Names and Numbers

(previously defined as “ICANN”). ICANN’s address is:

Paul Twomey, CEO and President
ICANN
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601
twomey@icann.org
Phone: 310.823.9358
FAX: 310.823.8649

Correspondence to ICANN may also be copied to:

John Jeffrey, General Counsel
ICANN
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601
jeffrey@icann.org
Phone: 310.823.9358
FAX: 310.823.8649

III. BACKGROUND OF THE INTERESTED PARTIES

A. ICM Registry, LLC

6. Claimant, ICM, was established under the laws of the State of Delaware on 28 June 1999,² and has its principal place of business in Jupiter, Florida.³ ICM was formed to serve as the registry operator for the proposed .XXX sTLD.

7. ICM has no affiliation with the adult entertainment industry. It does not, and has committed that it will not, develop, distribute, or sell adult entertainment. Instead, as a registry

² Delaware, Department of State, Division of Corporations, ICM Entity Details, *available through* <https://sos-res.state.de.us/tin/GINameSearch.jsp> (search for “ICM Registry”; then follow “ICM Registry LLC” hyperlink) (last visited 5 June 2008).

³ Although originally formed as a corporation, ICM Registry was reorganized into a limited liability company in 2005.

operator, its functions will be largely technical, and will involve providing the management, supporting infrastructure, and back-end functionality necessary for the proposed .XXX domain.

8. ICM is a well-funded, financially stable, privately owned company whose ownership and management team have significant experience and expertise in building and operating business infrastructures, including the creation of a field sales force, sales support teams, and the administrative and finance functions needed to run a successful domain. As owner-operators, ICM's management team is uniquely invested in the company's long term stability and success.

9. As discussed in further detail below, it is ICM's intention to serve as the registry operator for the .XXX domain, which will serve as a domain for members of the responsible online adult entertainment community who support and believe in the benefits of a system of self-identification. Websites in the .XXX domain will thus be clearly designated, empowering individuals wishing to select, avoid, or prevent access to such websites to do so easily. Additionally, by registering in the proposed .XXX domain, website operators would voluntarily commit to follow best practices to be developed in conjunction with the other impacted stakeholders. Among other benefits, such best practices would require that all sites be labeled with machine readable meta-tags to allow the effective use of filters. By promoting best practices through voluntary registration, responsible providers of online adult entertainment will be engaging in voluntary self-regulation. There is substantial industry support for the .XXX domain, as evidenced by the number of providers that have participated in ICM's pre-reservation program, which allows for applicants to reserve domain names in advance of the approval of the

sTLD application.⁴

B. The International Foundation for Online Responsibility

10. ICM sought to register the .XXX domain as a sponsored top-level domain, or sTLD, and therefore collaborated with a sponsoring organization to develop the plans for the domain.⁵ The sponsoring organization for the proposed .XXX domain is The International Foundation for Online Responsibility (“IFFOR”), which will be responsible for overseeing the policy formulation for the proposed sTLD. IFFOR is a non-profit Canadian entity, with its principal place of business to be in Washington, D.C.⁶ IFFOR’s incorporation was the product of a “four-year outreach campaign to educate and mobilize the responsible online adult-entertainment community.”⁷ IFFOR is to be operated by a board of directors representing all stakeholders in the .XXX domain, including leaders of the responsible online adult entertainment industry, as well as child safety representatives and members of the free speech community.⁸ Mr. Stuart Lawley will serve as chairman of both IFFOR and ICM.

⁴ At the time of the Board’s final action, on 30 March 2007, ICM had received more than 75,000 pre-reservations. To date, there are more than 100,000 pre-reservations.

⁵ ICANN distinguishes between “unsponsored” and “sponsored” top level domains (“TLDs”) in the following manner: “Generally speaking, an unsponsored TLD operates under policies established by the global Internet community directly through the ICANN process, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor thus carries out delegated policy-formulation responsibilities over many matters concerning the TLD.” ICANN, Top-Level Domains (gTLDs), available at <http://www.icann.org/tlds/> (last visited 5 June 2008) (“Top-Level Domains (gTLDs) Information Page”).

⁶ ICM Registry, New sTLD RFP Application, submitted 16 Mar. 2004, available at <http://www.icann.org/tlds/stld-apps-19mar04/xxx.htm> (last visited 5 June 2008) (“ICM Application”); see also IFFOR Charter, available at www.iffor.org (last visited 5 June 2008).

⁷ ICM Application.

⁸ ICM Registry, The Voluntary Adult Top-Level Domain (TLD)–.XXX, available at www.icmregistry.com (last visited 5 June 2008).

11. As described in ICM's application, IFFOR has been tasked with formulating the policies for the proposed .XXX domain.⁹ IFFOR's Bylaws were substantially modeled after ICANN's own Bylaws to ensure objectivity, transparency, and accountability. IFFOR's mission includes contributing funding towards developing programs and tools to combat child pornography and to promote child protection and parental awareness of online dangers, establishing a forum for the online adult entertainment community to communicate and proactively respond to the needs and concerns of the broader Internet community, and promoting freedom of expression online. Funding to carry out ICANN's mission will come from the registration fees collected for each individual domain name registered in the proposed .XXX domain. IFFOR is expected to contribute several million dollars per year to child protection and free expression initiatives.¹⁰

C. Internet Corporation for Assigned Names and Numbers

12. Respondent, ICANN, is a public benefit, non-profit corporation that was established under the laws of the State of California on 30 September 1998. ICANN is headquartered in Marina del Rey, California.

13. ICANN was established "for the benefit of the Internet community as a whole" and is tasked with "carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law"¹¹ As set forth in

⁹ ICM Application.

¹⁰ ICM Application. Specifically, ICM agreed to contribute US\$10 per domain name registered per year to IFFOR.

¹¹ Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, Article 4, available at <http://www.icann.org/general/articles.htm> (last visited 5 June 2008) ("Articles of Incorporation"). Attached as C-Exh. 2.

its Bylaws,¹² the organization has a limited technical mission: “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.”¹³ Thus, ICANN’s core function is the technical management of the Internet’s Domain Name System (“DNS”), which includes coordinating the introduction of new Top-level Domains (“TLDs”). The DNS is a database of Internet names and addresses that correlates the “human-readable” computer names, websites, and email addresses made of letters and words with the “computer-readable” Internet Protocol (“IP”) addresses that computers actually use to locate information, but which consist of complicated and less user-friendly numerical strings. TLDs appear in the human-readable addresses, or domain names, as the string of letters—such as “.COM”, “.GOV”, “.ORG”, “.EDU”, and so on—following the rightmost “dot” in domain names. ICANN delegates responsibility for the operation of each TLD to a registry operator. In simple terms, ICANN coordinates the technical elements of the DNS to ensure that all Internet users can find all valid addresses. As a technical body, ICANN’s involvement in policy formulation is limited to “policy development reasonably and appropriately related to these technical functions.”¹⁴

¹² ICANN’s Bylaws have been amended on numerous occasions throughout the events giving rise to this dispute, although the organization’s relevant principles, mission, and core values remain unchanged. *See generally* ICANN, Bylaws Archive, *available at* <http://www.icann.org/general/archive-bylaws> (last visited 5 June 2008). Any reference herein to ICANN’s Bylaws refers to the Bylaws that took effect on 28 February 2006 (unless otherwise expressly noted), these being the version of the Bylaws that were in effect when the ICANN Board voted to reject ICM’s application notwithstanding its previous determination that it met the RFP criteria. Attached as C-Exh. 3.

¹³ Bylaws for Internet Corporation for Assigned Names and Numbers, Article I, § 1 (Mission), *available at* <http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm> (last visited 5 June 2008) (“ICANN Bylaws”).

¹⁴ *Id.*

14. ICANN is subject to international law, and it is required to achieve its mission in conformity with the principles expressly espoused in its Bylaws, including objectivity, transparency, and accountability. Thus, by way of example, ICANN’s Bylaws specifically state that it “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment”¹⁵ ICANN is also obligated to operate “in an open and transparent manner and consistent with procedures designed to ensure fairness”¹⁶ and to “be accountable to the community for operating in a manner that is consistent with [the] Bylaws, and with due regard for the core values set forth” in the organization’s Bylaws.¹⁷

15. ICANN is managed by a Board of Directors (“Board”). The Board consists of 15 voting directors and six non-voting liaisons from around the globe, “who in the aggregate [are to] display diversity in geography, culture, skills, experience, and perspective.”¹⁸ The voting directors are composed of: (1) six representatives of ICANN’s Supporting Organizations, which are sub-groups dealing with specific sections of the policies under ICANN’s purview; (2) eight independent representatives of the general public interest, currently selected through ICANN’s Nominating Committee, in which all the constituencies of ICANN are represented; and (3) the President and CEO, who is appointed by the rest of the Board. Notably, consistent with ICANN’s mandate to provide private sector technical leadership in the management of the DNS, “no official of a national government” may serve as a director.¹⁹ ICANN’s day-to-day operations

¹⁵ *Id.* at Article II, § 3 (Non-Discriminatory Treatment).

¹⁶ *Id.* at Article III, § 1 (Transparency).

¹⁷ *Id.* at Article IV, § 1 (Purpose).

¹⁸ *Id.* at Article VI, § 2 (Directors and Their Selection).

¹⁹ *Id.* at Article VI, § 4 (Additional Qualifications).

are overseen by its President and CEO, who is supported by an international staff on several continents.²⁰

16. Prior to ICANN's formation in 1998, DNS management was carried out under contractual arrangements with the United States Government. In recognizing ICANN, the United States Department of Commerce retained a limited "oversight" role to ensure the stability of the Internet and DNS during the transfer of DNS management responsibilities to the private sector.²¹

17. In addition to the formal oversight of the Department of Commerce, the Board receives input from a number of Supporting Organizations and Advisory Committees established by the Bylaws. There are three Supporting Organizations: the Generic Names Supporting Organization ("GNSO"), which contributes to policy making for generic top-level domains ("gTLDs"); the Country Code Names Supporting Organization ("ccNSO"), which contributes to policy making for country-code top-level domains ("ccTLDs"); and the Address Supporting Organization ("ASO"), which contributes to policy making for Internet Protocol addresses.²²

18. The Board also receives input from several Advisory Committees, which provide advice on the interests and needs of stakeholders that do not participate directly in the Supporting Organizations described above. These include: (1) the Governmental Advisory Committee

²⁰ See ICANN: The Global Internet Community Working Together to Promote the Stability and Integrity of the Internet, *available at* <http://www.icann.org/tr/english.html> (last visited 5 June 2008).

²¹ Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, originally executed 25 Nov. 1998, *available at* <http://www.icann.org/general/icann-mou-25nov98.htm> (last visited 5 June 2008) ("[T]he [Department of Commerce] agrees to . . . [p]rovide general oversight of activities conducted pursuant to this Agreement.").

²² See generally ICANN Bylaws, Articles VIII-X.

("GAC"), which is composed of representatives of a number of national governments, distinct economies, and multinational government organizations and treaty organizations (as observers); (2) the At-Large Advisory Committee, which is composed of representatives of organizations of individual Internet users from around the world; (3) the Root Server System Advisory Committee, which is composed of representatives providing advice on the operation of the DNS root server system; and (4) the Security and Stability Advisory Committee, which is composed of Internet experts who study security issues pertaining to ICANN's mandate.²³ The Bylaws also establish the Technical Liaison Group, which is composed of representatives of other international technical Internet standard-setting bodies.²⁴ Of these advisory bodies, it is the GAC that is the most relevant to the present dispute.

19. The formal purpose of the GAC is to "consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues."²⁵ The GAC is permitted to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies."²⁶ The GAC is

²³ See generally ICANN Bylaws, Article XI (Advisory Committees).

²⁴ See generally ICANN Bylaws, Article XI-A (Other Advisory Mechanisms).

²⁵ *Id.* at Article XI, § 2(1) (Governmental Advisory Committee); see also Governmental Advisory Committee Operating Principles, Article I, as amended Apr. 2005, available at http://gac.icann.org/web/home/GAC_Operating_Principles.doc (last visited 5 June 2008) ("GAC Operating Principles").

²⁶ ICANN Bylaws, Article XI, § 2(1)(i) (Governmental Advisory Committee).

not a decision-making body,²⁷ and has no authority to act for ICANN.²⁸ The Chairman of the GAC serves as a non-voting liaison to the ICANN Board.²⁹

20. ICANN's Bylaws state that the Board shall "notify the Chair of the [GAC] in a timely manner of any proposal raising public policy issues on which it or any of ICANN's supporting organizations or advisory committees seeks public comment, and shall take duly into account any timely response to that notification prior to taking action."³⁰

21. The Board is not, however, required to follow the GAC's advice.³¹ The Bylaws specifically contemplate action by the ICANN Board over the objections of or contrary to the advice of the GAC, by providing that "[i]n the event that the ICANN Board determines to take an action that is not consistent with the [GAC] advice," the Board is required to inform the GAC and "state the reasons why it decided not to follow that advice. The GAC and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution."³² However, if no solution can be found, the Board is fully authorized to act, and need only "state in its final decision the reasons why the [GAC's] advice was not followed."³³ Conversely, of course, actions by the ICANN Board do not impinge on the rights of sovereign governments to act in accordance with the rule of law in their respective jurisdictions.³⁴ The

²⁷ GAC Operating Principles, Article I, Principle 2.

²⁸ *Id.* at Article I, Principle 5.

²⁹ *Id.* at Article I, Principle 3; ICANN Bylaws, Article VI, § 9(1)(a) (Non-voting Liaisons).

³⁰ ICANN Bylaws, Article XI, § 2(1)(h) (Governmental Advisory Committee).

³¹ *Id.* at § 2(1)(j) (Specific Advisory Committees).

³² *Id.*

³³ *Id.* at § 2(1)(k) (Specific Advisory Committees).

³⁴ Accordingly, the ICANN Board's explanation for any departure from GAC advice is

(continued...)

GAC is not a vehicle for governmental regulation of the DNS, and individual governments remain fully capable of, and regularly engage in, the regulation of online activities within their jurisdictional reach.

IV. SUMMARY OF RELEVANT FACTS

A. ICANN's 2000 Request For Proposals

22. Global interest in the creation of additional TLDs was at the heart of ICANN's creation, and a fundamental motivation for the U.S. Government's transfer of its DNS management role to the private sector.³⁵ Accordingly, in 1999, shortly after ICANN assumed overall technical coordinating responsibility for "the global Internet's systems of unique identifiers,"³⁶ it began to explore the possibility of adding more TLDs to the Internet domain name space in order to expand the number of domain names available for registration by the public.³⁷ In 2000, after lengthy deliberations and public consultations, which included

(continued)

"without prejudice to the rights or obligations of [GAC] members with regard to public policy issues falling within their responsibilities." *Id.*

³⁵ See Management of Internet Names and Addresses, 60 Fed. Reg. 111, 31741, 31749 (10 June 1998) ("The new corporation ultimately should have the authority . . . necessary to . . . [o]versee policy for determining the circumstances under which new TLDs are added to the root system.").

³⁶ ICANN Bylaws, Article I, § 1 (Mission).

³⁷ Initially, the domain name space consisted of .ARPA and three open top-level domains (.COM, .NET, and .ORG), four limited top-level domains (.MIL, .INT, .GOV, and .EDU.), and two-letter country code top-level domains from a list published by the International Organization for Standardization. Top-Level Domains (gTLDs) Information Page; *see also* J. Postel, Domain Name System Structure and Delegation, Request for Comments 1591 (Mar. 1994), *available at* <http://www.ietf.org/rfc/rfc1591.txt> (last visited 5 June 2008).

discussion of a possible TLD “restricted to adult uses,”³⁸ ICANN invited applications for new TLDs.³⁹

23. This “proof of concept” round of TLD applications was highly selective, as the applicants were to be the first new TLDs added to the DNS in its history. The goal of this round was to test—conceptually, technically, and commercially—diverse new TLD models and approaches. ICANN received a total of 47 applications, and ultimately agreed to enter into registry agreement negotiations with seven of the applicants.⁴⁰ Registry agreements were eventually approved for all seven TLDs—four unsponsored: .BIZ, .INFO, .NAME, and .PRO; and three sponsored: .AERO, .COOP, and .MUSEUM.

24. ICM applied during the “proof of concept” round to serve as the registry operator for the .XXX domain. Although its application was not among those chosen to participate in this “test” round of TLDs, it was not rejected. Rather, as ICANN explained:

[A] small set of TLDs was selected for an initial introduction of new TLDs, with the goal of testing diverse new TLD models and approaches. The fact that a new TLD proposal was not selected

³⁸ ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains, 13 June 2000, *available at* www.icann.org/yokohama/new-tld-topic.htm (last visited 5 June 2008). Notably, the GAC’s statement issued subsequent to the Yokohama meeting, in which it identified specific “public policy considerations” regarding the new TLD round, did not voice any concerns with a “TLD restricted to adult uses.” *See* GAC, Opinion of the Governmental Advisory Committee on New Generic Top Level Domains, 16 Nov. 2000, *available at* <http://www.icann.org/committees/gac/new-tld-opinion-16nov00.htm> (last visited 5 June 2008).

³⁹ ICANN Board Resolution on New TLDs, ICANN Board Meeting, Yokohama, Japan, 16 July 2000, *available at* <http://www.icann.org/tlds/new-tld-resolutions-16jul00.htm> (last visited 5 June 2008).

⁴⁰ Top-Level Domains (gTLDs) Information Page; ICANN, TLD Application Review Update, 5 Oct. 2000, *available at* <http://www.icann.org/tlds/tld-review-update-05oct00.htm> (last visited 5 June 2008).

under those circumstances *should not be interpreted as a negative reflection on the proposal or its sponsor.*⁴¹

Indeed, the evaluators noted that “[t]he level of thinking about the startup period [was] impressive” and specifically praised the ICM application for its “well-developed marketing strategy . . . strong financial support, intellectual property expertise, and technical partnerships with leaders in the registry/registrar business.”⁴²

B. ICANN’s 2003 Request For Proposals and its Selection Process

25. Based on the results of the “proof of concept” round, and following lengthy public consultations, ICANN agreed to initiate another round of TLD applications in 2003; this time, however, limited to sTLDs.⁴³ On 24 June 2003, ICANN posted a Draft Request for Proposals (“Draft RFP”) for public comment.⁴⁴

26. The Draft RFP established five eligibility requirements for the new sTLDs: (1) a well-defined community; (2) a clear charter; (3) a clear definition of responsibilities delegated

⁴¹ Reconsideration Request 00-15, Recommendation of the ICANN Reconsideration Committee, 30 Apr. 2001 (revised 7 Sept. 2001), *available at* <http://www.icann.org/committees/reconsideration/rc00-15-1.htm> (emphasis added) (last visited 5 June 2008).

⁴² ICANN, Report on New TLD Applications, Appendix B—ICM Registry (A General Description of the 2000 Application), 9 Nov. 2000, *available at* <http://www.icann.org/tlds/report/kids3.html> (last visited 5 June 2008). Following this “proof of concept” round, the ICANN Board engaged Summit Strategies International to conduct a review of the legal and policy issues involved in the round and the introduction of the seven new TLDs. The scope of the review was defined by a task force established by the ICANN Board. Nowhere in Summit Strategy International’s review is there any discussion of public policy or legal issues related to adult content. *See* Evaluation of the New gTLDs: Policy and Legal Issues, Prepared by Summit Strategies International, 10 July 2004, *available at* <http://www.icann.org/tlds/new-gtld-eval-31aug04.pdf> (last visited 5 June 2008).

⁴³ For a brief explanation of sTLDs, *see supra* note 5.

⁴⁴ ICANN, Draft of Establishment of new sTLDs: Requests for Proposals, 24 June 2003, *available at* <http://www.icann.org/tlds/new-stld-rfp/new-stld-rfp-24jun03.htm> (last visited 5 June 2008) (“Draft sTLD RFP”).

from ICANN to the sponsor; (4) open and transparent structures; and (5) a willingness to comply with ICANN policies.⁴⁵ The Draft RFP also included fixed “Evaluation Methodology and Selection Criteria” to be used by the evaluators of the sTLD applications. ICANN explained in the Draft RFP that:

It is ICANN’s intention to engage the services of one or more external consultants to provide an objective and independent evaluation of the applications with reference to the requirements stated in the RFP and following the selection criteria and evaluation methodology described in this document.⁴⁶

27. After ICANN posted the Draft RFP for public comment, the Board considered the question of who should be permitted to participate in the new round of sTLD applications. On 31 October 2003, the ICANN Board determined that the RFP would not be limited to only those applications submitted in the 2000 round. As was the case with all Board activities, the GAC was invited to and was represented at meetings, provided briefing papers, and was permitted to participate in the Board’s discussions regarding the Draft RFP for new sTLDs.

28. The Board proceeded to announce an “expedited process for a round of new [sTLDs], which will result in new sTLD’s [sic] in 2004,”⁴⁷ and directed ICANN’s President to finalize and post an “open Request for Proposals for a limited number of new sTLDs,” taking into consideration the public comments received on the Draft RFP.⁴⁸ The Board also resolved

⁴⁵ Draft sTLD RFP.

⁴⁶ *Id.*

⁴⁷ ICANN Announcement, ICANN Launches Broad Strategic Initiative for New Generic Top-Level Domains, 31 Oct. 2003, *available at* <http://www.icann.org/announcements/announcement-31oct03.htm> (last visited 5 June 2008).

⁴⁸ ICANN Board Resolution on New Generic TLDs, ICANN Board Meeting, Carthage, Tunisia, 31 Oct. 2003, *available at* <http://www.icann.org/announcements/advisory-31oct03.htm> (last visited 5 June 2008).

that “upon the successful completion of the sTLD selection process, an agreement reflecting the commercial and technical terms *shall be negotiated*.”⁴⁹ Again, as was a matter of course, the GAC was informed of and permitted to participate in the discussions leading up to this decision. No exceptions or exclusions were stated regarding applications for an sTLD connected with adult content, or for any other sTLD potentially raising “public policy” concerns.

29. On 15 December 2003, ICANN issued the final RFP for new sTLDs.⁵⁰ The RFP was broken down into six sections. The first section “provided applicants with explanatory notes on the process as well as an indication of the type of information requested by ICANN[,]” and the remaining five sections consisted of the application itself.⁵¹ Consistent with ICANN’s Bylaws, the Explanatory Notes accompanying the RFP stated that “[t]he selection procedure [was to be] based on principles of objectivity, non-discrimination and transparency.”⁵²

30. The RFP established a defined universe of criteria according to which each application was to be evaluated.⁵³ Specifically, applicants had to demonstrate that they satisfied the following criteria:

- **Technical Standards**—The ability to comply with the necessary technical standards “to ensure that [the proposed domain would] not affect the stability and integrity of the domain name system.” Applicants were required to provide: (1) evidence of an ability to ensure stable registry operation, (2)

⁴⁹ *Id.* (emphasis added).

⁵⁰ ICANN, Request for Proposals for New Sponsored Top-Level Domains, Part A: Explanatory Notes, 15 Dec. 2003, *available at* <http://www.icann.org/tlds/new-stld-rfp/new-stld-application-parta-15dec03.htm> (last visited 5 June 2008) (“sTLD RFP”). Attached as C-Exh. 1, *see supra* note 1.

⁵¹ ICANN, Status Report on the sTLD Evaluation Process, p.4, updated 3 Dec. 2005, *available at* <http://www.icann.org/tlds/stld-apps-19mar04/stld-status-report.pdf> (last visited 5 June 2008) (“sTLD Status Report”).

⁵² sTLD RFP, Part A: Explanatory Notes.

⁵³ *See id.*, Part A: Selection Criteria.

evidence that the registry could comply with best practice technical standards for registry operations, (3) evidence of a full range of registry services, and (4) assurances of continuity of registry operation in the event of business failure of the proposed registry;

- **Business Plan Information**—The necessary financial, technical, and operational capabilities. Evaluators were to assess each applicant’s: (1) financial model, and (2) business plan (which included staffing, marketing plan, registrar arrangements, fee structure, technical resources, uniqueness of application, and engagement with and commitment to the sponsoring organization);
- **Sponsorship Information**—The proposed domain’s ability to “address the needs and interests of a clearly defined community.” Evaluators were to assess each applicant’s: (1) definition of a sponsored community, (2) support by a Sponsoring Organization, (3) submissions regarding the appropriateness of the Sponsoring Organization and the policy formulation environment (to demonstrate that the Sponsoring Organization would operate in the best interests of the sTLD community and had the appropriate policy-formulation role), and (4) evidence that it had broad-based support from the community to be represented; and
- **Community Value**—The value that would be added to the Internet by virtue of the inclusion of the proposed sTLD. Evaluators were to assess whether the proposed sTLD would have in effect policies and procedures to: (1) add value to the Internet name space, (2) protect the rights of others, (3) assure charter-compliant registrations and avoid abusive registration practices, (4) assure adequate dispute-resolution mechanisms, and (5) provide ICANN-policy compliant WHOIS services.⁵⁴

31. In order to process the sTLD applications in a timely and efficient manner, ICANN established a two-step process for the consideration, approval, and implementation of the submitted applications. Kurt Pritz, ICANN’s Senior Vice President of Services, was the staff member with oversight authority over the sTLD RFP.

- **First**, sTLD applications were to be (1) checked for completion, (2) posted for public comment, and (3) evaluated for compliance with the Board-approved

⁵⁴ *Id.* In addition to the sTLD RFP, ICANN published criteria for the independent evaluators, describing the qualifications needed to serve on the panel. ICANN, Independent Evaluators of sTLD Proposals, *available at* <http://www.icann.org/tlds/new-stld-rfp/panel.htm> (last visited 5 June 2008).

RFP criteria by independent evaluation teams.⁵⁵ As explained by Mr. Pritz, “[t]his first round of the process is to demonstrate involvement in the community, technical competence, financial viability, and a robust business model.”⁵⁶

- **Second**, and only *after* an application was determined by the independent evaluators and the Board to be in compliance with the published RFP Criteria, could the applicant proceed on to commercial and technical negotiations for a registry agreement with ICANN staff.⁵⁷

32. This process was repeatedly confirmed during the “sTLD updates” presented to the ICANN Board and in other public comments by senior ICANN staff throughout the evaluation process. For example, a document entitled “Progress in Process for Introducing New Sponsored Top-Level Domains” stated:

The applications will be reviewed by an independent evaluation panel beginning in May 2004. The criteria for evaluation were posted with the RFP. *All applicants that are found to satisfy the posted criteria will be eligible to enter into technical and commercial negotiations with ICANN for agreements for the allocation and sponsorship of the requested TLDs.*⁵⁸

Similarly, at the ICANN Public Forum meetings in Rome in March 2004, Mr. Pritz explained:

May through July, the independent evaluation will occur. That time may shrink or grow a little bit, depending on the number of applications received. And then with the 1st of August, we’ll

⁵⁵ During this first stage, applicants were provided with the opportunity to address any potential deficiencies or contingencies contained in the evaluator’s primary assessments of their sTLD applications, *see* ICANN sTLD Status Report at p. 5.

⁵⁶ Kurt Pritz, “sTLD Update”, ICANN Public Forum—Part 1, Rome, Italy, 4 Mar. 2004: Real-Time Captioning, *available at* <http://www.icann.org/meetings/rome/captioning-forum1-04mar04.htm> (last visited 5 June 2008) (“Kurt Pritz sTLD Update, Rome”); *see also* Kurt Pritz, sTLD Update, PowerPoint Presentation to the Board, Rome, Italy, 4 Mar. 2004, *available at* <http://www.icann.org/presentations/pritz-forum-rome-04mar04.pdf> (last visited 5 June 2008).

⁵⁷ Kurt Pritz sTLD Update, Rome.

⁵⁸ *See* ICANN Announcement: Progress and Process for Introducing New Sponsored Top-Level Domains, 19 Mar. 2004 (emphasis added), *available at* <http://www.icann.org/announcements/announcement-19mar04.htm> (last visited 5 June 2008) (“ICANN Announcement: Progress and Process”).

identify those sTLDs that completed the first round and met the criteria, and we'll go on to the round of technical and commercial negotiations.⁵⁹

33. In December 2004 (by which time the ICM proposal was known to be actively under consideration by the Board), at the ICANN meeting in Cape Town, Mr. Pritz is on record as having described the process for all applications:

There was, essentially, a two-step process to evaluate that application with the goal of establishing a new sTLD. First, the application was reviewed by a panel of independent evaluators. And having passed that hurdle, the applicant would enter into technical and commercial negotiations with the target of establishing the new sponsored top-level domains.⁶⁰

34. And again, the transcript of Mr. Pritz's comments at the Mar del Plata Public Forum Meeting in April 2005 reflects confirmation of the two-step process:

At the end of [the independent evaluation process], if there were still contingencies remaining in the application, the ICANN Board, with full information, *i.e.*, with access to the original application, the questions that went back and forth, the independent evaluators'

⁵⁹ Kurt Pritz sTLD Update, Rome.

⁶⁰ Kurt Pritz, sTLD Update, ICANN Public Forum—Part 1, Cape Town, South Africa, 3 Dec. 2004: Real-Time Captioning, *available at* <http://www.icann.org/meetings/capetown/captioning-public-forum-1-03dec04.htm> (last visited 5 June 2008). Mr. Pritz's description of the sTLD evaluation process continued by noting:

So after that process . . . if there were still contingencies remaining at the close of that iteration process, we asked the ICANN board, giving them full information, meaning the original application, the independent evaluators' report, the questions that were asked, and the written responses of the applicants, we asked the board to determine whether the contingencies on the application had been satisfied and that the application could move on to the negotiation step or whether the contingency had not been removed or, perhaps, thirdly, the board may determine that more information was required to make a determination. . . . Those that were determined to meet that application then go on to negotiation.

report, and subsequent writings, took on to confirm whether the contingencies in the application had, in fact, been removed and the application could go on to the negotiation phase, or whether additional information was required, or, in fact, whether the application was deficient and should not be granted.⁶¹

35. From a practical standpoint, the bifurcated sTLD application process put in place by ICANN made perfect sense. In the first phase, applicants were to be subjected to a rigorous review that would entail: (1) an opportunity for all interested parties, including the GAC, to comment on all applications; (2) recommendations by the independent evaluation teams to the Board, taking into consideration the Board-defined criteria and the submitted public comments; and (3) input by applicants in response to concerns raised by the evaluating teams and the Board. It was only after the Board itself was fully satisfied that an applicant had complied with all of the RFP criteria that an applicant could proceed to phase two: registry agreement negotiations. Indeed, it would have been illogical and inefficient for either ICANN or an applicant to expend the considerable time and expense of negotiating a registry agreement when it had not yet been determined that the application fully satisfied the RFP criteria. Accordingly, nothing in the RFP or related *contemporaneous* commentary describing the evaluation process even hinted at the possibility that an sTLD application could be re-evaluated (*i.e.*, returned to the first phase of the process) after having already been approved by the Board to progress to the second phase.

36. In accordance with the procedures established by ICANN, all of the applications received in response to the RFP were submitted to a panel of independent evaluators. The panel was divided into three teams. One team was responsible for evaluating each application against

⁶¹ ICANN Public Forum Meeting—Part 2, Mar del Plata, Argentina, 7 Apr. 2005: Real-Time Captioning, *available at* <http://www.icann.org/meetings/mardelplata/captioning-public-forum-2-07apr05.htm> (last visited 5 June 2008).

the technical standards criteria; the second against the business plan and financial criteria; and the third against both the sponsorship criteria and the community value criteria (these two sets of criteria were collectively referred to as the “Sponsorship and Other Issues” criteria).

C. ICANN Approves Other sTLD Applications

37. The application period announced in the RFP closed on 16 March 2004. ICANN received ten completed applications by this deadline. Each application was accompanied by a mandatory fee of US\$45,000. The ten applicants were as follows:

- ***DotAsia Organisation Limited*** - application for the ***.ASIA sTLD*** to serve the Pan-Asia and Asia Pacific community.
- ***Fundació puntCAT*** - application for the ***.CAT sTLD*** to serve the Catalan linguistic and cultural community.
- ***Employ Media LLC*** - application for the ***.JOBS sTLD*** to serve the international human resource management community.
- ***The Anti-Spam Community Registry*** - application for the ***.MAIL sTLD*** to serve the community of responsible senders and receivers of spam-free electronic mail.
- ***A consortium of mobile Internet service, equipment, and content providers*** - application for the ***.MOBI sTLD*** to serve consumers of mobile devices, services and applications, mobile content and service providers, mobile operators, mobile device manufacturers and vendors, and information technology and software vendors who serve the mobile community.
- ***The Universal Postal Union*** - application for the ***.POST sTLD*** to serve the worldwide postal community, including public and private operators, organizations and government agencies.
- ***NetNumber, Inc.*** - application for the ***.TEL sTLD***, with Pulver.com as the sponsoring organization, to serve Internet Protocol Communications Service Providers (“.TEL (Pulver)”).
- ***Telnic Limited*** - application for the ***.TEL sTLD*** to serve individuals or businesses who wish to have a universal identity, brand or name, in the Internet-Communications space, as well as providers of Internet-Communications services and related content (“.TEL (Telnic)”).

- *Tralliance Corporation* - application for the *.TRAVEL sTLD* to serve businesses, organizations, associations, and governmental and non-governmental agencies operating in the travel industry.
- *ICM Registry, Inc.* - application for the *.XXX sTLD* to “serve the needs of the global responsible online adult-entertainment community.”⁶²

Like ICM, the applicants for .POST, .MOBI, both versions of .TEL, and .TRAVEL, had all previously submitted applications for TLDs during the 2000 “proof of concept” round, but had not been selected.

38. The public portions of the ten applications were posted on the ICANN website on 19 March 2004. The announcement accompanying the posting explained that the applications would be reviewed by the independent evaluation panel, and stated that “[a]ll applicants that are found to satisfy the posted criteria will be eligible to enter into technical and commercial negotiations with ICANN for agreements for the allocation and sponsorship of the requested TLDs.”⁶³

39. The posting announcement also indicated that there would be a single, month-long period for public comment beginning on 1 April 2004. During this comment period, ICANN received and posted “[d]ozens of public comments” on the applications.⁶⁴ All ten applications received both positive and negative comments. Sixty-three comments were posted to the comment forum for ICM’s application, the majority of which were positive.

⁶² ICM Application.

⁶³ ICANN Announcement: Progress and Process.

⁶⁴ sTLD Status Report at p. 5. The comments are archived on the ICANN website, and can be accessed through links at <http://forum.icann.org/lists/stld-rfp-xxx/> (last visited 5 June 2008).

40. The three teams of independent evaluators began their review of the sTLD applications in May 2004.⁶⁵ During their evaluations, the teams asked questions of the applicants, and received materials clarifying the applications. Drafts of the evaluation reports were provided to ICANN in July 2004. In the opinion of the independent evaluators, only two applications, .POST and .CAT, met all of the published selection criteria. The evaluators concluded that three applications, .ASIA, .TRAVEL, and .XXX, satisfied the technical and the business and financial criteria, but did not fulfill the sponsorship criteria. Two other applications, .JOBS and .MOBI, were viewed as having satisfied only the business and financial criteria, and the application for .MAIL and both applications for .TEL were deemed to have failed all three sets of criteria. The evaluation reports also concluded that the .ASIA, .JOBS, and .TRAVEL applications merited further discussions with ICANN, despite not meeting the selection criteria at the time of the evaluations, whereas the .MAIL, .MOBI, .TEL (Telnic), .TEL (Pulver), and .XXX applications did not merit further discussion.

41. In July 2004, at the ICANN meetings in Kuala Lumpur, Malaysia, ICANN announced that it would not act exclusively on the evaluation reports, but would give all of the applicants an opportunity to provide additional clarifying information and to answer further questions from the evaluators and the ICANN Board “relating to any potential deficiencies in the application that were highlighted in the independent evaluation.”⁶⁶ Each applicant received the evaluation of its respective application in late August 2004, which reflected the applicant’s

⁶⁵ The organization that had prepared the report of the legal and policy issues from the previous “proof of concept” round, Summit Strategies International, was retained to coordinate the evaluation process.

⁶⁶ ICANN Public Forum, Kuala Lumpur, Malaysia, 22 July 2004: Real-Time Captioning, available at <http://www.icann.org/meetings/kualalumpur/captioning-public-forum-23jul04.htm> (last visited 5 June 2008).

responses to questions from the evaluation teams, but did not reflect any Board questions or requests for information.

42. Over the next several months, almost all of the applicants worked to answer questions, clarify information, or provide additional materials to ICANN staff, the Board, and/or the independent evaluation panel. The form of these contacts varied, but included correspondence and/or meetings via teleconference. Even the applicant for .CAT was required to provide additional information, despite the opinion of the independent evaluators that the application had satisfied all three of the selection criteria. Only the .POST application automatically entered into registry agreement negotiations (*i.e.*, without Board intervention, action, or resolution) based on the satisfactory results from the evaluation panel. NetNumber, Inc. (one of the applicants for the .TEL sTLD) did not respond to ICANN's request for information to remedy deficiencies in its application, and was therefore informed in November 2004 that the process for its application was closed.⁶⁷

43. From December 2004 through March 2005, the .MAIL applicant collaborated with the independent evaluation panel's business and financial team in an effort to remedy the deficiencies identified in its application. Ultimately, however, in April 2005, the independent evaluators concluded that "the proposal 'for a .mail TLD is not financially viable and that the business plans are not sound.'"⁶⁸ Given this conclusion, the questions relating to the technical and sponsorship criteria were never revisited.

44. The .TRAVEL, .JOBS, .MOBI, and .CAT applications all progressed through the evaluation process relatively quickly. The Board authorized negotiations for the .TRAVEL

⁶⁷ See sTLD Status Report at p. 19.

⁶⁸ *Id.* at p. 15.

registry agreement on 18 October 2004, and authorized negotiations for the .JOBS and .MOBI registry agreements on 13 December 2004. Following the negotiations, the proposed .TRAVEL and .JOBS registry agreements were posted on the ICANN website on 24 March 2005, and approved by the ICANN Board two weeks later, on 8 April 2005. The proposed .MOBI registry agreement was posted on the ICANN website on 3 June 2005, and approved by the ICANN Board two weeks later, on 28 June 2005. The .CAT application was approved to enter into negotiations on 18 February 2005. The proposed registry agreement for .CAT was posted on the ICANN website on 9 August 2005, and the agreement was approved by the ICANN Board approximately one month later.

45. Approval of the .ASIA and .TEL (Telnic) applications took a little longer. In the end, however, both applications were approved, and both applicants entered into registry agreements, despite the fact that the .TEL (Telnic) application initially had failed all three evaluation categories. The .TEL (Telnic) application was approved to enter into negotiations on 28 June 2005, a proposed registry agreement was posted on the ICANN website in March 2006, and the ICANN Board approved the .TEL (Telnic) registry agreement in May 2006. The .ASIA application was approved to enter into negotiations in December 2005, a proposed registry agreement was posted on the ICANN website in July 2006, and the ICANN Board approved the .ASIA registry agreement in October 2006.

46. In short, even applications that had been identified by the independent evaluation panel as having more deficiencies than the .XXX application, such as .JOBS, .MOBI, and .TEL (Telnic), were subsequently approved by the ICANN Board and the applicants proceeded to execute registry agreements with ICANN. Moreover, despite the longer than anticipated time frame in some cases, the process for each application still followed the original two-step process

of criteria approval followed by registry agreement negotiation. In no case, other than with the .XXX application, did the Board approve an applicant to progress to the second phase (*i.e.*, registry agreement negotiations) and then later reverse the basis for that decision regarding the technical, business and financial, or sponsorship criteria.

D. ICM's Application and Registry Agreement Negotiations

47. In contrast to the other sTLD applications, ICM's application was subjected to a prolonged process of approval, negotiations, set-backs, delays, further negotiations, and additional demands, culminating in the Board's ultimate decision to terminate contract negotiations and reject the application.⁶⁹ Of all the applicants, it was only ICM that was unexpectedly, unjustifiably, and without notice, required to revisit the sponsorship criteria many months after the Board had originally determined that the application satisfied all of the evaluation criteria. Only ICM was asked, repeatedly, to modify its proposed registry agreement during the negotiation phase to include additional obligations and assurances of compliance. And only ICM's proposed agreement was repeatedly rejected, despite the Board's threshold determination approving ICM to enter into registry agreement negotiations and ICM's repeated accommodation of each and every formal and informal request by the Board and ICANN staff to modify the terms of the agreement.

1. ICANN Resolves to Commence Registry Agreement Negotiations with ICM

48. As with the other applicants, ICM received the independent evaluation panel's report regarding its .XXX application in late August 2004. The report indicated that ICM's application met the technical and the business and financial criteria set forth in the RFP.

⁶⁹ Attached as C-Exh. 4 is a timeline of key dates.

However, the “sponsorship and other issues” evaluation team was not convinced that ICM (or most of the other applicants, for that matter) had demonstrated that the sponsorship criteria had been satisfied. The ICANN Board asked ICM to supplement its application with additional sponsorship-related information for the Board’s direct review and consideration. Accordingly, between September and December 2004, ICM submitted, *inter alia*, a detailed letter and follow-up memoranda responding to each section of the evaluators’ report; information regarding the functionality of the proposed policy development processes; information regarding the global value of the proposed sTLD; justifications as to why an sTLD was the best means of achieving the goals of the sponsored community and other stakeholders; and confirmations regarding the commitment of ICM and IFFOR to the success of the proposed sTLD. ICM’s initial response letter also described how the sponsored community, as defined by the application, met the sponsorship requirements, and provided information regarding the support the application had received in the sponsored community and among child safety advocates.⁷⁰

49. The Board considered ICM’s supplemented application at its meeting on 24 January 2005. In light of the deliberations and the questions raised regarding the size and composition of the sponsored community, ICM was requested to give a presentation to the Board on the issue. Accordingly, on 3 April 2005, prior to the ICANN meetings in Mar del Plata, Argentina, ICM’s management gave a detailed, in-person presentation to the Board, in which

⁷⁰ See sTLD Status Report, Appendix E—Supplemental/Follow-up Materials (updated 30 Nov. 2005), at pp. 158-183, available at <http://www.icann.org/tlds/stld-apps-19mar04/AppE-30nov05.pdf> (last visited 5 June 2008). The “sponsorship and other issues” evaluation team raised similar concerns regarding the definition of and support from the sponsored community in their evaluations of a number of the applications. Those applicants, like ICM, responded with materials clarifying and elaborating on the initial applications, and ICANN later approved the other applications with little or no change to the original definitions of the sponsored communities.

they described, *inter alia*, the sponsored community and the policy-making process for the .XXX sTLD. ICM's presentation included remarks by Parry Aftab, the Executive Director of WiredKids and the WiredSafety Group, explaining her support for ICM's application.⁷¹ Present at the briefing were Board members as well as several Board liaisons, including the GAC liaison, Mohamed Sharil Tarmizi.

50. Following this presentation, the Board again discussed ICM's application in detail at its 3 May 2005 meeting. Once again, the sponsorship issue was the main topic of discussion. The Board did not make a final decision on the application, but determined to discuss it again at its next Board meeting. At that meeting, on 1 June 2005, the Board's deliberations again focused on the sponsorship criteria. At the conclusion of these deliberations, the Board adopted a formal resolution authorizing the commencement of the second phase of the approval process: contract negotiations with ICM for .XXX sTLD registry agreement. The resolution read:

Resolved [05.32] the Board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .XXX sponsored top-level domain (sTLD) with the applicant.

Resolved [05.33] if after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of *proposed commercial and technical terms* for a contractual arrangement, the President shall present such proposed

⁷¹ *Id.* at pp. 184-218. WiredSafety is one of the largest and oldest online safety groups, and the WiredKids program was created to help fight online child pornography and pedophilia. Parry Aftab is both a child safety advocate and a lawyer specializing in Internet privacy and security. She is the author of multiple books about child safety online and was appointed by the United Nations Educational, Social, and Cultural Organization ("UNESCO") to head the U.S. Action Committee of Innocence in Danger, work which she continued after UNESCO was no longer officially involved. Over the course of ICANN's consideration of ICM's application, the proposal received support from numerous child safety and other entities, including the Family Online Safety Institute (formerly the Internet Content Rating Association ("ICRA")) and the Association of Sites Advocating Child Protection ("ASACP"), among others.

terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.⁷²

51. The resolution reflected the Board's unconditional decision that ICM's application satisfied the RFP evaluation criteria, including the sponsorship criteria, an outcome that was also reflected in comments made by senior ICANN officials and members of the Board.⁷³ For example, in July 2005, at ICANN's Luxembourg meetings, Dr. Vinton Cerf (then the Chairman of the ICANN Board) informed the GAC that ICM's application had satisfied the selection criteria: "[t]he [.XXX] proposal this time *met the three main criteria, financial, technical, sponsorship*. They [sic] were doubts expressed about the last criteria which were discussed extensively and the Board reached a positive decision considering that ICANN should not be involved in content matters."⁷⁴ Likewise, during the Public Forum at the Luxembourg meetings, Mr. Pritz stated that the .XXX application "ha[d] been found to satisfy the baseline criteria," and was therefore "in negotiation for the designation of registries."⁷⁵ These statements provide clear

⁷² ICANN Board Resolution on .XXX sTLD Approval to Enter into Contractual Negotiations, ICANN Board Meeting, 1 June 2005: Minutes, *available at* <http://www.icann.org/minutes/minutes-01jun05.htm> (last visited 5 June 2008) (emphasis added).

⁷³ The following day, Board member Joichi Ito noted in his blog that "[o]ur approval of .XXX is a decision based on whether .XXX met the criteria." Joichi Ito, Some Notes on the .XXX Top Level Domain, 3 June 2005, *available at* <http://joi.ito.com/weblog/2005/06/03/some-notes-on-t.html> (last visited 5 June 2008).

⁷⁴ Governmental Advisory Committee Meeting XXII, Plenary Session, Luxembourg City, Luxembourg, 11 July 2005: Minutes (emphasis added), *available at* http://www.gac.icann.org/web/meetings/mtg22/LUX_MINUTES.doc (last visited 5 June 2008) ("GAC Luxembourg Minutes"). At this meeting, several GAC representatives expressed concern that the GAC had not been consulted sufficiently regarding the public policy aspects of the .XXX application, although it was also noted that there had been several opportunities for the GAC to comment as the process had been public.

⁷⁵ ICANN Public Forum—Part II, Luxembourg, 14 July 2005: Real-Time Captioning, *available at* <http://www.icann.org/meetings/luxembourg/captioning-pf2-14jul05.htm> (last visited 5 June 2008).

and *contemporaneous* evidence that the Board's resolution approving the commencement of registry agreement negotiations constituted a decision by the ICANN Board that ICM's application had satisfied all of the requisite RFP criteria.

52. Consistent with ICANN Bylaws, the GAC was invited to and was often represented at meetings in which ICM's application (and others) were discussed and debated, it was regularly provided with briefing papers regarding the sTLD RFP process, and it was permitted to participate in the Board's discussions regarding ICM's application (and others), including those meetings that ultimately led to the Board resolution authorizing registry agreement negotiations.⁷⁶

2. ICM and ICANN Negotiate a Proposed Registry Agreement

53. In accordance with the Board's approval of ICM's application, ICM and ICANN staff entered into contract negotiations for a registry agreement. Less than two weeks after the Board directed ICANN staff to begin negotiations, ICM sent a draft of the registry agreement for the .XXX sTLD to ICANN. This draft was based on the form contract that ICANN had provided to all sTLD applicants in February 2005, and was substantially similar to the contracts approved for the other sTLDs. Contract negotiations continued through early August, and on 9 August 2005, in light of the parties' agreement on all terms and conditions, a proposed registry agreement between ICANN and ICM was posted on the ICANN website for public comment. The posting announcement stated that the Board intended to discuss the proposed agreement at its forthcoming meetings scheduled for 16 August 2005.

⁷⁶ See, e.g., ICANN Board Meeting, 3 May 2005: Minutes, *available at* <http://www.icann.org/minutes/minutes-03may05.htm> (last visited 5 June 2008); ICANN Board Meeting, 18 October 2004: Minutes, *available at* <http://www.icann.org/minutes/minutes-18oct04.htm> (last visited 5 June 2008).

3. Individual GAC Members Intervene Regarding ICM's Application

54. Prior to July 2005, the GAC had not expressed any objections to the .XXX sTLD; neither at the outset, when the sTLD evaluation criteria were debated and ultimately approved, nor when ICANN resolved to commence registry agreement negotiations with ICM. In fact, only a few months earlier, in April 2005, the GAC's Chairman (Mr. Tarmizi) had confirmed that no GAC members had any objections to any of the sTLD applications.⁷⁷ And in July 2005, following a GAC meeting in Luxembourg during which there was significant discussion of the Board's approval of the .XXX application,⁷⁸ the resulting GAC Communiqué welcomed "the initiative of ICANN to hold consultations" with the GAC regarding policy only for *future* TLDs, and made no mention of any reservations or objections to the .XXX application or any other pending sTLD application.⁷⁹

55. It was only after ICM's proposed registry agreement was publicly posted on 9 August 2005 (approximately one month after the Luxembourg meetings), that certain GAC members began to formally document and express to the Board their concerns regarding ICM's

⁷⁷ ICANN Correspondence: Letter from Mohamed Sharil Tarmizi, GAC Chairman, to Dr. Paul Twomey, ICANN CEO and President, 3 Apr. 2005, *available at* <http://www.icann.org/correspondence/tarmizi-to-twomey-03apr05.htm> (last visited 5 June 2008) (confirming that "No GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round."). This letter represented GAC's timely advice to the Board, as required by the Bylaws, regarding the sTLD applications. ICANN Bylaws, Article III, § 6 (Notice and Comment on Policy Actions).

⁷⁸ At the Luxembourg meeting, the GAC representative from the United States noted that the GAC had already had "several opportunities to raise questions" regarding the sTLD approval process or applications pursuant thereto, and also noted that the entire process "had been public since the beginning." GAC Luxembourg Minutes.

⁷⁹ GAC 2005 Communiqué # 22—Luxembourg, 12 July 2005, *available at* <http://www.gac.icann.org/web/communiques/gac22com.rtf> (last visited 5 June 2008). Given that there had been some debate in the GAC at the Luxembourg meetings regarding ICM's application, the fact that the Communiqué made no reference to the ICM application is notable.

application.⁸⁰ Between 11 August and 15 August 2005, ICANN received, and posted to its website, two letters: one from Michael Gallagher, Assistant Secretary for Communications and Information, United States Department of Commerce, and head of the National Telecommunications and Information Administration (“Gallagher Letter”), and the other from Mr. Tarmizi, the GAC Chairman.⁸¹ The Gallagher Letter referenced negative comments that the United States Department of Commerce had received regarding the .XXX sTLD. Nonetheless, the letter did not expressly state that the United States Government had any objection to the .XXX proposal, but “urge[d] the Board to ensure that the concerns of all members of the Internet community on [the issue of .XXX] have been adequately heard and resolved before the Board takes action on this application,” and “request[ed] that the Board [] provide a proper process and adequate additional time for these concerns to be voiced and addressed before any additional action takes place on this issue.”⁸²

⁸⁰ ICM subsequently learned through documents obtained through a Freedom of Information Act request that the United States Department of Commerce had begun monitoring reactions to the proposed .XXX domain following the Board’s 1 June 2005 vote and had decided to intervene regarding the approval of the application. *See generally ICM Registry, LLC v. Department of Commerce*, No. 06-0949 (D.D.C. filed Oct. 16, 2006).

⁸¹ ICANN Correspondence: Letter from Michael Gallagher, Assistant Secretary for Communications and Information, United States Department of Commerce, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors, posted 15 Aug. 2005, *available at* <http://www.icann.org/correspondence/gallagher-to-cerf-15aug05.pdf> (last visited 5 June 2008) (“Gallagher Letter”); ICANN Correspondence: Letter from Mohamed Sharil Tarmizi, GAC Chairman, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors, 12 Aug. 2005, *available at* <http://www.icann.org/correspondence/tarmizi-to-board-12aug05.htm> (last visited 5 June 2008) (“Tarmizi Letter 12 Aug. 2005”). There is evidence to the effect that the Gallagher Letter was actually received by ICANN before the letter from Mr. Tarmizi, and that the latter letter was issued to mitigate the implications of the former; namely, a rear guard action by the United States Government to block the creation of an Internet domain for the adult entertainment industry, as a result of pressure on the Bush administration from special interest groups.

⁸² Gallagher Letter.

56. The letter from Mr. Tarmizi also refrained from stating direct opposition from the GAC to ICM's application, instead noting that "there remain[ed] a strong sense of discomfort in the GAC about the TLD, notwithstanding the explanations to date." Mr. Tarmizi stated that he had informed governments that had approached him on the subject that they were free to write to ICANN directly, and therefore believed that "the Board should allow time for additional governmental and public policy concerns to be expressed before reaching a final decision on this TLD."⁸³

57. ICANN staff informed ICM of this unexpected turn of events shortly before the Board meeting scheduled for 16 August 2005. ICM became aware during consultations with ICANN staff that the surprise interventions had placed the ICANN Board in an awkward situation, and therefore sought to accommodate ICANN by requesting that ICANN delay consideration of the proposed .XXX registry agreement for one month so that ICM could comprehensively address the concerns that were now being voiced. Consideration of the agreement was therefore postponed until the Board meeting scheduled for 15 September 2005.⁸⁴

⁸³ Tarmizi Letter 12 Aug. 2005.

⁸⁴ Among the comments and letters from governments and others about the .XXX proposal were two received by ICANN during this delay. The first, from the Brazilian Secretary of Information and Technology Policy, did not oppose the .XXX registration, instead stating that the .XXX and .TRAVEL sTLDs had been introduced without sufficient consultation between ICANN and the GAC. The Brazilian Government requested only that the introduction of new TLDs in the future include more robust consultations, especially with national governments. ICANN Correspondence: Letter from Marcelo de Carvalho Lopes, Brazilian Secretary of Information and Technology, to Mohamed Sharil Tarmizi, GAC Chairman, 6 Sept. 2005, available at <http://www.icann.org/correspondence/lopez-to-tarmizi-06sep05.pdf> (last visited 5 June 2008). The second, from the Swedish State Secretary for Communications and Regional Policy, expressed the opinion that pornography "is not compatible with [] gender equality goals" and asked ICANN to delay consideration of the .XXX proposal until after the next GAC meeting at the end of November in Vancouver, Canada. ICANN Correspondence: Letter from Jonas Bjelfvenstam, Swedish State Secretary for Communications and Regional Policy, to Dr. Paul

(continued...)

58. To address the GAC's concerns, ICM sent the ICANN Board a detailed letter responding to the letters from Mr. Gallagher and Mr. Tarmizi, describing the ways in which ICM had addressed the concerns of all stakeholders and expressing ICM's continued willingness to work with all stakeholders and governments. The letter reiterated ICM's repeated prior offers, all ignored, to meet with the GAC at any time in order to allow ICM to address any concerns that the GAC had with its application.⁸⁵

59. At its 15 September 2005 meeting, the Board approved a resolution directing the ICANN President and General Counsel "to discuss possible additional contractual provisions or modifications for inclusion in the .XXX Registry Agreement, to ensure that there are effective provisions requiring development and implementation of policies consistent with the principles in the ICM application."⁸⁶ The resolution specifically mentioned compliance issues in relation to potential changes in the ownership of ICM.⁸⁷

60. Once again, ICM responded to ICANN's requests, discussing with ICANN staff that very same day the changes to the draft registry agreement. ICM agreed to (1) include

(continued)

Twomey, ICANN CEO and President, 23 Nov. 2005, *available at* <http://www.icann.org/correspondence/bjelfvenstam-to-twomey-23nov05.htm> (last visited 5 June 2008).

⁸⁵ The letter also noted the inordinate length of the application evaluation and negotiation process, and the significant costs that had been incurred by ICM, and requested that the finalization of the .XXX registry agreement not be delayed further.

⁸⁶ ICANN Board Resolution on Proposed .XXX Sponsored Top-Level Domain Registry Agreement, ICANN Board Meeting, 15 Sept. 2005, *available at* <http://www.icann.org/minutes/minutes-15sep05.htm> (last visited 5 June 2008).

⁸⁷ Following this meeting, the Board received a communication from Taiwan's representative to the GAC, noting that the proposed registry agreement would be both technically workable and would assist in the labeling and filtering of adult entertainment websites, but requesting that approval of the proposal take into consideration customs, culture, social conditions, and legal conditions of different countries.

language regarding its obligations to achieve certain policy outcomes, and (2) notify ICANN in advance of any proposed change in control, and not to effect any such change until all ICANN concerns were addressed.⁸⁸ Before the end of the month, ICM provided ICANN staff with revisions to the draft agreement, reflecting those consultations. ICANN staff, however, were less responsive, and did not act on the revised draft for approximately six months.⁸⁹

61. During the pendency of the negotiations, ICANN received additional letters from GAC representatives. Among these was one from Peter Zangl, the Deputy Director of the European Commission's Information Society and Media Directorate General, dated 16 September 2005, requesting ICANN to allow the GAC the opportunity to review the independent sTLD evaluation reports before the Board made a final determination on the .XXX application and suggesting that the Board explain to the GAC why the .XXX application had been accepted after being rejected in the 2000 "proof of concept" round.⁹⁰

⁸⁸ See Draft, Sponsored TLD Registry Agreement, Appendix S, Part 7 (Change in Control Transactions), 18 Apr. 2006, *available at* <http://www.icann.org/tlds/agreements/xxx/revised-proposed-xxx-agreement-clean-20060418.pdf> (last visited 5 June 2008). It would appear that such a request was never made of the other applicants.

⁸⁹ Notwithstanding ICM's prompt discussions with ICANN staff and its immediate proffer of language to effect the relevant changes, the first version of the registry agreement (*i.e.*, the version that had been posted on 9 August 2005), remained on the ICANN website, with no indication that revisions had been discussed and agreed to by ICM, or that ICM had drafted contractual language to implement the changes. As a result, long after ICM had addressed the Board's concerns, debate centered on a version of the registry agreement that did not reflect the additional safeguards or terms and conditions agreed to by ICM and ICANN staff and which were ultimately included in the second draft.

⁹⁰ ICANN Correspondence: Letter from Peter Zangl, Deputy Director of the European Commission's Information Society and Media Directorate General, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors, 16 Sept. 2005, *available at* <http://www.icann.org/correspondence/zangl-to-cerf-16sep05.pdf> (last visited 5 June 2008). Partially as a result of the GAC's interest in the evaluation reports, ICANN informed ICM in October of 2005 that it intended to post the evaluation reports of all the applicants to the ICANN website. This unilateral change of ICANN's previous policy against publishing the reports until

(continued...)

62. In February 2006, ICANN CEO and President Dr. Paul Twomey responded to the GAC's requests for an explanation of the Board's reasoning with regard to the acceptance of ICM's application. The letter discussed the differences between the 2000 "proof of concept" round and the 2003 RFP, explained the evaluation process, and described the Board's deliberations regarding ICM's application. The letter concluded that:

[b]ased on the extensive public comments received, the independent evaluation panel's recommendations, the responses of ICM and the proposed Sponsoring Organization (IFFOR) to those evaluations, and a review of all supporting documents provided during the evaluation process, at its teleconference on 1 June 2005, the Board authorized the President and General Counsel to enter negotiations relating to proposed commercial and technical terms with ICM.⁹¹

Notably, no mention was made by Dr. Twomey that any reservations remained among Board members as to whether ICM's application had already satisfied the sponsorship criteria, or that the registry agreement negotiations authorized by the Board were to address any sponsorship issues.

(continued)

after the registry agreements were executed became a point of contention between ICANN and ICM, as ICM was subjected to disparate treatment. Other applicants who had also received mixed evaluations, such as .JOBS, .MOBI, and .TRAVEL, had already entered into registry agreements with ICANN, and thus public comments resulting from review of the mixed evaluations could no longer interfere with the negotiation process. ICM, however, was disadvantaged by the publication of the evaluation reports, which created more opportunity for criticism of ICM's proposed registry agreement, resulting in further delay in the Board's consideration of ICM's registry agreement. ICM nonetheless cooperated by providing redacted documents for publication, despite the disadvantage to ICM from the publication of the reports.

⁹¹ ICANN Correspondence: Letter from Dr. Paul Twomey, ICANN CEO and President, to Mohamed Sharil Tarmizi, GAC Chairman, 11 Feb. 2006, *available at* <http://www.icann.org/correspondence/twomey-to-tarmizi-16feb06.pdf> (last visited 5 June 2008) ("Twomey Letter 11 Feb. 2006").

4. ICM and ICANN Negotiate a Revised Registry Agreement

63. As noted above, ICM and ICANN staff reached agreement in concept regarding a revised draft of the .XXX registry agreement almost immediately following the September 2005 Board meeting, and ICM submitted the revised language soon thereafter. ICANN did not, however, respond to ICM's proposal or post a draft at this stage. It was not until March 2006 that ICANN staff directed its outside counsel to work directly with ICM's counsel to come to an agreement on the precise language for the revised agreement, based on the text provided by ICM six months earlier. The parties promptly reached agreement. Inexplicably, however, ICANN staff did not post this draft. As a result, neither the GAC nor the ICANN community was aware of the changes, and both the United States Government and the GAC continued to criticize the "failings" of the first draft of the registry agreement without the benefit of the revisions that had been negotiated and agreed upon specifically to address the earlier concerns.⁹² For example, on 20 March 2006, the U.S. Department of Commerce expressed its concern that the draft registry agreement failed to guarantee the public interest benefits ICM had described in its application and previous presentation to the GAC, notwithstanding the fact that ICM and ICANN had already negotiated contract language specifically to address this concern.⁹³ Similarly, following the GAC Plenary meeting in Wellington in March 2006, the GAC issued a Communiqué (the "Wellington Communiqué") requesting confirmation "that any contract currently under

⁹² These communications were themselves especially unusual for the United States Government, which had previously not involved itself with registry agreement details.

⁹³ ICANN Correspondence: Letter from John Kneuer, Acting Assistant Secretary, United States Department of Commerce, to Mohamed Sharil Tarmizi, GAC Chairman, 20 Mar. 2006, available at <http://www.icann.org/correspondence/kneuer-to-tarmizi-20mar06.pdf> (last visited 5 June 2008).

negotiation between ICANN and ICM Registry . . . include enforceable provisions covering all of ICM Registry's commitments."⁹⁴

64. In response to the Wellington Communiqué, ICM made additional revisions to the proposed registry agreement, and sent those revisions to ICANN staff on 31 March 2006. At the Board Meeting later that same day, however, the Board again directed further registry agreement negotiations, without any acknowledgment or discussion of any of the revisions that had already been agreed upon prior to the Wellington meeting, or the additional revisions offered by ICM during and after the Wellington meeting.⁹⁵ It was not until 18 April 2006 that the Board discussed the registry agreement as revised on 31 March 2006.⁹⁶ The draft agreement was then posted for public comment on the ICANN website, with the disclosure that the agreement would be considered by the ICANN Board on 10 May 2006.

65. Dr. Twomey also responded to the Wellington Communiqué. On 4 May 2006, he wrote to the GAC stating that, although the Board had determined that the materials provided by

⁹⁴ GAC 2006 Communiqué # 24—Wellington, New Zealand, 28 Mar. 2006, *available at* <http://gac.icann.org/web/communiqués/gac24com.pdf> (last visited 5 June 2008). The Communiqué also stated that several GAC members were opposed to a .XXX sTLD on public policy grounds. Following the Wellington meetings, the United Kingdom's representative to the GAC wrote to the Board, affirming that ICANN had the authority to approve the proposed registry agreement, but noting that it "would be important that ICANN ensures that the benefits and safeguards proposed by the registry, ICM, . . . are genuinely achieved." ICANN Correspondence: Letter from Martin Boyle, United Kingdom Representative to the GAC, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors, 4 May 2006, *available at* <http://www.icann.org/correspondence/boyle-to-cerf-09may06.htm> (last visited 5 June 2008).

⁹⁵ See ICANN Board Resolution on ICM Registry sTLD Application, ICANN Board Meeting, Wellington, New Zealand, 31 Mar. 2006: Minutes, *available at* <http://www.icann.org/minutes/minutes-31mar06.htm> (last visited 5 June 2008); ICANN Board Meeting, Wellington, New Zealand, 31 Mar. 2006: Real-Time Captioning, *available at* <http://www.icann.org/meetings/wellington/captioning-board-31mar06.htm> (last visited 5 June 2008).

⁹⁶ ICANN Board Meeting, 18 Apr. 2006: Minutes, *available at* <http://www.icann.org/minutes/minutes-18apr06.htm> (last visited 5 June 2008).

ICM were sufficient “to proceed with contractual discussions, the Board [had also] expressed concerns about whether the applicant met all of the criteria, but took the view that such concerns could possibly be addressed by contractual obligations to be stated in a registry agreement.”⁹⁷

Yet there is, simply put, nothing in the record that supports this assertion. There is nothing at all in the 1 June 2005 ICANN Board resolution, pursuant to which the registry agreement negotiations were authorized, reflecting the Board’s alleged “concerns” as to whether ICM had “met all of the criteria.” In fact, ICM has not been able to identify anything in any Board minutes, transcripts or other formal ICANN pronouncements (or private discussions) reflecting the notion that the Board’s approval to proceed to the registry agreement negotiation stage was subject to any residual concerns as to whether ICM’s application satisfied all of the RFP selection criteria. To the contrary, the evidence confirms the ICANN Board’s acceptance of the fact that ICM’s application had satisfied all of the RFP selection criteria and its approval of the parties’ negotiations to enter into a registry agreement. This was confirmed by the Chairman of the Board, senior ICANN staff, and members of the Board in contemporaneous statements, and publicly reiterated by senior ICANN staff at subsequent meetings. There is no controversy that those negotiations were only to concern the “proposed commercial and technical terms” of the .XXX registry agreement, a fact that had been confirmed to the GAC only months earlier by Dr. Twomey.⁹⁸

⁹⁷ ICANN Correspondence: Letter from Dr. Paul Twomey, ICANN CEO and President, to Mohamed Sharil Tarmizi, GAC Chairman, 4 May 2006, *available at* <http://www.icann.org/correspondence/twomey-to-tarmizi-04may06.pdf> (last visited 5 June 2008).

⁹⁸ Twomey Letter 11 Feb. 2006.

5. ICANN Rejects ICM's Revised Registry Agreement

66. At the 10 May 2006 meeting the Board engaged in a lengthy discussion of the proposed .XXX registry agreement, touching upon a number of issues, including the enforceability of the agreement, the sponsorship criteria, public and industry comments, and the advice that had been received from the GAC. The agreement was then put to a roll call vote. It was rejected, eight votes to five. The two main reasons cited by those voting against the draft agreement were, first, that ICM would not be able to fulfill its commitments under the agreement and, second, "public policy" concerns. The vote only constituted a rejection of the draft registry agreement that had been negotiated with ICANN staff, but did not constitute a rejection of ICM's application for the .XXX sTLD.⁹⁹

6. ICM Files, Then Withdraws, a Request for Reconsideration Pending Further Negotiations

67. The Board's rejection of the registry agreement came as a shock to ICM, especially in light of the amount of time and effort that it had spent negotiating with ICANN

⁹⁹ ICANN Board Meeting, 10 May 2006: Voting Transcript, *available at* <http://www.icann.org/minutes/voting-transcript-10may06.htm> (last visited 5 June 2008). Several Board members who were in favor of the agreement expressed their dissatisfaction with the obligations being imposed on ICM. Mouhamet Diop stated that he was in favor of the .XXX agreement because "[c]hanging our position after all that process will weaken more the organization that [sic] it will help it. . . . If we vote against, we will open the door to a process that we will never come back [from] again. Any group of pressure [sic] will see itself able to make us *change everything* on any issue." *Id.* (emphasis added). Board Member Peter Dengate-Thrush commented that he felt it was "unfair on this particular applicant to attempt to ask it to build a complete and working compliance model before it's allowed to start. That hadn't been imposed on any other applicant, and I don't think it could be or should be imposed on this one." *Id.* Likewise, Board Member Joichi Ito felt that any enforcement or compliance issues that existed with regard to the .XXX agreement "are mostly general issues that should be addressed in the framework of ICANN's ability to enforce agreements generally." *Id.* Board Member Susan Crawford expressed her fear that ICANN "may have gone too far" in addressing public policy concerns, and as a result, perhaps ran the risk of imposing content-related limitations on the use of domain names, rather than simply exercising technical oversight of the registration of domain names. *Id.*

over not one, but several versions of the agreement. During the course of these negotiations, ICM had gone to significant lengths to acquiesce to every reasonable request from ICANN staff, notwithstanding the fact that certain of the conditions being imposed upon ICM had not been required of any of the other applicants. Indeed, ICM's representatives had repeatedly informed the ICANN negotiators that there was effectively no reasonable amendment to the agreement that ICM would not accept. Other factors outside of ICM's control, however, were apparently at play. Accordingly, shortly after the 10 May Board meeting, ICANN filed a Request for Reconsideration of Board Action.¹⁰⁰

68. No decision, however, was made on ICM's Request. After ICM was informed that it would be appropriate to submit a new draft agreement and to engage in further negotiations regarding a registry agreement for the .XXX sTLD, on 29 October 2006, ICM officially withdrew its Amended Request for Reconsideration.

7. ICM Resumes Contract Negotiations with ICANN

69. Through November and December 2006, ICM engaged in further negotiations with senior ICANN representatives regarding revisions to the proposed registry agreement. As had previously been the case, ICM attempted to accommodate every demand put forward by ICANN, and provided ICANN with various additional materials to demonstrate its commitment to abide by the letter and spirit of the proposed agreement.¹⁰¹

¹⁰⁰ ICM filed an Amended Request for Reconsideration of Board Action shortly thereafter, once the Board minutes from the 10 May Board meeting were published.

¹⁰¹ Among other materials, ICM provided a list of individuals within the child safety community who would be willing to sit on the Board of IFFOR, the sponsoring organization for .XXX; commitments to enter into agreements with rating associations to provide tags for filtering .XXX websites and to monitor compliance with child pornography provisions; descriptions of the industry pre-registration service ICM had initiated to demonstrate the level of

(continued...)

70. By the end of December 2006, ICM and senior-most ICANN staff had once again reached agreement regarding the language, terms, and conditions for the proposed registry agreement. The revised agreement was posted on the ICANN website for public comment on 5 January 2007, with the expectation that the comment period would last for approximately 30 days, to be followed by the Board's vote on 12 February 2007.¹⁰²

71. On 2 February 2007, the GAC issued a letter to Dr. Cerf commenting on ICM's application, but adding little of substance. The letter stated that the Wellington Communiqué remained "a valid and important expression of the GAC's views" regarding the .XXX sTLD and referred to no other GAC statements amending or altering the statements of the Wellington Communiqué.¹⁰³ The letter also reiterated that various GAC members had objections to the proposed agreement, requested additional information from the Board regarding the Board's decision that ICM's application had overcome the deficiencies identified in the initial analysis, and requested that a final decision on ICM's agreement be delayed until the ICANN meetings in Lisbon, scheduled for the end of March 2007.

72. Notwithstanding the request by the GAC Chair for a postponement, the ICANN Board engaged in a discussion regarding ICM's draft registry agreement at its 12 February 2007

(continued)

support among the sponsored community; and a number of memos and summaries explaining how the revised agreement addressed all of the concerns that had been raised throughout the process.

¹⁰² ICANN Announcement, ICANN Publishes Revised Proposed Agreement on .XXX, 5 Jan. 2007, *available at* <http://www.icann.org/announcements/announcement-05jan07.htm> (last visited 5 June 2008).

¹⁰³ ICANN Correspondence: Letter from Mohamed Sharil Tarmizi, GAC Chairman, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors, 2 Feb. 2007, *available at* <http://www.icann.org/correspondence/tarmizi-to-cerf-02feb07.pdf> (last visited 5 June 2008).

meetings.¹⁰⁴ The discussion centered on three main issues: “1) community review and public comment of the agreement and the sufficiency of the proposed agreement; 2) the status of advice from the [GAC] and a clarification of the letter from the GAC Chair and Chair-Elect, and whether additional public policy advice had been received or was expected following the Wellington Communiqué; and 3) how ICM measures up against the RFP criteria.”¹⁰⁵

73. Following the discussion, a resolution was approved stating that “a majority of the Board ha[d] serious concerns about whether the proposed .XXX domain has the support of a clearly-defined sponsored community as per the criteria for sponsored TLDs,” although a minority felt the criteria had been met.¹⁰⁶ The resolution directed that the current version of the proposed agreement, with some slight revisions made following the 5 January posting, be posted for public comment for no less than 21 days,¹⁰⁷ and directed ICANN staff to confer with ICM to provide additional information to the Board regarding the sponsorship issue.

74. As the decision was thus again postponed, the ICM application was a subject of discussion at the GAC meetings in Lisbon in March 2007. The Communiqué issued by the GAC following those meetings (“Lisbon Communiqué”) reaffirmed the 2 February letter regarding the

¹⁰⁴ By the time these discussions took place, there had been considerable turn-over on the Board since it first authorized contract negotiations, and at least one new Board member was unclear on whether or not a final determination had been made regarding whether the application met the RFP criteria. Although the record clearly demonstrates that a final decision had been made, it is apparent from the discussion that the issue was nonetheless reopened.

¹⁰⁵ ICANN Board Meeting, 12 Feb. 2007: Minutes, *available at* <http://www.icann.org/minutes/minutes-12feb07.htm> (last visited 5 June 2008).

¹⁰⁶ *Id.*

¹⁰⁷ Throughout the many years ICM’s application remained in limbo, ICANN received many additional comments regarding the application, some positive and some negative. Some of the negative comments consisted of “canned” statements, pre-written by opponents of ICM and made available on various websites for others to send, and some were generated by automated tools designed to send posts using randomly selected email addresses.

Wellington Communiqué, and further noted concerns that the proposed registry agreement could result in ICANN “assuming an ongoing management and oversight role regarding Internet content.”¹⁰⁸

8. ICANN Rejects ICM’s Proposed Registry Agreement and Application

75. At the next Board meeting on 30 March 2007, when both the proposed agreement and ICM’s application for the .XXX sTLD were put to a vote, the Board resolved by 9 votes to 5 to reject the proposed agreement and to turn down ICM’s application. The operative part of the Board’s resolution reads as follows:

[T]he Board has determined that:

- ICM’s Application and the Revised Agreement fail to meet, among other things, the Sponsored Community criteria of the RFP specification.
- Based on the extensive public comment and from the GAC’s communiqués that this agreement raises public policy issues.
- Approval of the ICM Application and Revised Agreement is not appropriate as they do not resolve the issues raised in the GAC Communiqués, and ICM’s response does not address the GAC’s concern for offensive content, and similarly avoids the GAC’s concern for the protection of vulnerable members of the community. The Board does not believe these public policy concerns can be credibly resolved with the mechanisms proposed by the applicant.
- The ICM Application raises significant law enforcement compliance issues because of countries’ varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire a responsibility related to content and conduct.

¹⁰⁸ GAC 2007 Communiqué #27—Lisbon, Portugal, 28 Mar. 2007, *available at* <http://gac.icann.org/web/communiques/gac27com.pdf> (last visited 5 June 2008).

- The Board agrees with the reference in the GAC communiqué from Lisbon, that under the Revised Agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate.

Accordingly, it is resolved (07.18) that the Proposed Agreement with ICM concerning the .XXX sTLD is rejected and the application request for a delegation of the .XXX sTLD is hereby denied.¹⁰⁹

76. Aside from the sponsorship question, which had already been decided and could not be arbitrarily reversed, the reasons listed for denying ICM's application were unrelated to the originally stated evaluation criteria, unreasonable, and outside the mission of ICANN. Nowhere in the published sTLD RFP criteria, established at the outset of the application process after public comment and review by ICANN, was the possibility raised that an application could be denied based on "public policy" concerns, notions of "offensive content," or variations in national law that might apply to such content.

77. Several Board Members accurately stated these concerns. Peter Dengate-Thrush (now ICANN Chair) expressed his opinion that:

On . . . the issue of the sponsored community, I concluded that there is[,] on the evidence[,] a sufficiently identifiable, distinct community which the TLD could serve. It's the adult content providers wanting to differentiate themselves by voluntary adoption of this labeling system.

It's not affected in my view by the fact that that's a self-selecting community

¹⁰⁹ ICANN Board Resolution on Proposed sTLD Agreement with ICM Registry, ICANN Board Meeting, 30 Mar. 2007, *available at* <http://www.icann.org/minutes/resolutions-30mar07.htm> ("ICANN, 30 Mar. 2007 Board Resolution").

And I think it's a particularly thin argument that's been advanced that all of the rules for the application and operation of this community are not yet finalized. . . .

...

I think the resolution that I'm voting against today is particularly weak on this issue: On why the board thinks this community is not sufficiently identified. . . . [T]his silence is disrespectful to the applicant and does a disservice to the community.

The contract. I've also been very concerned, as other board members have, about the scale of the obligations accepted by the applicant. I think to a certain extent, some of those have been forced on them by the process. But for whatever reason, I'm, in the end, satisfied that the compliance rules raise no new issues in kind from previous contracts.

And I say that if ICANN is going to raise this kind of objection, then it better think seriously about getting out of the business of introducing new TLDs.

It's the same issue in relation to all of the others and we either come to terms with what it means to be granting TLD contracts and the consequences that flow or we stop.¹¹⁰

Susan Crawford, another Board Member, expressed similar concerns:

It seems to me that the only plausible basis on which the board can answer the question in the negative -- so [it] could say a group of people may not operate and use a lawful string of letters as a top-level domain -- is to say that the people affected by this decision have a broadly-shared agreement that the admission of this string to the root would amount to unjustifiable wrongdoing.

Otherwise, in the absence of technical considerations, the board has no basis for rejecting this application.

...

. . . ICANN[] . . . ha[s] very limited authority. And we can only speak on behalf of that community. I am personally not aware

¹¹⁰ ICANN Board Meeting, Lisbon, Portugal, 30 Mar. 2007: Transcript, *available at* <http://www.icann.org/meetings/lisbon/transcript-board-30mar07.htm>.

that any global consensus against the creation of a triple X domain exists.

In the absence of such a prohibition, and given our mandate to create TLD competition, we have no authority to block the addition of this TLD to the root. . . .

...

Notwithstanding my personal views on the vacuity of the sponsorship idea, the fact is that ICANN evaluated the strength of the sponsorship of triple X, the relationship between the applicant and the community behind the TLD, and, in my personal view, concluded that this criteria had been met as of June 2005. ICANN then went on to negotiate specific contractual terms with the applicant.

...

I do not find these recent comments sufficient to warrant revisiting the question of the sponsorship strength of this TLD, which I personally believe to be closed.

...

I would like to spend a couple of moments talking about the politics of this situation. . . .

...

[T]his content-related censorship should not be ICANN's concern . . .

...

ICANN should not allow itself to be used as a private lever for government chokepoint content control by making up reasons to avoid the creation of such a TLD in the first place.

To the extent there are public policy concerns with this TLD, they can be dealt with through local laws¹¹¹

¹¹¹ *Id.*

Board Members Joichi Ito, Rajasekhar Ramaraj, and David Wodelet agreed with Mr. Dengate Thrush and Ms. Crawford. Dr. Twomey, the President and CEO, who had previously voted in June 2005 to authorize the .XXX sTLD registry agreement negotiations, and who had personally and materially participated in the negotiations leading up to the Board's 30 March 2007 vote, abstained without explanation.

V. ICANN'S CONSENT AND PROCEDURAL FRAMEWORK

78. ICANN's consent to subject its conduct "alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws" to independent review is set forth in Article IV, Section 3 of ICANN's Bylaws:

1. . . . ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.
2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action.
3. Requests for such independent review shall be referred to an Independent Review Panel ("IRP")¹¹²

79. ICANN has selected the ICDR to serve as its designated international arbitration provider to handle any requests for an IRP.¹¹³

¹¹² ICANN Bylaws, Art. IV, § 3 (Independent Review of Board Actions), as amended effective 15 Feb. 2008, *available at* <http://www.icann.org/general/bylaws.htm> (last visited 5 June 2008). Attached as C-Exh. 5.

¹¹³ ICANN Board Resolution on Establishment of Independent Review Panel, ICANN Board Meeting, 19 Apr. 2004: Adopted Resolutions, *available at* <http://www.icann.org/minutes/resolutions-19apr04.htm> (last visited 5 June 2008); *see generally* ICANN Bylaws, Article IV, § 3 (Independent Review of Board Actions), as amended effective 15 Feb. 2008.

80. The procedural framework for the independent review process is provided by the ICANN Bylaws, the ICDR's International Arbitration Rules, and the Supplementary Procedures for ICANN Independent Review Process issued by the ICDR ("Supplementary Procedures").¹¹⁴

VI. APPLICABLE STANDARDS AND LAW

81. Pursuant to ICANN's Bylaws, the IRP's mandate is to (1) compare those actions of the Board contested by an affected party (in this case, ICM) to the Articles of Incorporation and Bylaws, and (2) to declare whether the Board has taken a decision, acted, or failed to act consistently with the provisions of those Articles of Incorporation and Bylaws.¹¹⁵

82. The Panel must therefore determine, *inter alia*, whether ICANN's procedures, processes, consideration and/or disposition of ICM's application to serve as the registry operator for the .XXX sTLD were inconsistent with all or any part of:

- **Paragraph 3 of ICANN's Articles of Incorporation**, which provides, in pertinent part:

[ICANN] shall, except as limited by Article 5 hereof, pursue the charitable and public purposes of lessening the burdens of government

¹¹⁴ ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process, *available at* <http://www.adr.org/sp.asp?id=32197> (last visited 5 June 2008) ("Supplementary Procedures"). Article 2 of the Supplementary Procedures provides:

The ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with Article IV, Section 3(4) of the ICANN Bylaws. In the event there is any inconsistency between these Supplementary Procedures and [the ICDR's International Arbitration Rules], these Supplementary procedures will govern. These Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is received by the ICDR.

¹¹⁵ ICANN Bylaws, Article IV, §§ 2 (Reconsideration), 3(3) (Independent Review of Board Actions), 3(8)(b) (same), as amended effective 15 Feb. 2008.

and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol (“IP”) address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system (“DNS”), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).

- **Paragraph 4 of ICANN’s Articles of Incorporation**, which provides:

[ICANN] shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, [ICANN] shall cooperate as appropriate with relevant international organizations.

- **Article I, Section 1 of ICANN’s Bylaws**, setting forth ICANN’s “Mission,” which provides:

The mission of [ICANN] is to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems. In particular, ICANN:

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are[:]
 - a. Domain names (forming a system referred to as “DNS”);
 - b. Internet protocol (“IP”) addresses and autonomous system (“AS”) numbers; and
 - c. Protocol port and parameter numbers.
2. Coordinates the operation and evolution of the DNS root name server system.

3. Coordinates policy development reasonably and appropriately related to these technical functions.¹¹⁶

- **Article I, Section 2 of ICANN's Bylaws**, setting forth ICANN's "Core Values," which provides:

In performing its mission, the following core values should guide the decisions and actions of ICANN:

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.
2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.
3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.
4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

¹¹⁶ ICANN Bylaws, Article I, § 1 (Mission). The quoted provisions have not changed from the date the RFP was published (*see* Bylaws as amended effective 13 Oct. 2003, *available at* <http://www.icann.org/general/archive-bylaws/bylaws-13oct03.htm>) through the date of this filing (*see* Bylaws as amended effective 15 Feb. 2008).

9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
 10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.
 11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.¹¹⁷
- **Article II, Section 3 of ICANN's Bylaws**, requiring ICANN to exercise its powers non-discriminatorily, which states:

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.¹¹⁸

- **Article III, Section 1 of ICANN's Bylaws**, requiring transparency, which provides:

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent

¹¹⁷ ICANN Bylaws, Article I, §§ 2(1)-(3); (5)-(9); (11) (Core Values). Article I, § 2 (Core Values) of the Bylaws states:

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

¹¹⁸ ICANN Bylaws, Article II, § 3 (Non-Discriminatory Treatment).

with procedures designed to ensure fairness.¹¹⁹

- **Article XI, Section 2 of ICANN's Bylaws**, governing the GAC, which provides, in pertinent part:

There shall be at least the following Advisory Committees:

1. Governmental Advisory Committee

a. The Governmental Advisory Committee should consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

...

f. The Governmental Advisory Committee shall annually appoint one non-voting liaison to the ICANN Board of Directors, without limitation on reappointment, and shall annually appoint one non-voting liaison to the ICANN Nominating Committee.

h. The Board shall notify the Chair of the Governmental Advisory Committee in a timely manner of any proposal raising public policy issues on which it or any of ICANN's supporting organizations or advisory committees seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.

i. The Governmental Advisory Committee may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.

j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The

¹¹⁹ *Id.* at Article III, § 1 (Purpose).

Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

k. If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities.¹²⁰

As summarized below, ICM respectfully submits that ICANN has acted inconsistently with each and every one of the above provisions of its Articles of Incorporation and Bylaws.¹²¹

¹²⁰ *Id.* at Article XI, § 2 (Specific Advisory Committees). The GAC's Operating Principles provide that:

ICANN's decision making should take into account public policy objectives including, among other things:

- secure, reliable and affordable functioning of the Internet, including uninterrupted service and universal connectivity;
- the robust development of the Internet, in the interest of the public good, for government, private, educational, and commercial purposes, world wide;
- transparency and non-discriminatory practices in ICANN's role in the allocation of Internet names and address[es];
- effective competition at all appropriate levels of activity and conditions for fair competition, which will bring benefits to all categories of users including, greater choice, lower prices, and better services;
- fair information practices, including respect for personal privacy and issues of consumer concern; and
- freedom of expression.

GAC Operating Principles (Preamble).

¹²¹ ICM reserves the right to identify additional provisions of ICANN's Articles of Incorporation and Bylaws with which it believes ICANN has acted inconsistently.

VII. SUMMARY OF INCONSISTENCIES AND VIOLATIONS

A. ICANN Failed to Follow Its Established Process in Its Rejection of ICM's Application, in Violation of the Articles of Incorporation and Bylaws

83. It is clear that ICANN did not act consistently with its Articles of Incorporation and Bylaws in the manner in which it evaluated ICM's application to serve as the registry operator for the .XXX sTLD. ICANN's sTLD evaluation process consisted of two phases: (1) an evaluation phase in which a panel of independent evaluators, and then the Board itself, analyzed the applications based on criteria clearly set out in the RFP; and then (2) a contract negotiation phase, in which the applicants determined by the Board to have met the RFP criteria were to negotiate the technical and commercial terms of an sTLD registry agreement with ICANN staff, for subsequent consideration and approval by the Board.

84. As described above, on 1 June 2005, after ICM submitted its application and its supplementary materials in response to the evaluation team's report, and made a presentation to the Board regarding ICM's sponsorship criteria credentials, the Board specifically determined and unconditionally resolved that ICM had satisfied the RFP criteria, and directed ICANN's staff to enter into negotiations regarding the technical and commercial terms of the .XXX registry agreement.

85. Despite the Board's decision in June 2005, however, ICANN delayed in considering a registry agreement with ICM and, in early 2007, when it could no longer credibly rely on alleged contract deficiencies, the Board re-opened its previous decision regarding sponsorship. More than a year and a half after directing ICANN staff to enter into negotiations with ICM, it revived the long settled question of ICM's compliance with the RFP criteria. Completely ignoring its previous decision, and the wealth of evidence proffered by ICM, the Board resolved on 30 March 2007 that ICM's application failed to meet the "Sponsored

Community” criteria and terminated registry agreement negotiations with ICM. The documented procedures established in advance to govern the evaluation of the applications never contemplated that the Board would revisit or reverse a previous decision approving negotiations. Nor did the Board ever inform ICM of any revisions to the formal procedure that would allow reversal of a previous decision. In no other case where the Board unconditionally directed negotiations did the Board later revisit an application’s compliance with the RFP criteria when approving the registry agreement.

86. ICANN’s failure to follow its established procedure in its rejection of ICM’s application violated ICANN’s Bylaws and Articles of Incorporation. Specifically, ICANN’s failure violates:

- ICANN’s Core Value of “[e]mploying open and transparent policy development mechanisms[;]”
- ICANN’s Core Value of “[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness[;]”
- ICANN’s Core Value of “[a]cting with a speed that is responsive to the needs of the Internet[;]”
- ICANN’s Core Value of “[r]emaining accountable to the Internet community[;]”
- ICANN’s Bylaws, Article II, Section 3, that “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition[;]”
- ICANN’s Bylaws, Article III, Section 1, that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness[;]” and
- ICANN’s Articles of Incorporation, Paragraph 4, that “[ICANN] shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and

consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.”

B. ICANN Improperly Established New Criteria in Its Assessment of ICM’s Application, in Violation of the Articles of Incorporation and Bylaws

87. As discussed above, ICANN established a set of criteria, clearly articulated in the RFP, regarding how each application was to be evaluated. Those criteria—technical, business and financial, and sponsorship—had been vetted by the various stakeholders and commented on by the public before official publication in December 2003. Each came with a specific definition that described the test that each applicant had to pass in order to reach the commercial negotiations phase. ICM’s application passed the technical and business and financial criteria as judged by the independent evaluation teams. The GAC had the opportunity to review the application materials and to consult with the Board at all relevant stages of the review process. The Board later determined that ICM’s application also passed the sponsorship criteria.

88. When the Board ultimately rejected ICM’s application in 2007, however, it did so by applying a *new definition* of the sponsorship criteria. The sponsorship criteria established in 2003 required the applicant to precisely define a sponsored community and demonstrate “broad-based” support from that community. Nothing in the stated criteria prohibited the community from being a self-selecting community, and in fact the Board approved several applications with self-selecting sponsored communities. Nor did anything in the stated criteria require that the sponsored community show unanimous support for the application. Yet, in 2007, the Board rejected the proposed registry agreement in part because the community was a self-selected community that did not have the universal support of all members of the community.¹²²

¹²² See, e.g., Rita Rodin, ICANN Board Meeting, Lisbon, Portugal, 30 Mar. 2007: Transcript, available at <http://www.icann.org/meetings/lisbon/transcript-board-30mar07.htm> (last visited 5

(continued...)

89. Moreover, the Board based the rejection of the registry agreement on *new criteria* wholly outside the criteria specified in the original RFP. In doing so, the Board deferred to the input of the GAC in a manner not contemplated in ICANN's Bylaws or established procedures, allowing the GAC to become a *de facto* ultimate decision-maker. Specifically, the Board rejected the application based on conclusions that it:

- “[R]aises public policy issues[.]”
- “[Does] not resolve the issues raised in the GAC Communiqués . . . [and] does not address the GAC’s concern for offensive content, and similarly avoids the GAC’s concern for the protection of vulnerable members of the community.”
- And “raises significant law enforcement compliance issues because of countries’ varying laws relating to content”¹²³

90. The ICANN Board’s decision to use different definitions and entirely new criteria with which to evaluate ICM’s application, not previously articulated to ICM nor applied to any other applicant, is a clear violation of ICANN’s Bylaws. Specifically, ICANN’s use of new, unpublished criteria violates:

- ICANN’s Core Value of “[r]especting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN’s activities to those matters within ICANN’s mission requiring or significantly benefiting from global coordination[;]”
- ICANN’s Core Value of “[e]mploying open and transparent policy development mechanisms[;]”
- ICANN’s Core Value of “[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness[;]”

(continued)

June 2008) (“I think it’s inappropriate to allow an applicant in any sTLD to simply define out what could potentially be any people that are not in favor of a TLD.”).

¹²³ ICANN, 30 Mar. 2007 Board Resolutions.

- ICANN’s Core Value of “[r]emaining accountable to the Internet community[;]”
- ICANN’s Core Value of considering governmental recommendations “[w]hile remaining rooted in the private sector[;]”
- ICANN’s Bylaws, Article II, Section 3, that “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition[;]”
- ICANN’s Bylaws, Article III, Section 1, that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness[;]”
- ICANN Bylaws, Article XI, Section 2(1)(j): “[t]he advice of the [GAC] on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the [GAC] advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice[;]” and
- ICANN’s Articles of Incorporation, Paragraph 4, that “[ICANN] shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.”

C. ICANN Failed to Engage in Good Faith Negotiations with ICM for a Registry Agreement, in Violation of the Articles of Incorporation and Bylaws

91. ICANN repeatedly stated throughout the RFP process that once an application was found to meet the published RFP criteria, ICANN staff would commence registry agreement negotiations regarding commercial and technical terms and then return to the Board for final approval. ICANN did exactly this with respect to nearly all of the other successful applicants.¹²⁴

With respect to ICM, however, ICANN determined that the application met the criteria, but

¹²⁴ The single successful applicant not yet to have signed a registry agreement is .POST, which appears now to be negotiating a final agreement.

refused to negotiate a registry agreement in good faith. This failure persisted over a number of months, amounting to a delay of nearly two years, despite ICM's demonstrated willingness to accept not only those modifications reasonably required by the nature of the sTLD itself, but also its commitment to agree to virtually any contract term sought by ICANN. Evidence of ICANN's lack of good faith is clear in the number of times that the agreement was required to be revised based on new, previously unarticulated concerns, the delay in posting the various revised versions of the agreement, and the length of time for which the agreement was required to remain posted for even minor, non-substantive revisions. ICANN staff repeatedly delayed the negotiations, and the Board also delayed a vote on the proposed agreement more than once. Additionally, ICM was required to include obligations in its proposed registry agreement *that no other applicant even had to consider*.

92. Although ICM agreed to ICANN's articulated demands during the negotiations, ICM's concessions were later held against it as the Board questioned whether ICM could perform the obligations that had been proposed by ICANN's negotiators. Even ICANN's CEO, who was one of the principal negotiators of the registry agreement and who brought the final proposed agreement to the Board for a vote, questioned whether it could be enforced and refused to vote in favor of it.

93. ICANN's failure to engage in good faith negotiations for a registry agreement with ICM is a clear violation of ICANN's Bylaws. Specifically, ICANN's failure violates:

- ICANN's Core Value of "[e]mploying open and transparent policy development mechanisms[;]"
- ICANN's Core Value of "[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness[;]"
- ICANN's Core Value of "[a]cting with speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected[;]"

- ICANN’s Core Value of considering governmental recommendations “[w]hile remaining rooted in the private sector[;]”
- ICANN’s Bylaws, Article II, Section 3, that “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition[;]”
- ICANN’s Bylaws, Article III, Section 1, that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness[;]” and
- ICANN’s Articles of Incorporation, Paragraph 4, that “[ICANN] shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.”

D. ICANN Exceeded Its Mission During the Evaluation and in the Rejection of ICM’s Application, in Violation of its Articles of Incorporation and Bylaws

94. ICANN’s mission is to coordinate at a technical level the allocation and assignment of top-level domains as needed to ensure the stable and secure operation of the DNS, and to coordinate policy development reasonably and appropriately related to that technical function. ICANN’s Core Values serve as a further constraint on ICANN’s authority and discretion by requiring ICANN to limit its activities to the technical coordination of the DNS.

95. ICM does not dispute that ICANN’s mission appropriately encompasses developing policies and procedures for the orderly introduction of new TLDs, including new sTLDs such as .XXX. That mission was served by ICANN’s issuance of the RFP and its specified criteria, by ICANN’s review of the ICM application, and by its determination that ICM’s application met the criteria. Having determined that .XXX posed no threat to the stability and security of the Internet, the only task left to ICANN with respect to ICM’s application was to negotiate and sign a registry agreement in accordance with published policies and procedures.

96. ICANN's handling of ICM's application after 1 June 2005, however, cannot be reconciled with its policies and procedures or with any concerns related to the technical coordination of the DNS. Rather, ICANN's actions reflect a myriad of other considerations, some of which were vaguely articulated and generally referred to as "public policy" issues.

97. ICANN's rejection of ICM application was, in the end, simply and undeniably a judgment about Internet content, and, as such, violated:

- ICANN's mission "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN: (1) Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet. . . . (2) Coordinates the operation and evolution of the DNS root name server system. (3) Coordinates policy development reasonably and appropriately related to these technical functions[;]"
- ICANN's Core Value of "[p]reserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet[;]"
- ICANN's Core Value of "[r]especting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination[;]"
- ICANN's Core Value of "[e]mploying open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process[;]"
- ICANN's Articles of Incorporation, Paragraph 3, that the corporation is responsible for "(i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv)[;]" and
- ICANN's Articles of Incorporation, Paragraph 4, that "[ICANN] shall operate for the benefit of the Internet community as a whole, carrying out its activities

in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.”

E. ICANN’s Actions Materially Affected ICM

98. As a result of these inconsistencies and violations, ICM has been materially and adversely affected. ICM has expended considerable time, effort, and money in fruitless consultation and negotiation with ICANN. More importantly, ICM has been wrongfully denied the opportunity to operate the proposed .XXX sTLD. In addition to the benefits the sTLD would have provided to the sponsored community and other stakeholders, the business plan approved by ICANN would have afforded substantial revenue and profit to ICM. Had ICM been allowed to enter into the registry agreement in a timely fashion, ICM would also have had a significant “first mover” advantage over any other registry operator who might register other adult content TLDs in the future, in that providers and consumers would already have become accustomed to .XXX. Although ICM can not completely recapture the benefits of this lost time, the establishment of the .XXX sTLD should not be delayed or denied any longer.

VIII. INDEPENDENT REVIEW PROCEDURAL ELECTIONS AND PROPOSALS

99. The ICDR does not maintain a panel of neutrals under contract for the ICANN Independent Review Process. Accordingly, ICM proposes that the parties agree to waive the requirement in Article IV, Section 3(4) of the Bylaws that the arbitrators be under contract with or nominated by the IRP provider.

100. Pursuant to Article IV, Section 3(6) of the Bylaws, ICM hereby elects that the Panel be composed of three (3) members, each of whom shall be impartial and independent of

the parties.¹²⁵

101. Pursuant to Article IV, Section 3(7) of the Bylaws, ICM proposes the following methodology for constituting the Panel: each party shall appoint one panelist. The two panelists so appointed, and in consultation with the parties, shall jointly select the third panelist, who shall serve as the Chairman of the Panel.

102. ICM shall make its panelist appointment within twenty (20) days of ICANN's agreement to the Panel appointment procedure set forth herein. ICANN shall make its panelist appointment within twenty (20) days of being notified of ICM's panelist appointment. The two co-panelists shall select the Chairman of the Panel within twenty (20) days of ICANN's panelist appointment. In the event that ICANN fails to make its panelist appointment within the time period indicated, the ICDR shall make the appointment of ICANN's panelist and the Chairman of the Panel within thirty (30) days of the date on which ICANN should have made its panelist appointment. In the event that the two party-appointed panelists fail to agree on the identity of the third arbitrator, that appointment shall be made by the ICDR, in accordance with its established procedures.

103. Pursuant to Article 13 of the ICDR Rules, ICM proposes that the place of arbitration be Washington, D.C., United States of America.

IX. RELIEF REQUESTED

104. Reserving its rights to amend or supplement the relief requested herein, ICM respectfully requests the Independent Review Panel to grant the following:

- (1) Declare that ICANN's administration of the RFP as it related to ICM's application to serve as the registry operator for the .XXX sTLD was inconsistent with ICANN's Articles of Incorporation and Bylaws;

¹²⁵ See also Supplementary Procedures, Rule 3.

- (2) Declare that ICANN's repudiation of its previous determination that ICM's application fulfilled the criteria for approval set forth in the RFP was inconsistent with ICANN's Articles of Incorporation and Bylaws;
- (3) Declare that ICANN's rejection of ICM's application to serve as the registry operator for the .XXX sTLD was inconsistent with ICANN's Articles of Incorporation and Bylaws, resulting in substantial, unjustifiable, and unreasonable harm to ICM;
- (4) Declare that ICANN must immediately execute a registry agreement on terms and conditions substantially similar to ICM's draft registry agreement posted to the ICANN website on 16 February 2007 within thirty (30) days from the issuance of the Panel's declaration;
- (5) Declare that ICANN must pay compensation for all costs incurred by ICM in connection with its application to serve as the registry operator for the .XXX sTLD and this Request, including attorneys' fees and costs;¹²⁶
- (6) Declare ICM the prevailing party in this Independent Review Process;
- (7) Declare that the Panel's determination regarding whether any of ICANN's actions were inconsistent with ICANN's Articles of Incorporation and Bylaws is binding on ICANN; and
- (8) Make such other declarations, or grant such other relief, as the Panel may consider appropriate under the circumstances.

Date: 6 June 2008

Respectfully submitted,

CROWELL & MORING LLP

By: Arif Ali/sun

Arif H. Ali, Esq.
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: 202.624.2500
Facsimile: 202.628.5116

¹²⁶ ICM acknowledges that under Article IV, § 3(12) of the Bylaws, the party not prevailing in an independent review proceeding shall ordinarily be responsible for bearing all costs of the IRP provider, and agrees that it will bear any costs assessed against it by the IRP.