



Internet Corporation for Assigned Names and Numbers

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Dear Mr. Zangl:

Thank you for your letter concerning the application submitted by ICM Registry for a new sponsored top-level domain (sTLD) for .XXX. As you know, increasing competition through expansion of the domain name system (DNS) is an important part of ICANN's mission. The White Paper that led to the establishment of ICANN described one of the organization's principal responsibilities as overseeing "policy for determining the circumstances under which new TLDs are added to the root system," including "development of policies for the addition, allocation, and management of gTLDs [generic top-level domains] and the establishment of domain name registries and domain name registrars" The importance of competition is reflected in ICANN's Bylaws, which consider "[i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest" to be a core value.

Consistent with Article II, Section 1 of the Bylaws, ultimate responsibility for promoting competition and overseeing the addition of new TLDs rests with the ICANN Board. In 2000, the Board undertook the first expansion of the DNS since the 1980s (other than with respect to country code top-level domains) when it selected seven proposals for new gTLDs -- .aero, .biz, .coop, .info, .museum, .name and .pro – from among more than 40 applications. The success of this expansion led the Board to launch a second round of expansion in 2004, this time dedicated solely to sTLDs.[1] The Request for Proposals (RFP) for the sTLD round was explicit that one of its purposes was "to enhance competition in registry services." ICANN and its supporting organizations are presently considering a third round of expansion of the DNS. The policy development process to create an appropriate framework for such an expansion has been launched and includes a global call for input on questions concerning key aspects of new gTLDs.

Your letter draws certain comparisons between the 2000 gTLD and 2004 sTLD rounds, but it appears that the assumptions upon which they are based reflect inaccurate or incomplete information. It is important to recall that during the 2000 round, the GAC provided only broad feedback on gTLD applications, and did not comment on any specific application. In fact, some GAC members in particular were quite concerned about the notion of commenting on the substance of specific applications. It is equally important to remember that the selection of the seven new gTLDs in 2000 was made without prejudice as to the future status of the remaining proposals, including .XXX.

Differences between the 2000 gTLD and 2004 sTLD Rounds

While it is tempting to compare the new sTLD round to the gTLD round that took place in 2000, there are several key differences to keep in mind. In 2000, only seven out of more than 40 applications were

¹ 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, and carrying out delegated policy-formulation responsibilities.

competitively selected under the deliberate “proof-of-concept” approach adopted to expand the namespace initially. In the sTLD round, however, there was no pre-determined number of applicants that could succeed. As a result, most applicants were competing only against themselves, i.e., the extent to which they could satisfy the criteria in the RFP. This meant that applicants not recommended by evaluators could be invited to clarify and supplement their documentation, if they so wished. While this stretched the independent review process and consideration by the Board over a longer period of time, it also enabled additional input from members of the ICANN community, including the GAC, and more detailed review by the Board. Allowing applicants an opportunity to try to remedy deficiencies identified by the evaluators, however, also meant postponement of publication of the evaluation reports in order to protect the identities of the evaluators while their work was ongoing. While the 2000 evaluation report was posted a few days before the Board met, it contained much less information and analysis for the Board than the sTLD reports contained.

The 2000 and 2004 processes are comparable in one important respect. In both cases, it is clear that the Board considered input from the GAC to be most welcome. At the 7th Meeting of the GAC on 14 November 2000, a member asked the Board to outline the process for the selection of new TLDs and the role of the GAC (see <http://gac.icann.org/web/meetings/mtg7/gac7min.htm>). The minutes indicate that Chairwoman Esther Dyson responded as follows: “the evaluation report had been published and was posted for public comment with the actual applications. After the public comment period at the meeting the board would make its selection of the applications to move towards negotiations between ICANN and the selected registries.” She indicated that there was no formal role for the GAC in the actual selection and negotiation process, but noted that input and advice from the GAC would be welcomed.” Two days later, the GAC issued a brief Opinion on New Generic Top Level Domains (<http://www.icann.org/committees/gac/new-tld-opinion-16nov00.htm>). It is significant to note that while the opinion elaborated on general principles, such as promoting competition and protecting trademark rights, it did not express any views on specific applications. Indeed, ICANN President and CEO Paul Twomey, who was Chairman of the GAC at that time, recalls that although a few members of the GAC voiced views in a closed GAC session on some applications, there was no consensus among GAC members for to provide comments on specific applications.

GAC Review of sTLD Applications

The Board’s obligation in Article XI, Section 2, of the Bylaws to “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” is an extremely important one. Indeed, on 1 December 2004, Dr. Twomey wrote to the GAC requesting input on the public policy elements of a number of issues and highlighting major developments in ICANN (<http://www.icann.org/correspondence/twomey-to-tarmizi-01dec04.pdf>). These developments included moving forward on the ten sTLD applications. His letter indicated that ICANN had proceeded to contract negotiations with .TRAVEL and .JOBS, and noted that other applicants were responding to the reports of the independent evaluators. He made it clear at that time that any “outstanding issues between the independent panels and the applicants will be resolved by ICANN’s Board,” and that he expected to move towards contract negotiations with other applicants as well.

The Chairman of the GAC responded to Dr. Twomey on 3 April 2005, welcoming his letter and outreach efforts (<http://www.icann.org/correspondence/tarmizi-to-twomey-03apr05.htm>). The Chairman noted that, as of that date, “[n]o GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round. However should sTLDs use ENUM, that should

not interfere with established international policies for the E164 numbering system. ICANN should ensure that sponsors of sTLDs encompass the entirety of the relevant user community, and that eventual distortions of competition are effectively avoided.”

On 1 June 2005, the Board voted to begin discussion of proposed commercial and technical terms with ICM. This decision generated more GAC interest in the application than had been shown earlier. During the ICANN-GAC meeting in Luxembourg we discussed many issues, including the ICM application (see http://gac.icann.org/web/meetings/mtg22/LUX_MINUTES.doc). Dr. Twomey reported to the GAC that no comments had been received from governments regarding the application, nor had the GAC raised the issue in any formal comment to ICANN, such as by inclusion in a communiqué. The Chairman indicated that GAC members had made comments during the consultation period regarding the .TEL and .MOBI proposals, but not regarding other sTLD proposals. Dr. Twomey replied that the GAC could still advise ICANN on the ICM proposal, should it decide to do so.

A few weeks later, a letter dated 12 August 2005 from the GAC Chairman to the Board described his belief that there was “discomfort” in the GAC about the .XXX TLD and requested that the Board allow additional time for input before reaching a final decision (<http://www.icann.org/correspondence/tarmizi-to-board-12aug05.htm>). In response to this and other requests, the Board’s consideration of the ICM application was deferred (see below).

Status of Applications Not Selected in 2000

The selection of the seven new gTLDs in 2000 was made without prejudice as to the future status of the remaining proposals, including .XXX. The results of the sTLD round thus far illustrate this point: six out of the ten sTLD applicants had applied previously in 2000, and five out of these six sTLD applicants were allowed to proceed to technical and commercial negotiations (.MOBI, .POST, .TEL (Telnic), .TRAVEL and .XXX). Indeed, the 2004 sTLD round was designed, in part, to overcome a perception that elements of the 2000 TLD round had been too subjective.

When ICM submitted an application for .XXX in 2000, it was (along with many others) passed over in favor of the seven TLDs that were chosen, but it was not rejected by the Board. As the evaluators in the 2000 round explained, the application did “not appear to meet unmet needs,” there was a “degree of controversy that surrounds .xxx,” and that “at this early ‘proof of concept’ stage with a limited number of new TLDs contemplated, other proposed TLDs without the controversy of an adult TLD would better serve the goals of this initial introduction of new TLDs” (<http://www.icann.org/tlds/report/report-iiiblc-09nov00.htm>).

It is helpful to note that one question considered during preparation of the sTLD RFP in 2003 was whether applicants should be *restricted* to only those that had submitted applications for TLDs in 2000, but had not been approved at that time. The draft RFP recommended such a limitation, but added that the Board had “an open mind . . . on whether the request for proposals should be [so] limited . . . or whether applications should also be accepted at this stage from others wishing to propose sTLDs.” The final RFP reflected the Board’s decision not to so restrict the new sTLD, but to welcome both earlier applicants and new applicants.

Openness of sTLD Process

ICANN’s selection of new sTLDs was conducted through an open and fair process, in accordance with ICANN’s Bylaws and procedures. Indeed, the process was characterized by close attention to the

requirements of openness, transparency and consultation. In particular, there were extensive opportunities for all members of the ICANN community to provide input at various stages.

The sTLD round that is now nearing completion began on 15 December 2002, when the Board asked the ICANN President and CEO (then Stuart Lynn) to develop a draft Request for Proposals (RFP) to invite applications for a limited number of additional new sTLDs (see Resolution 02.152, at <http://www.icann.org/minutes/prelim-report-15dec02.htm>). In keeping with ICANN's mandate from Article III, Section 1 of its Bylaws, efforts to develop the sTLD RFP were open and transparent (<http://www.icann.org/general/bylaws.htm>). On 23 March 2003, ICANN posted for public comment the proposed criteria and process for evaluating sTLD proposals, which was intended to prompt discussion leading to a draft RFP (<http://www.icann.org/riodejaneiro/stld-rfp-topic.htm>). ICANN invited the community to comment on the proposed criteria and process on an online public forum (<http://forum.icann.org/mtg-cmts/stld-rfp-comments/general/index.html>) and also at the 26 March 2003 ICANN Public Forum in Rio de Janeiro (<http://www.icann.org/riodejaneiro/index.html>). Following this comment period, on 24 June 2003, ICANN posted the draft RFP and invited further comment through 25 August 2003 (<http://www.icann.org/tlds/new-stld-rfp/new-stld-rfp-24jun03.htm>).

The draft RFP received significant input from the online public forum ICANN had established, from the At-Large Advisory Committee (ALAC), and from the Generic Names Supporting Organization (GNSO), as well as at the 26 June 2003 Board meeting in Montreal. On 13 October 2003, the Board reviewed the public comments and discussed at length the topic of how, and within what timeframe, ICANN should proceed with the potential introduction of new sTLDs. The Board noted, in particular, "an appreciation of the importance to the community of this topic, and the intent to seek further input and open communication with the community on the topic" before arriving at any decision.

On 29 October 2003, the GNSO called upon the Board to go forward with the process for an interim round of sTLDs (see <http://gns0.icann.org/meetings/minutes-gns0-29oct03.shtml>). On 31 October 2004, at its meeting in Carthage, the Board agreed with the GNSO's recommendation and directed the ICANN President to finalize and post no later than 15 December 2003 a final RFP for a limited number of new sTLDs (<http://www.icann.org/announcements/advisory-31oct03.htm>).

On 15 December 2003, ICANN posted the RFP that launched the sTLD round (<http://www.icann.org/announcements/announcement-15dec03.htm>). Any interested party could apply for the delegation of a new sTLD by the deadline of 16 March 2004. The RFP was divided into six parts. The first part provided applicants with a timeline of events leading to the introduction of the new sTLDs, explanatory notes on the process, as well as an indication of the type of information requested by ICANN. The remaining parts constituted the application itself. The explanatory notes described the selection criteria pertaining to technical standards, business and financial plans, sponsorship and community value.

On 19 March 2004, ICANN announced that it had received ten applications for sTLDs, including for .XXX. The other applications were for the following strings: .ASIA, .CAT, .JOBS, .MAIL, .MOBI, .POST, .TEL and .TRAVEL (with two different applicants submitting applications for .TEL).

ICANN posted the non-confidential portions of these applications for public review (<http://www.icann.org/announcements/announcement-19mar04.htm>), and stated that a public comment period on all applications would be open from 1 April 2004 through 30 April 2004 (later extended to 14 May 2004). Extensive public comments were received by ICANN. They were posted either on a general comment forum or on a comment forum specific to each application.

The RFP specified that the selection of successful sTLD applicants would be “based on principles of objectivity, non-discrimination and transparency.” It further provided that an “independent team of evaluators will perform the evaluation process,” and that the team would make “recommendations about the preferred applications, if any applications are successful in meeting the selection criteria.”

ICANN performed an initial review of the applications for completeness. Subsequently, an independent panel of experts with substantial knowledge of relevant technical, business/financial and sponsorship/community areas was convened to review and evaluate the applications. The evaluation panel was divided into three internationally diverse teams, with each one focused, respectively, on technical, business/financial or sponsorship/community value areas. The three teams worked diligently and thoroughly to discuss the selection criteria, analyze the applications, review public comments and assess the extent to which each proposal satisfied the different parts of the RFP. Additionally, the teams posed a series of questions to each applicant in an effort to amplify points that were unclear and to seek other clarifications. At every step, the applications were evaluated on their own merits, in an objective and fair manner.

Where an applicant passed all three sets of criteria and there were no other issues associated with the application, the Board was briefed and the application was allowed to move on to the stage of technical and commercial negotiations designed to establish a new sTLD. One application – POST – was in this category. In other cases -- where an evaluation team indicated that a set of criteria was not met, or there were other issues to be examined -- ICANN Staff decided to give each applicant an opportunity to submit clarifying or additional documentation before presenting the evaluation panel’s recommendations to the Board for a decision on whether the applicant could proceed to the next stage. The other nine applications, including .XXX, were in this category.

The extent to which clarifications or other information was necessary depended on the nature of each proposal and the feedback from the evaluators. For this reason, ICANN decided to allow each proposal to progress on its own timetable. In certain cases, the technical team was asked to reconvene to assess the clarifying information, and in other situations the business/financial team was requested to reconvene. Because of the more subjective nature of the sponsorship/community value issues being reviewed, it was decided to ask the Board to review those issues directly. ICANN Staff indicated that the evaluation reports would be released publicly as soon as all applicants had concluded the independent review process and had an opportunity to redact proprietary information. The reports were not released earlier because of concern for the confidentiality of the evaluators while their work was ongoing, in order to insulate them from outside pressures. Obviously, it would not have been appropriate to release any reports without also identifying the evaluators.

All ten sTLD applicants have now completed the independent evaluation process. A Status Report on the sTLD Evaluation Process was posted on 28 November 2005, and is available at <http://icann.org/tlds/stld-apps-19mar04/stld-status-report.pdf>. The Status Report includes the complete independent evaluations, pertinent follow-up documentation, and important correspondence. Based on the Board’s decisions, four sTLDs have been added to the root zone (.TRAVEL, .JOBS, .MOBI, and .CAT). In addition, four sTLDs are engaged in negotiations with ICANN concerning a Registry Agreement (.POST, .XXX, .TEL-Telnic and .ASIA). Another two sTLDs have not been accepted (.MAIL and .TEL-Pulver).

It should be noted that, consistent with Article II, Section 1 of the Bylaws, it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to

approve the creation of a new sTLD. Such decisions are not made by outside evaluators or by ICANN Staff. Indeed, the sTLD RFP made it clear that the evaluators would make “recommendations” to ICANN. Responsibility for resolving issues relating to an applicant’s readiness to proceed to technical and commercial negotiations and, subsequently, whether or not to approve delegation of a new sTLD, rests with the Board.

Extensive Review of ICM Application

ICM filed its current application in response to the RFP for sTLDs. After review by the independent panel, the technical and the business/financial evaluation teams found that the relevant selection criteria had been met. The sponsorship/community value team, however, found that the relevant selection criteria had not been met. On 31 July 2004, ICANN notified ICM of the evaluators’ recommendations. On 9 October 2004, ICM responded to the sponsorship/community value report, indicating its belief that it represented a sponsored TLD community. On 7 December 2004, the applicant submitted a sponsorship memorandum to the Board elaborating on these points.

The Board met several times to evaluate the ICM application. On 24 January 2005, the Board held extensive discussions regarding the application, in particular focused on “whether a sponsored community criteria of the RFP was appropriately met” (see <http://www.icann.org/minutes/minutes-24jan05.htm>). It was suggested by various Board Members “that it might be useful for the applicants to give a presentation to the board on these issues” at a later meeting.

On 3 April 2005 during ICANN’s Mar del Plata Meeting, ICM gave a presentation to the Board and introduced a summary of why it believed that the proposed TLD was a sponsored community. On 3 May 2005, the Board held a “broad discussion of this matter regarding whether or not the [XXX] application met the criteria within the RFP particularly relating to whether or not there was a “sponsored community” (<http://www.icann.org/minutes/minutes-03may05.htm>). The Board “agreed that it would discuss this issue again at the next Board Meeting.”

Based 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. It also requested the President to present any such negotiated agreement to the Board for approval and authorization (<http://www.icann.org/minutes/minutes-01jun05.htm>).

On 9 August 2005, the proposed .XXX sTLD registry agreement was posted on the ICANN web site and submitted to the Board for approval (see <http://www.icann.org/minutes>). On 16 August 2005, the Board discussed and then decided to defer consideration of the ICM proposal until its 15 September 2005 Meeting (<http://www.icann.org/minutes/resolutions-16aug05.htm>). The ICM application “was deferred in response to requests” from the applicant, the GAC Chairman, and various governments, to “allow for additional time for comments by interested parties.”

On 15 September 2005, following additional, extensive review of the proposed registry agreement, the Board expressed concerns about proceeding with .XXX (<http://www.icann.org/minutes/resolutions-15sep05.htm>). First, the Board “expressed concerns regarding issues relating to the compliance with the proposed .XXX Registry Agreement (including possible proposals for codes of conduct and ongoing obligations regarding potential changes in ownership).” Second, the Board “noted the importance of

private registry agreements, in creating contractual means of affecting registries and other actors of the Internet community for the public interest." Third, the Board noted that "ICANN has received significant levels of correspondence from the Internet community users over recent weeks, as well as inquiries from a number of governments." The Board therefore voted to authorize the 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. Following such additional discussions, the President and General Counsel are requested to return to the board for additional approval, disapproval or advice." Subsequently, ICM presented proposed language for inclusion in a Registry Agreement to ICANN's General Counsel but such language has yet to be reviewed by the Board.

Conclusion

ICANN's selection of new sTLDs has been an open and thorough process, conducted fully in accordance with ICANN's Bylaws and procedures. Indeed, Article 1, Section 2, of the Bylaws designates making "decisions by applying documented policies neutrally and objectively, with integrity and fairness" as one of ICANN's core values. Further, Article III, Section 1, mandates that ICANN operates "consistent with procedures designed to ensure fairness." The Board's extensive review of the ICM application, the evaluators' recommendations, the public comments, and the supplemental information, has been – and will continue to be – performed in a neutral, objective and fair manner, consistent with ICANN's mandate and the RFP developed by the ICANN community.

The GAC Communiqué issued recently in Vancouver welcomed the Board's decision to postpone consideration of the ICM application. This postponement gives the GAC an opportunity to review the evaluation reports and additional documentation, and to provide any additional comments to ICANN prior to the Wellington Meeting that begins 27 March 2006. I shall look forward to receiving any comments.

This should serve to answer the questions that you have raised in your letter. Strong communication and engagement between ICANN and the GAC is important and strengthens the Internet community as whole.

With best wishes,



Vint Cerf
Chairman