ICM REGISTRY
the .xxx top-level domain

2 March 2010

Mr. Peter Dengate-Thrush
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Mr. Rod Beckstrom
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Re: Independent Review Panel Decision

Dear Peter and Rod,

In light of the Board's announcement that it intends to consider the Independent Review Panel's decision at its upcoming meetings in Nairobi, we have prepared these materials to help the Board, as well as members of the broader Internet community, better understand the background of the dispute between ICM and ICANN, the significance of the Panel's decision, and to identify next steps to enable ICANN and ICM to bring this matter to a conclusion.

To that end, enclosed please find: (1) a brief FAQ on the Independent Review Process, the Panel's declaration, and ICM's position in light of these developments; and (2) an updated chronology of key events, which adds important dates, events, and facts omitted from the chronology posted by ICANN on its blog on 21 February.

We would be most grateful if you would kindly distribute these materials to the other Board members in advance of the upcoming meetings in Nairobi. In addition, as mentioned in my previous letter, I am willing to meet with the entire Board or individual Board members to discuss how ICM and ICANN can once and for all move this toward completion.

As the enclosed materials demonstrate, ICM has endeavored to work in cooperation with ICANN and wholly within the framework adopted for the 2004 round of new sTLDs. ICM remains committed to the .xxx project, and is eager to work together with ICANN to take the steps necessary to launch the new sponsored top level domain and, in so doing, ensure that the results of the first-ever ICANN Independent Review Process are fully implemented in accordance with ICANN's own Core Values of accountability, transparency, and objectivity.

Sincerely,

Stuart Lawley

Chairman

FAQ's on the Declaration of the Independent Review Panel in ICM v. ICANN

I. Overview

A. What is this all about?

ICM Registry, LLC, initiated the Independent Review Process following the Board's vote in Lisbon to reject ICM's proposal to create a sponsored top level domain for members of the online adult entertainment industry who wanted to come together to create best practices based on input from child safety and free expression advocates. The Independent Review Process is an accountability mechanism contained in ICANN's Bylaws, and can be initiated by affected members of the ICANN community who have been harmed by staff or Board action taken in a manner that violates ICANN's Bylaws.

ICANN and ICM submitted detailed briefing materials to a three-judge panel, which included the former president of the International Court of Justice, the President of the London Court of Arbitration, and a retired federal court judge. After reviewing those materials, the panel conducted a five day, face to face hearing in which witnesses for each side testified and were cross examined. After the hearing each side submitted another brief.

B. What did the Independent Review Panel decide?

In a 2-1 decision the Panel found that:

- The ICANN Board determined on 1 June 2005 that ICM's application met the criteria for the 2004 sTLD round;
- Reconsideration of that finding was "not consistent with the application of neutral, objective and fair documented policy," as required by ICANN's Bylaws; and
- The sTLD process was "successfully completed" in the case of ICM Registry with the adoption of the June 1, 2005, resolutions and ICANN "should have proceeded to conclude an agreement with ICM on commercial and technical terms, without reopening whether ICM's application met sponsorship criteria."

Other important aspects of this decision are discussed in greater detail below.

C. What's next?

If the Board intends to respect its own processes and the conclusions of this panel of accomplished international jurists, the only logical and fair step is to finalize the fully negotiated and agreed upon contract that was posted for nearly six weeks in 2007.

II. The Independent Review Process

A. What is the Independent Review Process?

The Independent Review Process or "IRP" is one of three mechanisms contained in ICANN's Bylaws to ensure ICANN's accountability to the wider internet community. Article IV, Section 3 of the Bylaws permits an affected party to initiate an "independent third-party review of Board actions or inactions that are inconsistent with the Articles of Incorporation or Bylaws." The IRP process was added to the Bylaws in 2003 to "strengthen[ ] confidence in the fairness of ICANN decision-making through . . . creating a workable mechanism for speedy independent review of ICANN Board actions by experienced arbitrators." IRPs are conducted by the International Centre for Dispute Resolution under its International Arbitration Rules and any supplementary procedures adopted by ICANN.

This is the first time the Independent Review Process has been used. The Panel's decision was based on detailed and lengthy written briefs filed by both sides (available at ICM and ICANN's websites), and five days of in-person hearings, at which witnesses for both ICM and ICANN testified.

B. Why did ICM choose to assert its claims in an IRP?

Because ICM supports the ICANN model of private sector led, self-regulation of the DNS, it chose to use the accountability processes and procedures established by ICANN in its Bylaws. From the beginning, ICM's preference has been to work cooperatively with ICANN, and to work within the framework established by ICANN. ICM invoked the IRP with the full expectation that ICANN would participate in the process in good faith, would accept and honor the result, and comply with the rule of law. By respecting the Panel's conclusions, ICANN would demonstrate to the community that it can depend upon ICANN's commitment to meaningful accountability.

C. How was the IRP conducted?

ICM filed a Request for Independent Review on 6 June 2008, to which ICANN responded by filing an Opposition to Request for Independent Review on 9 September 2008. Each party then received additional opportunity to present written arguments. ICM submitted a Memorial on the Merits on 22 January 2009, and ICANN submitted its response on 8 May 2009. Both parties' filings are available at: http://www.icann.org/en/irp/icm-v-icann.htm.

The parties agreed that each would appoint one arbitrator to the Panel, who would then select a third arbitrator to serve as the chair of the Panel. On 18 July 2008, ICM nominated Jan Paulsson. Mr. Paulsson is president of both the London Court of International Arbitration and the World Bank Administrative Tribunal, and was recently appointed the Michael Klein Distinguished Scholar Chair at the University of

Miami Law School. On 7 August 2008, ICANN nominated the Honorable Dickran Tevrizian, a retired judge who had served on the U.S. District Court for the Central District of California. Mr. Paulsson and Judge Tevrizian together selected Judge Stephen Schwebel, a renowned international law expert who served on the International Court of Justice from 1981 to 2000, including as its President from 1997 to 2000, to serve as the President of the Panel.

The Panel determined that a hearing would be held from 21 September through 25 September 2009. The parties then had a final opportunity to present formal written arguments in the form of Post-Hearing Submissions on 13 October 2009.

D. How was the hearing conducted?

The hearing was an in-person hearing, conducted in the presence of all three arbitrators, in Washington, D.C. ICM presented three fact witnesses: Mr. Stuart Lawley, the Chairman and President of ICM; J. Beckwith Burr, a partner at the Washington, D.C. law firm of Wilmer, Cutler, Pickering, Hale and Dorr, LLP and the outside counsel for ICM during the events that were the basis for the dispute; and Dr. Elizabeth Williams, an international affairs specialist and management consultant who served, on behalf of ICANN, as the Chair of one of the evaluation panels of the sTLD applications during the 2004 round. ICM also presented two expert witnesses: Dr. Milton Mueller, a tenured professor at Syracuse University's School of Information Studies and a Professor on the Faculty of Technology, Policy and Management at the Technische Universtiteit Delft, The Netherlands, a respected author and an expert on internet governance; and Professor Jack Goldsmith, an expert in public international law, conflicts of law, and the law of the Internet, who is the Henry L. Shattuck Professor of Law at Harvard Law School and had previously served as a United States Assistant Attorney General, a Special Counsel to the Department of Defense, and a legal assistant to the Iran-U.S. Claims Tribunal.

ICANN presented three fact witnesses: Dr. Vinton Cerf, the Chairman of the ICANN Board from 2000 through 2007; Dr. Paul Twomey, ICANN President and CEO from 2003 through 2009; and Alejandro Pisanty, a member of the ICANN Board from 1999 through 2006. ICANN also presented one expert witness, David Caron, the C. William Maxeiner Distinguished Professor of Law Chair at the University of California at Berkeley and an expert on international organizations.

Each side was permitted to cross examine the witnesses, and the three arbitrators were able to ask questions of each witness and the attorneys for each side. Transcripts from the hearing are available at: http://www.icann.org/en/irp/icm-v-icann.htm.

III. The Tribunal's Decision

A. What was the nature of the parties' dispute?

The dispute stemmed from the ICANN Board's rejection of ICM Registry's application to become the registry operator for the .xxx domain. ICM submitted the application in response to ICANN's 2003 Request for Proposals for new sTLDs. ICM proposed the .xxx sTLD to provide a domain space for those online adult entertainment providers who wish to participate in a system of voluntary self-identification. The proposed TLD would enable the community to organize and engage in self-regulation against questionable business practices, and would provide a reliable method for distinguishing themselves as responsible providers and facilitate the development of best practices. The policy development process for the sTLD would also include input from child protection advocates, free speech advocates, and privacy and security advocates, to ensure that the policies developed for the sTLD would benefit both the community and the broader Internet community.

Nine other applications were received at the same time. According to the terms of the RFP, ICANN committed to evaluate applications based on the objective criteria adopted by the Board after extensive community consultation. ICANN established a two-step process for selecting applications. First, the applications would be evaluated according to the objective RFP criteria. Second, the applications that met the RFP criteria would enter into negotiations with ICANN staff regarding commercial and technical terms, and would execute a registry agreement for the new sTLD.

On 1 June 2005, the ICANN Board voted to enter into registry agreement negotiations with ICM without any caveat, comment, or reservation. Under the written procedures established for the sTLD round, publicly reiterated by ICANN staff and Board members on numerous occasions, and as widely understood by the community, this vote signified the Board's determination that ICM's application met the RFP criteria. Several ICANN Board members, staff, and participants stated the same. All other applicants who entered into registry agreement negotiations eventually executed registry agreements with ICANN, and all of those agreements contained substantially the same terms.

ICM began negotiation with ICANN based on the standard contract drafted by ICANN, and on terms that were essentially the same as those in all of the other registry agreements that ICANN had already negotiated, or was in the process of negotiating. During the negotiations, ICM agreed to every reasonable request made by ICANN, and was willing to provide numerous additional contractual guarantees. Drafts of the agreement were posted in August 2005, April 2006, and January 2007. In February of 2007, ICANN posted a proposed registry agreement that had been fully negotiated and agreed to by ICANN staff, and which fully reflected advice provided by the GAC in its

Wellington Communiqué. Nonetheless, the ICANN Board voted to reject the application in March 2007 on grounds that bore little relation to the criteria established by ICANN in the RFP.

B. What were ICM's claims in the IRP?

ICM argued that ICANN failed to follow its Bylaws, Articles of Incorporation, and relevant principles of international and California law in the administration of the IRP process and the rejection of ICM's application. ICM described how ICANN's actions violated ICANN's core values of objectivity, transparency, non-discrimination, and accountability.

ICM claimed, among other things, that ICANN violated these principles by:

- reversing, in violation of the process established by the RFP, its 1 June 2005 decision that ICM had met the RFP criteria;
- rejecting ICM's application for reasons that were unrelated to the criteria established by the RFP;
- imposing requirements on ICM's registry agreement that were not imposed on any other application, and rejecting ICM's application based on criticisms that applied equally to other applications which ICANN had accepted;
- Rejecting ICM's application because of pressure from governments, particularly the United States government, despite the fact that one of ICANN's founding principles is independence from government interference.

IV. What is the Significance of the IRP Decision for ICANN?

As the organization with plenary authority over the management of the DNS, ICANN wields enormous power, and its legitimacy comes from and depends on the assent of stakeholders affected by its decisions. Neither the global internet community nor national governments will long tolerate an ICANN that does not act with accountability, transparency, and fairness. The Panel held that its declaration is non-binding, so it is now up to the ICANN Board to decide whether to respect its own processes and the thoughtful conclusions of a panel of eminent international jurists based on detailed documentation and five days of testimony. This is no longer just about the merits of ICM's application, which – as the community knows, ICM showed, and the Panel found – had already been conclusively accepted by the Board.

A decision by the Board to reject the outcome of the IRP – a process that ICANN has described as its "final method of accountability"– would demonstrate that ICANN is unwilling to be accountable to the ICANN community, and would severely damage its reputation, legitimacy, and authority.

V. Next Steps

A. What should the Board do now?

The Panel concluded that ICANN should have negotiated a contract on reasonable commercial terms without re-opening sponsorship issues, and that is what ICANN should now do. On 16 February 2007, ICANN posted a registry agreement that was fully negotiated and agreed to by ICANN staff and specifically designed to address public policy advice contained in the GAC's Wellington Communiqué. ICM remains willing to execute that agreement, and to fulfill its obligations under that contract. The registry agreement, which was already posted for public comment for six weeks, is available at: http://www.icann.org/en/tlds/agreements/xxx/appendix-S-rev-16feb07.pdf.

The final story of this IRP will not be written until a registry agreement is executed. That outcome will be a success story for both parties and a pivotal moment in ICANN's efforts to improve institutional confidence. Given the time and effort already expended by both parties, ICM is hopeful that the Board will act without further delay.

B. Why can't the Board just allow ICM's application to be reconsidered, whether in the upcoming round of TLD applications or by itself?

Actually, reconsideration of the ICM application would be in direct contradiction of the Panel's declaration. The Panel concluded that the Board decided that the ICM application met the RFP eligibility criteria on 1 June 2005. The Panel further held that once the Board had made that decision, reconsideration of the RFP criteria (in 2006 and 2007) was a violation of ICANN's Bylaws. Accordingly, the Panel stated that, after the 1 June vote, ICANN should have "proceeded to conclude an agreement with ICM on commercial and technical terms, without reopening whether ICM's application met the sponsorship criteria."

There is nothing in the declaration that suggests ICANN should "reconsider" ICM's application, now in 2010. In fact, "reconsideration" of the application would, under the declaration, be yet another violation of the ICANN Bylaws. The only way the Board can comply with the Panel's decision is to accept the Panel's conclusion that the decision has been made regarding whether ICM met the 2004 RFP criteria, and direct ICANN's CEO to execute a registry agreement with ICM to serve as the registry operator for .xxx.

Chronological History of ICM's Involvement with ICANN[1]

ICM Registry, a private company, submitted a proposal in ICANN's 2000 Proof of Concept round, proposing two unsponsored gTLD strings - .KIDS and .XXX, available at http://www.icann.org/en/tlds/kids3/. The evaluators in the Proof of Concept round recommended against the inclusion of either the .KIDS or the .XXX TLD strings in the Proof of Concept round. http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm.

↳ **ICM was hardly alone in not being selected—indeed, out of the 47 applications ICANN received during this round, the ICANN Board selected only seven to proceed to contract negotiations. Applications for .POST, .MOBI, two versions of .TEL, and .TRAVEL, were also submitted but not were selected (though they were approved in the 2004 round).**

In December 2000, ICM, along with many other applicants in the Proof of Concept round, filed Reconsideration Requests with ICANN's Board regarding the outcome of the Proof of Concept Round. Part of ICM's Request discussed the lack of uniformity in the adult entertainment community, and raised concerns with the community-based issues raised by the Proof of Concept evaluators. The Reconsideration Committee's 2001 recommendation noted that a failure to be selected in the Proof of Concept round was not a reflection on the proposal, and did not reflect a rejection of that proposal.

➔ **In late 2003, the ICANN Board launched the sponsored TLD (sTLD) round. ICANN initially intended to limit participation in the round to those that had been proposed already during the 2000 round, but the final Request for Proposals ("RFP") did not include such limits. The RFP established a two step process for the approval of applications: "upon the successful completion of the sTLD selection process, an agreement reflecting the commercial and technical terms shall be negotiated. . ." In the RFP, ICANN states that applications will be evaluated based upon objective criteria in four categories: (1) sponsorship; (2) business plan; (3) technical standards; and (4) community value. There is no mention of morality, content or public policy.**

In 2004, ICM submitted a proposal for .XXX as an sTLD string (as opposed to an unsponsored gTLD), after the sTLD application process was launched in December 2003. As an sTLD must have a sponsoring organization to oversee the policy development for the sTLD, ICM stated that the International Foundation for Online Responsibility, or the IFFOR, would serve in that role. The Sponsored Community was defined as "the responsible online adult- entertainment community." The "online adult-entertainment community" is further defined as those individuals, businesses, and entities that provide sexually-oriented information, services, or products intended for consenting adults or for the community itself."

[1] This document is an edited version of the chronology posted on the ICANN blog on 21 February 2010 at http://www.icann.org/en/irp/icm-v-icann/icm-icann-history-21feb10-en.pdf. The bold text represents ICM's additions and corrections to the information presented by ICANN.

↳ **The community definition specified that members of the community would only be those "for which a system of self-identification would be beneficial" and who wished to organize and engage in responsible self-regulation. The sTLD was designed to provide a mechanism for developing and implementing best practices through a policy development process for the sTLD that would also include input from child protection advocates, free speech advocates, and privacy and security advocates, to ensure that the policies developed for the sTLD would also benefit the broader Internet community.**

➔ **Several days after receiving the sTLD applications, ICANN posted the non-confidential portions of the applications to the website. Starting on 1 April 2004, ICANN accepted public comments on the posted applications. Sixty-three comments were posted to the comment forum for ICM's application, the majority of which were positive. Similar numbers of comments were posted for other applications.**

ICANN's Independent Evaluation Panels reviewed the ICM application throughout 2004. As part of the Evaluation reports, in August 2004, ICANN received a report that ICM's application failed the baseline sponsorship criteria of the sTLD process. Prior to issuing the report, the Independent Evaluation Panel provided a list of questions – focusing on sponsorship issues – to ICM and IFFOR, and ICM and IFFOR provided a joint response to those questions.

↳ **ICM was hardly alone: the Independent Evaluation Panel rejected a full eight of the ten sTLD applicants on sponsorship grounds, including .ASIA, .JOBS, .MAIL, .MOBI, .TEL (Telnic), .TEL (Pulver), and .TRAVEL. The independent evaluators did, however, find that ICM's application met the technical and business soundness criteria.**

➔ **ICANN announced in August that each application would now proceed forward on its own time table, and asked each of the eight applicants that the independent review panel rejected to submit additional information for the Board's consideration. In other words, ICANN set aside the determinations of the independent reviewers with respect to sponsorship, and conducted its own evaluation.**

➔ **Between September and December 2004, ICM submitted detailed information to ICANN responding to the evaluators' mistaken conclusions on sponsorship. ICM's application had already provided ICANN with over 20 letters of support from major organizations, and other organizations and individuals had posted to ICANN's public comment forum. ICM supplemented this with information about support it had from other stakeholders, including WiredSafety, the Internet Content Rating Association, the founder of TRUSTe, UNESCO's Innocence in Danger Program, leading free speech advocates, and privacy watchdog groups.**

➔ **ICM asked to make a presentation to the GAC at the meeting in Cape Town, South Africa, in December of 2004, but was rebuffed.**

➔ **On 13 December 2004, the ICANN Board authorized the .MOBI and .JOBS sTLD applicants to proceed to contract negotiations. Importantly, the resolutions contain <u>specific caveats</u> requiring the applicants to address the Board's concerns related to the sponsorship criteria during the negotiations.**

➔ **In December of 2004, Paul Twomey wrote to the GAC Chair Tarmizi, and requested GAC advice on the new sTLD applicants, including .xxx.**

➔ **The ICANN Board discussed ICM's application in January 2005 and decided to ask ICM to make a presentation to the Board at its next meeting in Mar del Plata.**

In April 2005, ICM met with the Board in Mar Del Plata to discuss sponsorship. GAC Chairman Sharil Tarmizi was present at this and other meetings where the Board considered ICM's application.

ICM again asked to discuss its proposal with the GAC or any members, but was again told that no such meeting was necessary.

➔ **On 3 April 2005, GAC Chairman Tarmizi responded to ICANN President Twomey's request for the GAC's timely advice on the pending sTLD applications. The letter stated that "no GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round." At this point, the GAC had been given over a year to comment on the applications, which had been posted since March 2004.**

➔ **On 3 May 2005, in preparation for the Board's approval of .xxx, ICANN's counsel, John Jeffrey, approved a press release, stating "ICANN's board of directors today determined that the proposal for a new top level domain submitted by ICM Registry <u>meets the criteria</u> established by ICANN."**

On 1 June 2005, the ICANN Board authorized the ICANN President and General Counsel to enter into negotiations with ICM relating to the proposed commercial and technical terms of a Registry Agreement for the .XXX sTLD. The Agreement was to be presented to the Board for approval – as all ICANN gTLD Registry Agreements are.

↳ **Unlike the resolutions authorizing .MOBI and .JOBS to enter into contract negotiations <u>only</u> upon satisfying certain concerns regarding sponsorship, the .xxx resolution contained <u>no caveats</u> in its approval to negotiate an agreement, and made no mention of any unresolved issues that ICM must address during contract negotiations.**

Following the 1 June 2005 vote, Board member Joichi Ito wrote that "the .XXX proposal, in my opinion, has met the criteria set out in the RFP. Our approval of .XXX is a decision based on whether .XXX met the criteria . . ." Bruce Tonkin, then the chair of the GNSO Council, emailed Stuart Lawley congratulating him on ICM's

approval.

➔ **On 13 June 2005, ICANN's counsel, Mr. Jeffrey, wrote to ICM's counsel that the ICM registry agreement "should be a fairly straightforward negotiation," and that ICANN "look[ed] for a quick resolution to any required discussions relating to the document."**

In July 2005, ICANN's Governmental Advisory Committee (GAC), in its Luxembourg Communiqué, invited ICANN to hold consultations on the implementation of new Top Level Domains, highlighting the significant public policy issues that arise with the introduction of new TLDs.

↳ **The minutes of the Board meeting with the GAC in Luxemberg showed that Chairman Dr. Vinton Cerf informed the GAC that ICM's application "met the three main criteria, financial, technical, [and] sponsorship." He noted that the sponsorship criteria was "discussed extensively and the Board reached a positive decision considering that ICANN should not be involved in content matters."**

Paul Twomey, President of ICANN, also reported to the GAC during the same conference, that ICANN had received no comments from governments regarding .xxx, nor had the GAC expressed concerns.

Additionally, GAC Charman Tarmizi, who had attended several Board meetings where .xxx was discussed, told the GAC during this meeting that "the Board came to a decision [about .xxx] after a very difficult and intense debate which has included moral aspects."

Finally, Kurt Pritz, the ICANN executive in charge of the 2004 sTLD round, stated that the .xxx application "ha[d] been found to satisfy the baseline criteria," and was therefore "in negotiation for the designation of registries."

Suzanne Sene, US Government representative to the GAC, stated that the GAC had already had more than enough time to object to the .xxx application. In her reporting email at the end of the meeting (acquired by ICM via a Freedom of Information Act request) she mentioned "happily" that the GAC Communique did not contain any statements about the ICM application.

THE U.S. GOVERNMENT REVERSES ITS POSITION ON .XXX AND POLITICAL PRESSURE FROM THE U.S. BEGINS

➔ **Internal emails from the U.S. Department of Commerce, recovered under the FOIA request, reveal that the United States government initially had a favorable position towards ICM's proposal, but beginning in June 2005, conservative groups in the U.S. began to pressure the Department to block the .xxx sTLD.**

➔ **On 5 August 2005, a memorandum from a U.S. Department of Commerce Senior**

Advisor warned that "if the international community decides to develop an .XXX domain for adult material, it will not go on the Top Level Domain registry if the U.S. does not wish for that to happen." As Paul Twomey testified under oath, such a move by the United States would clearly threaten ICANN's legitimacy, and there is substantial evidence that ICANN was aware of this threat.

➔ **In early August, ICM and ICANN agreed on the terms for the draft registry agreement—this is the First Draft Registry Agreement, which was posted on ICANN's website for public comment.**

In August 2005, ICANN began receiving individual communications from governmental representatives – including the then-Chair of the GAC – noting concerns over the ICM application and stating that the Board should allow time for additional governmental concerns to be heard before reaching a final decision the proposed .XXX sTLD.

↳ **The first "individual communication" came from a top official at the U.S. Department of Commerce, Michael Gallagher, who requested that the Board provide additional time for interested parties to voice their concerns over adult content on the internet. This *volte face* in the U.S. government position appears to have stemmed from the cascade of protests from conservative organizations, some of whom had influential access to high level officials in the U.S. administration. Dr. Twomey conceded during the IRP hearing that a senior member of the Department of Commerce had expressed the view that the U.S. government would not put .xxx in the root.**

Several days later, the chairman of the GAC sent the letter ICANN describes. Mr. Gallagher's letter was not posted until after Mr. Tarmizi's letter was received and posted.

The intervention of the United States also came at a delicate juncture in time, prior to the UN's World Summit on the Information Society, which promised to be a forum for criticism of the continuing influence of the U.S. government over the internet. As one article stated, the .xxx application put ICANN in a difficult situation: "It is facing mounting pressure from within the United States and other countries to reject the domain. But if it goes back on its earlier decision, many countries will see that as evidence of its allegiance to, and lack of independence from, the U.S. government."

On 15 August 2005, ICM requested that the ICANN Board defer final approval of the ICM Registry Agreement and Application until a September 2005 meeting of the Board. The Board agreed to defer consideration until 15 September 2005. On 16 August 2005, the Agreement was posted for public comment at http://forum.icann.org/lists/xxx-comments/mail34.html, and nearly 2000 comments were received.

↳ **ICM requested this deferral after several conversations with senior ICANN staff, including the CEO, in which the parties mutually agreed that a delay would be the best way for both ICM and ICANN to address misconceptions about the application and improve the public image of the sTLD within the GAC, thereby diminishing**

complaints ICANN might face after the .xxx contract was approved.

ICANN then started receiving substantial communications both in support and against the creation of the .XXX sTLD. One of these communications was from the Free Speech Coalition; a trade association of the adult entertainment industry, stating the ICM distorts the support received from the adult entertainment industry. Throughout the consideration of ICM's application ICANN would receive additional communications from other participants in the adult entertainment industry indicating that they no longer supported ICM or IFFOR's ability to represent the sponsored community identified in ICM's application.

↳ **ICM provided documented evidence to ICANN regarding a campaign by the limited opposition within the adult entertainment industry to generate automated letters using different email addresses to inflate the appearance of opposition to .xxx. In fact, when the Free Speech Coalition sought signatures for a petition opposing .xxx, it succeeded in obtaining less than 200 signatures (out of more than 100,000 adult webmasters). By this time ICM had gained extra support from nearly 2,000 adult webmaster from over 70 countries, which was provided to ICANN.**

At the 15 September 2005 meeting of the Board, the Board expressed concerns about the .XXX sTLD agreement and amount of correspondence received on the issue, and directed the President and General Counsel to discuss possible additional contractual provisions to address the Board's concerns. As requested in a September 2005 letter from member of the GAC reiterating points made in the Luxembourg Communiqué, the ICANN Board agreed to defer any Board decision on the ICM application until at least December 2005, to allow the GAC time to consider the issue further. ICANN also posted a status report on the sTLDs. ICANN continued receiving communications regarding the proposed .XXX sTLDs.

↳ **Neither the preliminary minutes of the 15 September 2005 meeting, nor the resolution requiring additional contractual negotiations mentioned sponsorship, or any other RFP criteria, but rather asked that ICM "discuss possible additional contractual provisions . . . to ensure that there are enforceable provisions requiring effective development and implementation of policies consistent with the principles in the ICM application." Nor was ICM told that sponsorship had been discussed. The first indication of this appeared in the final minutes – that were not posted until June 2006 – after the ICANN Board voted to reject the ICM contract.**

➔ **In response to the 15 September 2005 resolution by the Board, ICM immediately entered into discussions with ICANN to address the requested changes to the First Draft Registry Agreement, and sent proposed language to address the Board's request within two weeks.**

At the end of November 2005, the GAC held a meeting where both the ICANN Board and ICM made presentations on ICM's application.

↳ **Notably, the GAC Communiqué following this meeting (the Vancouver Communiqué) did not discuss the substance of the .xxx proposal, but only welcomed**

the postponement of the Board's decision. At this point, the GAC had had 20 months to comment on the .xxx application.

➔ **Throughout the following months, ICM and ICANN worked together to produce another draft registry agreement in response to ICANN's specific requests. None of these requests involved the sponsorship criteria; rather, ICM reaffirmed its commitment to establishing registry requirements incorporating certain standards for best practices and expanded the protections for cultural significant names. ICANN, for unknown reasons, did not post the revised Second Draft Registry Agreement.**

In March 2006, the GAC issued its Wellington Communiqué, noting that insufficient detail was provided by ICANN to support that the Independent Evaluator Team's concerns regarding the failure to meet the sponsorship criteria had been met. The GAC also noted its opposition to the introduction of the .XXX sTLD.

↳ **Actually, the Wellington Communiqué did not state GAC opposition to the introduction of .xxx, but rather noted that there were several individual countries that were opposed to the TLD. The GAC's only advice was "that any contract currently under negotiation between ICANN and ICM Registry . . . [should] include enforceable provisions covering all of ICM Registry's commitments." Moreover, the GAC's position was based upon an outdated draft of the ICM draft registry agreement, as ICANN staff had failed to post the updated version of the agreement that included revisions in response to the GAC's concerns. This was the first official GAC comment on the substance of the .xxx proposal, approximately 2 years after the application was first posted for comment. It remains the only official GAC advice to this day.**

After the receipt of the Wellington Communiqué, the Board requested a review of all publicly received inputs and to make recommendations to the Board regarding amendments to the proposed sTLD Registry Agreement to address the concerns raised.

In April 2006, a revised proposed sTLD Registry Agreement was posted for public comment at http://forum.icann.org/lists/xxx-tld-agreement/mail11.html. 632 emails were received on the public comment forum.

↳ **This version of the agreement contained language to address the GAC's request that ICM's contract reflect the specific commitments ICM had made in its application.**

On 10 May 2006, the Board voted against approval of the ICM sTLD Registry Agreement. ICM then initiates a Request for Reconsideration of the denial, which was withdrawn prior to deliberation, in favor of submitting additional information to ICANN in support of ICM's application.

↳ **A number of Board members rejected the agreement for "public policy" reasons not mentioned in the RFP criteria. Only Paul Twomey rejects the agreement suggesting**

an alleged failure to meet sponsorship criteria, despite the fact that he was intimately involved in the negotiations of the registry agreement, and did not raise sponsorship concerns during those negotiations.

ICM granted three extensions to the Reconsideration Committee, and as the deadline for the third extension was drawing near, ICANN's general counsel informed ICM that ICANN was prepared to return to contract negotiations. Based on these assurances, ICM withdrew the Request for Reconsideration.

While the Reconsideration Request was pending – and without ICANN involvement or approval – ICM begins pre-registration of .XXX domain names.

↳ **ICM notified ICANN on June 1, 2006 that it was commencing to permit pre-registration (without charge) of .xxx names by existing adult webmasters. This action was taken in response to Paul Twomey's suggestion, in the aftermath of the May 2006 vote, that the .xxx proposal lacked sufficient community support, despite the issue already having been decided in June 2005. ICM did not advertise or promote this opportunity, but nonetheless received more than 75,000 pre-reservation requests in the first six months alone.**

On 5 January 2007, another revised proposed sTLD Registry Agreement was posted for public comment. Over 1800 comments were received. http://forum.icann.org/lists/xxx-icm-agreement/mail31.html.

↳ **Like the previous draft agreements, this draft—the Fourth Draft Registry Agreement—was fully negotiated between ICANN and ICM, and contained additional language to respond to the GAC's advice that the contract contain provisions that would obligate ICM to fulfill its commitments made in the application process. Also, ICM submitted additional information to address the erroneous concerns previously raised by the GAC, including a list of persons within the child safety community who would likely be willing to serve on the board of IFFOR, commitments to enter into agreements with existing and reputable rating associations to provide tags for filtering .xxx websites, and to monitor compliance with rules for the suppression of child pornography.**

The Board considered the revised sTLD Registry Agreement at its February 2007 meeting. ICM provided additional information for the Board just two days prior to the meeting. At the February meeting, the Board noted concerns over the amount of support from a sponsored community and whether ICM met these criteria of the sTLD process. The Board instructed staff to provide information, as well as the posting for public comment of additional revisions to the proposed sTLD Registry Agreement.

↳ **At this meeting, the sponsorship issue was reopened for Board discussion for the first time since June 2005. According to the Board minutes, "Kurt Pritz said that in relation to the issue of establishing whether there was support for domain creation amongst a sponsorship community that ICM had provided extensive evidence for a**

sponsored community and that documentation of this could be found in the application. Kurt also pointed out that, at the Board's request, additional information had been presented to them during ICANN's Mar del Plata Meeting." Those minutes further contain Mr. Pritz's confirmation that sponsorship had not been a subject of discussion between ICM and since the Board's decision on .xxx in June 2005.

In March 2007, ICM provided a briefing to the Board and submitted additional material for the Board's consideration on sponsorship issues.

After receiving notification from the Board that the .XXX sTLD Registry Agreement would be up for Board consideration again, the GAC produced the Lisbon Communiqué, reaffirming the GAC's position against the introduction of the .XXX sTLD.

↳ **The Lisbon Communiqué did NOT say that the GAC was opposed to the introduction of .xxx. The Lisbon Communiqué reaffirmed the GAC's advice in Wellington, regarding contractual commitments.**

On 30 March 2007, the ICANN Board voted to reject the revised proposed sTLD Registry Agreement and deny ICM's application for the .XXX sTLD, based in large part on ICM's failure to meet the sponsored community criteria specified in the sTLD criteria.

↳ **This was the Fifth Draft Registry Agreement to be negotiated between ICANN and ICM, and the fourth draft to be posted for public comment.**

The Board's use of the sponsorship criteria as a reason for rejecting the Registry Agreement was an unjustified reversal of the 1 June 2005 vote approving ICM's application; the question of the sponsorship criteria already been decided, and nothing changed that would have required the decision to be reconsidered. ICM provided evidence that the sTLD still had more than sufficient (in fact, growing) support from the sponsored community. Aside from the sponsorship question, the reasons listed for denying ICM's application were unrelated to the originally stated evaluation criteria, unreasonable, and outside the mission of ICANN.

On 6 June 2008, ICM filed a request for Independent Review of the Board's action, initiating the Independent Review process pursuant to ICANN Bylaws, Article IV, section 3 (*see* http://www.icann.org/en/general/bylaws.htm#IV). The papers filed by ICM and ICANN are located at http://www.icann.org/en/irp/icm-v-icann.htm.

The three-member Independent Review Panel held a five-day hearing from 21- 25 September 2009 during which both parties submitted written and live testimony.

The Independent Review Panel issued its Declaration on 19 February 2010. The Declaration is available at http://www.icann.org/en/irp/icm-v¬icann/irp-panel-declaration- 19feb 1 0-en.pdf.

↳ **The Panel declared, *inter alia*, that (1) the ICANN Board, in its resolution of 1 June 2005, found that ICM's application met the required sponsorship criteria; and (2)**

the Board's reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy and (3) that following the June 2005 vote, ICANN should have proceeded to conclude a contract with ICM. Accordingly, the Panel determined that ICM was the prevailing party.