

From: Stuart Lawley

Date: Sun, 21 Mar 2010 15:52:59 -0700

To: Rod Beckstrom

Cc: John Jeffrey , Peter DengateThrush , Arif Ali , John Murino , Gary Laitner , Becky Burr

Subject: Letter for your consideration in the matter of ICM Registry.



21 March 2010

Mr. Rod Beckstrom
President and Chief Executive Officer
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Rey, California 90292

Re: ICM's Response to Board Resolutions of 12 March 2010

Dear Rod,

In light of the Board's resolutions of 12 March 2010, and your affirmation following the Nairobi meeting that the Board had accepted the findings of the IRP Panel, ICM would like to reiterate its commitment to work collaboratively with ICANN regarding the expeditious implementation of the Independent Review Panel's decision. I am writing specifically to offer ICM's input on courses of action available to implement the IRP declaration. As in the past, I remain available to meet with you, ICANN's attorneys, and/or the Board to identify a process that allows both parties to bring this matter to an expeditious, transparent, and predictable closure.

As you know, the Independent Review Panel held that the ICANN Board's 1 June 2005 vote was a conclusive determination that ICM Registry's application met the required 2004 RFP criteria, and that "ICANN should, pursuant to [its] documented policy, then have proceeded to conclude an agreement with ICM on commercial and technical terms, without reopening whether ICM's application met [the] criteria." Now that the Board has, to echo your words, "recognized and accepted . . . the validity of the Panel making the recommendation that it did," I am sure we agree that whatever "path-forward" the Board develops to "move to the next step" should be efficient and expeditious. To comport with the Panel's declaration and avoid further discriminatory treatment, any such process should reflect the rules established for the sTLD round.

On 12 March 2010 the Board resolved that "in the absence of a process for approving an sTLD six years following the receipt of the original application," a new process must be developed for approving ICM's registry agreement. ICM notes, however, that the correct process is straightforward and already established: the Board should vote to execute the registry agreement, as negotiated between ICM and ICANN, which was published for comment for

nearly six weeks, commencing on 16 February 2007, without further delay. We do not see any other option that would be consistent with the Panel's declaration and nondiscriminatory.

First of all, ICM's application was submitted in the 2004 sTLD round, evaluated under the criteria adopted by the Board for that round, and subject to the contractual requirements relevant to that round. ICANN needs no new mechanism for approving a registry agreement that reflects all of the requirements and conditions under which all other successful sTLD applicants were entered into the root.

Moreover, just three months ago, on 9 December 2009, the ICANN Board voted unanimously to approve the .POST sponsorship agreement with the Universal Postal Union (UPU). The .POST application was submitted in March 2004, at the same time as ICM's application, and was effectively approved to enter into registry agreement negotiations in July 2004, *nearly eleven months before* ICM's application was approved. More than five years later, no additional processes were required to approve the .POST registry agreement. Why is a new process required to finalize the ICM contract when no such process was needed for .POST? Treating ICM significantly differently from the UPU may be a further violation of Article II, Section 3 of ICANN's Bylaws, which requires that ICANN "not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment;" Article I, Section 2 of ICANN's Bylaws, which requires ICANN to apply its "documented policies neutrally and objectively, with integrity and fairness;" and may diminish the legitimacy of ICANN's accountability processes by failing to correct the violations already identified by the Independent Review Panel.

There is no legitimate obstacle to the approval of ICM's registry agreement. None of the technical, financial, and business components of ICM's application have changed since the application was approved to enter contract negotiations. Afiliacorp will still serve as the back-end technical operator of the registry. There has been no change of control of ICM throughout this process, nor have the financial and business models that established ICM Registry as a viable and reliable registry operator changed.

We understand that some have suggested ICM's registry agreement should reflect the registry agreement template contained in the Draft Applicant Guidebook for the new gTLD round. There is no principled reason for this. As stated above, ICM applied under the rules for the 2004 sTLD round, and its registry agreement should reflect those rules. Moreover, there is no material purpose served by applying new contract terms in this case - ICM's February 2007 registry agreement already contains a number of the additional protections being considered in the new gTLD context. For example, the 2007 agreement includes robust protections, including rapid takedown, other trademark protections, and enhanced protections for certain geographic, cultural and religious names. In fact, in many cases, the safeguards in ICM's 2007 negotiated agreement go well beyond the enhanced protection mechanisms under discussion in connection with the forthcoming gTLD round. So even if it was appropriate to apply the new gTLD standards to ICM, executing the registry agreement as negotiated in February 2007 is consistent with—indeed, more advanced than—ICANN's current contract template, which has not been officially amended or ratified yet.

ICM's legal rights must be consistent with the rights and obligations applicable to the other successful 2004 sTLD applicants and contractual discussions should not be held up while the community debates the provisions of the registry agreement for the new gTLD round. We can see no reason for further delay in the process of approving ICM's registry agreement, and there is no principled reason to suggest that ICM should be forced to wait for the completion of ICANN's registry agreement redrafting process at some indefinite time in the future. The .PRO contract renewal, before the Board right now, is modeled on the 2006 .BIZ renewal, showing that ICANN is still currently entering into older style contracts. Indeed, that would be the kind of unjustified discriminatory treatment cited in the IRP declaration.

ICM is hopeful that we can work together with ICANN to move this process forward quickly, and we have identified no option other than prompt execution of the 2007 negotiated agreement that would reflect and respect the IRP panel's findings. In light of the IRP declaration, the right course of action is for the Board to approve a draft agreement on the same or similar terms as the other successful 2004 sTLD applicants. ICM urges you and the Board to develop process choices consistent with ICANN's obligations of nondiscrimination, objectivity, and accountability and with proper respect for the IRP's declaration. To the extent that ICANN considers that additional steps are necessary before ICM's registry agreement can be executed, ICM urges that ICANN take extreme care to ensure that the additional steps are efficient, fair, non-discriminatory, and faithful to the IRP declaration.

As always, I remain willing to meet at any time and would like nothing more than to engage in further dialogue so that each party fully understands the interests and concerns of the other. I truly believe that this process should result in a win-win for both ICANN, the institution, and ICM, the registry operator. The world is watching us.

Sincerely,

A handwritten signature in blue ink, appearing to be 'Stuart Lawley', with a small flourish at the end.

Stuart Lawley

Chairman