



LET'S BE ADULT ABOUT IT

24 January 2011

Peter Dengate Thrush, Chair
Members of the Board of Directors
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601

RE: Consultation with GAC regarding ICM Registry and .XXX

Dear Mr. Chairman and Members of the Board of Directors:

I am writing in advance of your meeting on 25 January 2011, and in anticipation of the Board's consultation with the Governmental Advisory Committee (GAC) on 28 February 2011 through 1 March 2011. ICM Registry LLC (ICM) hereby (1) reiterates that we are ready to assist the ICANN Board in preparing for its meeting with the GAC, and (2) urges the Board to fulfill its commitment under the Cartagena resolutions to conclude consultations with the GAC in February and promptly thereafter enter into a registry agreement with ICM to operate the .XXX sponsored top level domain (sTLD).

In particular, ICM Registry calls upon the ICANN Board of Directors to conduct and conclude all necessary consultations with the GAC regarding .XXX in Brussels – as it promised to do in Cartagena in December. Neither ICM Registry nor the ICANN community can be expected to stand by while ICANN allows yet another self-imposed deadline on this matter to come and go without a plausible explanation. The issues for consultation with respect to ICM Registry are clearly specified and appropriately narrowed. Failing to approve the registry agreement for .XXX expeditiously will only (i) increase the already immense costs and damages imposed on ICM in the last seven years; (ii) further and needlessly divert attention and resources from the important work ICANN is tasked to undertake; and (iii) serve as a clear statement that ICANN is unwilling to act in a manner that is consistent with its Bylaws. Meanwhile, the Governmental Advisory Committee has been absolutely clear that it has ***no intention of offering new advice*** with respect to .XXX. Therefore, we are not aware of any impediments to conducting and concluding the consultation regarding .XXX.

19 February 2011 will mark the ***one year anniversary*** of the declaration of the majority (Declaration) in the independent review process (IRP) titled *ICM Registry v. ICANN*, which held that “the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria;” and (ii) “the Board's reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy.”

By the time ICANN's 40th public meeting opens in San Francisco in March, it will have been ***more than seven years*** since ICM Registry submitted its application to operate .XXX. It will



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have been *nearly six years* since 1 June 2005, when the ICANN Board of Directors found – according to relevant findings of the IRP Declaration adopted by the Board in Brussels on 25 June 2010 - that ICM Registry’s application to operate .xxx met the heavily debated and fully vetted selection criteria applicable to the **2004 sponsored top level domain application round**.

In the twelve months since the IRP majority issued its Declaration, the ICANN Board of Directors has undertaken an extended and exhaustive review of this matter. As Attachment A sets forth in painful detail, *nothing* about this case reflects a rush to judgment. Rather:

1. In Nairobi, in March of 2010, the Board directed ICANN's CEO and General Counsel to post a report setting out possible process options for responding to the Declaration for public comment for no less than 45 days, for the Board consideration no later than ICANN’s meeting in June 2010 in Brussels;
2. In Brussels, the Board accepted and determined to act in accordance with the findings of the Declaration of the majority in the Independent Review Process to the effect that:
(i) “the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria;”
and (ii) “the Board's reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy;
3. Throughout June and July of 2010, ICM Registry and ICANN staff worked in good faith to respond to the Board’s request for updated due diligence and to negotiate a registry agreement that reflects, to the maximum extent possible and appropriate, GAC input regarding ICM’s application;
4. On 5 August 2010, the Board directed ICANN staff to post for comment the registry agreement for ICM’s operation of .XXX, along with the due diligence materials produced over the course of multiple discussions and document exchanges between ICM and ICANN staff; and
5. On 10 December 2010 - following two meetings between the Board Chair and GAC Chair and additional meetings between members of the Board and GAC in Cartagena- the Board formally announced its intent to enter into a registry agreement with ICM Registry for the .XXX sTLD, subject to GAC consultation and advice; invoked the Bylaws consultation provisions; and resolved to conduct the necessary consultations with the GAC in February 2011.

Throughout this process, ICM Registry has interacted constructively with staff, Board, and community members; respected the Board’s extended timeline; and met every request put forth



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by staff with respect to the final documentation. In advance of the Board's meeting in August, ICM submitted formal and detailed baseline policies, including policies covering all of ICM's specific obligations regarding labeling, monitoring, compliance, and enforcement of registry policies, an articulation of a detailed policy development process, policies on preventing abusive registrations, and fully developed contracts between ICM Registry and the non-profit International Foundation for Online Responsibility (IFFOR). In subsequent months, ICM Registry has further invested in developing the implementation mechanisms for a variety of rights protection policies (trademark, personal names, names of cultural and religious significance, etc.), as well as a variety of policies that registries typically turn to once under contract (conflicts, automated enforcement, etc.). In addition we have engaged in extensive outreach with child safety, privacy, and free expression experts, as well as with law enforcement around the world.

In short, ICM has invested extraordinary resources in developing and articulating processes, procedures, and documentation that go well beyond anything that has ever been required of a TLD applicant and, indeed, anything that will be required by a TLD operator under the Proposed Applicant Guidebook issued on 10 November 2010.

Meanwhile, the GAC has been absolutely clear that it has *no intention of offering new advice* with respect to .XXX. Accordingly, the only thing preventing ICANN from making good on its decision to act in accordance with the findings of the IRP majority accepted in Brussels is a "consultation" with the GAC, during which the Board explains its reasons for proceeding with the agreement, notwithstanding ambiguous GAC advice that:

1. "Several" of its members are emphatically opposed to .XXX - although this view does not reflect GAC consensus;
2. ICANN should avoid becoming embroiled in content regulation - which, read literally, would preclude the introduction of anything but entirely open an unlimited new TLDs; and
3. Some members of the GAC may believe that ICANN should consider an sTLD application submitted in 2004 under undetermined terms and conditions for the next round - notwithstanding the fact that the application was submitted under and in reliance upon terms and conditions fully vetted by the ICANN community, including the GAC, *before the relevant RFP was issued in December of 2003.*

Whether or not these statements constitute GAC "advice," they are not actionable consistent with ICANN's Core Values as expressed in the ICANN Bylaws. We are well aware of the fact that one leading GAC participant argued in Cartagena – without any



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identified basis for, or clear competency to make such a statement– that the Board should interpret an ambiguous statement about the view of “several” GAC members as a consensus statement of GAC opposition to a proposal. This approach would turn ICANN’s bottom-up, private sector led, multi-stakeholder approach to policy development on its head and would sanction transmission of GAC “advice” in code, in direct contradiction of ICANN’s obligations with respect to transparency and accountability, and, as a result, threatening the integrity of the ICANN.

As you finalize the agenda for the Board’s consultation with the Government Advisory Committee next month, ICM Registry urges the ICANN Board to fulfill its explicit commitments to ICM Registry and to the ICANN community, and to uphold the integrity of the ICANN process by conducting and completing its consultations with the GAC.

.XXX is a game changing approach that leverages the Internet’s unique ability to support self-organization for the purpose of delivering tangible public interest benefits. All of our “i’s” have been dotted and our “t’s” have been crossed for a very long while now. There is no justification for further delay, which would, in any case, directly violate the Board’s resolutions in Cartagena. Accordingly, we expect that ICANN will ensure that consultations with the GAC regarding .XXX are conducted and concluded in the Brussels meeting now scheduled for 28 February through 1 March 2011.

As ever, we remain committed to working with ICANN in partnership and in good faith in order to finally resolve our dispute with respect to .XXX.

Sincerely

Stuart Lawley
President and CEO

cc: John Jeffrey, Esq.

Attachment A: Chronology of ICM Registry's Application to operate .XXX

1. In March of 2004, ICM Registry ("ICM") submitted an application to operate the .XXX sponsored top level domain.
2. On 1 June 2005, the ICANN Board of Directors (the "Board") determined that ICM's application met the criteria applicable to the 2004 sTLD application round, and directed staff to enter into contract negotiations with ICM.
3. On 30 March 2007, the ICANN Board "rejected" ICM's application, notwithstanding its prior approval of the application.
4. On 19 February 2010, an independent review panel (the "IRP Panel") convened in accordance with Article IV, Section 3 of the ICANN Bylaws, which challenged ICANN's treatment and denial of ICM's application for the .XXX sTLD, held by a majority vote and declared that (i) "the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria;" and (ii) "the Board's reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy" (the "Declaration").
5. In accordance with Article IV, section 3.15 of ICANN's Bylaws, the Board considered the Panel's Declaration throughout the week in Nairobi from 7-12 March 2010 and reviewed various paths toward conclusion.
6. Following the ICANN meeting in Nairobi, the staff created a transparent set of process options and posted those options for public comment for a period of 45 days commencing 26 March 2010.
7. The comments received on the process options were reviewed and analyzed, and the review and analysis was posted on 15 June 2010.
8. The Board reviewed public comments received, and further discussed and debated the process options for further consideration of the IRP Declaration throughout the week in Brussels from 20 – 25 June 2010.
9. In Brussels, on 25 June 2010, the Board determined to accept and act in accordance with the following findings of the Independent Review Process Majority: (i) "the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria;" and (ii) "the Board's reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy."
10. In Brussels, the Board further directed staff to conduct expedited due diligence to ensure that: (1) the ICM Application is still current; and (2) there have been no changes in ICM's qualifications.
11. ICANN's General Counsel reported to the Board on 5 August 2010 that the expedited due diligence regarding ICM Registry was completed.
12. ICM's due diligence materials were posted for public comment on 20 August 2010 for a period of 30 days.



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13. On 5 August 2010, the Board directed ICANN staff to complete draft contract negotiations with ICM, taking into account the GAC advice received to date.
14. On 24 August 2010, ICANN posted for public comment a Revised Proposed Registry Agreement submitted by ICM Registry following negotiations with ICANN staff, along with Due Diligence Documentation submitted by ICM Registry <<http://www.icann.org/en/announcements/announcement-24aug10-en.htm>>.
15. On 22 October 2010 ICANN staff provided the Board with a summary of the public comments on the draft registry agreement and the due diligence materials, which summary was also publicly posted on that date.
16. The Board reviewed public comments received on the Registry Agreement.
17. The IRP majority Declaration, accepted by the Board in Brussels, contains a detailed explanation for its conclusion that the Board found on 1 June 2005 that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria.
18. ICANN staff has reported to the Board that all GAC statements regarding .XXX were fully considered and taken into account in the course of contract discussions with ICM Registry.
19. ICANN staff has reported to the Board that both the staff and ICM Registry endeavored to reflect all GAC input into the proposed registry agreement.
20. ICANN staff has reported that the Registry Agreement reflects and implements GAC input on .XXX:
 - Consistent with the GAC's Wellington Communiqué, the proposed registry agreement between ICANN and ICM Registry includes enforceable provisions covering all of ICM Registry's commitments, including ICM's commitments to: (i) take appropriate measures to restrict access to illegal and offensive content; (ii) support the development of tools and programs to protect vulnerable members of the community; (iii) maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites, if need be; and (iv) act to ensure the protection of intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers drawing on best practices in the development of registration and eligibility rules;
 - Consistent with the GAC's Lisbon Communiqué, the proposed registry agreement does not include provisions that, in the view of the GAC, appeared to give ICANN the right to monitor the fulfilment of ICM's obligations and policy implementation in areas beyond what might reasonably be considered a technically-focused mandate;
 - Consistent with the GAC's Lisbon Communiqué, the proposed registry agreement eliminates areas of concern cited by the GAC regarding ICANN's involvement in ICM's content related activities

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including: (i) review and negotiation of policies proposed by the Registry Operator or the International Foundation for Online Responsibility (IFFOR); (ii) approval/disapproval of ICM's choice of a monitoring agency, and (iii) the identification of names of "cultural and/or religious significance" as well as "names of territories, distinct economies, and other geographic and geopolitical names" to be reserved from use in the .xxx domain.

21. ICANN staff reported that it is uncertain whether or not specified statements made by the GAC, all of which were taken into account in discussions regarding the proposed registry agreement, are intended by the GAC to constitute advice about public policy concerns related to the development and formulation of ICANN policy and, if so, how such advice could be implemented consistent with the findings of the Independent Review Panel Majority accepted by the Board on 25 June 2010, including as follow:

- The GAC statement in the Wellington Communiqué that "several members of the GAC are emphatically opposed from a public policy perspective to the introduction of a .xxx sTLD" reflects a diversity of views within the GAC, consistent with the GAC Operating Principles requirement that the Chair convey the full range of views with respect to areas on which the GAC is unable to achieve consensus, but (i) staff is concerned that some members of the GAC may view statements of a subset of GAC views as actionable "advice" and, if so, (ii) staff is uncertain as to how such advice could be implemented consistent with ICANN's private sector led, bottom-up, multi-stakeholder policy development model and the findings of the Independent Review Panel Majority accepted by the Board;
- The draft registry agreement incorporates the recommendations of the GAC in its Lisbon Communiqué regarding ICANN's involvement in content-related decisions, and ICM has come forward with a variety of mechanisms to avoid entangling ICANN in content issues (for example, by automated reporting of suspected child abuse images to national hotlines), but (i) staff is uncertain if the GAC intended to encompass ICANN's charter compliance activities (for example, relating to complaints about performance), and, if so, (ii) staff is uncertain how such advice could be implemented consistent with ICANN's obligations to the Internet community and the findings of the Independent Review Panel Majority accepted by the Board;
- The effect of the Board's resolution in Brussels on 25 June 2010 was to adopt the panel's finding that the Board had previously approved the .XXX string under rules that were finalized and published in 2003. If, however, the GAC's letter of 4 August 2010 was intended to cover .XXX as a "pending" TLD, staff is uncertain as to how such advice could be implemented retroactively consistent with ICANN's Core Values of employing open and transparent policy development mechanisms and making decisions by applying documented policies neutrally and objectively, with integrity and fairness, and with the findings of the Independent Review Panel Majority previously accepted by the Board.

22. On 28 October 2010, the Board directed the Board Chair to engage the GAC Chair on developing a process for consultation with the GAC on its advice about the ICM application, and directed the Board



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Chair to suggest to the GAC Chair that any consultation process conclude prior to the ICANN Public Meeting in Cartagena, Colombia.

23. Notwithstanding the direction of the Board, the consultation process was not concluded prior to the ICANN Public Meeting in Cartagena, Colombia.

24. On 10 December 2010 in Cartagena, Colombia, the ICANN Board resolved that it intends to enter into a registry agreement with ICM Registry for the .XXX sTLD, subject to GAC consultation and advice, and invoked the consultation as provided for in ICANN Bylaws section Article XI, Section 2, Paragraph 1(j).

25. On 10 December 2010 in Cartagena, Colombia, the ICANN Board directed staff to prepare within five working days a draft process for consulting with the GAC when necessary pursuant to ICANN Bylaws section Article XI, Section 2, Paragraph 1(j); to provide that process to the Board for comment and approval by the Board Executive Committee as soon as practicable; once approved, to forward the process to the GAC in order to have an agreed process for use in the consultations with the GAC in February 2011.

26. The ICANN Board indicated in Cartagena that it agreed with the staff's assessment of the conflicts with potential GAC advice relating to the ICM application, and directed staff to communicate the Board's determination to the GAC.

27. The proposed process for consultation with the GAC was prepared by staff, forwarded to the Board, approved by the Executive Committee, and forwarded to the GAC in accordance with the timeline set forth in the Board's Cartagena resolution.