

MEMORANDUM TO THE ICANN BOARD OF DIRECTORS

From: ICM Registry LLC

Date: 8 March 2007

RE: Board Questions Regarding ICM's Compliance with Sponsorship Criteria

INTRODUCTION AND SUMMARY

When ICANN issued its Request for Proposals (RFP) for sponsored top-level domains (sTLDs) in December of 2003, it promised to conduct an objective, non-discriminatory, and transparent process. ICANN obligated itself to evaluate sTLD proposals against published, agreed upon criteria (the "RFP Criteria"). Notwithstanding these commitments, and despite a promising start, ICANN's consideration of the ICM Registry proposal to operate an sTLD for responsible adult webmasters has repeatedly sacrificed objectivity and non-discrimination to political expediency and personal aesthetics. The current chapter in this ongoing saga illustrates this most starkly: On 12 February 2007, more than a year and a half after directing ICANN staff to enter into commercial negotiations with ICM, members of the ICANN board suddenly revived a long settled question about compliance with the RFP Criteria. Specifically, Board members expressed "serious concerns" about whether "the proposed .xxx domain has the support of a clearly defined sponsored community as per the criteria for sponsored TLDs."¹

¹ Preliminary Report for Special Meeting of the ICANN Board of Directors, ICANN (12 Feb. 2007), <http://www.icann.org/minutes/prelim-report-12feb07.htm> ("12 Feb 2007 Minutes").

Questions about ICM's compliance with the sponsorship criteria have long been asked and answered. On 1 June 2005, following numerous, in-depth discussions, the Board decided the sponsorship issue by directing staff to enter into contract negotiations with ICM. In making that decision, the Board was well aware—because ICM so informed it—that a vocal minority of adult webmasters opposed ICM's proposal. The Board nonetheless, and quite appropriately, concluded that the ICM application met the sponsorship criteria. Nothing has changed about the significance of that opposition nor called into question the existence and size of the well-defined community that supports .xxx. In fact, three public forums later, and despite several “calls to arms” and increasingly aggressive tactics, the size of the opposition has grown barely, if at all. Reopening this long-settled, gating issue at this point is highly improper and signals a dangerous indeterminacy and instability in ICANN's processes. It violates ICANN's Bylaws, conflicts with ICANN's “Core Values,” and raises serious questions about the integrity of the institution. The arbitrary manner in which ICANN has applied its processes and the RFP Criteria is inconsistent with ICANN's legal obligations, and it has dramatically increased ICM's cost and burdens in pursuing the sTLD application. This has harmed not only ICM itself, but also future sTLD applicants, the public, and the global Internet community. Private sector management of the Domain Name System (DNS) cannot survive without the confidence of ICANN stakeholders. If ICANN's procedures can be unilaterally changed mid-course, if its published standards can be applied selectively, and if its settled decisions can be revisited on a whim, no participant will or should have confidence in the process.

Further, as a substantive matter, concern about sponsorship is unfounded. ICM precisely defined the sponsored community for .xxx as a self-identified group of responsible adult webmasters with distinct needs and interests that differentiate them from the rest of the Internet

community: Within the universe of adult websites, the .xxx community is composed *only* of those webmasters who wish to work together to implement industry best practices in a specific, easily identifiable virtual marketplace, while providing a forum for interaction and cooperation with other community stakeholders affected by the adult-content industry. This type of self-identified community is nothing new. ICANN has already executed registry agreements with several applicants that defined their sponsored community in virtually identical terms, by reference to those who *wished to make use of the sTLD*. Moreover, the responsible business practices of this community already distinguishes its members from others in the adult webmaster industry.²

In contrast to many other applicants, ICM also demonstrated the strong support of a large sponsored community. That community and its support continue to grow to this day, despite the inordinate length and seeming irrationality of this process. And while, as ICM disclosed, some members of the adult online industry opposed the application right from the start, such opposition is not, and has never been disqualifying. ICANN has recognized other self-identified communities in the face of express opposition from significant portions of relevant industry sectors. There is no valid basis whatsoever to adopt a different approach with respect to .xxx —

² ICM recently reviewed websites operated by or affiliated with those who expressed support for .xxx, and compared them with a site operated by approximately fifty, randomly selected webmasters who have opposed .xxx. Though admittedly not scientific, the comparison is instructive: 93% of the sites operated by ICM supporters employ warning pages, age verification tools, and password-limited access. In comparison, less than 40% of the sites operated by ICM opponents have such practices. Nearly 80% of the sites operated by ICM supporters have ICRA or other labels, compared to 20% of those operated by ICM opponents. These differences emphasize the distinct needs and interests of the adult content webmasters who make up the sponsored community. (They also illustrate the tensions and transitions taking place within the industry, which are thoughtfully discussed in Dick Thornburgh and Herbert S. Lin, eds., *Youth, Pornography and the Internet* (CSTB 2002).)

especially given that the opposition here is overstated and, as ICM has demonstrated, in many cases simply fabricated.

Nevertheless, and without apparent justification, some Board members apparently would have ICANN revisit its previous determination with respect to sponsorship, adopt a new, previously unannounced criterion, and apply that criterion exclusively to ICM. Rather than apply the test used to evaluate every other application, they would hold ICM to a new, higher standard—namely, the *absence of opposition* from interested parties, even when that opposition does not come from within the carefully defined sponsored community. The “absence of opposition” test is a new criterion, likely seized upon by some as a way to avoid making a determination that, while long overdue, will be criticized on political and aesthetic grounds. But simple equity, the rule of law, and the very legitimacy of ICANN’s processes preclude retroactive application of new criteria to a pending application.

The Board should move ahead with the ICM application, pending now for three full years, on the basis of the RFP Criteria that were published, debated, and formally adopted by the ICANN Board in connection with the RFP. And on the basis of those Criteria, the .xxx sTLD must be readily approved—as should have happened long ago.

DISCUSSION

1. The Board Already Has Considered and Resolved the Sponsorship Issue, and Reopening It Contravenes ICANN’s Processes and Core Values.

ICANN’s RFP for new sTLDs makes clear that compliance with the sponsorship criteria—just like any of the other RFP Criteria—would be determined during an application’s evaluation period. The RFP sets out an explicit two-step process for consideration and approval of the submitted applications, and states that successful completion of the first step is a

prerequisite to commencement of the second.³ First, sTLD applications would be subject to public comment and evaluated for compliance with the Board-approved RFP Criteria by independent evaluations teams. Second, after—and only after—an application was determined to be in compliance with the RFP Criteria, it would proceed to commercial and technical negotiations.

This is explicit throughout the RFP Explanatory Notes (“Notes”), which repeatedly refer to an evaluation period *followed* by a separate commercial negotiation period commencing only upon a satisfactory evaluation. For example, the Notes observe that the “evaluation team will make recommendations about the preferred applications, *if any applications are successful in meeting the selection criteria. Based on the evaluator’s recommendations*, ICANN staff will proceed with contract negotiations and develop an agreement reflecting the commercial and technical terms.”⁴ In other words, only those applications that successfully meet the selection criteria would move into contract negotiations. Similarly, the authorizing resolution supporting the RFP process states that “upon the successful completion of the sTLD selection process, an agreement reflecting the commercial and technical terms shall be negotiated.”⁵

ICANN officially confirmed this approach at every meeting thereafter, beginning in Rome and continuing through Wellington. sTLD “updates” delivered by Kurt Pritz reflected and affirmed the phased process, explaining time and again the two steps involved: first, an evaluation, and second, a negotiation. As Mr. Pritz made clear, only those applications “that

³ New sTLD Application, Part A. Explanatory Notes, ICANN (15 Dec. 2003), <http://www.icann.org/tlds/new-stld-rfp/new-stld-application-parta-15dec03.htm> (“RFP Criteria”).

⁴ *Id.* (emphasis added).

⁵ ICANN Board Resolutions in Carthage, Tunisia, ICANN (31 Oct. 2003), <http://www.icann.org/announcements/advisory-31oct03.htm> (emphasis added).

meet the requirements of the RFP” could progress to contract negotiations.⁶ Mr. Pritz also explained that the Board followed this two-step process in every case in which “all contingencies weren’t resolved at the end of the independent evaluation.”⁷ In each such case, Mr. Pritz noted, “the application [would be] passed on to the board for a final determination as to whether the application met the stated criteria in the RFP. Those that were determined to meet that application then go on to negotiation.”⁸ These reports make clear that determinations regarding the RFP Criteria would be final by the time commercial negotiations began. In fact, as the .cat experience shows, the Board sought to eliminate all questions—even when the evaluation teams determined full compliance—before moving into contract negotiations.⁹

That two-step process makes eminent sense. It allows an applicant to address identified issues and receive a concrete determination of its eligibility without undue delay—avoiding an open-ended, unbounded process that would be unpredictable, expensive, and frustrating for all

⁶ See ICANN Meetings in Kuala Lumpur, ICANN Public Forum, ICANN (22 July 2004), <http://www.icann.org/meetings/kualalumpur/captioning-public-forum-23jul04.htm> (transcript of live captioning); ICANN Meetings in Rome, ICANN Public Forum, Part 1, ICANN (4 Mar. 2004), <http://www.icann.org/meetings/rome/captioning-forum1-04mar04.htm> (same). These reports, as well as the reports delivered in Capetown (December 2004), Mar del Plata, Argentina (March 2005), Luxembourg City (July 2005), Vancouver, Canada (December 2005), and Wellington, New Zealand (March 2006) are attached as Annex 1 hereto.

⁷ See ICANN Meetings in Cape Town, Public Forum – Part 1, ICANN (3 Dec. 2004), <http://www.icann.org/meetings/capetown/captioning-public-forum-1-03dec04.htm> (Kurt Pritz reporting on new sTLD process).

⁸ *Id.*

⁹ The evaluation team report concluded the .cat met all of the RFP Criteria. Information Page for Sponsored Top-Level Domains, ICANN, <http://www.icann.org/tlds/stld-apps-19mar04/> (last modified 3 Dec. 2005). Nonetheless, noting that Catalan is spoken predominantly in Spain, and that it is also the sole official language of Andorra, ICANN requested that puntCAT obtain “letters from the Government of Spain and the Government of Andorra indicating whether they agree with the designation of an sTLD for the ‘Catalan Linguistic and Cultural Community,’” and did not direct the staff to commence commercial negotiations until those were received. *Id.*

involved. The process also make sense from ICANN's perspective, as it increases Board and staff efficiency by initiating commercial negotiations only after the Board finalizes its determination regarding the RFP Criteria.¹⁰ Thus, applicants reasonably understood that only those applications deemed to meet the RFP Criteria would progress to the stage of commercial negotiations, and the record leaves no doubt that the Board shared this understanding.¹¹

¹⁰ Frankly, it strains credulity to suggest that the Board might act on a proposed contract (as it did with respect to ICM in May of 2006) *before* it has determined that the application was adequate. Indeed, if the Board vote to direct staff to begin negotiations were *not* a substantive gating event that distinguished applications that meet the RFP Criteria from those that do not, it is unclear why such a Board vote would be necessary at all, or what meaning or value that vote could possibly have. Further, if meeting the Criteria were not a necessary precondition to initiating negotiations, there is no reason that the Board would not have authorized commercial negotiations with respect to .tel (Pulver) and .mail, the two applications that ultimately were withdrawn for failing to meet the application criteria.

¹¹ No other explanation exists for the affirmative vote of Raimundo Beca, and the abstentions of Alejandro Pisanty and Hualin Qian when the Board first directed staff to discuss changes to the posted contract in September of 2005. Each of the three initially voted against the Board's decision to find the ICM application eligible for commercial negotiations in the first place, on 1 June 2005, and would certainly have done so again in September if the application's eligibility were still on the table. This point is confirmed by the following exchange, from the 15 September 2005 voting transcript of the Board:

ALEJANDRO PISANTY: I will abstain, Vint.

VINT CERF: I'm sorry. You're abstaining?

ALEJANDRO PISANTY: Yes, for the reason that I have voted against and I still don't see this provision to—Well, just because I voted against. No further explanation at this point.

VINT CERF: For consistency, you're abstaining?

ALEJANDRO PISANTY: Yeah.

Special Meeting of the Board, Voting Transcript, ICANN (15 Sept. 2005), <http://www.icann.org/minutes/transcript-15sep05.htm>. Clearly, Mr. Pisanty wished to defer to the Board's previous determination that evaluation was complete, as Mr. Beca did by his affirmative vote. Mr. Pisanty, however, either did not wish to be seen as endorsing the proposal, or wished to avoid any question about the objectivity of his views on the contract in light of his views on the application itself, and elected to abstain. If the eligibility of the application itself were still on the table, Mr. Pisanty obviously would have voted "no" as he had before.

In fact, the Board proceeded in precisely this manner with respect to all the sTLD applications—including (until now) ICM’s application. Thus, with respect to .xxx and every other sTLD application, the Board finally resolved all issues regarding eligibility, including compliance with the RFP Criteria, *prior* to authorizing commercial negotiations *for the purpose of establishing a TLD*. As Dr. Cerf himself described the process:

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 state of technical and commercial negotiations designed to establish a new sTLD. In other cases . . . 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.¹²

As the Board well knows, the evaluators raised questions about eight of the ten applications ICANN received, and the Board therefore extended the evaluation stage for those applications. With respect to ICM, the independent evaluation team found that the business and technical RFP Criteria had been satisfied, but the sponsorship evaluation team raised questions about how the community was being defined—while noting, nevertheless, the strong support from industry members in the United States and Canada.¹³ In response, ICANN specifically invited ICM to “suggest how the issues reported by the Sponsorship team might be addressed,” presumably so that the Board could reach a decision about the validity of those concerns.¹⁴

¹² Letter from Vint Cerf to Peter Zangl (17 Jan. 2006), *available at* <http://www.icann.org/correspondence/cerf-to-zangl-30jan06.pdf> (“Cerf-Zangl letter”).

¹³ Appendix D – Evaluation Reports – Technical, New sTLD Applications, Evaluation Report, pp. 110-113, *available at* <http://www.icann.org/tlds/stld-apps-19mar04/PostAppD.pdf> (“sTLD Initial Evaluation Reports”). The evaluators raised the same sponsorship question with respect to numerous other applicants—now under contract with ICANN—that relied on self-identified communities.

¹⁴ Letter from Kurt Pritz to Stuart Lawley (31 July 2004) (transmitting ET reports) (note that actual date of letter was 31 August 2004), attached as Annex 2 hereto.

The record amply reflects that, in the ensuing months, the Board extensively considered *and disposed of* any questions concerning the sponsorship criteria. Dr. Cerf noted the “extensive” and “broad discussion” by the Board regarding “whether or not the [.xxx] application met the criteria within the RFP particularly relating to whether or not there was a ‘sponsored community.’” He observed that, based on those discussions, ICM’s presentations, and ICM’s supplementary materials, “the Board authorized the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms with ICM.”¹⁵ In Dr. Cerf’s own words (as shown above), this meant that the application *met the Criteria*.¹⁶ Mr. Pritz’s official report in Luxembourg City could not be clearer about the significance of the Board’s decision to move forward: As he noted, .xxx was one of the “[f]our other applicants” who were finally “found to *satisfy the baseline criteria*.”¹⁷ Dr. Twomey similarly observed that in those cases where the Board of Directors reevaluated the evaluators’ negative reports, “the applicants answered questions and clarified issues that had been of concern to the evaluators *to the satisfaction of a majority of the Board and/or a majority of the Board concluded* that there was enough additional or clarifying information provided beyond the initial information, *that a different result was appropriate*.”¹⁸ And finally, even the GAC acknowledged, in its Wellington

¹⁵ Cerf-Zangl letter, *supra*.

¹⁶ *Id.* (referring to an applicant’s meeting all three criteria before moving on to negotiations) (emphasis added).

¹⁷ ICANN Meetings in Luxembourg, Public Forum Part II, ICANN (14 July 2005), <http://www.icann.org/meetings/luxembourg/captioning-pf2-14jul05.htm> (transcript of live captioning) (emphasis added).

¹⁸ Letter from Paul Twomey to Mohamed Sharil Tarmizi (4 May 2006), *available at* <http://www.icann.org/correspondence/twomey-to-tarmizi-04may06.pdf>. Dr. Twomey nevertheless asserted that the determination as to .xxx had *not* been made, which is simply inconsistent with his report concerning the well-established and applied ICANN procedures.

communiqué, that the Board’s decision was a “determination that the application *had overcome the deficiencies noted in the Evaluation Report.*”¹⁹

Consistent with its announced procedures and with its treatment of all other applicants, the Board, prior to approving commercial negotiations, extensively discussed whether .xxx met the sponsorship criteria on 24 January 2005, received a presentation from, and participated in a discussion with, ICM on the issue on 3 April 2005, and met again about the sponsorship question on 3 May 2005—as Dr. Cerf’s letter makes clear.²⁰ Once the Board approved commercial negotiations on 1 June 2005 (using exactly the same words with which it had moved other applications forward) however, the Board’s focus shifted exclusively to contract issues. The Board minutes and resolutions reflect the Board’s specific interest from that time forward in including terms and conditions such “that the TLD sponsor will have in place adequate mechanisms to address any potential registrant violations of the sponsor’s policies.”²¹

Throughout the remainder of 2005 and the first half of 2006, right up to the 10 May 2006 meeting at which it rejected the proposed agreement, the sole focus of Board discussion about

¹⁹ GAC Communiqué – Wellington, New Zealand (28 Mar. 2006), <http://www.icann.org/committees/gac/communique-28mar06.pdf> (emphasis added).

²⁰ See Cerf-Zangl letter, *supra*. See also Special Meeting of the Board, Minutes, ICANN (24 Jan. 2005), <http://www.icann.org/minutes/minutes-24jan05.htm> (“There was extensive board discussion regarding the application in particular focused around the issue of whether a sponsored community criteria of the RFP was appropriately met.”); Special Meeting of the Board, Minutes, ICANN (2 May 2005), <http://www.icann.org/minutes/minutes-03may05.htm> (“[T]here was broad discussion of this matter regarding whether or not the application met the criteria within the RFP particularly relating to whether or not there was a “sponsored community.”).

²¹ 15 Sept. 2005 Transcript, *supra* (“ICANN President and General Counsel are directed 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.”).

ICM’s application was the extent to which the .xxx “sTLD agreement[] guaranteed compliance by the registry operator with the terms” and contained sufficient enforcement and decision-making processes.²²

Likewise, staff negotiations beginning in June of 2005 were limited to the discrete contractual issues appropriate in the second stage of the sTLD application process. To put it simply, sponsorship was not on the table for a full year after the Board’s approval, when Dr. Twomey briefly referenced his concerns about community—and then immediately discounted them as ground for rejecting the agreement.²³ And following Dr. Twomey’s remarks in the May meeting, the issue did not resurface again until 12 February 2007.

As we show below, there is no valid reason that sponsorship *should* be on the table. In fact, this attempt to reopen settled issues should be understood for what it is: a response to blatant political pressure, to find an excuse to avoid acknowledging that ICM has crossed every

²² Meeting Minutes for Special Meeting of the Board, ICANN (18 Apr. 2006), <http://www.icann.org/minutes/minutes-18apr06.htm> (“Various board members discussed concerns about the manner in which sTLD agreements guaranteed compliance by the registry operator with the terms, and whether the right level of policy enforcement processes are currently in place within the sTLD agreements to cover communities as complex as the adult entertainment community. Concerns were also expressed about how policy processes would be set up and whether an ICANN-like policy process was quick enough for the community in the .xxx application.”).

²³ See Voting Transcript of Board Meeting, ICANN (10 May 2006), <http://www.icann.org/minutes/voting-transcript-10may06.htm> (“Having been ill and not been a participating member of the ICANN board that looked at this issue of sponsorship during the meeting in Mar Del Plata—I was a member of the board, but I wasn’t in attendance—I’ve always held concerns about the sponsorship test for this particular application. . . . Probably more importantly, the contractual terms put forward by ICM to meet the sorts of public-policy concerns raised by the Governmental Advisory Committee in my view are very difficult to implement, and I retain concerns about their ability to actually be implemented in an international environment where the important phrase, ‘all applicable law,’ would raise a very wide and variable test for enforcement and compliance. And I can’t see how that will actually be achieved under the contract.”)

“t” and dotted every “i” on the path to securing approval of its proposed sTLD.²⁴ As one Board member noted, it would be inappropriate to “reopen issues if they had already had been decided by the Board.”²⁵ And indeed, ICANN’s “Core Values” include a commitment to “mak[e] decisions by applying *documented policies* neutrally and objectively, with integrity and

²⁴ The political pressures ICANN faces have been anything but subtle, beginning in August of 2005 with the United States’ last minute intervention to knock ICM’s contract off the ICANN Board calendar. Although the Commerce Department attempted to disguise its intervention as an expression of only “procedural concerns,” the government has recently come clean, frankly admitting that it controls the introduction of new domains such as .xxx. through its retained “policy control over and operational oversight responsibility for modifications to, and maintenance and dissemination of, the ‘authoritative root zone file.’” Reply to Plaintiff’s Consolidated Opposition to Defendant’s Motion to Dismiss and for Summary Judgment, and Cross-Motion for Summary Judgment, *ICM Registry, LLC v. Department of Commerce*, No. 06-0949, at 8-9 (D.D.C. filed Oct. 16, 2006) (footnotes omitted). The U.S. government’s actions in fostering ICANN’s delay and disregard of its own procedures raise significant constitutional and statutory questions.

Meanwhile, the issue of pornography on the Internet has taken center stage in Australian domestic politics, with government ministers and opposition critics competing to demonstrate their tough anti-pornography stances. The issue reached fever pitch just as the community gathered in Wellington last year. In the midst of this scuffle, Australia’s communications minister publicly condemned .xxx to promote the Government’s anti-pornography credentials. *See, e.g.*, Louisa Hearn, “Australia wants .xxx domain on hold,” Sydney Morning Herald, 28 Mar. 2006, at <http://www.smh.com.au/news/breaking/australia-wants-xxx-domain-on-hold/2006/03/28/1143441141727.html> (“Last week Opposition Leader Kim Beazley said internet service providers (ISPs) would be forced to block violent and pornographic material before it reaches home computers if Labor won the next federal election. After initially scoffing at the announcement, Senator Coonan then said the Government had not ruled out implementing such a filtering system itself.”) The issue remains a hot topic in Australia, as the opposition has recently taken the government to task for failing to deliver on promised blocking tools. Lachlan Heywood, “Internet Raises Lib’s Ire,” Courier Mail, 2 Feb. 2007, at <http://www.news.com.au/couriermail/story/0,23739,21159702-5003418,00.html>. (“Anti-porn Liberal senator Guy Barnett will meet Communications Minister Helen Coonan next week amid mounting concern children are not being protected from offensive material on the internet.”) Not coincidentally, Senator Coonan has once again sought to deflect criticism of her government’s performance by shifting attention to .xxx. *Id.*

²⁵ 12 Feb 2007 Minutes, *supra*. Based on the subsequent discussion, it appears the new Board members were not appropriately briefed on the full import of the Board vote on 1 June 2005.

fairness.”²⁶ Those “documented policies” set forth a *one time review phase* concerning the RFP Criteria—not a never-ending game of whack-a-mole, in which applicants may be required over and over to address questions on long-resolved issues.

Moreover, reopening this preliminary issue would be inconsistent with ICANN’s obligations under its Bylaws to (1) employ procedures that are transparent and “designed to promote fairness,” and (2) avoid applying “its standards, policies, procedures, or practices inequitably” or in a manner that singles out a particular party for “disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”²⁷ It would be grossly unfair to subject ICM to an arbitrary second eligibility review stage never contemplated in ICANN’s documented policies, of which ICM had no prior notice, and that will impose new, unforeseen burdens on ICM and the sponsored community. The notion that ICANN’s processes may be so malleable not only runs counter to ICM’s settled expectations, but threatens to undermine the confidence of the Internet community in ICANN’s sTLD process and its compliance with applicable law and its own Bylaws and Core Values.

In sum, the integrity of this application process depends on acknowledging the finality of the Board’s determination on 1 June 2005 that ICM’s application meets the sponsorship criteria. Similarly, the Board must acknowledge that the pendency of the commercial negotiations (which have dragged on for two years, despite ICM’s reasonable and constructive contributions) does

²⁶ Bylaws For Internet Corporation for Assigned Names and Numbers (as amended effective 28 Feb. 2006), Art. I, Sec. 2, <http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm> (“ICANN Bylaws”).

²⁷ ICANN Bylaws, Art. III, Sec. 1, *supra*.

not present a basis for revisiting that earlier decision. Nothing other than the terms and conditions of the registry agreement should or may be on the table at this late date.²⁸

2. *There Is No Legitimate Question Regarding Sponsorship, as ICM Has Precisely Defined the Sponsored Community and Demonstrated the Support of that Community.*

ICM fully disposed of any questions regarding the sponsorship criteria prior to 1 June 2005, and the Board determined, based on ICM's showing, that the application precisely defined a sponsored community and demonstrated that community's broad and deep support for the .xxx domain. No material facts have changed since that time that would in any way change that determination or the underlying analysis.

The RFP requires sTLD proposals to address the needs and interests of a clearly defined community that is:

Precisely defined, so it can readily be determined which persons or entities make up that community; and

Comprised of persons that have needs and interests in common but which are differentiated from those of the general global Internet community.²⁹

ICM's application meets both criteria. It precisely defines the sponsoring community for .xxx as certain providers within the easily identifiable, online adult-entertainment community. As ICM explained, the specific subset of adult entertainment providers that make up the sponsored community are those responsible online adult entertainment providers that desire to work

²⁸ And it goes without saying that ICANN should resist the temptation to manufacture contract-based objections as an alternative means of avoiding approval of ICM's application.

²⁹ RFP Criteria, *supra*.

collectively to develop industry guidelines and best practices and wish to establish a space on the Internet where those guidelines and best practices can be implemented.³⁰

To be sure, this community is “self-identified.” Rather than comprising all online adult entertainment providers, the sponsored community for .xxx consists only of those providers who elect to participate in (i) the creation of an easily identifiable virtual marketplace for adult entertainment operating in accordance with industry best practices, and (ii) the development of a forum for the industry to interact with public interest and civil liberties organizations to develop such best practices. As ICM explained, “the referenced Community consists generally of websites that convey sexually-oriented information *and for which a system of self-identification would be useful.*”³¹ This is certainly a subset of the online adult industry, and ICM has committed resources to the defend the right of those webmasters who do not share the

³⁰ See New sTLD RFP Application, .xxx, Part B. Application Form, *available at* <http://www.icann.org/tlds/stld-apps-19mar04/xxx.htm>. The application included the following statements:

[.xxx is intended] to serve the needs of the global responsible online adult-entertainment community (‘Community’).

[T]he referenced Community consists generally of websites that convey sexually oriented information and for which a system of self-identification would be beneficial.

[.xxx will] serve the unique needs of the responsible online adult-entertainment industry.

IFFOR offers a unique framework for the responsible online adult-entertainment industry to work in conjunction with the broader Internet community to develop responsible business practices.

Id.

³¹ *Id.*

community's goals not to use the .xxx sTLD.³² In contrast, those who share these goals and wish to be a part of that common endeavor are, and will be, easily identifiable by their support of .xxx and their intention to use (and ultimately their use of) the .xxx sTLD.

Nothing in the 2004 RFP process precluded applicants from serving a self-identified sponsored community. To the contrary, several of the applicants with whom ICANN has now contracted expressly relied on self identified communities. Specifically,

- The “.mobi” application defined the self-identified, sTLD community as “Consumers, Providers, and the Representatives of such Consumers and Providers and other parties . . . interested in participating in the creation and development of the sTLD for the purpose of delivering a consistent and therefore predictable, high quality user experience across products, services, and content made available through domain names registered within the sTLD namespace.”³³ **ICANN approved the .mobi contract in June of 2005.**
- The “.tel-Telnic” sTLD defined its community as “those people and companies who wish to store communications contact details in one place. The community is *defined by their use of this sTLD*; the role of the sTLD is to act as the ‘well known place’ to store and publish contact information.”³⁴ **ICANN approved the .tel contract in May of 2006.**
- For .asia, the sTLD community is defined as all *self-identified participants that have a stake* in the Charter of the TLD as described in Part 1 of this Appendix S. (The DotAsia registry will serve the Pan-Asia and Asia Pacific community.)³⁵ **ICANN approved the .asia contract in October 2006.**

³² Indeed, ICM believes the voluntary nature of this space is critical to serving the sponsored community and has committed resources to support and preserve that voluntary nature of this space. *See id.* Moreover, there is little serious concern that self-regulatory activities like this will lead to censorship or ghettoization of the adult industry, and explained in detail in note 64 below.

³³ New sTLD RFP Application, .mobi, Part B. Application Form, *available at* <http://www.icann.org/tlds/stld-apps-19mar04/mobi.htm> (emphasis added).

³⁴ New sTLD RFP Application, .tel-Telnic, Part B. Application Form, *available at* <http://www.icann.org/tlds/stld-apps-19mar04/tel-telnic.htm> (emphasis added).

³⁵ New sTLD RFP Application, .asia, Part B. Application Form, *available at* <http://www.icann.org/tlds/stld-apps-19mar04/asia.htm> (emphasis added).

- The .cat community is defined as those who use the Catalan language for their online communications, and/or promote the different aspects of Catalan culture online, and/or *want to specifically address their online communications* to that Community.³⁶ **ICANN approved the .cat registry agreement in September of 2005.**

Dr. Twomey, though he belatedly declared a “longstanding” concern about the legitimacy of the .xxx sponsored community, specifically endorsed the notion of the self-identified sponsored community when discussing .tel-Telnic and .mobi. In his own words:

The TEL community is sponsored by Telnic and intended to serve individuals, persons, groups, businesses, organizations, or associations that wish to store and publish their contact information using the DNS. This model can be compared to that of the MOBI community . . . that includes individual and business consumers . . . *who are interested* in a predictable user experience made available via domain names. *Members of both the TEL and the MOBI communities are self-identified.*³⁷

The ICM application used the very same approach to define the sponsored community, referencing adult webmasters who were, by definition, “interested in” the responsible virtual marketplace that would be “made available” through the use of the .xxx sTLD.

ICM not only defined the community, but also demonstrated the community’s overwhelming support for the application. In fact, ICM demonstrated a level of support far exceeding that of any other applicant, with the possible exception of .cat. ICM has demonstrated support from webmasters, affiliate program operators, content providers, distributors, portal sites, traffic generators, service providers, and other industry participants.

The overwhelming record of community support includes the following:

- In 2004, in connection with the independent evaluation process, ICM submitted letters of support from industry members with combined points of presence in more than 35 countries, responsible for generating a substantial share of the global online

³⁶ New sTLD RFP Application, .cat, Part B. Application Form, *available at* <http://www.icann.org/tlds/stld-apps-19mar04/cat.htm> (emphasis added).

³⁷ Letter from Paul Twomey to Neil Edwards (6 May 2006), *available at* <http://www.icann.org/correspondence/twomey-to-edwards-06may06.pdf> (emphasis added).

adult-entertainment revenue and involving many thousands of adult-content webmasters.³⁸

- Before the proposal became fodder for partisan politics in the U.S., the vast majority of public comments received in connection with ICM’s application were supportive. In fact, in the sTLD public forum opened in April of 2004, the ICM Application received more positive comments than any other sTLD application—and a far higher percentage of positive comments than most other TLD applications.³⁹
- As previously reported, ICM has received tens of thousands of pre-reservations of .xxx names from the owners of corresponding strings in another ICANN-recognized TLD.⁴⁰ As of February 2007, without any advertising whatsoever, that number exceeded 75,000—*double* the best-case business projections included in ICM’s application.⁴¹
- Earlier this year, ICM documented the more than 1,200 unsolicited expressions of support from adult webmasters it has received since June 2005.⁴²

Moreover, all this support for .xxx comes from independent sources that are unaffiliated with ICM.⁴³ We believe, moreover, that this support will grow as concerns about the exposure

³⁸ The support of these companies was documented in ICM’s confidential response to the sponsorship evaluations team’s request, which documentation was, and is, available to the Board on a confidential basis.

³⁹ [stld-rfp-xxx] Chronological Index, ICANN, <http://forum.icann.org/lists/stld-rfp-xxx/> (last updated 18 May 2004). We note, however, that .cat specifically provided an alternative mechanism for public endorsements, which they apparently received in abundance.

⁴⁰ ICM Registry Name Reservation, ICM Registry, <https://domains.icmregistry.com/> (last accessed 2 Mar. 2007).

⁴¹ Opponents have attempted to discount these pre-reservations at “defensive,” but ICM’s analysis shows that only 0.1% of the pre-reservations have been submitted by those who have expressed opposition to .xxx in the three public comment periods and on industry bulletin boards.

⁴² ICM provided further details to ICANN staff.

⁴³ This is in stark contrast to the support for Telnic, which, according to the evaluators, came overwhelmingly from researchers and developers “under contract with the Telnic organization” or from sources who at most had offered to “consider” participating in the Policy Advisory Group. sTLD Initial Evaluation Reports at 102-106, *supra*. Nevertheless, ICANN ultimately overruled this finding and approved .tel-Telnic.

of children to adult content online increase, and as pressures for labeling of online adult content grow.

It has been suggested that the support for ICM's application should be discounted unless ICM reveals the identities of its supporters, including the letters of support (which have been available to the Board on a confidential basis for over two years). Such a policy would conflict with ICANN practice: Telnic's support was similarly provided to ICANN on a confidential basis only, yet this fact was not used as a basis to dismiss the support for .tel.⁴⁴ And there is no suggestion in that case that supporters were threatened and/or harassed, as has been the case here.⁴⁵ Moreover, the adult industry is traditionally and particularly sensitive about privacy. The Free Speech Coalition, to be sure, does not disclose its membership list. That was the case even in connection with ongoing litigation related to the Department of Justice regulations

⁴⁴ See, e.g., this exchange on the .tel-Telnic public forum:

Without the explicit support from technology standards bodies, industry trade organisations nor the global Information, Communication and Telecommunication (ICT) vendor community, how can it best be determined if the Telnic proposed .tel TLD has the potential to fulfill its promise to deliver on its unique TLD value proposition? And, what are the potential risks and associated consequences to the TLD industry if it can not?

Michael J. O'Farrell, Response to Telnic – Why did you choose not to provide specifics, details nor transparent disclosure to any of the questions I asked?, [tel-tld-agreement], ICANN (10 May 2006), <http://forum.icann.org/lists/tel-tld-agreement/msg00011.html>. In response, Telnic responded that it need not disclose its supporters, as the process insured that the community would be involved in policy making: “*There is publicly available documentation that details the process of policy.*” Julian Rose, Response to Mr O'Farrell's comments, [tel-tld-agreement], ICANN (8 May 2006), <http://forum.icann.org/lists/tel-tld-agreement/msg00008.html> (emphasis added) (referencing “Telnic's response to Neil Edwards' comments,” available at <http://forum.icann.org/lists/tel-tld-agreement/pdfXnFnZKkwfU.pdf>.)

⁴⁵ E.g., “If the .xxx law is passed, I'm going to hire an army of mercs to slowly torture kill every child that belongs to anybody who has any tie of responsibility to the whole ` .xxx' proposal.” 04-30-2006 9:21 am by sickbeatz.

promulgated under 18 U.S.C. § 2257, where the FSC sought - and received - an order appointing a special master to review its secret membership list.⁴⁶

To be sure, ICM's application has not been without opposition. ICM brought this to staff's attention early on, and specifically discussed it with the Board in Mar del Plata in April 2005.⁴⁷ **But the presence of opposition does not detract from the existence of a well-defined and supportive community.** And while this would be the case even if the opposition were relatively large, here, the size and significance of the opposition is dwarfed by the overwhelming tide of support from within the sponsored community. Indeed, as discussed below, review of postings to the public forums and industry boards reveals that, in contrast to the myriad unsolicited expressions of support ICM has received and the thousands of pre-registrations described above, those webmasters who *oppose* .xxx number in the hundreds, and constitute only a fraction of the estimated tens of thousands of adult webmasters.

Moreover, even this likely overstates the opposition, which has, as ICM has shown, resorted to trickery and deception in an effort to inflate its size and significance. For example, the opposition has described the .xxx forum at the xBiz show in California this past winter as a "jam-packed near capacity crowd" of adult webmasters opposed to the .xxx domain. In fact, one such opponent apparently conveyed this false assessment directly to Dr. Cerf just before

⁴⁶ "Since the Coalition **refuses to provide the government with a list of its members**, the way the Justice Department will determine if some entity is eligible for inspection is by inquiring of a "Special Master" to be appointed by the Court, to whom FSC will give a copy of its membership list solely for the purpose of answering such inquiries." *See*, "FSC Members Dodge 2257 Bullet, At Least For Now—But It's Not Too Late For Slackers" (6-23-2005), available at: http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=231600.

⁴⁷ Appendix E – Supplemental/Follow-up Materials (updated 30 November 2005), <http://www.icann.org/tlds/stld-apps-19mar04/>.

the 12 February meeting.⁴⁸ Nothing could be farther from the truth. Even outspoken opponents have admitted that the “crowd” consisted of only “several hundred” webmasters⁴⁹—as compared to the nearly 1000 webmasters who, according to the organizers, attended the conference. As one opponent of .xxx stated: “I was pretty disappointed at the turn out. The 2257 seminar was standing room only, and the .xxx seminar allowed us to stretch out and do jumping jacks without bothering anyone else.”⁵⁰ And indeed, the photograph below shows large numbers of empty seats throughout the room during the .xxx forum, in contrast to other sessions that day.⁵¹

⁴⁸ 12 Feb 2007 Minutes, *supra* (“Vint Cerf noted that he had been notified by email that there was a meeting of the adult online community that had recently taken place to discuss the creation of the new .xxx domain, and that the meeting was attended by ICM.”).

⁴⁹ See J D Obenberger, Comments on the new Appendix S and the .xxx TLD, [xxx-icm-agreement], ICANN (16 Feb. 2007), <http://forum.icann.org/lists/xxx-icm-agreement/msg00933.html>.

⁵⁰ Dot-XXX Seminar Raises Ire of Opposing Webmasters, comment of baddog (7 Feb. 2007, 11:40 pm) <http://www.gfy.com/showthread.php?p=11880361-post11880361>. “baddog” repeated some, but not all of this information, on the ICANN forum. baddog, opposition to .xxx and an open letter to Stuart Lawley, [xxx-icm-agreement], ICANN (9 Feb. 2007), <http://forum.icann.org/lists/xxx-icm-agreement/msg00648.html>.

⁵¹ Photograph shown in Figure 1 is available at <http://www.fubarwebmasters.com/current/xbizla07/F/F1.htm>. Photos from other sessions that day are available at <http://www.fubarwebmasters.com/current/xbizla07/xbizla07.htm>. ICM has also provided, under separate cover, a memorandum from Robert Corn-Revere, who attended the meeting.

Redacted at request of FUBAR Webmasters:

<http://icann.org/correspondence/belville-to-icann-03apr07.pdf>

Figure 1:

The “jam-packed,” “standing-room only” crowd at the xBiz Hollywood .xxx forum

The other source of the supposedly active opposition to .xxx from within the community comes from posts on the ICANN public forum. As noted, this at best amounts to several hundred postings. According to ICANN’s own count, in fact, fewer than 100 webmasters participated in the public forum following the 5 January 2007 contract posting.⁵² And ICM provided excerpts from industry boards—first in 2005 and again more recently—indicating that many of these messages were generated by automated tools used to send repeated posts using false email addresses and otherwise manipulate the public record.⁵³ Further, it is clear that

⁵² 12 Feb 2007 Minutes, *supra* (“Rita Rodin indicated that a note in the Board materials prepared by staff indicated that during the 5 January through 5 February 2007 public comment period, 88 commentators identified themselves as web masters of adult content of whom 65 were opposed to the development of the .XXX domain and 23 were in favor.”).

⁵³ Annex 3 contains copies of postings in advance of the Board’s 10 May 2006 vote reflecting efforts to manipulate the public forum:

webmasters opposed to .xxx have misrepresented their identities or failed to disclose their interests in order to advance their cause and stir up opposition. On the industry chat board YNot.com, three small adult site operators explicitly discussed posing as concerned parents, churchgoers, and librarians in advocacy opposing the .xxx sTLD.⁵⁴ More recently, one webmaster boasted about distributing flyers (featuring a photograph of ICM's President, Stuart Lawley) at evangelical churches with the headline ".XXX WILL EXPOSE YOUR CHILDREN TO MORE PORN than ever. This is the man behind it. VOTE NO! NOW! .XXX-icm-agreement@icann.org."⁵⁵

The industry boards reveal that the vocal opponents of .xxx are dismayed by the lack of response to their repeated battle cries. One webmaster asks, "Why is it that only myself and FTP

I built a little email script that automatically emails icann to reject the new .xxx proposal. I made this script before but I didn't realize you have to confirm your email. Basically what it does is picks a random email at dodgeit.com as the return address. After you click send, you will be shone a link to the email inbox so you can confirm the email from icann.

I have sent it twice from two different addys. Yesterday and today.

Ive sent icann seperate letters from 3 different names.

i have sent 5 all different style

Good point. I'll send more emails from my other addresses Monday

we should outsource sending anti-xxx emails to icann from different email addresses and IP's to you, in that case .xxx will never get approved.

⁵⁴ Annex 4 contains a copy of postings from GFY.com, forwarded to ICANN soon after the Board approved .xxx, describing an email campaign in which webmasters opposing .xxx would take advantage of their ability to "appear as a even larger group than we actually are because we are in fact owners of multiple websites. Each of which is an individual business which can contact our government representatives. Some of us are just a couple, others are hundreds." They apparently would write in, first, as webmasters threatening to double pornography on the Internet, and second, as Christian conservatives shocked by the proposal.

⁵⁵ Annex 5.

[Brandon Shalton, known as “Fight the Patent”] have made a comment to ICAAN (*sic*).”⁵⁶

Another writes:

ICM claims they have over 1,000 adult webmasters who have sent them emails of support. Doesn’t matter if you believe that or not, we couldn’t get 1,000 adult webmasters posting up against .xxx the last time, and even worse numbers showed up this time...in fact, probably more pro-.XXX supporter numbers are there.⁵⁷

Mr. Shalton, one of the most active opponents of .xxx, sums up industry opposition with these words: “The posting turnout to show a public demonstration to ICANN that .XXX is not wanted by the adult community has been nothing short of pathetic.”⁵⁸ And the “Polish Aristocrat,” who boasts of off-the-record communications with Dr. Cerf,⁵⁹ summed up the significance of this group as follows: “even on GFY there are only the same 10 ppl discussing .xxx all the time.”⁶⁰

In short, the opposition to .xxx is substantially overblown.

It is also irrelevant to the question whether ICM has met the sponsorship criteria, for each of the following reasons:

- The existence of a well-defined, supportive sponsored community is a demonstrated fact, which is no less true because there is opposition from some corners.
- The existence of some opposition, and the resulting back and forth, may actually be a sign of health, as opposed to a weakness. As Dr. Twomey has observed in other contexts, domain policy development activities are “inherently noisy, because they have to fight about things they think are important to their interest groups.”⁶¹ The

⁵⁶ [Annex 6](#).

⁵⁷ [Annex 7](#).

⁵⁸ *Id.*

⁵⁹ Posting of “Polish Aristocrat on GFY.com date 8 May 2006 (“from my todays correspondence with the ICANN chairman it looked like he isnt necessarily in favor of .xxx”). Attached as [Annex 8](#).

⁶⁰ [Annex 9](#).

⁶¹ See ICANN Meetings in Kuala Lumpur, ICANN Public Forum, ICANN (23 July 2004), <http://www.icann.org/meetings/kualalumpur/captioning-public-forum-23jul04.htm> (“The

result of such discourse ultimately may be a more cohesive community and policies that are better informed and more globally supported.

- Nothing in the RFP Criteria supports any distinction between a self-identified community with polite detractors (e.g., .tel and .mobi) and a self-identified community with aggressive detractors.
- The opposition that exists may be strategic rather than substantive, driven by concerns about competition, revenue sources, and turf. For example, one industry trade association—the Free Speech Association—opposes .xxx because it “ghettoizes” the industry, makes adult entertainment an easy target for government intrusion, and will lead to filtering that could “effectively eliminate much of the adult content currently available on the Web.”⁶² Notably, however, FSC nevertheless *supports* the use of ASACP’s voluntary self-label,⁶³ and the FAQs for that label specifically dismiss these concerns as scare-mongering, and note that “*the bottom line is, site labeling will help keep your material from reaching kids and other people who don’t want to view adult content, but will leave it accessible for consenting adults.*”⁶⁴

ICANN structure as it . . . has been put together . . . has a home for everyone of these interest groups Those who create the problem solve the problem. It’s bringing together a model for coordination and cooperation of all of these various interest groups. It is inherently noisy, because they have to fight about things they think are important to their interest groups. But it is a model to ensure all these people, and others, are represented.”).

⁶² Free Speech Coalition Homepage, <http://www.freespeechcoalition.com> (last accessed 2 Mar. 2007).

⁶³ Press Release, New ASACP Website Label Goes Live at RTAlabel.org, ASACP (6 Nov. 2006), <http://www.asacp.org/press/pr110606.php>.

⁶⁴ See frequently asked questions (faq’s), ASACP, <http://www.asacp.org/faq.php> (last accessed 2 Mar. 2007) (emphasis added). See also Frequently Asked Questions & Common Concerns, RTA, <http://www.rtalabel.org/faq.php> (last accessed 2 Mar. 2007) (“*Won’t labeling set me up for censorship?* Site labels, keywords, domain names—even certain types of images—can all be used by ISPs or other online intermediaries to filter out content. But those providers already filter based on numerous criteria—for subscribers who want that kind of filtering. They don’t just impose filtering on unsuspecting users; that would be disastrous for their business. As for government censorship: if certain conservative lawmakers could get away with making all pornography illegal, they would. But they can’t. Even the age verification provisions in COPA (the Child Online Protection Act) were kept tied up in the courts for years! Are you worried about the government ordering all ISPs to block all porn sites for all users? That’s simply not a realistic concern. *The bottom line is, site labeling will help keep your material from reaching kids and other people who don’t want to view adult content, but will leave it accessible for consenting adults.*”) (emphasis added).

- And finally, some opponents may turn out to be members of the sponsored community in the end. That would explain, for example, Diane Duke’s (FSC Executive Director) closing question at the xBiz Hollywood Forum: “Will you work with us [FSC]?” (Mr. Lawley’s answer was, of course, yes.) Similarly, one of the more vocal opponents of ICM nevertheless requested an IFFOR board position, in writing—suggesting that his current opposition may be more strategic than substantive.⁶⁵

In sum, ICM has both defined the sponsored community with particularity, and demonstrated that community’s deep and broad support. Nothing has changed since ICM made these showings in the first phase of the review process, when this issue was firmly and finally decided in ICM’s favor: If anything, the wave of pre-registrations received by ICM indicate that support has been expanding, and that the community has been coalescing into an identifiable group of like-minded, responsible adult content webmasters. Indeed, the pre-registrant supporter numbers *far* exceed the level of support shown by *any* sTLD applicant—including the very impressive number of supporters who emailed .cat. The Board has approved other self-identified communities, including those that were the subject of far less support and far more significant opposition. There simply is no legitimate and fair question on the table today concerning ICM’s satisfaction of the sponsorship criterion.

3. *The Board Appears to Be Fashioning a New Test, Which It Proposes to Apply Exclusively to .xxx, in Clear Violation of ICANN’s Bylaws.*

The Board appears to be fashioning a *new* RFP criterion, exclusively for .xxx. Specifically, it seems to be suggesting now that ICM must demonstrate the absence of *any* significant opposition for .xxx in order to satisfy the sponsorship criterion. Under this new, putative test, opposition from a few adult webmasters or from individuals or interest groups apparently overrides the overwhelming evidence provided by ICM to demonstrate that it has satisfied the sponsorship criterion.

⁶⁵ Annex 10.

The RFP Criteria do not include any suggestion that an application will be rejected if there is any public opposition to it, nor do they require a showing that all possible stakeholders are united in support. Certainly, neither the Board nor the independent evaluators ever referenced such a requirement during evaluation of ICM's application. And while the sponsorship evaluators did express concerns about *defining* the community, and even about the requisite level of geographic diversity that should be shown among the community members, the requisite level of support demonstrated by ICM was never in question during that evaluation. In any event, the Board referred ICM's application for commercial negotiations notwithstanding the existence of some opposition, of which it was fully informed.

Moreover, the Board has approved other applications notwithstanding the existence of significant opposition. For example, the public forum on .tel-Telnic consisted of 13 comments—four of which were from Telnic management. The remaining comments were negative—and included comments posted by Telefonica,⁶⁶ the European Telephone Network Operators' Association (ETNO),⁶⁷ and Japan Network Information Center (JPNIC).⁶⁸ ETNO and Telefonica cannot be dismissed as insignificant under any definition, and in relative terms are considerably more significant in the sTLD context than a few hundred opponents among the tens of thousands of adult webmasters. Indeed, as Susan Crawford recognized at the 12 February

⁶⁶ Francisco Cabanas, The trouble with protocol based TLDs (Both .tel and .mobi), [stld-rfp-tel-telnic], ICANN (29 Apr. 2004), <http://forum.icann.org/lists/stld-rfp-tel-telnic/msg00005.html>.

⁶⁷ Gerd Wiedenhaupt, ETNO comments on proposed new sponsored Top Level Domains, [stld-rfp-tel-telnic], ICANN (30 Apr. 2004), <http://forum.icann.org/lists/stld-rfp-tel-telnic/msg00008.html>.

⁶⁸ dom-sec@xxxxxxxxx, Comments from JPNIC Domain Name Policy Study Group, [stld-rfp-tel-telnic], ICANN (30 Apr. 2004), <http://forum.icann.org/lists/stld-rfp-tel-telnic/msg00009.html>.

2007 Board meeting, “No group can demonstrate in advance that they will meet the interests and concerns of all members in their community and . . . this was an unrealistic expectation to place on any applicant.”⁶⁹ Further, as she noted, “if that test was applied to any sponsor group for a new sTLD, none would ever be approved.”⁷⁰

The degree to which this line of questioning amounts to grasping at straws in the hopes of justifying inaction on or rejection of .xxx is made painfully apparent in the 12 February minutes: the suggestion is made that the empty chairs at the xBiz Hollywood Forum might constitute grounds for rejection because they allegedly show that there was no “groundswell” of support for the .xxx domain. Neither the RFP Criteria nor any previous Board action suggests that supporters must “rally” behind an applicant at distant trade shows in order to demonstrate the requisite level of support or otherwise meet the sponsorship criteria. Indeed, if the Criteria called for public displays of enthusiasm, it is hard to see how any applicant other than .cat would now be in the root.

Imposition of a higher, unprecedented standard on ICM constitutes disparate treatment of .xxx—and ultimately is little more than a content-related condition motivated by aesthetic and political concerns, as well as a variety of international, inter-governmental and ICANN/government conflicts. The bottom line is that .xxx has become hostage to partisan politics that have *nothing to do with its eligibility or appropriateness as an sTLD under the RFP Criteria*. The proposal to apply an entirely new criterion is simply the latest in a series of attempts to avoid finally approving the ICM agreement, a determination that is long overdue and that is clearly merited.

⁶⁹ 12 Feb 2007 Minutes, *supra*.

⁷⁰ *Id.*

Yet there is no circumstance that would permit ICANN to retroactively apply new criteria to a pending application. Imposing this new “no opposition” criterion on ICM—especially so late in the game—would be grossly unfair and entirely discriminatory. ICANN’s Bylaws strictly prohibit the application of ICANN’s standards, policies, procedures or practices inequitably or singling out any particular party for disparate treatment without substantial and reasonable cause.⁷¹ The Bylaws also require ICANN to operate in an open and transparent manner designed to ensure fairness.⁷² And ICANN’s Core Values require it to make decisions by applying *documented policies neutrally and objectively, with integrity and fairness.*⁷³ None of these requirements or values permit the Board to devise a new, belated criterion that applies exclusively to .xxx, long after the evaluation period is complete, and beyond any test any applicant could conceivably have foreseen.

Finally, imposing a new, supplemental test that was not included in the initial RFP Criteria is legally impermissible. Under the law applicable to ICANN, a party is bound to adhere to the terms of its RFP to the extent other parties rely on those terms to their detriment.⁷⁴ This is true even if the party issuing the RFP expressly states that it reserves the right to reject any and all applicants. In this case, the terms of the RFP clearly stated that ICANN would adhere to the benchmarks and procedures it set forth: “The following criteria *will be used* in the evaluation of all proposals received. They are designed as objective criteria to enable the independent

⁷¹ ICANN Bylaws, Art. II, Sec. 3, *supra*.

⁷² *Id.* at Art. III, Sec. 1.

⁷³ *Id.* at Art. I, Sec. 2.

⁷⁴ *Helmer v. Bingham Toyota Isuzu*, 129 Cal. App. 4th 1121, 1129 n.3 (Cal. Ct. App. 2005); *Swinerton & Walberg Co. v. City of Ingelwood*, 40 Cal. App. 3d 98, 104 (Cal. Ct. App. 1974). See also Restatement of Contracts (Second), § 90.

evaluators to determine which applicants best meet ICANN’s requirements under the Request for Proposal.”⁷⁵ ICANN cannot now rely on a new, “unwritten policy” or unstated criteria as the basis for denying—or even continuing to baselessly delay—grant of the ICM application.⁷⁶ A, a refusal by ICANN to abide by its announced RFP Criteria would expose it to liability on various legal grounds, including promissory estoppel and unfair business practices.

CONCLUSION

In sum, the evaluation period, during which ICM’s eligibility under the RFP Criteria could appropriately be considered, is long over. It cannot be reopened without substantial injury to the legitimacy of ICANN’s procedures and its Core Values. Nor should it be reopened, given that ICM has shown, repeatedly and persuasively, that the sponsorship criterion is readily satisfied: ICM has defined the sponsored community of responsible adult webmasters with particularity and has shown that community’s support and increasing coalescence. There is little opposition, and what there is does not detract from the support of the sponsored community or its interest in the .xxx domain. And finally, any suggestion that the existence of *any* opposition is a relevant factor comes too late in the game and is contrary to the treatment of every applicant. That test is simply not a legitimate part of the review process, and adding it would be a violation of law. ICM’s application has satisfied the RFP review, and the only legitimate concern on the table today is, and should be, completion of the long-pending commercial negotiations.

⁷⁵ RFP at 4 (emphasis added).

⁷⁶ See *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Auth.*, 23 Cal 4th 305, 309, 314 (2000). See also *Engenius Entertainment, Inc. v. Herenton*, 971 S.W.2d 12 (Tenn. Ct. App. 1998) (holding that a party makes a legally binding promise when it issues an RFP and selects an applicant, even if specifics of the agreement remain to be determined through contract negotiations).

ANNEX 1

Excerpts from Public Forum “sTLD Updates”

STLD Update Kuala Lumpur July 2004

THE NEXT REPORT COMES FROM KURT PRITZ ON THE STLD STATUS.

>>KURT PRITZ: GOOD AFTERNOON.

FOR THOSE OF YOU THAT WERE IN ROME OR FOLLOWED EVENTS THERE OR HAVE FOLLOWED EVENTS ON OUR WEB SITE SUBSEQUENT TO THAT, YOU'LL KNOW THAT THE ICANN BOARD RESOLVED THAT THE STAFF OPENED OUR RFP FOR A NUMBER OF NEW TOP-LEVEL DOMAINS AND THEY WILL BE SPONSORED TOP-LEVEL DOMAINS. AND IN ADDITION, THE NEW TLDS WILL BE ANALYZED IN THE NEW GTLD PROCESSES THAT WILL BE DEVELOPED FOR THE IMPLEMENTATION OF THOSE NEW REGISTRIES. SO IN RESPONSE TO THAT, ICANN RELEASED AN RFP AND RECEIVED TEN BONA FIDE APPLICATIONS THAT UPON INITIAL REVIEW THE APPLICATIONS WERE COMPLETE, AND THEN WERE FORWARDED ON THROUGH THE PROCESS. THESE APPLICATIONS ARE LISTED HERE. DOT ASIA, DOT CAT, DOT JOBS, DOT MAIL, DOT MOBI, DOT POST, TWO DOT TEL'S, TWO DIFFERENT MODELS, AND DOT TRAVEL, AND DOT XXX. A PORTION OF THEIR APPLICATIONS ARE POSTED ON THE ICANN WEB SITE. FOR REASONS OF CONFIDENTIALITY AND PROPRIETARY BUSINESS REASONS, PORTIONS OF THE APPLICATIONS ARE NOT POSTED AND THOSE GO TO PROPRIETARY TECHNICAL AND FINANCIAL INFORMATION THAT THE APPLICANTS WERE REQUIRED TO PROVIDE AS PART OF THE PROCESS. FOR THOSE OF YOU THAT FOLLOWED FROM LAST TIME, YOU MAY REMEMBER THIS SLIDE. THIS WAS ESSENTIALLY THE PROCESS FOR EVALUATING THE APPLICATIONS. AFTER THE APPLICANTS COMPLETED AN ONLINE APPLICATION, THEY WERE TO GO INTO AN INDEPENDENT EVALUATION PROCESS, AND I'LL DESCRIBE THAT A LITTLE BIT LATER. **THOSE THAT SATISFIED THE REQUIREMENTS OF THE RFP, AND THERE ARE TECHNICAL REQUIREMENTS, BUSINESS REQUIREMENTS, AND SPONSORED COMMUNITY REQUIREMENTS, THOSE THAT MEET THE REQUIREMENTS OF THAT RFP LISTED THERE WILL GO ON TO SEPARATE TECHNICAL AND COMMERCIAL NEGOTIATIONS.** FROM THAT AGREEMENT, AGREEMENTS WILL BE EXECUTED, AND I'LL PROVIDE A LITTLE MORE DETAIL ON THAT IN A SECOND. THESE ARE THE TIME LINES THAT ICANN ORIGINALLY POSTED FOR PERFORMING THIS WORK. BY THE END OF MARCH, WE HAD COMMITTED TO REVIEWING THE APPLICATIONS FOR COMPLETENESS. THEN A SERIES -- THEN WE HAD A PUBLIC COMMENT PERIOD, AND THEN AT THE CLOSE OF THE PUBLIC COMMENT PERIOD, INDEPENDENT EVALUATORS WOULD TEST THE APPLICATIONS AGAINST THE CRITERIA USING THE INFORMATION IN THE RFP, THE INFORMATION IN THE APPLICATIONS AND THE PUBLIC COMMENTS. THAT

INDEPENDENT EVALUATION WAS SCHEDULED TO CLOSE AT THE END OF JULY, AND THEN FROM THAT POINT FORWARD, **THOSE THAT QUALIFIED WOULD ENTER INTO NEGOTIATIONS.** I JUST WANT TO SPEAK ABOUT THE INDEPENDENT EVALUATION PANELS FOR A SECOND THAT HAVE BEEN FORMED.

THERE'S A PROGRAM MANAGER, AND THE PURPOSE OF THAT PROGRAM MANAGER IS TO KEEP THE PANELS BLIND FROM -- THE PROCESS AND THE PANELS SEPARATE FROM ONE ANOTHER. SO ALL COMMUNICATIONS GO BETWEEN THE -- ALL COMMUNICATIONS BETWEEN THE PANELISTS AND THE APPLICANTS OR THE PANELISTS AND ICANN STAFF WOULD GO BETWEEN THE PROGRAM MANAGER TO KEEP THE PANELISTS SEPARATE AND INDEPENDENT. THERE'S, LIKE I SAID, A TECHNICAL PANEL, A BUSINESS PANEL, AND A SPONSORSHIP PANEL. THERE'S THREE MEMBERS TO EACH PANEL. IT'S AN INTERNATIONALLY DIVERSE GROUP OF WELL-THOUGHT-OF EXPERTS, AND IT'S INTERNATIONAL IN SCOPE. THE PANELISTS REPRESENT -- THE NINE PANELISTS REPRESENT EIGHT COUNTRIES, AND ALL REGIONS OF THE WORLD. THE PANELS WERE ESTABLISHED AND REVIEW WAS BEGUN IN MAY 2004. I GOT AHEAD OF MYSELF BEFORE, BUT IN ORDER TO ACHIEVE THIS BLIND, INDEPENDENT REVIEW, ALL COMMUNICATIONS WERE THROUGH THE PROJECT MANAGER; AND THAT IS COMMUNICATION BETWEEN PANELISTS AND THE ICANN STAFF AND PANELS AND THE APPLICANTS. EACH PANEL OPERATED SEPARATELY AND INDEPENDENTLY OF THE OTHERS, BUT BY AND LARGE, THEY FOLLOWED THE SAME PATH, AND THAT IS THEY MET SIX TO EIGHT TIMES BY TELECONFERENCE. AT THE END OF THE INITIAL EVALUATION, THE PANELISTS AUTHORED A SERIES OF QUESTIONS FOR CLARIFICATION TO EACH OF THE APPLICANTS.

THOSE SETS OF QUESTIONS WERE VERY DIFFERENT FOR EACH APPLICANT DEPENDING UPON THE NATURE OF THE APPLICATION. AND THEN AT THE END OF THE DAY, EACH PANEL WILL REPORT SEPARATELY, THE TECHNICAL PANEL, THE BUSINESS PANEL, AND THE COMMUNITY PANEL. AND ESSENTIALLY, THE FORM OF THE REPORTS IS TO COMPARE THE INFORMATION -- COMPARE THE APPLICATIONS, THE INFORMATION IN THE APPLICATIONS AGAINST THE REQUIREMENTS IN THE RFP. SO IT'S FAIRLY STRAIGHTFORWARD FROM THAT STANDPOINT. SO WHAT'S LEFT TO GO? THE PANELS HAVE COMPLETED DRAFT REPORTS. ICANN IS REVIEWING THEM AND SEEKING CLARIFICATION IN SEVERAL AREAS. THE SUBSEQUENT DRAFTS WE GET FROM THE INDEPENDENT REVIEWERS OR THE INDEPENDENT EVALUATORS, RATHER, WILL BE DELIVERED TO ICANN ON AN APPLICANT-BY-APPLICANT BASIS. SO FROM THIS POINT FORWARD, THE PATHS OF THE APPLICANTS WILL DIVERGE AND THOSE APPLICANTS THAT CAN MOVE AHEAD QUICKLY WILL BE TAKEN AND NOT HELD BACK BECAUSE THERE ARE SOME QUESTIONS REMAINING FOR OTHER APPLICANTS. AT THE FINAL CLOSE OF THE INDEPENDENT EVALUATION PROCESS, ICANN WILL COMMUNICATE THE EVALUATION REPORTS DIRECTLY TO THE APPLICANTS. AND FOR ONE OR

TWO PURPOSES. ONE IS TO MOVE THE STLD APPLICATIONS INTO THE TECHNICAL AND COMMERCIAL NEGOTIATION PHASE, OR ICANN WILL REQUEST CLARIFYING DOCUMENTATION OR INFORMATION RELATING TO ANY POTENTIAL DEFICIENCIES IN THE APPLICATION THAT WERE HIGHLIGHTED IN THE INDEPENDENT EVALUATION. AND AFTER THAT PROCESS IS COMPLETE, THOSE APPLICATIONS MAY MOVE ON TO THE NEXT PHASE. UPON COMPLETION OF THE TECHNICAL AND COMMERCIAL NEGOTIATIONS, SUCCESSFUL APPLICATIONS WILL BE PRESENTED TO THE ICANN BOARD WITH ALL THE ASSOCIATED INFORMATION, SO THE BOARD CAN INDEPENDENTLY REVIEW THE FINDINGS ALONG WITH THE INFORMATION AND MAKE THEIR OWN ADJUSTMENTS. AND THEN FINAL DECISIONS WILL BE MADE BY THE BOARD, AND THEY'LL AUTHORIZE STAFF TO COMPLETE OR EXECUTE THE AGREEMENTS WITH THE SPONSORING ORGANIZATIONS, THEREBY DESIGNATED IN THE REGISTRIES. AS I STATED EARLIER, EACH APPLICATION WILL BE TREATED INDEPENDENTLY IN ORDER TO MOVE IT FORWARD AS QUICKLY AS POSSIBLE. THE FIRST REPORTS SHOULD BE FINISHED IN THE NEXT TWO WEEKS OR SO. AND THE INDEPENDENT EVALUATION PROCESS, IT WILL BE COMPLETED PRETTY MUCH BY THE END OF JULY. THAT'S A LITTLE BIT OF A CONFLICT THERE. THE PROCESS MAY SPILL OVER INTO AUGUST A LITTLE BIT. AT THE CLOSE OF THIS PROCESS, AT THE CLOSE OF THE INDEPENDENT EVALUATION PROCESS, ICANN WILL PUBLIC A DETAILED DESCRIPTION OF THE EXECUTION OF THAT PROCESS AND THE IDENTITY OF THE EVALUATORS. SO THAT INFORMATION WILL BECOME PUBLIC. SOME DETAILED INFORMATION IN THE EVALUATIONS THEMSELVES MAY BE HELD CONFIDENTIAL AT THE REQUEST OF THE APPLICANTS. THAT IS STILL PROPRIETY. AND AT THE END OF THE DAY, WHEN THE REGISTRIES, IDENTIFIED, ICANN WILL MAKE A FINAL REPORT STATING THE RESULTS. AND I THINK THAT'S ALL.

>>VINT CERF: THANK YOU VERY MUCH.

STLD Report
Cape Town South Africa

>>KURT PRITZ: Good afternoon.

As you know, in Carthage, the board resolved that the ICANN staff post an RFP soliciting proposals for the establishment of new sponsored top-level domains. So the staff did that.

This is the resolution authorizing that.
In response to that RFP, I'll briefly review the history.

We received ten applications for the establishment of new sponsored top-level domains.

The application process we developed is essentially laid out here, where, after the

posting of the application materials, the applicants applied for user name and password and completed an online application.

Then there was, essentially, a two-step process to evaluate that application with the goal of establishing a new sTLD.

First, the application was reviewed by a panel of independent evaluators. And having passed that hurdle, the applicant would enter into technical and commercial negotiations with the target of establishing the new sponsored top-level domains.

So it's important and a very important part of the process, then, was the establishment of these independent evaluation panels.

First, we retained an independent panel program manager so that all conversations between the applicant and the panels and the application and ICANN could be held at arm's length.

Then we established three panels: A technical panel -- three panels to measure the application in three different ways: A technical panel, a panel to measure the business and financial aspects of the application, and then one to test whether the applicant fairly represented a sponsored community.

The panel was -- the panel was and is an internationally diverse group.

They're very well respected in their fields.

And they represent the entire globe.

These independent evaluations began in May 2004.

As I said earlier, the -- all communications were at arm's length and blind through the project manager.

Each team met six to eight times by teleconference.

Given the geographical diversity of the panels, there were not face-to-face meetings.

As part of that evaluation process, there was iteration, there was a series of questions posed to the applicants to fill in any blanks that may have occurred in the application or that where clarification was sought.

And then each panel wrote a separate report to each applicant concluding whether or not the applicant met the baseline criteria laid out in the RFP so that each applicant received a -- three reports back, essentially, attesting whether they met the technical and then the business and then the sponsorship criteria.

So where are we now?

These independent evaluation reports have been forwarded to each of the applicants. Now, in the case where the applicant passed all three sets of criteria and there were no other contingencies associated with the application, it's proceeded right directly into this negotiation process.

In cases, however, where the evaluators indicated that one or more sets of the criteria weren't met, ICANN requested clarifying documentation from the applicant so that the applicant was afforded the opportunity to more or less cure the deficiencies that the

evaluators found to be in the application.

So this added a new iteration to the evaluation process and added some time onto the process.

As appropriate, the evaluators then were reconvened to respond to the responses of the applicant.

So this new iteration, this new -- the one step independent evaluation step that you saw in the earlier chart was replaced by the sort of iterative process where, after the independent panel gave their written report, the applicant was afforded the opportunity to respond in writing.

Then in certain instances, we had a teleconference between the evaluators and the applicants. We thought that that was a much quicker way to get at the issue -- potential resolution of the issues rather than a trading back and forth of documents. And our goal here was to get to resolution as quickly as possible.

So after each teleconference, there were notes written and jointly agreed to and distributed. And then the applicant made a final report in writing to the independent evaluation team, seeking to answer all the questions they have.

And in the interest of making this a complete process, if it was required, we held another iteration of that evaluation.

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

So if all the contingencies weren't resolved at the end of the independent evaluation, the application was passed on to the board for a final determination as to whether the application met the stated criteria in the RFP.

Those that were determined to meet that application then go on to negotiation. And then at the end of this negotiation, I will ask the board to confirm and authorize the formation of a new sTLD.

So given that complexification in the process, here's where we are.

There's two applicants, dot post and dot travel, there are presently in negotiations to establish a new TLD.

Nearly all of the remaining applicants have been through this iterative evaluation procedure, and documentation of that process has been sent to the board for consideration in the near future.

And as of yet, none of the applications have been formally rejected. As these independent evaluation processes are completed, the proposals are being managed separately, one by one, based on the timing of when it gets through the process and based on how the applicant responds to questions. So each application is essentially on its own.

And that way, applications can move forward at greater speeds. And it's determined that we'll get most, the majority of these, determinations as to whether the baseline criteria are met by the end of this calendar year. And we plan to have them all through the process by February of next year. Then at the close of this process, ICANN will publish the detailed description of the process and of the evaluation teams.

We've asked the applicants if they would like to redact some of the information in their application, if it contained proprietary or confidential information. And then final reports will be published by ICANN, and, most importantly, one of the reasons we -- one of the reasons for being in this process is to inform the gTLD process.

And this extended process has provided a wealth of information, and we've been able to go to school on it and feed substantial information into the gTLD strategy and the implementation of the gTLD strategy. That's essential my report.

>>VINT CERF: Thank you very much, Kurt.
A process which has a good deal of work associated with it.
We'll have opportunities for public comments later on.
But now we want to move on to the other important element of gTLD expansion.
And I'd like to call on Paul Verhoef to tell you where we are on that process.

sTLD Report Mar del Plata March 2005

Presidents Report: THERE HAVE BEEN SEVERAL DEVELOPMENTS REGARDING THE -- REGARDING GENERIC TOP-LEVEL DOMAINS. AS YOU ALL KNOW, THERE'S BEEN A NEW ROUND OF APPLICATIONS FOR SPONSORED TLDS. THERE WILL BE A MORE COMPLETE REPORT LATER, BUT THESE EVALUATIONS, THE EVALUATIONS OF THESE APPLICATIONS, HAVE BROUGHT SEVERAL INTERESTING ISSUES THAT WILL INFORM THE GTLD PROCESS TO TAKE PLACE LATER. BUT THE HIGHLIGHTS OF THE GTLD PROCESS IS THAT WE HAVE RECEIVED TEN APPLICATIONS FOR THE DESIGNATION OF NEW STLDS, AND I'M PLEASED TO REPORT THAT NEGOTIATIONS ARE COMPLETED AND ARE AWAITING BOARD APPROVAL ON TWO OF THEM, DOT JOBS AND DOT TRAVEL. THERE ARE ONGOING NEGOTIATIONS FOR THE DESIGNATION OF AN STLD WITH DOT CAT, DOT POST AND DOT MOBI, WHO HAVE ALL BEEN DETERMINED

TO MEET THE BASELINE CRITERIA SET OUT IN THE RFP. THERE ARE APPLICATIONS STILL BEING MEASURED AGAINST THE BASELINE CRITERIA, THEY'VE BEEN AFFORDED TO REVISE THEIR APPLICATIONS, AND THOSE REAPPLICATIONS ARE BEING CONSIDERED RIGHT NOW. THOSE! E TLD APPLICANTS INCLUDE TELNIC, DOT MAIL, DOT ASIA, AND DOT TRIPLE X.

STLD report:

>>VINT CERF: THANK YOU, NJERI.

KURT, LET'S GO ON NOW WITH THE STLD STATUS.

>>KURT PRITZ: THANK YOU, MR. CHAIRMAN.
IN TUNISIA, IT WAS RESOLVED BY THE BOARD THAT ICANN WOULD LAUNCH A ROUND TO SOLICIT APPLICATIONS FOR SPONSORED TOP-LEVEL DOMAINS, JUST FOR YOUR REFERENCE, BRING THE RESOLUTION HERE.

ICANN POSTED A REQUEST FOR A PROPOSAL AFTER FORMULATING CRITERIA AND RECEIVED TEN APPLICATIONS FOR THE DESIGNATION OF SPONSORED TOP-LEVEL DOMAINS.

THOSE ARE HERE, INDICATED ALSO BY -- ACCOMPANIED ALSO BY THE SPONSORING ORGANIZATION.

THE PROCESS POSTED, ESSENTIALLY, WAS THIS: WE POSTED -- ICANN POSTED APPLICATION MATERIALS.

THE APPLICANTS APPLIED FOR A USER NAME AND PASSWORD. AND USING THOSE TWO TOOLS, COMPLETED AN ONLINE APPLICATION. THERE WAS THEN AN INDEPENDENT EVALUATION DONE BY A TEAM OF EVALUATORS.

THERE WERE THREE TEAMS, A TECHNICAL TEAM, A BUSINESS/COMMERCIAL TEAM, AND A SPONSORSHIP TEAM.
SO EACH ONE OF THOSE THREE TEAMS RESPECTIVELY EVALUATED THE APPLICATIONS AGAINST THOSE FAMILY OF CRITERIA AS THEY WERE DESCRIBED IN THE RFP.

IF IT WAS DETERMINED THAT AN APPLICATION MET THOSE THREE SETS OF BASELINE CRITERIA, TECHNICAL, COMMERCIAL AND SPONSORSHIP COMMUNITY, THEY, THEN, WERE INFORMED THAT THEY WOULD ENTER INTO A PHASE OF COMMERCIAL AND TECHNICAL NEGOTIATION WITH ICANN, THE CULMINATION OF THOSE NEGOTIATIONS IS AND WAS INTENDED TO RESULT IN THE DESIGNATION OF THE NEW TOP-LEVEL DOMAIN.

AT THE CONCLUSION OF THAT, WE WOULD SIGN AGREEMENTS THAT WOULD

BE FORWARDED TO THE BOARD FOR THEIR APPROVAL.
AND ON APPROVAL -- BY APPROVAL OF THE ICANN BOARD, THEN THOSE TOP-LEVEL DOMAINS WOULD, IN FACT, BE DESIGNATED.

I DESCRIBED MOST OF THIS ON THE PAST SLIDE.
THE INDEPENDENT PANELS WERE AN INTERNATIONALLY-DIVERSE GROUP OF EXPERTS IN THEIR RESPECTIVE FIELDS.
THE NINE PEOPLE, THREE ON EACH PANEL, REPRESENTED EIGHT COUNTRIES LOCATED IN ALL THE REGIONS OF THE GLOBE.
ALSO PART OF THIS PROCESS WAS A PANEL PROGRAM MANAGER.
THAT SUPPLIED AN ADDITIONAL QUANTUM OF ARMS'-LENGTH DEALING AND RELATIONSHIPS BETWEEN ICANN, THE INDEPENDENT EVALUATORS, AND THE APPLICANTS, IN ORDER TO KEEP THE EVALUATION PROCESS TOTALLY INDEPENDENT.
THE PANELS WERE ESTABLISHED AND REVIEW WAS BEGUN IN 2004.
LIKE I JUST SAID, THE EVALUATIONS WERE DONE IN A BLIND, INDEPENDENT MANNER.
AND ALL COMMUNICATIONS WERE FUNNELED THROUGH THE PROJECT MANAGER.
EACH TEAM MET SIX TO EIGHT TIMES BY TELECONFERENCE IN THE INITIAL PHASE OF THE EVALUATIONS.

AND I'LL TALK A LITTLE BIT MORE ABOUT THAT LATER.

AS PART OF THE EVALUATION, EACH PANEL POSED A SERIES OF QUESTIONS TO EACH APPLICANT TO SEEK CLARIFICATION INTO THE APPLICATION. THOSE QUESTIONS WERE THEN ANSWERED BY THE APPLICANT IN WRITING. EACH PANEL PROVIDED SEPARATE REPORTS COMPARING THE INFORMATION AGAINST -- IN THE APPLICATION AND MEASURING THAT AGAINST THE CRITERIA IN THE RFP.

THE REPORTS WERE SENT TO EACH OF THE APPLICANTS.
IN CASES WHERE THE APPLICANTS MET ALL THREE SETS OF CRITERIA, THE APPLICATION WENT IMMEDIATELY ON INTO THE NEGOTIATION PHASE.

IN CASES WHERE THE CRITERIA WERE NOT MET YET, ICANN REQUESTED CLARIFYING DOCUMENTATION RELATING TO ANY DEFICIENCIES THAT WERE REPORTED.
IN CERTAIN CASES, THE INDEPENDENT EVALUATORS THEN RECONVENED IN ORDER TO RECONSIDER THE ADDITIONAL INFORMATION AND TEST WHETHER THAT ADDITIONAL INFORMATION IN FACT SATISFIED THE THREE SETS OF BASELINE CRITERIA.
WE THOUGHT THIS WAS APPROPRIATE IN THAT THERE WAS NO LIMIT PLACED ON THE NUMBER OF TLDS TO BE DESIGNATED.
SO WE WANTED TO FULLY UNDERSTAND ALL THE DETAIL BEHIND EACH APPLICATION AND WE DID NOT WANT TO DENY AN APPLICATION PERHAPS

BECAUSE THERE WAS A MISCOMMUNICATION IN THE INITIAL APPLICATION PROCEDURE.

THEN BY RECONSIDERING THE APPLICATIONS, WE WERE NOT DISADVANTAGING ANY OF THE OTHER APPLICANTS, BECAUSE, AS I SAID, THERE WAS NO LIMIT ON THE NUMBER OF APPLICATIONS. THIS LED TO SORT OF AN ITERATIVE PROCESS TOWARDS THE END OF THE CONSIDERATION THAT STRETCHED OUT THE EVALUATION PROCESS SOMEWHAT.

THE APPLICANTS RECEIVED THE INDEPENDENT EVALUATION IN WRITING. THEY RESPONDED IN WRITING. THERE WAS GENERALLY A TELECONFERENCE THEN BETWEEN THE INDEPENDENT EVALUATION TEAM AND THE APPLICANT. NOTES OF THAT MEETING WERE JOINTLY AGREED UPON AND THEN DISTRIBUTED, AND THE APPLICANT THEN RESPONDED IN WRITING AGAIN, ENABLING THE EVALUATOR TO ONCE AGAIN UNDERTAKE THE EVALUATION PROCESS.

SO IN CERTAIN APPLICATIONS, WE WENT THROUGH THIS ITERATION ONE OR TWO TIMES IN ORDER TO FULLY FLESH OUT THE APPLICATIONS AND UNDERSTAND THEM.

AT THE END OF THAT, IF THERE WERE STILL CONTINGENCIES REMAINING IN THE APPLICATION, THE ICANN BOARD, WITH FULL INFORMATION, I.E., WITH ACCESS TO THE ORIGINAL APPLICATION, THE QUESTIONS THAT WENT BACK AND FORTH, THE INDEPENDENT EVALUATORS' REPORT, AND SUBSEQUENT WRITINGS, TOOK ON TO CONFIRM WHETHER THE CONTINGENCIES IN THE APPLICATION HAD, IN FACT, BEEN REMOVED AND THE APPLICATION COULD GO ON TO THE NEGOTIATION PHASE, OR WHETHER ADDITIONAL INFORMATION WAS REQUIRED, OR, IN FACT, WHETHER THE APPLICATION WAS DEFICIENT AND SHOULD NOT BE GRANTED.

SO AFTER ALL THAT ABOUT THE STATUS, AFTER ALL THAT ABOUT THE PROCESS, I HAVE ONE SLIDE ABOUT THE STATUS.

TWO OF THE APPLICANTS, DOT JOBS AND DOT TRAVEL, HAVE SUCCESSFUL MET ALL THE BASELINE CRITERIA, COMPLETED NEGOTIATIONS WITH ICANN, AND AT THIS MEETING IN MAR DEL PLATA, WE HAVE PUT BEFORE THE BOARD THESE CONTRACTS FOR BOARD APPROVAL.

IF THE BOARD APPROVES THEM, THAT WILL LEAD DIRECTLY TO THE DESIGNATION OF STLDS.

THREE OTHER APPLICANTS HAVE BEEN FOUND TO SATISFY THE BASELINE CRITERIA AND ARE NOW IN ACTIVE NEGOTIATIONS WITH ICANN. WE HOPE TO BRING THOSE NEGOTIATIONS TO A CONCLUSION AS RAPIDLY AS POSSIBLE

AND ARE WORKING INTENSELY WITH EACH OF THESE APPLICANTS. THEY ARE DOT CAT, DOT MOBI, AND DOT POST.

OTHER APPLICANTS HAVE NOT YET BEEN DETERMINED TO MEET THE BASELINE CRITERIA. WE ARE WORKING WITH THEM STILL ACTIVELY TO DETERMINE IF THE APPLICATION CAN BE CONFIGURED IN A WAY SO THAT BASELINE CRITERIA CAN BE MET. AND THOSE ARE DOT ASIA, DOT MAIL, TELNIC, AND DOT XXX.

EACH -- AS EACH INDEPENDENT EVALUATION WAS COMPLETED, EACH APPLICATION TOOK OFF ON ITS OWN PATH. SO IN ORDER TO COMPLETE THESE THINGS IN AS TIMELY A BASIS AS POSSIBLE, WE'VE BEEN WORKING WITH EACH OF THE APPLICANTS INDIVIDUALLY AT THEIR PACE, AND THE NEGOTIATIONS WITH THEM HAVE HAPPENED AT A PACE GOVERNED BY THE COMMUNICATION BETWEEN US.

WE ANTICIPATE BEFORE THE LUXEMBOURG MEETING THAT ALL THE APPLICATIONS WILL BE THROUGH AT LEAST THIS EVALUATION PHASE AND THEN WILL BE DETERMINED IF THEY'RE GOING ON TO THE NEXT PHASE IN THE PROCESS.

AND THAT'S MY REPORT, MR. CHAIRMAN.

>>VINT CERF: THANK YOU VERY MUCH, KURT.

I RECOGNIZE A GREAT DEAL OF WORK BY THE STAFF IN GETTING TO THIS POINT.

I'D LIKE TO CALL NOW UPON PAUL VERHOEF TO GIVE US AN UPDATE ON THE PROCESS FOR NEW GTLDS CREATION.

SLTD Update Luxembourg City July 2005

THE NEXT TOPIC IS NEW STLDS AND AN UPDATE ON THAT FROM KURT PRITZ. OH, NO -- YES, FROM KURT. OKAY.

>>KURT PRITZ: THANK YOU, MR. CHAIRMAN.

IN THE ICANN MEETING IN TUNISIA, THE BOARD RESOLVED THAT THE STAFF SHOULD CONDUCT A ROUND SOLICITING APPLICATIONS FOR THE DESIGNATION OF NEW STLD REGISTRIES.

THIS IS THAT RESOLUTION.

AS A RESULT OF THAT, WE RECEIVED APPLICATIONS FROM TEN SPONSORING ORGANIZATIONS FOR THE ESTABLISHMENT OF THESE REGISTRIES.

THE PROCESS FOR APPLYING, ESSENTIALLY, WAS THAT THE APPLICANT COMPLETED AN ONLINE APPLICATION.

THAT APPLICATION WAS SUBMITTED TO A -- TO PANELS OF INDEPENDENT

EVALUATORS.

IF THE APPLICATION WAS DETERMINED TO MEET CERTAIN BASELINE CRITERIA, THOSE STLD APPLICANTS WENT ON TO HAVE TECHNICAL AND COMMERCIAL NEGOTIATIONS WITH ICANN.

IF WE WERE ABLE TO REACH AN AGREEMENT FOR THE DESIGNATION OF THE REGISTRY, THE AGREEMENT WAS SUBMITTED TO THE BOARD FOR APPROVAL.

THE NATURE OF THE INDEPENDENT EVALUATION PANELS WAS THAT THERE WAS A PANEL PROGRAM MANAGER AND THEN THERE WERE THREE SEPARATE INDEPENDENT PANELS TO EVALUATE THE APPLICATIONS. THERE WAS A PANEL TO EVALUATE THE TECHNICAL MERITS, ONE TO EVALUATE THE BUSINESS AND COMMERCIAL MERITS, AND, FINALLY, ONE TO DETERMINE WHETHER THE APPLICATION REALLY REPRESENTED A COMMUNITY WITHIN THE SPONSORSHIP DEFINITION.

THE PANEL WAS AN INTERNATIONALLY DIVERSE GROUP OF EXPERTS.

THERE WERE NINE PANELISTS FROM EIGHT DIFFERENT COUNTRIES, AND IT REPRESENTS ALL THE DIFFERENT REGIONS OF THE GLOBE.

THE PANELISTS CONDUCTED A BLIND, INDEPENDENT REVIEW, AND THAT IS THAT THE PROJECT MANAGER OR PROGRAM MANAGER WAS THE CONDUIT FOR ALL COMMUNICATIONS EITHER BETWEEN ICANN AND THE EVALUATORS, AND ALSO BETWEEN THE EVALUATORS AND THE APPLICANTS.

EACH TEAM MET MANY TIMES BY TELECONFERENCE.

AS PART OF THE EVALUATION, THERE WAS AN INITIAL EVALUATION AND THEN THE EVALUATORS SUBMITTED A LIST OF CLARIFYING QUESTIONS TO THE APPLICANTS TO MAKE SURE THAT THE ASPECTS OF THE APPLICATION WERE FULLY UNDERSTOOD BY THE PANELISTS.

EACH SEPARATE PANEL SUPPLIED A REPORT REGARDING EACH APPLICATION AND MADE A PRELIMINARY DETERMINATION AS TO WHETHER THE APPLICATION MET THE BASELINE CRITERIA SET OUT IN THE RFP.

THE REPORTS WERE SENT TO EACH OF THE APPLICANTS, AND IN THE CASES WHERE THE APPLICATIONS MET ALL THREE SETS OF CRITERIA, THAT APPLICANT WENT ON TO START COMMERCIAL AND TECHNICAL NEGOTIATIONS IN ORDER TO DESIGNATE A NEW REGISTRY.

WHERE THE APPLICANTS DIDN'T MEET THE BASELINE CRITERIA IN ANY ONE OR ALL OF THE THREE SETS OF CRITERIA, THE APPLICANTS WERE AFFORDED THE OPPORTUNITY TO AMEND THEIR APPLICATION, ACTUALLY, CLARIFY THEIR APPLICATION.

AND IN ORDER TO DEMONSTRATE THEIR COMPLIANCE WITH THE CRITERIA.

THE INDEPENDENT PANELISTS WERE THEN ASKED TO RECONVENE AS NECESSARY TO CONSIDER THE CLARIFYING INFORMATION.

SO WHAT WE HAD HERE IS SORT OF A FEEDBACK LOOP WHERE AN INDEPENDENT EVALUATION WAS FURNISHED IN WRITING TO THE APPLICANT AND THEN THERE WAS A RESPONSE.

IN ORDER TO SPEED THE PROCESS, INSTEAD OF AN EXCHANGE OF DOCUMENTS, WE HELD TELECONFERENCES, SO THERE COULD BE VIRTUAL FACE-TO-FACE COMMUNICATION BETWEEN THE APPLICANTS AND THE PANEL,

EVEN THOUGH THE PANELISTS REMAINED UNIDENTIFIED.
AND THAT WAS INTENDED TO FACILITATE COMMUNICATION BETWEEN THEM
AND MAKE SURE EVERYBODY UNDERSTOOD THE NATURE OF THE
DISAGREEMENTS OR THE NATURE OF THE ISSUES.
AFTERWARDS, THE APPLICANT WOULD RESPOND IN WRITING WITH A
CLARIFIED APPLICATION.
THE PANELISTS WOULD THEN DETERMINE AGAIN IF THE APPLICATION MET
THE BASELINE CRITERIA.
THIS SORT OF "DO" LOOP WAS CONTINUED UNTIL IT WAS CLEAR THAT THE --
ANY CHANGES OR CLARIFICATIONS TO THE APPLICATION HAD BEEN
EXHAUSTED AND THERE WAS CLARITY OF WHAT THE ISSUES WERE ON ALL
SIDES.

IN CASES WHERE THERE WERE CONTINGENCIES LEFT AS TO WHETHER THE
APPLICATION MET THE CRITERIA, THE APPLICATION WAS PASSED ON TO THE
BOARD WITH FULL INFORMATION, THAT IS, THE APPLICATION ITSELF AND THE
EXCHANGE OF INFORMATION BETWEEN THE EVALUATORS AND THE
APPLICANT.

AND AT THAT TIME THE ICANN BOARD DETERMINED WHETHER THE
APPLICATION, IN FACT, MET THE BASELINE CRITERIA, WHETHER IT DID NOT,
OR WHETHER FURTHER INFORMATION WAS REQUESTED.
SO BASED ON ALL OF THAT AND THE PROCESS TO DATE, THREE APPLICANTS
HAVE CONCLUDED NEGOTIATIONS TO ESTABLISH NEW REGISTRIES.

SO WE HAVE THREE NEW REGISTRIES SO FAR, DOT JOBS, DOT TRAVEL, AND
HERE IN LUXEMBOURG, DOT MOBI SIGNED AN AGREEMENT WITH ICANN FOR
THE DESIGNATION OF A REGISTRY.

THERE'S FOUR OTHER APPLICANTS THAT HAVE BEEN FOUND TO SATISFY THE
BASELINE CRITERIA, AND THEY'RE PRESENTLY IN NEGOTIATION FOR THE
DESIGNATION OF REGISTRIES, DOT CAT, DOT POST, TELNIC, AND XXX.

AND YOU CAN REFER TO THE EARLIER PART OF THE PRESENTATION FOR
SORT OF A ROSETTA STONE FOR THE SPONSORING ORGANIZATIONS FOR
EACH OF THOSE REGISTRIES.

AND THEN APPLICATIONS WHERE IT HAS NOT YET BEEN DETERMINED
WHETHER THE APPLICATION MEETS THE CRITERIA ARE STILL THERE, DOT
MAIL, TELNIC, AND DOT ASIA.

SO JUST SOME STATISTICS ON TLD LAUNCHES.
DOT JOBS SIGNED THEIR AGREEMENT ON MAY 5TH.
YOU CAN SEE THE APPLICATION -- THE AGREEMENT, RATHER, AT THAT URL.
IT'S POSTED.

SO FAR, THEY'VE ACCREDITED 20 REGISTRARS. AND WE EXPECT REGISTRATION LAUNCH IN LATE SEPTEMBER OF 2005. DOT TRAVEL SIGNED THEIR AGREEMENT ON THE SAME DATE. THEY HAVE ACCREDITED EIGHT REGISTRARS SO FAR ACCORDING TO THEIR SITE, AND EXPECT TO LAUNCH IN EARLY SEPTEMBER. AND, NOW, THE INDEPENDENT EVALUATION PROCESS HAS COME TO AN UNDER SO THAT ICANN WILL PUBLISH THE DETAILED DESCRIPTION OF THE PROCESSES, THE IDENTITY OF THE EVALUATION TEAMS, AND MUCH OF THE DETAILED INFORMATION IN THE REPORTS, WE'RE GOING TO REDACT SOME OF THE INFORMATION IN THE REPORTS IN ORDER TO KEEP PROPRIETARY INFORMATION PROPRIETARY.

AND THEN THE FINAL -- THESE FINAL REPORTS WILL BE PUBLISHED. MOST IMPORTANTLY, AND THE NEXT STEP, IS THAT THIS -- THIS PROCESS IN WHICH MANY ISSUES, MANY COMPLEX ISSUES WERE RAISED IN CONSIDERING WHETHER NEW TLDS SHOULD BE DESIGNATED, THIS INFORMATION WILL INFORM PARTIALLY THE GTLD IMPLEMENTATION PROCESS THAT'S CURRENTLY BEING CONSIDERED. SO THAT'S MY REPORT, MR. CHAIRMAN.
>>VINT CERF: THANK YOU VERY MUCH. THERE.
THANK YOU VERY MUCH, KURT.

STLD Update Vancouver December 2005

LET ME CALL ON KURT PRITZ NOW TO BRING US UP-TO-DATE ON THE NEW STLD SITUATION.

AS YOU KNOW, TEN STLDS WERE PROPOSED LAST YEAR.

AND WE ARE NOW IN THE CLOSING PHASES OF PROCESSING MOST OF THEM.

SO, KURT, LET ME INVITE YOU TO MAKE THAT REPORT.

>>KURT PRITZ: THANK YOU, MR. CHAIRMAN.

THE STLD PROCESS CONTINUES.

I'LL RECALL THAT THE BOARD RESOLVED THAT THE PRESIDENT AND STAFF OPEN A REQUEST FOR PROPOSALS FOR A LIMITED NUMBER OF STLDS, ONE, TO ADD VALUE TO THE

NAME SPACE, BUT, THEN, SECONDLY, AND IMPORTANTLY, TO USE THAT PROCESS AND THAT EXERCISE AND THE RESULTS OF THAT FOR THE EVALUATION OF THE NEW GTLD PROCESS AND INFORM THAT.

AFTER ICANN PUBLISHED ITS RFP ON A TIMELY BASIS, WE RECEIVED TEN APPLICATIONS FOR NEW STLDS.

I THINK THE PEOPLE IN THIS ROOM ARE FAIRLY FAMILIAR WITH ALL OF THESE APPLICATIONS.

IN THE RFP, WE LAID OUT A FAIRLY STRAIGHTFORWARD APPLICATION PROCESS.

APPLICANTS APPLIED FOR A USER NAME AND PASSWORD WHEN THEY PROVIDED SOME DEMONSTRATION OF A BONA FIDE APPLICATION.

THEY COMPLETED AN ONLINE APPLICATION FORM.

ICANN THEN RETAINED THE PANEL OF INDEPENDENT EVALUATORS TO EVALUATE THOSE APPLICATIONS ON THREE DIFFERENT SETS OF CRITERIA.

THE APPLICATIONS WERE EVALUATED FIRST ON TECHNICAL CRITERIA TO SEE IF THEY MET THAT BENCHMARK THAT WAS -- OR THAT BASELINE CRITERIA THAT WAS STATED IN THE RFP.

THERE WAS ALSO BUSINESS AND COMMERCIAL CRITERIA THAT HAD TO BE MET.

AND, FINALLY, THIS ROUND WAS FOR SPONSORED TLDS ONLY, WHICH IS A SPECIAL CLASS OF TOP-LEVEL DOMAINS. AND THERE WAS A DEFINITION OF SPONSORED COMMUNITY IN THE APPLICATION MATERIALS.

AND THAT WAS THE OTHER SET OF BASELINE CRITERIA.

IF THE APPLICANT WERE FOUND TO MEET THOSE CRITERIA, THE BOARD WOULD THEN DIRECT ICANN TO INITIATE COMMERCIAL AND TECHNICAL NEGOTIATIONS WITH THOSE APPLICANTS.

AND THAT WOULD RESULT IN A CONTRACT LEADING TO THE DESIGNATION OF THE STLD.

SO AN IMPORTANT PART OF THIS PROCESS WAS REALLY THAT ICANN HELD SEPARATE THE EVALUATION -- THE EVALUATION OF THE APPLICANTS ON THE THREE SETS OF CRITERIA.

AND I HAVE DESCRIBED THE THREE SETS OF CRITERIA.

WE HAD THREE PANEL MEMBERS SITTING ON EACH PANEL.

AND IT WAS AN EXTRAORDINARILY COMPETENT AND INTERNATIONALLY DIVERSE SET OF EXPERTS THAT -- NINE OF THEM ESSENTIALLY CAME FROM EIGHT COUNTRIES.

THESE ARE THE PANEL MEMBERS.

YOU WILL RECOGNIZE MOST OF THEM AS BEING MEMBERS OF OUR COMMUNITY.

MIRIAM SAPIRO WAS THE PROJECT MANAGER FOR THIS PROJECT.

AND I'LL DESCRIBE WHY WE RETAINED A PROJECT MANAGER IN JUST A SECOND.

BUT THEN THE TECHNICAL PANEL WAS MADE UP OF PATRIK FALTSTROM, OLAFUR, AND NII QUAYNOR.

THE BUSINESS PANEL WAS MAUREEN CUBBERLEY, FERNANDO SILVEIRA GALBAN, AND THEN JEFF LISSACK

AND THEN FINALLY, THE SPONSORSHIP PANEL WAS COMPRISED OF PIERRE OUEDRAOGO, DANNY WEITZNER, AND LIZ WILLIAMS.

THEY CONDUCTED THESE REVIEWS IN A BLIND, INDEPENDENT FASHION.

AND THAT MEANS THE PROJECT MANAGER WAS THE CONDUIT FOR ALL COMMUNICATIONS, EITHER FROM STAFF TO THE PANEL MEMBERS OR FROM THE APPLICANTS TO THE PANEL MEMBERS.

THE PANELS NEVER MET FACE TO FACE.

AND I THINK ONE OF THE STRENGTHS OF THIS PROCESS WAS, WE DEMONSTRATED A COMPETENT ABILITY TO CONDUCT AN EVALUATION WITHOUT A LOT OF TRAVEL EXPENSE.

AND EACH PANEL, I THINK, BECAME VERY FACILE AT COMMUNICATING BY PHONE AND CONDUCTING REAL BUSINESS AND GETTING THINGS DONE.

PARTWAY THROUGH THE EVALUATION PROCESS, TO ENSURE THE CLARITY OF THE APPLICATION, THE PANEL MEMBERS POSED A SERIES OF QUESTIONS TO EACH OF THE APPLICANTS WHICH WERE RESPONDED TO IN WRITING AND BECAME PART OF THE APPLICATION RECORD.

AND THEN, FINALLY, THE -- WELL, NOT FINALLY, AS IT TURNS OUT.

BUT THE NEXT STEP WAS THAT THE INDEPENDENT PANEL FURNISHED A REPORT, THREE SEPARATE REPORTS, FOR EACH APPLICATION, DESCRIBING AT THE END THE CONCLUSION AS TO WHETHER THE APPLICANT MET THE BASELINE CRITERIA SET OUT IN THE RFP.

THESE REPORTS WERE SENT TO EACH OF THE APPLICANTS.

IN THE CASES WHERE THE APPLICANT MET ALL THREE SETS OF CRITERIA AND THERE WERE NO OTHER CONTINGENCIES INVOLVED, THE APPLICATION WENT ON TO A COMMERCIAL AND NEGOTIATION STAGE WHERE THE GOAL WAS TO ARRIVE AT A CONTRACT THAT DESIGNATED A TLD.

HOWEVER, IN CASES WHERE THE CRITERIA WERE FOUND NOT TO BE MET, THE BASELINE CRITERIA, ICANN REQUESTED CLARIFYING DOCUMENTATION.

WE WANTED TO ENSURE THAT THE APPLICATION WAS GIVEN FULL CONSIDERATION AND FULL REVIEW.

YOU MIGHT THINK THAT WE RECEIVED APPLICATIONS FROM A BROAD SPECTRUM OF PEOPLE, FROM VENTURE CAPITALIST KIND OF PEOPLE WHO WOULD SCRIBBLE OUT A BUSINESS PLAN ON THE BACK OF AN ENVELOPE AND CONSIDER THAT ADEQUATE TO A LARGE MULTINATIONAL UNION OF CORPORATIONS THAT PROVIDE VERY PROFESSIONAL BUSINESS PLANS.

AND WE THOUGHT IT WAS OUR JOB TO EXTRACT THE MOST -- THE MEANINGFUL INFORMATION FROM ALL THE APPLICANTS, REGARDLESS OF THE FIRST FORMAT OF PROVIDING INFORMATION.

SO AS APPROPRIATE, THEN, WE RECONVENED THE PANEL MEMBERS TO DISCUSS ADDITIONAL CLARIFYING INFORMATION.

AND I JUST WANT TO MAKE SURE "CLARIFYING INFORMATION" MEANS THAT, IT MEANS EXACTLY THAT.

THE APPLICANTS WERE NOT PERMITTED TO SUBSTANTIALLY CHANGE THEIR APPLICATION IF THE EVALUATORS FOUND THAT THE APPLICATION AS ORIGINALLY POSTED DIDN'T HAVE MERIT, BUT, RATHER, WERE REQUESTED TO SUPPLY CLARIFYING MATERIAL.

SO THAT RESULTED IN -- I WON'T CALL IT A DO LOOP, BUT AT LEAST AN ITERATION IN THE PROCESS, WHEREBY THE APPLICANT WOULD RESPOND IN WRITING TO THE CONCERNS OF THE INDEPENDENT PANELS.

AND THEN WE WOULD HAVE A TELECONFERENCE WITH THE PANELS, EVEN THOUGH WE DIDN'T IDENTIFY THE PANEL MEMBERS, WHICH BECAME A LITTLE BIT AWKWARD.

BUT I THINK THEY WERE CONDUCTED VERY PROFESSIONALLY.

AND THE IDEA HERE IS A PROCESS WHERE YOU'RE EXCHANGING DOCUMENTS BACK AND FORTH CAN BE VERY LONG, WHEREAS AN INTERACTIVE TELECONFERENCE CAN SHORTCUT THE ISSUES AND RESOLVE ISSUES QUICKLY IF THEY CAN BE RESOLVED.

AND THEN, FINALLY, AFTER RECEIVING MINUTES OF THAT TELECONFERENCE, THE APPLICANT WOULD RESPOND IN WRITING TO UNDERSTANDING -- THEIR UNDERSTANDING OF THE CLARIFYING INFORMATION THAT MIGHT AID THE -- AID THEIR APPLICATION.

SO IF CONTINGENCIES STILL REMAINED AT THE END OF THAT PROCESS, IN OTHER WORDS, IF THE -- AT THE END OF THAT DAY, ALL THREE PANELS DID NOT FIND THAT THE APPLICANT MET THE CRITERIA, OR WHETHER THERE WERE SOME CONTINGENCIES OF SOME OTHER SORT LEFT ON THE APPLICATION, WE COMPILED THAT INFORMATION, ALL THE DOCUMENTATION THAT'S BEEN GENERATED WITH EACH APPLICATION, AND PASSED THAT ON TO THE BOARD.

AND THEN, THROUGH EXTENSIVE CONVERSATIONS WITH THE BOARD AND THEN IN BOARD MEETINGS, IT WAS DISCUSSED WHETHER THIS APPLICATION SHOULD OR SHOULD NOT GO ON TO THE TECHNICAL AND COMMERCIAL PHASE.

SO AFTER ALL THAT, THE STATUS OF THE TEN APPLICANTS IS THIS, THAT THREE APPLICANTS HAVE COMPLETED THE WHOLE PROCESS, AND THEY ARE IN THE ROOT ZONE.

AND THAT'S JOBS, TRAVEL, AND MOBI.

AND CERTAINLY FOR ALL THE FUTURE ONES, TOO, BUT I WOULD INVITE THEM TO REPLY TO THIS GROUP FROM TIME TO TIME AND LET US KNOW HOW THEY'RE DOING.

OF COURSE, WE'RE GOING TO FORMALLY CONSULT WITH THEM ALSO TO GLEAN INFORMATION THAT WILL INFORM THE NEXT PROCESS.

ONE APPLICANT, .CAT, COMPLETED NEGOTIATIONS.

THE CONTRACT'S BEEN APPROVED BY THE BOARD.

AND THE TLD'S IN THE IANA PROCESS, WHICH MEANS ANY DAY, ANY DAY, IT WILL BE IN THE ZONE.

THREE OTHER APPLICANTS HAVE MOVED ON TO COMMERCIAL AND TECHNICAL NEGOTIATIONS. SO THEY'VE BEEN THROUGH THE INDEPENDENT EVALUATION PROCESS. AND SO WE ARE -- CONTRACTS ARE BEING NEGOTIATED WITH THEM. THAT'S POST, TELNIC, AND TRIPLE X.

WITH REGARD TO DOT ASIA, IT HAS NOT BEEN DETERMINED YET BY THE BOARD WHETHER THAT APPLICATION SHOULD GO ON TO COMMERCIAL AND TECHNICAL NEGOTIATIONS.

AND THEN, FINALLY, THERE ARE TWO APPLICANTS THAT -- APPLICATIONS THAT ARE NO LONGER AVAILABLE, AND THAT'S DOT TEL, THE PULVER DOT TEL APPLICATION AND DOT MAIL.

RECENTLY, ICANN PUBLISHED A DETAILED DESCRIPTION OF THE EVALUATION PROCESS AND THE STATUS OF EACH OF THE APPLICANTS, WHICH INCLUDES, ESSENTIALLY, ALL OF THE SUPPORTING DOCUMENTATION THAT WAS GENERATED DURING THIS PROCESS.

IT'S QUITE EXHAUSTIVE.

WE GAVE THE APPLICATIONS THE OPPORTUNITY TO REACT -- REDACT COMMERCIALY SENSITIVE INFORMATION OR INFORMATION THEY DEEMED TO BE CONFIDENTIAL.

THIS IS IN LINE WITH POSTING OF THE APPLICATIONS WHICH HAD CERTAIN FINANCIAL INFORMATION REDACTED.

AND THEN, FINALLY, TO CLOSE WITH HOW I OPENED, REMEMBER THAT ONE OF THE PURPOSES OF THIS EXERCISE WAS TO INFORM THE GRANDER NEW GTLD PROCESS.

MIRIAM IS WORKING ON A REPORT THAT SUMMARIZES THE EXPERIENCES OF HER AND ALL THE PARTICIPANTS.

SHE'S INTERVIEWING THE PARTICIPANTS AND COMPILING THAT AND WILL PROVIDE A REPORT ON THE EXPERIENCES ASSOCIATED WITH THIS.

AND THAT WILL BE ONE OF THE FACETS OF THIS STLD PROCESS THAT WILL INFORM THE GTLD PROCESS.

SO THAT'S ALL I HAVE.

THANK YOU VERY MUCH.

THANK YOU, MR. CHAIRMAN.

STLD Update Wellington March 2006

>>KURT PRITZ: OKAY. THANK YOU MR. CHAIRMAN.
I HOPE THIS IS THE LAST TIME I'M OFFERING THIS REPORT TO THE BOARD.

SO AS YOU KNOW, SOME TIME AGO THE BOARD DIRECTED THE STAFF TO UNDERTAKE THIS LIMITED DESIGNATION OF NEW TLDS AND THAT THEY BE SPONSORED TLDS.

IN RESPONSE TO A SOLICITATION, ICANN RECEIVED TEN APPLICATIONS FOR THE DESIGNATION OF NEW TLDS. AND THESE ARE THEY.
ICANN CREATED A PROCESS WHERE APPLICATION MATERIALS WERE POSTED AND THE APPLICANTS' USED AN ONLINE PROCESS FOR APPLYING FOR THE TLD.

AFTER RECEIPT OF THE APPLICATION AND A STAFF VERIFICATION THAT THE APPLICATION WAS, IN FACT, COMPLETE, THERE WAS AN INDEPENDENT EVALUATION PROCESS THAT I WILL DESCRIBE IN A MINUTE.

THOSE APPLICANTS THAT SUCCESSFULLY CONCLUDED THAT PART OF THE PROCESS WERE ENTERED INTO TECHNICAL AND COMMERCIAL NEGOTIATIONS WITH ICANN THAT RESULTED IN AGREEMENTS OR WILL RESULT IN AGREEMENTS FOR NEW TLDS.

THE INDEPENDENT EVALUATION PROCESS WAS MANAGED BY AN INDEPENDENT PROGRAM MANAGER. AND THEN EACH APPLICATION WAS MEASURED WITH REGARD TO THREE SETS OF CRITERIA. THERE WERE TECHNICAL CRITERIA, BUSINESS AND FINANCIAL CRITERIA, AND THEN SPONSORSHIP AND COMMUNITY CRITERIA.

THE PANEL WAS AN INTERNATIONAL DIVERSE GROUP OF EXPERTS REPRESENTING EIGHT COUNTRIES. WE'RE QUITE PROUD OF THE TALENT AND SKILL LEVEL THAT WAS REPRESENTED ON OUR PANELS.

THE EVALUATIONS WERE CONDUCTED IN A BLIND, INDEPENDENT WAY. SO ALL COMMUNICATIONS FUNNELED THROUGH THE PROJECT MANAGER, EITHER COMMUNICATIONS BETWEEN THE APPLICANT AND THE EVALUATORS OR COMMUNICATIONS BETWEEN ICANN AND THE EVALUATORS OR ICANN AND THE APPLICANTS.

EACH TEAM MET SIX TO EIGHT TIMES BY TELECONFERENCE. THERE WERE NO FACE-TO-FACE MEETINGS, BUT THE MEETINGS WERE, IN FACT, I THINK VERY EFFECTIVE.

PARTWAY THROUGH THE PROCESS, EACH INDEPENDENT PANEL FORMULATED A SET OF QUESTIONS FOR EACH APPLICATION THAT WAS DESIGNED TO FLESH OUT BUT NOT ALTER THE NATURE OF THE APPLICATION, SO THAT THE EVALUATORS COULD ACT WITH FULL INFORMATION.

THERE WAS AN INDEPENDENT EVALUATION REPORT THAT WAS SENT TO EACH OF THE APPLICANTS. AND IN THE CASE WHERE THE APPLICATION MET ALL THREE SETS OF CRITERIA, IT IMMEDIATELY WAS DEEMED TO ENTER INTO TECHNICAL AND COMMERCIAL NEGOTIATIONS.

BUT IN CASES WHERE THE INDEPENDENT EVALUATORS DEEMED THAT THE BASELINE CRITERIA WERE NOT MET INITIALLY, AN OPPORTUNITY WAS PROVIDED TO THE APPLICANTS TO PROVIDE ADDITIONAL INFORMATION TO ENHANCE THEIR APPLICATION. AGAIN, NOT ALTER IT OR CHANGE IT.

IN ORDER TO PROVIDE THE EVALUATORS WITH FULLER INFORMATION AND, THEREFORE, PERHAPS MAKE ANOTHER DETERMINATION. THIS DELAYED THE PROCESS SOMEWHAT, BUT WE THINK IT MADE IT RICHER AND MORE VALID.

SO, THEN, AFTER THE INDEPENDENT EVALUATIONS WERE RECEIVED BY THE APPLICANT, THE APPLICANT WAS AFFORDED TO RESPOND IN WRITING TO THAT EVALUATION.

THEN A TELECONFERENCE WAS HELD AMONG THE APPLICANT AND THE EVALUATORS, THE PARTICULAR PANEL INVOLVED IN THIS STUDY. WE THOUGHT THE TELECONFERENCE WOULD SERVE TO MOVE THE PROCESS ALONG MORE QUICKLY RATHER THAN THROWING DOCUMENTS OVER THE WALL BACK AND FORTH. THEN IN SOME CASES THIS PROCESS WAS ITERATED ONE OR TWO ADDITIONAL TIMES IN ORDER TO FULLY UNDERSTAND THE APPLICATION.

SO IF AT THE CLOSE OF THAT PROCESS THE APPLICATION MET THE BASELINE CRITERIA, IT WENT ON TO TECHNICAL AND COMMERCIAL NEGOTIATIONS. BUT IN CASES WHERE SOME CONTINGENCIES REMAINED, IT WAS PASSED ON TO THE BOARD TO DETERMINE WHETHER THE APPLICATION WOULD THEN ENTER INTO NEGOTIATIONS. THIS IS THE PRESENT STATUS THAT WILL SERVE TO SETTLE SOME DISCUSSIONS ABOUT TRIVIA QUESTIONS AT THE ICANN BAR AND OTHER WAGERS.

ACTUALLY, FOUR APPLICANTS HAVE COMPLETED NEGOTIATIONS AND ESTABLISHED NEW REGISTRIES. SO CAT, JOBS, MOBI AND TRAVEL ARE ALL IN THE ROOT. AGAIN, FOUR OTHER APPLICANTS HAVE ENTERED INTO TECHNICAL AND COMMERCIAL NEGOTIATIONS WITH ICANN. I'LL REPORT THAT IN THE CASE OF THREE OF THEM, ASIA, .TEL AND TRIPLE-X, THOSE NEGOTIATIONS ARE OR ARE ESSENTIALLY COMPLETE, AND THE APPLICATIONS AND THE AGREEMENTS WILL BE PUT BEFORE THE BOARD FOR APPROVAL IN THE NEAR FUTURE. AND THEN THERE ARE TWO APPLICATIONS THAT ARE NO LONGER ACTIVE.

SO THERE'S FOUR STLDS IN THE ROOT. THE .CAT TOP-LEVEL DOMAIN IS PRESENTLY IN ITS SUNRISE PERIOD. I HAD AN I.M. SESSION WITH AMADEU YESTERDAY AND HE REPORTED ONE OF THE REASONS HE WASN'T HERE IS HE IS TRYING TO MANAGE THE SUNRISE PERIOD. HE IS EXTREMELY BUSY, EXTREMELY PLEASED WITH THE LEVEL OF ACTIVITY AND INVITES EVERYONE TO GOOGLE .CAT AND NOTE THE MILLION OR SO PAGES ASSOCIATED WITH IT.

THERE'S A LARGE AMOUNT OF INTEREST IN REGISTERING NAMES AS SOON AS THE SUNRISE PERIOD IS OVER. JOBS IS ALSO IN THE ROOT. IT'S ENGAGED WITH A NUMBER OF REGISTRARS, THAT IT HAS APPROVED THOSE REGISTRARS FOR ACCREDITATION AND IS REGISTERING NAMES AND HAS BEEN SINCE LATE 2005. MOBI IS SCHEDULED TO ENTER INTO ITS SUNRISE PERIOD NEXT MONTH. THEY HAVE ALSO ENTERED INTO AGREEMENT WITH A NUMBER OF

REGISTRARS SO THAT THEY HAVE ACCREDITED REGISTRARS TO SELL THE .MOBI NAMES.

AND TRAVEL HAS LAUNCHED A LIMITED PHASE. IT'S BEEN VERY ACTIVE. THE NUMBER OF REGISTRATIONS IN EACH CASE IS HELD CONFIDENTIAL FOR THREE MONTHS, BUT THEY HAVE BEEN VERY SUCCESSFUL IN THEIR COMMUNITY IN REGISTERING NAMES AND HAVE ALSO ENTERED INTO AGREEMENTS WITH A NUMBER OF REGISTRARS. SO THESE FOUR STLDS THAT ARE IN THE ROOT ARE ALL VERY ACTIVE. IF YOU WANT TO LOOK AT ADDITIONAL INFORMATION, YOU CAN GO TO ICANN.ORG AND CLICK ON THE NEW SPONSORED TLD APPLICATIONS ON THE RIGHT-HAND SIDE.

THERE IS A WEALTH OF INFORMATION THERE, INCLUDING THE INDEPENDENT EVALUATIONS THAT WERE YOU PUBLICLY POSTED A FEW MONTHS AGO.

SOME OF THE -- OOPS, I'M SORRY.

SOME OF THE DETAILED INFORMATION IN THOSE DOCUMENTS HAS BEEN REDACTED BECAUSE IT'S COMPANY CONFIDENTIAL, BUT IT IS QUITE RICH IN ITS DETAIL.

IN ADDITION, AND IN ORDER TO FACILITATE THE SUCCESS OF THESE DOMAINS AND THESE TOP-LEVEL DOMAINS AND OTHERS, ICANN HAS CREATED AN AREA ON OUR SITE FOR UNIVERSAL ACCEPTANCE OF TLDS. AND WE'RE GOING TO CONTINUE TO AUGMENT THAT SITE AND PROVIDE TOOLS TO CODE WRITERS TO ENSURE THAT TLDS, WHEN THEY ARE TYPED AS PART OF A URL, WILL BE ACCEPTED.

SO THAT'S ALL I HAVE ON THIS PRESENTATION.

ALEJANDRO?

Annex 2