IN THE MATTER OF
AN INDEPENDENT REVIEW PROCESS
BEFORE THE
INTERNATIONAL CENTRE FOR
DISPUTE RESOLUTION

ICM REGISTRY, LLC, Claimant, v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent.	ICDR Case No. 50 117 T 00224 08

CLAIMANT'S POST-HEARING SUBMISSION

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I. INTRODUCTION

1. Claimant ICM Registry, LLC ("ICM") respectfully submits this post-hearing submission in the above-referenced Independent Review Process ("IRP") against Respondent Internet Corporation for Assigned Names and Numbers ("ICANN"), arising from ICANN's conduct of its 15 December 2003 Request for Proposals ("RFP") for sponsored Top Level Domains ("sTLDs") (referred to herein as the "2004 Round").

2. In the words of the Panel, the purpose of the post-hearing submissions in this matter is for ICM and ICANN to identify the "points they believe still divide the parties and what inconsistencies they see in the record between the testimonies and arguments that have been advanced," and to provide specificity "as to what one side perceives as the defects in the argument of the other and vice versa based on the record."[1]

3. The record facts overwhelmingly support ICM on the points of difference between the Parties. In sum, the record demonstrates the following:

- On 1 June 2005, the ICANN Board concluded that ICM had met all of the RFP criteria – financial, technical, and sponsorship – and authorized ICANN's President and General Counsel to enter into negotiations concerning the "commercial and technical terms" of a registry agreement with ICM. The Board's 1 June 2005 resolution was the culmination of a process that had lasted over two years – during which the RFP criteria, the RFP, and the applications had all been posted for public comment – and during which ICANN's

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[1] *ICM Registry, LLC v. Internet Corporation for Assigned Names and Numbers ("ICANN")*, No. 50 117 T 00224 08, Transcript of Hearing, 1203:5-14, 25 September 2009. Hereafter, citations to the hearing transcript will be in the following abbreviated form: "Tr. 1203:5-14 (25 Sept. 2009)."

Governmental Advisory Committee ("GAC") and others had numerous opportunities to express their views concerning ICM's application.

- In August 2005, the U.S. government, spurred by a few domestic religious conservative advocacy groups, intervened to oppose ICM's application. ICANN's President, Dr. Paul Twomey, was told that the second-ranking official at the Department of Commerce, a member of President George W. Bush's "inner circle," had stated that even if ICANN approved the .XXX sTLD, the U.S. government would refuse to authorize its entry into the authoritative root zone file. Assistant Secretary of Commerce Michael Gallagher, the head of the National Telecommunications and Information Agency ("NTIA"), the agency of the Commerce Department with principal responsibility over the Internet, wrote to the Chairman of ICANN's Board, Dr. Vinton Cerf, asking ICANN to delay any action on ICM's application. From that point on, a process that had previously moved forward in a generally fair, transparent, and non-discriminatory fashion – and that was based on a reasoned evaluation of objective criteria – was abandoned by the ICANN Board.
- ICANN – concerned with intense international criticism that it was beholden to the U.S. government – attempted to conceal the U.S. intervention and its potentially grave implications for ICANN. Dr. Twomey asked Dr. Sharil Tarmizi, Chairman of the GAC, to write

a letter also requesting ICANN to delay action on ICM's application, to serve as "cover" for Mr. Gallagher's letter. Although ICANN has consistently portrayed Dr. Tarmizi's letter as a statement on behalf of the GAC, ICM confirmed through an email obtained under the Freedom of Information Act ("FOIA") that there was, in fact, no GAC position on .XXX in that timeframe. Indeed, the first time the GAC expressed any specific opinion about ICM's application was its Wellington Communiqué of 28 March 2006 – and even then, the GAC simply asked that ICM's registry agreement reflect several "public policy concerns," while observing that only "several" GAC members were "emphatically opposed" to a .XXX sTLD.

- In the meantime, apparently acting under pressure from the "several" GAC members who "emphatically opposed" the .XXX sTLD, ICANN repeatedly delayed action on ICM's proposed contract, while also imposing additional requirements for ICM to satisfy during contract negotiations. ICM responded in a reasonable and responsible manner to all of ICANN's additional demands, working closely with ICANN's staff and outside counsel. The issue of sponsorship – which had *not* been raised with ICM in the months following the 1 June 2005 Board vote – resurfaced in the Board only in May 2006, when Dr. Twomey was the *only* Board member to mention sponsorship in voting to reject ICM's draft proposed registry agreement. Even then, ICM provided abundant evidence (far more than was required of any other applicant)

that its level of support had in fact increased from when the Board originally approved the application for contract negotiations.

- Ultimately, the Board rejected ICM's application on 30 March 2007, relying on false, pretextual, and discriminatory grounds. The real reason for the 30 March 2007 resolution was far outside ICANN's mission and entirely inconsistent with its Articles and Bylaws: ICANN was bowing to several powerful governments that demanded that ICM's application be rejected based solely on the "offensive content" of the proposed sTLD.

4. As detailed below, and as reflected in the Evidentiary Chart attached hereto as Appendix A, ICM's position on these points is supported by all of the contemporaneous documents, and by the testimony of neutral witnesses, its own witnesses, and (to a large degree) ICANN's witnesses.[2]

5. ICANN's positions on these points, by contrast, are entirely unsupported by the record in this case. Although ICANN acknowledges that it treated ICM differently than all the other applicants in the 2004 Round, ICANN attempts to spin the numerous delays, additional requirements, procedural changes, and ultimately, the unfair and discriminatory treatment it imposed on ICM, into a story of ICANN's patience and beneficence. Thus, ICANN asserts that its differential treatment of ICM was preferential treatment – that even as ICANN "treat[ed] ICM discriminatorily," it treated ICM "positively."[3] According to ICANN, ICM was "treated better

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[2] Claimant's Post-Hearing Evidentiary Chart, Appendix A. The Evidence Chart presents a guide to the various documentary and testimonial evidence on key relevant points in this IRP.

[3] Testimony Dr. Paul Twomey, Tr. 904:8-11 (24 Sept. 2009) ("Q: Did [ICANN] treat ICM discriminatorily? A: Yes. Q: How so? A: Positively").

than the other[applicants] because they were given more chances and more opportunities . . . . [I]t would have been so much more easy to turn down this application in June or in September of 2005 . . . ."[4] ICANN would actually have the Panel believe that its Board could have "easily" rejected the ICM application in June or September 2005, but that ICANN, in its magnanimity, allowed ICM to continue its futile pursuit for months and then years, until, finally, ICM's application died of the flaws that had apparently always existed in its proposal.

6. Unfortunately for ICANN, its laudatory self-depiction is based solely on the testimony of its own three witnesses, who, at the IRP Hearing, frequently acknowledged that they were not involved in or could not remember key events. In addition to the numerous omissions, inconsistencies, and logical flaws in their testimony, critical assertions in their testimony are refuted or unsupported by the contemporaneous documents (which often quote these same witnesses and contradict their own testimony). As for the two ICANN officials who were most intimately involved in the events at issue – Kurt Pritz, the ICANN Vice-President who oversaw the 2004 Round, and John Jeffrey, ICANN's General Counsel, who was responsible for negotiating ICM's registry agreement on ICANN's behalf – ICANN declined to present them as witnesses in this IRP. The significance of this should not be lost on the Panel, especially in light of Mr. Jeffrey's consistent presence in the hearing room. Quite likely, given the contemporaneous documentary evidence presented by ICM, as well as the unrebutted testimony of ICM's witnesses (especially Ms. Burr and Mr. Lawley), there is probably very little that Mr. Jeffrey or Mr. Pritz would have been willing to say under oath that would have been helpful to the positions ICANN has taken in these proceedings.

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[4] Closing argument of ICANN Counsel, Tr. 1181:19-21, (25 Sept. 2009); *see also id.* Tr. 1157:13-15.

7. In this post-hearing submission, ICM summarizes the evidence concerning the points of difference set forth above. ICM's focus is on the factual record before the Panel. ICM will not attempt to summarize the legal arguments set forth in ICM's Memorial or at hearing, other than to comment briefly on the evidence concerning the Panel's remit, and to identify the main provisions in the ICANN Articles and Bylaws that ICANN's conduct violated. The remainder of this submission is organized as follows:

I. Introduction;

II. Facts Leading to the 1 June 2005 Vote;

III. ICANN Determined That ICM Met the RFP Criteria When It Voted for ICM to Proceed To Contract Negotiations;

IV. ICANN reacted to the U.S. Government's Intervention in August 2005 by Abandoning the Fair, Transparent, and Non-Discriminatory Process that it had Previously Followed with Respect to ICM;

V. ICANN Failed to Negotiate the Registry Agreement in Good Faith and Abandoned the RFP Criteria and Procedures;

VI. The Board's rejection of ICM's Application was Inconsistent with ICANN's Articles of Incorporation and Bylaws; and

VII. The Panel's Remit.

II. FACTS LEADING TO THE 1 JUNE 2005 VOTE

8. The 2004 Round was preceded by ICANN's 2000 "proof of concept" Round (also referred to as the "2000 Round") for generic Top Level Domains ("gTLDs").[5] ICM (then under different management) applied for an unsponsored .XXX gTLD. ICANN determined to select a

[5] gTLDs included both sponsored and unsponsored TLDs.

relatively small number of gTLDs – seven out of 47 applicants – for addition to the root.[6] ICM's application was not selected. In these proceedings, ICANN has taken the position that this rejection is strong evidence that ICM knew its application for an .XXX sTLD would be "controversial: and likely to be rejected again. ICANN's position is belied by its statements at the time. Given the experimental nature of the "proof of concept" Round, ICANN emphasized that the fact that a new TLD proposal had not been selected under the circumstances "should not be interpreted as a negative reflection on the proposal or its sponsor."[7] Thus, the 2000 Round rejection of ICM's application for the .XXX gTLD has no bearing on the present dispute. Indeed, it is as irrelevant as ICANN's other stalking horse (as discussed in further detail below) that ICM knew full well that there is no sponsored community, and as such, a .XXX TLD should be a generic TLD.

9. ICANN received wide-spread criticism for its lack of well-defined criteria and procedures in the 2000 Round. Accordingly, ICANN determined that in the 2004 Round, it would undertake special efforts to employ neutral and objective criteria, and fair and "robust" procedures, for the evaluation of sTLD applications.[8] An extended process was also developed in order to provide interested parties an opportunity to comment. Thus, ICANN posted the

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[6] ICANN entered Registry Agreements with all seven. Of the seven, three were unsponsored TLDs – .AERO, .COOP, and .MUSEUM – and four were sponsored – .BIZ, .NAME, .INFO, and .PRO.

[7] Hearing Exhibit 58, Reconsideration Request 00-15: Recommendations of the Committee (Revised).

[8] Testimony of Dr. Milton Mueller, Tr. 156:15 – 157:16 (21 Sept. 2009); Testimony of Mr. Stuart Lawley, Tr. 262:16 – 263:8 (21 Sept. 2009); Testimony of Dr. Elizabeth A. Williams 368:18 – 369:16, 396:4-9 (22 Sept. 2009); Testimony of Ms. J. Beckwith Burr, Tr. 428:3-9 (22 Sept. 2009) ("the 2004 round was specifically not a beauty contest."). Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section A.5.

proposed criteria for the 2004 Round for public comment on 25 March 2003;[9] posted a draft RFP for public comment on 24 June 2003;[10] and posted the RFP itself on 15 December 2003.[11] There has been some dispute between the Parties as to whether and to what extent the 2004 RFP criteria included an explicit requirement that an applicant address "public policy" issues potentially raised by the application. In varying degrees, both ICANN's and ICM's witnesses were in agreement that the RFP criteria implicitly included a public policy requirement. But any contention that this requirement was made explicit in the 2004 RFP criteria lacks any basis. What is also clear is that the criteria said nothing about morality considerations or offensive content even though ICANN was well aware that an application for an adult content TLD was quite likely.[12] In any event, as discussed below, whatever legitimate public policy considerations were raised by ICM's application were comprehensively addressed by ICM.

10. ICANN posted a description of the 10 applications it received – including, specifically, ICM's application for .XXX – for public comment on 1 April 2004.[13] There is no divergence between the Parties as to the fact that the GAC initially voiced no specific concern regarding ICM's application. The evidence shows that on 1 December 2004, Dr. Twomey wrote to Dr. Tarmizi to ask if the GAC had any comments on the pending applications.[14] On 3 April

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9 Hearing Exhibit 66, ICANN Rio de Janeiro Meeting Topic: Criteria to Be Used in the Selection of New Sponsored TLDs (25 Mar. 2003).

10 Hearing Exhibit 72, Draft RFP (24 Jun. 2003).

11 Hearing Exhibit 45, sTLD RFP (15 Dec. 2003); Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section A.5.

12 Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section A.3.

13 Hearing Exhibit 82, ICANN Announcement: Progress and Process (19 Mar. 2004).

14 Hearing Exhibit 157, Letter from Paul Twomey to Sharil Tarmizi (1 Dec. 2004).

2005, Dr. Tarmizi reported that "[n]o GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current Round."[15]

11. ICANN conducted the 2004 Round as a two-step process, in which it was first determined whether each applicant met the RFP criteria. If the criteria were met, the applicant would then proceed to negotiate the commercial and technical terms of a registry agreement.[16] The RFP included a detailed description of the criteria that had to be met for the applicant to proceed to contract negotiations.[17] The RFP also stated that the selection criteria would be applied "based on principles of objectivity, non-discrimination, and transparency."[18] As mentioned above, none of the criteria explicitly mentioned morality, public order, or content issues.[19]

12. The criteria in the RFP were divided into three categories: (1) Technical, (2) Business, and (3) Sponsorship and other issues ("Sponsorship"). ICANN appointed independent

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[15] Hearing Exhibit 158, Letter from Sharil Tarmizi to Paul Twomey (3 Apr. 2005), at 1.

[16] As confirmed by ICANN's own witnesses, there can be no serious dispute as to whether there was a two-step process set forth by the RFP. *See* Testimony of Dr. Vinton J. Cerf, Tr. 663:13-20 (23 Sept. 2009) ("Q. In fact, there are numerous contemporaneous documents by ICANN officials that state that this was a two-step process, isn't that correct? A. That's the way it was described in the RFP. Q. As a two-step process? A. Yes."). ICM has presented extensive evidence – including numerous contemporaneous statements from ICANN officials – concerning the two-step process. *See* Demonstrative: Claimant's Opening PowerPoint – ICANN Statements Confirming a Two Step Process; Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section B.1.

[17] Hearing Exhibit 45, sTLD RFP (15 Dec. 2003).

[18] *Id*. at 1.

[19] *Id.*; Testimony of Dr. Mueller, Tr. 158:15 – 159:5 (21 Sept. 2009); Testimony of Mr. Lawley, Tr. 262:12 – 263:8 (21 Sept. 2009); Testimony of Dr. Williams, Tr. 368:18 – 369:16 (22 Sept. 2009). Interestingly, the current draft RFP for the upcoming 2010 TLD Round includes provisions for filing and resolving objections to an application, including provisions that objections may be filed if the "string is contrary to generally accepted legal norms and public order that are recognized under international principles of law." Witness Statement of Dr. Williams, ¶ 32 ("By including these processes in the draft RFP for the 2009 round, ICANN has provided sufficient notice to applicants that controversial or unpopular applications may be subject to objection and even rejection based on 'morality' considerations.").

evaluation teams to evaluate each category of criteria. Although the Technical and Business Teams passed ICM's application, the Sponsorship Team failed eight of the 10 applicants, including ICM.[20] ICANN tried to make much of the fact that ICM's application was among the eight applications that were rejected and that the application was rejected on sponsorship grounds. The insignificance of that fact was demonstrated by Dr. Williams' testimony that there was no way that the Board could have fairly applied the sponsorship criteria so that ICM failed and all of the other sTLDs passed.[21]

13. The ICANN Board, dissatisfied with the negative results for so many applicants, rejected the conclusions of the Sponsorship Team, and took over the evaluation process on the issue of sponsorship.[22] Of the eight applicants failed by the Sponsorship Team, two voluntarily dropped out of the 2004 Round. The ICANN Board approved all of the remaining six for contract negotiations – but ultimately rejected only ICM's application.[23] Indeed, applicants deemed by the Sponsorship Team to have failed more criteria than ICM ultimately executed final registry agreements with the Board.[24]

14. After the Board took over the evaluation process, and prior to the 1 June 2005 vote, ICANN engaged ICM in further discussions about a number of issues, including sponsorship.[25] In April 2005, ICM made a presentation on sponsorship to the ICANN Board at

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[20] Hearing Exhibit 110, Appendix D, sTLD Status Report (updated 30 Nov. 2005), at 21, 59-60, and 114; Claimant's Memorial on the Merits, Appendix A.

[21] Testimony of Dr. Williams, Tr. 375:2-9 (22 Sept. 2009); Witness Statement of Dr. Williams, ¶¶ 23, 28-33.

[22] Testimony of Dr. Williams, Tr. 371:8 – 371:10 (22 Sept. 2009); Hearing Exhibit 111, ICANN Meetings in Kuala Lumpur, Malaysia: ICANN Public Forum (22 Jul. 2004), at 36-37.

[23] Claimant's Memorial on the Merits, Appendix B.

[24] Claimant's Memorial on the Merits, Appendix A.

[25] Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section D.1.

the ICANN meeting in Mar del Plata, Argentina. Among other things, ICM presented poll results conducted by a well respected independent adult entertainment industry news and information portal. The poll showed that 57% of the industry thought the .XXX TLD was a good idea, 22% thought it was a "horrible idea," and 21% thought it was "no big deal either way."[26]

15. On 1 June 2005, the Board voted for ICM to proceed to contract negotiations.[27]

III. ICANN DETERMINED THAT ICM MET THE RFP CRITERIA WHEN IT RESOLVED FOR ICM TO PROCEED TO CONTRACT NEGOTIATIONS.

A. The Significance of the 1 June 2005 Vote

16. The record evidence in this case demonstrates overwhelmingly that when the Board approved ICM to proceed to contract negotiations on 1 June 2005, the Board concluded that ICM had met all of the RFP criteria – including, specifically, sponsorship. The issue is important given ICANN's current contention that sponsorship was always an "open" question for ICM, that ICANN gave ICM numerous "chances" and "opportunities" to meet the

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[26] Confidential Hearing Exhibit 007, ICM Confidential Presentation, The Sponsored .xxx TLD: Promoting Online Responsibility (2 Apr. 2005), at 26; Testimony of Mr. Lawley, Tr. 274:20 – 276:1 (21 Sept. 2009). In closing argument, ICANN's Counsel mischaracterized the poll, stating: "If you do your own survey, I would think you might come up with a better number. But the point was not how many people supported it. It was that the RFP made it clear that there was not supposed to be substantial opposition from the community you were proposing to represent." Closing argument of ICANN Counsel, Tr. 1174:6-11 (25 Sept. 2009). First of all, this was not ICM's "own survey"; it was an independent poll conducted by an independent adult industry organization. Second, the RFP did not require the absence of "opposition" in the community. Rather, it asked for "[e]vidence of broad-based support" which ICM unquestionably demonstrated. Third, after this presentation in April 2005, the Board proceeded to conclude that ICM's application had in fact met all the RFP criteria. Hearing Exhibit 45, sTLD RFP (15 Dec. 2003), at 4.

[27] Hearing Exhibit 120, ICANN Board Resolution on .XXX sTLD Approval to Enter into Contractual Negotiations (1 Jun. 2005).

sponsorship criteria,[28] and that ICANN properly denied ICM's application in March 2007 because ICM "fail[ed] to meet" the sponsorship criteria.[29]

17. There is simply no credible evidence to support ICANN's contentions. All of the contemporaneous documentary evidence supports ICM's position that ICM met the sponsorship criteria on 1 June 2005.[30] Moreover, the fact that the Board determined that ICM met the sponsorship criteria in June 2005 further supports the conclusion (discussed below) that ICANN's eventual rejection of ICM's application on sponsorship grounds in March 2007 was pretextual.

18. For example, ICANN's Chairman of the Board, Dr. Vinton Cerf, was quoted as telling the GAC that ICM had met the sponsorship and other criteria at the ICANN meetings in Luxembourg in July 2005:

> **Dr. Cerf** added, taking the example of *.xxx* that there was a variety of proposals before, including for this extension, but this time the way to cope with the selection was different. ***The proposal this time met the three main criteria, financial, technical, sponsorship***. They [sic] were doubts expressed about the last criteria which were discussed extensively and **the Board reached a positive decision considering that ICANN should not be involved in content matters.**[31]

Also in Luxembourg, Kurt Pritz – the ICANN Vice President with primary responsibility for the 2004 Round – stated:

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[28] Closing argument of ICANN Counsel, Tr. 1157:10-19 (25 Sept. 2009).

[29] Hearing Exhibit 121, ICANN Board Resolution on Proposed sTLD Agreement with ICM Registry (30 Mar. 2007).

[30] Claimant's Post-Hearing Evidentiary Chart, Appendix A, Sections D.2, D.4, D.5, and D.6.

[31] Hearing Exhibit 139, GAC Luxembourg Minutes (11 Jul. 2005) (emphasis added), at 5. Dr. Cerf did not deny that he made this statement, but simply offered that "I don't remember saying that." Testimony of Dr. Cerf, Tr. 615:20-21 (23 Sept. 2009).

> 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***.[32]

Even the GAC Chairman, Dr. Tarmizi, told the GAC at Luxembourg: "the Board **came to a decision** after a very difficult and intense debate which has included moral aspects."[33]

19. In addition, several days after the 1 June 2005 vote took place, Board Member Joichi Ito posted on his blog "**Our approval of .XXX is a decision based on whether .XXX met the criteria** and does not endorse or condone any particular type of content or moral belief."[34] Mr. Jeffrey – the ICANN General Counsel who supposedly advised the Board that it could use contract negotiations to test whether the sponsorship criteria had been met – approved a press release stating that "ICANN's board of directors today determined that **the proposal for a new top level domain submitted by ICM Registry meets the criteria established by ICANN**.[35] And ICANN's spokesman Kieran Baker was cited in the press as stating that adult-oriented sites "could begin buying 'xxx' addresses as early as fall or winter depending on ICM's

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[32] Hearing Exhibit 140, ICANN Meetings in Luxembourg, Public Forum (14 Jul. 2005), at 28 (emphasis added).

[33] Hearing Exhibit 139, GAC Luxembourg Minutes (11 Jul. 2005) at 3 (emphasis added). This press release was prepared in May 2005, in anticipation that the Board would vote on ICM's application at its May 2005 meeting. The press release was issued in this form, with ICANN's approval, immediately following the 1 June 2005 vote. *See* Testimony of Dr. Cerf, Tr. 678:1-17 (23 Sept. 2009).

[34] Hearing Exhibit 142, Joichi Ito, Some Notes on the .XXX Top Level Domain (3 Jun. 2005), at 2 (emphasis added).

[35] Hearing Exhibit 221, Emails between John Jeffrey and J. Beckwith Burr (3 May 2005) (emphasis added).

plans."[36] ICANN's witnesses had no response to this evidence, other than to say they could not remember it.[37]

20. Furthermore, the testimony of ICANN's witnesses on this point is without any documentary support. There is not a single contemporaneous document evidencing or even suggesting that the purpose of negotiations with ICM included "testing" the sponsorship criteria. Moreover, such testimony is simply implausible in light of the contemporaneous evidence. Specifically, ICANN's witnesses testified that there were extensive discussions at the 1 June 2005 board meeting as to whether or not ICM met the sponsorship criteria. According to Dr. Cerf's "recollection," the Board was unable to decide the sponsorship issue and finally consulted with Mr. Jeffrey, ICANN's General Counsel.[38] Dr. Cerf testified that Mr. Jeffrey advised the Board that even though the sponsorship issue was unresolved, ICANN could nonetheless proceed to contract negotiations with ICM and "use the discussions with regard to the contract as a means of exposing and understanding more deeply whether the sponsorship criteria had been or could be adequately met."[39]

21. First, Dr. Cerf's testimony is flatly contradicted by the numerous contemporaneous statements of ICANN Board members and officials that ICM had, in fact, met the criteria, including Dr. Cerf's own contemporaneous statement to the GAC in Luxembourg, quoted above.[40]

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[36] Hearing Exhibit 283, "Internet group OKs New Suffix for Porn Sites," Associated Press (2 June 2005).

[37] Testimony of Dr. Cerf, Tr. 615:18-21, 660:9-12, 675:3-16 (23 Sept. 2009); Testimony of Dr. Twomey, 914:4-915:11 (24 Sept. 2009).

[38] Testimony of Dr. Cerf, Tr. 600:6-22 (23 Sept. 2009).

[39] *Id.*, Tr. at 600:13-18 (23 Sept. 2009).

[40] Hearing Exhibit 139, GAC Luxembourg Minutes (11 Jul. 2005) at 5 (emphasis added).

22. Second, it is simply not plausible that following the "lengthy discussion" that allegedly transpired, and the advice that Mr. Jeffrey allegedly gave (*i.e.*, that the parties could proceed to "test" sponsorship during contact negotiations), that there is not a single document to reflect those discussions or advice. One would imagine that following such a lengthy discussion, and with the significant caveats that Mr. Jeffrey supposedly imposed on the negotiations, the Board would reflect those caveats in the resolution approving ICM to proceed to negotiations. After all, the Board had previously included such caveats in the resolutions for two other applicants.[41] But there are no caveats in ICM's resolution.[42] The resolution authorized "negotiations relating to proposed **commercial** and **technical** terms for the .XXX sponsored top-level domain (sTLD) with the applicant."[43] There is no mention whatsoever of the sponsorship issue.[44] ICANN argues that the resolution stated that a contract would be entered into, "if" the Parties were able to negotiate "commercial and technical terms;" therefore, ICM should have

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[41] Hearing Exhibit 116, ICANN Board Resolutions on .JOBS and .MOBI sTLD Negotiation (13 Dec. 2004). The resolutions for .JOBS and .MOBI, passed by the Board on 13 December 2004, authorized contract negotiations with those applicants, subject to specific caveats explicitly set forth in the resolutions.

[42] Hearing Exhibit 120, ICANN Board Resolution on .XXX sTLD Approval to Enter into Contractual Negotiations (1 Jun. 2005).

[43] *Id.* (emphasis added).

[44] ICM does not necessarily believe that Dr. Cerf or ICANN's other witnesses intentionally provided false testimony. However, Dr. Cerf acknowledged that he did not draft his own witness statement (Tr. 660:12 – 662:6) (23 Sept. 2009); that a number of passages of his witness statement were verbatim or nearly verbatim to Dr. Twomey's (*id.* Tr. 658:12 – 660:8, 663:8-12); and that he did not have access to many contemporaneous documents (*id.* Tr. 661:9 – 662:3). It is possible that Dr. Cerf and ICANN's other witnesses misremembered certain events that had transpired several years before the preparation of their witness statements and hearing testimony. Indeed, Dr. Pisanty, on questioning from the Panel, did not seem able to recall exactly what transpired during the 1 June 2005 Board meeting, which was conducted by telephone. He testified: "I don't remember precisely what the criteria were expressed during that teleconference. This was a concern from very early on and it appears on the record as shared by many other directors later on." Testimony of Dr. Pisanty, Tr. 831:9-13 (24 Sept. 2009). When pressed on whether ICANN staff raised the sponsorship issue in the time frame immediately following the 1 June 2005 vote, Dr. Twomey testified: "I would have to go back and – it's a long time ago and a lot of issues have taken place since." *Id*. at 913:21 – 914:1.

known that all other issues also remained open. ICANN's argument finds no support in the text of the resolution, the contemporaneous evidence, or in logic.[45] Complete silence on an issue – when other issues are specifically mentioned – does not create ambiguity concerning the missing issue. It means that the missing issue is no longer an issue.

23. One would also imagine that Mr. Jeffrey would have raised the issue in his correspondence with ICM concerning the contract, having supposedly advised the Board that the parties could use negotiations, to use Dr. Cerf's words, "as a means of exposing and understanding more deeply whether the sponsorship criteria had been or could be adequately met."[46] Instead, upon receiving the first draft agreement from ICM's counsel on 13 June 2005, Mr. Jeffrey did not mention the sponsorship issue, even in passing. He simply responded: "We anticipate that this should be a fairly straightforward negotiation and also look for a quick conclusion to any required discussions relating to the agreement."[47] Similarly, if ICM's counsel, J. Beckwith Burr, had been informed that sponsorship was still at issue, her email to Mr. Jeffrey makes no mention of it, and concludes: "Thanks – we look forward to reaching agreement on the terms and conditions under which ICM Registry will operate .xxx in the very near future."[48]

24. Indeed, both Ms. Burr and ICM's President, Stuart Lawley, testified that sponsorship was never raised by the ICANN Board as an issue following the 1 June 2005 vote until May 2006.[49] In unrebutted testimony, Mr. Lawley said that numerous ICANN Board members and staff – including Dr. Cerf, Dr. Twomey, Mr. Jeffrey, and Mr. Pritz – all

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45 Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section E.3.

46 Testimony of Dr. Cerf, Tr. at 600:13-18 (23 Sept. 2009).

47 Hearing Exhibit 150, Email from John Jeffrey to Becky Burr (13 Jun. 2005), at 1.

48 *Id*. at 2.

49 Testimony of Mr. Lawley, Tr. 282:14 – 285:7 (21 Sept. 2009).

congratulated him following the 1 June 2005 vote, and none mentioned the issue of sponsorship.[50] Moreover, as discussed below, there is no contemporaneous documentary evidence (and no other convincing evidence) that the issue of sponsorship was ever raised with ICM following the 1 June 2005 vote, until mid-2006.[51]

25. In sum, the evidence overwhelmingly demonstrates that the Board determined that ICM's application met the sponsorship criteria on 1 June 2005. Thus, contrary to ICANN's closing argument, it would *not* have been "so much more easy [for ICANN] to turn down [ICM's] application in June or in September of 2005,"[52] as there would have been absolutely no basis for doing so. Nor (as discussed below) was there any legitimate basis for ICANN's rejection of ICM's application in March 2007.

B. There is No Evidence That Sponsorship Was Ever Raised with ICM in the Months Following the 1 June 2005 Vote.

26. In closing argument, ICANN's counsel asserted that even "if there were ambiguity" in the 1 June 2005 resolution over whether sponsorship was still an open issue, such ambiguity was resolved "because the board addressed sponsorship at *every subsequent* board meeting."[53] In fact, there is no credible evidence that sponsorship was addressed at *any* board meeting – let alone *every* board meeting – between 1 June 2005 and 10 May 2006.

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[50] Testimony of Mr. Lawley, Tr. 292:3 – 293:20, 300:1 – 301:8 (21 Sept. 2009); Testimony of Ms. Burr, Tr. 484:11-16; 453:12 – 454:19 (22 Sept. 2009).

[51] Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section E.4.

[52] Closing argument of ICANN Counsel, Tr. 1181:18-21 (25 Sept. 2009).

[53] *Id.*, Tr. 1161:13-18 (25 September 2009). Given that the 1 June 2005 resolution authorized negotiations only on the "commercial and technical terms for a contractual arrangement" and made no mention of sponsorship whatsoever (*see* Hearing Exhibit 120, ICANN Board Resolution on .XXX sTLD Approval to Enter into Contractual Negotiations (1 Jun. 2005)), it is difficult for ICM to see any ambiguity in the resolution.

27. The only documentary evidence that ICANN can cite for the proposition that the Board discussed the sponsorship issue in the months following the 1 June 2005 vote was Hearing Exhibit 119. That exhibit purports to represent the minutes of a "Special Meeting of the Board" held on 15 September 2005. However, as the evidence showed, these minutes were not posted contemporaneous to the 15 September 2005 board meeting. Rather, they were posted *nine months later* – after a Board meeting on 14 June 2006[54] and *after* the Board had voted to reject ICM's proposed registry agreement at its 10 May 2006 meeting.[55]

28. By contrast, the *Preliminary Report* of the 15 September 2005 board meeting – which was prepared and released contemporaneously with that meeting – *makes no mention of sponsorship*.[56] According to the Preliminary Report, the Board identified only two specific concerns: "possible proposals for codes of conduct and ongoing obligations regarding potential changes in ownership."[57] As Ms. Burr testified, these were the only two concerns that the ICANN staff raised with ICM following the 15 September 2005 board meeting.[58] As Dr. Cerf acknowledged on cross-examination, there was nothing in the Preliminary Report pertaining to sponsorship.[59]

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[54] Hearing Exhibit 276, ICANN, Special Meeting of the Board, Minutes (14 Jun. 2006), at 1 (resolving that "the minutes of the Board Meeting of 15 September 2005 are hereby approved and should be posted"). As Dr. Cerf acknowledged when asked about the late posting, "this was an area of considerable unhappiness on the part of the board that minutes were not being posted in a timely way, as counsel has evidenced here." Testimony of Dr. Cerf, Tr. 725:22 – 726:3 (23 Sept. 2005).

[55] Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section E.7.

[56] *See* Hearing Exhibit 272, ICANN, Special Meeting of the Board, Preliminary Report, (15 Sept. 2005), at 1.

[57] *Id.*

[58] *See* Testimony of Ms. Burr, Tr. 447:18 – 448:20 (22 Sept. 2009).

[59] Testimony of Dr. Cerf, Tr. 727:21-22 (23 Sept. 2009) ("Q. Is there any mention of sponsorship [in the Preliminary Report]? A. There is none in that text.").

29. Similarly, in detailed (and largely identical) letters signed by Drs. Cerf and Twomey on, respectively, 17 January 2006 and 11 February 2006, there is a lengthy summary of the 15 September 2005 Board discussion concerning .XXX. Neither mentions sponsorship.[60]

30. It is puzzling, to say the least, that the minutes posted in June 2006 purport to show that the issue of sponsorship was raised at the 15 September 2005 meeting, while the contemporaneous Preliminary Report, and subsequent letters written more closely in time to the 15 September meeting, make no mention of sponsorship at all. The timing is also interesting. Again, it was on 10 May 2006 that the Board first voted to reject ICM's proposed registry agreement, with Dr. Twomey being the only Board member to mention sponsorship as a basis for voting against the Agreement. Although Dr. Twomey was the only Board member to mention sponsorship at that meeting, the 10 May 2006 minutes prominently mention sponsorship as one of the items discussed prior to the Board's negative vote.[61] It is difficult to come to any conclusion other than that the minutes posted in June 2006 do not accurately reflect the proceedings of the board meeting that took place on 15 September 2005.

31. Even looking at the evidence in the light most favorable to ICANN, the best one can say is that even if sponsorship *was* discussed at the 15 September 2005 board meeting, no one on the ICANN Board or Staff thought it sufficiently important to include in the Preliminary Report, or in Dr. Cerf's and Dr. Twomey's subsequent letters describing the meeting, or to raise with ICM. Again, there is not a single piece of documentary evidence to suggest that the issue was raised with ICM prior to May 2006.

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[60] *See* Hearing Exhibit AJ, Letter from Mr. Cerf to Mr. Zangl (17 Jan. 2006) at 6-7; Hearing Exhibit 175, Letter from Dr. Twomey to Mr. Tarmizi (11 Feb. 2006), at 7.

[61] Hearing Exhibit 122, ICANN Board Consideration of .XXX sTLD Registry Agreement (10 May 2006), at 1.

32. All of ICM's witnesses testified that the issue was not raised. Although ICANN's closing argument cited Dr. Twomey's testimony as supporting the notion that sponsorship was frequently raised with ICM following the 1 June 2005, Dr. Twomey acknowledged on cross-examination that his memory on this issue was unclear. ICM counsel specifically asked Dr. Twomey: "Are you aware of any communications from [ICANN] staff to ICM between June 1st, 2005, and early 2006 that said sponsorship was an issue?" Dr. Twomey initially responded that, according to his "recollection," such communications took place, but he quickly added: "I would have to go back and – it's a long time ago and a lot of issues have taken place since."[62] Nor could ICANN's other witnesses identify any occasions between June 2005 and May 2006 when the Board raised sponsorship issues with respect to ICM.

33. In sum, there is no credible evidence – documentary or testimonial – to suggest that the Board discussed the sponsorship issue with respect to ICM in the months following the 1 June 2005 vote. To the contrary, all of the evidence demonstrates that the Board concluded on 1 June 2005 that ICM had satisfied the sponsorship criteria set forth in the RFP, and that the issue was closed. Therefore, ICANN seriously overplays its hand when it says "the board addressed sponsorship at *every subsequent* board meeting."[63]

IV. ICANN REACTED TO THE U.S. GOVERNMENT'S INTERVENTION IN AUGUST 2005 BY ABANDONING THE FAIR, TRANSPARENT, AND NON-DISCRIMINATORY PROCESS THAT IT HAD PREVIOUSLY FOLLOWED WITH RESPECT TO ICM.

34. ICANN's case barely mentioned the U.S. government's intervention against ICM's application in August 2005, and did so only in order to minimize its significance. It was

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62 Testimony of Dr. Twomey, Tr. 913:16 – 914:1 (24 Sept. 2009).

63 ICANN's Response to Claimant's Memorial on the Merits, note 47.

the U.S. intervention, however – and more specifically, ICANN's reaction to it – that led the ICANN Board (quite likely at Dr. Twomey's urging) to depart dramatically from the fundamental requirements of its Articles and Bylaws. This evidence cannot be ignored.

35. Indeed, up until the intervention of the U.S. government in August 2005. ICANN's treatment of ICM's application had generally been fair, transparent, and non-discriminatory. The Board had approved ICM to proceed to contract negotiations on 1 June 2005, and shortly thereafter, negotiations commenced. Ms. Burr handled the negotiations for ICM. ICANN's General Counsel, Mr. Jeffrey, along with Esme Smith of the Jones Day law firm, handled the negotiations for ICANN. As predicted by Mr. Jeffrey in his 13 June 2005 email to Ms. Burr, the negotiations were "quick" and "straightforward."[64] By 1 August 2005, the Parties had reached agreement on the terms of a registry contract.[65]

36. Indeed, when a handful of GAC members raised concerns about the .XXX sTLD at the ICANN meetings in Luxembourg on 11-12 July 2005, both Dr. Cerf and Dr. Twomey defended the Board's "positive decision" that ICM's "proposal this time met the three main criteria, financial, technical, sponsorship."[66] Dr. Cerf explained to the GAC:

> The TLD system is neutral, although filtering systems could be solutions promoted by governments. However, to the extent that governments do have concerns they relate to issues across TLDs. Furthermore one could not slip into censorship.[67]

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64 *See* Hearing Exhibit 150, Email from John Jeffrey to Becky Burr (13 Jun. 2005), at 1.

65 Testimony of Ms. Burr, Tr. 440:9-15 (22 Sept. 2009).

66 Hearing Exhibit 139, GAC Luxembourg Minutes (11 Jul. 2005), at 5.

67 *Id*.

Dr. Twomey "noted that no comments had [previously] been received from governments regarding *.xxx*."[68]

37. The GAC issued a communiqué from Luxembourg that did not mention ICM or .XXX.[69] Ms. Burr met with Mr. Jeffrey during the Luxembourg meetings to "walk through some issues" concerning the draft registry agreement. They finalized the draft within a few weeks and that draft was posted on the ICANN website on 9 August 2005. The Board was scheduled to discuss the draft registry agreement at the board meeting scheduled for 16 August 2005.[70]

38. Shortly before the 16 August 2005 board meeting, however, the U.S. government intervened to demand that any further action on ICM's application be delayed.

39. As ICM learned through a FOIA request, the U.S. government's intervention came after an effective summer lobbying campaign by one or two highly conservative religious-based advocacy groups in the United States, which apparently commenced shortly after the Board's 1 June 2005 vote. The influence that these groups were able to exercise on the U.S. government – and, in turn, on ICANN's treatment of ICM – was extraordinary.[71]

40. Thus, for example, an internal email dated 16 June 2005 from Fred L. Schwien, the Executive Secretary of the Commerce Department, expressed considerable alarm at the possibility that Jim Dobson – an evangelical Christian and host of an influential conservative radio show, who was also the founder of the Family Research Council – would oppose the .XXX sTLD. According to the email:

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68 *Id*.; Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section J.3.

69 *See* Hearing Exhibit 159, GAC Luxembourg Communiqué (12 Jul. 2005).

70 Testimony of Ms. Burr, Tr. 443:1-18 (22 Sept. 2009).

71 Claimant's Post-Hearing Evidentiary Chart, Appendix A, Sections K.1 – K.4.

> Who really matters in this mess is Jim Dobson. What he says on his radio program in the morning will determine how ugly this really gets – if he jumps on the bandwagon, our mail server may crash. My suggestion is that someone from the White House ought to call him ASAP and explain the situation, including that the White House doesn't support the porn industry in any way, shape or form, including giving them their own domain.[72]

41. Another internal email, sent by Clyde Ensslin of the NTIA early in the morning of Monday, 20 June 2005, reported the receipt of thousands of emails over the weekend from the Family Research Council. Time-stamped at 7:32 am, the email stated:

> As of midnight Sunday night June 19, by my count, the publicaffairs@ntia.doc.gov account set up on Friday June 16 to accept emails regarding .xxx had received 2,567 messages. Between midnight and 8 am this morning, another 79 came in. Most have an identical text and came from an "Alert" on the Family Research Council home page. If you go to www.frc.org. and scroll to the bottom of a story titled "Stop the Porn Industry from Expanding" and fill in name and address fields, FRC will automatically send messages to both ICANN and Commerce with the subject line "Stop the Establishment of the .xxx domain."[73]

42. That NTIA was keeping such close count of the messages it received from the Family Research Council is not the only indication of the influence that the group was able to wield at the U.S. Department of Commerce. Three hours later (at 10:38 am on 20 June 2005), Mr. Ensslin sent another email to Pat Trueman of the Family Research Council, and J. LaRue of Concerned Woman for America (another conservative advocacy group), setting up a meeting

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[72] Hearing Exhibit 164, Email from Fred Schwien to Michael Gallagher, et al. (16 Jun. 2005). *See also* Hearing Exhibit 160, Email from Meredith Attwell, Senior Advisor at the NTIA, to Jeffrey Joyner, NTIA, et al. (14 Jun. 2005) (internal email dated 14 June 2005 showing Department of Commerce had been contacted by the Family Research Council, as well as by the office of Congressman Chip Pickering, a conservative Republican from Mississippi).

[73] Hearing Exhibit 280, Email from C. Gunderson to Clyde Ensslin (20 Jun. 2005), at 1.

with Deputy Assistant Secretary of Commerce John Kneuer, who was described by Mr. Ensslin in his email as "the second ranking official at NTIA behind Asst Sec Michael Gallagher."[74]

43. On 5 August 2005, a one page memo entitled "United States Control of the Domain Name System" was circulated within the NTIA. Although the identity of the memo's author is not clear, the memo asserted (among other things):

> Because ICANN's role is dependant upon its contract with Commerce, the Department maintains the ultimate control of the IANA [*i.e.* the "Internet Assigned Names Authority"]. This gives the U.S. the ability to implement any decision made by the international community regarding the internet. **For example, if the international community decides to develop an .XXX domain for adult material, it will not go on the Top Level Domain (TLD) registry if the U.S. does not wish for that to happen**.[75]

Several days later, Assistant Secretary Gallagher would convey that same message to Dr. Twomey in a phone call that preceded Mr. Gallagher's letter to Dr. Cerf asking ICANN to defer any further action on the ICM application.[76]

44. On 12 August 2005, while Ms. Burr was on vacation with her family, she received an "emergency call" from Mr. Jeffrey. Mr. Jeffrey reported that ICANN had received a letter from Assistant Secretary Gallagher, who had asked ICANN to delay consideration of the draft .XXX registry agreement. Ms. Burr asked to speak with Dr. Twomey, who called her later that day.[77] Ms. Burr testified that Dr. Twomey told her that prior to receiving the letter, he had

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[74] Hearing Exhibit 281, Email from Clyde Ensslin to J. Larue (20 Jun. 2005).

[75] Hearing Exhibit 166, United States Control of the Domain Name System, Memorandum attached to email from Meredith Attwell, Senior Advisor at the NTIA, to Robin Layton, NTIA (8 Aug. 2005) at 2 (emphasis added). The email chain included Evan Gottlien, a staff member at the U.S. House of Representatives.

[76] Testimony of Ms. Burr, Tr. 444:9 – 445:22 (22 Sept. 2009); Testimony of Dr. Twomey, Tr. 868:12-21, 926:17 – 927:5 (24 Sept. 2009).

[77] Testimony of Ms. Burr, Tr. 443:10 – 444:8 (22 Sept. 2009).

spoken with Mr. Gallagher, and "that in fact the Commerce Department had threatened not to put .xxx in the root."[78] Dr. Twomey told Ms. Burr that "he was extremely concerned about how this unilateral intervention of the U.S. government was going to be perceived by the board and by the international community."[79] In his own testimony, Dr. Twomey acknowledged that Mr. Gallagher had told him that the Deputy Secretary of Commerce – the second-in-charge of the entire Department of Commerce – had stated, "we just won't put this on the Internet."[80]

45. The Gallagher letter, dated 11 August 2005, was remarkable both for what it said and for what it did not say. The U.S. Department of Commerce asked ICANN – supposedly a "nonprofit public benefit corporation" operating "for the benefit of the Internet community as a whole"[81] – to alter its treatment of ICM, which had diligently followed ICANN's procedures since the issuance of ICANN's RFP on 15 December 2003 (not to mention the preceding 2000 Round), which had been deemed by the Board to have met the substantive criteria of the RFP, and which had negotiated in good faith with ICANN staff to reach agreement on the term of a draft registry agreement. Moreover, the Department of Commerce asked ICANN to alter its treatment of ICM based on a domestic letter – and email – writing campaign. But Mr. Gallagher failed to say anything about the origins of these letters and emails, even though, as demonstrated by the emails obtained through ICM's FOIA request, NTIA was keeping close track of their number and source.

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78 *Id*. 445:18-20.

79 *Id*. at 444:10-13.

80 Testimony of Dr. Twomey, Tr. 868:12-21 (24 Sept. 2009).

81 Hearing Exhibit 4, ICANN Articles of Incorporation, Articles 3-4.

46. Thus, Mr. Gallagher's 11 August 2005 letter asserted that "[t]he Department of Commerce has received nearly 6,000 letters and emails from individuals expressing concern about the impact of pornography on families and children and opposing the creation of a new top level domain devoted to adult content"[82] – but did not mention that nearly all of them had been "automatically" generated from the Family Research Council's website.[83] The letter continued: "The volume of correspondence opposed to the creation of a .xxx TLD is unprecedented. Given the extent of the negative reaction, I request that the Board will provide a proper process and adequate additional time for these concerns to be voiced and addressed before any additional action takes place on this issue."

47. What is even more remarkable is the extent to which ICANN altered its course of conduct with respect to ICM in response to the U.S. government's intervention – and the extent to which ICANN tried to conceal the fact of the intervention.

48. There is no question that the U.S. government's intervention came at an extremely difficult time for ICANN. ICANN had come under intense international criticism for being too beholden to the United States government. In particular, the World Summit on the Information Society ("WSIS"), a United Nations-sponsored conference on the internet, was to convene in Tunis in November 2005. As Professor Mueller explained, WSIS provided a forum "for the rest of the world who didn't like the ICANN model and didn't like the United States to sort of gang up on ICANN and try to somehow bring it under intergovernmental control or at least to

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82 Hearing Exhibit 162, Letter from Michael Gallagher to Dr. Vinton Cerf (11 Aug. 2005).

83 *See* Hearing Exhibit 281, Email from Clyde Ensslin to J. Larue (20 Jun. 2005) (reporting that "[i]f you go to www.frc.org and scroll down to the bottom of a story titled 'Stop the Porn Industry from Expanding' and fill in name and address fields, FRC will automatically send messages to both ICANN and Commerce with the subject line 'Stop the Establishment of the .xxx domain'").

eliminate the unilateral U.S. position over it."[84] Dr. Twomey also testified about the pressure placed on ICANN because of WSIS:

> You must remember that during this process, we were also engaged in a very big U.N. conference about how basically was the Internet going to be coordinated, and there were concerns being expressed by countries like Brazil, China, Russia, Saudi Arabia and many others, India, about that it was not fair, was not equitable that the United States should have any particular role when it comes to the coordination of the Internet, particularly the domain name system. So forget about the historical reality. They were just saying, this is not fair. And so they were putting a lot of pressure upon the U.S. Government relationship with ICANN and asking questions.[85]

As Ms. Burr explained, "it was a very awkward position for ICANN to be caught in the middle of sort of the United States government saying 'don't go forward.' And the rest of the international community saying, 'don't be controlled by the U.S. government.'"[86] Dr. Cerf put it more bluntly: "We're damned if we do and damned if we don't."[87]

49. Indeed, ICANN was not supposed to be controlled by the United States or any other government or groups of governments.[88] Instead, governments were supposed to express their consensus "advice" (if such a consensus could be reached) through the GAC. The unilateral intervention by the U.S. government was entirely inappropriate and ICANN knew it. But rather than adhere to the principles of its Articles and Bylaws, ICANN quickly bowed to the U.S. intervention, and at the same time, tried to conceal it.

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84 Testimony of Dr. Mueller, Tr. 174:21 – 175:3 (21 Sept. 2009).

85 Testimony of Dr. Twomey, Tr. 869:11 – 870:2 (24 Sept. 2009).

86 Testimony of Ms. Burr, Tr. 445:11-16 (22 Sept. 2009).

87 Hearing Exhibit 284, "Web Neutrality vs. Morality," by Amol Sharma, CQ Weekly, (11 Nov. 2005), at 3. *See also* Testimony of Dr. Cerf, Tr. 719:19-720:10 (23 Sept. 2009).

88 Hearing Exhibit 31, White Paper (5 Jun. 1998), at 21; Testimony of Dr. Mueller, Tr. 151:14-20 (21 Sept. 2009).

50. Ms. Burr testified that Dr. Twomey had originally asked Mr. Gallagher not to send his letter, but rather to work through the GAC. When Mr. Gallagher insisted on sending the letter directly on behalf of the U.S. government, Dr. Twomey asked the GAC's Chairman, Dr. Tarmizi, also to write a letter to the ICANN Board requesting a delay of any further consideration of ICM's registry agreement.[89] The purpose of the Tarmizi letter was to make it appear that the Gallagher letter was merely "a follow-up to the letter that [Dr. Tarmizi] had provided."[90] Dr. Tarmizi's letter to the Board was dated 12 August 2005, and referred to the several GAC members that had expressed "some concern" about .XXX in the Luxembourg meetings[91] – which had taken place a month earlier. Dr. Tarmizi added: "I believe there remains a strong sense of discomfort in the GAC about the TLD . . . ."[92] Again, the GAC Communiqué from Luxembourg had not mentioned ICM or .XXX.

51. Dr. Twomey acknowledged that he "suggested" that Dr. Tarmizi write his 12 August 2005 letter to the Board, but said that the letter was nothing more than confirmation of "what the board members had heard during the meeting in Luxembourg some six, eight weeks beforehand when we met with the GAC members, where some GAC members specifically raised the concerns with us."[93] But when asked on cross-examination why he had not "suggested" that Dr. Tarmizi write a letter in July – when the concerns were actually raised – and instead waited until the precise moment when Assistant Secretary Gallagher was sending his letter, Dr. Twomey

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89 Testimony of Ms. Burr, Tr. 444:15 – 445:5 (22 Sept. 2009).

90 *Id.* At Tr. 445:1-5. Dr. Mueller also testified that Dr. Tarmizi subsequently told him that ICANN had asked Dr. Tarmizi to write the letter. Testimony of Dr. Mueller, Tr. 186:13-20 (21 Sept. 2009).

91 Hearing Exhibit 163, Letter from Mohamed Sharil Tarmizi to Dr. Vinton Cerf (12 Aug. 2005).

92 *Id.*

93 Testimony of Dr. Twomey, Tr. 859:8-12 (24 Sept. 2009).

had no convincing answer. He testified: "They raised issues during the meeting and they raised it directly with us. They did not raise something – Mr. Tarmizi did not communicate anything from the GAC meeting to us on the board officially. I think he wrote this down."[94]

52. Although the 11 August 2005 Gallagher letter predated the 12 August 2005 Tarmizi letter, the Tarmizi letter was posted on ICANN's website first. The Gallagher letter was not posted until several days later.[95] Moreover, as Professor Mueller explained, although the Gallagher letter was "highlighted on the front page of the ICANN website, so that anybody who entered would see that the GAC chairman had requested a delay of xxx," the Gallagher letter "was buried in the correspondence of the web site and no mention was made of it on the web site, so in order to find it, you would have to be looking for it."[96]

53. Several days after dispatching his 12 August 2005 letter to the ICANN Board, Dr. Tarmizi sent an email to the GAC, emphasizing that the letter "was mine and not really speaking on the GAC's behalf."[97] He continued:

> Consequently, the only appropriate person to respond to the statement will be me alone.
>
> There is NO GAC POSITION on this issue, therefore, no statements from the GAC but only the GAC Chairman.[98]

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94 *Id.*, Tr. 918:4-10 (24 Sept. 2009). ICANN also mischaracterizes the nature of the concerns expressed by the individual governments. Most such objections related not to the substance of ICM's application, but rather to the process followed by ICANN.

95 Testimony of Ms. Burr, Tr. 446:13-21 (22 Sept. 2009). *See also* Testimony of Dr. Mueller, Tr. 187:13-16 (21 Sept. 2009).

96 Testimony of Dr. Mueller, Tr. 187:13 – 188:1 (21 Sept. 2009).

97 Hearing Exhibit 282, Email from Sharil Tarmizi to GAC (15 Aug. 2005).

98 *Id*. (emphasis in original).

54. Notwithstanding this email, ICANN has consistently maintained the fiction that Dr. Tarmizi's letter was a statement on behalf of the GAC, which justified its postponing further action on ICM's registry agreement. Even through the briefing of this IRP, ICANN has asserted that "[w]ithin days of ICANN posting the proposed registry agreement, GAC Chairman Mr. Tarmizi wrote Dr. Cerf a letter **expressing the GAC's 'diverse and wide ranging' concerns** with the .XXX sTLD (concerns that echoed those of the Board) and requesting that the Board provide additional time for governments to express their public policy concerns before the Board reached a final decision on the proposed registry agreement."[99] Similarly, Dr. Cerf's witness statement asserted that Dr. Tarmizi's 12 August 2005 letter was a communication "**from the GAC where the GAC expressed concern** with the .XXX application."[100] Dr. Twomey also asserted in his witness statement that Dr. Tarmizi's 12 August 2005 letter represented "[t]he first time that **the GAC** communicated any concerns to ICANN" concerning .XXX.[101] Put plainly and simply: there was no official GAC position and no communication from the GAC.

55. It was only through its FOIA request that ICM learned that there was in fact no GAC position on this issue in this time frame. Nor would the GAC take any substantive position on .XXX until its Wellington Communiqué of 28 March 2006 (which suggested "several public policy aspects" for inclusion in ICM's proposed registry agreement, while observing that only "several members" of the GAC were opposed to a .XXX TLD).[102]

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99 ICANN's Response to Claimant's Memorial on the Merits, ¶ 236 (emphasis added) (footnote omitted).

100 Witness Statement of Dr. Cerf, ¶ 33 (emphasis added). Interestingly, Dr. Cerf's witness statement made no mention of Assistant Gallagher's letter, even though that letter was addressed to Dr. Cerf. On cross-examination, Dr. Cerf explained the omission as "pure oversight." Testimony of Dr. Cerf, Tr. 697:16-18 (23 Sept. 2009).

101 Witness Statement of Dr. Twomey, ¶ 41 (emphasis added).

102 Hearing Exhibit 181, GAC Wellington Communiqué (28 Mar. 2006), at 3-4.

56. Dr. Twomey's attempt to play down the significance of the U.S. intervention during his testimony was unconvincing at best. According to Dr. Twomey's testimony, when Assistant Secretary Gallagher called him to ask him to delay any further action on .XXX, Mr. Gallagher "said something like, all hell's broken out here. You know, I've got all this tension inside."[103] According to Dr. Twomey, Mr. Gallagher reported that the Deputy Secretary of Commerce "was even talking about, well, we just won't put this on the Internet, I think was the phrase that he is reported as saying."[104] Yet at the same time, Dr. Twomey testified that he "never took any of those threats, any discussion about the U.S. not putting anything in the root seriously," because, he said, the United States would be so concerned about the potential international reaction, which hung like the "Sword of Damocles" over the U.S. government.[105] Dr. Twomey asserted that the U.S. government "could not ever threaten to intervene in the operation of the Internet's root service in such a way because the rest of the world would say, you can't be trusted and the whole system would shift very quickly."[106]

57. But as Dr. Cerf explained during his testimony, to "shift" the system away from the U.S. government's control of the root would be all but impossible. Such a shift would require all current internet addresses – which "are literally burned into the software of most of

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103 Testimony of Dr. Twomey, Tr. 868:12 – 871:10 (24 Sept. 2009).

104 *Id*. at Tr. 868:20-21. As Ms. Burr explained, the Deputy Secretary of commerce was "second in command" at the Department. At the time, the Deputy Secretary "was a gentleman by the name of David Samson. . . . He was part of the Bush inner circle. He had been head of George Bush's economic development commission in Texas . . . . He was part of the campaign. He was a Ph.D. from Abilene Christian college and a Southern Baptist minister." Testimony of Ms. Burr, Tr. 1037:7-16 (24 Sept. 2009).

105 Testimony of Dr. Twomey, Tr. 869:8 – 871:1 (24 Sept. 2009). The Panel can make its own judgment on the extent to which the Bush Administration allowed itself to be influenced by the potential reaction of the international community.

106 *Id*. at Tr. 871:5-10.

the computers that do domain lookups" – to be changed for all internet users who wanted to move to a new system. Dr. Cerf testified that there would be:

> great difficulty forcing that change on the entire world of Internet users, of which there are now 1.6 billion. There are in excess of 600 million computers on the Internet today and that doesn't count laptops and things that we see in the room here. Probably a billion devices are on the Net. Getting every single one of those to change its address to refer to [a different root zone file] is mechanically extremely hard.[107]

58. The reality, therefore, is that if the U.S. government refused to add an ICANN-approved TLD to the root, there would be little that the international community could do in response. The credibility of ICANN in the international community, however, would be destroyed. Indeed, as Dr. Twomey himself testified, the international community was already "putting a lot of pressure upon the U.S. government relationship with ICANN . . . ."[108] Dr. Twomey confided his anxiety not only to Ms. Burr, who testified that "he was extremely concerned about how the unilateral intervention of the U.S. government was going to be perceived."[109] He also spoke about it to Dr. Williams. According to the witness statement of Dr. Williams, a longstanding friend and colleague of Dr. Twomey's, with no stake in this dispute:

> Although he could not describe his conversations with U.S. representatives in great detail, Dr. Twomey expressed to me his anxiety about the .XXX registry agreement as a result of this intervention. This concern went to the heart of ICANN's legitimacy as a quasi-independent technical regulatory organization with the power to establish the process by which new TLDs could be created an put on the root. If the United States Government disagreed with ICANN's process or decision at any

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107 Testimony of Dr. Cerf, Tr. 711:16 – 712:10 (23 Sept. 2009).

108 Testimony of Dr. Twomey, Tr. 869:22 – 870:2 (24 Sept. 2009).

109 Testimony of Ms. Burr, Tr. at 444:10-13 (22 Sept. 2009).

> point and did not enter a TLD accepted by ICANN on to the root, it would call into question ICANN's authority, competence, and entire reason for existence.[110]

59. Again, following the U.S. intervention, ICANN tried to conceal it, and to act as though it was still proceeding according to the procedures and substantive criteria set forth in the RFP. In reality, however, the RFP procedures and criteria were abandoned from that point forward. In Professor Mueller's words:

> The whole process as basically defined in the RFP was thrown out the window and the new process was improvised. Public comments were reopened, the information that we had discussed earlier about the evaluation teams was released for xxx and the process of negotiating contracts was actually put in front of the GAC, rather than with the staff and you know, in a variety of other ways, the whole RFP process simply broke down.[111]

60. Thus, ICANN did not, as it asserts in the IRP, treat ICM "better" than the other applicants. As detailed below, after the U.S. intervention, ICANN abandoned its two-step process, in which, having found that ICM met the substantive criteria of the RFP, it was supposed to negotiate the "technical" and "commercial" terms of a registry agreement in good faith; subjected ICM to interminable delays in the negotiations; improperly released the negative reports of the independent evaluation teams, which provided useful grist to the opponents of .XXX; repeatedly imposed new requirements on the contract negotiations at the behest of the GAC, as well as of individual governments (whose actual advice ICANN frequently distorted, even as it was not supposed to be acting on the advice of individual governments); improperly allowed the sponsorship criteria to be reopened; and, ultimately, denied ICM's application based

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110 Witness Statement of Dr. Williams, ¶ 27 (footnote omitted).

111 Testimony of Dr. Mueller, Tr. 191:14 – 192:7 (21 Sept. 2009).

on factors that were not in the RFP, were not reasonable or rational, and were not applied in a fair, objective, and non-discriminatory manner.

61. This matter would have turned out very differently if ICANN had followed its Articles and Bylaws and resisted the improper pressure from the U.S. government. Indeed, it would have turned out differently if ICANN had at least publicly acknowledged the U.S. interest without inviting Dr. Tarmizi to write a letter as "cover." Instead, ICANN chose a different course of action.

V. ICANN FAILED TO NEGOTIATE THE REGISTRY AGREEMENT IN GOOD FAITH AND ABANDONED THE RFP CRITERIA AND PROCEDURES.

A. ICANN's Initial Strategy: Delay

62. Between 1 June 2005 and 30 March 2007, ICM presented five separate draft registry agreements to the ICANN staff. The first, as noted above, was agreed upon by ICM and the ICANN staff on 1 August 2005, and posted by ICANN on its website on 9 August 2005.

63. As also discussed above, following the 15 September 2005 Board Meeting, the ICANN staff requested ICM to make two changes to the draft registry agreement.

64. The first change was to address the possibility of a change in control over ICM. As Ms. Burr explained, ICANN was "comfortable with Stuart Lawley, but they [were] uncomfortable about what would happen if there was a change of controls, what if Larry Flynt bought out ICM."[112] ICM and the ICANN Staff agreed on a provision that would provide notice and an opportunity for ICANN to object to any proposed change in ownership.[113]

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[112] Testimony of Ms. Burr, Tr. 448:4-8 (22 Sept. 2009).

[113] *Id*. at 448:9-12 That provision is included in substantially the same form in the fifth and last draft Registry Agreement that ICM provided to ICANN, Hearing Exhibit 286, Final Draft, Sponsored TLD Registry Agreement, (Jan. 2007) with attached Final Draft Appendix S (Feb. 2007), Appendix S-7, at 79.

65. The second change "that the board asked for was a more specific articulation of . . . ICM's obligation to fulfill its commitments that were in the application and various documents submitted in the process of that, and ICM was quite happy to provide that since it intended to be obligated."[114] To address that request, ICM added provisions affirming its intention to develop policies against, *inter alia*, child pornography; fraudulent marketing practices; unauthenticated use of credit cards; spam; and misuse of personal data.[115]

66. As she would throughout the next 18 months, Ms. Burr worked with ICANN staff to draft additional provisions addressing these concerns. She provided the new draft to Mr. Jeffrey on 27 September 2005.[116] ICM did not receive any response from ICANN for six months.[117] Having concluded that ICM's application had met the RFP criteria, ICANN could hardly reject ICM's proposed registry agreement – particularly given the scrutiny that WSIS and other events had placed on ICANN on that timeframe. Nor could ICANN proceed to finalize the registry agreement, given the opposition from the U.S. government. ICANN's apparent solution – at least in the fall of 2005 – was delay. That solution also happened to fit perfectly with the goals of the U.S. government. As Mr. Lawley testified, he met with Assistant Secretary Gallagher in September 2005. Mr. Gallagher told him: "'[L]isten, you are dealing with the

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114 Testimony of Ms. Burr, Tr. 448:12-18 (22 Sept. 2009).

115 These provisions were originally included in Appendix S-1 to the second draft Registry Agreement. By the time of the fifth draft Registry Agreement, they had been moved to Appendix S-8. *See* Hearing Exhibit 286, Final Draft, Sponsored TLD Registry Agreement, (Jan. 2007) with attached Final Draft Appendix S (Feb. 2007), Appendix. S-8, at 81-95.

116 Testimony of Ms. Burr, Tr. 448:19-20 (22 Sept. 2009).

117 *Id*. at 448:19 – 449:8. In the interim, ICM made one additional change to the second Registry Agreement, to address a concern raised by several GAC members. Specifically, ICM added a provision that would allow any country to provide ICM with names of cultural or religious significance, which ICM would prevent from being used on the .XXX TLD. *Id*. at Tr. 449:12 – 450:6.

United States government now. We spend years like you spend dimes.' . . . . [H]e was basically saying, look, this is going to be very much delayed."[118] Mr. Gallagher's prediction was correct.

B. ICANN's Release of the Independent Evaluation Team Reports

67. As ICM awaited a response from the ICANN staff concerning the second draft registry agreement that had been submitted in September 2005, ICANN prepared for its meetings in Vancouver, Canada, which were scheduled to begin on 29 November 2005. ICM also planned to attend the Vancouver meetings. In fact, at the request of the GAC Chairman, ICM made a presentation describing the expected benefits of the sTLD in order to address the "sense of discomfort" to which Dr. Tarmizi had referred in his 12 August 2005 letter.[119]

68. On 28 November 2005, the eve of the Vancouver meetings, Dr. Twomey suddenly decided to release the reports of the independent evaluation teams, which had been completed in the summer of 2004, and which several members of the GAC had been requesting at least since the Luxembourg meetings of 11-12 July 2005.[120]

69. According to Dr. Twomey's witness statement, ICANN released the reports "consistent[ly] with ICANN's interest in transparency and openness. . . . The reports were not released earlier because of concern for the confidentiality of the evaluators while their work was ongoing, in order to insulate them from outside pressures."[121] In fact, at the time ICANN released the reports, the work of the evaluators had not been "ongoing" for well over a year.

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118 Testimony of Mr. Lawley, Tr. 295:15 – 296:7 (21 Sept. 2009).

119 Confidential Hearing Exhibit 12, ICM Registry, The Sponsored .xxx sTLD: Promoting Online Responsibility (27 Nov. 2005).

120 *See* Hearing Exhibit 139, GAC Luxembourg Minutes (11 Jul. 2005) at 5.

121 Witness Statement of Dr. Twomey, ¶ 45.

Moreover, the independent evaluators had been assured that the reports would be released only when all applicants were at the same stage of the process.[122]

70. On cross-examination, Dr. Twomey was unable to provide a coherent answer as to why ICANN decided to release the reports on 28 November 2005 – when many applicants had already executed registry agreements, but while ICM's was still being negotiated. He testified, among other things:

> Eventually we had to make a judgment. We said, we're going to have to err on the side of transparency now. We can't keep it even though we had made – we discussed with the technical evaluators in particular that we would try to keep their names confidential.[123]

71. In fact, there is no conceivable explanation as to why Dr. Twomey chose the eve of the Vancouver meeting to release the independent evaluator reports other than to prejudice ICM. And indeed, the release of the independent evaluator reports prejudiced ICM significantly.[124] As discussed above, the independent team on sponsorship had failed eight of the 10 applicants, but many of the failing applicants had, by now, executed registry agreements with ICANN. As the Board had rejected the conclusions of the Sponsorship Team and engaged in its own evaluation of the applications, ICM's negative sponsorship report was irrelevant to the current process, and only served to provide fodder to those seeking to block the .XXX TLD. In fact, ICANN posted the evaluation reports while its own ombudsman was still considering the discriminatory impact of posting the evaluations.[125] As explained by Dr. Williams (who had chaired the independent team on sponsorship):

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122 Witness Statement of Dr. Williams, ¶ 22.

123 Testimony of Dr. Twomey, Tr. 938:19 – 939:2 (24 Sept. 2009).

124 Claimant's Post-Hearing Evidentiary Chart, Appendix A, N.5.

125 Claimant's Memorial on the Merits, ¶¶ 392-394; Witness Statement of Ms. Burr, ¶ 53.

> It was the evaluators' understanding that our report for each application would be made public at the same time, and the anonymity of the evaluators would end, as soon as the reports were provided to the Board. This commitment had been made to us by ICANN when the evaluation teams were formed. If that procedure had been followed, all applications would have been at the same stage of the process when the reports were published. Instead, the reports were not made public until November 2005 . . . . Thus, our critical comments in the evaluation report became available to be used by those seeking to block the .XXX application. However, applications for which registry agreements had already been executed were insulated from similar criticisms.[126]

Even Dr. Twomey acknowledged at the hearing that opponents of .XXX seized upon the negative sponsorship report for ICM and used it against ICM.[127]

72. Following the Vancouver meeting, and several days after ICANN released the independent evaluation reports, the GAC issued its first Communiqué ever referring specifically to .XXX. It is worth observing that at this point, ICANN had posted the .XXX application for notice and comment in March 2004 (*i.e.,* almost two years earlier);[128] that Dr. Twomey had written to Dr. Tarmizi on 1 December 2004 (*i.e.*, one year earlier), asking if the GAC had any comments on any of the applications;[129] that Dr. Tarmizi had responded by letter dated 3 April 2005, stating that "[n]o GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round";[130] that several GAC members had raised questions about the .XXX application in July 2005 in Luxembourg; but that the Luxembourg Communiqué had declined to make any mention of .XXX or ICM.[131]

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126 Witness Statement of Dr. Williams, ¶ 22.

127 Testimony of Dr. Twomey, Tr. 944:2-18 (24 Sept. 2009).

128 Hearing Exhibit 82, ICANN Announcement: Progress and Process (19 Mar. 2004).

129 Hearing Exhibit 157, Letter from Paul Twomey to Sharil Tarmizi (1 Dec. 2004), at 5.

130 Hearing Exhibit 158, Letter from Sharil Tarmizi to Paul Twomey (3 Apr. 2005), at 1.

131 Hearing Exhibit 159, GAC Luxembourg Communiqué (12 Jul. 2005).

73. It is therefore notable that the Vancouver Communiqué specifically relied on the negative sponsorship report to approve further delay in the Board's consideration of ICM's proposed registry agreement. Even so, the Vancouver Communiqué did not express any specific opposition to .XXX *per se*. Its reference to .XXX was brief:

> The GAC also welcomed a report from ICANN on the status of Board approval of sponsored TLDs, as well as the Evaluation Report requested by GAC members. In that regard, the GAC welcomed the decision to postpone the Board's consideration of .XXX from its December 4th, 2005 meeting until such time as the GAC has been able to review the Evaluation Report and the additional information requested from ICANN.[132]

74. Following the Vancouver meetings, Dr. Twomey sent Dr. Tarmizi a long letter, dated 11 February 2006, detailing the process by which ICANN had considered the ICM application. Although the letter noted the numerous opportunities that the GAC had had to comment on the .XXX application, it mentioned that "[t]he GAC Communiqué issued recently in Vancouver welcomed the Board's decision to postpone consideration of the ICM application," and invited further "comments" from the GAC in connection with ICANN's upcoming meetings in Wellington, New Zealand, scheduled for March 2006.[133] Indeed, the GAC did provide further comments at Wellington, to which ICM duly responded.

C. ICM Addressed the Concerns Raised by the GAC at Wellington.

75. The GAC's Wellington Communiqué, dated 28 March 2006, is notable for several reasons. First, the GAC obviously believed that the ICANN Board had determined on 1 June 2005 that ICM had satisfied the sponsorship criteria. The Wellington Communiqué specifically requested more

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132 Hearing Exhibit BD, GAC Vancouver Communiqué (1 Dec. 2005), at 3.

133 Hearing Exhibit 175, Letter from Dr. Twomey to Mr. Tarmizi (11 Feb. 2006), at 8.

> detail concerning the rationale for the Board **determination that the application had overcome the deficiencies noted in the Evaluation Report.** The GAC would request a written explanation of **the Board decision** with respect to the sponsored community and public interest criteria outlined in the sponsored top level domain selection criteria.[134]

This is further evidence (if any more were required) to refute ICANN's assertion that the Board was continuously raising the issue of sponsorship in the months following the 1 June 2005 vote, so that it should have been "obvious" that sponsorship was still an open issue. In fact, even the GAC – whose Chairman, Dr. Tarmizi, attended many of the Board's meetings – believed that the Board had resolved the sponsorship issue on 1 June 2005.

76. Second, the fact that the GAC was now requesting an explanation as to why the Board determined that ICM "had overcome the deficiencies noted in the Evaluation Report" is further evidence of the prejudice caused to ICM by the timing of the report's release. No requests were made concerning how other applicants who had also been failed by the Sponsorship Team, but who had already entered registry agreements when their reports were released, had "overcome the deficiencies" in their reports.

77. Third, and most significantly, the GAC did not express opposition to .XXX *per se*. In fact, the Wellington Communiqué specifically stated that only "several members of the GAC are emphatically opposed from a public policy perspective to the introduction of a .xxx sTLD."[135] Thus, the Wellington Communiqué simply requested that certain "public policy aspects" be addressed in the registry agreement, noting that ICM has "promised a range of public interest benefits as part of its bid to operate the .xxx domain."[136] According to the Communiqué:

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134 Hearing Exhibit 181, GAC Wellington Communiqué (28 Mar. 2006), at 3 (emphasis added).

135 *Id.*, at 4.

136 *Id*., at 3.

> The public policy aspects identified by members of the GAC include the degree to which .xxx application would:
>
> - Take appropriate measures to restrict access to illegal and offensive content;
> - Support the development of tools and programs to protect vulnerable members of the community;
> - Maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites, if need be; and
> - Act to ensure the protection of intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers drawing on best practices in the development of registration and eligibility rules.[137]

78. As testified by Ms. Burr, a week before the Wellington meetings, ICM and ICANN had agreed to a second draft of the registry agreement, incorporating the changes made in response to ICANN's earlier request. This draft in fact contained provisions addressing all of the items in the Wellington Communiqué. However, ICANN inexplicably failed to post it on its website before or during the Wellington meetings.[138]

79. Nonetheless, following the Wellington meetings, ICM negotiated with ICANN to provide (to use Ms. Burr's words) a "more fulsome articulation" of its commitment to address the "public policy aspects" set forth in the Wellington Communiqué.[139] The third draft registry agreement, finalized on 18 April 2006, included commitments to establish policies and procedures to label the sites on the domain; to use automated tools to detect and prevent child pornography; to maintain accurate lists of registrants and assist law enforcement agencies to

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137 *Id*., at 4.

138 Testimony of Ms. Burr, Tr. 450:11 – 451:20 (22 Sept. 2009).

139 *Id.,* at Tr. 454:21.

identify and contact the owners of particular sites; and to ensure the intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers, drawing on domain name registry best practices.[140]

80. In sum, at ICANN's staffs prompting, ICM reasonably and responsibly addressed all of the concerns raised in the GAC's Wellington Communiqué.

D. ICANN's New Demand to ICM: Solve the Problem of Pornography on the Internet.

81. In his testimony at hearing, Dr. Cerf made a particularly startling admission. According to Dr. Cerf, the reason ICM ultimately did not obtain a registry agreement was that ICM could not provide adequate solutions "to deal with the problem of pornography on the Net."[141]

82. Of course, ICM had never undertaken to "deal with" or solve "the problem of pornography on the Net." The purpose of .XXX was to create an sTLD where responsible adult content providers would agree, *inter alia*, to submit to technological tools to help tag and filter their sites; allow their sites to be "crawled" for indicia of child pornography (real or virtual); and otherwise adhere to best practices for responsible members of the industry (including practices to prevent credit card fraud, spam, misuse of personal data, the sending of unsolicited promotional email, the "capture" of visitors to their sites, *etc*.).

83. After the issuance of the Wellington Communiqué, however, Dr. Twomey seized on a phrase in the Communiqué in order to impose an impossible burden on ICM. The GAC, he

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[140] Hearing Exhibit 171, Draft, Sponsored TLD Registry Agreement (18 Apr. 2006), Appendix S, at 64-87; Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section I.3.

[141] Testimony of Dr. Cerf, Tr. 760:7-9 (23 Sept. 2009).

asserted, was now insisting that ICM be responsible for "enforcing restrictions" around the world on access to illegal and offensive content. Dr. Twomey testified that, following the Wellington Communiqué, he became convinced that it would be impossible for ICM to "enforce" the GAC's "recommendations." He specifically recalled expressing that conviction to Ms. Burr:

> And I said, how are you going to respond to the GAC recommendations? . . . How are you going to enforce these things that the GAC is wanting?
>
> And I can remember actually walking between the hotel and the meeting room in Wellington several times with counsel saying, how are you going to enforce it? Just explain to me. I don't understand how you're going to be able to enforce the things they're putting forward. Particularly this issue of restrict[ing] access to illegal and offensive content.
>
> The specific thing said take appropriate measures to restrict access to inappropriate and illegal content. Because the previous night, I had been in a meeting with the New Zealand prime minister and a series of South Pacific island ministers. And knowing the South Pacific as I do, I know their idea of what is illegal and offensive is very different from what it is in the United States.
>
> So I was just saying to the counsel, how are you going to enforce this general wording?[142]

84. First of all, to the extent the GAC was requesting ICM to "enforce" restrictions on "illegal and offensive" content, such a request would have been entirely improper and far outside the scope of ICANN's mission, not to mention that was not what ICM was actually proposing. If Dr. Twomey's interpretation of the Wellington Communiqué was correct – and ICANN was in turn imposing an obligation on ICM to enforce "restrictions" on "illegal and offensive" content around the globe – then ICANN was not merely acting outside its mission. It was also imposing a requirement on ICM that had never been imposed on any other registrant for any other top level domain, and that, indeed, no registrant could possibly fulfill. .COM, for example, is

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142 Testimony of Dr. Twomey, Tr. 882:19 – 884:1 (23 Sept. 2009).

unquestionably filled with content that is considered "illegal and offensive" in many countries. Some of its content is considered "illegal and offensive" in all countries. Adult content can also be found on numerous other TLDs, including, for example, .NET, .ASIA, and even .MOBI. As Dr. Cerf had told the GAC in Luxembourg in July 2005, when he was explaining the Board's determination that ICM had met the RFP criteria: "to the extent that governments do have concerns they relate to the issues across TLDs."[143] ICANN has never suggested that the registries for these other TLDs must "enforce" restrictions on access to illegal or offensive content for sites on their TLD.

85. If the GAC was in fact asking ICANN to impose such an absurd requirement on ICM, then ICANN should have told the GAC that it could not do so. As discussed at length during the hearing, the GAC is an "advisory" committee that is supposed to provide ICANN with "advice" on a timely basis.[144] ICANN is by no means under any obligation to do whatever the GAC tells it to do. Indeed, ICANN's Bylaws specifically contemplate that the Board may "decide[ ] not to follow that advice."[145] At the very least, ICANN should have stated publicly what Dr. Twomey said he told Ms. Burr privately: that GAC's "recommendations" were impossible to implement.

86. But Dr. Twomey's reading of the Wellington Communiqué is *not* a reasonable reading. The relevant portion of the Wellington Communiqué states:

> In its application, supporting materials and presentation to the GAC in November 2005, **ICM Registry promised a range of public interest benefits as part of its bid to operate the .xxx domain**. To the GAC's

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143 Hearing Exhibit 139, GAC Luxembourg Minutes (11 Jul. 2005) at 5.

144 Hearing Exhibit 41, GAC Operating Principles, Principles 2-3.

145 Hearing Exhibit 5, ICANN Bylaws, Article XI, Section 1(j); Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section J.13.

> knowledge, these undertakings have not yet been included as ICM obligations in the proposed .xxx registry agreement negotiated with ICANN.
>
> The public policy aspects identified by members of the **GAC include the degree to which .xxx application would: Take appropriate measures to restrict access to illegal and offensive content . . .** .[146]

87. In fact, as ICM promised in its application, ICM provided numerous measures to restrict access to illegal and offensive content. Some of these measures were to be implemented in the first instance by ICM (*e.g.*, through creating numerous mechanisms to detect and prevent child pornography, whether real or virtual); some of the measures were available to be implemented by others (*e.g.*, through tagging, filtering, *etc*.). But nowhere did GAC state that ICM should be responsible for "enforcing" different countries' (or any individual country's) restrictions on access to illegal and offensive content. Indeed, the fact that the GAC wanted ICM to "maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites"[147] demonstrates that the GAC did *not* expect ICM to enforce various national restrictions on access to illegal and offensive content.

88. Nor did ICM ever commit to enforcing restrictions on access to illegal and offensive content. As Ms. Burr testified:

> Now, what we told ICANN in our application, what we said every single time that we mentioned this, what we said to the GAC and is clearly reflected in our presentation to the GAC is that ICM would require all registrants to clearly tag their sites as XXX sites so that they could be automatically filtered, that ICM would monitor compliance with that using an automated means of doing that . . . .[148]

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146 Hearing Exhibit 181, GAC Wellington Communiqué (28 Mar. 2006), at 3 (emphasis added).

147 *Id.*, at 4.

148 Testimony of Ms. Burr, Tr. 1043:12-20 (24 Sept. 2009).

Furthermore, in addition to prohibiting child pornography, including virtual child pornography, ICM would require all registrants to permit their sites to be "crawled" by a service that would look for words and images indicative of such pornography.[149] Among other things, ICM agreed to:

- "Provide for automated tools to monitor proactively registrant compliance with registry policies related to labeling and the prohibition of child pornography, and mechanisms for user reporting of registrant non-compliance with registry policy."

- "Create mechanisms for user reporting of noncompliance with registry policies, including the development, posting, and enforcement of procedures for curing non-compliance and penalties, including cancellation of registration, for failure to cure."

- "Name a compliance officer to receive and respond to reports of non-compliance . . . ."

- "Name an ombudsman to receive and respond to complaints and/or concerns about Registry Operator, including concerns about enforcement of registry policies and handling of complaints related to registrant non-compliance."

- "[E]nter into monitoring and oversight arrangements with adequately funded and staffed independent associations . . . to be responsible for oversight [of] ICM's compliance with its obligations to prohibit child pornography and require labeling."[150]

The "Whois" provisions of ICM's proposed registry agreement required ICM to keep detailed information on all of the sites registered on the TLD so that such information could be provided, if necessary, to law enforcement and regulatory agencies.[151]

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149 *Id.,* at Tr. 1043:21-1044:2.

150 Hearing Exhibit 286, Final Draft, Sponsored TLD Registry Agreement, (Jan. 2007) with attached Final Draft (Feb. 2007), Appendix S-8, at 87.

151 *Id.*, Appendix S-6, 72-78.

89. These and other provisions in ICM's proposed registry agreement provided "appropriate measures" that could be used to "restrict access to illegal and offensive content." However, as Ms. Burr testified, these measures did not constitute an agreement or "representation to enforce the laws of the world on pornography."[152] Nor could ICANN have properly required or expected that ICM would undertake such an impossible commitment. Again, ICM negotiated and agreed upon all of these provisions with ICANN's staff.

90. As both Professor Mueller and Professor Goldsmith stated, the very existence of an .XXX TLD – even without all of the additional provisions included by ICM – would make it far easier for governments to "restrict access" to content that they deemed "illegal or offensive."[153] Indeed, as Dr. Cerf told the GAC in Luxembourg in July 2005, in defending ICANN's approval of ICM to move to contract negotiations: "The TLD system is neutral, although filtering systems could be solutions promoted by governments."[154] In other words, the appropriate place for restricting access to content deemed illegal or offensive by any particular country is within that particular country. ICM offered far more tools for countries to effectuate such restrictions than have ever existed before. Thus, ICM provided "appropriate measures to restrict access to illegal and offensive content."

91. Nonetheless, on 10 May 2006, the ICANN Board proceeded to reject ICM's registry agreement, because, in Dr. Twomey's words, ICM had not demonstrated how it would "ensure enforcement of these contractual terms" as they relate to various countries' individual

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152 Testimony of Ms. Burr, Tr. 1044:8-9 (24 Sept. 2009).

153 Testimony of Dr. Mueller, Tr. 131:7 – 134:12 (21 Sept. 2009); Expert Report of Dr. Mueller, p. 26, note 45 and accompanying text; Expert Report of Dr. Goldsmith, ¶¶ 39-40.

154 Hearing Exhibit 139, GAC Luxembourg Minutes (11 Jul. 2005) at 5.

laws "concerning pornographic content."[155] In other words, ICM's draft registry agreement was rejected on the basis of its inability to comply with a contractual undertaking to which it had never agreed in the first place.

E. Only Dr. Twomey Mentions Sponsorship in Voting to Reject ICM's Registry Agreement on 10 May 2006

92. On 10 May 2006, the ICANN Board voted to reject it by a vote of 9-5.[156] Of the nine board members who voted to reject ICM's contract, only Dr. Twomey said anything about sponsorship. Putting aside the Minutes of the 15 September 2005 board meeting (which, as of 10 May 2006, would not be finalized and posted for more than a month[157]), this is the first time any Board member is on record as raising sponsorship at a board meeting since 1 June 2005. Dr. Twomey stated at the 10 May 2006 meeting:

> Having been ill and not been a participating member of the ICANN board that looked at the issue of sponsorship during the meeting in Mar Del Plata [in April 2005] – 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.
>
> More input into this recently, particularly opposition from significant members of the online adult entertainment community makes me further doubtful about the sponsorship aspect.[158]

93. Dr. Twomey was apparently referring to three letters that had been sent to ICANN in March and April of 2006 from Private Media Group, Inc., Wicked Pictures, and Flynt

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155 Hearing Exhibit 189, Voting Transcript of ICANN Board Meeting (10 May 2006) at 6.

156 Hearing Exhibit 122, ICANN Board Consideration of .XXX sTLD Registry Agreement (10 May 2006), at 1.

157 *See* Hearing Exhibit 276, ICANN, Special Meeting of the Board, Minutes (14 Jun. 2006).

158 Hearing Exhibit 189, at 6. Interestingly, Dr. Twomey made no mention of any discussion of sponsorship at the 1 June 2005 vote to approve ICM for contract negotiations, even though he testified at the hearing that there was "a lot" of discussion of the sponsorship issue during that meeting. Testimony of Dr. Twomey, Tr. 843:16-17 (24 Sept. 2009).

Management Group, Inc., all of which expressed concern that governments would enact legislation that would require adult-content sites to be located on the .XXX sTLD.[159] No one could seriously contend that these several letters evinced a meaningful change in the community support that had originally led ICANN to conclude that ICM's application met the sponsorship criteria on 1 June 2005. Again, none of the other Board members voting against ICM's contract on 10 May 2006 even mentioned the sponsorship issue.[160]

94. After mentioning sponsorship, Dr. Twomey then turned to what he deemed the "more important" issue. In particular, Dr. Twomey referred to a letter dated 9 May 2006 that he had received from Martin Boyle, the U.K. representative to the GAC.

95. The Boyle letter stated that ICANN should ensure that "the benefits and safeguards proposed by the registry, ICM . . . are genuinely achieved from day one."[161] Mr. Boyle also opined that it was "essential that ICM liaise with the relevant bodies in charge of policing illegal Internet content at [the] national level, such as the Internet Watch Foundation (IWF) in the UK, so as to ensure the effectiveness of the solutions it proposes to avoid the further propagation of illegal content."[162]

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[159] Hearing Exhibit AV, Letter from Johan Gillborg, Private Media Group, to ICANN (22 Mar. 2006); Hearing Exhibit AU, Letter from Steve Orenstein, Wicked Pictures, to ICANN Board (10 Apr. 2006); and Hearing Exhibit AT, Letter from Larry Flynt to ICANN Board (30 Apr. 2006). The Free Speech Coalition had sent a similar letter in August 2005. Hearing Exhibit S Letter from Michelle Freridge, Free Speech Coalition, to Vinton Cerf, ICANN (30 Aug. 2005).

[160] Hearing Exhibit 122, ICANN Board Consideration of .XXX sTLD Registry Agreement (10 May 2006), at 1; Hearing Exhibit 189, Voting Transcript of ICANN Board Meeting (10 May 2006).

[161] Hearing Exhibit 182, Letter from Martin Boyle, United Kingdom Representative to the GAC to Dr. Vinton Cerf (9 May 2006).

[162] *Id.*

96. Putting aside whether Mr. Boyle's concerns were valid – or whether it was appropriate for individual governments to try to impose their views on ICANN outside the GAC – Dr. Twomey's description of Mr. Boyle's letter in the 10 May 2006 board meeting was overstated to say the least.[163] According to Dr. Twomey:

> The letter from the UK is an indication of the expectations of the international governmental community to ensure enforcement of these contractual terms as they each individually interpret them against their own law concerning pornographic content. This will put ICANN in an untenable position.[164]

97. In fact, it is impossible to reconcile the points in Mr. Boyle's letter – *i.e.*, that ICANN should ensure that ICM delivered on the "benefits and safeguards" promised in its contract, and that ICM should liaise with the IWF – as a requirement "to ensure enforcement of these contractual terms as they each individually interpret them against their own law concerning pornographic content." And even if Mr. Boyle had been making such a demand, it would have been entirely outside ICANN's mission to impose it on ICM, and would have imposed a requirement on ICM that has never been imposed on any other registry.

98. Yet the comments of all of the board members voting in opposition to the ICM's proposed registry agreement indicated that the contract, to be approved, had to provide means to enforce the world's pornography laws, and/or reconcile global differences concerning what is "illegal and offensive." Thus, for example, Dr. Pisanty stated:

> I don't find that the agreement as stated has in-built structural guarantees that the conditions and representations made by ICM can be fulfilled. Many of them are not so because of any fault of ICM itself, but because of

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163 Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section J.11.

164 Hearing Exhibit 189, Voting Transcript of ICANN Board Meeting (10 May 2006), at 6.

> the complexities of developing them further in an international, multilingual, and multicultural environment.[165]

Hualin Qian stated:

> I vote against, because I think with the cultural and the (inaudible) about the content of this kind is very, very different from different countries. So the commitment made by ICM is not very easy to implement. I don't see any – not clearly seeing that this can be implemented.[166]

And Dr. Cerf stated:

> My reason for voting against it is that I no longer believe it's possible for ICM to achieve the conditions and recommendations that the GAC has placed before us as a matter of public policy and that the terms of the contract do not assure any of those – the ability of ICM to provide the protections that are requested.[167]

99. In short, the ICANN Board was now imposing a requirement that was outside the mission of ICANN; that had never been imposed on any other registry; that was incapable of being performed by any registry; and that – had it been included in the RFP – would have kept any applicant from applying for an sTLD dealing with adult content.

F. Mr. Jeffrey Convinces ICM To Withdraw Its Request for Reconsideration and To Try, Try Again.

100. Following the Board's 10 May 2006 vote to reject its proposed registry agreement, ICM filed a request for reconsideration with ICANN's Reconsideration Committee. Article IV of the Bylaws – the same Article that includes the IRP provisions – also provides that "any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board."[168]

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165 *Id.*, at 5.

166 *Id.*, at 7.

167 *Id.*, at 5.

168 Hearing Exhibit 5, ICANN Bylaws, Article IV. Although ICANN asserted at the Hearing that ICM had never stated its believe that the 1 June 2005 vote signified that its application had met the RFP (continued …)

101. After the request had been pending for a number of months without decision, Mr. Jeffrey approached Ms. Burr at the end of October 2006. According to Ms. Burr's unrebutted testimony:

> [Mr. Jeffrey] said the reconsideration committee has asked me to tell you that it will – would not be inappropriate for ICM to submit a new contract. . . . I said to John, if we withdraw and submit a new contract, what happens? And we agreed that the contract – the substantive contract would be considered expeditiously.[169]

ICM believed that Mr. Jeffrey was acting in good faith and that ICANN would not have invited ICM to reengage in negotiations if ICANN did not believe that an acceptable registry agreement could be achieved.[170] Accordingly, ICM withdrew its request for reconsideration and re-entered negotiations with ICANN.

102. Again, ICM complied with every request made by the ICANN staff. Thus, for example, ICANN agreed to execute a contract with the Internet Content Rating Associations ("ICRA") (now known as the Family Online Safety Institute ("FOSI")) before launching the TLD.[171] Under the contract, ICRA was "to use an automated tool to scan" the TLD and develop other ways to monitor ICM's compliance with its policy commitments.[172] ICM also agreed to a number of enforcement mechanisms that would give ICANN concrete and practical mechanisms

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(… continued)
criteria, ICM's Request for Reconsideration made that statement very clearly. Hearing Exhibit 190, Amended Request for Reconsideration of Board Action (21 May 2006), at 4, 8.

169 Testimony of Ms. Burr, Tr. 462:5-17 (22 Sept. 2009).

170 *Id.,* at Tr. 461:11 – 462:17.

171 ICANN actually did execute the contract with ICRA on 1 February 2007. Confidential Exhibit 9, Agreement between ICRA/FOSI and IFFOR (1 Feb. 2007).

172 Confidential Exhibit 9, Agreement between ICRA/FOSI and IFFOR (1 Feb. 2007); *see also* Testimony of Ms. Burr, Tr. 465:18 – 466:2 (22 Sept. 2009).

to enforce the contract. In addition, all of ICM's expanded commitments were consolidated and included in a new stand-alone appendix (S8).[173]

103. Throughout the entire negotiation process, the ICANN staff never asked ICM to change the definition of the sponsored community, which remained the same through each of the five iterations of the draft registry agreement.

104. The fourth draft registry agreement, containing a new list drafted **by ICANN's outside counsel** that summarized ICM's policy commitments, was posted on ICANN's website on 5 January 2007.[174] The Board was scheduled to consider it at its meeting on 12 February 2007.

G. The Board Reopens the Sponsorship Issue at the Eleventh Hour

105. Again, the only Board member who had raised the issue of sponsorship at the 10 May 2006 vote against the third draft registry agreement was Dr. Twomey. At the 12 February 2007 meeting, however, numerous Board members were suddenly asking about the issue. Particularly given that the Board had addressed and resolved the sponsorship issue on 1 June 2005, there was no basis for reopening the issue now.[175] Members of the Board, however, appeared to be looking for new issues on which to delay further action on the draft registry agreement.

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[173] Hearing Exhibit 286, Final Draft, Sponsored TLD Registry Agreement, (Jan. 2007) with attached Final Draft Appendix S (Feb. 2007), 81-89.

[174] Hearing Exhibit 197, ICANN Announcement, ICANN Publishes Revision to Proposed ICM (.XXX) Registry Agreement for Public Comment (5 Jan. 2007); Hearing Exhibit AK, Draft Sponsored TLD Registry Agreement (5 Jan. 2007); *see also* Hearing Exhibit 289, ICM Overview: Agreement Changes Reflecting GAC Advice (5 Jan. 2007).

[175] Claimant's Post-Hearing Evidentiary Chart, Appendix A, Sections N.1 and N.2.

106. For example, Dr. Cerf asked whether a review of the comments received since the fourth draft registry agreement was posted revealed "what fraction of the adult online content community supported the creation of the domain."[176] Mr. Jeffrey responded that "it would be difficult to measure the participation of the larger community in this manner, since only those that wished to participate in the forum would do so."[177] Dr. Cerf also asked about a recent conference that had taken place to discuss the creation of the new .XXX domain, and, upon learning that it was sparsely attended, "asked whether by inference that meant there was no groundswell of support for the creation of the domain at that meeting."[178] Mr. Jeffrey responded that there was not enough information about the conference to support that conclusion. Ms. Rodin, a new Board member, also said "she had some concerns about whether the proposal met the criteria set forth in the RFP," specifically mentioning the sponsorship issue.[179]

107. Mr. Pritz, who, again, was the ICANN Vice President charged with running the 2004 Round, stated that ICM had previously "provided extensive evidence for a sponsored community and that documentation of this could be found in the application. [He] also pointed out that, at the Board's request, additional information had been presented to them during ICANN's Mar del Plata Meeting [in April 2005]."[180] Mr. Pritz observed further that "ICANN had not asked ICM specifically about their level of support since the Board's decision on .XXX in June 2005."[181]

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176 Hearing Exhibit 199, ICANN, Special Meeting of the ICANN Board of Directors, Consideration of Proposed .XXX Registry Agreement and Recent Public Comment Period (12 Feb. 2007) at 2.

177 *Id*.

178 *Id*.

179 *Id*., at 3.

180 *Id*., at 2.

181 *Id*., at 3.

108. Nonetheless, at the end of the meeting, it was concluded that "a majority of the Board has serious concerns about whether the proposed .XXX domain has the support of a clearly-defined sponsored community as per the criteria for sponsored TLDs . . . ."[182] This marked the first time since 1 June 2005 – *i.e.*, nearly two years earlier – that anyone on the Board had raised the sponsorship question, other than Dr. Twomey in the 10 May 2006 meeting.

109. In addition, because some minor organizational changes had been made to Appendix S, the Board concluded that the draft registry agreement (which was now considered the fifth draft registry agreement) should again be posted for notice and comment, and that the ICANN Staff should "consult with ICM and provide further information to the Board prior to its next meeting, so as to inform a decision by the Board about whether sponsorship criteria is met for the creation of a new .XXX sTLD."[183]

H. The Board's Rejection of ICM's Application on 30 March 2007

110. Following the 12 February 2007 board meeting, Ms. Burr told Mr. Jeffrey that she "could see the writing on the wall" and that "[t]his is not going to happen."[184] She also told Mr. Jeffrey that ICM was prepared to move immediately to "invoke the dispute resolution procedures" in the Bylaws.[185] According to Ms. Burr, Mr. Jeffrey reassured her that it was "okay. They are just going to demonstrate a sponsorship support that you have already demonstrated before, and then we will be able to move on . . . ."[186] Ms. Burr testified:

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182 *Id*., at 4.

183 *Id*.; Hearing Exhibit 199, ICANN, Special Meeting of the ICANN Board of Directors, Consideration of Proposed .XXX Registry Agreement and Recent Public Comment Period (12 Feb. 2007) at 4.

184 Testimony of Ms. Burr, Tr. 468:5-8 (22 Sept. 2009).

185 *Id*., at Tr. 468:9-10.

186 *Id*., at Tr. 468:17-20.

> I do believe that he was being genuine . . . . But for that, I would have, you know – I would have persuaded Stuart that the best thing for everybody was to engage in a civilized dispute resolution over this rather than continue on with the charade that was clear to me had – this had become.[187]

111. On 13 March 2007, ICM provided the ICANN Board with a memo describing its extensive evidence of community support (discussed in greater detail below).[188] In addition, ICM made another presentation to the Board at the ICANN meetings in March 2007 in Lisbon, Portugal. Neither at the meetings in Lisbon, nor at the hearing in this IRP, could ICANN point to any meaningful evidence that ICM's community support had diminished. As stated above, ICM had already demonstrated to the Board in April 2005 in Mar del Plata that about 57% of the industry supported the idea; 22% opposed it; and 21% had no opinion one way or the other.[189] Based on these numbers, ICANN had concluded that ICM met the sponsorship criteria in June 2005. As Dr. Cerf conceded, ICANN did nothing afterwards to test whether that support had changed in any significant manner.[190] ICANN could only cite the several letters it had received in March-April 2006;[191] 65 negative comments it had received from webmasters following the

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187 *Id.,* at Tr. 468:20 – 469:5.

188 Hearing Exhibit DI, ICM Memorandum to the ICANN Board of Directors (13 Mar. 2007).

189 Confidential Hearing Exhibit 007, ICM Confidential Presentation, The Sponsored .xxx TLD: Promoting Online Responsibility (2 Apr. 2005), at 26.

190 Testimony of Dr. Cerf, Tr. 751:14-17 (23 Sept. 2009).

191 Hearing Exhibit AV, Letter from Johan Gillborg, Private Media Group, to ICANN (22 Mar. 2006); Hearing Exhibit AU, Letter from Steve Orenstein, Wicked Pictures, to ICANN Board (10 Apr. 2006); and Hearing Exhibit AT, Letter from Larry Flynt to ICANN Board (30 Apr. 2006). The Free Speech Coalition had sent a similar letter in August 2005. Hearing Exhibit S Letter from Michelle Freridge, Free Speech Coalition, to Vinton Cerf, ICANN (30 Aug. 2005).

posting of the fourth draft registry agreement;[192] and a petition from the Free Speech Coalition, signed by a small fraction of its membership.[193]

112. By contrast, in its March 2007 materials presented to the Board, ICM demonstrated that in addition to the evidence it had presented to the Board *before* the 1 June 2005 vote, there was substantial evidence accumulated after the vote to show that ICM enjoyed "broad-based support from the community," which was the standard in the RFP.[194] Thus, ICM presented, *inter alia*, the following facts:

- 76,723 adult website names had been pre-reserved in .XXX since 1 June 2005;[195]
- 1,217 adult webmasters from over 70 countries had registered on the ICM Registry website, saying they supported .XXX and wished to register a .XXX name, since 1 June 2005;[196]
- nearly 300 additional webmasters had emailed ICM requesting additional information about the sTLD, since 1 June 2005.[197]

113. In short, the evidence that ICM had "broad-based support from the community" was abundant, far more than any other sTLD had ever been required to demonstrate.[198]

114. On 28 March 2007, the GAC issued a Communiqué from Lisbon. Interestingly, the Lisbon Communiqué expressed the concern that if ICM had to enforce local rules restricting access to illegal or offensive content, and if ICANN had to oversee ICM, then ICANN "could be

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192 Hearing Exhibit 199, ICANN, Special Meeting of the ICANN Board of Directors, Consideration of Proposed .XXX Registry Agreement and Recent Public Comment Period (12 Feb. 2007), at 2.

193 *See* Testimony of Ms. Burr, Tr. 1065:15 – 1066:3 (24 Sept. 2009).

194 Hearing Exhibit DI, ICM Memorandum to the ICANN Board of Directors (13 Mar. 2007), at 2.

195 *Id.* By the time of hearing, the number exceeded 100,000. Claimant's Memorial on the Merits ¶ 248.

196 Hearing Exhibit DI, ICM Memorandum to the ICANN Board of Directors (13 Mar. 2007), at 2.

197 *Id.*

198 Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section G.4.

moving toward assuming an ongoing management and oversight role regarding Internet content, which would be inconsistent with its technical mandate."[199] The GAC was apparently referring to provisions that ICM added to the draft registry agreement at the behest of ICANN, which was supposedly responding to the advice of the GAC. Thus, following the Wellington Communiqué, Dr. Twomey had claimed that the GAC was requiring ICM to enforce local restrictions on access to illegal and offensive content. But in the Lisbon Communiqué, the GAC was now stating that if ICM undertook to enforce such restrictions, then ICM (and by extension, ICANN in its oversight role) would be acting outside of ICANN's technical mandate. Once again, a review of ICM's draft registry agreement demonstrates that ICM was *not* undertaking to enforce such restrictions.[200]

115. When the Board convened at Lisbon to take up ICM's application two days later, on 30 March 2007, the Board voted 9-5 to reject it. None of the Board members voting against the application mentioned the extensive evidence that ICM had provided in support of sponsorship. Indeed, only a few mentioned sponsorship at all. Most of the Board members voting in opposition seemed to be completely unaware that they were meant to be assessing the proposal according to a set of criteria, and instead opined more broadly on whether or not a .XXX TLD was a good idea. And many seemed to be under the misapprehension that "ICANN would be forced to assume oversight of internet content, which is totally against our bylaws."[201]

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199 Hearing Exhibit 200, GAC Lisbon Communiqué (28 Mar. 2007), at 5.

200 Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section M.8.

201 Hearing Exhibit 196, ICANN Dashboard—Registry Status, at 18-20.

VI. THE BOARD'S REJECTION OF ICM'S APPLICATION WAS INCONSISTENT WITH ICANN'S ARTICLES OF INCORPORATION AND BYLAWS.

116. ICM's Memorial sets forth in detail all of the provisions of the Articles and Bylaws that ICANN's conduct violated, as well as the facts giving rise to the violations.[202] We will not repeat them here. But before turning to the Board's 30 March 2007 resolution, it is worth summarizing the principal ways in which ICANN acted inconsistently with the provisions of its Articles and Bylaws leading up to the 30 March 2007 resolution. The specific provisions at issue require transparency and procedural fairness;[203] non-discriminatory treatment;[204] and proscribe on the role of the GAC in the Board's decision-making.[205] They also limit ICANN's mission to the coordination of policies that are "reasonably and appropriately related" to its "technical functions" – *i.e.,* "the allocation and assignment" of TLDs, and "the operation and evolution of the DNS root name server system."[206] In addition, as set forth in ICM's Memorial, the requirement in the Articles that ICANN "carry[ ] out its activities in conformity with relevant

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202 *See* Claimant's Memorial on the Merits, Section X.

203 Hearing Exhibit 4, Articles of Incorporation, Article 4 (ICANN "shall operate . . . through open and transparent processes that enable competition and open entry in Internet-related markets"); Hearing Exhibit 5, ICANN Bylaws, Article III, Section 1 ("ICANN and its constituent bodies shall operate to the maximum extent feasible through open and transparent processes designed to ensure fairness"); *Id.,* Article I, Section 2(8) (ICANN should make "decisions by applying documented policies neutrally and objectively, with integrity and fairness").

204 *Id.,* Article III ("ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such the promotion of effective competition").

205 The Board is supposed to "take duly into account any timely advice provided by the GAC." *Id.,* Article XI, Section 2(1)(j). The Board is not required to – and is not supposed to – implement whatever recommendations the GAC provides, at whatever time, as though they were orders that the Board cannot question. The Bylaws contain specific provisions that envision that the Board will sometimes decide "not to follow that advice." *Id*. The Board's consideration of "recommendations" from governments or public authorities most specifically were weighed against ICANN's other core values. *Id.* Article 1.

206 *Id.,* Article 1.

principles of international law . . . and local law" impose additional and separate requirements on ICANN under international and California law – in addition to the specific provisions of the Articles and Bylaws.[207]

117. Leading up to the 30 March 2007 Board meeting, ICANN acted inconsistently with these provisions by, *inter alia:*

- Trying to conceal the fact that the U.S. government had in fact intervened to delay ICM's application in August 2005, and attempting to portray the subsequent delays as having been instigated by the GAC;

- Allowing the U.S. government's intervention to cause protracted delays in the consideration of ICM's registry agreement;

- Releasing the negative reports of the independent evaluation committees on the eve of the Vancouver meetings in November 2005, when a number of applicants had already entered registry agreement, but while ICM was still in negotiations;[208]

- Interpreting comments from GAC and others in an unreasonable manner, *viz*., to require ICM to be responsible for enforcing local restrictions on access to illegal and offensive content, and then seeking to impose such requirements on ICM (when no such requirement had ever been imposed on another applicant and could not be fulfilled by any other applicant);[209]

- Abandoning the two-step process and reopening the sponsorship criteria one-and-a-half years after the Board had concluded that ICM had satisfied those criteria.[210]

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207 *See* Claimant's Memorial on the Merits, Section X.

208 Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section N.5.

209 If ICANN genuinely came to believe that it was going to be impossible for ICM to meet the demands imposed by the GAC – and that ICANN had no choice but in turn to impose the GAC's demands on ICM – then ICANN was continuing to negotiate with ICM in bad faith. Of course, a fair inference to draw based on the evidence is that ICANN was simply trying to find a way to delay having to make a decision for as long as possible, which would also mean that ICANN was negotiating in bad faith. *See also* Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section M.8.

210 Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section N.1.

118. These various violations culminated in the 30 March 2007 resolution, in which ICANN provided five reasons for rejecting ICM's application. We will briefly review the evidence concerning each of these five points, demonstrating why none of them withstands even the most modest scrutiny. The 30 March 2007 resolution in itself was inconsistent with the provisions of ICANN's Articles and Bylaws requiring ICANN to act transparently, with procedural fairness, in a manner that does not single out any particular party for disparate treatment, and in furtherance of its technical mission in the allocation and assignment of TLDs.

REASON 1: "ICM's Application and Revised Agreement Fail to Meet, mong other things, the Sponsored Community criteria of the RFP specification."

119. The first reason given by the Board for rejecting the ICM application in its 30 March 2007 resolution – sponsorship – is the only reason that remotely relates to the criteria included in the 15 December 2003 RFP.

120. However, the record evidence in this IRP overwhelmingly demonstrates that the Board concluded that ICM had met the sponsorship criteria in the RFP on 1 June 2005; that no one on the Board raised the issue of sponsorship until Dr. Twomey alone mentioned it at the Board meeting of 10 May 2006; and that the Board collectively decided to reopen the issue only in February 2007 – *i.e.*, one month before it rejected the ICM application (which at that point had been pending since its submission to ICANN in March 2004). The Board's abandonment of the two-step process – and its reopening of the sponsorship criteria at the eleventh hour (and *only* with respect to ICM's application) – by itself violated ICANN's Articles and Bylaws.[211]

121. Not only did the Board lack any proper basis for reopening the sponsorship criteria in February 2007, but the manner in which it "reapplied" the sponsorship criteria to ICM

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[211] *Id*. at N.1 - N.2.

was incoherent, discriminatory, and pretextual. There was no evidence before the Board that ICM's support in the community was eroding. If anything, the evidence showed that the support had increased since the Board had determined that ICM satisfied the sponsorship criteria on 1 June 2005. As set forth in ICM's 13 March 2007 memo to the Board, the evidence of support dwarfed that of any opposition.

122. Furthermore, no other applicant was held to a similar standard of demonstrating community support. As Dr. Cerf acknowledged, "numerous major telephone carriers" opposed .TEL, but that did not stop .TEL from being added to the root as an sTLD.[212]

123. The standard set forth in the RFP is "broad-based support from the community."[213] ICM produced evidence that 57% of the industry supported .XXX; that 1,217 specific webmasters from over 70 countries had registered on ICM, expressing support for the sTLD; and that more than 76,000 adult website names had been pre-reserved since 1 June 2005. By contrast, .MUSEUM – which Dr. Twomey described as a "quite successful" sTLD[214] – has approximately 500 sites,[215] representing well less than 1% of the world's museums.[216]

124. In this IRP (but not in its 30 March 2007 resolution), ICANN offered several additional reasons as to why the Board rejected ICM's application upon the reopening of the

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212 Testimony of Dr. Cerf, Tr. 749:8 – 750:3 (23 Sept. 2009); *see also* Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section G.4.

213 Hearing Exhibit 45, sTLD RFP (15 Dec. 2003), at 4.

214 Testimony of Dr. Twomey, Tr. 840:16 – 841:2 (24 Sept. 2009).

215 Hearing Exhibit 196, ICANN Dashboard—Registry Status.

216 According to the American Association of Museums, there are approximately 17,500 museums in the United States alone. http://www.aam-us.org/aboutmuseums/abc.cfm (last visited on 12 October 2009).

sponsorship criteria. Although they are plainly *post hoc* rationalizations for action taken by the Board over two years ago, they are still discriminatory, irrational, and pretextual.

125. First, ICANN complained that ICM's community definition was self-identifying, so that ICANN could not "determine which persons or services would be in or out of the community."[217] In fact, numerous other sTLDs are self-identifying. The community definition for .TEL, for example, consists of the "individuals, persons, groups, businesses, organizations, or associations that wish to store their contact information using the DNS."[218] As Dr. Twomey wrote in a 6 May 2006 letter, "[m]embers of both the TEL and MOBI communities are self-identified."[219] Both sTLDs are now in the root.

126. Second, ICANN complained that "[t]he sponsored community as defined by ICM was simply a subset of all online adult entertainment providers" and was not sufficiently "differentiated" from such other providers.[220] In fact, ICM set forth numerous criteria by which members of its community would differentiate themselves from other providers of the adult community, but even if it had not done so, this criticism would have applied equally to numerous other sTLDs – including, for example, .TRAVEL, which, much like .XXX, is designed to provide an sTLD for certain members of the industry that want to follow the rules of a particular charter. According to its registry agreement, .TRAVEL is "intended to serve the needs of the international travel industry, which consists of those people, businesses, organizations and

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217 ICANN's Response to Claimant's Memorial on the Merits, ¶ 270.

218 Demonstrative: Claimant's Opening PowerPoint – Comparison of sTLD Resolution Language; *see also* Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section F.2.

219 Hearing Exhibit 275, Letter from Paul Twomey to Neil Edwards (6 May 2006), at 1.

220 ICANN's Response to Claimant's Memorial on the Merits, ¶ 272.

entities, however constituted, eligible to register in the .travel TLD pursuant to the Agreement and the .travel Charter."[221]

127. Third, ICANN complained that .XXX would merely duplicate content that was found elsewhere on the Internet.[222] But again, the same was true for virtually all of the other sTLDs, including, for example, .ASIA and .CAT, which contain content that can be found elsewhere on the Internet. Similarly, many of the museums found on .MUSEUM, and many of the travel businesses found on .TRAVEL, can also be found on .ORG, .COM, and other TLDs. There was no requirement in the RFP – and no requirement applied to any other applicant – that the content on an sTLD had to be unique to that sTLD.

128. Fourth, ICANN complained that ICM and its supporting organization, the International Foundation for Online Responsibility ("IFFOR"),[223] proposed to "proactively reach out to governments and international organizations to provide information about IFFOR's activities and solicit input and participation."[224] According to ICANN, "such measures diluted the possibility that the policies would be 'primarily in the interests of the Sponsored TLD Community,' as required by the sponsorship selection criteria, because the measures specifically obligated ICM to seek input from multiple governments and organizations on local concerns,

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221 Demonstrative: Claimant's Opening PowerPoint – Comparison of sTLD Resolution Language.

222 ICANN's Response to Claimant's Memorial on the Merits, ¶ 278.

223 Contrary to Dr. Twomey's assertion during his testimony that IFFOR was not well-developed (Testimony of Dr. Twomey, Tr. 970:19 – 976:9 (24 Sept. 2009)), in fact, ICM *had* provided ICANN with detailed information regarding IFFOR's structure and charter, and even the identity of individuals who would serve on the IFFOR Board. Confidential Hearing Exhibit 8 [also referred to as Confidential Hearing Exhibit DK], Letter from Stuart Lawley to Vinton Cerf and the ICANN Board (14 Dec. 2006). For example, Steven Balkam, the founder of and CEO of ICRA, was willing to serve. *Id.* To ICM's knowledge, no one at ICANN ever talked to Mr. Balkam about his willingness to serve on IFFOR's Board. Claimant's Post-Hearing Evidentiary Chart, Appendix A, Sections H.1 and H.2.

224 ICANN's Response to Claimant's Memorial on the Merits, ¶ 278, citing Hearing Exhibit 256, Revised Appendix S (posted 16 Feb. 2007).

which added yet another non-community voice to the policy formulation aspect."[225] In fact, ICM added these provisions specifically in response to requests made by ICANN.[226] For ICANN to argue now that these provisions provided a basis for rejecting ICM's application evinces the extent to which ICANN has acted in bad faith. More fundamentally, given that ICM's proposed community was defined as those adult content providers wanting to adhere to best practices and responsible behavior, the notion of seeking input from "governments and international organizations" was entirely consistent with the interests of the sponsored community.

129. As Dr. Williams testified at the Hearing, and explained in her witness statement, there is simply no principled basis on which the Board could have rejected ICM on the issue of sponsorship, while finding that all of the other applicants satisfied the sponsorship criteria.[227]

130. ICANN's reopening of the sponsorship criteria – which it did *only* for ICM – was unfair, discriminatory, and pretextual, and a departure from transparent, fair and well-documented policies.[228] Having improperly reopened the issue, ICANN's purported application of the sponsorship criteria to ICM was not done neutrally and objectively, with integrity and fairness; was not done in an open and transparent manner consistent with procedures designed to ensure fairness; and singled out ICM for disparate treatment, without substantial and reasonable cause.

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225 *Id*. (citing Hearing Exhibit 280, Email from C. Gunderson to Clyde Ensslin (20 Jun. 2005)).

226 Testimony of Ms. Burr, Tr. 1039:11 – 1041:3 (24 Sept Date); *see also* Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section L.3.

227 Testimony of Dr. Williams, Tr. 375:2-5, 401:12-17 (22 Sept. 2009); Witness Statement of Dr. Williams, ¶¶ 23, 28-33. For the Panel's ease of reference, ICM attaches Appendix B hereto, a "Sponsorship Decision Tree" demonstrating Dr. Williams' point that no fair application of the sponsorship criteria could lead to the conclusion that all of the other applicants met the criteria but ICM did not.

228 Claimant's Post-Hearing Evidentiary Chart, Appendix A, Section N.2.

131. Before turning to Reasons 2-5, it is worth observing that in its briefing of this IRP, ICANN barely mentioned these reasons, instead focusing almost entirely on sponsorship – perhaps reflecting ICANN's own reservations concerning the legitimacy of these reasons. As discussed below, Reasons 2-5 are neither legitimate nor defensible.

REASON 2: "Based on the extensive comment and from the GAC's Communiqués that this agreement raises public policy issues."

132. As discussed at length above, ICM in fact addressed all of the public policy issues raised by ICANN (whether at the behest of the GAC or otherwise) in a reasonable and responsible manner.

133. Reason 2 does not identify the "public policy" issues raised; nor does it explain why raising public policy issues, in itself, would warrant the rejection of an sTLD application.

134. But based on the transcript of the 30 March 2007 Board meeting, and the transcripts of several earlier meetings, it is apparent that Reasons 2-5 all arise from the same flawed interpretation of the Wellington Communiqué and other comments received from governments or government officials. A number of Board members – apparently led by Dr. Twomey – maintained that the GAC and others expected ICM to be responsible for enforcing the world's various and different laws and standards concerning pornography.

135. ICM submits that ICANN's interpretation of the Wellington Communiqué and the other "recommendations" was sufficiently absurd as to have been made in bad faith. But putting aside the issue of whether ICANN was incorrect or acting in bad faith in interpreting the Wellington Communiqué and other "recommendations" to impose a requirement to enforce the world's varying pornography laws on ICM, there is no question that ICANN, in turn, held ICM to that impossible standard.

136. In doing so, ICANN imposed a requirement that had never been imposed on any other registrant and that no registrant could possibly perform. Moreover, the flawed premise that ICM would be responsible for enforcing various local laws and standards concerning pornography led to several additional flawed conclusions, *viz*., that if ICM could not meet its responsibility (and, of course no one could), then ICANN would have to take it over; and if ICANN took it over, then ICANN would be taking on an oversight role regarding Internet content, which was beyond its technical mandate.

137. ICANN's imposition of this impossible requirement on ICM ensured that ICM's application would fail. Its imposition on ICM alone was discriminatory. It meant that ICANN rejected ICM's application on grounds that were not applied neutrally and objectively, or with integrity and fairness. It is evidence that ICANN was acting in bad faith, and seeking a pretextual basis to "cover" the real reason for rejecting .XXX, *i.e.*, that the U.S. government and several other powerful governments objected to its proposed content. As demonstrated below, these flaws are repeated in Reasons 3-5.

REASON 3: "Approval of the ICM Application and Revised Agreement is not appropriate as they do not resolve the issues raised in the GAC Communiqués, and ICM's response does not address the GAC's concern for offensive content, and similarly avoids the GAC's concern for the protection of vulnerable members of the community. The Board does not believe that these public policy concerns can be credibly resolved with the mechanisms proposed by the applicant."

138. Reason 3 is a more elaborate restatement of Reason 2. But again, ICM's proposed registry agreement contained detailed provisions to address child pornography issues

and detailed mechanisms that would enable governments and others easily to identify and filter content they deemed to be illegal or offensive.[229]

139. ICM undertook to provide mechanisms that would have "public policy" benefits. It did not undertake to "resolve" the problem of child pornography or, to use Dr. Cerf's words, to "deal with the problem of pornography on the Net." To the extent the Board was requiring ICM to "resolve" such ills, it was again placing a unique burden on ICM, which neither ICM nor any other registrant could possibly carry.

REASON 4: "The ICM Application raises significant law enforcement compliance issues because of the countries' varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire a responsibility related to content and conduct."

140. Reason 4 builds on the logical fallacy of Reasons 2 and 3. According to the Board's apparent reasoning: the GAC was requiring ICM to undertake to enforce local restrictions on access to illegal and offensive content; if, therefore, ICM was unable to meet such "enforcement" obligations, ICANN would have to do so.

141. But once again, ICANN could not have properly required ICM to undertake such enforcement obligations, whether or not ICM was actually requested to do so by the GAC. Given that it would have been unfair, discriminatory and entirely unfeasible to require ICM to enforce the varying national laws of the world with respect to adult content, ICANN would not have been obligated to take over that responsibility if ICM was unable to fulfill it.

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[229] Hearing Exhibit 286, Final Draft, Sponsored TLD Registry Agreement, (Jan. 2007) with attached Final Draft Appendix S (Feb. 2007), at 83-89.

REASON 5: "The Board agrees with the reference in the GAC Communiqué from Lisbon, that under the Revised Agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate."

142. Reason 5 largely restates Reason 4. But it underscores the absurdity of the position that the ICANN Board was taking on these issues. First, ICANN interpreted the GAC's advice to require ICM to be responsible for regulating content on the Internet – a task plainly outside ICANN's mandate. ICANN then criticized ICM for taking on a task plainly outside ICANN's mandate – and complaining that ICANN would have to undertake the task if ICM were unable to fulfill it.

143. As Professor Mueller put it, "[I]f you remember the reasons for rejecting the ICM registry contract, one of them was that it didn't effectively regulate content, and another one was that it did regulate content."[230]

144. Once again, ICANN could not properly require ICM to regulate content on the Internet and ICM did not undertake to regulate content on the Internet. ICM's application, submitted to ICANN in March 2004, promised a number of public policy benefits that would come from clearly labeling and identifying adult content sites that agreed to adhere to the industry's best practices. After the ICANN Board concluded that ICM met all of the RFP criteria on 1 June 2005, ICM spent nearly two years trying to negotiate a registry agreement in good faith, and reasonably and responsibly addressing every legitimate issue that ICANN raised.

145. At the end of the process, ICANN rejected ICM's application by reopening the sponsorship issue that it had resolved in ICM's favor nearly two years earlier; applying the

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[230] Testimony of Dr. Mueller, Tr. 232:17-21 (21 Sept. 2009).

sponsorship criteria in an unfair, discriminatory, and pretextual manner; and relying on other factors that were not in the RFP, were not reasonable or rational, and were not applied in a fair, neutral, or objective fashion.

146. In sum, even if the stated reasons were the true reasons that ICANN rejected ICM's application, then ICANN rejected ICM's application on grounds that were not applied neutrally and objectively, or with integrity and fairness, or in a non-discriminatory fashion. Indeed, the five reasons stated in the 30 March 2007 are so flimsy that it is difficult to believe that they were not simply pretext for the real reason that the Board rejected ICM's application: pressure from certain governments that objected to the content that would reside on the sTLD (coupled, perhaps, with the personal beliefs of board members who held the same views). But rather than state that it was not willing or able to resist that pressure (or, for that matter, that the Board itself found the proposed sTLD objectionable on content grounds), the Board carried out the charade that it was proceeding according to the original criteria and procedures set forth in the IRP. Either way, the Board's rejection of the application, particularly under the circumstances that preceded the rejection, violated ICANN's Articles and Bylaws.

VII. THE PANEL'S REMIT

147. There is at least one point on which ICM and ICANN agree: The Panel's remit is not to "affirm" or "reverse" the Board's decision. Nor is it the Panel's task to determine whether .XXX was a good or bad idea or how the Panel would have assessed the proposal against the RFP criteria.

148. Rather, under ICANN's Bylaws, the Panel is "charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the

Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."[231]

149. The Panel is then to issue a written Declaration, declaring whether the Board's actions and/or inaction were inconsistent with the Article of Incorporation or Bylaws.[232] The Declaration "shall specifically designate the prevailing party."[233]

150. ICM and ICANN disagree as to whether the Panel's Declaration is binding on the Board. ICANN is apparently of the view that if the Panel declares that an action or inaction of the Board was inconsistent with the Articles or Bylaws, the Board can reject the Panel's Declaration.[234] ICM will not repeat the various arguments set forth in its Memorial demonstrating why, as a matter of law and the plain language of the controlling documents, the Panel's Declaration is binding on the Board, and the Board may not reject a Declaration that the Board acted inconsistently with its Articles or Bylaws.[235]

151. ICM observes, however, that there was no evidence adduced in the IRP that would allow the Panel to depart from the unambiguous terms in the Bylaws, the ICDR International Arbitration Rules, and the Supplementary Procedures – terms such as "international arbitration," "arbitrators," "declare," "decide," "prevailing party," and "independent review," all of which connote a binding result. The ICDR International Arbitration Rules specifically provide for this Panel to issue an award that "shall be final and binding on the parties."[236] The

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231 Hearing Exhibit 5, ICANN Bylaws, Article IV, Section 3(3).

232 *Id*., Article IV, Section 3(8)(b).

233 *Id*., Article IV, Section 3(12).

234 *See, e.g.,* Testimony of Dr. Cerf, 592:4-19 (23 Sept. 2009).

235 *See* Claimant's Memorial on the Merits, ¶¶ 158-173.

236 Hearing Exhibit 11, ICDR, International Arbitration Rules of the International Centre for Dispute Resolution (1 Mar. 2008) ("ICDR Rules"), Article 27 (1).

Supplementary Procedures for ICANN's Independent Review Process state that the ICANN Board shall review and then "act[ ] upon the IRP declaration."[237] Although the term "nonbinding" was apparently mentioned when the provisions were being drafted, the term did not make its way into any of the final provisions.

152. It is up to the ICANN Board to determine how to act upon a Declaration by an IRP that it has acted inconsistently with its Articles or Bylaws (*i.e.*, the Board "reviews *and acts* upon the opinion of the IRP"[238]). But the Board may not decide that, notwithstanding an IRP Declaration to the contrary, its actions were consistent with the Articles and Bylaws. Nor is there anything to suggest that the Panel, in framing its Declaration, must refrain from providing guidance on how to address any inconsistencies.

153. ICM will also refrain from repeating the arguments in its Memorial as to why the Panel, in determining whether the Board acted inconsistently with the Articles or Bylaws, does not conduct a "deferential" review of the Board's actions or inaction.[239] Again, there is no language in the relevant provisions to suggest a deferential review. And no evidence was adduced in the IRP that would suggest that the Panel – which, again, is "charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws" – should be "deferential" in making that comparison.

154. With respect to the application of international law, ICM will also rely on the arguments put forth in its Memorial,[240] as well as on the testimony of Professor Goldsmith and

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237 Hearing Exhibit 12, ICDR, Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process, ¶ 60.

238 Hearing Exhibit 5, ICANN Bylaws, Article IV, Section 3(8)(c) (emphasis added).

239 Claimant's Memorial on the Merits, ¶¶ 310-323, 460-476.

240 *Id.,* pp. 178-188.

the arguments of counsel at the hearing. We observe only that the evidence adduced at the hearing served to further emphasize the extraordinary power that ICANN wields over a critical global resource – and that this power is not supposed to be subject to the control of any particular government or group of governments.

155. We observe further that because ICANN is not supposed to be the agent of any particular state, the only recourse of a party, anywhere in the world, who has a dispute with ICANN in a case such as ICM's, is the IRP.

156. Finally, we observe that the Articles and Bylaws – including, for example, the detailed provisions governing the GAC's interaction with the Board, and the explicit provision that the GAC is an advisory committee, whose advice the Board does not have to follow – is meant to protect the ICANN Board as well as parties like ICM from the efforts of any government or group of governments to control the policies and procedures of the Domain Name System. Although governments may certainly convey their advice and recommendations to ICANN, the requirement that ICANN consider and (if it so chooses) implement that advice in an open, transparent, fair, and non-discriminatory manner, in accordance with procedural fairness, will protect ICANN as well as Parties like ICM from the undue influence of any government or group of governments.

157. To use the words of the White Paper, the document that effectively gave birth to ICANN, only strict adherence to the principles of ICANN's Articles and Bylaws will protect ICANN "against capture by a self-interested faction."[241] Nothing less should be required for the private corporation that "operate[s] for the benefit of the Internet community as a whole," and

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[241] Hearing Exhibit 31, White Paper (5 Jun. 1998), at 21.

that has been given global responsibility over the Internet, "an international network of networks, owned by no single nation, individual or organization."[242]

CONCLUSION

ICM respectfully requests that the Panel issue a Declaration that ICANN's actions and inaction, as described herein, at the Hearing, and in ICM's Memorial and accompanying Witness Statements and Exhibits, were inconsistent with ICANN's Articles of Incorporation and Bylaws. ICM repeats and incorporates by reference the statement of "Relief Requested" from its Memorial.[243]

Respectfully submitted,

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13 October 2009

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242 Hearing Exhibit 4, ICANN Articles of Incorporation, Articles 3-4.

243 Claimant's Memorial on the Merits, pp. 265-67.

ICM REGISTRY, LLC

V.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

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APPENDIX A: POST-HEARING EVIDENTIARY CHART

TABLE OF CONTENTS

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
A.	**The RFP criteria were objective and did not include content, morality, or controversy components.**	**ICM Memorial pp. 55-65** **Hearing Exh. 45, TLD RFP (15 Dec. 2003)**		
A.1	The RFP criteria were carefully developed and were the result of a process that allowed for many opportunities for public comment.	Hearing Exh. 56, Letter from Lawley to Peter Zangl (8 Nov. 2005), p. 2 Hearing Exh. 60, A Plan for Action Regarding New gTLDs (18 Oct. 2002) Hearing Exh. 61, ICANN Public Forum, Shanghai, China (30 Oct. 2002) Hearing Exh. 62, General Comments Regarding A Plan for Action Regarding New gTLDs (10 Nov.- 22 Dec. 2002) Hearing Exh. 63, ICANN, Amsterdam Meeting Topic: A Plan for Action Regarding New gTLDs (10 Dec. 2002) Hearing Exh. 65, ICANN Board Minutes, Amsterdam, Netherlands (15 Dec. 2002) Hearing Exh. 66, ICANN Rio de Janeiro Meeting Topic: Criteria to Be Used in the Selection of New Sponsored TLDs (25 Mar. 2003) Hearing Exh. 67, ICANN Meetings in Rio de Janeiro, Brazil—Schedule and Agenda (26 Mar. 2003) p. 3 Hearing Exh. 69, Stuart Lynn, sTLD RFP: Status, PowerPoint (24 Mar. 2003) Hearing Exh. 71, ICANN GNSO Council gTLDs Committee—new gTLDs, conclusions v.7 (12 Jun. 2003)	Mueller, pp. 24-25, 28-30 Twomey, ¶¶ 13-16	Mueller, Day 1, 157:11 – 157:16 (the 2004 RFP criteria were objective as compared to 2000 round)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		Hearing Exh. 72, Draft sTLD RFP (24 Jun. 2003) Hearing Exh. 73, Minutes of the Regular Meeting of the Board, Montreal, Canada (26 Jun. 2003), pp. 5-6 Hearing Exh. 77, ICANN, Special Meeting of the Board, Minutes (9 Sept. 2003) Hearing Exh. 78, Board Resolution Finalizing New sTLD RFP (31 Oct. 2003), p. 4 Hearing Exh. 79, ICANN Announcement, ICANN Launches Broad Strategic Initiative for New Generic Top-Level Domains (31 Oct. 2003) Hearing Exh. 80, Submissions to the stld-rfp-comments Forum (21 Mar. – 12 Nov. 2003) Hearing Exh. 175, Letter from Twomey to Tarmizi, (11 Feb. 2006), pp. 4-5 Hearing Exh. AJ, Letter from Cerf to Peter Zangl (17 January 2006), pp. 4-5		
A.2	The GAC had numerous opportunities to comment on the RFP criteria and chose not to.	Hearing Exh. 42, GAC Chairman's Report to WGIG (Feb. 2005), pp. 11-17 Hearing Exh. 60, A Plan for Action Regarding New gTLDs (18 Oct. 2002) Hearing Exh. 64, GAC Meeting, Shanghai, China (27-29 Oct. 2002) Hearing Exh. 67, ICANN Meetings in Rio de Janeiro, Brazil (26 Mar. 2003) Hearing Exh. 68, GAC Meeting Minutes, Rio de Janeiro, Brazil (23-25 Mar. 2003) Hearing Exh. 70, GAC Communiqué, Rio de Janeiro, Brazil (25 Mar. 2003) Hearing Exh. 74, GAC Minutes, Montreal, Canada (22-25 Jun. 2003)	Mueller, pp. 28-30	Mueller, Day 1, 177:15 – 178:10 (the GAC never commented on the RFP despite multiple public postings)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		Hearing Exh. 75, GAC Communiqué # 16—Montreal, Canada (24 Jun. 2003) Hearing Exh. 76, GAC Communiqué # 17—Carthage, Tunisia (28 Oct. 2003)		
A.3	ICANN was aware of the possibility of an adult content TLD, and could have included criteria to address the issue.	Hearing Exh. 23, ICANN Yokohama Meeting (13 Jun. 2000), p. 11 Hearing Exh. 44, Description of ICM Application in the 2000 Round Hearing Exh. 50, Report on TLD Applications (9 Nov. 2000), p. 41 Hearing Exh. 54, ICANN, TLD Applications Lodged (10 Oct. 2000), p. 5 Hearing Exh. 62, General Comments Regarding A Plan for Action Regarding New gTLDs (10 Nov.- 22 Dec. 2002) Hearing Exh. 80, Submissions to the stld-rfp-comments Forum (21 Mar. – 12 Nov. 2003) Hearing Exh. 81, New gTLD Program Explanatory Memorandum (29 Oct. 2008)	Lawley, ¶ 10 Mueller, p. 29 Twomey, ¶ 12 Williams, ¶¶ 6-7, 33	Lawley, Day 2, 314:13 – 314:16 (the 2000 .XXX application was controversial) Mueller, Day 1, 155:19 – 156:14 (applicants not selected in the 2000 round, such as .XXX, were free to apply again in 2004) Williams, Day 2, 369:9-13 (ICM submitted an application for .XXX in 2000)
A.4	The criteria included in the RFP were from three general categories: technical, business and financial, and sponsorship.	Hearing Exh. 45, sTLD RFP (15 Dec. 2003)	Cerf, ¶ 21 Lawley, ¶¶ 30-44 Mueller, pp. 28-30 Williams, ¶¶ 8-9	Burr, Day 2, 431:14 – 432:10 (describing the three categories of RFP criteria); 433:3-6 (there were no content-based criteria) Lawley, Day 1, 261:22 – 262:11 (describing the three categories of RFP criteria; there were no morality or content-based criteria) Williams, Day 2, 369:6-16 (no morality or content-based criteria)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
A.5	The criteria were to be applied according to principles of objectivity, non-discrimination and transparency.	Hearing Exh. 4, Articles of Incorporation (21 Nov. 1998) Hearing Exh. 5, ICANN Bylaws (29 May 2008), p. 2 Hearing Exh. 45, sTLD RFP (15 Dec. 2003), p. 1 Hearing Exh. 77, Special Meeting of the Board, Minutes (9 Sept. 2003) Hearing Exh. 82, ICANN Announcement: Progress in Process (19 Mar. 2004)	Cerf, ¶ 14 Mueller, pp. 28-30, 32-33 Twomey, ¶ 17 Williams, ¶¶ 5, 14, 23	Burr, Day 2, 428:3-9 ("the 2004 round was specifically not a beauty contest") Lawley, Day 1, 261:22 – 262:11 (the RFP criteria "were objective criteria, and they were going to be applied in a non-discriminatory way") Lawley, Day 2, 316:4 – 316:11 (applications could only be rejected based on the stated criteria) Twomey, Day 4, 979:10-20 ("the RFP itself is drafted in the context of the ICANN bylaws. You know, we can't put out an RFP, and then act not in the context of the ICANN bylaws.") Williams, Day 2, 396:4-9 (principles of fairness and transparency extend to the evaluation process)
B.	**ICANN established a two-step process for evaluating and approving sTLD applications.**	**ICM Memorial pp. 66-72; 93-95**		
B.1	In the first step, applications were to be evaluated against the RFP criteria; only those that met the criteria would proceed	Hearing Exh. 45, sTLD RFP (15 Dec. 2003), p.1 Hearing Exh. 78, Board Resolution Finalizing New sTLD RFP (31 Oct. 2003), p. 4	Burr, ¶¶ 13, 31 Mueller, pp. 28-30, 36-38	Burr, Day 2, 433:14 – 434:3 (describing the two-step process) Cerf, Day 3, 663:13 – 663:20 (RFP describes a two-step process)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	to the second step of commercial and technical negotiations.	Hearing Exh. 82, ICANN Announcement: Progress and Process (19 Mar. 2004) Hearing Exh. 84, sTLD Update, Rome (4 Mar. 2004), p. 13 Hearing Exh. 85, Kurt Pritz, sTLD PowerPoint Presentation for the ICANN Meeting, Rome, Italy (4 Mar. 2004), p. 5 Hearing Exh. 86, sTLD Update, Carthage (31 Oct. 2003), p. 6 Hearing Exh. 87, sTLD Update, Cape Town (3 Dec. 2004), p. 12 Hearing Exh. 88, ICANN Public Forum, Mar Del Plata (7 Apr. 2005), p. 23 Hearing Exh. 89, Letter from Pritz to Lawley (31 Jul. 2004), p. 2 Hearing Exh. 111, ICANN Meetings in Kuala Lumpur, Malaysia (22 Jul. 2004), p. 36 Hearing Exh. 140, ICANN Meetings in Luxembourg, Public Forum—Part II, Luxembourg (14 Jul. 2005), p. 28 Hearing Exh. 221, Email from Jeffrey approving ICM press release (3 May 2005) Hearing Exh. 269, ICANN Meetings in Rome (6 Mar. 2004), pg. 22 Hearing Exh. 271, ICANN Announcement, sTLD Update (1 Jun. 2005) Hearing Exh. 273, ICANN Meetings in Vancouver, Canada, (3 Dec. 2005), p. 33 Hearing Exh. 274, ICANN Meetings in Wellington, New Zealand (30 Mar. 2006), p. 41	Williams, ¶¶ 8, 23-24	Lawley, Day 1, 277:7 – 278:8 (describing the two-step process) Mueller, Day 1, 159:8 – 161:17 (process as described in RFP)
B.2	All contemporaneous	*See* § B.1 above	Burr, ¶¶ 13-15	Cerf, Day 3, 663:13 – 663:20 (RFP

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	statements and documents describe this as a two-step process.		Mueller, pp. 29-30	describes a two-step process) Lawley, Day 1, 277:7 – 279:14 (ICANN descriptions of process, both before and after ICM submitted the application) Mueller, Day 1, 160:5 – 162:7 (ICANN's Kurt Pritz repeatedly described two-step process)
C.	**ICM's application was clearly for a sponsored TLD.**	**ICM Memorial pp. 88-100**		
C.1	The benefits of best business practices, including labeling, tagging, prohibitions of child pornography, prohibitions of malicious software, privacy protections, and prohibitions of SPAM and fraud could only be achieved through a sponsored TLD.	Confid. Hearing Exh. 2, ICM Confidential Application (16 Mar. 2004), pp. 6-8 Confid. Hearing Exh. 4, ICM Confidential Memorandum to the ICANN Board of Directors (Revised 7 Dec. 2004) Confid. Hearing Exh. 5, ICM Confidential Memorandum to the ICANN Board of Directors (2 Nov. 2004) Confid. Hearing Exh. 7, ICM Confidential Presentation, The Sponsored .xxx TLD: Promoting Online Responsibility (2 Apr. 2005) Confid. Hearing Exh. 11, ICM Responses to Evaluators Questions Including Letters of Support Confid. Hearing Exh. 12, ICM Registry, The Sponsored .xxx sTLD: Promoting Online Responsibility (27 Nov. 2005) Confid. Hearing Exh. 13, Email from Burr (6 Dec. 2006) Hearing Exh. 47, The Voluntary Adult Top-Level Domain (TLD), Pre-	Burr, ¶¶ 20, 24 Lawley ¶¶ 11-18, 25-29	Burr, Day 2, 430:8 – 431:9 (Burr would not have supported a gTLD) Lawley, Day 1, 253:17 – 254:5 (only as an sTLD would .XXX provide benefits to the targeted community and the Internet community as a whole); 259:8 – 261:20 (sTLD was intended to provide benefits of identification and self-regulation); 265:17 – 266:11 (registrants would be attracted by commercial benefits of identification and self-regulation)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		Registration Program Hearing Exh. 125, Letter from Lawley to Pritz (9 Oct. 2004) Hearing Exh. 192, Letter from Lawley to Cerf and the ICANN Board (22 Dec. 2006) Hearing Exh. 216, .XXX Application, public version posted 19 Mar. 2004, p. 7 Hearing Exh. 225, Letter from Lawley to Jeffrey (5 April 2005) Hearing Exh. 249, Letter from Lawley to Cerf re Policy Commitments (5 Jan. 2007)		
C.2	Only through a sponsoring organization responsible for policy development could the community coordinate and engage in self-regulation.	*See* § C.1 above Hearing Exh. 24, Top-Level Domains (gTLDs) Hearing Exh. 46, IFFOR Charter	Burr, ¶¶ 10-12 Lawley ¶¶ 12-13, 26	Burr, Day 2, 430:8 – 431:9 (Burr was willing to represent ICM because of the potential to use the sTLD for self-regulation and user empowerment) Lawley, Day 1, 256:16-20 ("the whole essence of the sTLD was self-regulation") Mueller, Day 1, 139:3-6 (the sponsor of an sTLD makes the decisions about what is suitable for the domain)
C.3	ICANN is incorrect in its *current* assertion that ICM's application was essentially an unsponsored TLD.	*See* §§ C.1 & C.2 above Confid. Hearing Exh. 11, ICM Responses to Evaluators' Questions Including Letters of Support Confid. Hearing Exh. 12, ICM Registry, The Sponsored .xxx sTLD: Promoting Online Responsibility (27 Nov. 2005)	*See* §§ C.1 & C.2 above Burr, ¶¶ 8-9, 11-12	*See* §§ C.1 & C.2 above Lawley, Day 1, 253:10 – 254:5 (ICM's 2000 application for .XXX was for a "restricted gTLD so it was targeted at the community" and making it a sponsored TLD was a natural extension and a way to

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
			Lawley ¶¶ 12-18, 27, 28	ensure the application was "win-win") Mueller, Day 1, 155:19-156:14 (ICM's 2000 application for .XXX was for a restricted content TLD, and it did not matter in the 2004 round that the 2000 application had not been successful)
D.	**The Board decided on 1 June 2005 that ICM's application met the RFP criteria.**	**ICM Memorial pp. 100-108**		
D.1	Sponsorship criteria were a major topic *before* the vote, and ICM even gave a presentation to the Board to address residual sponsorship concerns before 1 June 2005.	Confid. Hearing Exh. 4, ICM Confidential Memorandum to the ICANN Board of Directors (Revised 7 Dec. 2004) Confid. Hearing Exh. 5, ICM Confidential Memorandum to the ICANN Board of Directors (2 Nov. 2004) Confid. Hearing Exh. 7, ICM Confidential Presentation, The Sponsored .xxx TLD: Promoting Online Responsibility (2 Apr. 2005) Hearing Exh. 125, Letter from Lawley to Pritz (9 Oct. 2004) Hearing Exh. 132, ICANN, Minutes, Special Meeting of the Board (24 Jan. 2005) Hearing Exh. 133, ICANN, Board Meeting Real Time Captioning (8 Apr. 2005), p. 11 Hearing Exh. 134, ICANN, Minutes, Special Meeting of the Board (3 May 2005) Hearing Exh. 139, GAC Luxembourg Minutes (11 Jul. 2005), p.5	Burr, ¶¶ 15, 26-27, 32, Cerf, ¶ 23 Lawley ¶¶ 45, 49 Mueller, pp. 36-38 Williams, ¶¶ 15-18	Lawley, Day 1, 274:20 – 277:1 (After the ICANN Board disbanded the Sponsorship Team, ICM provided information to Board, largely regarding sponsorship issues, as that was the only section of the independent evaluation that ICM did not pass.); 279:15 – 280:1 (After the ICANN Board took over the process before the 1 June vote, the Board asked for clarifying information about sponsorship, including the definition of the community and the support from that community.)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		Hearing Exh. 225, Letter from Lawley to Jeffrey (5 April 2005) Hearing Exh. DB, Letter from Lawley to Pritz (16 Sept. 2004)		
D.2	The 1 June 2005 resolution was an unequivocal statement that the application met the RFP criteria and should continue on to the second step, the negotiation stage of the application process.	Hearing Exh. 120, ICANN Board Resolution approving .XXX to Enter into Contractual Negotiations (1 Jun. 2005)	Burr, ¶ 30-32 Lawley, ¶¶ 49-53 Mueller, pp. 6, 30, 36-38 Williams, ¶ 24	Lawley, Day 1, 280:17 – 281:18 (Lawley was "overjoyed" that resolution did not have caveats) Williams, Day 2, 371:13 – 372:9 (June 1 vote signified that the "evaluation process had completed.") Mueller, Day 1, 371:13 – 372:9
D.3	Other resolutions, such as those approving .JOBS and .MOBI did mention specific issues to be addressed during contract negotiations.	Demonstrative: Claimant's Opening PowerPoint – Comparison of sTLD Resolution Language Hearing Exh. 116, ICANN Board Resolutions on .JOBS and .MOBI sTLD Negotiation (13 Dec. 2004)	Burr, ¶ 33 Cerf, ¶ 26 Lawley, ¶ 50 Mueller, pp. 37-38 Twomey, ¶ 21	Cerf, Day 3, 683:9 – 684:7 (the caveats in the other applicants' resolutions were to provide clarity and to direct the staff as to carrying out the wishes of the Board.) Lawley, Day 1, 281:19 – 282:6 (resolutions for .JOBS and .MOBI had been directed them to discuss specific provisions with ICANN staff) Twomey, Day 4, 910:16 – 912:5 (the purpose of the caveats in the .JOBS and .MOBI resolutions was to put applicants on notice of what to address in contract negotiations)
D.4	Contemporaneous statements of ICANN	Hearing Exh. 139, GAC Luxembourg Minutes (11 Jul. 2005), p. 5	Burr, ¶ 34	Cerf, Day 3, 673:13 - 675:2 (admitting there is no ambiguity in the statement on

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	Board members show the Board understood the vote to be a decision on the criteria.	Hearing Exh. 142, Joichi Ito, Some Notes on the .XXX Top Level Domain (3 Jun. 2005)	Lawley, ¶ 51 Mueller, pp. 6, 42	Joichi Ito's blog); 682:11 – 683:8 (the meeting minutes of the GAC meeting in Luxembourg "shows that [Cerf] said – or someone believed [Cerf] said" that the Board determined on 1 June 2005 that the RFP criteria had been met) Lawley, Day 1, 282:14 – 283:4 (Board members Michael Palage, Vinton Cerf, and Paul Twomey congratulated Lawley on the approval); 285:8 – 286:4 (Board members Vinton Cerf and Joichi Ito made public statements that ICM's application met the criteria) Mueller, Day 1, 164:16 – 169:6 (Board member Vinton Cerf stated to the GAC in Luxembourg and Board member Joichi Ito stated on his blog that the 1 June vote was taken to resolve the issue of whether .XXX met the criteria)
D.5	Contemporaneous statements of ICANN executives and staff show they understood the vote to be a decision on the criteria.	Hearing Exh. 140, ICANN Meetings in Luxembourg, Public Forum—Part II, Luxembourg (14 Jul. 2005), p. 28 Hearing Exh. 221, Email from Jeffrey approving ICM press release (3 May 2005) Hearing Exh. 283, "Internet group OKs New Suffix for Porn Sites," Associated Press (2 June 2005)	Burr, ¶¶ 28, 34 Lawley, ¶¶ 49-51 Mueller, pp. 6	Cerf, Day 3, 672:17 – 673:12; 675:3 – 678:17 (admitting there is no ambiguity in statements by Kurt Pritz, Kieran Baker, and John Jeffrey that ICM had met the RFP criteria) Lawley, Day 1, 283:5-13 (John Jeffrey and Kurt Pritz were congratulatory after the 1 June 2005 approval, and did not mention any outstanding concerns with the RFP criteria) 286:5 – 288:6 (Kurt

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
				Pritz, Kieran Baker, John Jeffrey, and ICANN's own press release all stated that ICM's application had met the criteria)
D.6	ICM and other third parties understood and were told that the vote was a decision on the sponsorship criteria.	Hearing Exh. 141, Email from Bruce Tonkin to Lawley (2 Jun. 2005) Hearing Exh. 143, Email from Marie Zitkova, Chair of the gTLD Registries Constituency, to Lawley (29 Jun. 2005) Hearing Exh. 145, BBC News, Sex Sites Get Dedicated Net Home (2 Jun. 2005) Hearing Exh. 146, Declan McCullough, Porn Friendly '.xxx' Domains Approved, News.com (1 Jun. 2005) Hearing Exh. 147, Keith Regan, ICANN Approves Concept of .xxx Domain for Porn, E-Commerce Times (2 Jun. 2005) Hearing Exh. 148, Holden Frith, Web to Put All Its Pornography in One Basket, The Times Online (2 Jun. 2005) Hearing Exh. 149, Council of Europe General Report, Human Rights in the Information Society: Responsible Behavior by Key Actors (13 Sept. 2005), p. 5 Hearing Exh. 190, Amended Request for Reconsideration of Board Action (21 May 2006), pp. 4-5 [also referred to as Hearing Exh. AI]	Burr, ¶ 34 Lawley, ¶¶ 50-52 Mueller, pp. 30, 36-38 Williams, ¶ 24	Burr, Day 4, 1051:17 – 1053:7 (ICM sent ICANN a legal memo in March 2007 explaining why the sponsorship question was closed) Lawley, Day 1, 282:14 – 283:13 (ICANN Board members, staff, and executives congratulated Lawley on the 1 June 2005 approval); 284:14 – 285:5 (Marie Zitkova, the chair of ICANN's registry constituency, and the Council of Europe believed that the application had met the criteria and a contract would be executed as long as ICM agreed to the fees ICANN wanted); 285:8 – 288:6 (ICANN Board members, staff, and executives made public statements that ICM's application met the criteria) Mueller, Day 1, 165:11-21 (the process as understood by the applicants, discussions with other applicants, and statements by Board members indicated to Mueller that the 1 June vote meant ICM met the criteria)
D.7	Later statements of ICANN Board members (*e.g.* Susan Crawford, Mouhamet	Hearing Exh. 189, Voting Transcript of ICANN Board Meeting (10 May 2006), p. 7		

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	Diop) show they believed the 1 June 2005 vote resolved the question of sponsorship.	Hearing Exh. 201, ICANN Meetings in Lisbon, Portugal, Transcript (30 Mar. 2007), pp. 5-22		
D.8	ICANN's *current* assertion that the 1 June 2005 vote was only intended to test whether sponsorship or other residual concerns could be addressed during contract negotiations is not supported by any contemporaneous evidence.	*See* §§ D.1 – D.7 above		
E.	**Sponsorship was not a subject in contract negotiations or in ICANN's public statements between 1 June 2005 and 10 May 2006.**	**ICM Memorial pp. 108-110, 120-122, 126-128, 132-131** **Demonstrative: ICM Registry Agreement Negotiations**		
E.1	Initial contract negotiations were brief, involved minor changes to the standard terms, and resulted in a draft registry agreement with few differences from those registry agreements ICANN had already	Demonstrative: Revisions to Draft Registry Agreement Hearing Exh. 137, Email from Burr to Lawley (8 May 2005) Hearing Exh. 150, Email from Jeffrey to Burr discussing draft registry agreement (13 Jun. 2005) Hearing Exh. 151, Email from Burr to Jeffrey discussing draft registry agreement	Burr, ¶¶ 34-35, Appendix A: Registry Agreement Comparison Lawley, ¶ 56	Burr, Day 2, 435:1-15 (describing negotiation of commercial and technical terms); 441:5-20 (ICM accepted all of the standard registry agreement provisions) Cerf, Day 3, 678:18 – 680:2 (admitting that there is no mention of outstanding criteria in Jeffrey's email to Burr);

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	executed with other applicants.			
E.2	ICANN did not ask ICM for changes in the definition of its sponsored community or for further evidence of community support.	*See* § E.1 above Hearing Exh. 171, Draft, Sponsored TLD Registry Agreement, Appendix S (18 Apr. 2006) Hearing Exh. 178, Email from Burr to Jeffrey and Twomey regarding ICM's outreach to the Board (19 Mar. 2006) Hearing Exh. 183, Email from Burr to Jeffrey with draft registry agreement attached (31 Mar. 2006) Hearing Exh. 186, ICANN, Board Review of Progress Regarding .XXX (ICM) sTLD Registry Agreement: Minutes (18 Apr. 2006) Hearing Exh. 241, Email from Burr to Jeffrey with attachment (26 Mar. 2006)	Burr, ¶¶ 34, 52, 55 Lawley, ¶¶ 56, 63	Burr, Day 2, 454:18-19 ("we were not changing the substance"); 463:1-2 ("again, substantively there was no difference except that we rearranged things."); 484:11-17 ("Not only was ICM never asked to change that, at one point, John [Jeffrey] reported that some board members were concerned that ICM might try to get out from under its obligations by changing the definition of the sponsored community. So they affirmatively did not want it to be changed.") Lawley, Day 1, 290:1 – 292:13; 299:18 – 301:2 (no change in community definition) Cerf, Day 3, 727:9 – 728:12 (Cerf has no reason to dispute Burr's testimony that ICANN did not raise sponsorship with ICM during registry agreement negotiations)
E.3	Board resolutions, the formal directives of the ICANN Board to staff and applicants, did not reflect any interest in addressing sponsorship concerns	Hearing Exh. 120, ICANN Board Resolution approving .XXX to Enter into Contractual Negotiations (1 Jun. 2005) Hearing Exh. 184, ICANN Board Resolution on ICM Registry sTLD Application, Regular Meeting of the Board: Minutes (31 Mar. 2006)		Cerf, Day 3, 683:9-19 (purpose of placing caveats in resolutions was "[f]or clarity and to direct the staff as to carrying out the wishes of the board.")

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	during the contract negotiations.	Hearing Exh. 272, ICANN, Special Meeting of the Board, Preliminary Report, (15 Sept. 2005)		
E.4	Meeting minutes and other Board documents showed sponsorship was not a significant topic of conversation.	*See* § E.3 above Hearing Exh. 175, Letter from Twomey to Tarmizi (11 Feb. 2006) Hearing Exh. 185, Board Meeting Real Time Captioning (31 Mar. 2006), pp. 1-2 Hearing Exh. 186, ICANN, Board Review of Progress Regarding .XXX (ICM) sTLD Registry Agreement: Minutes (18 Apr. 2006) Hearing Exh. AQ, Special Meeting of the Board, Preliminary Report, (16 August 2005) Hearing Exh. CF, Special Meeting of the Board, Minutes (16 Aug. 2005)		Cerf, Day 3, 727:9-22 (acknowledging that the 15 September 2005 resolution does not mention sponsorship)
E.5	Dr. Twomey—*alone*—raised residual sponsorship concerns *for the first time* in May 2006.	Hearing Exh. 188, Letter from Twomey to Tarmizi (4 May 2006) Hearing Exh. 189, Voting Transcript of ICANN Board Meeting (10 May 2006) Hearing Exh. 122, ICANN Board Consideration of .XXX, Special Meeting of the Board: Minutes (10 May 2006) [also referred to as Hearing Exh. T]	Burr, ¶ 63 Twomey, ¶¶ 30, 47, 52, 55 Cerf, ¶ 27 Pisanty, ¶ 17	Burr, Day 2, 459:14 – 460:7 Lawley, Day 1, 301:3 – 302:20 (ICM unaware of sponsorship concerns until May 2006 vote, and only Twomey raises sponsorship at that vote)
E.6	In response to Dr. Twomey's newly raised questions on sponsorship, ICM informed ICANN that it believed the issue had been decided in June 2005, and began the pre-	Hearing Exh. 190, Amended Request for Reconsideration of Board Action (21 May 2006), pp. 4-5 Hearing Exh. 191, Letter from Lawley to Cerf and the ICANN Board regarding pre-reservation program (30 May 2006) Hearing Exh. 192, Letter from Lawley to Cerf and the ICANN Board (22 Dec.	Burr, ¶ 70 Cerf, ¶ 27 Lawley, ¶¶ 43, 59	Lawley, Day 2, 301:21 – 302: 11 (ICM opened pre-reservation service after May 2006 vote); 321:7 – 321:16 (Lawley recalls writing to Cerf saying sponsorship had been decided)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	reservation program to further demonstrate its community support.			
E.7	The 15 September 2005 meeting minutes, the only minutes that mention sponsorship, were not published until June 2006; and the preliminary report, the only *contemporaneous* account of the actual meeting, made no mention of sponsorship.	Hearing Exh. 119, Special Meeting of the Board: Minutes (15 Sept. 2005) Hearing Exh. 276, ICANN, Special Meeting of the Board, Minutes (14 Jun. 2006)		Cerf, Day 2, 723:15 – 730:22 (the 15 September 2005 meeting minutes were not posted until June 2006, and the preliminary report did not mention sponsorship)
F.	**ICM had a clearly defined sponsored community.**	**ICM Memorial, pp. 78-80; 96-100** **Hearing Exh. 45, sTLD RFP (15 Dec. 2003)**		
F.1	ICANN determined that the application met the criteria on 1 June 2005 and never asked ICM to change the community definition after that vote.	*See* §§ D.1 – D.7 & E.2 above Demonstrative: Claimant's Opening PowerPoint – The Definition of "Community" Never Changed Between 2005 & 2007 Hearing Exh. 179, Email from Smith to Burr regarding the draft registry agreement (19 Mar. 2006) Hearing Exh. 184, ICANN Board Resolution on ICM Registry sTLD Application, Regular Meeting of the Board: Minutes (31 Mar. 2006) Hearing Exh. 185, Board Meeting Real Time Captioning (31 Mar. 2006), pp. 1-2	*See* §§ D.1. – D.7 & E.2 above Burr, ¶¶ 30, 44, 52 Lawley, ¶¶ 49-50, 58, 60 Mueller, pp. 3, 6, 30, 37-38	*See* §§ D.1 – D.7 & E.2 above Burr, Day 2, 483:19 – 486:9 ("Not only was ICM never asked to change that, at one point, John [Jeffrey] reported that some board members were concerned that ICM might try to get out from under its obligations by changing the definition of the sponsored community. So they affirmatively did not want it to be changed.") Lawley, Day 1, 280:17 – 282:8 (1 June

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		Hearing Exh. 199, Board Meeting Minutes (12 Feb. 2007) Hearing Exh. 255, ICANN Board Meeting Minutes (16 Jan. 2007) Hearing Exh. 272, ICANN, Special Meeting of the Board, Preliminary Report, (15 Sept. 2005) Hearing Exh. 286, Final Draft, Sponsored TLD Registry Agreement, (Jan. 2007) with attached Final Draft Appendix S (Feb. 2007) Hearing Exh. AK, Draft of Registry Agreement (5 Jan. 2007) Hearing Exh. AQ, Special Meeting of the Board, Preliminary Report, (16 August 2005) [also referred to as Hearing Exh. CF, Special Meeting of the Board, Minutes (16 Aug. 2005)]		2005 vote meant ICM "had clearly and unequivocally satisfied the application criteria, particularly the sponsored criteria."); 282:14 – 283:13, 285:8 – 288:6 (describing what ICANN said publicly about the vote); 291:10 – 292:13, 293:10-20 (ICANN never brought up sponsorship); 290:1-291:13; 299:18 – 301:2 (no change in community definition)
F.2	Sponsored communities were frequently defined through self-selection.	Demonstrative: Community Definitions in Finalized sTLD Registry Agreements Hearing Exh. 90, .ASIA Application (19 Mar. 2004), p.4-6 Hearing Exh. 92, .JOBS Application (19 Mar. 2004), pp. 4-6 Hearing Exh. 95, .MOBI Application (19 Mar. 2004), pp. 3-4 Hearing Exh. 97, .TEL (Telnic) Application (19 Mar. 2004), p. 4 Hearing Exh. 275, Letter from Twomey to Neil Edwards (6 May 2006), p. 5	Burr, ¶¶ 19, 62 Lawley, ¶ 42 Mueller, pp. 47-48 Williams, ¶ 18	Burr, Day 2, 429:13 – 430:7 (all 2004 applications had self-identified communities); 486:18 – 487:9 (same) Lawley, Day 1, 268:11 – 269:22 (the .CAT, .ASIA, and .TEL communities are also self-selecting) Twomey, Day 4, 963:17 – 965:6 ("Q: …many approved sTLDs are self-selecting communities, right? A: some of them are")
F.3	ICM was not required to create a universal or regulatory definition of its community.	Confid. Hearing Exh. 2, ICM Confidential Application (16 Mar. 2004), p. 4 Hearing Exh. 45, sTLD RFP (15 Dec. 2003)	Lawley, ¶ 42 Mueller, pp. 35-36	Lawley, Day 1, 268:11-22 (a regulatory definition was not required)

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		Hearing Exh. 125, Letter from Lawley to Pritz (9 Oct. 2004), p. 6 Hearing Exh. 216, .XXX Application, public version posted 19 Mar. 2004		
G.	**Community support for ICM's application was always sufficient.**	**ICM Memorial, pp. 97-98, 110, 139-140** **Hearing Exh. DI, ICM Memorandum to ICANN Board of Directors (13 Mar. 2007)**		
G.1	Before the 1 June 2005 vote, ICM produced letters of support from organizations around the world which were sufficient to show that the TLD would be commercially successful.	Confid. Hearing Exh. 2, ICM Confidential Application (16 Mar. 2004), p. 4 Confid. Hearing Exh. 4, ICM Confidential Memorandum to the ICANN Board of Directors (Revised 7 Dec. 2004) Confid. Hearing Exh. 5, ICM Confidential Memorandum to the ICANN Board of Directors (2 Nov. 2004) Confid. Hearing Exh. 7, ICM Confidential Presentation, The Sponsored .xxx TLD: Promoting Online Responsibility (2 Apr. 2005), pp. 25-27 Confid. Hearing Exh. 11, ICM Responses to Evaluators Questions Including Letters of Support, pp. 12-43 Confid. Hearing Exh. 12, ICM Registry, The Sponsored .xxx sTLD: Promoting Online Responsibility (27 Nov. 2005) Hearing Exh. 125, Letter from Lawley to Kurt Pritz (9 Oct. 2004)	Burr, ¶¶ 9, 17, 24 Lawley, ¶¶ 27, 42	Lawley, Day 1, 257:11 – 258:3 (ICM conducted industry outreach and gathered letters of support before submitting its application); 263:18 – 264:19 (business evaluators determined application had enough support to be economically viable); 271:4-16 (letters of support submitted with application); 274:10 – 276:1 (additional support information provided before 1 June vote)
G.2	Before the 1 June 2005 vote and throughout the entire process, ICM was open with ICANN about the level of opposition	Confid. Hearing Exh. 7, ICM Confidential Presentation, The Sponsored .xxx TLD: Promoting Online Responsibility (2 Apr. 2005), p. 26 Confid. Hearing Exh. 12, ICM Registry, The Sponsored .xxx sTLD: Promoting	Burr, ¶¶ 18-19 Lawley, ¶ 43	Lawley, Day 1, 274:20 – 276:1 (ICM provided additional support information, including the poll, which also showed there was opposition in the industry)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	from the industry, including presenting a poll showing 22% against the application, and there is no quantifiable evidence that the level of opposition increased after the 1 June vote.	Online Responsibility (27 Nov. 2005), p. 12 Hearing Exh. DG, Letter from Lawley to Cerf (8 May 2006), p. 2		
G.3	After the May 2006 vote, when Dr. Twomey publicly raised the level of support issue for the first time, ICM produced additional evidence of support, showing that .XXX would likely have more registrations than previously approved TLDs.	Hearing Exh. 47, The Voluntary Adult Top-Level Domain (TLD), Pre-Registration Program Hearing Exh. 191, Letter from Lawley to Cerf and the ICANN Board regarding pre-reservation program (30 May 2006) Hearing Exh. 195, Letter from Lawley to Cerf and ICANN Board regarding pre-reservation program (8 Mar. 2007) Hearing Exh. 196, ICANN Dashboard—Registry Status Hearing Exh. 254, Letter from Lawley to ICANN Board regarding pre-reservation program (23 Mar. 2007) Hearing Exh. DI, ICM Memorandum to ICANN Board of Directors (13 Mar. 2007) Hearing Exh. DG, Letter from Lawley to Cerf (8 May 2006)	Burr, ¶ 70 Lawley, ¶¶ 43, 59	Burr, Day 4, 1053:8 – 1054:5 (Discussing Exh. DI, which outlines considerable industry support for .XXX) Lawley, Day 1, 270:17 – 272:2; 301:21 – 302:11 (ICM initiated a very successful pre-reservation program after the May 2006 vote)
G.4	Industry support was not required to be unanimous for any other applicant.	Hearing Exh. 45, sTLD RFP (15 Dec. 2003) Hearing Exh. 100, Archive of Public Comments on .XXX Hearing Exh. 101, Archive of Public Comments on .MAIL	Burr, ¶ 18 Mueller, p. 48	Burr, Day 2, 487:10-18 (there were numerous objections to the .TEL proposal from the telecommunications industry) Lawley, Day 2, 342:1-17 (there were objections to both .TEL and .MOBI

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		Hearing Exh. 102, Archive of Public Comments on .TRAVEL Hearing Exh. 103, Ed Hasbrouk, The Practical Nomad (8 Apr. 2005) Hearing Exh. 104, Archive of Public Comments on .MOBI Hearing Exh. 106, Posting regarding .TEL (30 Apr. 2004) Hearing Exh. 107, Posting regarding .TEL (29 Apr. 2004) Hearing Exh. 223, Posting regarding .MOBI (30 Apr. 2004)		before they were approved)
H.	**IFFOR, the sponsoring organization for .XXX, was more developed than the sponsoring organizations for other applications.**	**ICM Memorial, pp. 49-50, 98-99, 121-122, 127; 140-141**		
H.1	ICM provided detailed information about IFFOR's structure, including its supporting organizations, procedures for policy formulation, and dispute settlement procedures.	Confid. Hearing Exh. 2, ICM Confidential Application (16 Mar. 2004), pp. 3-18 Confid. Hearing Exh. 7, ICM Confidential Presentation, The Sponsored .xxx TLD: Promoting Online Responsibility (2 Apr. 2005), pp. 10-23 Confid. Hearing Exh. 8, Letter from Lawley to Cerf (14 Dec. 2006) [also referred to as Confid. Hearing Exh. DK] Confid. Hearing Exh. 9, Executed agreement with ICRA (1 Feb. 2007) Confid. Hearing Exh. 11, ICM Responses to Evaluators Questions Including Letters of Support, pp. 3, 44-46 Confid. Hearing Exh. 12, ICM Registry, The Sponsored .xxx sTLD: Promoting	Burr, ¶¶ 10-11, 65 Lawley, ¶¶ 33-34	Burr, Day 4, 1034:4 – 1036:3 (ICM provided extensive detail about IFFOR and its future Board members) Lawley, Day 2, 323:20 – 325:11 (IFFOR had a very detailed dispute resolution system in place, similar to ICANN's own system)

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		Online Responsibility (27 Nov. 2005) Confid. Hearing Exh. 13, Email from Burr (6 Dec. 2006) Hearing Exh. 46, IFFOR Charter Hearing Exh. 47, The Voluntary Adult Top-Level Domain (TLD), Pre-Registration Program Hearing Exh. 216, .XXX Application, public version posted 19 Mar. 2004 Hearing Exh. 226, Email from Lawley to Jeffrey and Pritz regarding IFFOR (31 May 2005) Hearing Exh. 235, Email from Burr to Jeffrey with attachment (14 Sept. 2005) Hearing Exh. 237, Email from Burr to Jeffrey and Twomey with attachment (17 April 2006) Hearing Exh. 251, Email from Burr to Jeffrey and Pritz with attachment (14 Dec. 2006)		
H.2	ICM provided specific information about potential IFFOR Board members, many of whom were known to ICANN or who were willing to speak with ICANN if requested.	Confid. Hearing Exh. 8, Letter from Lawley to Cerf (14 Dec. 2006) [also referred to as Confid. Hearing Exh. DK]		Burr, Day 4, 1034:4 – 1036:3; 1063:1-22 (ICM provided extensive detail about IFFOR and its future Board members) Lawley, Day 1, 271:4-16 (many initial letters of support from the industry indicated willingness to participate in IFFOR) Lawley, Day 2, 325:1-11 (ICANN's own adjunct ombudsman had volunteered to serve as ombudsman for .XXX)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
H.3	ICANN never requested that ICM change any aspect of IFFOR, only that it provide additional assurances that IFFOR would fulfill its commitments.	Demonstrative: ICM Registry Agreement Negotiations Confid. Hearing Exh. 8, Letter from Lawley to Cerf (14 Dec. 2006) [also referred to as Confid. Hearing Exh. DK] Confid. Hearing Exh. 9, Executed agreement with ICRA (1 Feb. 2007) Confid. Hearing Exh. 13, Email from Burr (6 Dec. 2006) Hearing Exh. 150, Email from Jeffrey to Burr discussing draft registry agreement (13 Jun. 2005) Hearing Exh. 153, Email from Burr to Jeffrey and Smith regarding negotiation of registry agreement (15 Jul. 2005) Hearing Exh. 154, Email from Burr to Jeffrey, et al. regarding negotiation of registry agreement (19 Jul. 2005) Hearing Exh. 155, Email from Burr to Jeffrey and Smith regarding changes to draft registry agreement (21 Jul. 2005) Hearing Exh. 156, Email from Smith to Burr regarding changes to draft registry agreement (1 Aug. 2005) Hearing Exh. 171, Draft, Sponsored TLD Registry Agreement, Appendix S (18 Apr. 2006) Hearing Exh. 179, Email from Smith to Burr (19 Mar. 2006) Hearing Exh. 183, Email from Burr to Jeffrey with draft registry agreement attached (31 Mar. 2006) Hearing Exh. 184, ICANN Board Resolution on ICM Registry sTLD		

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		Application, Regular Meeting of the Board: Minutes (31 Mar. 2006) Hearing Exh. 185, Board Meeting Real Time Captioning (31 Mar. 2006), pp. 1-2 Hearing Exh. 190, Amended Request for Reconsideration of Board Action (21 May 2006), pp. 7-10 Hearing Exh. 226, Email from Lawley to Jeffrey and Pritz regarding IFFOR (31 May 2005) Hearing Exh. 228, Email from Smith to Burr regarding draft registry agreement (1 Aug. 2005) Hearing Exh. 229, Draft of Sponsored TLD Registry Agreement between ICM and ICANN (posted 9 Aug. 2005) Hearing Exh. 233, Email from Burr to Jeffrey (27 Sept. 2005) Hearing Exh. 234, Email from Jeffrey to Burr (27 Sept. 2005) Hearing Exh. 241, Email from Burr to Jeffrey with attachment (26 Mar. 2006) Hearing Exh. 255, ICANN Board Meeting Minutes (16 Jan. 2007) Hearing Exh. 286, Final Draft, Sponsored TLD Registry Agreement, (Jan. 2007) with attached Final Draft Appendix S (Feb. 2007) Hearing Exh. AK, Draft of Registry Agreement (5 Jan. 2007)		
H.4	Other applicants provided far less information about the planned structure, policy making actions, or membership of their	Hearing Exh. 90, .ASIA Application (19 Mar. 2004) Hearing Exh. 91, .CAT Application (19 Mar. 2004) Hearing Exh. 92, .JOBS Application (19 Mar. 2004)	Lawley, ¶ 12	Burr, Day 4, 1064:1-11 (the .TEL and .MOBI applicants provided less information about the proposed sponsoring organization)

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	sponsoring organizations.	Hearing Exh. 91, .CAT Application (19 Mar. 2004) Hearing Exh. 92, .JOBS Application (19 Mar. 2004) Hearing Exh. 93, .MAIL Application (19 Mar. 2004) Hearing Exh. 95, .MOBI Application (19 Mar. 2004) Hearing Exh. 96, .POST Application (19 Mar. 2004) Hearing Exh. 97, .TEL (Telnic) Application (19 Mar. 2004) Hearing Exh. 98, .TEL (Pulver) Application (19 Mar. 2004)		information about the proposed sponsoring organization) Twomey, Day 4, 963:17 – 965:6 ("Q: Other sTLD communities were self-identified and they were approved? A: That's right, and other board members did not have the same concern")
H.5	It is appropriate for the sponsoring community, through the sponsoring organization, to create community policies consistent with the types of policies described in ICM's application.	*See* §§ C.1-C.2 above	*See* §§ C.1-C.2 above Burr, ¶ 6 Lawley, ¶ 13	*See* §§ C.1-C.2 above Burr, Day 2, 430:8 – 431:9 (Burr was willing to represent ICM because of the potential for self-regulation and user empowerment) Lawley, Day 1, 253:17 – 254:5 (only as an sTLD would .XXX provide benefits to the targeted community and the Internet community as a whole); 259:17 – 261:20 (the sTLD was intended to provide benefits of identification and self-regulation); 265:17 – 266:11 (engaging in credible self-regulation could help avoid top-down mandatory regulation)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
I.	**During registry agreement negotiations ICM was willing to accede to all reasonable ICANN requests.**	**ICM Memorial, pp. 108-110; 125-132; 138-145** **Demonstrative: Revisions to Draft Registry Agreement** **Demonstrative: ICM Registry Agreement Negotiations**		
I.1	Initial negotiations between ICM and ICANN's staff and outside counsel in June 2005 through August 2005 were straightforward and involved only commercial and technical contract terms, and a first draft of the registry agreement was posted on 9 August 2005.	*See* § E.1 above Hearing Exh. 226, Email from Lawley to Jeffrey and Pritz regarding IFFOR (31 May 2005)	Burr, ¶¶ 34-35, Appendix A: Registry Agreement Comparison Lawley, ¶ 54	Burr, Day 2, 434:12 – 435:18 (describing the negotiation of commercial and technical terms); 441:5-20 (ICM accepted all of the standard registry agreement provisions) Cerf, Day 3, 678:18 – 680:2 (admitting that there is no mention of outstanding criteria in Jeffrey's email to Burr); Lawley, Day 1, 289:1-16 (ICM expected speedy and straightforward negotiations); 292:3-20 (ICANN never brought up sponsorship); 293:21 – 294:3 Twomey, Day 4, 915:12-17 (affirming that John Jeffrey told Becky Burr that contract negotiations would be straightforward) Williams, Day 2, 373:2-10 (contract negotiations were limited and not open to "reanalysis for the sponsorship and other

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
				issues criteria.")
I.2	Between August 2005 and March 2006, in response to comments from certain governments and the ICANN Board, ICM agreed to provisions reaffirming the commitments made in the application and also created expanded protection of geographic names. This second draft of the registry agreement was never posted.	Hearing Exh. 178, Email from Burr to Jeffrey and Twomey regarding ICM's outreach to the Board (19 Mar. 2006) Hearing Exh. 179, Email from Smith to Burr regarding the draft registry agreement (19 Mar. 2006) Hearing Exh. 241, Email from Burr to Jeffrey with attachment (26 Mar. 2006)	Burr, ¶¶ 45, 51	Burr, Day 2, 447:16 – 452:19 (describing contract negotiations between August 2005 and March 2006)
I.3	Between March and April 2006, in response to government comments to the outdated first draft agreement, including the comments in the Wellington Communiqué, ICM agreed to a number of provisions reaffirming its commitments and obligations, and the third draft of the registry agreement was posted 18	Hearing Exh. 171, Draft of Appendix S to Registry Agreement (18 Apr. 2006) Hearing Exh. 183, Email from Burr to Jeffrey with draft registry agreement attached (31 Mar. 2006) Hearing Exh. 187, Announcement of Revised Registry Agreement (18 Apr. 2006) Hearing Exh. 193, Letter from Lawley to Cerf and the ICANN Board (18 Apr. 2006) Hearing Exh. 237, Email from Burr to Jeffrey and Paul Twomey with attachment (17 April 2006)	Burr, ¶¶ 51-53, 55	Burr, Day 2, 453:1 – 455:5 (ICM provided provisions addressing the Wellington Communiqué concerns and enabling ICANN to tell the GAC, "you advised us to do this. Here's where we did it in the contract.") Burr, Day 4, 1039:11 – 1042:12 (Burr compiled all policy commitments made by ICM so ICANN's outside counsel could add summaries to the contract); 1046:13 – 1049:16 (outlining contract changes negotiated by ICM and ICANN

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	April 2006.			to meet GAC concerns) Twomey, Day 4, 882:11 – 883:1 (ICM told Twomey they would "do whatever [the GAC] want[s] us to do")
I.4	Following the May 2006 rejection of the third draft registry agreement, ICM filed a Request for Reconsideration, which it withdrew in November 2006 at ICANN's suggestion. Between November 2006 and January 2007, ICM agreed to an additional list specifying ICM's commitments, *drafted by ICANN's own counsel based on materials previously submitted*, and the fourth draft of the registry agreement was posted on 5 January 2007.	Hearing Exh. 194, Memorandum from Lawley to Cerf and the ICANN Board (22 Dec. 2006) Hearing Exh. AK, Draft of Registry Agreement (5 Jan. 2007)	Burr, ¶¶ 65-69	Burr, Day 2, 462:5 – 465:2 (Burr compiled all policy commitments previously made so that ICANN's outside counsel could add summaries to the contract) Burr, Day 4, 1039:13 – 1042:2 (Burr compiled all policy commitments previously made so that ICANN's outside counsel could add summaries to the contract) Lawley, Day 1, 304:7 – 305:2
I.5	Between January and February 2007, ICM responded to various Board member comments by specifying the variety of contract safeguards it had agreed to in order to ensure	Hearing Exh. 194, Memorandum from Lawley to Cerf and the ICANN Board (22 Dec. 2006) Hearing Exh. 197, Announcement of Revised Registry Agreement (16 Feb. 2007) Hearing Exh. 286, Final Draft of Registry Agreement (Feb. 2007)	Burr, ¶¶ 71-72, Appendix A: Registry Agreement Comparison	Burr, Day 2 465:7 – 466:21 (Describing contract changes between January and February) Lawley, Day 1, 304:7-13 (ICANN "asked for a lot of belts and braces around the whole operation . . . and [ICM] kept

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	the policy commitments are fulfilled, and re-organized the list of policy commitments to avoid repetition. The fifth draft of the agreement is posted on 16 February 2007.			complying on the natural assumption that if [ICM] did what [ICANN] asked . . . [ICM] would approve the contract.")
I.6	No draft of the registry agreement ever addressed the level of community support.	Hearing Exh. 151, Email from Burr to Jeffrey discussing draft registry agreement (12 Jun. 2005) Hearing Exh. 152, Email from Burr to Jeffrey (13 Jun. 2005) Hearing Exh. 153, Email from Burr to Jeffrey and Smith regarding negotiation of registry agreement (15 Jul. 2005) Hearing Exh. 154, Email from Burr to Jeffrey, *et al.* regarding negotiation of registry agreement (19 Jul. 2005) Hearing Exh. 155, Email from Burr to Jeffrey and Smith regarding changes to draft registry agreement (21 Jul. 2005) Hearing Exh. 156, Email from Smith to Burr regarding changes to draft registry agreement (1 Aug. 2005) Hearing Exh. 171, Draft, Sponsored TLD Registry Agreement, Appendix S (18 Apr. 2006) Hearing Exh. 178, Email from Burr to Jeffrey and Twomey regarding ICM's outreach to the Board (19 Mar. 2006) Hearing Exh. 179, Email from Smith to Burr regarding the draft registry agreement (19 Mar. 2006)		Lawley, Day 1, 292:14 – 293:9 (the contract has no terms addressing community support)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		Hearing Exh. 183, Email from Burr to Jeffrey with draft registry agreement attached (31 Mar. 2006) Hearing Exh. 193, Letter from Lawley to Cerf and the ICANN Board (18 Apr. 2006) Hearing Exh. 194, Memorandum from Lawley to Cerf and the ICANN Board (22 Dec. 2006) Hearing Exh. 171, Draft of Appendix S, 18 Apr. 2006 Hearing Exh. 228, Email from Smith to Burr regarding draft registry agreement (1 Aug. 2005) Hearing Exh. 229, Draft of Sponsored TLD Registry Agreement between ICM and ICANN (posted 9 Aug. 2005) Hearing Exh. 241, Email from Burr to Jeffrey with attachment (26 Mar. 2006) Hearing Exh. 252, Email from Smith to Burr with attachment (21 Dec. 2006) Hearing Exh. 256, Revised Appendix S, posted 16 Feb. 2007 Hearing Exh. 286, Draft of Registry Agreement (Feb. 2007) Hearing Exh. AK, Draft of Registry Agreement (5 Jan. 2007)		
I.7	ICANN never asked or suggested that ICM change the definition of its sponsored community during the entire negotiation process.	*See* §§ D.1 – D.7, E.2 & F. 1 above Hearing Exh. 179, Email from Smith to Burr regarding the draft registry agreement (19 Mar. 2006) Hearing Exh. 184, ICANN Board Resolution on ICM Registry sTLD Application (31 Mar. 2006)	Burr, ¶ 52	Burr, Day 2, 483:19 – 484:16 ("Not only was ICM never asked to change that, at one point, John [Jeffrey] reported that some board members were concerned that ICM might try to get out from under its obligations by changing the definition of the sponsored community. So they

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		Hearing Exh. 185, Board Meeting Real Time Captioning (31 Mar. 2006), pp. 1-2 Hearing Exh. 190, Amended Request for Reconsideration of Board Action (21 May 2006), pp. 7-10 Hearing Exh. 193, Letter from Lawley to Cerf and the ICANN Board (18 Apr. 2006) Hearing Exh. 194, Memorandum from Lawley to Cerf and the ICANN Board (22 Dec. 2006) Hearing Exh. 252, Email from Smith to Burr with attachment (21 Dec. 2006) Hearing Exh. 256, Revised Appendix S, posted 16 Feb. 2007 Hearing Exh. 286, Draft of Registry Agreement (Feb. 2007) Hearing Exh. AK, Draft of Registry Agreement (5 Jan. 2007)		affirmatively did not want it to be changed."); 454:18-19 ("we were not changing the substance."); 463:1-2 ("again, substantively there was no difference except that we rearranged things.") Lawley, Day 1, 291:15 – 292:13 ("[a]t no time did they ever raise any issues about the sponsorship definition of the community . . . we were never asked to change the definition of the sponsored community."); 305:3-8
I.8	ICM was willing to do anything ICANN staff asked during negotiations and promptly responded to all requests from ICANN staff.	Confid. Hearing Exh. 8, Letter from Lawley to Vinton D. Cerf (14 Dec. 2006) [also referred to as Confid. Hearing Exh. DK] Confid. Hearing Exh. 9, Executed agreement with ICRA (1 Feb. 2007) Confid. Hearing Exh. 10, Email from Burr with attached letter (11 Feb. 2007) Confid. Hearing Exh. 13, Email from Burr (6 Dec. 2006) Hearing Exh. 151, Email from Burr to Jeffrey discussing draft registry agreement (12 Jun. 2005) Hearing Exh. 152, Email from Burr to Jeffrey (13 Jun. 2005) Hearing Exh. 153, Email from Burr to Jeffrey and Smith regarding negotiation of	Burr, ¶¶ 65-68	Burr, Day 2, 466:18-21 (ICM gave ICANN "absolutely everything" it requested); *see also* 440:5-15 (ICM revised contract based on John Jeffrey's July 2005 comments); 447:18 – 449:4 (ICM revised contract to address Board's September 2005 concerns); 449:19 – 450:10 (ICM added clause requested by the GAC); 453:12 – 455:5 (responding to concerns in the Wellington Communiqué) Burr, Day 4, 1039:13 – 1040:15 Twomey, Day 4, 882:11 – 883:1 (ICM told Twomey they would "do whatever

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		registry agreement (15 Jul. 2005) Hearing Exh. 154, Email from Burr to Jeffrey, et al. regarding negotiation of registry agreement (19 Jul. 2005) Hearing Exh. 155, Email from Burr to Jeffrey and Smith regarding changes to draft registry agreement (21 Jul. 2005) Hearing Exh. 156, Email from Smith to Burr regarding changes to draft registry agreement (1 Aug. 2005) Hearing Exh. 171, Draft, Sponsored TLD Registry Agreement, Appendix S (18 Apr. 2006) Hearing Exh. 176, Email from Lawley to Cerf regarding the status of ICM's registry agreement (14 Oct. 2005) Hearing Exh. 178, Email from Burr to Jeffrey and Twomey regarding ICM's outreach to the Board (19 Mar. 2006) Hearing Exh. 179, Email from Smith to Burr regarding the draft registry agreement (19 Mar. 2006) Hearing Exh. 183, Email from Burr to Jeffrey with draft registry agreement attached (31 Mar. 2006) Hearing Exh. 190, Amended Request for Reconsideration of Board Action (21 May 2006), pp. 7-10 Hearing Exh. 193, Letter from Lawley to Cerf and the ICANN Board (18 Apr. 2006) Hearing Exh. 194, Memorandum from Lawley to Cerf and the ICANN Board (22 Dec. 2006)		[the GAC] want[s] us to do") Lawley, Day 1, 304:7 – 305:2 (ICM kept complying with ICANN's requests "on the natural assumption that if [ICM] did what [ICANN] asked . . . [ICM] would approve the contract.")

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		Hearing Exh. 197, Announcement of Revised Registry Agreement (16 Feb. 2007) Hearing Exh. 228, Email from Smith to Burr regarding draft registry agreement (1 Aug. 2005) Hearing Exh. 229, Draft of Sponsored TLD Registry Agreement between ICM and ICANN (posted 9 Aug. 2005) Hearing Exh. 233, Email from Burr to Jeffrey (27 Sept. 2005) Hearing Exh. 234, Email from Jeffrey to Burr (27 Sept. 2005) Hearing Exh. 237, Email from Burr to Jeffrey and Twomey with attachment (17 April 2006) Hearing Exh. 241, Email from Burr to Jeffrey with attachment (26 Mar. 2006) Hearing Exh. 251, Email from Burr to Jeffrey and Pritz with attachment (14 Dec. 2006) Hearing Exh. 253, Email from Burr to Jeffrey, Pritz, and Dan Halloran with attachments (10 Feb. 2007) Hearing Exh. 254, Letter from Lawley to ICANN Board regarding pre-reservation program (23 Mar. 2007) Hearing Exh. AK, Draft of Registry Agreement (5 Jan. 2007) Hearing Exh. DG, Letter from Lawley to Cerf (8 May 2006)		
I.9	Throughout the negotiation process, ICM provided detailed information to the ICANN Board and the	Hearing Exh. 178, Email from Burr to Jeffrey and Twomey regarding ICM's outreach to the Board (19 Mar. 2006) Hearing Exh. 183, Email from Burr to Jeffrey with draft registry agreement		Lawley, Day 1, 298:19 – 299:17 (ICM made a presentation to the GAC in Vancouver because they knew ICANN

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	GAC about how those provisions were responsive to government concerns, and met with the GAC to address any additional concerns.	attached (31 Mar. 2006) Hearing Exh. 193, Letter from Lawley to Cerf and the ICANN Board (18 Apr. 2006) Hearing Exh. 194, Memorandum from Lawley to Cerf and the ICANN Board (22 Dec. 2006) Hearing Exh. 171, Draft of Appendix S, 18 Apr. 2006 Hearing Exh. 237, Email from Burr to Jeffrey and Twomey with attachment (17 April 2006) Hearing Exh. 251, Email from Burr to Jeffrey and Pritz with attachment (14 Dec. 2006) Hearing Exh. 253, Email from Burr to Jeffrey, Pritz, and Dan Halloran with attachments (10 Feb. 2007) Hearing Exh. 289, ICM Memo about GAC Requests (5 Jan. 2007)		would need to keep the GAC happy) Burr, Day 2, 464:11 – 465:2 (ICM made clear through the contract it was addressing every one of the GAC's concerns); 465:18 – 466:6
I.10	ICANN's *current* assertion that the registry agreement drafts were the result of ICM's unilateral decisions regarding the contract is not supported by the evidence.	Hearing Exh. 153, Email from Burr to Jeffrey and Smith regarding negotiation of registry agreement (15 Jul. 2005) Hearing Exh. 154, Email from Burr to Jeffrey, *et al.* regarding negotiation of registry agreement (19 Jul. 2005) Hearing Exh. 155, Email from Burr to Jeffrey and Smith regarding changes to draft registry agreement (21 Jul. 2005) Hearing Exh. 156, Email from Smith to Burr regarding changes to draft registry agreement (1 Aug. 2005) Hearing Exh. 179, Email from Smith to Burr regarding the draft registry	Burr, ¶¶ 65-68	See § I.5. above Burr, Day 2, 463:18 – 465:2 Burr, Day 4, 1040:10 – 1041:5 (ICANN's outside counsel compiled the list of commitments for the Jan. 2007 draft); 1042:2-10 (Burr strongly disagrees that ICM drafted the wording of the contract appendices) Lawley, Day 1, 304:7 – 305:2 (ICM responded to what ICANN wanted in the

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		agreement (19 Mar. 2006) Hearing Exh. 183, Email from Burr to Jeffrey with draft registry agreement attached (31 Mar. 2006) Hearing Exh. 193, Letter from Lawley to Cerf and the ICANN Board (18 Apr. 2006) Hearing Exh. 194, Memorandum from Lawley to Cerf and the ICANN Board (22 Dec. 2006) Hearing Exh. 228, Email from Smith to Burr regarding draft registry agreement (1 Aug. 2005) Hearing Exh. 229, Draft of Sponsored TLD Registry Agreement between ICM and ICANN (posted 9 Aug. 2005) Jeffrey to Burr (27 Sept. 2005) Hearing Exh. 241, Email from Burr to Jeffrey with attachment (26 Mar. 2006)		appendices) Lawley, Day 1, 304:7 – 305:2 (ICM responded to what ICANN wanted in the registry agreement)
J.	**Government discomfort with the subject of adult content was not sufficient reason to reject ICM's agreement.**	**ICM Memorial, pp. 221-223** **Hearing Exh. 41, GAC Operating Principles (Apr. 2005)**		
J.1	The GAC, and individual governments, had many opportunities to comment on ICM's application before 1 June 2005.	Demonstrative: Timeline of Events – ICM Registry v. ICANN, Phases I-II Confid. Hearing Exh. 10, Email from Burr with attached letter (11 Feb. 2007), p. 13 Hearing Exh. 56, Letter from Lawley to Peter Zangl (8 Nov. 2005) Hearing Exh. 88, ICANN Meetings in Mar Del Plata, ICANN Public Forum	Burr, ¶ 36 Lawley, ¶ 54 Mueller, pp. 26-27, 30-32,	Cerf, Day 3, 624:10-18 (" all of the proceedings had been very open, that all of the negotiations and discussions and everything else were – all the intermediate drafts of the contract and the like had been made publicly available and

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		Meeting (7 Apr. 2005), pp. 23-24 Hearing Exh. 134, ICANN, Minutes, Special Meeting of the Board (3 May 2005) Hearing Exh. 139, GAC Luxembourg Minutes (11 Jul. 2005), p. 7 Hearing Exh. 157, Letter from Twomey to Tarmizi (1 Dec. 2004) Hearing Exh. 159, GAC Communiqué, Luxembourg (12 Jul. 2005) Hearing Exh. 169, Letter from Kai Sheng-Kao, GAC Representative of Taiwan, to ICANN Board of Directors (30 Sept. 2005) Hearing Exh. 170, Letter from Lawley to ICANN Board (15 Sept. 2005) Hearing Exh. 175, Letter from Twomey to Tarmizi, (11 Feb. 2006), p. 3 Hearing Exh. 270, ICANN, Special Meeting of the Board, Minutes (18 Oct. 2004) Hearing Exh. AJ, Letter from Cerf to Peter Zangl (17 Jan. 2006) Hearing Exh. DF, Letter from Lawley to Cerf (15 Sept. 2005)		
J.2	In April 2005, the GAC Chairman stated that no GAC members had expressed concern regarding ICM's application.	Hearing Exh. 56, Letter from Lawley to Peter Zangl (8 Nov. 2005) Hearing Exh. 158, Letter from Tarmizi to Twomey (3 Apr. 2005) Hearing Exh. 175, Letter from Twomey to Tarmizi, (11 Feb. 2006) Hearing Exh. AJ, Letter from Cerf to Peter Zangl (17 January 2006)	Burr, ¶ 36 Lawley, ¶ 54 Mueller, pp. 26-27	Lawley, Day 1, 280:2-16 (there was an April 2005 letter from the GAC saying no concerns with any of the applications)
J.3	The U.S. government was initially supportive of	Hearing Exh. 139, GAC Luxembourg Minutes (11 Jul. 2005)	Burr, ¶¶ 37, 41	Mueller, Day 1, 173:17 – 174:5 ("the United States government was actually

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	ICM's application.	Hearing Exh. 159, GAC Communiqué # 22—Luxembourg (12 Jul. 2005) Hearing Exh. 160, Email from Meredith Attwell, Senior Advisor at the NTIA, to Jeffrey Joyner, NTIA, et al. (14 Jun. 2005) Hearing Exh. 165, Internet Governance Project, "Review of Documents Released under the Freedom of Information Act in the .XXX Case" (19 May 2006) Hearing Exh. 190, Amended Request for Reconsideration of Board Action (21 May 2006), pp. 18-21 Hearing Exh. 230, Email from Suzanne Sene to Fiona Alexander, et al. (13 July 2005)	Mueller, pp. 38-44	trying to scare the GAC away from blocking the .xxx application.") Lawley, Day 1, 297:8 – 298:1 (the U.S. was initially supportive)
J.4	The U.S. government was eventually subjected to internal domestic political pressure opposing ICM's application based on the content within the proposed domain.	Hearing Exh. 160, Email from Meredith Attwell, Senior Advisor at the NTIA, to Jeffrey Joyner, NTIA, et al. (14 Jun. 2005) Hearing Exh. 164, Email from Fred Schwien to Michael Gallagher, et al. (16 Jun. 2005) Hearing Exh. 165, Internet Governance Project, "Review of Documents Released under the Freedom of Information Act in the .XXX Case" (19 May 2006) Hearing Exh. 170, Letter from Lawley to ICANN Board (15 Sept. 2005) Hearing Exh. 190, Amended Request for Reconsideration of Board Action (21 May 2006), pp. 18-21 Hearing Exh. 239, Louisa Hearn, Wellington to Host .XXX Debate, The Age (10 Mar. 2006) Hearing Exh. 262, Free Speech Coalition Press Release (17 Jul. 2005) Hearing Exh. 263, Heilbrunn, Jacob, "The Gospel of Dobson," New York Times	Burr, ¶ 41 Mueller, pp. 38-44 Twomey, ¶ 38	Twomey, Day 4, 853:18 – 857:3; 868:3-16 (Gallagher told Twomey that "all hell's broken out here," referencing U.S. political turmoil regarding .XXX) Mueller, Day 1, 181:5 – 183:22 ("the June 1 vote [ ] triggered a bunch of lobbying campaigns by conservative religious groups in the United States.")

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		(27 May 2007) Hearing Exh. 264, Crowley, Michael, "James Dobson, The religious right's new kingmaker," Slate (12 Nov. 2004) Hearing Exh. 280, Email from C. Gunderson to Clyde Ensslin (20 Jun. 2005) Hearing Exh. 281, Email from Clyde Ensslin to J. Larue (20 Jun. 2005) Hearing Exh. 284, "Web Neutrality vs. Morality," by Amol Sharma, CQ Weekly, (11 Nov. 2005) Hearing Exh. 287, Email from Meredith Attwell to Kelli Emerick (15 Jun. 2005) Hearing Exh. 288, Email from Fred Schwien to John Kneuer and Michael Gallagher (2 Jun. 2005) Hearing Exh. DG, Letter from Lawley to Cerf (8 May 2006)		
J.5	The letter from Mr. Gallagher to ICANN in August 2005 represented a drastic change in the U.S. government's position.	*See* § J.3 above Hearing Exh. 162, Gallagher Letter (11 Aug. 2005) Hearing Exh. 165, Internet Governance Project, "Review of Documents Released under the Freedom of Information Act in the .XXX Case" (19 May 2006) Hearing Exh. 190, Amended Request for Reconsideration of Board Action (21 May 2006), pp. 18-21 Hearing Exh. 170, Letter from Lawley to ICANN Board (15 Sept. 2005) Hearing Exh. DF, Letter from Lawley to Cerf (15 Sept. 2005)	*See* § J.3 above Burr, ¶¶ 38, 41 Mueller, pp. 38-44	*See* § J.3 above Mueller, Day 1, 173:17 – 174:5 ("the United States government was actually trying to scare the GAC away from blocking the .xxx application.") Lawley, Day 1, 294:14 – 295:13 (ICM was shocked by the Gallagher letter because it was a complete volte-face) 297:8 – 298:1 (U.S. initially supported ICM's application but changed position in response to complaints from conservative Christian groups)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
J.6	The letter from Mr. Tarmizi to ICANN in August 2005 requesting a delay was not from the GAC, but rather a suggestion from the Chairman in his individual capacity that ICANN delay consideration of ICM's application to allow additional time for individual governments to express concerns.	Hearing Exh. 163, Letter from Tarmizi to Cerf (12 Aug. 2005) Hearing Exh. 282, Email from Tarmizi to GAC (15 Aug. 2005)	Mueller, p. 43	Cerf, Day 3, 620:12-20, 697:19 – 699:13 (August 2005 letter from Tarmizi was not a statement of the GAC as a whole) Mueller, Day 1, 188:2-19 (Tarmizi said the August 2005 letter was not a GAC position) Twomey, Day 4, 859:1-8 (the August 2005 letter from Tarmizi was a personal statement)
J.7	The GAC Chairman was asked by ICANN to write the August 2005 letter to deflect criticisms that ICANN was being overly deferential to the U.S. government.	Hearing Exh. 163, Letter from Tarmizi to Cerf (12 Aug. 2005) Hearing Exh. 165, Internet Governance Project, "Review of Documents Released under the Freedom of Information Act in the .XXX Case" (19 May 2006) Hearing Exh. 282, Email from Tarmizi to GAC (15 Aug. 2005)	Burr, ¶ 38	Burr, Day 2, 444:9 – 445:5 (Twomey asked Tarmizi to provide a letter since the U.S. government was writing a letter) Mueller, Day 1, 186:13 – 188:12 (Mueller asked Tarmizi about the letter at Marrakesh; ICANN needed cover to make it less obvious how deferential they were being to the U.S., ICANN posted the Tarmizi letter prominently but buried the U.S. letter) Twomey, Day 4, 916:19 – 919:4 (Twomey and Tarmizi decided that Tarmizi should send a letter)
J.8	Neither the GAC nor any individual government ever	Hearing Exh. 162, Gallagher Letter (11 Aug. 2005)	Burr, ¶ 47	Burr, Day 2, 453:4-21 (the Wellington Communiqué was about whether ICM's

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	stated that ICM's application did not meet the RFP criteria.	Hearing Exh. 167, Letter from Marcelo de Carvalho Lopes, Brazilian Secretary of Information and Technology, to Tarmizi (6 Sept. 2005) Hearing Exh. 168, Letter from Jonas Bjelfvenstam, Swedish State Secretary for Communications and Regional Policy, to Twomey (23 Nov. 2005) Hearing Exh. 169, Letter from Kai Sheng-Kao, GAC Representative of Taiwan, to ICANN Board of Directors (30 Sept. 2005) Hearing Exh. 170, Letter from Lawley to ICANN Board (15 Sept. 2005) Hearing Exh. 172, Letter from Peter Zangl, EC Deputy Director, to Cerf (16 Sept. 2005) Hearing Exh. 173, Email from Sidse Aegedius (25 Sept. 2005) Hearing Exh. 174, Memorandum from Stuart Duncan to Twomey (3 Dec. 2005) Hearing Exh. 180, Letter from Kneuer to Tarmizi (20 Mar. 2006) Hearing Exh. 181, GAC 2006 Communiqué # 24—Wellington, New Zealand (28 Mar. 2006) Hearing Exh. 182, Letter from Martin Boyle to Cerf (4 May 2006) Hearing Exh. 190, Amended Request for Reconsideration of Board Action (21 May 2006), pp. 10-17, 19 Hearing Exh. 191, Letter from Lawley to Cerf and the ICANN Board regarding pre-reservation program (30 May 2006) Hearing Exh. 198, Letter from Tarmizi and Janis Karklins (2 Feb. 2007) Hearing Exh. DF, Letter from Lawley to Cerf (15 Sept. 2005)	Mueller, pp. 44, 52	obligations appeared in the registry agreement, not the RFP criteria) Mueller, Day 1, 176:15 – 177:4 (governments were talking about whether or not .XXX was good, not criteria) Twomey, Day 4, 878:13 – 879:19 (Wellington Communiqué was about process and public policy concerns)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
J.9	Neither the Wellington nor the Lisbon Communiqué asserted that ICM's application did not meet the RFP criteria, but focused on concerns regarding the enforceability of ICM's commitments.	Hearing Exh. 181, GAC 2006 Communiqué, Wellington, New Zealand (28 Mar. 2006) Hearing Exh. 198, Letter from Tarmizi and Janis Karklins (2 Feb. 2007) Hearing Exh. 200, GAC Communiqué, Lisbon (28 Mar. 2007) Hearing Exh. AL, Letter from Cerf to Tarmizi (17 Mar. 2007)	Burr, ¶ 51	Burr, Day 2, 453:12 – 454:4; Day 4, 1038:6-16. Twomey, Day 4, 878:13 – 879:19 (the Wellington Communiqué was about process and public policy concerns)
J.10	There was no unified GAC position opposing ICM's application.	Confid. Hearing Exh. 10, Email from Burr with attached letter (11 Feb. 2007) Hearing Exh. 41, GAC Operating Principles (Apr. 2005), Principles 30, 46 Hearing Exh. 139, GAC Luxembourg Minutes (11 Jul. 2005), p.5 Hearing Exh. 159, GAC Communiqué # 22—Luxembourg (12 Jul. 2005) Hearing Exh. 161, Government of Canada Comments on the Proposed ICM Registry Agreement (2 Feb. 2007) Hearing Exh. 163, Letter from Tarmizi to Cerf (12 Aug. 2005) Hearing Exh. 167, Letter from Marcelo de Carvalho Lopes, Brazilian Secretary of Information and Technology, to Tarmizi (6 Sept. 2005) Hearing Exh. 168, Letter from Jonas Bjelfvenstam, Swedish State Secretary for Communications and Regional Policy, to Twomey (23 Nov. 2005) Hearing Exh. 169, Letter from Kai Sheng-Kao, GAC Representative of Taiwan, to ICANN Board of Directors (30 Sept. 2005) Hearing Exh. 170, Letter from Lawley to ICANN Board (15 Sept. 2005)	Mueller, pp. 42, 44, 49	Mueller, Day 1, 154:3-13 (the GAC tries to achieve consensus, and if it can't, the Chair expresses the division of opinions); 176:10-17 (only 4 or 5 governments complained about .XXX during the Luxembourg GAC meeting); 185:7-13 (improper to delay vote for one government); 188:2-19 (Tarmizi says his August 2005 letter was not GAC position)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		Hearing Exh. 172, Letter from Peter Zangl, EC Deputy Director, to Cerf (16 Sept. 2005) Hearing Exh. 173, Email from Sidse Aegedius (25 Sept. 2005) Hearing Exh. 174, Memorandum from Stuart Duncan to Twomey (3 Dec. 2005) Hearing Exh. 182, Letter from Martin Boyle to Cerf (4 May 2006) Hearing Exh. 190, Amended Request for Reconsideration of Board Action (21 May 2006), pp. 10-17 Hearing Exh. 198, Letter from Tarmizi and Janis Karklins (2 Feb. 2007) Hearing Exh. 282, Email from Tarmizi to GAC (15 Aug. 2005)		
J.11	ICANN mischaracterized the comments of certain governments. Many governments were simply concerned with the process ICANN followed, rather than the substance of ICM's application, and others were concerned about enforcing the contractual provisions that ICANN had requested ICM add to the registry agreement.	*See* § J.10 above. Confid. Hearing Exh. 10, Email from Burr with attached letter (11 Feb. 2007) Hearing Exh. 161, Government of Canada Comments on the Proposed ICM Registry Agreement (2 Feb. 2007) Hearing Exh. 191, Letter from Lawley to Cerf and the ICANN Board regarding pre-reservation program (30 May 2006), p. 1 Hearing Exh. DF, Letter from Lawley to Cerf (15 Sept. 2005)		Burr, Day 2, 456:8 – 458:6 (during the May 2006 Board meeting, Twomey mischaracterized the letter from the U.K. GAC representative, which asked ICANN to ensure that ICM's obligations were enforceable, as stating that ICANN would have to enforce community policies against registrants) Lawley, Day 2, 353:5-15 (Lawley wrote after the May 2006 vote that the letter from the U.K.'s GAC representative had been mischaracterized)
J.12	ICM met with the GAC in December 2005 to discuss	Confid. Hearing Exh. 10, Email from Burr with attached letter (11 Feb. 2007)	Burr, ¶ 47	Lawley, Day 1, 298:19 – 299:17 (ICM made presentation to GAC about the

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	its application and to make ICANN's decision less politically awkward.	Confid. Hearing Exh. 12, Presentation to GAC (27 Nov. 2005)		benefits of the TLD because they knew ICANN would need to keep the GAC happy)
J.13	ICANN is not required to obey the GAC, but only to explain why it does not follow GAC advice.	Confid. Hearing Exh. 10, Email from Burr with attached letter (11 Feb. 2007) Hearing Exh. 5, ICANN Bylaws (29 May 2008) Hearing Exh. 41, GAC Operating Principles (Apr. 2005), Principle 2	Mueller, pp. 16-17, 45, 49 Cerf, ¶ 30 Twomey, ¶ 37	Cerf, Day 3, 618:16 – 619:7 (ICANN not bound by GAC recommendations) Twomey, Day 4, 862:4 – 863:3 (ICANN not required to follow GAC's advice)
J.14	Neither the GAC nor the ICANN Board has explained how the contractual provisions agreed to by ICM and ICANN's staff and outside negotiators after the Wellington Communiqué were insufficient to address government concerns, or requested additional terms to satisfy those concerns.	Hearing Exh. 198, Letter from Tarmizi and Janis Karklins (2 Feb. 2007) Hearing Exh. 289, ICM Memo about GAC Requests (5 Jan. 2007) Hearing Exh. DG, Letter from Lawley to Cerf (8 May 2006) *See also* Confid. Hearing Exh. 10, Email from Burr with attached letter (11 Feb. 2007) (explaining contract provisions in response to GAC comments)		Burr, Day 2, 453:12 – 455:5 (ICM addressed Wellington Communiqué concerns and enabling ICANN to tell the GAC, "you advised us to do this. Here's where we did it in the contract."); 466:18-21 (ICM gave ICANN "absolutely everything" it requested) Burr, Day 4, 1042:4-12; 1046:14 – 1049:18 (outlining contract changes made by ICM to meet GAC concerns).
J.15	Government complaints about content inside a domain are beyond the scope of ICANN's mission.	Hearing Exh. 4, Articles of Incorporation, Article 3 Hearing Exh. 5, ICANN Bylaws (29 May 2008) Hearing Exh. 30, Green Paper (30 Jan. 1998) Hearing Exh. 31, White Paper (30 Jan. 1998) Hearing Exh. 41, GAC Operating Principles (Apr. 2005)	Mueller, pp. 19-21, 39, 48-52	Cerf, Day 3, 616:11-14 (the Board "should not base its decisions with regard to sponsored top-level domains or any top-level domains on the basis of content.") Mueller, Day 1, 221:14-21 Twomey, Day 4, 885:15 – 886:13

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		Hearing Exh. 42, GAC Report to WGIG (Feb. 2005), p. 11-14 Hearing Exh. 158, Letter from Tarmizi to Twomey (3 Apr. 2005) Hearing Exh. 161, Government of Canada Comments on the Proposed ICM Registry Agreement (2 Feb. 2007) Hearing Exh. 170, Letter from Lawley to ICANN Board (15 Sept. 2005) Hearing Exh. 279, ICANN Meetings in Sydney, Australia, GAC/ICANN Board Joint Session Transcript (23 Jun. 2009), p.20		Mueller, Day 1, 221:14-21 Twomey, Day 4, 885:15 – 886:13 (ICANN's mission is very clear, "We're not in the business of content.")
J.16	Government complaints about content apply equally to all TLDs, not just .XXX.	Hearing Exh. 279, ICANN Meetings in Sydney, Australia, GAC/ICANN Board Joint Session Transcript (23 Jun. 2009), p.20	Mueller, pp. 50-51	
J.17	Governments can address their concerns about Internet content within their own jurisdictions using technology that is already available.		Burr, ¶ 8, fn. 14 Mueller, p. 26, fn. 45 and accompanying text	Mueller, Day 1, 131:11 – 135:1 (describing the technological capability of governments to block)
K.	**ICANN was concerned that the U.S. government would undermine ICANN's authority by refusing to add .XXX to the root.**	**ICM Memorial, pp. 114-116**		
K.1	The record shows that the	Hearing Exh. 165, Internet Governance Project, "Review of Documents Released	Burr, ¶¶ 40,	Burr, Day 2, 445:17-20 (Dept. of

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	U.S. government was considering the possibility of refusing to add .XXX to the root.			
K.2	ICANN admits to knowing the U.S. government was considering the possibility of not adding .XXX to the root.		Burr, ¶ 40 Williams, ¶ 27	Burr, Day 2, 445:17-20 (Dept. of Commerce had threatened not to put .XXX on the Root) Lawley, Day 1, 298:11-18 (ICANN told Becky Burr about the U.S. threat) Twomey, Day 4, 868:3 – 871:17 (Twomey was aware that the Deputy Secretary of the Dept. of Commerce had threatened not to add .XXX to the root)
K.3	ICANN relayed this knowledge to ICM as a cause for concern.		Burr, ¶ 40	Burr, Day 2, 444:10-14 (Twomey was "extremely concerned" about unilateral intervention by USG and how it would be perceived); 445:17-20 Lawley, Day 1, 298:11-18 (ICANN told Becky Burr about U.S. threat) Twomey, Day 4 859:13 – 860:8 (Twomey explained that he discussed the government intervention with Burr because "she and I have known each other for a long time and she [is] obviously familiar with the context, so I thought it best to share with her.")

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
K.4	Because of the unique relationship between the U.S. government and ICANN, if the U.S. government had refused to put an ICANN-approved TLD on the root, it would have undermined ICANN's legitimacy and authority and demonstrated ICANN's lack of independence from U.S. control to the rest of the world.	Demonstrative: Control of the Root Hearing Exh. 32, MOU (25 Nov. 1998) Hearing Exh. 33, JPA (29 Sept. 2006) Hearing Exh. 34. IANA Contract (14 Aug. 2006) Hearing Exh. 165, Internet Governance Project, "Review of Documents Released under the Freedom of Information Act in the .XXX Case" (19 May 2006) Hearing Exh. 166, Hearing Exh. 166, Memorandum attached to email from Meredith Attwell, Senior Advisor at the NTIA, to Robin Layton, NTIA (8 Aug. 2005) Hearing Exh. 284, "Web Neutrality vs. Morality," by Amol Sharma, CQ Weekly, (11 Nov. 2005) Hearing Exh. DF, Letter from Lawley to Cerf (15 Sept. 2005)	Burr, ¶ 40 Williams, ¶¶ 25-28 Mueller, pp. 15, 44	Burr, Day 2, 445:6-16 (Awkward situation – the US Government was saying "don't go forward" and the international community was saying "don't be controlled by the U.S. Government.") Cerf, Day 3, 686:5 – 688:16 ("it's better for ICANN to be perceived as a nonaligned international organization . . . if it appeared to be controlled by one government, that would be difficult for ICANN's credibility."); 702:14 – 713:20; 714:2 – 720:16 Lawley, Day 1, 296:12 – 297:7 Twomey, Day 4, 845:17 – 845:2; 855:15-855:22; 868:3 – 871:17 ("At the time, we were dealing with a lot of issues, the World Summit on the Information Society. That was my great concern, was to keep reinforcing the ICANN processes and the ICANN institution that it works on.")
L.	**ICANN failed to negotiate with ICM in good faith as required by its Articles of Incorporation and Bylaws.**	**ICM Memorial, pp. 108-110; 125-132; 138-145, 224-230** **Hearing Exh. 4, Articles of Incorporation (21 Nov. 1998)** **Hearing Exh. 5, ICANN Bylaws (29 May 2008)**		

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
L.1	If sponsorship criteria were still an issue of concern during registry agreement negotiations, ICANN failed to discuss it with ICM.	*See* §§ D.1-D.7, E.1 – E.7, F.1 & I.5 above Hearing Exh. 120, ICANN Board Resolution approving .XXX to Enter into Contractual Negotiations (1 Jun. 2005) Hearing Exh. 178, Email from Burr to Jeffrey and Twomey regarding ICM's outreach to the Board (19 Mar. 2006) Hearing Exh. 183, Email from Burr to Jeffrey with draft registry agreement attached (31 Mar. 2006) Hearing Exh. 184, ICANN Board Resolution on ICM Registry sTLD Application, Regular Meeting of the Board: Minutes (31 Mar. 2006) Hearing Exh. 185, Board Meeting Real Time Captioning (31 Mar. 2006), pp. 1-2 Hearing Exh. 190, Amended Request for Reconsideration of Board Action (21 May 2006), p. 4	*See* §§ D.1-D.7, E.1 – E.7, F.1 & I.5 above Burr, ¶ 53	*See* §§ D.1-D.7, E.1 – E.7, F.1 & I.5 above Burr, Day 2, 440:5-15 (ICM revised contract based on Jeffrey's July 2005 comments); 448:2-20 (ICM revised contract to address Board's September 2005 concerns); 449:13 – 450:10 (ICM added clause requested by the GAC); 453:12 – 455:5 (ICM responded to concerns in the Wellington Communiqué) Lawley, Day 1, 290:1 – 292:13 (community definition never changed); 299:18 – 301:2 (ICANN never raised sponsorship prior to May 2006 vote)
L.2	If ICANN was never going to approve ICM's application because of politics, ICANN should have been open and transparent with ICM instead of requesting that ICM continue to negotiate proposed terms and include further contractual commitments.	Hearing Exh. 121, Adopted Resolutions from ICANN Board Meeting (30 Mar. 2007)		
L.3	ICANN's Board used	Hearing Exh. 121, Adopted Resolutions from ICANN Board Meeting (30 Mar.	Burr, ¶ 53	Burr, Day 2, 479:5 – 481:15 (discussing

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	provisions added to the registry agreement (by its own staff) to satisfy ICANN Board and GAC concerns as additional reasons to reject the agreement.	2007) Hearing Exh. 183, Email from Burr to Jeffrey with draft registry agreement attached (31 Mar. 2006) Hearing Exh. 193, Letter from Lawley to Cerf and the ICANN Board (18 Apr. 2006) Hearing Exh. 194, Memorandum from Lawley to Cerf and the ICANN Board (22 Dec. 2006) Hearing Exh. 201, ICANN Meetings in Lisbon, Portugal, Transcript (30 Mar. 2007) Hearing Exh. 286, Draft of Registry Agreement (Feb. 2007) Hearing Exh. AK, Draft of Registry Agreement (5 Jan. 2007)	Mueller, pp. 52-53	ICANN's reasons for rejection) Lawley, Day 1, 306:2-17 (discussing reasons for rejection)
L.4	ICANN required ICM to agree to more in its registry agreement than of any other applicant, but still did not approve .XXX even after ICM agreed with everything asked of it by ICANN's own staff.	*See* §§ I.1 – I.5 above Confid. Hearing Exh. 10, Email from Burr with attached letter (11 Feb. 2007) Confid. Hearing Exh. 12, ICM Registry, The Sponsored .xxx sTLD: Promoting Online Responsibility (27 Nov. 2005) Hearing Exh. 121, Adopted Resolutions from ICANN Board Meeting (30 Mar. 2007) Hearing Exh. 194, Memorandum from Lawley to Cerf and the ICANN Board (22 Dec. 2006) Hearing Exh. 201, ICANN Meetings in Lisbon, Portugal, Transcript (30 Mar. 2007)	*See* §§ I.1 – I.5 above. Burr, ¶ 75	*See* §§ I.1 – I.5 above Burr, Day 2, 440:5-15 (ICM revised contract based on Jeffrey's July 2005 comments); 448:2-20 (ICM revised contract to address Board's September 2005 concerns); 449:13 – 450:10 (ICM added clause requested by the GAC); 453:12 – 455:5 (responding to concerns in the Wellington Communiqué); 466:18-21 (ICM was giving ICANN "absolutely everything" they wanted) Lawley, Day 1, 304:13 – 305:2 (ICANN asked ICM for things that they had not asked of any other applicant, and ICM

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		Hearing Exh. 228, Email from Smith to Burr regarding draft registry agreement (1 Aug. 2005) Hearing Exh. 229, Draft of Sponsored TLD Registry Agreement between ICM and ICANN (posted 9 Aug. 2005) Hearing Exh. 233, Email from Burr to Jeffrey (27 Sept. 2005) Hearing Exh. 234, Email from Jeffrey to Burr (27 Sept. 2005) Hearing Exh. 241, Email from Burr to Jeffrey with attachment (26 Mar. 2006) Hearing Exh. 249, Letter from Lawley to Cerf re Policy Commitments (5 Jan. 2007) Hearing Exh. 251, Email from Burr to Jeffrey and Pritz with attachment (14 Dec. 2006) Hearing Exh. 252, Email from Smith to Burr with attachment (21 Dec. 2006) Hearing Exh. 253, Email from Burr to Jeffrey, Pritz, and Dan Halloran with attachments (10 Feb. 2007) Hearing Exh. 256, Revised Appendix S, posted 16 Feb. 2007 Hearing Exh. AK, Draft of Registry Agreement (5 Jan. 2007)		agreed)
L.5	ICANN failed to inform ICM what contract provisions would satisfy the ICANN Board's concerns *or* what additional assurances should be left out of the	Demonstrative: ICM Registry Agreement Negotiations Demonstrative: Revisions to Draft Registry Agreement Hearing Exh. 150, Email from Jeffrey to Burr discussing draft registry agreement (13 Jun. 2005)	Burr, ¶¶ 52, 55, 65-69	Lawley, Day 1, 299:18 – 301:2 (describing conversations with ICANN before May 2006); 302:12 – 305:2 (describing communications with ICANN between December 2006 and March 2007)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	contract because of Board concerns.	Hearing Exh. 151, Email from Burr to Jeffrey discussing draft registry agreement (12 Jun. 2005) Hearing Exh. 153, Email from Burr to Jeffrey and Smith regarding negotiation of registry agreement (15 Jul. 2005) Hearing Exh. 154, Email from Burr to Jeffrey, et al. regarding negotiation of registry agreement (19 Jul. 2005) Hearing Exh. 155, Email from Burr to Jeffrey and Smith regarding changes to draft registry agreement (21 Jul. 2005) Hearing Exh. 156, Email from Smith to Burr regarding changes to draft registry agreement (1 Aug. 2005) Hearing Exh. 171, Draft, Sponsored TLD Registry Agreement, Appendix S (18 Apr. 2006) Hearing Exh. 178, Email from Burr to Jeffrey and Twomey regarding ICM's outreach to the Board (19 Mar. 2006) Hearing Exh. 183, Email from Burr to Jeffrey with draft registry agreement attached (31 Mar. 2006) Hearing Exh. 228, Email from Smith to Burr regarding draft registry agreement (1 Aug. 2005) Hearing Exh. 233, Email from Burr to Jeffrey (27 Sept. 2005) Hearing Exh. 234, Email from Jeffrey to Burr (27 Sept. 2005) Hearing Exh. 241, Email from Burr to Jeffrey with attachment (26 Mar. 2006) Hearing Exh. 286, Final Draft, Sponsored TLD Registry Agreement, (Jan. 2007)		

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
		with attached Final Draft Appendix S (Feb. 2007)		
M.	**ICANN offered pretextual reasons for denying ICM's application.**	**ICM Memorial, pp. 145-157; 201-218; 230-245** **Hearing Exh. 4, Articles of Incorporation (21 Nov. 1998)** **Hearing Exh. 5, ICANN Bylaws (29 May 2008)** **Hearing Exh. 121, Adopted Resolutions from ICANN Board Meeting (30 Mar. 2007)**		
M.1	The sponsorship criteria had already been decided, and there was no reason to revisit the analysis.	*See* § D.1 – D.7 above Hearing Exh. 190, Amended Request for Reconsideration of Board Action (21 May 2006), p. 4 Hearing Exh. 201, ICANN Meetings in Lisbon, Portugal, Transcript (30 Mar. 2007), p. 9 Hearing Exh. DI, ICM Memorandum to ICANN Board of Directors (13 Mar. 2007)	*See* § D.1 – D.7 above Mueller, pp. 36, 46-49 Williams, ¶¶ 28-29	*See* § D.1 – D.7 above Lawley, Day 1, 280:17 – 283:13; 305:17 – 306:1 (sponsorship was settled by the 1 June 2005 vote) Mueller, Day 1, 164:16 – 166:13 (vote on 1 June 2005 represented a decision that ICM met the criteria); 191:14 – 192:7 (Process went out the window after U.S. intervention); 193:3 – 195:15 (change in Board membership doesn't allow them to reverse previous vote; most Board members didn't even mention sponsorship)
M.2	Even if sponsorship had not been decided, ICM's application clearly met the sponsorship criteria as those criteria were applied to the other applications of	Hearing Exh. 201, ICANN Meetings in Lisbon, Portugal, Transcript (30 Mar. 2007), p. 3, 7, 10, 12	Mueller, pp. 46-49	Burr, Day 2, 474:17 – 475:20 (Burr describing how ICM met sponsorship criteria) Williams, Day 2, 375:2-6 (Williams does not believe that there was "any way to

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	the 2004 round.			criteria) Williams, Day 2, 375:2-6 (Williams does not believe that there was "any way to fairly apply the sponsorship criteria so that ICM failed and all of the other sTLDs passed")
M.3	General, vague "public policy issues" were not an RFP criterion.	Hearing Exh. 45, sTLD RFP (15 Dec. 2003)	Mueller, pp. 49-51 Williams, ¶ 30	Cerf, Day 3, 757:12-22 (four of the reasons for rejection were not in the RFP) Mueller, Day 1, 192:11 – 193:2 (the five reasons for rejection have "almost no relationship" to the RFP) Twomey, Day 4, 946:8-15 (ICANN did not plan to negotiate public policy issues with ICM after the 1 June 2005 vote) Williams, Day 2, 373:21 – 374:19 (ICANN's reasons 2-5 for rejecting ICM had nothing to do with the RFP criteria)
M.4	"Offensive content" was not an RFP criterion.	Hearing Exh. 45, sTLD RFP (15 Dec. 2003)	Mueller, pp. 51-52 Williams, ¶ 30	*See* § M.3 above
M.5	Concerns for "offensive content" and protecting vulnerable individuals from such content apply		Mueller, pp. 51-52 Williams, ¶	Burr, Day 2, 477:18 – 478:3 (parents could easily filter .XXX sites because of tagging)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	equally to all TLDs, and, in fact, are less serious for .XXX because sites would be clearly labeled and tagged.			
M.6	Concerns about "offensive content" are beyond ICANN's mission.	Hearing Exh. 4, Articles of Incorporation (21 Nov. 1998) Hearing Exh. 5, ICANN Bylaws (29 May 2008) Hearing Exh. 30, Green Paper (30 Jan. 1998) Hearing Exh. 31, White Paper (30 Jan. 1998) Hearing Exh. 201, ICANN Meetings in Lisbon, Portugal, Transcript (30 Mar. 2007), pp. 10-11	Burr, ¶ 61 Mueller, pp. 18-21; 39; 51-52	Mueller, Day 1, 138:5-10 (sTLDs policy making on content has never been an issue for ICANN before); 138:19 – 139:15; 234:17 – 235:4 (no Bylaw explicitly prevents content regulation, but it is outside of the mission in Bylaws and Articles) Twomey, Day 4, 885:13-886:13 (ICANN is "not involved with Internet content . . . [t]hat's outside our mandate. Our mandate is very clear. . . . We're not in the business of content.)
M.7	ICM's registry agreement did not obligate ICANN to become involved in content management in any fashion.	Hearing Exh. 286, Draft of Registry Agreement (Feb. 2007)	Mueller, pp. 52-54 Williams, ¶ 31	Burr, Day 2, 479:5 – 481:11 (it is "preposterous" for ICANN to say that ICANN's failure to enforce policies against registrants would lead to content management); Burr, Day 4, 1042:12-1044:7 (registration requirements were not a representation that ICM would enforce all the laws of the world on pornography)

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
M.8	ICM's registry agreement did not require ICM to enforce all laws regarding adult content.	Hearing Exh. 242, Registrar Accreditation Agreement (17 May 2001) Hearing Exh. 243, Appendix 3 ("Zone File Access Agreement"), Section 4(e) of the .ASIA Registry Agreement (containing parallel language obligating recipients of the zone file to "comply with all applicable laws and regulations . . . .") Hearing Exh. 244, Appendix 3 ("Zone File Access Agreement"), Section 4(e) of the .CAT Registry Agreement (containing parallel language obligating recipients of the zone file to "comply with all applicable laws and regulations . . . .") Hearing Exh. 245, Appendix 3 ("Zone File Access Agreement"), Section 4(d) of the .MOBI Registry Agreement (containing parallel language obligating recipients of the zone file to "comply with all applicable laws and regulations . . . .") Hearing Exh. 246, Appendix 3 ("Zone File Access Agreement"), Section 4(e) of the .TEL Registry Agreement (containing parallel language obligating recipients of the zone file to "comply with all applicable laws and regulations . . . .") Hearing Exh. 247, Appendix 3 ("Zone File Access Agreement"), Section 4(c) of the .TRAVEL Registry Agreement (containing parallel language obligating recipients of the zone file to "comply with all applicable laws and regulations . . . .") Hearing Exh. 286, Draft of Registry Agreement (Feb. 2007)	Burr, ¶¶ 53-54, 56-57 Mueller, pp. 52-54 Williams, ¶¶ 30-31	Burr, Day 4, 1038:17 – 1039:12 (GAC never asked ICM to enforce all countries' pornography laws, and ICM never offered to do that); 1043:9 – 1044:9 (Wellington Communiqué merely asked ICM to restrict access to illegal and offensive content, and ICM did that through site tagging that allowed parents to filter .XXX sites if they chose and by prohibiting child pornography – ICM *never* promised to "enforce the laws of the world on pornography.")
M.9	ICANN had no basis to believe that ICM would not fulfill its commitments, requiring ICANN to step in.	Confid. Hearing Exh. 10, Email from Burr with attached letter (11 Feb. 2007), pp. 8-9	Burr, ¶ 59 Mueller, pp. 52-54	Burr, Day 2, 480:12 – 481:15; Burr Day 4, 1050:1-19 (ICM was fully capable of meeting all of its contractual obligations)

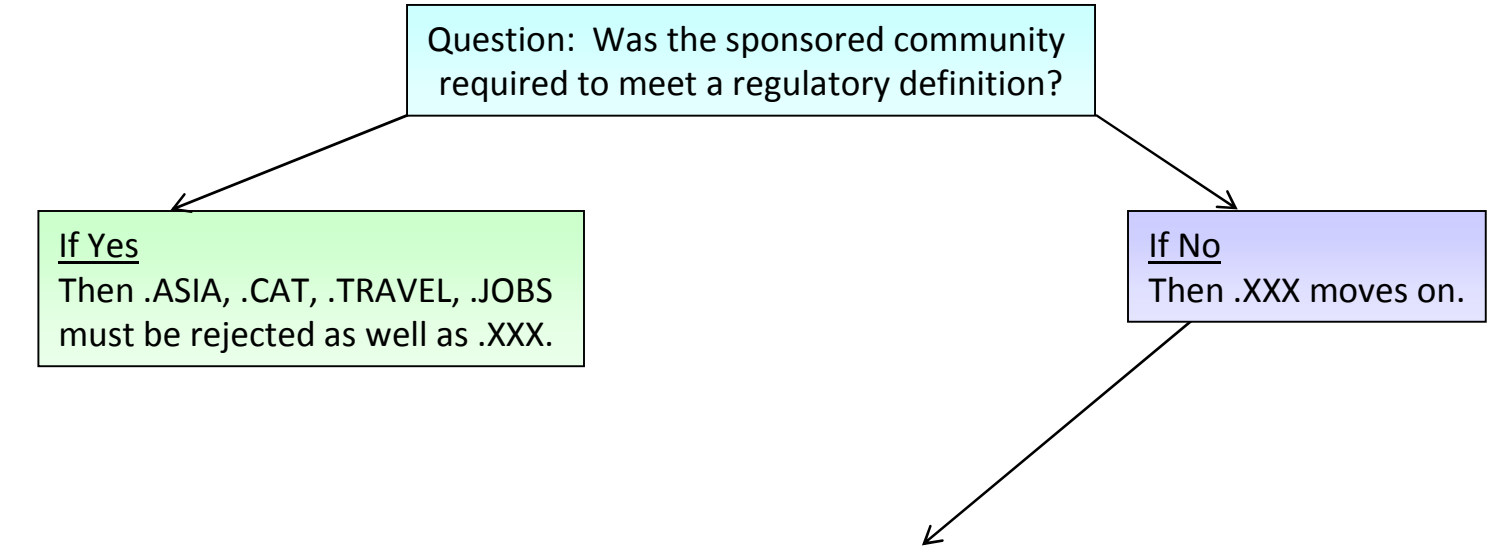
	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
M.10	ICANN always had the option of terminating ICM's registry agreement if ICM was not fulfilling its commitments.	Confid. Hearing Exh. 10, Email from Burr with attached letter (11 Feb. 2007), p. 9	Burr, ¶¶ 58-60 Mueller, pp. 53-54	Burr, Day 2, 480:12 – 481:15 (it's preposterous that ICANN would have to enforce community policies instead of shutting down the TLD or other contract enforcement options)
M.11	Complaints about content on .XXX could be addressed the way all complaints about Internet content are addressed – by individual governments, within their own jurisdictions.	Hearing Exh. 218, *Complaint, Yahoo v. La Ligue Contre Le Racism Et L'Antisemitisme* (filed 21 Dec. 2000) Hearing Exh. 219, FEDERAL TRADE COMMISSION, FIGHTING CONSUMER FRAUD: NEW TOOLS OF THE TRADE (Apr. 1998)	Mueller, pp. 51-52 Williams, ¶ 31	Mueller, Day 1, 131:11 – 135:1 (describing the technological capability of governments to block)
N.	**ICANN's administration of the TLD Round between June 2005 and March 2007 violated its Bylaws and Articles of Incorporation.**	**ICM Memorial, pp. 188-262** **Hearing Exh. 4, Articles of Incorporation (21 Nov. 1998)** **Hearing Exh. 5, ICANN Bylaws (29 May 2008)**		
N.1	ICANN established a two-step process of evaluation based on RFP criteria followed by commercial and technical negotiations, but revisited the first step almost a year after resolving it.	*See* §§ A.1 – B.2 above Hearing Exh. 188, Letter from Twomey to Tarmizi (4 May 2006) Hearing Exh. 189, Voting Transcript of ICANN Board Meeting (10 May 2006) Hearing Exh. 122, ICANN Board Consideration of .XXX, Special Meeting of the Board: Minutes (10 May 2006) [also referred to as Hearing Exh. T]	Mueller, pp. 37, 46-47	

	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
N.2	No other applicant was required to revisit the first step after moving on to the second step of the application process.	Memorial Appendix B: The Board's Review of the 10 sTLD Applications	Mueller, pp. 46-47	
N.3	ICM acknowledges that ICANN could have rejected the application after the original independent evaluation reports were completed in the summer of 2004, as long as it also rejected other applications with negative evaluations.		Williams, ¶ 29 Mueller, pp. 46-47	Williams, Day 2, 393:10-14 (could have rejected all applications rejected by the Sponsorship Team)
N.4	ICANN delayed posting, or failed to post, the revised drafts of ICM's registry agreement, preventing governments from learning what ICM had proposed to address their concerns.	Demonstrative: ICM Registry Agreement Negotiations	Burr, ¶ 51	Burr, Day 2, 451:3 – 452:7 (Wellington Communiqué was based on old version of the contract)
N.5	The timing of the posting of the independent evaluation reports was discriminatory towards ICM, as applicants with approved agreements were	Demonstrative: Timeline of Events – ICM Registry v. ICANN, Phases III-IV	Burr, ¶¶ 48-50 Mueller, p. 45 Williams, ¶ 22	Mueller, Day 1, 171:20 – 172:12 (there was discrimination and a lack of uniformity of process in ICANN's posting of the evaluation reports)

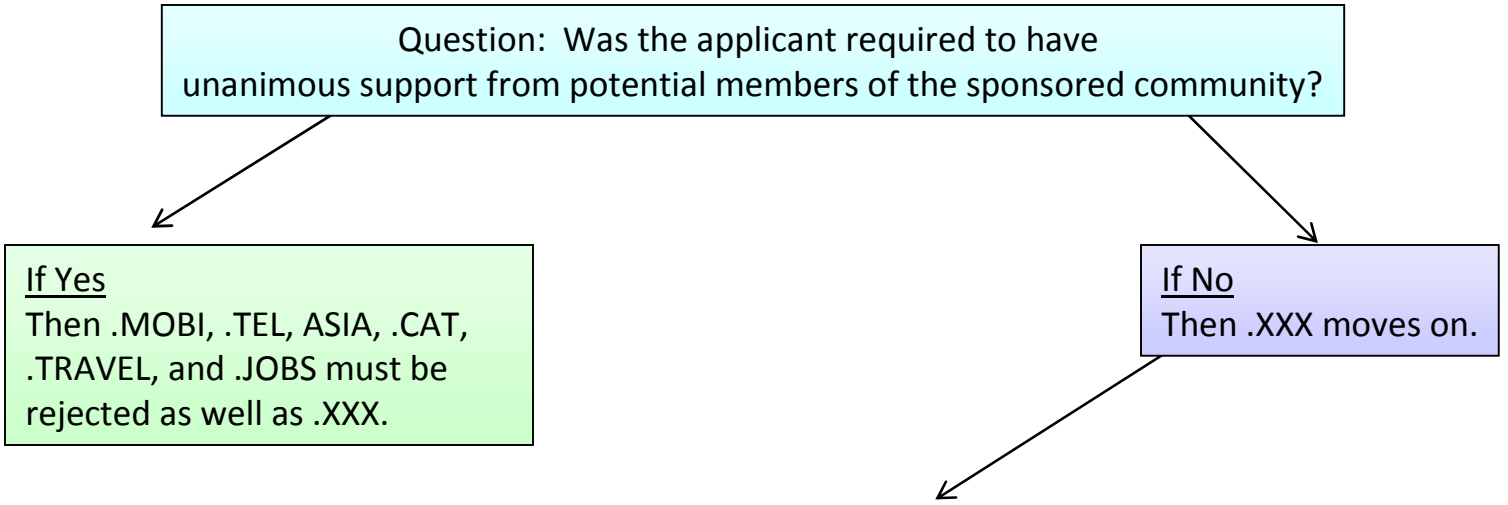
	PROPOSITION	DOCUMENTARY SUPPORT	WITNESS EVIDENCE	HEARING TESTIMONY (WITNESS, HEARING DAY, LINE)
	immune to complaints based on the initial negative evaluations but ICM was not.			
N.6	In its March 2007 reversal of the 1 June 2005 vote on the criteria, ICANN applied the RFP criteria to ICM's application in an entirely different manner than they were applied to other applications.	Hearing Exh. 121, Adopted Resolutions from ICANN Board Meeting (30 Mar. 2007) Hearing Exh. 201, ICANN Meetings in Lisbon, Portugal, Transcript (30 Mar. 2007)	Mueller, pp. 47-48 Williams, ¶¶ 23-33	Williams, Day 2, 374:20 – 375:6 (no fair way to apply sponsorship criteria so that .XXX failed while others passed); 401:12-19 (ICANN did not apply the criteria to .XXX like it applied them to other applicants).
N.7	ICANN required far more contractual assurances from ICM than from any other applicant, and ICM always complied, yet ICANN still failed to approve the registry agreement.	*See* §§ I.1 – I.5 & L.4 above Hearing Exh. 183, Email from Burr to Jeffrey with draft registry agreement attached (31 Mar. 2006) Hearing Exh. 185, Board Meeting Real Time Captioning (31 Mar. 2006), pp. 1-2 Hearing Exh. 199, Board Meeting Minutes (12 Feb. 2007) Hearing Exh. 201, ICANN Meetings in Lisbon, Portugal, Transcript (30 Mar. 2007)	*See* §§ I.1 – I.5 & L.4 above Lawley, ¶¶ 56, 63	*See* §§ I.1 – I.5 & L.4 above Burr, Day 2, 440:5-15 (ICM revised contract based on Jeffrey's July 2005 comments); 448:2-20 (ICM revised contract to address Board's September 2005 concerns); 449:13 – 450:10 (ICM added clause requested by the GAC); 453:12 – 455:5 (responding to concerns in the Wellington Communiqué); 466:18-21 (ICM was giving ICANN "absolutely everything" they wanted) Lawley, Day 1, 304:13 – 305:2 (ICANN asked ICM for things that they had not asked of any other applicant, and ICM agreed)

Appendix B: Sponsorship Decision Tree

Pretext: ICM's application was rejected because the community was not sufficiently clearly defined, due to the "extreme variability in definitions of what constitutes" adult content.



Pretext: ICM's application was rejected because certain potential members of the community were opposed to it.



Appendix B: Sponsorship Decision Tree

Pretext: ICM's application was rejected because its sponsoring policy organization was created solely for the purpose of applying for this sTLD.

Question: Was the sponsoring policy organization required to exist prior to, or independent from, the application process?

If Yes
Then .ASIA, .CAT, .MOBI and .TRAVEL must be rejected as well as .XXX.

If No
Then .XXX moves on.

Pretext: ICM's application was rejected because its community did not exist prior to the creation of the sTLD.

Question: Did the community have to exist prior to the formation of the sTLD?

If Yes
Then .TEL and .MOBI must be rejected as well as .XXX.

If No
Then .XXX moves on.

Appendix B: Sponsorship Decision Tree

Pretext: ICM's application was rejected because the community is self-selecting.