ICM REGISTRY'S COMMENTS ON ICANN'S PROPOSED OPTIONS IN LIGHT OF THE INDEPENDENT REVIEW PANEL'S DECLARATION OF 19 FEBRUARY 2010

ICM hereby responds to the 26 March 2010 report (the "Options Report"), drafted by ICANN Staff, purporting to "describe[] the most plausible process options" in light of the Independent Review Panel's Declaration in the dispute between ICM and ICANN regarding ICM's Application for the .XXX sTLD (ICDR Case No. 50 117 T 00224 08). First, ICM briefly summarizes the background to the dispute, and the findings of the Independent Review Panel ("IRP" or "Panel"). Next, ICM addresses the various recommendations put forward by ICANN Staff for the Board's consideration. We have also enclosed a graphical representation at the end of this paper to aid clarity

As the Board no doubt appreciates, how it addresses the IRP's Declaration is being and will be scrutinized for years to come by policymakers, politicians, future TLD applicants and all other Internet stakeholders alike. The Board's treatment of the IRP Declaration, its process choices and its ultimate decision will indeed be about a specific TLD application. But far more importantly, what the Board does will also say much about ICANN's views regarding what accountability really means in practice within ICANN's model of self-governance, and the degree to which ICANN is able to address difficult issues in a balanced and rational fashion, guided by principles of good faith and with strict adherence to the organization's Articles of Incorporation and Bylaws.

The Options Report was created by ICANN Staff in response to a resolution passed by the ICANN Board in Nairobi requesting advice as to the various options available to the Board in dealing with ICM's Application. In ICM's view, the Board has not been well-served by Staff in this instance. The Options Report setting out Staff's advice suffers for lack of comprehensiveness and fails for lack of objectivity. Rather than providing the Board with the "most plausible" options for implementing the IRP Declaration, Staff have instead identified the "most plausible" options for not giving effect to the Declaration. Indeed, as demonstrated below, almost every one of the "options" put forward by Staff involves rejecting the Declaration (in full or in part), and distorting the import of the Board's 2005 positive vote on ICM's Application. This cannot be what the Board asked Staff to do, and this cannot be the correct embarkation point for the Board's deliberations with respect to ICM's pending Application and the implications of the IRP Declaration. The "most plausible" option—inconceivably, one omitted by Staff—is really very simple: ***the Board should accept that ICM's Application was approved (as the Panel concluded), and enter into negotiations with ICM for a registry agreement (as the Panel declared it should)***.

Consistent with its commitment to assist the Board in reaching a decision that is fair and balanced, ICM sets out below its criticisms of the substantive and procedural guidance contained in Staff's recommendations.

BACKGROUND

In March 2004, ICM submitted an Application for the .XXX sTLD in response to an RFP published by ICANN. On 1 June 2005, the ICANN Board approved ICM's Application, and the parties entered into registry agreement negotiations regarding technical and commercial terms. In March 2007, however, the ICANN Board reversed its decision and rejected both the draft registry agreement and ICM's Application. Dismayed not only by this decision, but also by the procedural and substantive treatment of the Application throughout the protracted negotiation process, ICM filed a Request for Independent Review in June 2008, pursuant to ICANN's Bylaws on accountability.[1]

A three-member panel was formed to hear the dispute, consisting of Jan Paulsson, the president of both the London Court of International Arbitration and the World Bank Administrative Tribunal and the Michael Klein Distinguished Scholar Chair at the University of Miami Law School, the Honorable Dickran Tevrizian, a retired judge who had served on the U.S. District Court for the Central District of California, and Judge Stephen Schwebel, an international law expert who served on the International Court of Justice from 1981 to 2000, including as its president from 1997–2000. The parties submitted thousands of pages of legal briefing, as well as documentary, fact and expert evidence. A live hearing was held in Washington, D.C., from 21 through 25 September 2009, at which nine witnesses[2] presented testimony and were subject to cross examination by ICM's and ICANN's counsel.

In a majority decision issued 19 February 2010, authored by Judge Schwebel, the Panel found that:

- The ICANN Board's vote on ICM's Application on 1 June 2005 reflected the Board's determination that the Application "met the required sponsorship criteria;"[3]
- Reconsideration of that finding by the Board was "not consistent with the application of neutral, objective and fair documented policy," as required by ICANN's Bylaws;[4]
- Instead of reconsidering the Application, following the 1 June 2005 vote, the Board should have immediately entered into a registry agreement with ICM;[5]
- There were "grounds for questioning the neutral and objective performance of the Board" during the registry agreement negotiations with ICM, and grounds for finding

[1] *See* Bylaws, Article IV § 3.
[2] ICANN's witnesses were: Dr. Vinton Cerf, Dr. Paul Twomey, Dr. Alejandro Pisanty, and Professor David Caron. ICM's witnesses were: Mr. Stuart Lawley, Dr. Elizabeth Williams, Ms. J. Beckwith Burr, Dr. Milton Mueller, and Professor Jack Goldsmith.
[3] IRP Declaration, para. 152.
[4] *Id.*
[5] *Id.*, para. 149.

that ICANN failed in "its obligation not to single out ICM Registry for disparate treatment;"[6]

- ICM was the prevailing party, and ICANN was therefore responsible for paying the full $478,244.91 in costs and expenses associated with the administration of the IRP.[7]

During the Board meeting on 12 March 2010 in Nairobi, Kenya, the ICANN Board considered this Declaration, and directed "ICANN's CEO and General Counsel to finalize a report of possible process options for further consideration."[8] As directed, ICANN Staff posted the Options Report to the ICANN website on 26 March 2010, and invited public comment.

In accordance with ICANN's request for comments, ICM's comments on the options proposed by ICANN Staff are set forth below.

ANALYSIS OF DECISION TREE PART 1 – ICANN OPTIONS IN CONSIDERING THE IRP DECLARATION

In Part One of the Options Report, ICANN Staff lay out three options—described as "the most plausible process options" for dealing with ICM's Application in light of the IRP Declaration. These are: (1) accept the findings of the majority in full; (2) accept the findings of the majority in part; or (3) adopt the findings of the dissent.

ICM addresses Staff's comments, analyses and recommendations in respect of each of these options below.

"Accept Findings of the Majority in Full"
(Options Report, Item 1)

The first option presented by Staff is that the findings of the majority of the IRP (Schwebel and Paulsson) be accepted by the Board in full. ICM agrees that Staff are absolutely correct to put this option front and center. However, ICM's support for Staff's recommendation ends there. What becomes clear from a further examination of Staff's analysis of this option is a pattern of dissimulation that is also evident in the remainder of the Options Report.

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[6] *Id.*, para. 151.
[7] *Id.*, para. 152.
[8] ICANN Board Resolution on Consideration of the Independent Review Panel Declaration—ICM Registry, 12 Mar. 2010, *available at*: http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#15.

What is remarkable about ICANN Staff's discussion of an option purportedly based on "accept[ing] the findings of the majority" are the efforts to which Staff go to gut this option—and thereby the IRP Declaration—of any meaningful effect. The discussion of this option proceeds not with an analysis based on the recommendations and findings of the IRP Declaration, but rather with a listing of a number of unnecessary and inappropriate processes that are neither mentioned in the IRP Declaration, nor which derive even remotely from the Panel's findings.

The official conclusion of the IRP regarding the dispute between ICM and ICANN was that:

> . . . [T]he Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria.
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> . . . [T]he Board's reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy.[9]

By way of analogy, the Panel noted that if "there was a construction contract at issue, the party contracting with the builder could not be heard to argue that specifications and criteria defined in invitations to tender can be freely modified once past the qualification stage."[10]

Additionally, the Panel determined that:

> [T]he sTLD process was "successfully completed", as that term is used in the Carthage RFP resolution, in the case of ICM Registry with the adoption of the June 1, 2005 resolutions. ICANN should, pursuant to the Carthage documented policy, then have proceeded to conclude an agreement with ICM on commercial and technical terms, without reopening whether ICM's application met the . . . criteria.[11]

If the ICANN Board is to accept and act upon these determinations in good faith, the only appropriate course of action would be for ICANN to rectify its previous errors by "proceed[ing] to conclude an agreement with ICM on commercial and technical terms."[12] To do otherwise would amount to nothing less than a statement that the Board does not feel bound by its Bylaws, Articles of Incorporation, or international law, and can violate these imperatives without consequence.

There is no legitimate obstacle to the immediate negotiation and conclusion of a registry agreement between ICANN and ICM. Had ICANN complied with the Bylaws after the 1 June 2005 vote, the registry agreement between ICM and ICANN would today be in force and .XXX

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[9] IRP Declaration at para. 152.
[10] *Id.*, para. 150.
[11] *Id.*, para. 149.
[12] *Id.*

would be active; approving the registry agreement now will have the affect of bringing about the situation that should already exist. ICANN's assertion that "[a] process for evaluating ICM's Application is necessary" because "ICM first submitted its .XXX sTLD Application more than six years ago" is clearly a pretext; an excuse to create processes through which to delay, and perhaps finally suffocate, ICM's Application.

Despite ICANN Staff's attempts to confuse the issue, there is no reason why the delay between the submission and approval of ICM's Application and the approval of the registry agreement require the imposition of additional processes—especially as the delay was entirely the result of ICANN's own actions. The processes appropriate for approval of ICM's registry agreement are those established in the 2004 round, under which ICM's Application was already approved. For ICM, because the Application is still outstanding, the 2004 round is not yet complete.

Imposing new processes, entirely different from those used to evaluate other applications in the 2004 round, would:

- Violate paragraphs 149 and 152 of the IRP Declaration;
- Violate the Core Value of "employing open and transparent policy development mechanisms" in Article I, Section 2(7) of the Bylaws;
- Violate the Core Value of "applying documented policies neutrally and objectively" in Article I, Section 2(8) of the Bylaws;
- Violate the prohibition of non-discriminatory treatment in Article II, Section 2 ;
- Violate the requirements of transparency, openness, and fairness in Article III, Section 1 of the Bylaws; and
- Violate Article 4 of the Articles of Incorporation, including the general principles of international law.

In this regard, ICM notes that just four months ago, on 9 December 2009, the ICANN Board voted unanimously to approve the .POST registry agreement with the Universal Postal Union. The .POST application, like ICM's Application, was submitted in March 2004; the .POST application was effectively approved to enter into registry agreement negotiations in July 2004, nearly eleven months before the Board's June 2005 approval of ICM's Application. More than five years after .POST's application was approved, no additional processes were required to approve the .POST registry agreement. Nor should any new process be required to finalize ICM's registry agreement. Thus, there is nothing preventing ICANN from accepting the Panel's Declaration and approving a registry agreement with ICM; treating ICM's Application differently from the .POST application would be a further violation of the Article II, Section 2 prohibition on non-discriminatory treatment.

ICANN Staff's version of "accepting" the Declaration of the Panel, however, involves not a simple, expedited process designed to result in the conclusion of a registry agreement, but instead the imposition of new, burdensome, and arbitrary processes that are certain to delay an

agreement and possibly to prevent it altogether. In short, ICANN Staff propose to give lip service to the Declaration of the Panel, but not correct any of the violations that the Panel identified.

Disregarding the findings of the Panel in practice, regardless of how the Board's actions are described, would:

- Violate the purpose of the IRP, as established by Article IV, Section 1 of the Bylaws;
- Violate the Core Value of "applying documented policies neutrally and fairly" in Article I, Section 2(8) of the Bylaws;
- Violate the Core Value of "[r]emaining accountable to the Internet community" in Article I, Section 2(10) of the Bylaws; and
- Violate the requirements of transparency, openness, and fairness in Article III, Section 1 of the Bylaws, Article 4 of the Articles of Incorporation, and general principles of international law.

As "accepting" the findings in full but failing to act in accordance with the Panel's Declaration is functionally equivalent to accepting those findings in part or rejecting them, the observations set out above apply with equal force to the proposals of rejecting all or part of the Panel's Declaration, which are discussed in the next section.

"Accept Findings of the Majority in Part"

(Options Report, Item 2)

ICANN claims to be—and its very foundational premises were conceived on the basis of—a community-driven, bottom-up organization, with various checks and balances in place to ensure accountability, transparency, and effectiveness in ICANN's decision-making. At the organization's establishment, the principle of accountability was enshrined in ICANN's Bylaws as a Core Value that would "guide the decisions and actions of ICANN."[13] Notwithstanding this commitment, however, concerns remained about ICANN's accountability, especially since ICANN was effectively not accountable to any authority aside from itself. The Independent Review Process was implemented in response to such concerns, and ICANN has repeatedly touted the process as its "final method of accountability." The Bylaws themselves re-affirm that the purpose of the Independent Review Process was intended to ensure that ICANN's commitment to accountability was carried out in practice.[14]

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[13] Bylaws, Article I, § 2.
[14] *Id.*, Article IV, § 1.

An IRP declaration that is disregarded, in whole or in part, based on the advice of Staff, fails to achieve even a minimal level of accountability. An ICANN Board with ultimate authority over all decision-making, that can freely disregard the results of the mechanisms it set up to police its accountability, would be equally antithetical to the goals of accountability, transparency, and bottom-up organization. ICM does not doubt that these points are more than self-evident to the Board.

The legitimacy provided by the Independent Review Process derives from its unique position in the accountability framework that was developed by the Internet community and established by the Board. An IRP is an unbiased, neutral, third party review of the complete record of a dispute resulting in an objective and reasoned set of conclusions. For this reason, ICANN officials and personnel are not eligible to serve on an independent review panel, and the panelists must adhere to a conflicts-of-interest policy.[15] For the Board, on its own initiative, to disregard any part or all aspects of a declaration would render futile these attempts to preserve the legitimacy and neutrality of independent review panels, and would be clearly at odds with the very objectives that led to the establishment of the Independent Review Process.

Unlike an independent review panel, the Board is not and cannot be a detailed fact-finding body, mainly because it is neither positioned nor equipped to review the extensive record that is presented to a panel, and upon which the panel relies in issuing its declaration based on findings of fact and in accordance with the applicable principles of law, Bylaws and Articles of Incorporation. For example, the record that was created during the .XXX Independent Review Process, included both written and oral testimony of multiple witnesses and hundreds of documentary exhibits. If the Board were at all to attempt to review the record upon which the IRP relied, it would at best be able to review only a small, select portion (as determined by Staff) of that record. On such a cursory basis, it would not only be inappropriate, but dangerous, for the Board to reach conclusions at odds with the considered determinations of the IRP.

If the Board feels free to reject the conclusions of an IRP, the declarations issued by a panel will serve not as a guarantee of accountability, and will provide no check on the Board's exercise of authority over a global resource. Again, the Bylaws give the IRP the responsibility to "declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws."[16] A decision by the Board to reject a panel's findings would put the the ICANN Board in the position of usurping the fundamental role of the IRP, and improperly acting as the judge of its own actions.

Should ICANN decide to accept only portions of the IRP Declaration, allowing ICM's Application to "go forward" is a better course of action than disallowing it, but Staff's proposals for proceeding are still problematic. The Panel found that ICANN's 2006 and 2007 re-evaluation and rejections of ICM's Application and registry agreement were violations of ICANN's Bylaws and international law. For the ICANN Board to once again re-evaluate and reject ICM's Application would constitute a repeat of those violations—and, what is worse, a repeat of those violations after having just been informed by an esteemed panel of international jurists that such actions were inconsistent with ICANN's Articles of Incorporation and Bylaws.

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[15] *Id.*, Article IV, § 3(9), 3(11).

[16] *Id.*, § 3(8).

Specifically, re-evaluating and rejecting ICM's Application would, at a minimum, constitute additional violations of:

- Paragraphs 149 and 152 of the IRP Declaration;
- The Core Value of "applying documented policies neutrally and objectively," in Article I, Section 2(8) of the Bylaws;
- The prohibition of non-discriminatory treatment in Article II, Section 2 of the Bylaws;
- The requirements of transparency, openness, and fairness in Article III of the Bylaws; and
- Article 4 of the Articles of Incorporation, including the general principles of international law.

"Adopt Findings of the Dissent"

(Options Report, Item 3)

As their third "most plausible process option," ICANN Staff have proposed that:

> [t]he Board could vote to adopt the dissenting opinion of the Panel's Declaration on the basis that the Board thinks that the Panel's majority opinion was wrong and that the Board's conduct was consistent with ICANN's Bylaws and Articles of Incorporation.

In support of the foregoing, Staff noted that:

> the Panel unanimously agreed that its Declaration is not binding. Accordingly, while the ICANN Board is required to consider the Declaration, the Board is not required to follow the majority views.

ICANN Staff's proposed third option cannot be viewed by any objective observer as one of "the most plausible process options ICANN has … with respect to ICM Registry's Application … for the .xxx sTLD." The third "option" is effectively a non-option for at least the following reasons, and should be given no consideration by the Board:

- There is no jurisprudential, procedural or policy-based rationale that could even remotely support disregarding the majority's opinion in favor of that put forward by the dissenting panelist (*i.e.*, Judge Dickran Tevrizian, ICANN's appointee), even though the Declaration was ultimately determined to be non-binding. And, indeed,

ICANN Staff cite to no precedent or other rationale that would justify the Board's adoption of the proposed third option.

- The fact that the Declaration was determined to be non-binding is no basis to disregard the majority opinion, which was based on findings of fact and established principles of law, and followed a careful consideration of the parties' well-plead and detailed arguments, as well as all of the testimonial and documentary evidence. As previously mentioned, the Board should not be a judge in its own cause, and should not undermine the very processes for independent accountability that it established by choosing to follow a minority view. To do so would make a mockery of the very system of accountability that the Board created to legitimize ICANN's model of self-governance.

- Were the Board to adopt the dissenting panelist's views, it would undoubtedly become the object of intense public and political criticism. The Board would also thereby expose ICANN to further legal action in the United States and other fora.

ANALYSIS OF DECISION TREE PART 2 – THE DECISION PROCESS

The second part of the Options Report contains ICANN Staff's purported guidance to the Board regarding a series of issues that Staff consider the Board could plausibly encounter in reviewing ICM's Application.

ICANN Staff's advice is fundamentally flawed in a variety of respects. Below, ICM addresses the mistaken assumptions upon which Staff's guidance is based, and then addresses the various issues identified by Staff arising out of the different decisions that, in Staff's view, the Board may have to make.

As a general matter, the objectivity of Staff's guidance to the Board must be seriously questioned. As already noted, Staff's guidance to the Board is based on a conceptual premise that can only be described as flawed (if not biased): namely, "let's see what additional procedural and substantive traps, hurdles and obstructions we can set up to lead to the Application's rejection," rather than "let's see what can be done to give full and fair effect to the IRP Declaration."

Thus, for example, Staff's Decision Process unabashedly states that "[t]he Decision Process described herein does not include an option for the ICANN Board to allow ICM and ICANN to go directly to contract negotiations or enter into the agreement that was posted for public comment in 2007 that was eventually voted down on 30 March 2007 in Lisbon. A key issue in this regard is that ICM first submitted its .XXX sTLD Application more than six years ago." Staff's dismissive and unsubstantiated rejection of what is the "most plausible" process option for ICM's Application provides a plain and unquestionable illustration of the lack of objectivity underlying the advice that has been offered to the Board. As already discussed

above, the fact that the Application is now being considered six years after it was first submitted should provide no reason to subject it to scrutiny pursuant to review standards that were not applied to any of the other applications.[17] The fact of the matter, as determined by the IRP, is that ICM is where it is today as a result of the Board's actions in violation of ICANN's Bylaws and Articles of Incorporation. It is a fundamental principle of any system of remedies that an injured party should be put in the position that it would have been in but for the actions that caused its injury. At a very minimum, this guiding principle and that of good faith must serve as the Board's decision-making lodestar as it proceeds forward. Notably, these principles find no reflection in any of the options suggested by Staff.

Staff's lack of objectivity is further evidenced by yet another flawed premise underlying the advice offered to the Board: namely, that the Board must now decide whether or not to "approve" ICM's Application. The fact of the matter, as ICANN Staff and the Board know full well, is that ICM's Application was approved by the Board in June 2005; a finding that was also specifically made in the IRP Declaration. The issue before the Board is by no measure a "re-consideration" of ICM's Application or other *de novo* review; rather, it is very simply what process should be put in place to finalize the technical and commercial aspects of a registry agreement for the .XXX sTLD.

In short, today, the Board's remit should only be about "how can we get this done consistently with our Bylaws, Articles of Incorporation and the Declaration of the IRP" and not "let's identify as many reasons and ways that we can to not get this done." Any other approach would be lacking in good faith, constitute violations of ICANN's constitutional documents and foundational principles of self-governance, and expose the organization to unnecessary and expensive legal risk in the United States and abroad.

Below, ICM addresses each specific sub-section of Staff's Decision Process guidance.

ICANN Staff's Proposal that the Board Consider ICM's Application Using Selected Criteria

(Options Report, Item 4)

ICANN Staff have advised the Board that "[i]f the Board determines that a comprehensive evaluation of ICM's application is appropriate, it must next determine the criteria against which the Application should be measured." (***Options Report, Item 4***) In this regard, Staff identify two options: (1) evaluation of ICM's Application in accordance with the 2004

[17] Again, no such processes were required for the approval of .POST and treating ICM's Application significantly differently from the .POST application would be a further violation of Article II, Section 3 of ICANN's Bylaws, which requires that ICANN "not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment;" as well as Article I, Section 2 of ICANN's Bylaws, which requires ICANN to apply its "documented policies neutrally and objectively, with integrity and fairness."

round criteria; or (2) evaluation of ICM's application in accordance with the criteria being created for the new gTLD program. (***Options Report, Items 4.a and 4.b***)

ICM takes serious issue with Staff's fundamental premise underlying this section of the Report, namely, that ICM's 2004 Application should be subjected to a "comprehensive evaluation." ICM's Application should be subjected to no form of re-evaluation. It was evaluated, re-evaluated and finally accepted by the Board in June 2005. The IRP's findings on this point were clear and categorical.

As discussed in more detail below, ICM objects even more strenuously to the proposal that its Application be evaluated using criteria other than the criteria in the 2004 RFP. There are no objective reasons whatsoever justifying ICANN's reliance on yet-to-be-finalized criteria for the new gTLD program in evaluating ICM's Application.

To the extent that any further verification of ICM's Application is called for, this should be done in the context of the final negotiations with Staff regarding the .XXX registry agreement, and then only in connection with technical and commercial contract terms.

ICANN Proposal that ICM's Application be Evaluated in Accordance with the 2004 Round Criteria

(Options Report, Item 4.a)

Application of the 2004 round criteria to ICM's Application is the only option that is even potentially compliant with ICANN's Bylaws, Articles, and international law. ICM's Application was submitted in response to the 2004 RFP. Its Application was already evaluated and accepted in accordance with the criteria applicable to that RFP. Any further evaluation of its Application must therefore be pursuant to those—and only those—criteria, and only in respect of those issues that remained to be considered in the context of technical and commercial negotiations for a registry agreement and taking into consideration the Board's positive June 2005 resolution.

➢ ***ICANN Proposal that an Independent Evaluation Panel be Convened***

ICANN Staff's proposal that a new independent evaluation panel be constituted to "objectively consider ICM's .XXX sTLD Application" is unnecessary, unacceptable, and inappropriate and should not be considered by the Board for at least the following reasons:

- The crux of the IRP's finding is that ICM's Application was approved by the Board and should not have been subject to reconsideration, and that the ICANN's Board's re-evaluation of the Application was a violation of its Bylaws, Articles and general principles of international law. To create an entirely new panel to re-start the evaluation process is incompatible with this finding, and incompatible with ICANN's obligations of non-discrimination and neutral application of documented policies. In

fact, not only would such evaluation be incompatible with the Declaration, it would be a direct repetition of the behavior for which ICANN was rebuked by the Panel; that is, reconsidering the Application after having definitively approved it in June 2005.

- Any new panel established by ICANN would have to take into consideration and give effect to the Board's June 2005 resolution, as well as the findings of the IRP. Thus, establishing a new evaluation panel would be not only redundant but also ineffectual and entail unnecessary expense.

- ***ICANN Proposal Regarding ICANN Due Diligence***

Any further verification of ICM's Application – to the extent even required – should be done on an expedited and transparent basis, consistent with the IRP Declaration, as well as ICANN's Articles of Incorporation and Bylaws. Moreover, any further verification should be limited to only those remaining technical and commercial issues associated with finalizing a registry agreement with ICM.

ICANN Proposal that ICM's Application be Evaluated in Accordance with the Criteria Being Created for the New gTLD Program

(Options Report, Item 4.b)

Another of the "most plausible process options" suggested by ICANN Staff in connection with any further consideration of ICM's Application is that the Board "[a]pply the criteria being created for the new gTLD program." (***Options Report, Item 4.b***) In this regard, Staff suggest that the Board could, "[w]ithin the context of the new gTLD Program, and at the same time as all other applications in the new gTLD Program, … apply the standards articulated in the Draft Applicant Guidebook, version 4." Staff further suggest that consideration could be given to applying the new gTLD Program criteria to ICM based on "an expedited process… on an individual basis."

For at least the reasons set out below, this recommended option by ICANN Staff is, in effect, a non-option and should not be considered by the Board.

- It would be utterly inappropriate, and entirely contrary to ICANN's obligation for open and transparent policy development, neutral application of policies, and non-discrimination in its treatment of community members for ICANN to accept an application designed for one set of criteria and then—many years later—evaluate it according to an entirely new set of criteria.

- ICM, like the other 2004 applicants, submitted its Application in response to the 2004 RFP, and designed its Application specifically to meet those criteria. The other applicants in the 2004 round were approved under those criteria, and ICM was also

approved under those criteria. For ICM, the 2004 round has not yet concluded, and the policies and procedures of that round are the only appropriate methods for concluding that round. Significant and serious questions must be asked regarding ICANN Staff's true objectives in even asking the Board to consider evaluating an application in an RFP process according to criteria that were not even developed at the time the application was submitted, and that have yet to be finalized.

- The proposal to evaluate ICM's Application using completely new criteria—whatever those criteria are—would be patently inconsistent with:
  - Paragraphs 149 and 152 of the IRP Declaration;
  - The Core Value of "employing open and transparent policy development mechanisms" in Article I, Section 2(7) of the Bylaws;
  - The Core Value of "applying documented policies neutrally and objectively," in Article I, Section 2(8) of the Bylaws;
  - The prohibition of non-discriminatory treatment in Article II, Section 2 of the Bylaws;
  - The requirements of transparency, openness, and fairness in Article III of the Bylaws; and
  - Article 4 of the Articles of Incorporation, including the general principles of international law.

ICANN's Analysis Regarding the Consequences of a Determination that ICM's Application Meets the Selected Criteria

Options Report, Item 5

In Item 5 of the Options Report, ICANN Staff consider the consequences of a positive or negative determination by the Board with respect to ICM's Application. In respect of a negative determination, Staff correctly raise the risk that ICANN would likely be subject to further legal action. This is self-evident and merits no further comment.

What does, however, warrant further comment are ICANN Staff's observations regarding the "extent to which [the Board] will consider input from the GAC in approving the Application and moving forward with a registry agreement." (***Options Report, Item 5.b***) ICANN Staff's premise is telling. It reveals Staff's intentional disregard of the IRP Declaration and the Panel's finding that ICM's Application was "approved" in June 2005. Accordingly, while ICM has no quarrel with the fact that the Board may solicit the GAC's input, such input should not be with respect to re-treading trodden ground or in any way re-evaluating ICM's Application – which

was properly approved in June 2005, after GAC input was solicited and the Board was informed in writing that GAC had no such input. Rather, to the extent that any further GAC input is sought, or past GAC input relied upon, any such input should only be with respect to what would be called for in the ordinary course in accordance with the Bylaws.

Additionally, while the GAC is certainly welcome to comment during any public comment period for the registry agreement—there is no requirement that the Board seek additional GAC comment. GAC had the opportunity and did provide – and reconfirm – its advice on the registry agreement for ICM, which was duly taken into account in the contract fully negotiated by ICM and ICANN. Advice has never before been sought, or offered, on the commercial or technical terms of a particular registry agreement. Nor are the terms of a particular registry agreement the type of policy question for which GAC advice is required, as discussed in more detail below with regards to the Board's consideration of GAC advice.

ICANN Staff's Analysis of the Consequences of the Board's Consideration of the GAC's Input

Options Report, Item 6

The role of the GAC is to provide input relating to policy issues, not implementation decisions.[18] In light of the IRP Declaration, the sole issue before the Board is the implementation of the IRP's Declaration. The only public policy question on the table is whether or not ICANN should respect the processes it has established in its bylaws to ensure accountability to the ICANN community. To the extent that ICANN decided that GAC input was needed to determine whether or not it should comply with its obligations to be accountable to the community, such input should have been sought out in connection with the actions to be taken in light of, and the effect to be given to, the IRP Declaration; that is, in advance of the issuance of the Options Report.

In fact, however, the public policy advice of the GAC was sought in connection with the Evolution and Reform Committee process that resulted in the creation of the independent review process as embodied in ICANN's Bylaws. ICANN is now at the stage of implementing the Panel's Declaration, not developing policies for the IRP. The GAC has provided its advice on the ICM Application, ICANN Staff and ICM negotiated a registry agreement that reflected that advice, and since re-evaluation of ICM's Application is utterly inappropriate, the additional step of seeking new GAC input about the TLD is equally inappropriate.

The proposal to seek GAC advice on an issue that is not on the table is a transparent attempt to shift responsibility to the GAC for a decision by the Board to turn its back on it own accountability obligations. Regardless of any advice offered by the GAC, the Board's actions must be guided by the IRP Declaration, ICANN's Articles of Incorporation and Bylaws, and international law. To do otherwise demeans the role of the GAC, and:

[18] Bylaws, Article XI, Section 2(1).

- Violates the Core Value of "applying documented policies neutrally and objectively," in Article I, Section 2(8) of the Bylaws;
- Violates the prohibition of non-discriminatory treatment in Article II, Section 2 of the Bylaws;
- Violates the requirements of transparency, openness, and fairness in Article III of the Bylaws; and
- Violates Article 4 of the Articles of Incorporation, including the general principles of international law.

ICANN Staff's Views Regarding the Consequences of the Board Approving ICM's Application

Options Report, Item 7

In Item 7 of the Options Report, ICANN Staff address the consequences of a Board decision to "approve ICM's Application." In this regard, the Options Report notes that if such a decision were taken by the Board, "ICANN would then proceed to (or resume) contract negotiations with ICM in an effort to negotiate a registry agreement." Once a draft registry agreement is negotiated, Staff advise that "ICANN must post the draft agreement for public comment for a period of at least 30 days." Following the public comment period, "the agreement must be submitted to the ICANN Board, along with a summary and analysis of public comment, for final approval, subject to any appropriate revisions resulting from public comment."

In considering Staff's advice, the Board should be mindful of at least the following considerations:

- ICM's Application was already approved by the Board in June 2005. There is no decision to be taken by the Board in light of the IRP Declaration with respect to "approving" ICM's Application. Rather, the sole matter for decision by the Board is whether the technical and commercial terms of the draft registry agreement negotiated between ICANN and ICM are acceptable and consistent with those accepted by the Board for the other sTLD registry agreements.
- ICM has no objection to the Board's posting, for a period of no more than 30 calendar days, the draft registry agreement that is finally negotiated between ICANN and ICM. In this regard, ICM is hopeful that ICANN will not use the posting period in any way to delay or derail the final approval of a registry agreement for the .XXX sTLD.
- The finalization of the .XXX sTLD registry agreement has now been delayed by almost 5 years. The Board should act with all due alacrity and good faith to finalize the registry agreement. ICM will never be able to recover the revenues that have

been lost as a result of the delays occasioned by the Board's improper rejection of its Application. Any further delays will continue to cause ICM irreparable financial and reputational harm.

ICANN Staff's Views Regarding the Consequences of the Board Disapproving ICM's Application

Options Report, Item 8

In Item 8 of the Options Report, ICANN Staff address the consequences of a Board decision to "not approve" the ICM Application.

In considering Staff's advice, the Board should be mindful of at least the following considerations:

- As noted above, ICM's Application was already approved by the Board in June 2005. There is no decision to be taken by the Board in light of the IRP Declaration with respect to "approving" ICM's Application. Rather, the sole matter for decision by the Board is whether the technical and commercial terms of the draft registry agreement negotiated between ICANN and ICM are acceptable and consistent with those accepted by the Board for the other sTLD registry agreements.

- "Disapproving" the Application would represent the ultimate statement by the ICANN Board that it does not intend to abide by the accountability procedures that the community has established and which the Board approved, and that there is nothing the ICANN community can do in the event that the Board acts inconsistently with its Bylaws, Articles of Incorporation, and international law.

- Disapproving the Application after submitting it to additional processes involves wasting the time, money, and effort of both ICANN and ICM so that ICANN can appear to maintain the air of accountability. Nevertheless, by failing to implement the Declaration, ICANN will have proven that its assertions of accountability are hollow.

- Specifically, disapproving ICM's Application would be the ultimate violation of:

    - Paragraphs 149 and 152 of the IRP Declaration;

    - The purpose of the IRP, as established by Article IV, Section 1 of the Bylaws;

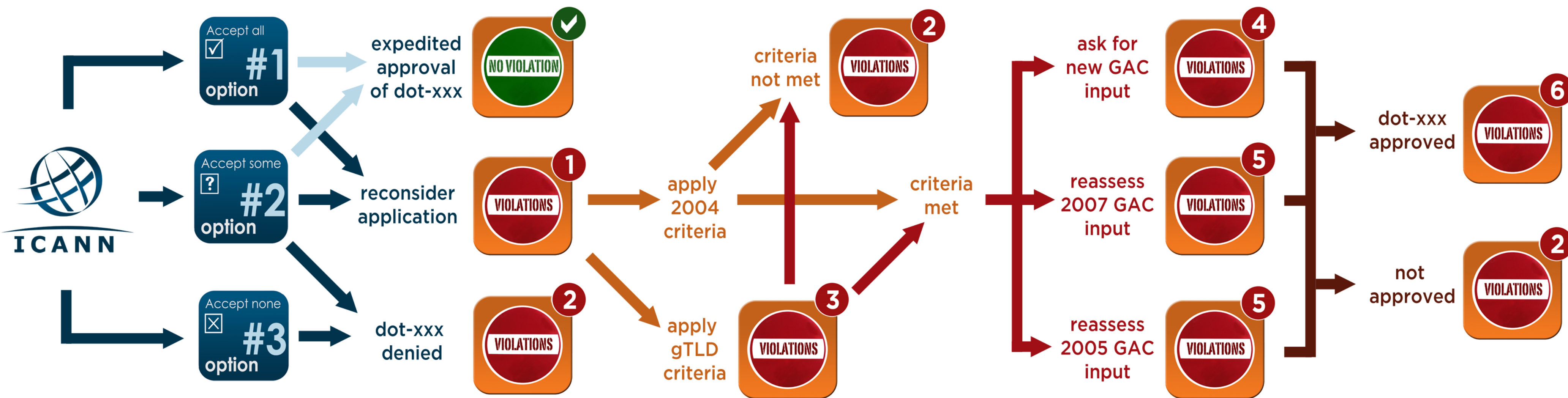
    - The Core Values of "employing open and transparent policy development mechanisms" in Article I, Section 2(7) of the Bylaws;

- The Core Value of "applying documented policies neutrally and objectively," in Article I, Section 2(8) of the Bylaws;
- The Core Value of "remaining accountable to the Internet community" in Article I, Section 2(10) of the Bylaws;
- The prohibition of non-discriminatory treatment in Article II, Section 2 of the Bylaws;
- The requirements of transparency, openness, and fairness in Article III, Section 1 of the Bylaws; and
- Article 4 of the Articles of Incorporation, including the general principles of international law.

CONCLUSION

In preparing the Options Report, ICANN Staff have overlooked the fundamental finding of the IRP Declaration: the ICANN Board determined, in June 2005, that ICM's Application met the RFP criteria, and the Board's subsequent reconsideration of that determination was a violation of ICANN's Bylaws, Articles of Incorporation, and international law. The Panel concluded that the Board was in error by not entering into a registry agreement with ICM following the 1 June 2005 vote.

Only one course of action is now available to ICANN to correct that error: enter into a registry agreement with ICM, with no further delay. ICANN's recent approval of .POST demonstrates that immediate negotiations and approval of a registry agreement remains a perfectly valid process option, despite the delay since the application was submitted. ICM is, of course, willing to negotiate with ICANN over the specific terms of that agreement, so long as the final terms are consistent with the terms in the agreements negotiated with other registry operators from the 2004 round. Given the time and effort ICM and ICANN have already spent in negotiations, ICM suggests the February 2007 draft as a starting point for the current negotiations. Entering into registry agreement negotiations, with the intent of concluding such an agreement, is the only process option consistent with the processes developed for the 2004 round, and therefore the only process option consistent with the IRP Declaration, ICANN's Articles of Incorporation and Bylaws, and international law.



VIOLATIONS KEY

1

- IRP, para. 149: According to the policy established by the Board Resolution in Carthage, "the sTLD process was 'successfully completed' . . . in the case of ICM Registry with the adoption of the June 1, 2005 resolution. ICANN should . . . then have proceeded to conclude an agreement with ICM on commercial and technical terms, without reopening whether ICM's application met the sponsorship criteria;"
- IRP, para. 152: "reconsideration of [the finding that ICM's application met the criteria] was not consistent with the application of neutral, objective and fair documented policy;"
- The purpose of the IRP, as established by Article IV, Section 1 of the Bylaws;
- Core Value of "applying documented policies neutrally and objectively" in Article I, Section 2(8) of the Bylaws;
- Core Value of "[r]emaining accountable to the Internet community" in Article I, Section 2(10) of the Bylaws;
- Non-discriminatory treatment required by Article II, Section 3 of the Bylaws;
- Transparency, openness, and fairness required in Article III, Section 1 of the Bylaws, Article 4 of the Articles of Incorporation, and international law. Each additional delaying action following this option continues and compounds these initial violations. Violations in later boxes are additional ways in which the specific proposals violate the Bylaws, Articles of Incorporation, or Declaration.

2

- The Declaration of the IRP;
- The purpose of the IRP, as established by Article IV, Section 1 of the Bylaws;
- Core Value of "applying documented policies neutrally and fairly" in Article I, Section 2(8) of the Bylaws;
- Core Value of "[r]emaining accountable to the Internet community" in Article I, Section 2(10) of the Bylaws;
- Non-discriminatory treatment required by Article II, Section 3 of the Bylaws;
- Transparency, openness, and fairness required in Article III, Section 1 of the Bylaws, Article 4 of the Articles of Incorporation, and international law.

3

- IRP, para. 149: According to the policy established by the Board Resolution in Carthage, "the sTLD process was 'successfully completed'... in the case of ICM Registry with the adoption of the June 1, 2005 resolution. ICANN should... then have proceeded to conclude an agreement with ICM on commercial and technical terms, without reopening whether ICM's application met the sponsorship criteria;"
- IRP, para. 150: "If, by way of analogy, there was a construction contract at issue, the party contracting with the builder could not be heard to argue that specifications and criteria defined in invitations to tender can be freely modified once past the qualification stage."
- IRP, para. 152: "reconsideration of [the finding that ICM's application met the criteria] was not consistent with the application of neutral, objective and fair documented policy;"
- Core Value of "applying documented policies neutrally and objectively" in Article I, Section 2(8) of the Bylaws;
- Core Value of "employing open and transparent policy development mechanisms" in Article I, Section 2(7) of the Bylaws;
- Non-discriminatory treatment required by Article II, Section 3 of the Bylaws;
- Transparency, openness, and fairness required in Article III, Section 1 of the Bylaws, Article 4 of the Articles of Incorporation, and international law.

Once again, each additional delaying action following this option continues and compounds these initial violations. Violations in later boxes are additional ways in which the specific proposals violate the Bylaws, Articles of Incorporation, or Declaration.

4

- IRP, para. 149: According to the policy established by the Board Resolution in Carthage, "the sTLD process was 'successfully completed' . . . in the case of ICM Registry with the adoption of the June 1, 2005 resolution. ICANN should . . . then have proceeded to conclude an agreement with ICM on commercial and technical terms, without reopening whether ICM's application met the sponsorship criteria;"
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- Core Value of "applying documented policies neutrally and objectively" in Article I, Section 2(8) of the Bylaws;
- Non-discriminatory treatment required by Article II, Section 3 of the Bylaws
- Transparency, openness, and fairness required in Article III, Section 1 of the Bylaws, Article 4 of the Articles of Incorporation, and international law;
- Core Value of "employing open and transparent policy development mechanisms" in Article I, Section 2(7) of the Bylaws;
- Requirement in Article XI, Section 2(1)(h) that GAC advice be timely;
- Article 3 of the Articles of Incorporation requirement to lessen the burdens of government.

5

- Core Value of "applying documented policies neutrally and objectively" in Article I, Sections 2(8) of the Bylaws;
- Non-discriminatory treatment required by Article II, Section 3 of the Bylaws;
- Requirement in Article XI, Section 2(1)(h) that GAC advice be timely.

6

Additional violations if ICM is asked to make commitments, different from those required of the other 2004 sTLD applicants.