

Summary and Analysis of Comments for Report of Possible Process Options for Further Consideration of the ICM Application for the .XXX sTLD

Comment Period: 26 March 2010 to 10 May 2010

BACKGROUND

On 19 February 2010, the Independent Review Panel issued its Declaration in the Independent Review filed by ICM Registry challenging ICANN's denial of ICM's application for the .XXX sTLD.

Pursuant to ICANN's Bylaws, the Board of Directors considered the Panel's Declaration at the Board's meeting on 12 March 2010 in Nairobi, and directed ICANN's CEO and General Counsel to finalize a report of possible process options for further consideration, and post that report for no less than 45 days of public comment. The Board's resolution on this matter is available at:

<http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#15>

The General Counsel published a draft report of possible process options including explanatory diagrams on 26 March 2010 (the "**Process Report**") for public comment. The Process Report and accompanying diagrams can be found at:

<http://www.icann.org/en/irp/icm-v-icann/draft-options-post-irp-declaration-26mar10-en.pdf>;

<http://www.icann.org/en/irp/icm-v-icann/options-map-26mar10-en.pdf>;

<http://www.icann.org/en/irp/icm-v-icann/eval-decision-process-26mar10-en.pdf>

SUMMARY AND ANALYSIS

Nearly 12,600 comments were received into the designated public comment forum during the official comment period (26 March 2010 – 10 May 2010). Approximately 650 additional comments¹ were received after the closing of the public forum, and comments continue to come in.² ICANN reviewed all of the submissions received through 27 May 2010, with a priority focus on those received within the open comment period. ICANN presents statistics for submissions during the formal comment period as well as overall submission statistics.

¹ The numbers and statistics reported here are ICANN's best approximations based upon a manual review of the public comment forum. If there are errors in calculation, staff does not believe they are statistically significant.

² Comment submissions are posted in the chronological order they are received by ICANN's systems, recorded in local time at ICANN's main offices in Marina del Rey, California (UTC-7). The date and time stamp in the submission header is applied by the sender's system, and does not reflect the date and time ICANN received the submission.

The numbers cited above do not necessarily equal the number of individual comments or commenters participating in the forum; some commenters provided multiple submissions and some submissions were duplicated to address formatting issues. Approximately 30 submissions received in the .XXX public comment forum were either blank, spam or comments on unrelated topics.

Where staff identified comment submissions that relate to the .XXX public comment forum but were submitted into other open ICANN public comment forums, staff had those misplaced comments manually submitted into the .XXX forum. Those misplaced comments – the extent they were located – are included in this summary and analysis.

Many of the submissions were drafted with identical, or form language serving as the majority of or as the entire submission. ICANN’s review and further research revealed that there were multiple campaigns utilizing webforms or pre-drafted suggestions for submissions. A review of the most common form submissions is included in the relevant summary sections below. Every submission received, however, was reviewed individually to confirm its content.

Due to the high volume of submissions, it is not feasible to provide a summary of each individual comment. ICANN applied the following criteria to each submission to identify which would be individually summarized:

(1) The submission must discuss the process options identified in the Process Report. Submissions that only contain a reference to a process option in a subject line or without discussion relating to the Process Report are reflected only in the summary charts. As part of this review, submissions that only provided substantive discussion on the perceived value or lack of value in establishing a .XXX top-level domain, and did not address the subject of the public comment, were not individually summarized.

(2) The submission is NOT visibly a form response or substantially similar to a form response. ICANN attempts to identify each major thread of form responses outside of the individual summary section.

(3) The submission must contain substantial discussion capable of summarizing. There are some submissions that meet the first and second criteria, but are so brief that summarization is not feasible. For example, Shawn Williamson’s comment, at <http://forum.icann.org/lists/icm-options-report/msg00002.html>, consists only of a subject line stating: “Use the Original process and the Panels verdict and award the contract.” While this clearly addresses the discussion laid out in the Process Report, and is not an identified form, no summary is needed. Mr. Williamson’s submission, and others like it, are reflected in the statistical summary chart.

A. Summary of Individual Submissions

Stuart Lawley, President of ICM Registry, submitted two comments with analysis of the Report. The first (at <http://forum.icann.org/lists/icm-options-report/msg00006.html>) was submitted on 28 March 2010, noting that ICM and its counsel find several of the options in the Report inconsistent with the IRP declaration, and that only the option of expedited due diligence to confirm financial and technical capabilities offers the current Board a path to avoid “new and ongoing” violations of the Articles of Incorporation. Lawley comments that the Report “would appear to have not been conceived with the objective of affirmatively giving full effect to the IRP declaration” and the evaluative process is “lacking in objectivity.” Lawley noted that ICM and its counsel, after study of the options paper, would provide analysis. That analysis was delivered on 10 May 2010.

The analysis, available at <http://forum.icann.org/lists/icm-options-report/msg12042.html>, provides ICM’s opinion that the Board has not been well-served by the creation of the Report, as the Report ignores the “most plausible” options for implementing the IRP Declaration, and instead identified the “most plausible” options for not giving effect to the Declaration. The most plausible option was omitted – the Board accepting that ICM’s Application was approved and entering into negotiations for a registry agreement. ICM set out some procedural background regarding the Declaration and the Board’s 12 March 2010 resolution directing the creation of the Report.

ICM walks through each portion of the Report, including all three process options, and the steps noted on the Decision Tree. ICM notes that staff, even in proposing acceptance of the majority in full, engages in “a pattern of dissimulation” found throughout the Report. ICM states “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,’” and acting otherwise would signal that the Board does not feel bound by its Bylaws or Articles of Incorporation. ICM suggests that the six-year delay from the time of the ICM application is pretext; ICANN created the delay, and ICANN should complete the 2004 process. ICM also notes the recent approval of the .POST registry agreement, another applicant in the 2004 round, and states that “treating ICM [] differently . . . would be a further violation of the [Bylaws] prohibition on non-discriminatory treatment. ICM notes that the proposed process is not in accordance with the Panel declaration, and requiring ICM to go through additional process is “lip service” to the Declaration, are in violation of the Bylaws and the Articles of Incorporation, and is equivalent to partial acceptance or rejection of the findings.

For the other two options (accept panel findings in part or reject the filings), ICM comments that this would “fail[] to achieve even a minimal level of accountability,” as the Board would be free to disregard the results of its self-created accountability mechanisms. To the extent the Board rejected any part of the Declaration, the Board would be in violation of the Bylaws and the Articles of Incorporation. For the complete rejection of findings, ICM notes that there is no precedent or rationale presented to justify this option (Option 3), and the non-binding nature of the

Declaration should not then invite the Board to be a judge of its own cause. ICM also noted that ICANN would be subject to scrutiny and further legal action.

In evaluation of the decision tree, ICM notes that explicitly excluded was the option to proceed directly to contract negotiations, which ICM states is a “dismissive and unsubstantiated rejection of what is the ‘most plausible’ process option”, which is an “illustration of the lack of objectivity” in the advice to the Board. ICM noted that it, as the “injured party” should be put into the position it would have been in but for the injury caused, yet there was no mention of this principle in the Report. ICM also noted the continued use of concept that the “Board must now decide whether or not to ‘approve’ ICM’s Application.” ICM states that under the Declaration, the Application was already approved, and all that remains is the process to finalize the technical and commercial aspects of the registry agreement. ICM also notes that any concept of “re-evaluation” is inappropriate, whether it is re-evaluation of the Application under the 2004 criteria that ICM applied under, or an evaluation under the criteria being developed for the new gTLD program. If any due diligence or verification is needed, it should be limited to the remaining technical and commercial issues associated with finalizing a registry agreement.

ICM also commented on the inclusion of the extent of consideration of the GAC’s input on the ICM application, noting that the GAC had the opportunity to comment on the public policy issues prior to the June 2005 Board vote for approval. ICM notes that the GAC could offer comment in a public comment period, but ICM’s application now is past the policy stage, and is at an implementation stage. Seeking further advice from the GAC, states ICM, would be in violation of ICANN’s Core Value of neutral treatment, and other provisions of the Bylaws, Articles of Incorporation and principles of law.

ICM notes that it would not object to a posting of a final .XXX registry agreement for a period of no more than 30 days, so long as it was not undertaken for the purposes of delay. ICM notes that it has lost revenue because of the delays occasioned by the Board’s actions.

ICM concludes that entering into the negotiations to conclude a registry agreement “is the only process option consistent with the process developed for the 2004 round.” ICM also provided a graphic regarding the potential for violations of the Declaration, Bylaws, Articles of Incorporation or principles of international law in the process options proposed.

Steve Goldstein, a former ICANN Board member, noted his vote against awarding the .XXX sTLD to ICM in 2007 based on advice regarding the potential for ICANN’s need to step in as a regulator of the DNS if ICM failed to properly police the .XXX sTLD. Setting that substantive issue aside, the issue now posed by the Report is “whether or not ICANN will adhere to the accountability framework that it had set up,” as “ICANN had already determined that ICM’s application . . . met all the basic criteria.” Mr. Goldstein encouraged ICANN to “walk the talk” and noted that the

Report contained “dilatatory procedural steps” resulting in delay.
<http://forum.icann.org/lists/icm-options-report/msg00007.html>

Patrick Vande Walle, writing in his personal capacity, noted that the criteria for the new gTLD program is not relevant to ICM’s application, and that due diligence – to the extent required – should be based on 2004 criteria and submissions. Vande Walle noted that content-based objections to the .XXX sTLD are outside of the scope of ICANN’s mission. Finally, Mr. Vande Walle noted that the only way forward is to proceed with the negotiation of the registry agreement, and ICANN should stop wasting time on procrastination exercises. <http://forum.icann.org/lists/icm-options-report/msg00523.html>.

Quentin Boyer, Director of Public Relations of PinkVisual.Com/TopBucks.com, noted that he is “a stakeholder in the relevant sponsoring community for the proposed .XXX sTLD,” noted his opinion that ICANN should adopt the findings of the dissenting opinion, holding that ICM never satisfied the sponsorship requirement and criteria for a sponsored TLD. Mr. Boyer based this upon his belief that ICM never demonstrated that it has the support of the prospective sponsoring community. Mr. Boyer requested that at minimum, ICANN has an obligation to the sponsoring community to consider ICM’s application anew, given the questions raised about ICM’s assertions of community support. <http://forum.icann.org/lists/icm-options-report/msg00532.html>. David Conners reposted Mr. Boyer’s comment noting his adoption of the comment with minor additions. <http://forum.icann.org/lists/icm-options-report/msg00546.html>.

Diane Duke, Executive Director of the Free Speech Coalition (FSC), wrote to express the FSC’s support for Option 3, adopting the findings of the dissent. FSC agrees with the dissent that ICM never satisfied the sponsorship requirements and criteria for a sponsored TLD, and the denial was done in an open and transparent way. The FSC then provides some support from the transcript on which the FSC bases its disagreement with the IRP’s majority findings. FSC notes that if ICANN moves forward with Options 1 or 2, ICM should be required to show support from the sponsored community, and not rely on the confidential submissions to the Board, and ICANN should approach the adult entertainment community to measure anew the amount of support. FSC suggests the creation of a sponsorship community comment period, with verifiable information of membership in the sponsored community. In the event that the New gTLD criteria are used for evaluation, the “FSC remains open, as it always has been, to the adoption to a .XXX gTLD as part of the roll out of . . . new TLDs.” <http://forum.icann.org/lists/icm-options-report/msg00592.html>.

Thierry Moreau commented that the Report was misleading in referring to the “outright rejection” of the Declaration under the label “Adopt the findings of the dissent.” Mr. Moreau noted that in a three-party panel, as used in the IRP proceeding, only the third panelist is expected to be neutral, therefore a 2-1 result is a normal outcome. Because of that, Mr. Moreau states that there was a “deliberate”

omission of the true status of the decision as a final ruling that could mislead the Board and the public. ICANN needs to remain externally accountable and should not postpone this decision. <http://forum.icann.org/lists/icm-options-report/msg01093.html>.

Paul Walsh, the CEO of Segala, wrote to urge the Board to abide by the Declaration and enter into a registry agreement with ICM. Mr. Walsh noted that ICANN must respect its procedures, or risk damage to its legitimacy and credibility. Therefore, the only option is to immediately execute a registry agreement. Mr. Walsh also provided remarks relating to the filtering of content in the DNS. <http://forum.icann.org/lists/icm-options-report/msg01161.html>.

Michele Neylon of Blacknight Solutions (an ICANN-accredited registrar), commented that ICANN and ICM should move to contract negotiations as soon as possible. Mr. Neylon noted that ICANN's position as an international organization will be harmed if ICANN ignores the findings of the IRP. If ICANN accepts the Panel's findings and moves forward with the .XXX sTLD, "it would show a greater level of commitment to transparency and accountability" as embraced in the Affirmation of Commitments. <http://forum.icann.org/lists/icm-options-report/msg01219.html>.

Andrew Perkins commented that ICANN must prove its accountability, and the blocking of the implementation of the findings of the IRP – an ICANN-created accountability mechanism – will undermine the trust placed in ICANN by the Internet community. If ICANN picks and chooses parts of the Declaration, or adds "unnecessary procedural steps" in adopting the findings, that will signal ICANN's lack of fairness and objectivity. ICANN should adopt the Declaration and enter into a registry agreement without further delay. <http://forum.icann.org/lists/icm-options-report/msg01396.html>.

Tom Hymes, a member of the Board of Directors of the FSC and a member of the adult online community, wrote in his personal capacity to encourage the Board to adopt Option 3 and reject the ICM Registry application. Mr. Hymes also encouraged the exploration of a .XXX gTLD for ICM. Mr. Hymes rebutted ICM's contention that expedited approval of the .XXX sTLD is a possible outcome, relying on the arguments set out in the Process Report. Mr. Hymes also addressed the potential hurdles faced when seeking GAC advice, as it seems likely (and Mr. Lawley testified) that ICANN as a content regulator could be likely – and that is contrary to ICANN's mission. Mr. Hymes also suggested that ICM's insistence on no re-evaluation of sponsorship is based upon "the now obvious fact that ICM does not have sufficient support within the industry." Mr. Hymes notes that ICM should move forward with a gTLD, as is suggested in the Process Report. <http://forum.icann.org/lists/icm-options-report/msg11676.html>.

Anriette Esterhuysen, Executive Director of the Association for Progressive Communications (APC), notes that "the only viable solution is to accept the findings of the Majority of the IRP in full." The APC notes that the findings of the Panel

demonstrate a “breakdown regarding administrative justice in ICANN’s decision-making” and the cure is to follow the processes in place in the 2004 sTLD application process. The New gTLD criteria should not be retroactively applicable to this application, and there should not be further interaction with the GAC. Suggestion of further due diligence on financial and technical capacities is also inappropriate. The APC notes that if ICANN rejects the conclusions of the IRP, it will make the IRP process irrelevant and discourage its use. It will also “contaminate” the new gTLD process by introducing uncertainty into that procedure and the treatment of potentially contentious applications. ICANN must restore confidence in its decision making. The APC also noted its support for the submission by the NCUC. <http://forum.icann.org/lists/icm-options-report/msg12098.html>.

Robin Gross, Executive Director of IP Justice, noted IP Justice’s support for the “swift adoption” of the Declaration and the inclusion of the .XXX sTLD into the root. This is a means for ICANN to follow its accountability mechanism and correct past mistakes. The decision should not – and cannot – be a referendum on pornography. Further, allowing lobbying for and against proposed TLDs undermines ICANN’s legitimacy. <http://forum.icann.org/lists/icm-options-report/msg12391.html>.

Milton Mueller³ submitted the comments of the Non Commercial Users Constituency (NCUC) of ICANN’s GNSO. The NCUC believes the options are simpler than the “distractions” presented – either ICANN accepts that it “made serious mistakes in its handling of the matter . . . or it can refuse to do so.” The NCUC believes the Board should accept the Panel’s findings and add .XXX to the root with an agreement based on the template offered to other sTLDs. The NCUC notes that anything less “will raise serious doubts about ICANN’s accountability mechanisms and will undermine the legitimacy of the corporation.” Further, the NCUC noted that a rejection of the IRP findings will encourage parties to take disputes with ICANN to litigation. The NCUC also requested the Board to focus on the accountability questions, and not focus on the comments assessing the popularity of the domain, as ICANN’s should not be a mechanism for censorship or content regulation. <http://forum.icann.org/lists/icm-options-report/msg11309.html>.

The At Large Advisory Committee (ALAC) submitted a statement that was unanimously endorsed by its members. The ALAC noted its concern with the transparency and accountability of the processes being undertaken and the considerable time and thoroughness of the IRP. ALAC suggests that the process be completed in an expedient, equitable and defensible manner “taking into account the decision of the IRP.” Of the five Regional At-Large Organizations (RALOs), three RALOs supported the ALAC statement, one (APRALO) supported the ALAC statement and submitted a separate statement (noting agreement with ALAC, and further noting that the .XXX is primarily an issue of procedural justice, and ICANN has to follow its processes), and one (NARALO) submitted a separate statement

³ For full transparency, the submitter of this comment, Milton Mueller, was retained by counsel for ICM to testify as an expert witness on ICM’s behalf in the Independent review process.

(ICANN should approve the request without further unwarranted process, as the IRP rejected the validity of ICANN’s earlier resolution.)

<http://forum.icann.org/lists/icm-options-report/msg12360.html>.

Jothan Frakes, in his personal capacity, noted that ICANN should “do the right thing” and let .XXX move forward, as accountability and trust are at stake. Mr. Frakes noted that the IRP is the final accountability mechanism in ICANN, and anything but a full acceptance of the Panel’s findings will undermine the Internet community’s trust in ICANN. Partial adoption, or adding unnecessary procedural steps to adopt the findings, would be a sign that ICANN cannot be relied on be fair and objective.

<http://forum.icann.org/lists/icm-options-report/msg01435.html>.

Richard Schreier, CEO of Pool.com, commented that the .XXX sTLD should be granted and be “up-and-running” as soon as is technically possible, and further delay would undercut the recommendations from a “robust panel of experts.” Mr. Schreier stated that ICANN’s response to the Declaration was to invent new processes, because the Declaration was not what ICANN hoped for. Mr. Schreier noted his concern that the public comment process will provide a weight of opposition to the .XXX sTLD, and that if there’s a favoring of ICM’s application, even more review will follow. Mr. Schreier noted the differential treatment of the ICM application throughout the process, encourages ICANN to accept the panel finding and follow its own procedures. <http://forum.icann.org/lists/icm-options-report/msg00025.html>.

Edward Hasbrouck noted that the Report was “devoted primarily to considering how ICANN could **not** implement the findings of the arbitrators” instead of implementation, and endorsed the other comments on this line. Mr. Hasbrouck also stressed that the finding was not that ICANN was incorrect in its decision, but that ICANN had not acted in accordance with its Bylaws and processes in making that decision, and commented that the options presented in the staff report would not do anything to change the procedures to bring into conformity with the Bylaws. Mr. Hasbrouck noted that ICANN should reverse its decision on .XXX, admit that it acted contrary to the Bylaws, and consider changes to be made in the decision making process to bring it into conformity with the Bylaws. Mr. Hasbrouck also commented on broader ICANN procedural matters not raised within the Report.

<http://forum.icann.org/lists/icm-options-report/msg12577.html>.

B. Other Submissions

The submissions can generally be categorized in one of two ways⁴:

⁴ A small handful of submissions (less than 10) did not state any preferred outcome or process option, but instead provided general observations or social commentary, such as the message at <http://forum.icann.org/lists/icm-options-report/msg00243.html> (whatever rule is applied, it should be applied equally).

1. Submissions in favor of the creation of a .XXX sTLD or proceeding with the .XXX sTLD Application.
2. Submissions opposing proceeding with the .XXX sTLD Application or the creation of a .XXX sTLD.

Submissions in favor of the creation of a .XXX sTLD or proceeding with the .XXX sTLD Application

Submissions supporting Option 1/Proceeding with the .XXX sTLD Agreement

Just over 5% percent of submissions expressed a position favoring process Option #1 and/or proceeding with the .XXX sTLD Application. At least 92% of these submissions either appeared to be or were reported to be based on form templates.⁵ There were multiple reasons given for support of the .XXX application.

The predominate reason noted for support of was based on accountability arguments and adherence to the majority opinion of the Independent Review Panel (See an example at <http://forum.icann.org/lists/icm-options-report/msg00056.html>). Where substantive discussion was given regarding how ICANN should implement Option 1, such as immediately entering into a contract, due diligence options, receipt of advice from the Governmental Advisory Committee and the standards to be applied to the .XXX sTLD Application, those are discussed above in the Individual Summary section.

Among some of the shorter comments supporting the awarding of the .XXX comments, typical themes were that ICANN should not engage in further delay in proceeding to contract with ICM, nor should ICANN “bend the rules” to suit ICANN’s purposes. See <http://forum.icann.org/lists/icm-options-report/msg00008.html>; <http://forum.icann.org/lists/icm-options-report/msg00024.html>; and <http://forum.icann.org/lists/icm-options-report/msg00022.html>.

⁵ As will be explained below, ICM Registry submitted three “compilation” emails providing names and redacted email addresses for a total of 500 persons, noting that these commenters submitted support for one of three different template statements directly to ICM. Though these comments were not provided directly to ICANN through the .XXX public comment forum, ICM requested for ICANN to count each identified in the ICM compilation emails as if they had contributed individually. The 500 persons identified in the compilation emails are included in the percentage reported above. If the 500 compilation contributors are not counted in their individual stead, approximately 2% of commenters support Option 1 or the awarding of the .XXX contract.

For all three of the ICM compilation emails identified in this summary, ICANN performed a brief cross-check of supporters identified by ICM against the comments submitted directly into the ICANN Public Comment Forum, and staff did not identify duplication of submissions in the samples. ICANN therefore includes the ICM totals as reported, though a small number of duplicate submissions may have gone undetected.

Some of the commenters supporting the .XXX sTLD Application were less focused on the Process Report presented for comment, and instead provided other rationale for the creation of a .XXX sTLD. Of those “content” based commenters, most focused on the potential for filtering of adult content through the use of the .XXX label. Some also suggested that the .XXX sTLD be approved so that all adult content could be migrated to the .XXX sTLD and off of other top-level domains. (See, for example, <http://forum.icann.org/lists/icm-options-report/msg01201.html>; <http://forum.icann.org/lists/icm-options-report/msg03180.html>; <http://forum.icann.org/lists/icm-options-report/msg03700.html>; and <http://forum.icann.org/lists/icm-options-report/msg11804.html>.)

ICANN notes that the anticipated content of sites on the proposed .XXX sTLD was not part of the discussion invited in the Process Report, and ICANN is not empowered to enforce any filtering or forced content migration rules in the event the .XXX sTLD is approved and entered into the root. Other submissions, such as <http://forum.icann.org/lists/icm-options-report/msg00014.html>, suggested that if a top-level domain for adult content is created, the proposed .XXX sTLD be replaced with a “more descriptive” string, such as “.PORN”. ICANN notes that the Process Report is only about the handling of ICM’s application for the .XXX sTLD, and there is no option presented that would allow ICANN or ICM to dictate that the application be changed to a different string.

Common template language submitted in support of awarding the .XXX agreement

The following form comment was generated through ICM Registry. As reported by ICM, commenters could make submissions to ICANN through a support form on the ICM website. In addition, ICM accepted submissions directly to its website, and reported the receipt of additional 240 supporters of this form text below. ICM requested that these 240 supporters (identified by name and redacted email address) be counted in full into the summary statistics, and below, ICANN provides statistics with these ICM-reported comments included. (See <http://forum.icann.org/lists/icm-options-report/msg12555.html>)

Subject: Support for Option # 1

Dear ICANN,

I am a member of the Sponsoring Community for the .xxx sTLD, and I have long been interested in registering names in the new .XXX sTLD. I respectfully urge ICANN to abide by the Declaration of the Independent Review Panel and enter into a registry agreement with ICM Registry without delay. Further delay in the launch of .XXX will erode confidence in ICANN’s accountability, credibility, and legitimacy.

Regardless of the nature of the sTLD, ICANN must respect the procedures it has established to ensure accountability to the wider Internet community. Failing to fully abide by the decision of the IRP will demonstrate that ICANN has no meaningful commitment to accountability, and will seriously damage ICANN's legitimacy and authority.

Therefore, ICANN has only one option if it wishes to preserve the integrity of its procedures and its long-term credibility as the manager of the DNS: immediately execute a registry agreement with ICM and allow ICM to proceed with the launch of the sTLD.

ICANN also received multiple submissions with substantially the same language as this form that did not include affiliation as a member of the sponsored community. Some examples are at: <http://forum.icann.org/lists/icm-options-report/msg01299.html>; <http://forum.icann.org/lists/icm-options-report/msg01378.html>; and <http://forum.icann.org/lists/icm-options-report/msg01379.html>.

Another form comment was generated through the proposed sponsoring organization for the .XXX sTLD, the International Foundation for Online Responsibility (IFFOR). As reported by ICM, potential commenters were provided with recommended template language for submission to ICANN. In addition, ICM set up a form on the IFFOR to direct submissions to ICM, and reported the receipt of additional 130 supporters of this form text below. ICM requested that these 130 supporters (identified by name and redacted email address) be counted in full into the summary statistics, and below, ICANN provides statistics with these ICM-reported comments included. (See <http://forum.icann.org/lists/icm-options-report/msg12402.html>.)

Subject: Approve .xxx without delay.

Dear ICANN,

Please approve the contract for a dot-xxx top-level domain. I believe that the labeling of adult content online is a good and useful step forward.

As the company behind dot-xxx, ICM Registry has spent many years trying to make the extension a reality, and well as given considerable thought into how a self-regulated adult area online would work.

I urge you to make the right decision and approve its contract as soon as possible.

A third form is a separate template made available through the ICM Registry website. As with the two forms above, ICM reports receiving 130 additional statements of support of the following language. ICM requested that these 130 supporters (identified by name and redacted email address) be counted in full into the summary statistics, and below, ICANN provides statistics with these ICM-reported comments included. (See <http://forum.icann.org/lists/icm-options-report/msg12364.html>.)

Subject: Approve .xxx without further process or delay.

Dear ICANN, I urge you to abide by the declaration of the Independent Review Panel and sign a registry agreement with ICM without further delay. The independent review is the final accountability mechanism for ICANN that was devised by ICANN. If you do anything but accept the full results of that review, you are undermining the foundation of trust granted to ICANN by the Internet community. ICANN has to prove that it is accountable if it is to continue to be credible as the overseer of the domain name system. Picking and choosing elements of the Panel's declaration, or adding unnecessary procedural steps in adopting the review's findings, would be a clear sign to the global Internet community that the organization cannot be relied upon to do its job fairly and objectively. Make the responsible choice by approving .xxx now.

This text was included in numerous other submissions, including <http://forum.icann.org/lists/icm-options-report/msg01740.html>; <http://forum.icann.org/lists/icm-options-report/msg01408.html>; and some commenters provided additional comment along with the form text, such as the comment at <http://forum.icann.org/lists/icm-options-report/msg01286.html>.

Submissions Supporting a Denial of the .XXX sTLD Application

Nearly 95% of commenters expressed a position favoring process Option #3 or were against the formation of a .XXX sTLD.⁶ At least 95% of these comments appear to derive from form-generated texts.

Option 3 Proponents

There were a large number of submissions that explicitly referenced Option #3 of the Process, and urged ICANN to follow the dissenting opinion – nearly 11,500 comments, or approximately 89% of all submissions. Of these “Option #3” proponents, over 99% of the submissions appeared to be derived from form text.

⁶ If the 500 commenters represented in the ICM compilation emails are not included in the totals, 98% of the submissions into the Public Comment Forum supported the denial of the .XXX sTLD application.

Samples of the most prevalent form emails stating support for process Option 3 are set out below.

The Free Speech Coalition urged its supporters to submit comments with the following form text:

I am a member of the adult entertainment industry. I support Option # 3 of the March 26, 2010 process options submitted by ICANN for public comment.

I do not support the creation of a .XXX sTLD and believe that the ICANN Board was well within its rights to deny ICM's application in the 2007 Board meeting in Lisbon.

Regardless of the option chosen, I ask that ICANN continue to consider the widespread opposition of the sponsored community in any further decisions concerning a .XXX sTLD.

Another email campaign referencing Option 3 is likely to have originated from the American Family Association (http://secure.afa.net/afa/activism/takeaction_intl.asp?id=371). This form generated a large number of comments containing the following language:

Subject: (Please enter your own subject line.)

Dear ICANN,

I support Option #3 of the March 26, 2010 process options submitted by ICANN for public comment.

ICANN should 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 many instances, the subject line “(Please enter your own subject line.)” was left unmodified by the submitter. The language used in this form mirrors language that was in the Process Report:

The 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.

United Families International, <http://unitedfamiliesinternational.wordpress.com/category/the-family/>, is the likely source of another campaign⁷ of Option #3 email submissions. The form text of the United Families International submission is:

Title: Vote NO to Triple X Domain

To Whom It May Concern:

I support Option #3 of the March 26, 2010, process options submitted by ICANN for public comment. The .XXX sponsor, ICM, never satisfied the sponsorship requirements and criteria for a sponsored Top Level Domain. The ICANN Board denied ICM's application for the .XXX TLD on the merits in an open and transparent forum. Please oppose ICM's proposition to establish an .XXX domain.

Sincerely,

(Your name)

This form also borrows language directly from the Process Report and restates the finding of the Dissenting Opinion from the IRP Declaration:

The dissenting opinion of the Panel's Declaration concluded that ICM never satisfied the sponsorship requirements and criteria for a sponsored TLD, and that the ICANN Board denied ICM's application for the .XXX sTLD "on the merits in an open and transparent forum."

Another "Option 3" form submission can be traced to a campaign by the Adult Entertainment Broadcast Network (AEBN) (<http://newscompilation.com/2010/05/05/help-aebn-defeat-icm's-petition-for-a-xxx-stld/>). An example of this form submission is at <http://forum.icann.org/lists/icm-options-report/msg01488.html>. The AEBN form reads:

⁷ Evidence of email campaigns can be found within the public comment forum as well. See <http://forum.icann.org/lists/icm-options-report/msg01452.html>, stating:

I hope you oppose a new .XXX domain for the Internet which would mean even more Internet porn. Time is ending on May 10 for your comments to kill this terrible idea. Even if you have emailed your comments before, please email again TODAY with the following comment:

*I support Option # 3 of the March 26, 2010 process options submitted by ICANN for public comment.
The .XXX sponsor, ICM, never satisfied the sponsorship requirements and criteria for a sponsored Top Level Domain. The ICANN Board denied ICM's application for the .XXX s TLD on the merits in an open and transparent forum.*

As an affiliate program for the adult entertainment industry, my business' foundation is internet based. If ICM's application were granted and a .XXX sTLD were to be created it would negatively impact my business. Also it would put ICANN in the position of creating an entity to impose regulations and policy for the adult entertainment community-a situation that could easily stifle what is now a robust adult entertainment internet presence.

I do not support the creation of a .XXX sTLD and believe that the ICANN Board was well within its rights to deny ICM's application in the 2007 Board meeting in Lisbon.

It is imperative that ICANN consider the widespread opposition from the adult entertainment community to a .XXX sTLD as it makes its decision. For that reason, I support Option # 3 of the March 26, 2010 process options submitted by ICANN for public comment.

"No to .XXX" Proponents

The remaining 11% of submissions supporting the denial of the .XXX sTLD Application made no reference to the process report that was the subject of the public comment period. These "No to .XXX" submissions had some common themes. The most common types of submissions in this category are:

- Concerns relating to proliferation of adult-oriented material on the Internet (including moral, legal, and "family" protection concerns);
- Single line submissions, such as "Do not create the .XXX domain," as stated at <http://forum.icann.org/lists/icm-options-report/msg01223.html>;
- Concerns that the .XXX sTLD could be used to stifle freedom of speech (<http://forum.icann.org/lists/icm-options-report/msg01493.html>; <http://forum.icann.org/lists/icm-options-report/msg01301.html>);
- Concerns that the adult entertainment industry does not support the creation of the .XXX and that ICM made false declarations of support from the industry in the initial application for the sTLD (<http://forum.icann.org/lists/icm-options-report/msg01491.html>; <http://forum.icann.org/lists/icm-options-report/msg01347.html>);
- Concerns that the .XXX sTLD is being proposed only for the prospect of financial gain to ICM (<http://forum.icann.org/lists/icm-options-report/msg01352.html>);

- Concerns regarding costs to trademark holders in a new sTLD (<http://forum.icann.org/lists/icm-options-report/msg01350.html>).

While the “No to .XXX” comments included many submissions that were not obvious templates, at least 65% of the “No to .XXX” comments were based on template language. The most common form language is identified below.

One type of submission restated all or part of a comment made by Patrick Trueman, at <http://forum.icann.org/lists/icm-options-report/msg00027.html>, and reposted on pornharms.com. While Mr. Trueman’s submission is quite lengthy, the most frequently restated portion of his comment contains the following language:

Neither ICANN nor the company urging the establishment of this new domain are arguing that the .XXX domain would clean up the .COM domain and require all pornographers to move to .XXX. The .COM domain is a cash cow for pornographers and they are not leaving it. ICANN has no enforcement powers to make them leave and thus clean up .COM. Pornographers would simply expand to .XXX and maintain their current .COM sites, perhaps doubling the number of porn sites and doubling their menace to society.

Another form example opposing the substance of the .XXX domain and not addressing the Process Report posted for public comment is likely to have originated from the Florida Family Association (http://florida-family.org/send_email_1.php). The text of that form is:

Subject: I Oppose the .XXX Domain

Dear Members of the Board of ICANN:

I am writing to urge you to kill the proposal of the .XXX domain. In addition to strong opposition from both sides of the argument, this new domain would only increase the amount of pornography available on the Web, easing accessibility to hard core pornography to minors and adults alike.

Pornography is a widespread, ever-growing crisis, polluting the minds of its viewers and negatively changing attitudes towards women and children.

Please do NOT participate in the destruction of marriages, the abuse of children, and the demise of our culture.

A more appropriate goal should be to STOP the distribution of this destructive material by prosecuting those responsible for it, not to protect pornography on the .XXX domain.

Again, please kill the proposal of the .XXX domain.

Submissions supporting Option 2 (Accept the findings of the majority in part)

ICANN identified one submission that supported Option 2 of the Process Report. The submission simply stated “I support Option #1 or #2 of the March 26, 2010 process options submitted by ICANN for public comment.” and did not contain any other analysis or discussion. See <http://forum.icann.org/lists/icm-options-report/msg12561.html>.

Analysis

While the .XXX Public Comment Forum received one of the highest – if not the highest – number of submissions in ICANN’s history, very few submissions provided substantive discussion regarding the Process Report posted for public comment. Some commenters noted that they were submitting their “vote,” focusing on achieving a mass of responses in favor of a desired outcome, instead of discussing the merits of the process necessary to achieve the desired outcome. As a result, there were very few comments actually calling for summarization or analysis outside of review for statistical information.⁸

⁸ Kieren McCarthy, ICANN’s former General Manager of Public Participation and Engagement, was retained by ICM to produce summary and analysis of the .XXX public comment period (the McCarthy Summary). The McCarthy Summary can be found at <http://forum.icann.org/lists/icm-options-report/msg13161.html>. Because ICANN staff was in the process of preparing its own evaluation of the .XXX public comment period when the McCarthy Summary was presented, in an effort to remain objective, staff assisting in the preparation of ICANN’s summary and analysis refrained from an in-depth reading of the McCarthy Summary prior to substantially completing ICANN’s summary and analysis.

Though there are some discrepancies in the reported numbers of submissions between ICANN’s Summary and the McCarthy Summary, a comparison of the reported percentages of responses demonstrate that the counts track very closely. Though McCarthy attempts to provide a geographic submission, ICANN did not track for that information as many commenters did not provide geographic identification. In addition, McCarthy never provides an overall statistic on comments in support of the various options without first “weighting” the responses.

The suggestion of “weighting” responses relying upon the reviewer’s judgment on the import of the person/entity providing the response is unique to the McCarthy Summary. Staff proceeded with an alternative and objective means of differentiation, evaluating the responsiveness of the comment to the Process Report posted for public comment. ICANN staff does not agree that an “objective” approach to a summary and analysis of public comment is properly focused only on stating the “clear preference” of persons already active within the ICANN community, as that would discourage others from engaging.

In the end, the McCarthy Summary and the ICANN Summary reach a similar conclusion – the commenters are polarized; they are either for or against the Board moving forward with the .XXX sTLD Application, with no middle ground.

Many of the commenters focused on the content of the proposed .XXX sTLD and voiced opinions (predominately against) the expansion of availability of adult content on the Internet, or discussed barriers to regulation of adult content.

As noted in the summary, many of the form comments – even those comments advocating for a Process Option – simply borrowed words from the Process Report and failed to provide any independent assessment to support the selected Option.

There were a few themes that arose among the commenters:

- Aside from one commenter, no person specifically advocated for the Board to adopt Option 2 – Accept the findings of the majority in part. ICM and others in favor of proceeding with the .XXX sTLD Application noted that a disregard of parts of the Majority decision would raise the same accountability issues as adopting the Dissent – it would demonstrate that ICANN believes that it is not required to abide by its accountability mechanisms.
- For those in favor of Option 1, or adopting the findings of the Majority, any of the commenters addressed ICANN’s accountability and transparency, and the need to adhere to the findings reached through the Independent Review Process.
- Those who identify as adult entertainment providers and/or a member of the sponsoring community to be served by the .XXX sTLD and who do not support proceeding with the .XXX sTLD Application repeatedly question the level of support ICM had at any point from the sponsoring community. There are many statements that ICM does *not* have support in the community, that the community does not want the .XXX sTLD, and asserting that any statements of community support based upon preregistration in the .XXX are false, as preregistration is only proof of the need for defensive registrations. Many of the commenters who challenged pre-registration as a demonstration of support also stated that they do not intend to use their pre-reserved .XXX sTLD domains.
- For those in favor of proceeding with the .XXX sTLD Application, many created an alternative option – that ICM and ICANN should proceed to a contract right away. There was substantial discussion on this point in the ICM submissions. Few commenters addressed the technical realities identified within the Process Report - that prompt execution of the agreement negotiated in 2007 is not feasible. To that end, the very few of the comments provided suggestion or guidance to the Board on how – if the Board adopts the findings of the Majority – it could proceed with consideration of the Application. Of the guidance provided:
 - The majority of the people addressing the application criteria that should apply agreed that the 2004 sTLD Application should remain applicable to ICM. Some questioned how ICM could retroactively be held to the new gTLD criteria.

- Very few commenters addressed the various steps of the decision trees presented other than to say that the Board should not engage in unnecessary procedure or undue delay in moving forward with the .XXX sTLD Application.
- A couple of commenters who do not agree with proceeding with the .XXX as an sTLD encouraged the applicability of the new gTLD standards to the Application in the event the Board elected to proceed with Option 1. Proceeding with the .XXX Application as a gTLD would remove some of the sponsoring community support concerns that have been at issue throughout the consideration of the .XXX sTLD Application.
- Those commenters against proceeding with the .XXX Application also noted that if ICANN adopts the findings of the Majority and applies the 2004 sTLD criteria, it would be appropriate to make ICM demonstrate that currently it meets all of the criteria, including support from the sponsored community.
- Only two commenters⁹ directly addressed the question of further interaction with the Governmental Advisory Committee (GAC) on the .XXX sTLD Application. Both of those commenters were against seeking any further input from the GAC outside of any public comment period. Neither of these commenters – nor any other – addressed the potential violation of the ICANN Bylaws that could result from the Board’s failure to properly consider the advice of the GAC in the Board’s further deliberations on the .XXX sTLD Application and how such a failure of consideration could impact the Board’s ability to implement any decision on the future of the .XXX sTLD Application.

Submissions from Self-Reported Members of the Adult Entertainment Industry

As noted in the Process Report, a key finding of the IRP Majority is that ICANN decided that ICM met the sponsorship criteria in 2005, and that the Board’s later reconsideration of that finding was not consistent with the application of documented policy. Of the commenters, approximately 320 provided a self-identification as a member of the adult entertainment industry (the proposed sponsoring community for the .XXX sTLD). ICANN received a compilation submission from ICM purporting to provide comments from another 240 self-identified members of the adult entertainment industry.¹⁰ Not including the ICM

⁹ See ICM’s comment at <http://forum.icann.org/lists/icm-options-report/msg12042.html> and the comment of Anriette Esterhuysen, Executive Director of the Association for Progressive Communications (APC), at <http://forum.icann.org/lists/icm-options-report/msg12098.html>.

¹⁰ ICANN has not attempted to verify any self-identification provided in the comments.

bulk submission, 95% of the industry members commenting were either in favor of Option 3 (accepting the findings of the dissent) or were against the creation of the .XXX sTLD. A common theme in the industry submissions opposed to the creation of the .XXX sTLD is that ICM never could demonstrate support from the sponsoring community, and ICANN was right to reject the .XXX sTLD Application and agreement in 2007.

The percentage of industry members supporting the adoption of the findings of the Majority and proceeding with the .XXX sTLD Application rises significantly when counting the 240 persons in ICM's compilation submission. With those 240 industry members, approximately 45% of the industry members commenting are in favor of Option 1 (up from 5%).

No other trends were noted based on the self-identification of commenters.

SUMMARY TABLE

A general statistical summary of submissions received is set out in the tables below:

Table 1: TOTAL Submissions received from 26 March 2010 -27 May 2010¹¹

Position	Submissions Received		Percentage of Submissions *		Webform/Standard Form Submissions		Self-Identified Adult Industry	
	W/ ICM	W/O ICM	W/ ICM	W/O ICM	W/ ICM	W/O ICM	W/ ICM	W/O ICM
Proceed with .XXX sTLD Application (With ICM Compilation)	716	216	5%	2%	658	158	255	15
Do not proceed with .XXX sTLD Application	12949	12949	95%	98%	12363	12363	305	305
No .XXX	1448	1448	11%	11%	948	948	36	36
Option 3	11501	11501	84%	87%	11415	11415	269	269
All, through 27 May 2010 (including ICM compilation, excluding identified errors and	13704	13204	100%	100%	13023	12523	560	320

¹¹ Though the .XXX sTLD Public Comment Forum was officially open only through 10 May 2010, staff provides statistical information on all comments received through 27 May 2010. After comparing the statistics on all comments and only those comments received by 10 May 2010, the percentages remain nearly the same, changing only in tenths of percentage points of difference between the comparative statistics.

* Rounded to nearest percentage point.

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NEXT STEPS

This summary will be presented to the Board for consideration of the possible process options at the ICANN's 38th International Meeting in Brussels.

CONTRIBUTORS

Due to the large volume of postings, a listing of individual contributors will not be included in this report. Each of the contributors can be viewed via their public comments posted at: <http://forum.icann.org/lists/icm-options-report/>.