

Delegation of the .XXX top-level domain

This report is being provided by the Internet Corporation for Assigned Names and Numbers (ICANN), under its contract with the United States Government for performance of the Internet Assigned Numbers Authority (IANA). Under the contract, the IANA function includes receiving delegation and redelegation requests concerning TLDs, investigating the circumstances pertinent to those requests, making its recommendations, and reporting actions undertaken in connection with processing such requests¹.

1 Factual and Procedural Background

There are several types of top-level domains (TLDs) within the Domain Name System (DNS), including TLDs with three or more characters referred to as “generic” TLDs, or “gTLDs.” These gTLDs can be subdivided into two types — “sponsored” TLDs (sTLDs) and “unsponsored” TLDs.

Generally speaking, an unsponsored TLD operates under policies established by the global Internet community directly through the ICANN process, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor thus carries out delegated policy-formulation responsibilities over many matters concerning the TLD.

As sponsor, an organization is delegated some defined ongoing policy-formulation authority regarding the manner in which a particular sponsored TLD is operated. The sponsored TLD has a charter that defines the purpose for which the sponsored TLD has been created and will be operated. The sponsor is responsible for developing policies on the delegated topics so that the TLD is operated for the benefit of a defined group of stakeholders known as the “sponsored TLD community” and who are most directly interested in the operation of the TLD. The sponsor is also responsible for selecting the registry operator and, to varying degrees, establishing the roles played by registrars and their relationship with the registry operator. The sponsor must exercise its delegated authority according to fairness standards and in a manner that is representative of the sponsored TLD community.

The extent to which policy-formulation responsibilities are appropriately delegated to a Sponsor depends upon the characteristics of the organization that may make such delegation appropriate. These characteristics may include the mechanisms the organization uses to formulate policies, its mission, its guarantees of independence from the registry operator and registrars, which individuals or entities will be permitted to participate in the Sponsor’s policy-development efforts and in what way, and the Sponsor’s degree and type of accountability to the sponsored TLD community.

2 The Sponsored TLD Application Process

On 26 June 2003, at the ICANN Board meeting in Montreal, the Board directed ICANN staff to invite public comment on a draft request for proposals for sTLDs posted on 24 June 2003, and in particular on the question whether the Request for Proposals (RFPs) should be limited

¹<http://www.icann.org/general/iana-contract-14aug06.pdf>, Section C.2.2.1.2

to applicants that had proposed sponsored TLDs in November 2000². The public comments are available at ICANN's website³.

In parallel with the public comments, the ICANN Board discussed at length the topic of how, and within what timeframe, ICANN should proceed with the creation of new gTLDs, including sTLDs. On 29 October 2003, ICANN's Generic Names Supporting Organisation (GNSO) called upon the Board to initiate a process for an interim round of sTLDs.

Following various community discussions, including input by experts and interested parties through the GNSO, and from users both directly and through the ICANN At-Large Advisory Committee (ALAC), on 31 October 2003, at its meeting in Carthage, Tunisia, the ICANN Board directed the ICANN President to finalize and post no later than 15 December 2003 an open RFP, not restricted to prior applicants, for a limited number of new sTLDs⁴. The final RFP was to be based on these conclusions and the comments received concerning the posted draft.

In response to this direction, on 15 December 2003, ICANN announced and released the request for proposals (RFP) for sTLDs. The RFP was divided into six parts⁵. The first part provided explanatory notes on the application and evaluation process, as well as on the type of information requested by ICANN. The remaining parts constituted the application itself.

The RFP's explanatory notes described the selection criteria, which were in brief:

- The technical standards included “evidence of ability to ensure stable registry operation,” “evidence of ability to ensure that the registry conforms with best practice technical standards for registry operations,” “evidence of a full range of registry services,” and “assurance of continuity of registry operation in the event of business failure of the proposed registry.”
- The business plan had to “demonstrate the applicant's methodology for introducing a new sTLD and the ability of the organization to implement a robust and appropriately resourced organization.” The financial model had to “outline the financial, technical and operational capabilities of the organization.”
- The sponsorship information had to include a “definition of sponsored TLD community,” “evidence of support from the Sponsoring Organization,” “appropriateness of the Sponsoring Organization and the policy formulation environment,” and “level of support from the Community.” In addition, the criteria of “community value” had to be demonstrated by the “addition of new value to the Internet name space,” protections for “the rights of others,” “assurance of charter-compliant registrations and avoidance of abusive registration practices,” “assurance of adequate dispute-resolution mechanisms,” and “provision of ICANN-policy compliant WHOIS service.”

ICANN received 10 applications for new sTLDs before close of the application period on 16 March 2004. Applications were received for the following 9 sTLD strings: .ASIA, .CAT, .JOBS, .MAIL, .MOBI, .POST, .TEL, .TRAVEL, and .XXX. Two different applicants submitted

²<http://www.icann.org/en/minutes/minutes-26jun03.htm>

³<http://forum.icann.org/mtg-cmts/stld-rfp-comments/general/index.html>

⁴<http://www.icann.org/en/announcements/advisory-31oct03.htm>, Resolutions 03.169–03.171.

⁵<http://www.icann.org/tlds/new-stld-rfp/new-stld-application-parta-15dec03.htm>

applications for .TEL. The public parts of the ten applications were posted on the ICANN website⁶ for public comment. The public comments received were posted at the same location.

An independent panel of experts with substantial knowledge of relevant technical, business/financial and policy areas was established to review and evaluate the applications. The internationally diverse panel was separated into three teams, with each one focused on technical, business/financial or policy areas. The teams began their work in May 2004 and completed their reports in July 2004. The independent review procedures ensured that all communications involving the evaluations were made through the Project Manager and as such, the review was blind between the teams and ICANN staff and between the teams and the applicants. The identity of the experts serving on the evaluation teams was confidential until conclusion of the evaluation process.

Each of the three review teams met six to eight times by teleconference. Each team posed a series of questions to applicants that sought clarification of points relevant to evaluation of the applications against the RFP criteria. Each team provided a separate report, assessing the information in the applications against the criteria — technical, business/financial and sponsorship/community value — that they were charged with evaluating.

In the case where an applicant passed all three sets of criteria and there were no other issues associated with the application, it proceeded to technical and commercial negotiations designed to establish a new sTLD.

In cases where an evaluation team indicated that a set of criteria was not met, or other issues had to be addressed, ICANN gave each applicant an opportunity to submit clarifying or additional documentation.

3 The .XXX Application

ICM Registry LLC (ICM), a private company, submitted a proposal in ICANN's 2000 Proof of Concept round, proposing two unsponsored gTLD strings: .KIDS and .XXX⁷. The evaluators in the Proof of Concept round recommended against the inclusion of either the .KIDS or the .XXX TLD strings in the Proof of Concept round⁸.

In December 2000, ICM, along with many other applicants in the Proof of Concept round, filed Reconsideration Requests with ICANN's Board regarding the outcome of the Proof of Concept Round. Part of ICM's Request discussed the lack of uniformity in the adult entertainment community, and raised concerns with the community-based issues raised by the Proof of Concept evaluators. The Reconsideration Committee's 2001 recommendation noted that a failure to be selected in the Proof of Concept round was not a reflection on the proposal, and did not reflect a rejection of that proposal.

In 2004, ICM submitted a proposal for .XXX as an sTLD string (as opposed to an unsponsored gTLD), after the sTLD application process was launched in December 2003. As an sTLD must have a sponsoring organization to oversee the policy development for the sTLD, ICM stated that the International Foundation for Online Responsibility, or the IFFOR, would serve in that role. The Sponsored Community was defined as “the responsible online adult-entertainment community.” The “online adult-entertainment community” is further defined

⁶<http://www.icann.org/tlds/stld-apps-19mar04/stld-public-comments.htm>

⁷<http://www.icann.org/en/tlds/kids3/>

⁸<http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm>

as those individuals, businesses, and entities that provide sexually-oriented information, services, or products intended for consenting adults or for the community itself.”

ICANN’s Independent Evaluation Panels reviewed the ICM application throughout 2004. As part of the Evaluation reports, in August 2004, ICANN received a report that ICM’s application failed the baseline sponsorship criteria of the sTLD process. Prior to issuing the report, the Independent Evaluation Panel provided a list of questions — focusing on sponsorship issues — to ICM and IFFOR, and ICM and IFFOR provided a joint response to those questions.

In April 2005, ICM provided a presentation on the proposed .XXX sTLD to the ICANN Board, and the Board continued having discussions on ICM’s meeting of the baseline criteria for a “sponsored community.”

On 1 June 2005, the ICANN Board authorized the ICANN President and General Counsel to enter into negotiations with ICM relating to the proposed commercial and technical terms of a Registry Agreement for the .XXX sTLD. The Agreement was to be presented to the Board for approval, as all ICANN gTLD Registry Agreements are.

In July 2005, ICANN’s Governmental Advisory Committee (GAC), in its Luxembourg Communiqué, invited ICANN to hold consultations on the implementation of new Top Level Domains, highlighting the significant public policy issues that arise with the introduction of new TLDs.

In August 2005, ICANN began receiving individual communications from governmental representatives — including the then-Chair of the GAC — noting concerns over the ICM application and stating that the Board should allow time for additional governmental concerns to be heard before reaching a final decision the proposed .XXX sTLD.

On 15 August 2005, ICM requested that the ICANN Board defer final approval of the ICM Registry Agreement and Application until a September 2005 meeting of the Board. The Board agreed to defer consideration until 15 September 2005. On 16 August 2005, the Agreement was posted for public comment⁹ and nearly 2000 comments were received.

ICANN then started receiving substantial communications both in support and against the creation of the .XXX sTLD. One of these communications was from the Free Speech Coalition; a trade association of the adult entertainment industry, stating the ICM distorts the support received from the adult entertainment industry. Throughout the consideration of ICM’s application ICANN would receive additional communications from other participants in the adult entertainment industry indicating that they no longer supported ICM or IFFOR’s ability to represent the sponsored community identified in ICM’s application.

At the 15 September 2005 meeting of the Board, the Board expressed concerns about the .XXX sTLD agreement and amount of correspondence received on the issue, and directed the President and General Counsel to discuss possible additional contractual provisions to address the Board’s concerns¹⁰. As requested in a September 2005 letter from member of the GAC reiterating points made in the Luxembourg Communiqué, the ICANN Board agreed to defer any Board decision on the ICM application until at least December 2005, to allow the GAC time to consider the issue further. ICANN also posted a status report on the sTLDs. ICANN continued receiving communications regarding the proposed .XXX sTLDs.

At the end of November 2005, the GAC held a meeting where both the ICANN Board and ICM made presentations on ICM’s application.

⁹<http://forum.icann.org/lists/xxx-comments/mail34.html>

¹⁰<http://www.icann.org/en/minutes/minutes-15sep05.htm>, Resolution 05.75

In March 2006, the GAC issued its Wellington Communiqué¹¹, noting that insufficient detail was provided by ICANN to support that the Independent Evaluator Team’s concerns regarding the failure to meet the sponsorship criteria had been met. The GAC also noted its opposition to the introduction of the .XXX sTLD.

After the receipt of the Wellington Communiqué, the Board requested a review of all publicly received inputs and to make recommendations to the Board regarding amendments to the proposed sTLD Registry Agreement to address the concerns raised¹².

In April 2006, a revised proposed sTLD Registry Agreement was posted for public comment¹³. 632 emails were received on the public comment forum.

On 10 May 2006, the Board voted against approval of the ICM sTLD Registry Agreement¹⁴. ICM then initiated a Request for Reconsideration of the denial, which was withdrawn prior to deliberation, in favor of submitting additional information to ICANN in support of ICM’s application. While the Reconsideration Request was pending – and without ICANN involvement or approval – ICM began pre-registration of .XXX domain names.

On 5 January 2007, another revised proposed sTLD Registry Agreement was posted for public comment¹⁵. Over 1,800 comments were received¹⁶.

The Board considered the revised sTLD Registry Agreement at its February 2007 meeting. ICM provided additional information for the Board just two days prior to the meeting. At the February meeting, the Board noted concerns over the amount of support from a sponsored community and whether ICM met these criteria of the sTLD process. The Board instructed staff to provide information, as well as the posting for public comment of additional revisions to the proposed sTLD Registry Agreement.

In March 2007, ICM provided a briefing to the Board and submitted additional material for the Board’s consideration on sponsorship issues.

After receiving notification from the Board that the .XXX sTLD Registry Agreement would be up for Board consideration again, the GAC produced the Lisbon Communiqué, reaffirming the GAC’s position against the introduction of the .XXX sTLD.

On 30 March 2007, the ICANN Board voted to reject the revised proposed sTLD Registry Agreement and deny ICM’s application for the .XXX sTLD, based in large part on ICM’s failure to meet the sponsored community criteria specified in the sTLD criteria.

On 6 June 2008, ICM filed a request for Independent Review of the Board’s action, initiating the Independent Review process pursuant to ICANN Bylaws¹⁷. The papers filed by ICM and ICANN are available online¹⁸.

The three-member Independent Review Panel held a five-day hearing from 21-25 September 2009 during which both parties submitted written and live testimony.

The Independent Review Panel issued its Declaration on 19 February 2010¹⁹.

On 12 March 2010, in accordance with the Bylaws, the Board considered the Panel’s Declaration. The Board noted, “*in the absence of the process for approving an sTLD six years following*

¹¹<http://www.icann.org/en/committees/gac/communique-28mar06.pdf>

¹²<http://www.icann.org/en/minutes/minutes-31mar06.htm>, Resolution 06.12.

¹³<http://forum.icann.org/lists/xxx-tld-agreement/mail11.html>

¹⁴<http://www.icann.org/en/minutes/minutes-10may06.htm>

¹⁵<http://www.icann.org/en/announcements/announcement-05jan07.htm>

¹⁶<http://forum.icann.org/lists/xxx-icm-agreement/mail31.html>

¹⁷<http://www.icann.org/en/general/bylaws.htm#IV>, Article IV, section 3

¹⁸<http://www.icann.org/en/irp/icm-v-icann.htm>

¹⁹<http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf>

*the receipt of the original application, the Board wishes to create a transparent set of process options which can be published for public comment.*²⁰

On 26 March 2010, a draft report and explanatory diagrams describing ICANN’s options following the IRP Declaration on ICM’s .XXX Application were posted for a 45-day public comment period²¹. ICANN received over 13,000 comments into the forum – the highest number of comments ever received on a single topic, though many of the comments did not address the substance of the process options document. The Board was provided with a summary and analysis of those comments for consideration of further action on the Panel’s Declaration²².

At its 25 June 2010 meeting in Brussels, the Board determined the process it would follow in considering the IRP Panel’s Declaration. Further, the Board resolved to “act in accordance with the following findings of the Independent Review Process Majority: (i) ‘the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria;’ and (ii) ‘the Board’s reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy.’”²³ Also on 25 June 2010, the Board directed “staff to conduct expedited due diligence to ensure that: (1) the ICM Application is still current; and (2) there have been no changes in ICM’s qualifications.”²⁴

ICANN staff conducted the expedited due diligence on ICM, which showed that the ICM Application remains current and that there have been no negative changes in ICM’s qualifications. ICM also provided ICANN with a new proposed registry agreement that included additional provisions, requirements and safeguards to address the issues that the GAC and other community members had raised with respect to the previously proposed agreement. ICM also provided other supporting information.

On 5 August 2010, the ICANN Board authorized staff to post for public comment ICM’s supporting due diligence materials and proposed registry agreement for the .XXX sTLD. The Board also directed staff, upon completion of the public comment period, to provide the Board with a summary and analysis of comments and recommend whether the proposed registry agreement is consistent with GAC advice on the proposed .XXX sTLD²⁵. The ICM materials were posted²⁶, and over 700 comments were received, and a summary and analysis of those comments was posted²⁷.

At the 28 October 2010 Board meeting, staff provided the Board with its recommendation as to whether the proposed registry agreement is consistent with GAC advice. Three areas where the approval of a registry agreement may be in conflict with GAC advice were identified, though the registry agreement otherwise appears to contain sufficient protections to address earlier stated concerns by the GAC. A chart of the identified areas of potential conflict was developed²⁸.

In December 2010, while in Cartagena, Colombia, the Board and the GAC met twice regarding a consultation over GAC advice. After these sessions, on 10 December 2010, the Board

²⁰<http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>

²¹<http://www.icann.org/en/public-comment/#icm-options-report>

²²<http://forum.icann.org/lists/icm-options-report/msg13297.html>

²³<http://www.icann.org/en/minutes/resolutions-25jun10-en.htm#5>

²⁴<http://www.icann.org/en/minutes/minutes-25jun10-en.htm>

²⁵<http://www.icann.org/en/minutes/minutes-05aug10-en.htm>

²⁶<http://www.icann.org/en/public-comment/#xxx-revised-icm-agreement>

²⁷<http://forum.icann.org/lists/xxx-revised-icm-agreement/msg00723.html>

²⁸<http://www.icann.org/en/tlds/agreements/xxx/icm-gac-advice-chart-28oct10-en.pdf>

noted its agreement with the staff's assessment of potential conflicts with GAC advice if the Board proceeds with its determination to enter a registry agreement with ICM Registry for the .XXX sTLD²⁹, and invoked the GAC consultation process as provided for in ICANN Bylaws section Article XI, Section 2, Paragraph 1(j)³⁰.

On 25 January 2011, the Board directed staff to provide the GAC with a document clearly setting out the Board's position on GAC advice for further GAC consultation³¹. The Board established that the Bylaws consultation on ICM, triggered in Cartagena, shall take place no later than Thursday, 17 March 2011³². The Board's position paper was sent on 11 February 2011³³.

ICANN held its 40th international public meeting in San Francisco in March 2011. During this meeting, on the 16th, the GAC submitted a letter to the Board clarifying GAC advice on the application for the .XXX sTLD. Noting that there were areas where the Board's entering into a registry agreement with ICM may not be consistent with GAC advice, the Board and the GAC held a formal consultation on the 17th. This consultation fulfilled the Bylaws requirement.

On 18 March 2011 the ICANN Board authorized ICANN to enter into a registry agreement with ICM for the operation of the .XXX sTLD. The Board identified that this decision was not consistent with GAC advice, and provided a detailed rationale, including the reasons that the Board differed from that advice³⁴.

On 31 March 2011, ICANN and ICM entered into a Sponsored TLD Registry Agreement for the operation of the .XXX sTLD³⁵. ICM also signed an Agreement and General Release, releasing all ICANN from potential claims that ICM may have had relating to ICANN's consideration of ICM's application.

On 7 April 2011, ICANN's Root Management Staff, in accordance with the IANA function contract, received an application for delegation of the .XXX domain.

4 Conclusion

In accordance with the aforementioned sponsored TLD process, ICANN has concluded that the .XXX sponsored top-level domain should be established and delegated to ICM Registry LLC. This conclusion was reached after an extensive process involving an open request for proposals involving several opportunities for public review and comment, evaluation by an independent panel of experts established as part of the sTLD application round, and an extended period of review by the ICANN Board and other parties. Subsequent to successful conclusion of the evaluation process, the Board approved a registry agreement for .XXX, which was executed on 31 March 2011.

²⁹<http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#4>

³⁰<http://www.icann.org/en/general/bylaws.htm#XI>

³¹<http://www.icann.org/en/minutes/resolutions-25jan11-en.htm>, Resolution 2011.01.25.28

³²*Ibid.*, Resolution 2011.01.25.29

³³<http://www.icann.org/en/correspondence/jeffrey-to-to-dryden-10feb11-en.pdf>

³⁴<http://www.icann.org/en/minutes/resolutions-18mar11-en.htm>

³⁵<http://www.icann.org/en/tlds/agreements/xxx/>