

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

In the Matter of the Independent Review Process:

ICM Registry, LLC,

Claimant,

v.

Internet Corporation For Assigned Names and
Numbers (“ICANN”),

Respondent.

CASE MANAGER: Carolina Cardenas

ICDR Case No. 50 117 T 00224 08

ICANN’S POST-HEARING BRIEF

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Pursuant to Article IV, Section 3 of the Bylaws for the Internet Corporation for Assigned Names and Numbers (“ICANN”), the International Centre for Dispute Resolution’s Rules as supplemented by ICANN’s Bylaws, and in reference to the Independent Review Panel hearing conducted on September 21, 2009 through September 25, 2009, and the Panel’s request following closing argument, ICANN hereby submits this Post-Hearing Brief.

INTRODUCTION

The purpose of the five-day hearing before this Panel was to present testimony and evidence relevant to the question of whether ICANN acted inconsistent with its Articles of Incorporation and Bylaws in considering the application of ICM Registry, LLC (“ICM”) for a .XXX sTLD. In its closing statement, ICANN addressed in detail ICM’s allegations relating to this question and identified the hearing testimony and exhibits refuting those allegations.¹ ICANN provided the Panel (and ICM) with Powerpoint slides carefully quoting from the hearing testimony and exhibits so that there would be no doubt that ICANN’s references to the evidence were accurate.² Given this, as well as the volumes of materials already presented to the Panel, ICANN will (as the Panel requested) limit this brief to reinforcing evidentiary issues addressed during ICANN’s closing statement, rather than to presenting a comprehensive review of the entire record and the testimony of the nine witnesses. ICANN will also address the evidence with respect to the seemingly contradictory testimony of J. Beckwith Burr and Dr. Paul Twomey. Finally, ICANN will respond to ICM counsel’s statements to the Panel at the close of the hearing regarding his belief that there were “two versions” of meeting minutes from ICANN’s September 15, 2005 Board meeting.

¹ IRP Hearing Transcript (“TR”) 1141:19-1200:19.

² ICANN Closing Statement Power Point Presentation, September 25, 2009.

I. Brief Summary Of The Relevant Evidence.

The evidence provided prior to and during the hearing in this matter is clear: the ICANN Board acted consistent with its Articles of Incorporation and Bylaws in considering ICM's application for a .XXX sTLD.

A. From The Outset, ICANN Gave ICM Many Opportunities To Cure The Sponsorship Deficiencies In Its .XXX Application.

There is no dispute that ICM's application for the .XXX sTLD was rejected by the independent sponsorship evaluation team in 2004 for failing to satisfy the sponsorship criteria contained in the sTLD Request for Proposal ("RFP").³ ICM's own witness, Dr. Liz Williams, confirmed that, in reviewing ICM's application, the sponsorship evaluation team found that the "extreme variability of definitions of what constitutes the content which defines this [proposed .XXX] community makes it difficult to establish which content and associated persons or services would be in or out of the community."⁴ Nor is there a dispute that, despite ICM's sponsorship deficiencies, the ICANN Board allowed ICM's application to proceed, allowed ICM to respond to the independent evaluation panel's report, and allowed ICM to give a live presentation to the ICANN Board.⁵

B. The June 1, 2005 Resolutions Did Not Approve The .XXX sTLD, But Instead Provided ICM With Another Opportunity To Satisfy The Sponsorship Criteria.

The evidence also is clear that the June 1, 2005 resolutions passed by the ICANN Board did not constitute an "irreversible finding" of some sort that ICM had satisfied the RFP's sponsorship criteria. First, the June 1, 2005 resolutions are unambiguous: they call for another

³ Hearing Exhibit 110 at p.113; TR 385:1-17 (Williams).

⁴ TR 386:3-12 (Williams).

⁵ TR 603:15-604:11 (Cerf).

vote by the Board *if* the ICANN Staff was able to negotiate a registry agreement with ICM.⁶

Second, three of the nine ICANN Board members who participated in the Board's telephonic meeting that day—Dr. Cerf, Dr. Twomey and Dr. Pisanty—each testified that the June 1, 2005 resolutions did not constitute approval of the selection criteria, but were instead intended to give ICM another opportunity to demonstrate that it could satisfy the sponsorship criteria through contract discussions and a proposed registry agreement.⁷

ICM's arguments to the contrary were not supported by the evidence, and, as Dr. Cerf testified, were to a large degree irrelevant because the ICANN Board under all circumstances had to vote on the proposal again (for final approval) after a registry agreement was proposed.⁸ And Dr. Cerf explained why the June 1, 2005 resolutions did not mention the sponsorship deficiencies in ICM's application: "There were many, many issues that we hoped would be resolved by entering into contract negotiations. Quite frankly, trying to incorporate them into this resolution ... would have been impossible and also inadvisable."⁹

⁶ Hearing Exhibit 120; TR 607:7-13 (Cerf) ("This resolution does not speak explicitly in any way to the question of sponsorship criteria. It speaks to authority to enter into negotiations. So I don't think that there is anything in this resolution that should necessarily imply that the board concluded anything about the sponsorship criteria.").

⁷ TR 599:13-22 (Cerf); 601:4-13 (Cerf) ("We were using the contract negotiations as a means of clarifying whether or not ... the sponsorship criteria could be or had been met or would be met, and that this was not a decision that all three of the criteria had been met."); 609:5-18 (Cerf) ("I believed that in the course of contract negotiation that ICM would have to characterize more accurately the community that they would serve, and I hoped that staff's negotiation would in fact reveal that and provide information to the board to make its final determination."); 845:4-846:8 (Twomey) ("And I voted in favor because I thought what was best for us was to go forward with the applicant for the negotiation terms, talk about the contract and give us more time to actually satisfy, see if we could satisfy the concerns around sponsorship."); 821:2-8 (Pisanty) ("The resolution of the board is let's move to contract language, let's move to contract negotiations to see if, when trying to put together the entire structure that to give this delegation of policy authority over .XXX, we can effectively verify that there is or is not a way to satisfy the sponsorship criterion.").

⁸ TR 628:10-18 (Cerf) ("I feel obligated to point out to you and to the panel that even if the sponsorship criterion had been met or had been judged to have been met, that this top level domain would not be adopted by the board unless and until it concluded that a satisfactory contract had been negotiated. So the emphasis on sponsorship criteria, while I think relevant, is not dispositive.")

⁹ TR 611:15-612:7 (Cerf).

ICM argued that Dr. Cerf conceded that the sponsorship issues had been resolved at a Governmental Advisory Committee (“GAC”) meeting shortly after this vote (although ICM submitted no evidence that it ever saw the GAC’s minutes much less relied on them). But Dr. Cerf and Dr. Twomey each testified that Dr. Cerf did not state to the GAC that ICM had satisfied the sponsorship selection criteria.¹⁰ More relevantly, the GAC’s minutes confirm that the .XXX issue was still very much open.¹¹

C. The Board Was Always Concerned With The Sponsorship Deficiencies In ICM’s Application, As ICM Was Well Aware.

The evidence demonstrates that the sponsorship shortcomings identified in ICM’s application were always a concern for the ICANN Board, and that ICM knew this. The sponsorship criteria were discussed at every Board meeting subsequent to the June 1, 2005 vote.¹² No Board member ever objected and argued the sponsorship issue had already been resolved in ICM’s favor.¹³ ICM knew sponsorship remained an open and controversial issue with respect to its application. For example, ICM continued to try to garner support from its proposed “community,” and Dr. Twomey and ICANN Staff members discussed sponsorship with ICM on a number of occasions throughout contract negotiations.¹⁴ The minutes of the

¹⁰ TR 616:1-4 (Cerf) (“These are not minutes that I had access to or had opportunity to read and opine on their accuracy but I don’t remember saying specifically that all three criteria had been met.”); 865:1-866:1 (Twomey).

¹¹ Hearing Exhibit 139 at p.5 (“Dr. Cerf invited GAC to comment in the context of the ICANN public comments process.”).

¹² TR 626:13-627:20 (Cerf); 848:10-851:16 (Twomey).

¹³ TR 609:19-610:7 (Cerf); 626:20-628:19 (Cerf).

¹⁴ TR 848:21-851:16 (Twomey) (“... the board members kept raising this issue in discussion so we raised it with counsel and with the proponents, ICM, on a pretty regular basis. ... It was always my view that they understood there was an ongoing question about sponsorship.”).

ICANN Board meetings, which were publicly posted on ICANN’s website, also made this point, repeatedly.¹⁵

Even if the Panel were to conclude that ICM did not learn until May 2006 that sponsorship was still being considered by the ICANN Board, as ICM now claims, this finding would not alter the outcome because ICM was provided numerous opportunities, after May 2006, to cure the sponsorship deficiencies. Yet, the record is clear that ICM never addressed the sponsorship concerns to the Board’s satisfaction. In fact, as ICM itself pointed out repeatedly during the hearing, ICM never changed the definition of the community it sought to represent—“responsible” adult-entertainment content providers—despite the Board’s concerns with this imprecise definition.¹⁶ Even with the addition of Appendix S to the proposed registry agreement, which was intended to address sponsorship issues, ICM never refined its community definition. And it was this constant, amorphous definition of the proposed community that raised sponsorship concerns from the time the independent evaluation panel reviewed ICM’s application in 2004, through virtually all of the ICANN Board meetings thereafter, to the eventual March 2007 resolution denying ICM’s application.¹⁷ Notably, during the hearing, ICM’s president, Stuart Lawley, still could not define what “responsible” meant in ICM’s application: “... I mean we were not proposing to be the arbiter of what constituted responsible.

¹⁵ Hearing Exhibit 119 (September 15, 2005 Minutes), Exhibit T (May 10, 2006 Minutes), Exhibit 199 (February 12, 2007 Minutes), and Exhibit 121 (March 30, 2007 Adopted Board Resolutions).

¹⁶ TR 484:7-10 (Burr) (“That was the definition in the first contract, in the second contract, in the third contract, in the fourth contract and in the fifth contract.”); 486:3-5 (Burr) (“[T]he definition of sponsored community never changed? Never.”); 1109:17-18 (ICM Closing Argument) (“Did the definition change? No.”).

¹⁷ TR 634:7-635:8 (Cerf); 608:3-609:4 (Cerf); 647:19-650:9 (Cerf); 890:11-891:1 (Twomey); 821:15-822:20 (Pisanty); Exhibit 201.

The .XXX domain was meant just to allow members of the community to indicate to the world that they felt they were behaving responsibly.”¹⁸

D. ICANN Did Not Violate Its Bylaws Or Articles Of Incorporation By Listening To The Concerns Voiced By Interested Governments.

ICM went to great lengths to criticize the GAC as well as the multitude of governments, including the U.S. government, that voiced their concerns regarding the proposed .XXX sTLD or the process ICANN used to review ICM’s application. But ICM’s challenge ignores ICANN’s own Bylaws, which require the Board to listen to and consider the GAC’s views on matters of public policy, which is exactly what the Board did.¹⁹

ICM argued that ICANN’s Dr. Twomey “solicited” a letter from the GAC chairman, Sharil Tarmizi, as “cover” for opposition being lodged by the U.S. government. But Dr. Twomey testified to the contrary and explained that he merely told the GAC chairman that, if the GAC was going to comment on the .XXX proposal, the GAC should do so in writing, per ICANN’s policies.²⁰

Similarly, there is no evidence to support ICM’s claim that ICANN “hid” on its website a letter from the U.S. government,²¹ while prominently displaying Mr. Tarmizi’s letter.²² As

¹⁸ TR 323:10-19 (Lawley); 340:13-341:17 (Lawley) (“...We weren’t defining responsible...”); 350:5-351:2 (Lawley).

¹⁹ Hearing Exhibit 5 at p.24 (ICANN Bylaws, Article XI, § 2(j)) (“the advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account”); TR 652:4-21 (Cerf) (“Implicit in everything that ICANN does is responsiveness to public policy issues raised by the GAC. And as I pointed out earlier, we are obligated to respond to the GAC, to any recommendations they make or observations they make, particularly if we choose to ignore or reject their advice.”); 861:21-863:3 (Twomey).

²⁰ TR 859:13-861:20 (Twomey); *id.* at 861:10-18 (“And I said, well, if you’ve got these concerns, rather than you raising them with me, you probably need to write a letter so that it was communicated to the board. So I think we had a comment and I think I should have shared it with Ms. Burr that evening. It certainly was not asking for cover. My concern - - I’m quite open about it - - was that people followed the process. It was the process steps that obviously concerned me, that this was an issue related to a TLD application, it should go through the GAC process.”); 852:12-857:3 (Twomey).

²¹ Hearing Exhibit 162.

²² Hearing Exhibit 163.

Dr. Twomey testified, communications from the GAC are normally posted prominently on the ICANN website, while communications from the U.S. government are typically posted on the correspondence page, as was the case here.²³ In all events, the location of the posting of a letter on the ICANN website could hardly be a violation of ICANN’s Articles of Incorporation or Bylaws.

Finally, ICM’s assertion that the GAC’s comments on the .XXX proposal were “untimely” was not supported by the evidence, as ICM essentially conceded during closing argument in response to a question from the Panel.²⁴ The evidence established that the GAC’s comments on the .XXX proposal were about as timely as comments from an organization representing almost 200 governments can be.²⁵ And while it was clear that the GAC had concerns—as expressed both in 2006 and 2007—the evidence demonstrated that the ICANN Board’s denial of ICM’s application was not due to “pressure” from the GAC or any government, but was due instead to a myriad of concerns with ICM’s submission, many of which had been present from the very outset.²⁶

E. ICM’s Application Was Denied Due To Sponsorship Shortcomings And Defects In The Proposed Registry Agreements.

There is no dispute that a number of governments, as well as members of the adult-entertainment industry, opposed the .XXX proposal.²⁷ But even more problematic for ICM’s

²³ TR 919:5-14 (Twomey).

²⁴ TR 1208:16-1214:16 (ICM Closing Argument) (“...can GAC come in later on and say, yes, we’re concerned and we want to reflect our views? Absolutely.”)

²⁵ TR 732:17-733:15 (Cerf); 875:16-876:14 (Twomey); 877:9-20 (Twomey).

²⁶ Hearing Exhibit 210 (describing Board members reasons for voting to deny ICM’s application); TR 636:13-637:5 (Cerf); 903:6-904:1 (Twomey); 824:14-18 (Pisanty).

²⁷ See, e.g., Hearing Exhibit 181 at p.4 (Wellington Communiqué: “[S]everal members of the GAC are emphatically opposed from a public policy perspective to the introduction of a .XXX sTLD.”); Exhibit I69 (Letter from Taiwan (Chinese-Taipei) government); Exhibit DJ (Letter from Canadian government); Exhibit S (Letter from Free Speech Coalition); Exhibit AT (Letter from Larry Flynt); Exhibit AV (Letter from Private Media Group); Exhibit AU (Letter from Wicked Pictures).

application were the terms of ICM's proposed registry agreements. ICM's proposed registry agreements included provisions that the ICANN Board did not believe ICM could enforce.²⁸ For example, ICM proposed to monitor all .XXX content to ensure that it was "responsible," but ICM never demonstrated how it could effectively do this, much less how ICM would define what was "responsible."²⁹ Indeed, ICM never provided the ICANN Board with sufficient information regarding its "sponsoring organization," IFFOR, which was going to be tasked with monitoring the content on the proposed .XXX sTLD.³⁰ As Dr. Twomey testified, "in the whole history of dealing with this application, I never once met anyone who said 'I'm from IFFOR, I'm going to be involved with IFFOR, I'm going to be on the council for IFFOR.'"³¹ This uncertainty led the ICANN Board to conclude that there was a distinct possibility that ICANN would be called on to monitor the .XXX content itself, which would have required ICANN to exceed its technical mandate.³² As Dr. Cerf testified: "...monitoring all of the potentially irresponsible behaviors of members seemed to be extremely difficult, to say the least. And one of the biggest concerns that I had as a board member was what happens if this particular operator is unable to undertake

²⁸ TR 881:14-886:13 (Twomey); 889:8-892:11 (Twomey); 893:13-896:1 (Twomey); 761:10-762:4 (Cerf); Hearing Exhibit 121.

²⁹ TR 229:19-230:6 (Mueller); 768:9-769:19 (Cerf) ("... somebody has to create and monitor all of the [potentially irresponsible] activities of the members. The question is whether or not the proposed organization was capable of doing that. I concluded that it was not possible to do that....").

³⁰ TR 765:3-19 (Cerf) ("...there were organizations like the IFFOR which had not yet been populated and whose terms and conditions had not been specified ... It's just that we didn't know who would be involved and what their proscriptions would be. So in the end, we still had a contract with a lot of open questions to it. And four years roughly into the process."); 967:4-6 (Twomey) ("Of course, we did not yet know who IFFOR were, nor had IFFOR been found to know what their policies were."); 850:19-851:16 (Twomey); 967:12-22 (Twomey); 968:1-969:7 (Twomey).

³¹ TR 974:3-8 (Twomey); Hearing Exhibit DK (December 14, 2006 Letter from Stuart Lawley stating: "... I am unable to tell you at this time precisely who will be on the IFFOR Board."). And while ICM's witness Ms. Burr testified on direct examination that ICM had identified IFFOR Board members, during cross-examination she conceded that ICM had identified only "intended" IFFOR Board members and did not permit the ICANN Board to discuss those names publicly. TR 1058:11-1064:6 (Burr).

³² TR 764:9-20 (Cerf) ("I believed that this [final] contract that you just handed me would not be adequately enforceable and that ICANN itself would wind up having to deal with issues arising from the .XXX top level domain."); 885:3-886:13 (Twomey).

successfully the obligations that are proposed, then those obligations will then fall to ICANN to cope with because ICANN's responsible ultimately for all the top-level domains."³³

F. The ICANN Board Treated ICM Fairly And Equitably, In An Open And Transparent Manner, Consistent With ICANN's Bylaws and Articles.

ICM claims that it was treated differently than other applicants, but the evidence demonstrates that ICANN's Board spent more time and energy on ICM's application than any other sTLD application, and that ICANN provided ICM with multiple opportunities to attempt to satisfy the RFP criteria and to conclude a registry agreement.³⁴ But ICM's proposal was, by far, the most controversial sTLD proposal and the most difficult to try to implement via a registry agreement, which could not possibly have surprised ICM in view of the proposed community ICM sought to represent and the content ICM sought to monitor. On this point, Dr. Cerf testified as follows:

"I guess that I would point out that variations in this particular case arose from two different things. The first one is that the sponsorship criterion was not met at the outset and the board agreed to pursue the matter anyway. Maybe that was a mistake. Second, when we get down into the details of contract negotiation, it is not surprising that every single top level domain has varying requirements and they show up as part of the contract negotiations. So I don't think you can argue successfully - - well, that's up to the panel. I would not believe that you could argue successfully because there were variations in the treatment of contracts, that there have - - there was some unfairness or some singling out of this particular top level domain. Every one of the contracts had its own variations in terms and conditions. And that's been true generally since we started introducing any new top-level domains."³⁵

Throughout this entire time period, ICANN acted in a fully open and transparent manner.

ICANN posted all correspondence and proposed agreements on its website; at every turn, ICM

³³ TR 769:4-19 (Cerf).

³⁴ TR 792:17-793:6 (Cerf); 892:18-893:12 (Twomey); 904:8-905:1 (Twomey); 824:19-825:3 (Pisanty).

³⁵ TR 777:19-778:16 (Cerf). Similarly, Dr. Twomey explained that what made the .XXX registry agreement language different from other top level domains was the fact ICM, not ICANN, continued to propose terms that would be difficult, if not impossible, to satisfy in an effort to appease the concerns of a number of different governments and Internet stakeholders. TR 893:13-895:14 (Twomey).

was alerted to the concerns regarding its application and proposed registry agreements; and ICM always was given an opportunity to address those concerns. Indeed, a review of the transcript of ICANN Board's March 30, 2007 meeting demonstrates that each Board member who voted against ICM's application did so for reasons that had been evident to ICM for quite some time.³⁶ In short, in considering ICM's application, ICANN's Board acted fully consistent with its Articles of Incorporation and its Bylaws.

II. Each Of The Allegations Ms. Burr Directed At Dr. Twomey Were Rebutted By Dr. Twomey Or By Ms. Burr's Own Testimony.

During the hearing, ICM's attorney, Ms. Burr, leveled a number of accusations at Dr. Twomey in an effort to support her theory that Dr. Twomey orchestrated a "charade" aimed at undercutting ICM's application.³⁷ During ICM's rebuttal case, Ms. Burr again challenged Dr. Twomey's testimony with respect to Dr. Twomey's statement that ICM had "lifted" the GAC's public policy statements and pasted them in ICM's proposed registry agreements in an attempt to dispel the GAC's concerns.³⁸

Dr. Twomey responded to and rebutted each of Mr. Burr's personal attacks with clear and consistent testimony. And Ms. Burr's rebuttal testimony regarding the language placed in ICM's proposed registry agreements was completely contradicted by Ms. Burr's own testimony during her first appearance in ICM's case-in-chief.

As already discussed, Dr. Twomey testified that Ms. Burr's allegation that Dr. Twomey requested a letter from the GAC's chairman Sharil Tarmizi as "cover" for a letter from the U.S.

³⁶ Hearing Exhibit 201.

³⁷ TR 444:1-446:2; 469:1-9; 469:19-473:20 (Burr).

³⁸ TR 881:14-22 (Twomey) ("They basically just lifted public policy issues related out here, and put them in as things that they would find."); TR 1037:17-1042:10 (Burr).

Department of Commerce was a “misinterpretation” Dr. Twomey’s statements.³⁹ Dr. Twomey did not request a letter from the GAC or anyone else as “cover” for comments made by the U.S. government, as Ms. Burr alleged.⁴⁰ Similarly, Dr. Twomey explained that he never believed that the U.S. government would refuse to add .XXX to the root if ICANN eventually approved ICM’s application.⁴¹ Ms. Burr, as a former senior member of the Department of Commerce, surely understood the politics of the situation.⁴²

Likewise, Ms. Burr’s claim that Dr. Twomey mischaracterized a May 9, 2006 letter from Martin Boyle, the UK representative to the GAC, in an effort to confuse ICANN Board members on the .XXX issue was not only belied by Dr. Twomey’s statements in the ICANN meeting minutes, but also by the fact that each ICANN Board member had access to Mr. Boyle’s letter, which clearly articulated the UK’s concerns.⁴³

Ms. Burr’s most salacious claim—that Dr. Twomey engineered a “charade” to kill the .XXX proposal in order to score points with the Australian government, specifically, Minister Coonan—turned out to be as outrageous as it sounds.⁴⁴ In his testimony, Dr. Twomey made clear that he has no intention of seeking a position with the Australian government, and that he barely knew Ms. Coonan.⁴⁵ But more importantly, Dr. Twomey testified that he would not have violated his fiduciary duties to ICANN in the hope of landing a future job with the Australian government:

³⁹ TR 859:13-860:8 (Twomey).

⁴⁰ TR 860:9-861:20 (Twomey).

⁴¹ TR 868:3-871:17 (Twomey).

⁴² TR 404:17-405:15 (Burr).

⁴³ TR 886:14-889:7; *compare* Hearing Exhibit 182 (5/9/2006 Letter from M. Boyle to V. Cerf) *with* Hearing Exhibit T (Minutes of May 10, 2006 ICANN Board Meeting).

⁴⁴ TR 469:19-473:20 (Burr).

⁴⁵ TR 836:20-837:18 (Twomey).

“I was not particularly sensitive to any criticism from the Australian government more than I was to any other government. And as I said before, I come from the tradition of the Westminster system where the civil servant is charged to give frank and fearless advice. I very strongly feel that my responsibilities are to the bylaws of ICANN and to serving the ICANN community. Any thought that somehow or other some pressure by somebody in Australia was going to have an influence on my performing that role I find both ludicrous and insulting.”⁴⁶

Finally, in ICM’s rebuttal case, Ms. Burr took issue with Dr. Twomey’s testimony that ICM “lifted” language from the GAC’s 2006 Wellington Communiqué and placed it into ICM’s proposed registry agreement.⁴⁷ This, however, is precisely what Ms. Burr testified to when she testified in ICM’s case-in-chief:

“I took that – this Communiqué and I also took the letter from the Department of Commerce, and I went through the 19th of March [2006] agreement and I added – I didn’t change anything substantively, but I added a lot of text and specificity. And the point was to enable ICANN to point to the contract and say, okay, Government Advisory Committee, you advised us to do this. Here’s where we did it in the contract. And go down the line and cover every point in the GAC communiqué and also every point in the Department of Commerce letter.”⁴⁸

Given this earlier testimony, Ms. Burr eventually conceded on cross-examination that during her rebuttal testimony she had focused on the wrong period of time and ultimately agreed with Dr. Twomey that ICM did import language from the Wellington Communiqué in a 2006 version of the proposed registry agreement.⁴⁹

After conceding her mistake, however, Ms. Burr’s advocacy again emerged, and she testified that the proposed registry agreement before the Board in March 2007 “was completely different [from the registry agreement created after the 2006 Wellington Communiqué] and it was sourced from Esme,” ICANN’s outside counsel.⁵⁰ But on this point too, Ms. Burr is

⁴⁶ TR 931:9-932:17 (Twomey).

⁴⁷ TR 881:14-884:16 (Twomey).

⁴⁸ TR 453:1-454:15 (Burr).

⁴⁹ TR 1055:14-1058:10 (Burr).

⁵⁰ TR 1058:7-10 (Burr).

contradicted by the testimony she gave in ICM's case-in-chief. In her original testimony, Ms. Burr testified that, in connection with the 2007 registry agreements, she provided ICANN's outside counsel with a list of the terms that ICM wanted in the revised registry agreement and that ICANN's outside counsel drafted a revised Appendix S-8 from Ms. Burr's list.⁵¹

III. ICM's Counsel Misstated The Evidence At The Close Of The Hearing.

In his final statements to the Panel, ICM's counsel, Mr. Ali, asked the Panel to compare what Mr. Ali referred to as "two versions of the Board minutes" from the September 15, 2005 ICANN Board meeting.⁵² Mr. Ali stated that one version of the minutes was posted immediately after the September 15 meeting and did not contain any reference to sponsorship, whereas another version of the September 15 minutes, posted later, included a reference to the sponsorship criteria.⁵³ Mr. Ali found this to be "very strange" and "bothersome"—intimating that ICANN had included a discussion of sponsorship in the meeting minutes after the fact.⁵⁴

Mr. Ali actually was referring to two completely different documents—first, the Preliminary Report of the Board Meeting,⁵⁵ and second, the approved Meeting Minutes⁵⁶ from the September 15, 2005 Board meeting. ICANN's Preliminary Reports—typically posted immediately after a Board meeting but before the Board has had an opportunity to approve the complete set of Meeting Minutes—only include a listing of the resolutions considered at a given

⁵¹ TR 462:18-465:2 (Burr) ("I went through every document that had been identified as a relevant document and made a list. And this document in the application ICM committed to do X, Y, and Z. And in this ICM committed to do X, Y, and Z. Obviously there was overlap because they were committing to do the same thing. I provided that list to ICANN's outside counsel and ICANN's outside counsel took that list and created sort of appendix 8...So what we did was we took every single commitment that was contained in any of the documents, and listed them. That was included in the contract. And – you know, we wanted to make sure that it was as easy as possible for ICANN to convey to the Government Advisory Committee that it had heard their concerns and responded to their concerns.").

⁵² TR 1230:14-1231:20 (ICM Closing Statement).

⁵³ *Id.*

⁵⁴ TR 1230:21-1231:16 (ICM Closing Statement).

⁵⁵ Hearing Exhibit 272.

⁵⁶ Hearing Exhibit 119.

meeting, if any. Indeed, Dr. Cerf testified that the Preliminary Reports were intended to show merely “what resolutions were treated and what their outcomes were.”⁵⁷ ICANN Meeting Minutes, on the other hand, contain a more complete description of the Board’s discussion during a meeting.

A comparison of these two documents reveals that the Preliminary Report does not include reference to Board’s discussions on any of the matters that the Board discussed on September 15. For example, during the September 15 Meeting, the Board voted to approve the registry agreement for .CAT. The Preliminary Report provides only the adopted resolution.⁵⁸ The approved Meeting Minutes for the September 15 meeting, however, include a summary of what the Board discussed with respect to the .CAT application.⁵⁹ Accordingly, it is not “very strange” or “bothersome” that the September 15 Preliminary Report did not mention the Board’s “lengthy discussion” regarding ICM’s application and, specifically, the sponsorship criteria. As is customary, a description of these discussions were included in the September 15 Meeting Minutes.⁶⁰

CONCLUSION

The five-day hearing in this matter culminated with ICANN’s closing statement, during which ICANN carefully refuted ICM’s allegations with specific reference to the hearing transcript. The evidence presented in this Post-Hearing Brief confirms that the allegations leveled by Ms. Burr against Dr. Twomey are without merit, that ICM counsel’s reference to “two

⁵⁷ TR 726:19-727:5 (Cerf).

⁵⁸ Hearing Exhibit 272.

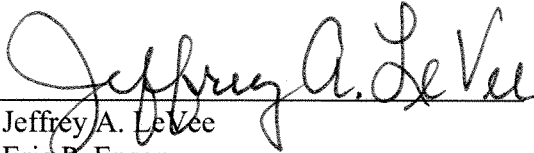
⁵⁹ Hearing Exhibit 119 (“After a detailed discussion of the sponsored top-level domain application criteria and after a detailed discussion regarding the terms of the proposed agreement [the Board voted to approve the proposed agreement for .CAT].”).

⁶⁰ Hearing Exhibit 119 (“After a lengthy discussion involving nearly all of the directors regarding the sponsorship criteria, the application and additional supplemental materials, and the specific terms of the proposed agreement, a resolution was put on the table [regarding .XXX].”).

versions of the Board minutes” from the September 15, 2005 ICANN Board meeting was inaccurate, and that all of the testimony presented during this first Independent Review Process hearing further reinforces ICANN’s position: ICANN’s Board treated ICM fairly and equitably and did so in an open and transparent manner. ICANN respectfully requests that the Panel issue a declaration finding that ICANN acted consistent with its Articles of Incorporation and Bylaws in its consideration of ICM’s application for a .XXX sTLD.

Respectfully submitted,

Dated: October 13, 2009

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