

ICM REGISTRY, LLC

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

ICDR CASE No. 50 117 T 00224 08

APPENDIX A: POST-HEARING EVIDENTIARY CHART

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

