

**IN THE MATTER OF  
AN INDEPENDENT REVIEW PROCESS  
BEFORE THE  
INTERNATIONAL CENTRE FOR  
DISPUTE RESOLUTION**

ICM REGISTRY, LLC	)	
	)	
Claimant	)	
	)	
v.	)	ICDR Case No. 50 117 T 00224 08
	)	
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS	)	
	)	
Respondent	)	

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**WITNESS STATEMENT OF ELIZABETH WILLIAMS**

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**I. Background**

1. My full name is Elizabeth A. Williams. I am an international affairs specialist and management consultant; my clients include global regulatory agencies, national governments, technology entrepreneurs, large corporations, and non-profit organisations. I have a Ph.D in Information Technology and Law from Queensland University of Technology, an MA in Communications from the University of Canberra, and a BA in International Relations from

the Australian National University.<sup>1</sup>

2. On three separate occasions, I have been retained by ICANN to provide advice to the CEO and senior management team with regard to the development and implementation of ICANN policy; and, more recently, have been involved in ICANN's Business Constituency and Nominating Committee. My first two positions both related to ICANN's selection of new sponsored Top Level Domains ("sTLDs"), formally initiated by ICANN's December 2003 Request for Proposals, in response to which applications were submitted in March 2004 ("2004 round"). First, I was retained to design and implement the technical functionality of the online application system for use in the 2004 round of sTLD applications. Second, I was the Chair of the Sponsorship and Other Issues Evaluation Team ("Sponsorship Team"), which was one of the teams responsible for making recommendations to the ICANN Board about the sTLD applications. My third advisory position with ICANN was that of Senior Policy Counselor, where I had a lead role in the policy development process for ICANN's upcoming 2009 round of applications for TLDs and was the primary author of the Generic Names Supporting Organisation New TLDs Committee's Final Report. I was involved in the policy development process until 2007, but am no longer involved now that the programme is moving into the implementation phase. I have never been a part of the ICANN staff, but have always worked for ICANN as a contractor. In 2008, as a member of the Business Constituency, I was elected to the ICANN Nominating Committee. The Nominating Committee appoints Board members and also makes appointments to an array of other leadership positions within ICANN. Members of the

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<sup>1</sup> My full curriculum vitae is attached as Williams Exh. 1.

Nominating Committee serve as volunteers, without compensation other than the reimbursement of certain expenses.

3. I was acquainted with Dr. Paul Twomey, ICANN's current CEO, before I began my work with ICANN, and during my involvement with ICANN we had a close working relationship. We spoke often about events and developments at ICANN, and as a result I have knowledge of his experiences and opinions on a number of issues, including the 2004 round.

4. Although the Sponsorship Team recommended that the ICANN Board reject the .XXX application, as I discuss below, we did so applying the criteria on an equal basis to all of the applicants. I feel that the Board did not act properly or consistently in ultimately rejecting ICM's application. The Board accepted several other applications that the Sponsorship Team also recommended be rejected, for basically the same reasons we recommended that ICM's application be rejected. Having accepted these other applications, the Board should not have rejected ICM's application. As all of the other accepted applications ultimately resulted in signed registry agreements, ICM's application should also have resulted in an agreement, on the same or similar terms.

## **II. Development of the Selection Criteria for the RFP Initiating the 2004 Round**

5. I was already involved with ICANN, in my first role in the development of the technical aspects of the application process, during the time that ICANN was discussing and creating the criteria for the selection of sTLDs in the 2004 round. Although the criteria were objective, they were underspecified in several respects, and little guidance was given to the evaluators to help them to interpret the criteria. Nor was sufficient attention paid to what process the ICANN Board should follow in the event that it became the final adjudicator of the

applications because the evaluation teams and the ICANN staff were unable to make a decision or made a decision with which the Board disagreed.

6. The criteria also failed to address a number of important matters, many of which could have been anticipated to arise, such as the issue of adult content. Those involved in the development of the selection criteria for the 2004 round were well aware of the possibility that an application for a “.XXX”, “.SEX”, or other adult content strings might be forthcoming. In fact, in the 2000 “proof of concept” round of TLD applications, several applicants had applied for “.SEX” and/or “.XXX.” Even before these applications were submitted, ICANN was aware that a TLD application targeted at adult content was a possibility; in fact, the possibility was discussed at the ICANN meetings in Yokohama, Japan, in July 2000, in which I took part, where the Board introduced the “proof of concept” round.<sup>2</sup> Moreover, the prevalence of adult content on the Internet, which is by no means a hidden secret, made it likely that someone would apply for such a string.

7. It was also obvious from the 2000 “proof of concept” round that an application for an adult content string would be controversial from a public relations standpoint. In the evaluation of the .XXX application from the 2000 round, ICANN had already noted that there was a “degree of controversy [] surround[ing]” the application.<sup>3</sup> ICANN could have, and should have, anticipated that someone would apply for an adult content sTLD, and that the application,

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<sup>2</sup> ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains, 13 June 2000, available at <http://www.icann.org/en/meetings/yokohama/new-tld-topic.htm> (attached as Williams Exh. 2).

<sup>3</sup> ICANN, Report on New TLD Applications, Section III.B.1.c—Restricted Content Group, 9 Nov. 2000, available at <http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm> (attached as Williams Exh. 3).

however well prepared, would be controversial. This point would have been well understood by Dr. Twomey, who was the Chairman of the Governmental Advisory Committee (“GAC”) in 2000. And because of his connection with the GAC and with the Australian government, he would certainly have been aware that some governments might react unfavorably. ICANN therefore had an opportunity to create criteria or procedures to address and resolve these concerns, or to include statements in the RFP or related materials that applications raising such concerns would be subjected to increased scrutiny. Nonetheless, the final criteria were completely silent on the subject of adult content, or morality or offensive content generally, and the related public relations controversy.

8. The final criteria that were established for the 2004 round were divided into three main topics: technical, business and financial, and sponsorship and other issues.<sup>4</sup> In addition to establishing the substantive criteria for evaluating applications, ICANN also created a process for all evaluations of the applications. The process, as initially envisioned, called for the establishment of three independent evaluation teams, one for each of the three sets of criteria. Each team was to be composed of experts with substantial knowledge and experience in the relevant areas. These teams would review each application for compliance with the selection criteria, and then provide the ICANN Board of Directors with a report of their conclusions and recommendations on how to proceed. The Board would then make the final determinations about the applications, based on the evaluators’ recommendations and advice from senior ICANN staff (such as Kurt Pritz, who was then Vice President of Business Operations, and John

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<sup>4</sup> ICANN, Request for Proposals for New Sponsored Top-Level Domains, 15 Dec. 2003, available at <http://www.icann.org/tlds/new-stld-rfp/new-stld-application-part1-15dec03.htm> (“New sTLD RFP”) (attached as Williams Exh. 4).

Jeffrey, who was ICANN's General Counsel). As the process was explained to me, after the Board approved an application, it would negotiate specific contract terms with the applicant, execute the final registry agreement, and enter the new string into the root.

9. The evaluators were to remain anonymous until the evaluation process was completed. Miriam Sapiro, of Summit Strategies International, was responsible for coordinating the overall process and communicating with the applicants without revealing the identity of the evaluators. In May 2004, I was selected to serve as the Chair of the Sponsorship Team. The other two members were Daniel Weitzner and Pierre Ouedraogo. Mr Weitzner, a lawyer, had both legal and technical expertise. He served as Policy Director of the World Wide Web Consortium's Technology and Society activities, where he was involved in the development of technical standards relating to social, legal, and public policy challenges. The World Wide Web Consortium is an international consortium where member organisations, staff, and the public collaborate to develop open standards for Internet technology, languages, protocols, and software, to ensure compatibility and interoperability. Mr. Ouedraogo was the Information Society Project Manager at the Francophone Institute for Information and Learning New Technologies, a subsidiary unit of the Agence intergouvernementale de la Francophonie (now called the Organisation internationale de la Francophonie) which focuses on promoting the development of information technology in French-speaking states and the participation of those states in the international endeavors related to information technology. Mr. Ouedraogo's background is in internet governance, human resource development, and the use of information technology to promote economic development. The three of us began our review the third week of May 2004, and we planned to complete our report in about six weeks.

### **III. Applications and Evaluations**

#### **A. Ten Applications are Submitted**

10. ICANN received 10 sTLD applications, for the strings “.ASIA,” “.CAT,” “.JOBS,” “.MAIL,” “.MOBI,” “.POST,” two different versions of “.TEL,” “.TRAVEL,” and “.XXX.” .ASIA was to “serve the Pan-Asia and Asia Pacific community” by offering a regionally dedicated domain to promote stronger global competition “among Asia and Asia Pacific corporations, economies, and people.”<sup>5</sup> .CAT was requested to serve the “Catalan Linguistic and Cultural Community”, that is, “those identifying themselves and/or their activities with the promotion of those areas in the Internet.”<sup>6</sup> .JOBS was proposed for the “benefit of the international human resource management community,” ostensibly to allow the registration of employers based on applications submitted by their human resource manager or other qualified individual within the company.<sup>7</sup> .MAIL was to serve “the community of individuals and companies who wish to receive spam-free email and individuals and companies who wish to send spam-free email and who do not want to be blocked, filtered or inconvenienced when doing

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<sup>5</sup> DotAsia Organisation Limited, New sTLD RFP Application, public version posted 19 Mar. 2004, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/asia.htm> (“ASIA Application”) (attached as Williams Exh. 5).

<sup>6</sup> Associació puntCat, New sTLD RFP Application, public version posted 19 Mar. 2004, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/cat.htm> (“CAT Application”) (attached as Williams Exh. 6).

<sup>7</sup> Employ Media LLC, New sTLD RFP Application, public version posted 19 Mar. 2004, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/jobs.htm> (“JOBS Application”) (attached as Williams Exh. 7).

so.”<sup>8</sup> Using the sTLD would allow “mail server operators who follow ‘the rules’ to be able to identify each other.”<sup>9</sup> The community to be served by .MOBI was, essentially, “all commercial participants in the mobile community.”<sup>10</sup> The goal was to allow mobile service operators and content providers to better serve the online needs of the mobile market by harmonising their efforts “under a single namespace to serve the entire community.”<sup>11</sup> .POST was meant to serve “the worldwide postal community, which includes public and private operators, organisations and government agencies” in order to “facilitate and enhance global communications between members of the postal communities in developed and less developed countries alike,” thus improving transportation logistics, increasing expertise, and promoting business.<sup>12</sup> The first .TEL application, to be sponsored by an entity named Pulver.com (“.TEL (Pulver)”), was designed for “those who seek to register telephone numbers in ITU E.164 format as domain names on the Internet”<sup>13</sup> in order to “to facilitate the smooth migration of communications

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<sup>8</sup> The Anti-Spam Community Registry, New sTLD RFP Application, public version posted 19 Mar. 2004, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/mail.htm> (“MAIL Application”) (attached as Williams Exh. 8).

<sup>9</sup> *Id.*

<sup>10</sup> ICANN, New sTLD Applications, Appendix D: Evaluation Reports, 27 Aug. 2004, p. 95, public version available at <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppD.pdf> (“Independent Evaluation Report”) (attached as Williams Exh. 9).

<sup>11</sup> Nokia Corporation *et al.*, New sTLD RFP Application, public version posted 19 Mar. 2004, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/mobi.htm> (“.MOBI Application”) (attached as Williams Exh. 10).

<sup>12</sup> Universal Postal Union, New sTLD RFP Application, public version posted 19 Mar. 2004, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/post.htm> (“.POST Application”) (attached as Williams Exh. 11).

<sup>13</sup> Independent Evaluation Report, p. 100.

services.”<sup>14</sup> The community for the other .TEL string, applied for by a company called Telnic Limited (hereinafter “.TEL (Telnic)”), was to “consist[] of individuals and/or businesses who wish to have a universal identity, brand or name, in the Internet-Communications space, as well as providers of Internet-Communications services and related content.”<sup>15</sup> Registrants would be able to consolidate all contact information to one website.<sup>16</sup> The .TRAVEL string was intended to serve “businesses, organisations, associations, and governmental and non-governmental agencies operating in” certain sections of the travel industry.<sup>17</sup> Finally, the .XXX application was intended to serve “the global responsible online adult-entertainment community.”<sup>18</sup>

11. The Sponsorship Team struggled considerably with the task of evaluating these applications. The sponsorship criteria were harder to apply than were the other criteria; for example, how does one measure “adding value to the Internet?” Whereas the Business Evaluation Team could make straightforward determinations about such matters as the applicants’ financial models and business plans, the Sponsorship Team was faced with more nebulous questions, such as the definition of the community, the appropriateness of the

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<sup>14</sup> NetNumber, Inc., New sTLD RFP Application, public version posted 19 Mar. 2004, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/tel-pulver.htm> (“.TEL (Pulver) Application”) (attached as Williams Exh. 12).

<sup>15</sup> Telnic Limited, New sTLD RFP Application, public version posted 19 Mar. 2004, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/tel-telnic.htm> (“.TEL (Telnic) Application”) (attached as Williams Exh. 13).

<sup>16</sup> *Id.*

<sup>17</sup> Tralliance Corporation, New sTLD RFP Application, public version posted 19 Mar. 2004, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/travel.htm> (“.TRAVEL Application”) (attached as Williams Exh. 14).

<sup>18</sup> ICM Registry, Inc., New sTLD RFP Application, public version posted 19 Mar. 2004, *available at* <http://www.icann.org/tlds/stld-apps-19mar04/xxx.htm> (“ICM Application”) (attached as Williams Exh. 15).

sponsoring organisation, the level of support from the sponsored community to be represented, and the addition of value to the Internet name space. These are all significant questions in an environment where different approaches to innovation are so important, but they are not easy to decide. The evaluators also had somewhat different philosophies on the various criteria and how they should be applied. The difference in philosophies was one of the reasons the team was put together as it was, to ensure that these different perspectives—technical, non-technical, governance, cultural, economic, and so on—were shared and taken into account in the final decision, but it also made it difficult to come to an agreement. Moreover, while the technical and business aspects of each application were fairly standard, the sponsorship portions of the 10 applications were different, because the applications were based on very different ideas.

12. The most important element of our evaluation was the judgment about what formed a “community” for the purposes of the application process. As a team, we felt that the crux of the sponsorship evaluations was to answer the question of whether the application actually represented the sponsored community it claimed to represent, but that question was exceedingly difficult to answer based on the information available to us in each of the applications. In a number of applications, such as .TEL (Telnic), .TRAVEL, .XXX, and .JOBS, the “community” was formed solely for the purposes of applying for the sTLD; there was no pre-existing community and no shared interests other than putting a certain type of information on the Internet in a certain space.

13. We created several drafts of our evaluation report before finalising it and sending it to the Board. As Chair of the Sponsorship Team, I was in charge of the drafting. Our final report was provided to the Board in July 2004.

**B. Criteria and Evaluations of Applications Other Than .XXX**

14. The criteria to be analysed by the Sponsorship Team were divided into the Sponsorship Information criteria and the Community Value criteria.<sup>19</sup> Each of the two sets of criteria was further divided into subparts.<sup>20</sup> We evaluated each application against all of the subparts, determining whether it passed or failed each, before coming to an overall conclusion regarding the application. We did not compare the applications to each other to make our decision, but evaluated each individually against the selection criteria. I felt that the Sponsorship Team worked very hard to properly evaluate the applications in the face of the difficulties described above; meeting through a series of teleconferences to discuss the applications and our opinions, drafting reports, and reviewing and revising our positions until we were satisfied with our conclusions. It was our impression from early on that the majority of the applications did not meet the sponsorship criteria, and most suffered from the same or similar flaws, despite the fact that the applicants' concepts were very different. In our view, the only applications that met all of the sponsorship criteria were the .CAT and .POST applications.<sup>21</sup>

**1. Sponsorship Information**

**a. Definition of Sponsored TLD Community:** The RFP required "precise definition of a sponsored community; evidence that that community would benefit from the establishment of an sTLD and evidence that the community would be involved in policy

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<sup>19</sup> Independent Evaluation Report, p. 75; *see also* New sTLD RFP.

<sup>20</sup> Independent Evaluation Report, pp. 75-80; *see also* New sTLD RFP.

<sup>21</sup> Independent Evaluation Report, at p. 82.

formulation.”<sup>22</sup> The Sponsorship Team felt that most of the applications did not meet these criteria. In our opinion, the applications did not define a specific community with clearly identifiable needs and membership that could be readily determined.<sup>23</sup> Specifically, we felt that .ASIA identified a community that was too diverse to be served by an sTLD;<sup>24</sup> that the string “.JOBS” was broader than the community described;<sup>25</sup> that the .MAIL community was too amorphous to be a distinct community;<sup>26</sup> that it was unclear how membership in the .MOBI community could be established;<sup>27</sup> and that the communities described in both .TEL applications were far too broad.<sup>28</sup> Aside from .CAT and .POST,<sup>29</sup> only .TRAVEL had an adequate definition of the sponsored community, but its community, as defined, was not “consistent in breadth with the name string .travel.”<sup>30</sup>

**b. Evidence of Support from the Sponsoring Organisation:** The second section of the RFP looked for “direct evidence of support from the Sponsoring Organisation for the application.”<sup>31</sup> The applicants generally did not have a problem with these criteria, as the applicant and the sponsoring organisation were all either closely affiliated, or were the same

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<sup>22</sup> *Id.* at p.76.

<sup>23</sup> *Id.* at pp. 83, 90, 93, 95, 100, 102-105.

<sup>24</sup> *Id.* at p. 83.

<sup>25</sup> *Id.* at p. 90.

<sup>26</sup> *Id.* at p. 93.

<sup>27</sup> *Id.* at p. 95.

<sup>28</sup> *Id.* at pp. 100, 102-105.

<sup>29</sup> *Id.* at pp. 87, 98.

<sup>30</sup> *Id.* at p. 107.

<sup>31</sup> *Id.* at p. 76.