

Burr, Becky

From: Burr, Becky
Sent: Tuesday, October 25, 2005 9:33 AM
To: 'ombudsman@icann.org'
Cc: 'stuart@lawley.com'; 'stuarduncan13@mac.com'
Subject: RE: 05-1546

Importance: High



report-xxx1.pdf



response-xxx1.pdf

Mr. Fowlie:

I have copied Stuart Lawley, President and CEO of ICM Registry LLC, as well as Stuart Duncan, COO, on this. One of them will confirm that this complaint is authorized.

Here are the relevant facts:

All applicants received the Evaluation Team reports in July/August of 2004. We understand that the vast majority received negative evaluations from the sponsorship and other issues team (S&OI ET). I personally know that to be the case as an absolute matter with respect to at least one of the other applicants.

All applicants responded to the ET reports sometime in the next few months. ICM's response was complete and in place in early October, which was earlier than at least one - but likely many - of the other applicants. Over the next many months, the ICANN Board determined that .jobs, .travel, .mobi, .cat, .xxx, and one of the .tels met the application criteria, notwithstanding the S&OI ET reports.

The ICANN Board has since given final approval to the contracts for .jobs, .travel, .mobi, and .cat. Thus, these applicants have a contract obligating ICANN to use best efforts to put them in the root. The contract for .xxx was agreed by staff in July. We were scheduled for final consideration on August 16, but were the subject of a last minute intervention by the USG.

When the Board took up the contract in September, it asked for certain changes, to which ICM readily agreed. Nonetheless, the Board has not yet blessed the agreed upon contract. Thus ICM - unlike .jobs, .travel, .mobi, and .cat - does NOT have ICANN's contractual commitment to put .xxx in the authoritative Internet root.

ICANN now proposes to publish the ET reports on all applicants - including .xxx. ICANN will, in our opinion, be criticized for approving the applications over the objections of the S&OI ET. The reports are quite negative. Nonetheless, because the contracts have received the Board's final approval, the criticism can not change the fact that .jobs, .mobi, .cat, and .travel have commitments from ICANN.

ICANN proposes to post the negative S&OI ET report on .xxx BEFORE the Board approves the contract and commits itself. If ICANN is subject to significant criticism it can - WITH RESPECT TO .XXX ONLY - simply elect not to approve the contract. There can be little argument that ICM stands to lose much more than .jobs, .travel, .mobi, and .cat by publication.

I have attached both the ET report on .xxx and ICM Registry's response, which was the basis for the Board's determination that ICM met the sponsorship criteria. I think you will conclude, as the ICANN staff and Board did, that the S&OI ET report is very wide of the mark. Nonetheless, I think you will also agree that the report - though rejected by ICANN - will provide opponents with plenty of ammunition to shoot at the application. It will also likely be used by the USG to justify its eleventh hour intervention in the ICANN process - motivated purely by domestic policy and politics - which has caused months of delay and several hundred thousand dollars in additional cost. Finally, it may be taken advantage of the GAC, notwithstanding the fact that it had every opportunity to weigh in

on this matter and simply elected not to do so.

If you are in the DC or New York area, please let me know. I would be most happy to answer your questions and provide the appropriate documentation in person.

Becky Burr

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-----Original Message-----

From: ICANN Ombudsman [mailto:ombudsman@icann.org]
Sent: Monday, October 24, 2005 10:20 PM
To: Burr, Becky
Subject: 05-1546
Importance: High

Dear Becky Burr,

Thank you for your complaint submission. I will review the matter concerning the posting of the evaluations.

It would be my suggestion, as you are the agent, and not the principal in this matter, that I receive a confirming email from Mr. Lawley that he wishes to proceed with this as an Ombudsman complaint. This Office does not usually take jurisdiction over complaints given on behalf of another person, as is explained in the Ombudsman Framework (P.2 Jurisdiction of the Ombuds. <http://www.icann.org/ombudsman/documents/ombuds-frmwrk-eng-20jun05.pdf>). However, due to the time sensitive nature of this matter, I will begin my enquiry on the understanding that such a missive will be forthcoming.

It would also be beneficial for me to have your explanation of how you feel that ICM is being treated in a manner different than other applicants. i.e. Is this information being posted at a time or in a sequence which is not consistent with the RFP process, or have you not been given sufficient time to prepare the redactions as requested by the General Counsel's Office.

As I am presently in travel status on the East Coast, I would encourage you to provide me with copies of documents which you feel it would be helpful

for me to review.

I look forward to hearing from you. Thank you for contacting me with the complaint form.

Best regards,

Frank Fowlie

Frank Fowlie, MACAM
Ombudsman

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www.icann.org/ombudsman/

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- Respect for Diversity;
- Excellence in Ombudsmanship;
- Professionalism;
- Confidentiality;
- Impartiality;
- and Independence.

-----Original Message-----

From: beckwith.burr@wilmerhale.com [mailto:beckwith.burr@wilmerhale.com]
Sent: Monday, October 24, 2005 9:59 PM
To: ombudsman@icann.org
Subject: COMPLAINT FORM SUBMISSION

ALTERNATE LANGUAGE: English

SUBMITTED BY

Name:
Becky Burr

Email:
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Phone:
202 663 6695

Address:
Wilmer Cutler Pickering et al
2445 M Street NW
Washington, DC

Zip:
20037

Country:
United States

COMPLAINT INFORMATION

Date:
10-24-2005

Registry:
ICM Registry LLC

Registrar:

Domain:

Complaint:

ICM Registry applied for the sTLD - .xxx. In the summer of 2004 ICM received the report of the independent evaluators on its application. The sponsorship and other issues (S&OI) evaluation team report was highly negative.

ICANN gave ICM the opportunity to respond, which it did, promptly. On June 1 2005 ICANN's Board determined that ICM's application met the sponsorship criteria, notwithstanding the S'&OI ET report.

Other applicants received similarly negative reports. For example, we understand that the S&OI ET report for .cat, .mobi, and .travel were negative. Nonetheless, ICANN approved those applications and, in fact, provided final approval of the contract.

ICANN has not yet considered and approved the .xxx contract, though it has appeared on a number of board agendas and though ICM has been fully and completely responsive. ICANN now proposes to post all of the evaluation team reports.

Impact:

While ICM received negative comments from the S&OI ET, so did other applicants. Inasmuch as ICANN has approved the contracts for these other applicants, publication of the negative reports will not change the fact that they have rights to proceed. ICM's contract, on the other hand, has not been approved. The negative comments of the evaluation team will be used by various groups to oppose the proposal, subject ICANN to heavy criticism, and otherwise provide fodder for those who have refused to take part in the ICANN process in a meaningful way.

Actions:

We have discussed this at great length, and proposed alternative approaches to ICANN. We have provided a summary of the evaluation team response that we consider more neutral.

Additional Information:

ICM Registry has cooperated with ICANN in every way and has been through every single step in the ICANN process. We appreciate that the application has become politically uncomfortable for ICANN, but the applicant has been determined by the ICANN board to meet the criteria. There is no reason that ICM's application should be subject to different treatment than other applicants, especially where publication of the reports in full will be used by opponents of the ICM proposal who, despite ample opportunity, simply did not participate in the ICANN process.

WHOIS ON DOMAIN NAME

'No Domain Name Entered'