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MarkMonitor
303 Second Street
Suite 800N
San Francisco, CA 94107

VIA EMAIL

Mr. Rod Beckstrom
President and CEO, ICANN
4676 Admiralty Way, Suite 330
Marina del Ray, CA 90292

Mr. Peter Dengate Thrush
Chairman of the Board of Directors, ICANN
4676 Admiralty Way, Suite 330
Marina del Ray, CA 90292

May 3, 2011

Dear Mr. Beckstrom, Mr. Dengate Thrush and the ICANN Board & Staff:

MarkMonitor appreciates the opportunity to submit its general comments to the gTLD Applicant Guidebook Discussion Draft ("DD-AG") dated April 15, 2011.

MarkMonitor acknowledges the efforts of the ICANN Board to expand the namespace through the introduction of new gTLDs. However, as MarkMonitor has asked in the past, and now insists, we believe that new gTLDs should only be introduced in a rational, controlled and informed manner. To that end, MarkMonitor asks, yet again, that the ICANN Board act responsibly by limiting the rollout of new gTLDs in order to mitigate risks and maximize the economic and social benefits of the program.

A more limited and staged rollout will allow ICANN to assess, and, more importantly, mitigate negative impact of new gTLDs on the security and stability of the Internet, consumers, stakeholders, brand holders, and, for that matter, the Internet as an institution and a critical part of global infrastructure. In addition to likely harm to the community, ICANN should also seriously consider the cost implications of exponential increases in fraud and abuse of the proposed unlimited rollout. A controlled and staged rollout will allow for the new gTLD program to evolve which will ensure its success and maximize benefit to the Internet and its full spectrum of users.

ICANN Should Limit First-Round New gTLD Applications and Delegations to Ensure Success

The new gTLD program can yield community benefit with a limited and discrete number of gTLDs that are introduced in a rational, controlled and informed manner. Conversely, ignoring logical conclusions that can be drawn from their own costly economic studies, the ICANN Board

and Staff have continued to plan an unlimited rollout.

ICANN has argued that the program is limited due to "various requirements …and by the maximum delegation rates." However, there is no finite cap on applications other than an artificial ceiling imposed by ICANN to mitigate potential risk to the security and stability of the Internet due to operational constraints on the application and delegation process. Furthermore, ICANN states that the "development of new rules and procedures for a process with limitations that are fair and effective would be a complex and difficult undertaking – a lesson learned from previous rounds." Taken differently, this would mean that the lesson that ICANN learned from previous rounds is that an unrestricted undertaking is the easiest and fairest process for a new gTLD rollout. It is difficult to imagine that after several years and hundreds of comments, the argument that a process without limitations is the fairest or easiest process for all. This thinking seems to be aligned with the conclusion of ICANN's own hired economists: "if ICANN were to delegate hundreds or even thousands of gTLDs, then web site visitors might begin to think about and use gTLDs in a new way, placing greater reliance on them as certification and navigation tools." It is also hard to imagine that consumers won't find the Internet more difficult to navigate when hundreds of additional gTLDs are added to the root.

ICANN should re-evaluate its "open spigot" approach and consider limiting this round to either community-based TLDs or a limited number of TLDs within certain designated categories. ICANN could parse a limited numbers of applications in designated categories (e.g., linguistic, geographic and cultural) and allow them to move forward in the first round. With a small, properly managed number of gTLDs, ICANN will be able to 1) test the unchartered and highly complex procedures and processes outlined in the DD-AG including extended evaluation, string contention, and other processes, 2) validate that the new rights protection mechanisms will function as expected, and, 3) ensure that technical and operational systems support expansion of the namespace. This will also resolve any potential issues that may arise relating to security and stability and satisfy the GAC's request for universal resolvability of the DNS[1]. Moreover, this limited and discrete roll-out will also allow ICANN to set up the necessary infrastructure to monitor any potential problems and better assess and evaluate the potential costs and benefits to consumers and the Internet community as a whole by developing, testing and scaling their compliance organization.

ICANN's gTLD Economic Studies Demonstrate No Discernible Consumer Benefit

At great expense to the community, ICANN commissioned several studies[2] to evaluate the economic impact of the new gTLDs. These studies do not support an unlimited new gTLD rollout. And, these reports' plain-spoken advice has been repeatedly ignored by ICANN. In fact, the

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[1] "In the GAC's view, [straightforward, non-sensitive and uncontroversial proposals] could be considered as part of a

[2] On June 16, 2010, ICANN posted an economic report called the "Economic Framework for the Analysis of the Expansion of Generic Top Level Domain Names" by Michael L. Katz, Gregory L. Rosston and Theresa Sullivan which was posted on June 16, 2010) ("Economic Framework Report"). On December 3, 2010, ICANN posted its follow-up economic report entitled *Economic Considerations in the Expansion of Generic Top-Level Domain Names, Phase II Report: Case Studies* by Michael L. Katz, Gregory L. Rosston and Theresa Sullivan ("Economic Considertions Report").

conclusions in these reports do not identify any quantifiable net benefits[3]. The Economic Considerations Report states that no previous gTLDs have been able to unseat the market dominance of .com. Specifically, the Economic Studies Report states, "past gTLD introductions have not had significant competitive impact on .com's dominance in the registration of second-level domain names"[4] and, "additional generic unrestricted gTLDs using the Latin alphabet and a traditional business model of registering domain names would be unlikely to provide significant additional competition for .com in the registration of second-level domain names."[5] But the Economic Considerations Report is short on recommendations for what a non-traditional business model would look like other than to point to already successful community business models (i.e. geographic limited extensions). In other words, the Economic Considerations Report validates what we already know; community based extensions are likely to be more successful based on their targeted appeal. Thus the logical inference is that a limited rollout targeted to communities based on linguistic, geographic or cultural commonalities would make business sense.

As set forth in the Reply to Comments on Economic Considerations in the Expansion of Generic Top-Level Domain Phase II Report-Case Studies dated February 11, 2011, ICANN's economists indicated, "the [Economic Considerations Report] attempted to shed light on the consequences of new gTLDs by looking at gTLD introductions in the past…', and, "did not offer a conclusion as to whether the benefits of new gTLDs outweighed the costs." However, MarkMonitor posits that the Economic Considerations Report did in fact offer a conclusion on the potential benefits of a new gTLD introduction when it "looked back" and analyzed several legacy gTLDs. These gTLDs were not deemed to be successful (as outlined in the Economic Considerations Report itself). Thus, if looking back in the gTLD namespace "sheds light" on the future as stated by ICANN's economists, then there would appear to be a dim future for ICANN's new gTLDs.

This fact was not overlooked by the GAC. The GAC, in their "GAC comments on the ICANN Board's response to the GAC Scorecard" dated April 12, 2011 (GAC April Comments) recommended the imposition of:

> "criteria to facilitate the weighing of the potential costs and benefits to the public in the evaluation and award of new gTLDs."

The criteria recommended by the GAC is designed to assist ICANN in evaluating the success or failure of the new gTLD program after a defined period. But such criteria would only be beneficial in a limited rollout scenario given that the information acquired by ICANN could then be used to create a broader, more efficient and hopefully less costly program after its initial rollout. With an unlimited rollout, the risks of significant harm to brand owners and consumers could be onerous. This concern was emphasized in the GAC April Comments where "the GAC urge[d] the Board to acknowledge the results of the two phases of economic studies conducted

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[3] New gTLD Program Exploratory Memorandum, Page 2.

[4] See Economic Considerations Report, Page 7.

[5] Economic Considerations Report, Page 7.

by Katz, Rosston et al that finds identifiable costs related to the introduction of new gTLDs, whether in the form of the costs of defensive registrations by brand owners or potential harms to consumers (e.g. from spam, phishing, illegal sales of online pharmaceuticals, or other deceptive practices)." MarkMonitor therefore recommends that any criteria or metrics created should be tangible and transparent in order to evaluate the success of the program and help form recommendations for its continual improvement through future rounds and expansion.

Furthermore, specific applications should highlight the potential community costs and benefits of any new gTLD. Any such costs and benefits identified in an application should be 1) measurable, 2) directly affect whether an application is approved or not, and, 3) be used to hold registry operators accountable for the operation of the gTLD.

Potential Risks Posed by ICANN's New gTLD Program

It has become clear over the past several iterations of the DD-AG that ICANN's role is limited to simply approving companies to become registries under a defined process, and that ICANN is unconcerned with the actual success or failure of any registry. Therefore, each individual registry will dictate its own success. With respect to registry operations oversight, there is little compliance monitoring by ICANN. ICANN will simply watch the process take its course and rely on the community and local law to dictate anomalies. In addition, if there are hundreds or thousands of registry failures then ICANN will simply pick up the pieces, becoming in fact a guarantor like a "pseudo FDIC" that finds a home with other registries for any existing domain name registrations registered with the failing registry.

In this instance ICANN cannot avail itself of a "safe harbor". If registries begin to fail, they will likely take more risks in order to stay afloat which may include registries turning a blind eye to fraud and malicious conduct on a massive scale. Without significant compliance and enforcement monitoring, ICANN may unwittingly be subject to liability for acts of fraud or malicious conduct it should have been aware of and which were allowed to continue. Inevitably, ICANN's future will be inextricably tied to the success and failure of future registries. A large number of such failures could impact its global reputation as a trusted custodian of the Internet.

Finally, the potential for registry failures is not unforeseeable. For example, it is conceivable that certain countries may see fit to block access to entire extensions that might make it more difficult for these extensions to profit from their operation. And, the potential for fraud and misuse is not unrealistic either. In fact, this potential risk seems to have prompted the threat of litigation by the International Olympic Committee (IOC) and the subsequent acknowledgment by the GAC. In the GAC's latest recommendation they have asked for a reserved list of top-level domains like those provided for ICANN, effectively a GPML for several entities likely to encounter fraud as well as for the IOC.[6]

This is perhaps a pessimistic outlook but opening the floodgates as currently prescribed could

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[6] http://gac.icann.org/press-release/gac-advice-international-olympic-committee-international-red-cross-and-

303 Second Street   415 278 8400 **tel**
Suite 800N   415-278-8445 **fax**
San Francisco, CA 94107   www.markmonitor.com

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have negative implications for ICANN. Thus, limiting the rollout is critical, otherwise Internet stability and security as well as consumers and consumer trust could be harmed with the failure of massive numbers of new gTLDs.

Conclusion

MarkMonitor reiterates that ICANN should limit the rollout of new gTLDs to either community-based gTLDs or a limited number of TLDs within certain designated categories that mitigate downside risk and test the new systems proposed by this program. By limiting the scope of the first round of applications, the Internet community as a whole can enjoy the net benefits of this program while assessing the impact of the rollout on the Internet infrastructure and consumers, ensuring a successful program and strengthening and not injuring ICANN and the Internet.

We look to forward to working with ICANN and the community to affect a successful launch of new gTLDs.

Respectfully submitted,

Frederick Felman
MarkMonitor Inc.

303 Second Street   415 278 8400 **tel**
Suite 800N   415-278-8445 **fax**
San Francisco, CA 94107   www.markmonitor.com