ARI REGISTRY SERVICES

ariservices.com

26 February 2013

ICANN
12025 Waterfront Drive
Suite 300
Los Angeles
CA 90094

Second Letter

Dear Sir/Madam,

Public Comments on New gTLD Registry Agreement

This letter is submitted on behalf of ARI Registry Services ("ARI").

It is the second of two letters providing comments in response to the New gTLD Registry Agreement (the "Agreement") released by ICANN on 5 February 2013. The first provided comments on the Agreement in terms of issues existing with the draft before the latest raft of changes. This letter will focus on those latest changes. Comments regarding operational issues will be submitted separately.

Executive Summary

We reject both the content of the material changes to the Agreement proposed by ICANN and object in the strongest terms to the timing and method by which ICANN has sought to enact such change.

We are not convinced that, with the arguable exception of the optional elements of the Public Interest Specification, there is any pressing need for the material changes proposed by ICANN.

Further, by releasing the specific changes to the Agreement in the manner it has, ICANN is circumventing the cornerstone protections upon which its operational model is founded.

At the same time, whether by accident or design, it is holding a gun to the head of every applicant and by doing so likely to draw further negative publicity to a process already widely ridiculed.

We invite ICANN to:

- withdraw the proposed amendments highlighted below;
- explain its rationale for any proposed changes so that where consensus dictates that change to the Agreement is fundamentally necessary to the success of the gTLD program, the community can work with ICANN to develop appropriate amendment; and
- confirm that this episode, of ICANN's making, will not further impact the repeatedly delayed timeline for delegation.

AusRegistry International Pty Ltd, trading as ARI Registry Services
Head Office
Level 8, 10 Queens Road, Melbourne, Victoria, Australia 3004
p +61 3 9866 3710 f +61 3 9866 1970 ACN 103 729 620
US Office
601 South Figueroa Street, Suite 4050, Los Angeles, California, USA 90017
p +1 213 330 4203 f +1 213 330 4222 LLC 98 0673827

Content

The NTAG and Registry Stakeholder Group ("RySG") have submitted persuasive papers on this issue. Both highlight three key changes to the Agreement which are fundamentally flawed in concept and execution.

1. Supermajority Board Approval - Section 7.6

Without rehearsing the detailed history of the development of the Applicant Guidebook as is compellingly described in the RySG submission, suffice to say it is well known that ICANN previously sought to include a unilateral right to vary the terms of the Agreement.

Such suggestion was given particularly short shrift by the community a number of years ago.

To propose such a right again, without warning, less than three months before the first TLD is to be delegated is as startling as it is ill-conceived.

Historically, following much negotiation, a compromise between stakeholders and ICANN was reached providing for a transparent and equitable methodology for change to the Agreement. We see no reason for the issue to be raised again now, much less raised in terms of the language provided of "substantial and compelling need". The language is at best subjective and overbroad and at worst a potential litigation minefield.

2. Public Interest Commitments ("PIC") – Specification 11

On one view, we can see the efficacy of an optional instrument designed, as the PIC is, to assuage the concerns of the Governmental Advisory Committee ("GAC") by allowing applicants to bind themselves to statements of intent as to the operation of a TLD. In principle it has its attraction and we commend ICANN for its attempt to reconcile competing needs.

However, upon closer inspection, practically the concept is flawed.

Any efficacy withers when one considers that the GAC has not explicitly stated that its concerns will be satisfied by the contents of a PIC.

Timing issues also pose difficulties. Applicants are asked to submit their PIC, not only in advance of confirmation as to whether they will receive a GAC warning, but also in advance of the close of the very consultation period in which it is proposed. One can hardly claim the consultation to be transparent and open when it would appear the PIC is already an accepted truth.

We challenge ICANN to explain how applicants can reasonably be expected to agree to a binding contractual document in which the dispute process is as yet undefined. Any attempt to adequately define such in the time available must surely fail to be exhaustive.

In addition, we fail to understand the rationale underlying the inclusion of a compulsory obligation in the PIC whereby applicants must only use registrars who have executed the 2013 Registrar Accreditation Agreement ("RAA"). Even if such an obligation were warranted, which we firmly reject, such must surely sensibly live within the body of the Agreement for ICANN to enforce, not within a contractual commitment to third parties via an undefined dispute process.

When one also considers that the RAA does not yet exist in a final form, it is fanciful to expect applicants to make such a binding commitment.

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On one rather more conspiratorial view, it could be suggested that the compulsory element of the PIC is seeking to force the hand of registrars to sign the RAA. Regardless, if registrars fail to sign the RAA en masse for any reason then such will stifle competition and likely irreparably damage the commercial success of new gTLDs.

3. WHOIS – Specification 4 section 1.10

In a similar vein, we find it disturbing that applicants are asked to simply comply with a new model for data directory services that may be adopted by ICANN based upon the recommendations of the Expert Working Group on gTLD Directory Services.

It is unreasonable and inequitable to expect applicants to agree to a clause that binds them to the findings of a technical review, with certain impact on registry operations, when such has not even reported.

Timing/Method

Having discussed the proposed changes at length with the community, what strikes us is the strength of feeling regarding the way in which ICANN has acted in relation to these latest changes.

ICANN is founded upon, and depends upon, its bottom-up, consensus-driven, multi-stakeholder model. The latest changes entirely subvert this model.

Rather than engaging and seeking consensus, ICANN dropped the Agreement upon the community without warning with minimal time to raise objections at the most critical time of the entire gTLD process.

If circumstance had dictated that change was necessary, we confidently predict the community would have reacted well. However, by seeking to include clauses previously battled over at this late juncture, applicants could be forgiven for thinking ICANN were gambling on them being too scared of delay to object – the "take it or leave it" approach. When one considers recent suggestions, understood to stem from ICANN, that it may be unwilling to enter into detailed negotiation with applicants, one could argue that the Agreement resembles a contract of adhesion.

Conclusion

We see no justification for the proposed changes to the Agreement as highlighted above, particularly when levered in at such a late stage to the process without warning.

If a pressing need were identified, such as might be argued in relation to the GAC, and a fully formed solution to such were proposed to be considered, we would gladly engage with ICANN and with the remainder of the community to seek to agree changes appropriate and of benefit to all interested parties, all the time being mindful of the risk of delay and seeking to avoid such at all costs.

To conclude, we would remind ICANN of the following text as contained in the Applicant Guide Book:-

> *Applicant acknowledges that ICANN may make such updates and changes and agrees that its application will be subject to any such updates and changes. In the event that Applicant has completed and submitted its application prior to such updates or changes and Applicant can demonstrate to ICANN that compliance with such updates or changes would present a material hardship to Applicant, then ICANN will work with Applicant in good faith to attempt to make reasonable accommodations in order to mitigate any negative consequences for Applicant to the extent possible consistent with ICANN's mission to ensure the stable and secure operation of the Internet's unique identifier systems.*

The changes proposed will inevitably cause every applicant material hardship as they are being asked to take on unknown and unquantifiable risks.

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p +1 213 330 4203 f +1 213 330 4222 LLC 98 0673827

It is therefore incumbent upon ICANN, not only as per the basic requirements of its structure, but also as a point of contract, to work in good faith with applicants to mitigate the risks caused by the changes it has proposed.

Yours faithfully

David Carrington
General Counsel
ARI Registry Services

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