



26 February 2013

Re: Valideus comments on ICANN's Revised New gTLD Registry Agreement Including Additional Public Interest Commitments Specification

We are of the view that ICANN has proposed a range of substantive changes to the New gTLD Registry Agreement apparently without regard to basic due process or ample opportunity for due consideration. For this reason, we support the IPC's request for an extension of time to consider the proposed changes.

We also note that the unexpected proposed changes to the New gTLD Registry Agreement seem to be at odds with the fundamental GNSO principle of introducing the new gTLDs in an orderly and predictable fashion and the GNSO policy recommendation that "there must be a base contract provided to applicants at the beginning of the application process".

We further agree with the position of the gTLD Registries Stakeholder Group (RySG) that the proposed changes to the New gTLD Registry Agreement calls into question ICANN's commitment to the multi-stakeholder process, and fails to provide a degree of contractual certainty that supports necessary investment in new businesses. We also note that while there is already a mechanism in the New gTLD Registry Agreement to give effect to the required changes, this should not prejudice the ability of individual applicants to negotiate specific terms of the New gTLD Registry Agreement with ICANN.

We therefore urge ICANN to engage in good faith discussions about any proposed changes using a more appropriate and collaborative process, and to provide all affected parties with appropriate time for due consideration.

Specific Concerns

Notwithstanding our principled questioning of the proposed changes to the New gTLD Registry Agreement, we offer the following more specific comments, should ICANN not consider it appropriate to rescind this unexpected proposal, or at least engage in a considered dialogue.

ICANN's Unilateral Right to Amend the Registry Agreement

We reject the proposal for the ICANN Board to exercise a unilateral right to amend the New gTLD Registry Agreement in Clause 7.6(c) (Amendments and Waivers). This offends even the most basic notion of contract parity, and on its present terms, is inexcusable. We believe that in the case of emergency circumstances, ICANN already has the tools required to effect any necessary

changes (i.e., Special Amendments or Temporary Polices). We sincerely hope that ICANN can appreciate that applicants who are considering using their New gTLDs to house their critical business infrastructure cannot hand over unrestricted control to ICANN to change the terms of their contract without appropriate justification.

ICANN's Requirement for 2013 RAA-Compliant Registrars

We do not believe that Specification 11 (Public Interest Commitments) of the New gTLD Registry Agreement is the appropriate vehicle to test ICANN's desire to compel registrar uptake of 2013 RAA (Registrar Accreditation Agreement). Whilst we support such uptake in principle, we suggest an approach whereby registrars are positively encouraged to use the 2013 RAA, rather than forcing through this preference, understandable as it may be, through new registries.

The Introduction of the Public Interest Commitments Specification

The Public Interest Commitments (PIC) and associated dispute resolution process require a more considered discussion than the present short and unexpected Public Comment period allows.

Applicants wishing to respond to the GAC Early Warnings or otherwise use the PIC (e.g., to respond to comments raised in the public comment fora) are faced with an unreasonable dilemma: potentially be seen as being unresponsive to raised concerns, or sign on to a completely unknown and untested mechanism with third party standing to lodge a complaint on unspecified grounds. Beyond this, we do not believe it is appropriate to seek to hold applicants to statements made about business plans in their applications; not only is this overly broad, but applicants may not have been able to share the full range of business possibilities – which surely ICANN can appreciate may themselves change after a PIC is submitted, and which likelihood seems to be wholly unaccounted for – in their public applications.

Practically speaking, there is also an important procedural issue which seems to have been overlooked: applicants are expected to submit PIC replies before the reply comment period on the instant proposed changes to the Registry Agreement expires. As such, applicants are requested to submit commitments on an agreement, the terms of which may change after the fact; while we recognize the PIC is intended to be a vehicle for applicants to address concerns raised by governments and the community, we hope ICANN recognizes the predicament this creates, and urge consideration of a more considered approach.

More fundamentally, if ICANN wishes to involve its compliance function with a range of potential commitments, we believe that any PIC-type mechanism should follow a formal Policy Development Process (PDP) for application to all registries, not just New gTLD registries.

We also do not believe it appropriate to cast the PIC Dispute Resolution Procedure (PICDRP) wide open to any third party, and suggest that if and when a PDP on a PIC and PICDRP emerge, ICANN should commit to a mechanism that strongly avoids the potential for abuse by the filing of frivolous claims. We also believe that discussion of a range of remedies including new harm-data-driven Rights Protection Mechanisms to respond to abuses should be on the table if and when such discussions emerge.

Directory Services Expert Group

We believe that ICANN should exercise responsibility and good faith by reflecting contractually its apparent intention made in a 13-December-2012 announcement by its CEO to subject the findings of the directory services Expert Group to a full PDP.

Conclusion

In summary, we believe that the unexpected proposed New gTLD Registry Agreement should be withdrawn or at the very least given more time for discussion.

We also encourage ICANN to recognize the need for a specific set of amendments to the New gTLD Registry Agreement to reflect the nature of brand applicants, and to begin discussions on this matter in earnest.

Thank you for your consideration of the above suggestions; please do not hesitate to contact us if we can be of further assistance.

Yours sincerely,

/s/

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