



February 26, 2013

Via Electronic Mail
comments-base-agreement-05feb13@icann.org

Re: Public Comment on ICANN Registry Agreement by Google Inc.

Google Inc. respectfully provides the following comments in response to the Revised New Registry Agreement (“Revised Agreement”) proposed by ICANN on February 5, 2013.

Google applauds ICANN’s efforts to keep the new gTLD program on schedule and understands that the Revised Agreement is at least in part a response to a Government Advisory Committee (GAC) inquiry about the enforceability of representations made in new gTLD applications. However, as explained in greater detail below, we believe all of the proposed changes should be withdrawn.

The Timing of the Proposed Changes is Unreasonable

Google has applied for a number of new gTLDs through its subsidiary Charleston Road Registry Inc. As a new gTLD applicant, we relied on the Applicant Guidebook (AGB) as a roadmap to the application and delegation process. It, therefore, concerns us that ICANN now seeks to unilaterally revise the agreement set forth in the January 2012 AGB almost a year after the deadline for submitting new gTLD applications and mere months before the anticipated date of ICANN’s first delegation recommendations on April 23, 2013.

ICANN’s eleventh-hour changes to the registry agreement violate the spirit of ICANN’s multi-stakeholder process and threaten to erode ICANN’s credibility with applicants who are making good faith efforts to work in partnership with ICANN to ensure the success of the new gTLD program. As aptly pointed out in comments from the Registry Stakeholder Group (RySG), New TLD Applicants Group (NTAG), and Verisign, the Revised Agreement is untimely in that it seeks to make substantial changes to the registry agreement that disrupt a balance calibrated through years of negotiation.

We further note that the timing of ICANN’s proposal prevents applicants from making an informed decision about whether to participate in the public interest commitments (PIC) program outlined in Specification 11 of the Revised Agreement. ICANN has set a March

5, 2013, deadline for opting into the program. As a result, applicants must decide whether to participate weeks before ICANN's deadline for responding to public comments on the Revised Agreement and without knowing the parameters of the Public Interest Commitment Dispute Resolution Process (PICDRP) to which they will be subject. The deadline also falls well before many applicants will receive final GAC advice on their applications, thereby limiting applicants' ability to address GAC advice through the program.

The Revised Agreement is Unnecessary and Unrealistic

In addition to being untimely, the Revised Agreement also is unnecessary, as many of the proposed changes address issues that are already covered in the AGB and the existing registry agreement. For example, Section 2.17 and Specification 11 of the Revised Agreement seek to bind applicants to the "commitments," "statements of intent," and "statements of business plans," in their applications. We agree that applicants should be bound to the material representations in their applications. However, it is neither necessary nor sensible for ICANN to use an ambiguously worded last-minute change as its basis for enforcement.

Instead we believe the AGB and registry agreement already appropriately bind applicants to the material statements provided in their applications. Relevant portions of the AGB include Section 1.3(a) of the registry agreement, which requires that applicants represent and warrant that material information and statements in the application were true at the time made and remain true in all material respects as of the effective date of the agreement. Similarly, Module 6 of the AGB requires applicants to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading, while Module 2 of the AGB lays out the criteria for awarding points to applications and explains that material changes to the application may result in re-evaluation.

We further believe that the PIC program in Specification 11 adds unnecessary complication and ambiguity while unreasonably asking applicants to make a commitment to the program before understanding how it will work. A simpler solution is to clarify that applicants can amend their applications to make any public interest commitments through the application change request process.

Other proposed changes in the Revised Agreement simply are not realistic for many applicants, such as the proposed changes to Section 7.6(c). The revisions to Section 7.6(c) give ICANN the unilateral right to amend the agreement through special amendments that are not subject to registry approval. Although we understand ICANN's desire for flexibility, applicants are making significant investments in the new gTLD program and could be profoundly impacted by unilateral changes to the agreement by ICANN. Our calculation for participating in the new gTLD program was based on the assumption that we would be afforded the checks and balances contained in the January 2012 agreement, which provides an agreed-upon process for changing the agreement.

Thus, in order to maintain the momentum and credibility of the new gTLD program, we strongly encourage ICANN to roll back the most recent changes to the registry agreement. Although we appreciate ICANN's efforts to avoid slippage of its timeline for delegating new gTLDs, the date on which ICANN recommends gTLDs for delegation effectively is meaningless if all or most applicants are unable to sign the registry agreement.

That said, we also believe there is an important dialog to be had between ICANN and applicants regarding certain provisions in the January 2012 registry agreement. We believe the agreement exposes registries to more liability than is reasonable and could use clarification and cleanup in certain key areas. Among other issues, there are a number of places in the agreement where links to the relevant policies or portions of the AGB have not been inserted, including Section 2.13 of the agreement, which asks registries to submit to a Registry Transition Process without defining the process. We also note that numerous provisions in the agreement do not apply to closed TLDs, including the non-discrimination provision in Section 2.9(a), Section 2.10 on domain pricing, Section 2.14 addressing the Registry Operator Code of Conduct, and various sections of the specifications. We would appreciate ICANN's prompt focus on these and other concerns raised during this comment period so that applicants are in a position to move swiftly when the new gTLDs are delegated.

Conclusion

In summary, we believe the Revised Agreement raises enough concerns that it should be withdrawn in its entirety. Instead we encourage ICANN to engage in a dialogue focusing on addressing applicants' reasonable concerns with the existing agreement so that the new gTLD program can move forward as expeditiously as possible. To the extent ICANN believes any changes to the agreement are necessary, they should be included as part of this dialogue rather than imposed on applicants with no explanation or opportunity for negotiation.

Sincerely,
/s/
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Google Inc.