VERISIGN

May 16, 2013

Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, California 90094-2536

Re: ICANN's Unilateral Rights under Section 7.6: The Illusory "Public Interest" Standard

Dear ICANN:

Under Section 7.6 of the proposed New gTLD Registry Agreement, some current and future registry operators may be prepared to grant ICANN a new unilateral power to change the Registry Agreement without the consent of the registry operator and, indeed, over the registry operator's objection. They may be prepared to do so because they have concluded that it is unlikely ICANN can, or will, exercise this power in any way contrary to the community's best interests – including those of registry operators – and in any way inconsistent with the spirit and letter of the established multi-stakeholder model. Some may be comforted by the notion that the limitation on such changes must be within the scope of ICANN's mission, consistent with its core values, and justified by "a substantial and compelling reason in the public interest." However, in our view, relying on the hope or belief that ICANN will exercise these new powers only in ways that are consistent with broad community interests and within the spirit and letter of the established multi-stakeholder model is a fundamental mistake because the "public interest" standard is illusory, virtually undefined, and protected from challenge in any meaningful way.

Under ICANN's proposed Section 7.6 of the Registry Agreement, "a substantial and compelling reason in the public interest" is defined as "a reason that is justified by an important, specific, and articulated public interest goal that is within ICANN's mission and consistent with a balanced application of ICANN's core values as defined in ICANN's Bylaws." We submit that this "public interest" standard is illusory and meaningless in providing boundaries for the exercise of ICANN's proposed new unilateral powers.

Because the public interest standard is defined so broadly, and completely lacks boundaries, we believe it is susceptible to misuse and abuse. It is ICANN that will determine what the "public interest" is in each case where it seeks to exercise its unilateral power. Moreover, there is no way to challenge ICANN's determination of what is in the "public interest" so long as ICANN can map any proposed changes back to its Bylaws or core values – both of which can be changed.

Typically, a "public interest" standard is reserved for elected officials or their delegates, and in these cases, accountability exists in the ballot box or through judicial review. In Section 7.6, it is clear that ICANN has no such accountability: There are no elections by which community participants can register their dissent or disagreement on policy or other matters, and there is no opportunity for judicial review. Even when the "public interest" is determined by officials who can be held accountable, there is no assurance that officials with such authority will exercise it at any given time in a predictable, or even lawful, manner. That is why such exercises of power and authority, in a democratic society, must be reviewable by some independent authority (typically a court of competent jurisdiction) against well understood criteria that are consistently and fairly applied. This ensures predictability and accountability. These "safeguards" and guardrails around ICANN's ability to implement virtually unlimited unilateral amendments are wholly lacking in this context. How predictable will ICANN's application of the "public interest" standard be? And how will ICANN be held accountable?

In the current framework described in Section 7.6, ICANN cannot be held accountable because there is no mechanism to do so. ICANN refuses to allow any dispute about the "public interest" to be settled by a court of competent jurisdiction. Instead, ICANN is requiring arbitration lasting exactly one day. This response alone is telling: How could judicial review of a regulatory authority's unilateral actions possibly be against the "public interest"? It is as if the community is being asked by ICANN to "wait and see" or to simply "trust us." If judicial review does not fall within the "public interest" standard, it is reasonable to question ICANN's perspective on, and analysis behind, what it may find to be in the "public interest." Without defined criteria, accountability or consistency, how can the community that ICANN was created to serve rely on ICANN to reasonably determine what is in the "public interest"?

No existing or prospective registry operator – or registrar for that matter – should take comfort in ICANN's promise to be bound by an illusory "public interest" standard. The "public interest" standard provides neither predictable nor sufficient boundaries to ICANN's new unilateral power to serve the Internet community, the operation of businesses, or investors.

We petition ICANN to withdraw Section 7.6 and the related provision Section 7.7 and any version of the concept of unilateral rights of amendment on the part of ICANN as being, in and of themselves, not in the best interest of the community and not consistent with the spirit or letter of the multi-stakeholder model. In short, Sections 7.6 and 7.7 are not in the "public interest."

Sincerely yours,

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