

## **Comment to ‘Proposed Amendment to .XXX Registry Agreement to Transition to New Fee Structure and to Adopt Additional Safeguards’**

Submitted [comments-xxx-amendment-12oct16@icann.org](mailto:comments-xxx-amendment-12oct16@icann.org) on December 1st, 2016 by Stefania Milan and Edward Morris, Councillors, NonCommercial Users Stakeholders Group.

We are deeply concerned with the staff-driven process that subtended to the “Proposed Amendment to .XXX Registry Agreement to Transition to New Fee Structure and to Adopt Additional Safeguards”, posted for public comments on October 12, 2016. We believe that the process of policy made by contract subverts the bottom-up consensus policy processes laid out in ICANN’s Bylaws and sets a dangerous precedent that imperils the role of the ICANN community, and by extension that of non-commercial users, in policy development. It also has the effect of discouraging volunteers from continuing their involvement in the ICANN community. After all, if staff is to establish policy by a contract that is not supported by the proper community based policy development processes (PDP) then why volunteer to participate in said processes?

In addition, we would like to draw your attention to the tenuous nature of the Uniform Rapid Suspension (URS) Policy. The URS was NOT developed by the Community in a proper PDP: it was ONLY to apply to the first round of the new gTLD program. It was part of a group of Rights Protection Mechanisms (RPMs) created to allay concerns of the Trademark Community regarding the release of many new gTLDs in a short period of time. But there are many concerns about the Uniform Rapid Suspension including: Do its procedures move too fast? Does it allow Registrants a reasonable time to respond? Do Registrants understand their rights under this new mechanism? Is it a fair and balanced mechanism? Further, NCSG has raised concerns to ICANN and especially the Global Domains Division (GDD) that not a single cent has been spent to educate Registrants regarding their rights and defenses under the URS. Is it even fair to have a dispute mechanism that Registrants cannot navigate and have never heard of?

That is why the URS is currently under review by a GNSO PDP. The GNSO Council has created the Review of All Rights Protection Mechanisms Working Group to review the Trademark Post-Delegation Dispute Resolution Procedure (TM-PDDRP,) the Trademark Clearinghouse (TMCH) and the URS. What the working group may recommend is unbounded - anything from eliminating these RPMs completely to extending all, some or none to legacy gTLDs.

So why would GDD short-circuit this review, evaluation and action by the ICANN Community? Future policy lies within the purview of the GNSO Council--and whatever recommendations it may choose to make to the Board when Phase I of the RPM PDP WG is completed. *Accordingly, it is outside of the scope of ICANN Staff powers to add RPMs created for New gTLDs to legacy registry contracts, including .XXX.*

We respectfully but strongly submit that Staff is applying the TM-PDDRP, URS and Public Interest Commitments (PICs) to legacy TLDs entirely without the consent of the Community. The results could be striking. If the Community decides to reject the URS for use going forward, for example, what then of the URS policy provisions improperly written by Staff into the renewal contract with .XXX? It is clear that the consequences of this subversion of proper policy development processes was not carefully thought out and needs to be rejected before more harm is done not only to the integrity of the proper policy development process but to ICANN corporate itself.

Finally, as members of a stakeholder group that is heavily reliant on volunteers to take part in policy work, we believe the top-down process seen in operation with the Proposed Amendment to .XXX Registry Agreement is detrimental to our activities in a number of ways. First, it constitutes a (and yet another) dangerous precedent jeopardizing the bottom-up consensus policy process at ICANN. We believe this makes our efforts to represent non-commercial interests relatively irrelevant looking forward. Second, undermining the credibility of ICANN's multistakeholder policymaking it negatively impacts the efforts of our stakeholder group to recruit volunteers willing to do policy work at ICANN.

We note that none of these comments are intended to be derogatory to the ICM Registry. We do not doubt their good faith in the renegotiation of their contract.

We do, however, note that ICANN has given them something that is outside the scope of its powers to grant. In this matter, we agree with the Business Constituencies comment of 25 November 2016 which states: "While greater consistency as between registry agreements is a worthwhile goal, and convenient for ICANN in terms of contractual compliance, it cannot supersede consistency of action in accord with ICANN's Bylaws."

We join all of the Commenters who have clearly called upon ICANN to delete from *Amendment No. 4 to [ICM's] Registry Agreement* the addition of Section 3.1(i) and completely eliminate Appendix 8 as wholly inappropriate to its renewal agreement with ICM as a legacy gTLD.

Nothing could be more inappropriate than circumventing the GNSO's PDP Process.

Respectfully submitted,  
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