

Public Comment Summary and Analysis on Proposed .NET Renewal Registry Agreement

Sources:

Public Comment Postings (11 April 2011-10 May 2011). The full text of the comments may be found at <http://forum.icann.org/lists/net-agreement-renewal/>.

The forum received 186 comments, they have been categorized and summarized as follows, and an analysis of comments for each topic has been provided.

1. Presumptive Renewal – Summary of Comments

“...renewal continues to be anti-competitive and therefore does not serve the public interest.” (*G. Kirikos 5/9/2011; R. Sampson 5/9/2011*)

ICANN should eliminate the third party management of the .NET registry completely and operate the registry for .NET itself as it has done with respect to the root zone and the .INT registry. (*G. Kirikos 5/9/2011; R. Sampson 5/9/2011*)

The "presumptive renewal" in existing contracts only applies if ICANN decided to outsource the management of the TLD. Nothing compels it to outsource that function. The contract only says that *if* the function is outsourced, then VeriSign must be able to renew. In the event that ICANN decides to internalize the function, it is not bound by presumptive renewal, since that external function no longer exists. (*G. Kirikos 5/9/2011; R. Sampson 5/9/2011*)

“ICANN can also "break" the presumptive renewal by deconstructing the existing contract into 2 brand new separate contracts:

- (a) a contract for management of the .NET database of names (i.e. creation of names, renewals, transfers, etc.), and
- (b) a separate contract for *resolution* of the zone file (i.e. servers around the world handling the DNS requests for the .NET zone). ” (*G. Kirikos 5/9/2011; R. Sampson 5/9/2011*)

“The contract should be changed to include language which separates the formal Registry Operator (RO) functions (zone file signing, zone file production from one or more distinct data sources, pointer data to registrar held "thin registry" registrant data, registrar transfer processing, registrar invoicing, ICANN reporting and transactional fee processing and payment), from the Data Base Operator (DBO) (aka "registry technical services") set of functions, allowing registrants, through their registrars, to select the underlying competitive DBO for a given domain.” (*E. Brunner-Williams 5/10/2011; ALAC 5/17/2011*)

“It does not hurt ICANN in any way to put out a Request for Proposals from other prospective registry operators, to see what other options exist, and in particular what prices could be offered that would benefit consumers. We believe that savings would be immense, at least 50% lower than existing fees charged by VeriSign to registrars.” (*G. Kirikos 5/9/2011; R. Sampson 5/9/2011*)

ICANN is not bound by the renewal provisions of the existing .NET registry agreement because:

- the current agreement is being challenged on antitrust grounds in the CFIT litigation;
- the board must seek the advice of multiple law firms and the DOJ as to the legality of the current contract;
- ICANN should set aside the renewal provision and allow VeriSign to challenge that decision in court. (*G. Kirikos 5/9/2011; R. Sampson 5/9/2011*)

The Board should act on the 9 August 2007 GNSO recommendation that “there was majority support for the concept of a re-bid of registry contracts.” Presumptive renewal is a bad idea and remains an anti-competitive mistake that the Board should correct. (*D. Younger 5/10/2011*)

The operation of the .NET registry should be put out to competitive bid. (*M. Kellerman 5/10/2011; N. Norder 5/10/2011*)

“...where the contract has been held for more than three five year periods, the presumption of re-award absent adverse circumstances is incompatible with [ICANN’s] original, and continuous, competition policy goal.” (*E. Brunner-Williams 5/10/2011*)

“I am opposed to the new net agreement renewal. It's nothing but a shill for the recording and movie industries and does no good for consumers.” (*J. LeCheminant 5/10/2011*)

“I am in opposition to the proposed changes in the .net contract. The proposed process appear to lack even a semblance of checks and balances to prevent the mis-use of the process and as such should not be adopted.” (*B. Ferrell 5/10/2011*)

The presumptive renewal provisions “conflict with ICANN’s mission to enhance competition and to act for the benefit of the Internet community as a whole.” (*Telepathy Inc. 5/10/2011*)

“...the presumption of renewal should be discussed by the community before it is enshrined in a contract. At the very least a clause should be added that, should a Policy Development Process be held on the topic of presumption of renewal, the consensus view of such a PDP would be applicable to future considerations of renewal for this contract.” (*A. Doria 5/10/2011*)

“The statement of ICANN's position, "ICANN's gTLD registry agreements provide for presumptive renewal so long as certain requirements are met," fails to distinguish between legacy contracts, established before ICANN's existence, and contracts entered into subsequent to the 2001 and 2004 rounds of the new gTLD process, and prospective contracts from any continuation of ICANN's new gTLD process. This is unfortunate as there are substantive differences of market power exercised by the holder of pre - ICANN registry agreements, and the holders of ICANN registry agreements, and one of ICANN's core public purposes arose from a competition policy goal, which necessitates distinguishing between actors in a market with market power and actors lacking market power.” (*ALAC 5/17/2011*)

“The ALAC deplores the fact that no community input was allowed at an earlier stage of the negotiations on the new contract. Given that the contractual conditions are matters of policy, it seems inappropriate that these negotiations were held behind closed doors without community observers or input.” (*ALAC 5/17/2011*)

Presumptive Renewal – Analysis of Comments

The renewal provisions in the current .NET Registry Agreement are consistent with the all other ICANN gTLD agreements. These renewal provisions encourage long-term investment in robust TLD operations, and this has benefitted the community in the form of reliable operation of the registry infrastructure. ICANN does not have the right under the current .NET Registry Agreement to unilaterally refuse to renew the agreement or to bifurcate registry functions. No court has found the renewal provisions to be illegal, and intentionally breaching the renewal provision would not be prudent as it would expose ICANN to liability under the contract.

2. Approval of New Registry Services – Summary of Comments

ICANN should be required to seek expert advice when making determinations regarding the competition implications of new registry services. (*D. Younger 5/10/2011*)

Approval of New Registry Services – Analysis of Comments

ICANN is permitted to seek expert advice in connection with the review of proposed registry services under the existing .NET Registry Agreement and all other gTLD agreements. Not every proposed new registry service will raise competition issues and it would not be appropriate to require expert antitrust advice in all cases. Also, the process for review of new registry services is consistent with other agreements and with the GNSO-developed Registry Services Evaluation Policy.

3. Rights Protection – Summary of Comments

The URS should not be included in the .NET renewal. (*65 comments*)

The .NET registry agreement should implement best practices for registry agreements that have developed since the current .NET agreement was signed, including appropriate provisions from the new gTLD registry agreement as it now appears in the New gTLD applicant guidebook, including thick WHOIS, enhanced Whois data quality requirements (similar to those implemented for .ASIA, .MOBI and .POST), abuse point of contact, cooperation with contract audits, emergency transition and continuity plans and rights protection mechanisms (including the URS). (*IPC 5/09/2011*)

New rights protection mechanisms (such as those recommended by the IPC) should not be adopted in connection with the renewal of the .NET registry agreement. (*101 comments*)

“Rights protections mechanisms developed for the new gTLD program, especially Uniform Rapid Suspension, should not be imposed on .Net through the contract renewal and revision process.” (*ICA 5/10/2011*)

“The .NET registry should implement Thick WHOIS, and WHOIS that is Verified (e.g. PIN codes mailed to registrants, before resolution of a domain name).” (G. Kirikos 5/9/2011; R. Sampson 5/9/2011)

“ICANN should seek as a fundamental principle to amend this contract to minimally include requirements for Thick Whois.” (*Business Constituency 5/11/2011*)

“It is unfortunate that ICANN has not included in the renewal of the contract a provision for .NET to transition to a thick WHOIS model at some specific date in the future (perhaps during the term of this agreement but no later than the time of the next renewal).” (*ALAC 5/17/2011*)

Rights Protection – Analysis of Comments

The draft .NET Registry Agreement that was posted for public comment did not include obligations of the registry operator to participate in the URS or any other newly developed rights protection mechanism currently under development for the new gTLD program. The IPC submitted comments suggesting that these mechanisms should be incorporated into the .NET Registry Agreement. There is considerable opposition to this IPC proposal from current .NET registrants reflected in the public comments and it would be premature to implement these mechanisms into a large existing TLD without further study and community discussion. The question of transitioning a large existing registry to “thick” Whois raises operational and other issues that require further discussion and consideration. Such a change might be implemented separately from the renewal process, and there is no compelling basis for ICANN to require such a change as a condition of renewal has been presented. In agreement with most comments, no change to the .NET Registry Agreement is recommended.

4. Use of Traffic Data (Section 3.1(f)) – Summary of Comments

“We oppose the use of traffic data by VeriSign, or other registry operators.” (*G. Kirikos 5/9/2011; R. Sampson 5/9/2011*)

“We do not oppose allowing VeriSign to make commercial use of .Net traffic data so long as ICANN rigorously enforces the contract restrictions on reintroduction of SiteFinder or other wildcard services and such data is made available on a nondiscriminatory basis.” (*ICA 5/10/2011*)

“Without a Policy Development Process of what are acceptable uses of Traffic Data, agreeing to such a wide scope of permissible use is not appropriate. Not only does the community need to discuss this issue and come to a bottom-up decision of what limits are appropriate in a registry's use of Traffic Data, but an impact analysis of the effect of this on privacy would need to be done. It would also be necessary to ascertain whether this degree of data usage was permissible under all applicable national laws.” (*A. Doria 5/10/2011*)

Use of Traffic Data (Section 3.1(f)) – Analysis of Comments

The inclusion of the new provision with respect to the use of traffic data was done to make the .NET Registry Agreement consistent with existing registry agreements for large gTLDs in accordance with the renewal provisions of the current .NET Registry Agreement. Public comments have not suggested any harm to registrants or other community members in all the other gTLDs with agreements that permit the registry to make use of traffic data. Additional language was added to clarify that services akin to SiteFinder are not permitted.

5. Special Programs for Registrars (Section 7.1(b)) – Summary of Comments

We oppose this provision because it could lead to gaming and discriminatory practices. “Because geographies was not defined, it could even be pinpointed to certain states (Arkansas, Wyoming, Nevada) or even cities (Tokyo, Berlin), where ‘friends of VeriSign’ were located.” “If lower prices were targeted to certain regions, it is trivial for domain name registrants to lie about their location. WHOIS is unverified (despite our repeated proposals that ICANN institute Verified WHOIS). Furthermore, it is trivial for companies to setup “shell companies” to take advantage and exploit any discriminatory pricing practices that VeriSign or other registries announce.” This provision “can be used to punish and put out of business registrars that VeriSign does not like.” (*G. Kirikos 5/9/2011; R. Sampson 5/9/2011*)

“While we do not object to the provision that would allow ICANN to better serve the Internet community through the provision of marketing and incentive programs by VeriSign to ‘underserved geographies’, we believe that a tight definition of that term as well as additional safeguards should be written into the registry agreement to prevent potential abuse of these programs by registrars or registrants, as well as potential cross-subsidization by registrants residing in the developed world.” (*ICA 5/10/2011*)

Special Programs for Registrars (Section 7.1(b)) – Analysis of Comments

This new provision is designed to allow Verisign flexibility in designing programs that will foster the development of DNS infrastructure in underserved geographic regions. In response to community comments, the language was revised to provide specificity and add transparency.

6. Registry Fees (Section 7.2(a)) – Summary of Comments

Use of Registry-Level Transaction Fees for (1) a special restricted fund to enhance and facilitate the security and stability of the DNS, and (2) general ICANN operating funds is not appropriate and the provisions allowing for this in the contract should be stricken and all such funds should be allocated to “developing country Internet communities to enable further participation in the ICANN mission by developing country stakeholders.” (*D. Younger 5/10/2011*)

There is no need to restrict the per-registrar component of the Variable Registry-Level Fee to the funding established by the 2004-2005 ICANN budget.” (*D. Younger 5/10/2011*)

ICANN has not justified the aberrantly high \$0.75 surcharge it imposes on every .NET domain name. ICANN makes a mockery of its own mission by burdening the Internet with excessive and unnecessary costs. The one immediate step that ICANN should take is to lower the \$.75 surcharge to match the \$.18 charged on .COM domains. (*Telepathy Inc. 5/10/2011*)

Price increases should need to be justified (*M. Kellerman 5/12/2011*)

Registry Fees (Section 7.2(a)) – Analysis of Comments

The reference to the 2004-2005 ICANN budget was deleted and does not appear in the draft .NET Registry Agreement that was posted for public comment.

In connection with the competitive bidding process held in 2005 for the operation of the .NET TLD, ICANN specified a US\$0.75 registry-level registration fee for .NET. The additional funds provided by this fee aid ICANN in its mission of enhancing the security and stability of the DNS and the Internet and in improving participation in the Internet community among developing nations. ICANN utilizes the funds generated by Registry-Level Transaction Fees in accordance with the ICANN Budget, which is developed in consultation with the community and approved by the Board. ICANN committed to put the funds to the purposes set out in the .NET agreement but did not set up separate accounting or organizational separations to track this. That would have been expensive and complex and resulted in no real value. ICANN has expended funds in the areas specified in the NET agreement - in excess of the amounts received. To encourage participation of developing countries ICANN has, for example, created the fellowship program, participated in many regional meetings, increased translation, engendering participation in new gTLDs. ICANN has also expended significant funds in security: signing the root zone and implementing DNSSEC, participating in cross-industry security exercises, growing the SSR organization, and conducting studies for new gTLDs.

7. Pricing (Section 7.3) – Summary of Comments

“ICANN has not published any analysis of the financial impact of 10% annual increases in the wholesale cost of domain name registrations on the public, nor has it offered any analysis of the financial impact of continued increases.” (*G. Kirikos 5/9/2011; R. Sampson 5/9/2011*)

“It seems odd that under the proposed agreement it seems that VeriSign will be allowed to increase the registration price by 10% per year (section 7.3.a). I'm sure that providing the registry service is already very profitable for them without any price increases.” (*M. Kellerman 5/10/2011*)

“ICANN should incorporate a price discovery mechanism into the process so that, as with a regulated utility that is granted a limited monopoly, the prices charged are tied to a reasonable return on invested capital. Price discovery can occur through expert consultants who can advise on the actual cost of running the .NET registry, or by opening up the .NET registry to competitive bid while allowing VeriSign the right to match the lowest bid.” (*Telepathy Inc. 5/10/2011*)

“I see no rationale for continued steep price increases for .net domain names.” (A. Alleman 5/10/2011)

Costs of running the registry should go down with scale. Therefore, if VeriSign wants to increase prices pursuant to this provision, it should be required to justify the need for such increase. (*Network Solutions 5/10/2011; M. Kellerman 5/12/2011*)

Pricing (Section 7.3) – Analysis of Comments

Consistent with comparable unsponsored gTLD registry agreements, the prices that registry operator may charge under the .NET Registry Agreement are capped, subject only to a permitted 10% annual increase. The permitted 10% increase is designed to allow the registry operator to increase prices with inflation and increased costs of running a large registry. Permanent fixed price caps would not be appropriate, and in fact ICANN is proposing to move to complete market-based pricing for all new gTLDs as it has done with all existing sponsored gTLDs. For more information on price controls and gTLDs, please see the expert economic reports posted at <http://www.icann.org/en/announcements/announcement-06jun09-en.htm>.