Telefónica

COMMENTS ON THE PULVER.COM APPLICATION ON THE NEW SPONSORED TOP LEVEL DOMAIN .TEL

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1. THE .TEL APPLICATION DOES NOT SATISFY THE REQUIREMENTS LAID DOWN BY ICANN TO BE A "SPONSORED TOP LEVEL DOMAIN".

Unlike gTLD, which are open to any individual, sTLD are for exclusive use by a specific "community", and are proposed and managed by one or more authorised members of that community with its backing.

1.1.- The following are the ICANN requirements as regards the meaning of "Community":

"The proposed sTLD must address the needs and interests of a clearly defined community (the Sponsored TLD Community)… and the applicants must demonstrate that the sponsored TLD Community is precisely defined, so it can readily be determinated which persons or entities make up that community and comprised of persons that have needs and interests in common but which are differentiated from those of the general global Internet community" [1].

The application must also *"provide detail on the community to be served and explain why the defined community to be served is appropriate for the creation of an sTLD".*

1.2.- As regards how the notion of "community" has been interpreted in practice we need only refer as examples to the existing .aero, .coop and .museum sTLD. The .aero domain, sponsored by Société Internationale de Télécommunication Aéronautiques (SITA), is exclusively reserved for the aviation community. The .coop domain, sponsored by DotCooperation LLC, is restricted to use by bona fide cooperatives and cooperative service organizations that ascribe to the Cooperative Principles of the ICA, such as member ownership and control and, finally, the .museum, sponsored by the Museum Domain Management Association (MuseDoma), was developed exclusively for the museum community.

1.3.- What Pulver's application says about what comprises the .tel community:

"IP Communications Service Providers (IPCSPs) that enables the mapping of legacy telephone numbers to the Internet addresss information required by IP-enabled communications applications and services… by allowing IPCSPs to utilize the telephone numbers that have been assigned to them or to their subscribers as a resource for addressing IP-based communications services".

[1] New sTLD Application. Part A. Explanatory Notes. 15 December 2003. Sponsorship information.

1.4.- Pulver's application doesn't explain the meaning of "IP Communications Service Providers". However, it is obvious **what Pulver understands by "community"**, **is not what an sTLD community should be according to the above-referred ICANN regulations themselves**.

2. THE .TEL/PULVER APPLICATION IS NOT A SIMPLE APPLICATION ON A NEW TLD. IN VIEW OF ITS CONTENT AND OBJECTIVES, ITS APPROVAL GOES BEYOND THE PURPOSE, FUNCTION, ROLE AND COMPETENCE OF ICANN.

In order to reach this conclusion it suffices to compare the implications of the terms of the proposal and the objectives and function of ICANN as we shall do below:

2.1.- What is the new sTLD .tel/Pulver application?

"The objective of the ".tel" TLD is to enable IP Communications Service Providers (IPCSPs) to register telephone numbers as domain names on the Internet and to associate IP-based services with those registered telephone numbers."

2.2.- What is ICANN?

"Is a nonprofit public benefit corporation... organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes". ",,, the Corporation shall, ..., pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv)[2].

Its mission is *"to coordinate, at the overall level, the global internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems*"[3].

Its roll *"is responsible for coordinating the management of the technical elements of the DNS to ensure universal resolvability so that all users of the Internet can find all valid addresses"* [4].

[2] Articles of incorporation of Internet Corporation for Assigned Names and Numbers as revised November 21, 1998
[3] Section 1 of the Article 1 from Bylaws for ICANN as amended effective 13 October 2003
[4] http://www.icann.org/general/

2.3.- It is obvious that the ".tel" application is not just another application for a new domain name, **its content and objectives go far beyond approval of a new domain name and therefore, as we have observed, beyond the purpose, function, role and competence of ICANN.**

Indeed, ICANN is just a domain name technical coordination body; it is not the telecommunications and Internet regulatory policy world authority which Pulver is seeking in order to give the green light to its proposal.

Admittedly, domain name and Internet address management includes technical and coordination tasks for which private bodies such as ICANN, with the assistance of other organizations[5], can be responsible, but these must not under any circumstances relate to or include, as they indisputably do in the case of .tel's proposal, "*matters of public interest (in particular stability, freedom of use, protection of individual rights, competition rules and fair access for all) which are the responsibility of governments or intergovernmental organizations and to which competent international bodies contribute*"[6]. In the .tel instance one should add to the aforementioned public issues a long list such as IP telephony, universal services, prices, interconnection matters, numbering, impact on PSTN and other telecommunication service providers, impact on telecommunications networks, competitive environment, security, requirements in cases of emergency, intellectual property rights or data, privacy and consumers protection. In discussion and decision-making on any of these issues one cannot overlook either the role of the sectors involved nor the competence of States or of the relevant supra and international organizations .

2.4.- It remains only to mention that **any decision by ICANN, exceeding its powers, which approves the .tel application would be particularly serious, taking into account the fact that its future effects would be irreversible.**

[5] See Document CO2/46-S of 12 April 2002, Report of the General Secretary of the ITU Council on domain name and Internet address management

[6] In this vein see ITU Resolution 102 (Rev. Marrakesh, 2002) on domain name and Internet address management

3. THE .TEL APPLICATION FAILS TO TAKE INTO ACCOUNT NATIONAL AND INTERNATIONAL REGULATIONS AND THE NEED FOR CONSENSUS ON KEY ASPECTS AMONGST THE INTERNATIONAL COMMUNITY.

The nature of the proposal and the extent of its subject-matter and of the intended services affect, if not encroach upon, aspects which are the responsibility of established international organizations, primarily the ITU, and of both national telecommunications services regulators (States) and supranational regulators. Successfully implementing the proposal would also require the consensus of the international community (regulators, service providers, consumers ..) on key aspects of the proposal, which has categorically not been obtained.

We are speaking about matters such as: network security and integrity, universal service (directory of directories), operator selection, tariff rebalancing and pricing mechanisms, policies for routing and Internet use incentivization, commercial agreements between operators, server location and application legislation, call identification services, emergency services …. and in particular about issues relating to numbering, interconnection and voice services over IP.

3.1.- The ENUM initiative[7] is a good example of the need to observe the competence granted to organizations and States, to obtain the consensus of the international community and what a proper "modus operandi" for success might consist of, and is in striking contrast to the .tel application. Much good work has been done on ENUM since 1998 and the correlation between the two proposals is nonetheless undeniable.

[7] ENUM is a protocol that is the result of work of the Internet Engineering Task Force's (IETF's) Telephone Number Mapping working group. The charter of this working group was to define a Domain Name System (DNS)-based architecture and protocols for mapping a telephone number to a Uniform Resource Identifier (URI) which can be used to contact a resource associated with that number. The protocol itself is defined in the standards track document "E.164 number and DNS" (RFC 2916) that provides facilities to resolve E.164 telephone numbers into other resources or services on the Internet. ITU-T Recommendation E.164 is the international public telecommunication telephony numbering plan. The syntax of Uniform Resource Identifiers (URIs) is defined in RFC 2396 (1998). ENUM makes extensive use of Naming Authority Pointer records defined in RFC 2915 in order to identify available ways or services for contacting a specific node identified through the E.164 number.
The Internet Architecture Board (IAB) and ITU-T Study Group 2 are discussing collaboration on the operational, administration and delegation issues related to deployment of ENUM protocol-based services. This requires extensive consultation with administrators of resources derived from the international E.164 numbering plan including national and integrated numbering plan administrators

3.2.- The General Secretariat of the **ITU has already spoken about proposals like this in its *"letter on Telephony-Related TLDs"* of 1 November 2000 to ICANN.** We draw attention to the following paragraphs from that letter, because they are of special interest to the new Pulver's proposal:

"…We have taken note of multiple applications to ICANN for telephony-related TLDs that involve mapping of the E.164 numbering plan into the DNS. As a general remark, the ITU suggests that careful reflection is given by ICANN as to the advisability of allocating TLDs corresponding to Uniform Resource Locator (URL) scheme names as defined in various RFCs and assigned by IANA. As URL scheme names are typically associated with widely-deployed protocols or existing naming/addressing resources, control over a corresponding TLD may suggest control over the corresponding protocol or naming/addressing resource."

". ..A great deal of work on technical standards for IP Telephony is currently underway in many forums and standardization bodies such as the European Telecommunications Standards Institute (ETSI), the Internet Engineering Task Force (IETF) and the ITU Telecommunication Standardization Sector (ITU-T)…"

"…The issues surrounding the intersection between telephone numbering and the DNS are very complex and currently under discussion between experts in the IETF and ITU as well as with governments responsible for numbering plans. As I am sure you are aware, the E.164 international public telecommunication numbering plan is a politically significant numbering resource with direct implications of national sovereignty. It is subject to a multitude of national approaches, regulatory provisions, and, in some cases, multilateral treaty provisions. Considering this, governments should be given the opportunity to fully reflect upon how their particular numbering resource responsibilities relate to DNS-based telephony resources."

"…In this regard, the ITU is working with the IETF to progress a careful exploration of these complicated issues in the context of its joint work concerning the ENUM protocol. As there are still considerable areas of coordination work needed at this time, until there is an opportunity to further explore the issues within the context of joint work underway and with national governments; it is the view of ITU that it would be premature for ICANN to grant any E.164-related TLD application as this may jeopardize these cooperative activities or prejudice future DNS IP Telephony addressing requirements."

3.3.- There is an **undeniable close relationship between the proposal and numbering plans**, their current standards and those being developed and the powers and responsibilities for the assigning and management of numbering resources, which also includes the potential inclusion of those resources in the DNS. These, as is well-known, are the powers and responsibilities of specific international organizations and of the States as the bodies invested with the majority of powers related to numbering.

The ability to dial via .tel conflicts with the provisions of the National Numbering Plans which are the instruments which indicate for which particular services the numbering should be used, how it should be used and both the rights and obligations of the

operator and those of users, and it should be recalled that any unauthorized use may incur an administrative penalty.

It is clear that numbering powers are affected in any event since, in order for a subscriber to access an address-based IP network from the PSTN it is necessary, whether one so wishes or not, to prepare, put in place or abide by some form of world numbering/address allocation plan between the PSTN and the address-based IP networks, and one of the main problems in doing so, which must be familiar to Pulver, is that the numbering plans may not be affected in any way by the new TLD-based communications. This is the direction towards which the international community is working, primarily in the ITU, and options are being explored such as the possibility of allocating E.164 numbering resources to IP devices or of applying the IETF's ENUM protocol[8].

3.4.- At the same time, proposals, such as that under analysis, which seek to use the capacity of the IP networks and their capacity to integrate all services raise the common problem of how to distinguish between what is voice traffic and what is data traffic, an issue which **has a bearing on sensitive issues such as what, in this context, national and international interconnection obligations should be, new criteria for routing and cross-border communications, what should be the impact on the new commercial interoperablity and transmission agreements or on possible new systems for the payment for services or how the operator providing a universal service can gauge networks and sufficient capacity and meet its quality obligations.**

The international consensus requiered in this regard is desirable but not easy to achieve, as well illustrated by the diversity of approaches in the legislation of various States and the difficulties in acquiring total technical standardization for voice and IP telephony.

As regards legislation, some states permit IP telephony with no restrictions whatsoever, some regulate it as a public service, and others prohibit it[9].

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[8] See the Report of the Secretary General on IP telephony of 31 January 2001, World Telecommunications Policy Forum, Geneva, 7-9 March 2001

[9] 1.9 Report of the Secretary General on IP telephony at the World Telecommunications Policy Forum, Geneva, 7-9 March 2001 on IP Telephony

In terms of technical standardization there are many sector and regional bodies working on IP telephony - the European Telecommunications Standards Institute (ETSI), the Internet Engineering Task Force (IETF) and the Telecommunication Standardization (ITU-T) and Radio-communication (ITU-R) Sectors of the ITU. Specifically the work of the latter and the ITU-T and ITU-R Study Groups has included the preparation of standards for interfunctioning between PSTN and IP networks, numbering, names and address allocation.

3.5.- In short, it is not possible, by means of mere, and hypothetical, approval by ICANN of a new domain name, to dispense with, in favour of a private company like Pulver, the regulations and work of the regulators, States, organizations and the international community.

4. SHORTCOMINGS OF THE APPLICATION AS REGARDS INTELLECTUAL PROPERTY.

4.1.- As is customary in the telecommunications sector it is desirable in the development of new platforms and services to acquire a standard with the consensus of regulators, service-providers, consumers and the sectors affected to ensure the interoperability of the various platforms and the legal certainty of access to their use at affordable cost, avoiding proprietary technology and, in particular, preventing any problems concerning intellectual property rights, since such rights would otherwise inevitably give rise to captive markets and real barriers to entry for potential competitors.

We obviously take the view that the best “standard” for Pulver.com is its system. However, that conclusion can only be reached, as we have explained, after discussion by the international community working with the regulators.

4.2.- The absence of such analysis and consent undoubtedly suggests that ICANN should be aware of the possibility that there may be third party claims for the infringement of intellectual property rights. This possibility should not be discounted given that the work carried out by the ITU on the basis of and in relation to ENUM (E.164) is well-known, that there are patents relating to it.

5. SHORTCOMINGS OF THE APPLICATION AS REGARDS DATA, PRIVACY AND CONSUMER PROTECTION

5.1.- The database required to implement Pulver's proposal, presents numerous lacunae if not real problems in terms of data, privacy and consumer protection deriving primarily from failure to identify the applicable rules and legal arrangements. These problems relate to key aspects, i.e., what consents are necesary, could be enough the IPCSP's decision, what about the final customer consent, how to enforce users' rights to access, rectification, opposition and cancellation of their data, data quality control, which provisions and rules would govern file security, which specific uses of that data would be permitted and which not and, lastly, before which authority (national, international, ICANN, Pulver, etc.) can these rights be validly and effectively enforced.

6. SHORTCOMINGS OF THE APPLICATION AS REGARDS COMPETITION

Nor is the proposal clear on competition issues and raises problems in this regard:

6.1.- The hypothetical grant of the .tel domain which is in fact merely a tool around which to formulate the proposal, is nevertheless vital in terms of ensuring not only that Pulver has a position merely of significant power in the market in question but that it has a veritable monopoly in that market, an issue quite clearly not resolved by the fact that there could be different Registrars.

6.2.- Its exclusive ownership of such a powerful database would be an insuperable barrier to entry for any other potential competitor. See, accordingly, Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

6.3.- To the extent that Pulver might also, even if only indirectly, manage telecommunications traffic, it would render meaningless the right of users to freely choose the operator through which to make their telephone calls or any other telecommunications service and would give rise to enormous confusion on issues as fundamental as whether the customer will still be the customer of the operator or will in fact become a Pulver customer.

6.4.- If to the foregoing we add on the one hand the **uncertainty** caused, as we have said in section 5, referring there to data and privacy protection, by not knowing where the Registry will be based, where the server will be and, in short, **where the database will be located, which is crucial to ascertaining which provisions of competition law will apply** and, on the other, the fact that **history has shown that merely having effective control over the issuing of names, numbering and addresses very often implies control of communications systems** and an obstacle to competition and exercise of the rights of consumers, **we have to conclude that there are sufficient grounds, in this regard too, for questioning the proposal.**

7. CONCLUSION

In accordance with the foregoing, ICANN should reject the .tel proposal on the following summarised grounds:

1. The .tel proposal does not satisfy the requirements laid down by ICANN to be an sTLD, most particularly because it does not comply with the strict limits on what should be the "community" in any proposal for an sTLD. Furthermore, is expressly prohibited and infringes the requirement that any proposal for an sTLD “must address the needs and interests…and provides detail of a clearly… and precisely defined community”.

2. Approval of an sTLD such as .tel is not within the competence of ICANN.

ICANN is not and cannot be a kind of world-wide regulatory authority for all types of telecommunications, Internet and information society services, as Pulver self-servingly claims.

3. It fails to take into account national and international regulations and the need for consensus among the international community.

Accordingly, the .tel proposal is closely and unambiguously linked to numbering plans and would require a future review of national and international interconnection obligations and new routing and cross-border communications criteria, of what should be the impact on the new commercial interoperablity and transmission agreements and on possible new systems for the payment for services or how the operator providing a universal service can gauge networks and sufficient capacity and meet its quality obligations. In short, it infringes areas of competence vested in specific international organizations and of States themselves.

4. It has shortcomings in relation to intellectual property.

It is very likely that there will be claims against ICANN for infringement of the intellectual property rights of third parties.

5. It has shortcomings as regards data protection and the law relating to consumers and users as a result of the failure to identify which rules and legal provisions would apply.

6. It has shortcomings in terms of competition.

Accordingly, ICANN's approval of .tel would in fact create a monopoly on the provision of this kind of service, further reinforced by the fact that it would have exclusive rights over the database, and exacerbated by uncertainty, here too, as to which legal provisions are applicable.

Madrid, 28 April 2004