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**VIA ELECTRONIC MAIL**

Mr. Fadi Chehade
President and CEO
ICANN
12025 Waterfront Drive
Suite 300
Los Angeles, CA 90094-2536

Re: Reply Comments of General Electric Company on the Trademark Clearinghouse "Strawman Solution" and Limited Preventative Registration Proposal

Dear Mr. Chehade:

General Electric Company ("GE") appreciates this opportunity to submit reply comments to ICANN on the Trademark Clearinghouse "Strawman Solution" and the Limited Preventative Registration ("LPR") proposal developed and supported by the ICANN Intellectual Property and Business Constituencies.

As stated in GE's original comments, while GE supports the protections outlined in the Strawman proposal, without the LPR, the Strawman is inadequate to protect consumers and brands from massive fraud and abuse in the new gTLD system. The LPR is absolutely necessary.

We want to reiterate that: (1) the LPR is narrowly tailored to cover only the domain names a brand owner could have registered in Sunrise anyway; (2) it is prospective, not retroactive, so a brand owner cannot use the LPR to take a domain name away from an existing registrant; (3) Sunrise registration takes priority over LPR; and, (4) the proposed Reverse Domain Name Hijacking exclusion in LPR provides an important registrant safeguard that does not currently apply to Sunrise registrations.

These reply comments, however, are designed to specifically address the previously submitted comments of others, as well as recent statements and events that have come to light.

As an initial point, GE notes that the majority of the comments that have been submitted express overwhelming support for the LPR—as well as for protections reflected in the Strawman—and consistently state that the LPR is a top priority. This should be of *significant* importance to ICANN. Unfortunately, the process surrounding the new gTLD program is dominated by those who seek to profit off of the program. A substantial portion of the public has no knowledge of the program, and many businesses simply do not have legal staff or budgets large enough to be actively engaged in these issues. For each trademark holder that came forward to express its views, there are certainly many more who feel the same way. Yet, even among those who filed comments, the support leaned strongly in favor of enacting the LPR.

In fact, very few substantive concerns about LPR appear to have been raised. Instead, there continues to be a reflexive act by those who do not want their profit model affected to describe anything they want established as mere "implementation" and anything they do not want established as a drastic "policy" change. There can be no question but that these semantics are designed solely to avoid doing the right thing.

**Avoiding consumer fraud is the right thing. Avoiding trademark abuse is the right thing.** Someone's—incorrect—designation of what would otherwise be the right thing as "policy" should not sway ICANN away from taking appropriate action.

Moreover, the Strawman Proposal and the LPR are not new policy. They are entirely in line with the PDP-developed consensus policy recommendation that: "Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law." All other work done on rights protection mechanisms has been completed as "implementation" of this policy recommendation, starting from the Implementation Recommendation Team and continuing on until today.

For instance, the requirement that new gTLD registries offer both a Sunrise period and a Trademark Claims process originated with the Board, not the community. The duration of that Sunrise period and the Trademark Claims process originated with the Board, not the community. Requiring proof of use for Sunrise eligibility originated with the Board, not the community.

In addition to this ample precedent, the completely unprecedented Prioritization Draw was "a random selection method" specifically excluded under the current Applicant Guidebook. ICANN enacted the Draw as implementation of the decision to process applications in batches, itself an implementation decision. ICANN developed and conducted the Prioritization Draw without a PDP, without a policy working group, and without protest from those community members who now contend that the Strawman and the LPR are "policy."

Finally, both paragraph 14 of the "Top-Level Domain Application Terms and Conditions" and the "Change Review Process," which have been part of the Applicant Guidebook since May 2011 and September 2011, specifically and explicitly anticipate the possibility of additions like the LPR and Strawman. Applicants have no "veto" over such additions, and no PDP or policy working group is required. Even material changes require only a public comment period like the one in which we are submitting these comments.

The one other supposed concern of those against the LPR—that of "free speech,"—is another example of smoke and mirrors. Trademark owners are not out to restrict free speech. However, there must be a strong focus on consumer protection. Trademarks are an external validator, a proxy for consumer trust. A systemic breakdown in trademarks online could lead to consumer fraud en masse.

In actuality, the LPR mechanism is protective of free speech interests because it comes *after* Sunrise, so it does not get in the way of any legitimate rights holders who want to register domain names in the Sunrise process. In addition, even trademark holders who pass all the eligibility requirements for LPR can only use LPR for strings corresponding to exact marks. Trademark variants cannot be stopped by LPR so there are ample opportunities for legitimate commentary or fair use.

We are aware of recently reported comments you made to registrars and registries in Amsterdam last week, including your belief that the gTLD program is simply not ready to launch (or even close), will not be for a long time, and that if it were up to you, you would wait at least a year, so that you could get the proper technical aspects and protection aspects properly in place. Among your statements, you proclaimed: "I don't want to delay this program, but under all circumstances, my mind would tell me: stop." You also revealed that Erich Clementi at IBM, who is creating the TMCH, said you were "nuts" to expect the TMCH would be up and running by when the new gTLD program launches and that it takes "three times the amount of time to … build reliable systems." http://domainincite.com/11710-chehade-honestly-if-it-was-up-to-me-i-would-delay-the-whole-release-of-new-gtlds-by-at-least-a-year. *See also* http://www.circleid.com/posts/20130129_icann_ceos_admissions_icann_is_not_ready_for_new_gtlds_concern/

We hope that you do not believe that the opinions of the registries and registrars are the only ones that matter, and that you are powerless to do anything without their approval. There is no reason for you to be beholden to the wishes of those who desire a quick profit and refuse to hit the brakes. The Internet community includes more than registries and registrars. If more time is needed—and GE agrees with you that it is—then more time should be taken to launch

this program correctly.[1] We also believe that if others knew about your desire to delay launch by a year or more, they would support that decision.

Certainly, it was the near unanimous view of the US Congress, following extensive hearings in both the Senate and the House of Representatives in December of 2011, that it was too early even to open the initial application window because so many issues remained to be resolved. But, over a year later, we appear to be in much the same position with respect to "readiness," or lack thereof. Yet, you seem to believe that you are bound, without recourse, to a time-table adopted for no objective reason, even though your own instincts, and the experience and wisdom for which you were hired, drive you towards the conclusion that you might well be at the helm of an oversized truck barreling headlong to the edge of a very steep cliff. To the contrary, you have the power to decide to temporarily apply the brakes to avert a potential calamity from which there would be no turning back.

On January 3, 2012, just before ICANN began accepting applications from parties "interested" in applying for new gTLDs, shortly after the Congressional hearings in December and in response to: concerns expressed therein; conce rns expressed by such well-respected experts in the field as Esther Dyson (ICANN's first Chairman); concerns expressed in editorials and articles in an array of national and international newspapers; concerns expressed by NGOs and IGOs around the world; concerns expressed by brand owners; and, concerns expressed by global law enforcement officials and agencies, Larry Strickland, Administrator of NTIA, wrote to ICANN Board Chair Stephen Crocker observing that:

> [I]n meetings we have held with industry over the past weeks, we have learned that there is tremendous concern about the specifics of the [new gTLD] program that may lead to a number of unintended and unforeseen consequences and could jeopardize its success. Accordingly, as ICANN moves forward, I urge you to consider implementing measures: (i) to minimize the perceived need for defensive registrations; (ii) to implement promptly ICANN's existing commitments for law enforcement and consumer protection; and, (iii) to ensure better education of stakeholders.

Mr. Strickling continued:

> First, in our recent discussions with stakeholders, it has become clear that many organizations, particularly trademark owners, believe they need to file defensive

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[1] We note that even as recently as this past month, ICANN delayed its date for revealing the results of its string similarity analysis until March 1, just days before the March 13 deadline for filing objections, because the analysis system was not working and the results were neither clear nor consistent. http://domainincite.com/11581-anger-as-icann-delays-key-new-gtlds-milestone

> applications at the top level. It appears that this possibility might not have been fully appreciated during the multi-stakeholder process on the belief that the cost and difficulty of operating a top-level registry would constrain companies from filing defensive registrations. We think, and I am sure ICANN and its stakeholders would agree, that it would not be healthy for the expansion program if a large number of companies file defensive top-level applications when they have no interest in operating a registry. I suggest that ICANN consider taking some measures well before the application window closes to mitigate against this possibility.

Your predecessor ignored this well intentioned advice, but it is incumbent on you not to repeat the mistakes of the past and to do what you can to contain the damage that will inevitably result in the event you do not take the time to get the details of the new gTLD program right. Among those details is doing everything you can to implement adequate brand and consumer protections on the second level. Again, in Mr. Strickling's words:

> [A]fter the application window closes and ICANN publishes details about the pool, facts will be available to determine the potential scope of the gTLD expansion. At that time, it would be useful for ICANN to assess whether there is a need to phase in the introduction of new gTLDs. In addition, prospective gTLD operators have the ability to offer additional protections beyond those required in the Applicant Guidebook.

In the year since Mr. Strickling's letter to Mr. Crocker, there have been many missteps and setbacks in attempting to implement the gTLD expansion; there have been many conflicts of interest exposed and personnel changes necessary; there has been a lack of significant progress, not only with respect to the development of meaningful RPMs, but also, to pick just a single example, with respect to key aspects of the standard registrar agreement.

Despite everything, ICANN's friends, and we count GE to be among them, continue to advocate for, and be strong supporters of, the multi-stakeholder model. However, as we learned just this past December in Dubai, not everyone around the world feels the same way. It is our deeply held belief that there is no greater threat at this moment to the independence of the Internet than a demonstration on the world stage, for all to see, that ICANN is not a worthy fiduciary of the enormous responsibilities that have been entrusted to it. No matter how many things ICANN gets right, and the majority of what ICANN does it does extremely well, it could be the one thing that ICANN does not do well that would mar its reign.

Mr. Strickling ended his January 3 letter to Mr. Crocker with exactly that thought:

> NTIA is dedicated to maintaining an open, global Internet that remains a valuable tool for economic growth, innovation, and the free flow of information, goods, and services online. We believe the best way to achieve this goal is to continue to

> actively support and participate in multi-stakeholder Internet governance processes such as ICANN. **How ICANN handles the new gTLD program will, for many, be a litmus test of the viability of this approach**. (Emphasis added).

The risks are simply too great not to take the time needed to make sure this unprecedented gTLD expansion, when launched, is as perfect as reasonably possible and that its benefits truly outweigh its costs, as you will ultimately have the burden of demonstrating under the Affirmation of Commitments. We urge you either to make the decision to delay the launch or to put that option on the table with a comment period. The entire gTLD process will be evaluated a year after launch. We do not understand why you would want to put something forward for evaluation that you know is broken or destined to fail.

As a final matter, I would be remiss if I did not bring up the comments you supposedly made at the recent Amsterdam meeting you had with registries and registrars wherein you told them that it was a "mistake" to deal with trademark holders regarding adequate rights protection mechanisms, and "hopefully I won't make that mistake again." http://domainincite.com/11732-industry-man-chehade-admits-strawman-mistake

On a personal note, I truly hope that is not the case. The multi-stakeholder model depends on the views of all those affected by ICANN decisions being represented. I have spent much of my last year working in reliance on the good faith of those involved in this process and I hope that all stakeholders can continue to do so.

As you may know, in trying to assuage trademark holder and consumer concerns, Kurt Pritz testified before Congress that ICANN would have "substantial," "significant," and "robust" rights protection mechanisms in place before any gTLDs launched. In Toronto, you specifically stated that you understood these concerns. You then tasked the Business Constituency and Intellectual Property Constituency—neither of which is made up of purely trademark holders—to present a plan for the protections ICANN would need to enact before launch.

I, and others, participated in this process in good faith and worked day and night to come up with extremely limited and reasonable recommendations, the chief one being an LPR framework that does not expand trademark rights whatsoever and does not cost the registries and registrars anything. I can tell you that a significant portion of the BC/IPC meetings was devoted to making the proposal as reasonable as possible so that it had the best chance of succeeding within the ICANN system. Even with that goal, we have been shouted down by the registries and registrars at every turn.

It was very upsetting to read articles in the trade press reporting that you had implied that even allowing input from the BC/IPC and discussing these extremely reasonable proposals with BC/IPC representatives was a "mistake." Therefore, I hope the reports of your statement are not accurate.

GE looks forward to working with you and ICANN in establishing clear and adequate measures to protect against trademark abuse and consumer fraud. We hope you view such interactions as worthwhile, and that ICANN will act to implement both the Strawman and LPR in accordance with ICANN's mandate under the Affirmation of Commitments (specifically Section 9.3) to promote consumer trust and to act in the public interest.

Thank you again for your consideration. If you have any questions or wish to discuss any of the points raised herein, please feel free to contact me at kathryn.park@ge.com.

Sincerely yours,