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**SENT VIA U.S. MAIL AND EMAIL**

January 27, 2010

Peter Dengate-Thrush  
Chairman of the Board  
Internet Corporation for Assigned Names and Numbers  
4676 Admiralty Way, Suite 330  
Marina del Ray, CA 90292-6601  
Email: <draft-eoi-model@icann.org>

**Re: Support for Expressions of Interest and Pre-Registration  
for new gTLDs**

Dear Chairman Thrush,

I write in support of ICANN's draft model for Expressions of Interest and Pre-Registration for new gTLDs (the "EOI Process"). I am the founding partner of Newman & Newman, Attorneys at Law, LLP, a Seattle-based law firm whose clients include prospective new gTLD applicants. The purpose of this letter is to respond to former ICANN board member Michael Palage's recent statement requesting that the board further delay the new gTLD program and the EOI Process. I respectfully disagree with Mr. Palage. For the reasons discussed below, I encourage the board to approve the EOI Process in February 2010 and avoid further delays in opening the new gTLD application program.

In sum, the EOI Process is necessary to provide ICANN and the Internet community with a better understanding of the dynamics underlying the new gTLD program including: the economic demand for new gTLDs; the number and kind of strings requested; certainty as to root-zone delegation rates; and how best to implement the operational readiness plan. The EOI Process will permit ICANN to obtain data from actual prospective applicants with a demonstrated commitment to the new gTLD program as evidenced by the required up-front deposit. Only with that data will ICANN be able to effectively prepare the new gTLD program in accordance with its core values of preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet and promoting and sustaining a competitive environment. The EOI Process's proposed publicity campaign should ensure that the public—and all interested parties—are informed of the process and have the opportunity to participate. It is in the public's interest for ICANN to be prepared so that the new gTLD program runs smoothly. It is in ICANN's interest to not risk damaging its reputation by being unprepared. These clear benefits of the

EOI Process outweigh the speculative and procedural concerns raised by Mr. Palage.

Mr. Palage's argument in opposition to the EOI Process centers on several arguments that consideration of the EOI Process has violated ICANN Bylaws and the Affirmation of Commitments: First, Mr. Palage claims that ICANN must seek the Governmental Advisory Committee's input because the EOI Process implicates public policy concerns. Second, Mr. Palage claims that ICANN must hold an in-person public forum prior to any Board action on the EOI Process. Third, Mr. Palage claims that the ICANN staff's analysis and publication of positive and negative effects of the EOI Process violated the Affirmation of Commitments because it failed to take into account the identity of the stakeholders and it weighed all stakeholders equally. Finally, Mr. Palage speculates that if the EOI Process is approved, a number of Reconsideration Requests will be filed which will further delay the new gTLD program. None of these arguments merit further delaying the new gTLD program and the EOI Process should proceed.

**The EOI Process does not affect public policy concerns and does not require input from the Governmental Advisory Committee.**

The ICANN Bylaws do not require input from the Governmental Advisory Committee ("GAC") on the EOI Process. The GAC is entitled to provide input only where a proposed policy action affects public policy concerns:

[I]n those cases where the policy action affects public policy concerns, [ICANN shall] request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.

Article III, Section 6(1)(c) (and similar language in Section XI and Section 2(1)(h)). Mr. Palage claims the existence of "public policy concerns" that mandate GAC input. But the concerns he identifies either do not impact public policy or have no greater impact on public policy than the new gTLD program itself.

For example, Mr. Palage cites as a public policy concern ICANN's request for financial commitments from prospective gTLD applicants prior to the publication/approval of the final Applicant Guidebook. But the GAC is concerned with the Internet community at large, not the sophisticated and well-capitalized entities qualified to participate in the new gTLD process. Furthermore, to the limited extent the deposit requirement for the EOI Process impacts public policy concerns, that impact is the same as that posed by the deposit requirement for the new gTLD application process itself, an issue which the GAC has already had substantial opportunity to review.

**In the alternative, the EOI Process does not preclude requesting an opinion from the Governmental Advisory Committee.**

Even if the Board determines that the EOI Process impacts public policy concerns and requires the GAC's input—which it does not—the existing timetable provides the GAC sufficient opportunity to provide such input. The GAC has already had ample opportunity to participate in the new gTLD process itself, and the concerns it has raised are not meaningfully affected by the EOI Process. Principle 2.6 from GAC's March 2007 principles regarding new gTLDs states: "It is important that the selection process for new gTLDs ensures the security, reliability, global interoperability and stability of the Domain Name System (DNS) and promotes competition, consumer choice, geographical and service-provider diversity." The EOI Process was designed specifically to provide data necessary to evaluate the concerns raised by the GAC with regard to the new gTLD program.

For example, the data obtained from the EOI Process will address root scalability and stability concerns and aid ICANN in developing a comprehensive analysis of economic and competition impacts. Also, the pre-EOI Process publicity campaign will mitigate the GAC's concern regarding lack of business awareness. To ensure that the new gTLD application program will satisfy the concerns already identified by the GAC, ICANN must first obtain crucial information from prospective new gTLD applicants. This can only be done through the EOI Process where serious prospective applicants demonstrate their commitment by submitting an up-front deposit and are incentivized to participate by earning a first-round application spot. Also, Principles 2.10 and 2.11 require that applicants, along with ICANN, establish and implement appropriate security and technology measures. The data obtained through the EOI Process will facilitate the goals already identified by the GAC.

To delay the EOI Process would mean unreasonable delays to the start of the new gTLD application program itself and undermine the precise concerns already identified by the GAC. Moreover, proceeding with the EOI Process does not preclude GAC from providing input while still allowing the process to move forward.

**The EOI Process does not violate ICANN's obligations under the Affirmation of Commitments.**

Nor does the EOI Process violate ICANN's publication obligations under the Affirmation of Commitments. The Affirmation of Commitments simply requires that ICANN "perform and publish analyses of the positive and negative effects of its decisions on the public". (Affirmation of Commitments, Paragraph 4.) The purpose of the publication requirement is to ensure that ICANN's decisions "are in the public interest, and not just the interests of a particular set of stakeholders" (*Id.*) Mr. Palage suggests that the publication requirement obliges ICANN to provide a "contextual analysis" of the comments received and to assign differing weight to comments from various stakeholders. However that

Affirmation of Commitments neither dictates nor suggests that such a practice is required.

Moreover, Mr. Palage neglects to disclose whether and which particular stakeholder interests he represents. ICANN satisfied its obligations under the Affirmation of Commitments and Mr. Palage's desire that particular stakeholders' input be accorded more value does not provide a basis for further delay of the new gTLD program or the EOI Process.

**The Bylaws do not require an in-person public forum.**

Article III, Section 6(2) of the Bylaws identifies certain circumstances when the Board should convene an in-person public forum regarding a particular policy:

Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 6(1)(b) of this Article

Article III, Section 6(1)(b) merely states that ICANN shall:

[P]rovide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board.

The ICANN online public forum regarding the EOI Process (available at <http://forum.icann.org/lists/draft-eoi-model/>) has satisfied Article III, Section 6(1)(b). And it is not "practically feasible" to also hold an in-person public forum, which would merely result in further delays to the opening of the new gTLD program with no tangible benefit.

**Speculation about hypothetical Reconsideration Requests does not justify further delays in the new gTLD program.**

Mr. Palage further notes that if the EOI process is approved in February 2010, "it is highly likely that multiple Requests for Reconsideration would be filed under Article IV, Section 2 of the ICANN bylaws, further delaying the gTLD process". This is mere speculation and should not provide cause for further delay.

Article IV, Section 2 provides that any person or entity may submit a Reconsideration Request in the event he, she, or it is adversely affected by staff actions or inactions or if ICANN Board actions have been taken or refused to be taken without consideration of material information. Mr. Palage does not identify particular material information that the Board has refused to consider or any particular entities that would be adversely affected should ICANN proceed with the EOI Process. To the extent he claims that the GAC

would provide “material” information that would “adversely affect” some unknown entity his argument is purely speculative. Ironically, it is Mr. Palage’s request that would further delay the new gTLD process, not the EOI Process itself.

### **Conclusion**

The EOI Process has not violated ICANN’s Bylaws or its core values. The EOI Process will provide the crucial data necessary for ICANN to ensure that the new gTLD application program is consistent with ICANN’s core values of preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet and promoting and sustaining a competitive environment. Further delay of the EOI Process would itself result in an unreasonable and unnecessary delay to the new gTLD application program. Furthermore, commencing the new gTLD application program without first undertaking the EOI Process would pose the substantial risk that ICANN would be insufficiently prepared to launch the new gTLD application program.

Newman & Newman respectfully requests that ICANN move forward as planned with the EOI Process in order that it might obtain the crucial data necessary to adequately prepare for the successful launch of the new gTLD application program.

Very Truly Yours,

NEWMAN & NEWMAN,  
ATTORNEYS AT LAW, LLP

A handwritten signature in black ink, appearing to read "Derek Newman", with a long horizontal line extending to the right.

Derek A. Newman