

**Comments of NeuStar, Inc.
On the Draft Guidebook for new gTLDs
December 5, 2008**

NeuStar, Inc. (“NeuStar”) appreciates the opportunity to provide comment on the Draft Applicant Guidebook for new Generic Top-level Domains (gTLDs) (the “Guidebook”). We would like to first thank the ICANN staff for the hard work that went into the development of the Guidebook. We understand that creating an implementation plan based on a comprehensive but complex set of policies was not an easy task, but we believe that the ICANN staff did a good job overall.

That said, NeuStar believes that there is still a good deal of work to be done and that a number of difficult issues remain to be resolved. Provided that the ICANN community can successfully and fairly resolve these issues, NeuStar supports the introduction of new top-level domains in a timely and responsible manner to ensure a more competitive landscape amongst registry providers and to provide consumers and organizations more choice among domain name registration names and services.

I. Comments on the Base Agreement

A. General

NeuStar wholeheartedly supports the comments submitted by the gTLD Registries Constituency (“RyC”) on December 6, 2008 (<http://forum.icann.org/lists/gtld-guide/msg00054.html>) (“RyC Contract Statement”). These comments focused specifically on the contractual provisions contained in the Guidebook, *i.e.*, the terms and conditions under which applications are submitted and the registry agreement that an applicant would be required to sign.

More specifically, NeuStar believes that (i) the draft base agreement reflects fundamental over-reaching by ICANN, including an attempted end run around the constraints on ICANN’s ability to impose new terms and conditions in the absence of a demonstrated stability and/or security need and (ii) the proposed contractual terms do not allay – indeed they reinforce – concerns about ICANN’s willingness to be accountable to contracted parties and gTLD registrants, who currently pay over 90% of ICANN’s fees through registry and registrar fees.

B. Key Issues for NeuStar

Although NeuStar will not rehash all of the points made by the RyC Contract Statement, we wish to emphasize and expand on some of the issues presented therein.

1. *ICANN must include Covenants that were eliminated from base agreement*

As has been pointed out in numerous meetings and teleconferences, ICANN has eliminated its obligations to: (a) operate in an open and transparent manner consistent with its expressed mission and core values, and (b) not apply its standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and not single out particular registries for disparate treatment unless justified by substantial and reasonable cause. Its justification for

removing the covenants is reflected in ICANN's Expanded Summary of Changes to the Base Agreement.¹

ICANN proposed eliminating this language because it restates ICANN's existing Bylaws obligations to act transparently and equitably. ICANN's accountability mechanisms (Ombudsman, Reconsideration, and Independent Review) are available to any party that believes that ICANN is not acting transparently and equitably. This proposed deletion was made consistent with the approach of streamlining the agreement to remove where practical any registry or ICANN covenants, representations and warranties that are not related to TLD registry and root zone operations. Although this proposed deletion would not affect ICANN obligations with regard to existing or new registries, nor would it affect existing registry agreements, it has generated significant controversy from existing registry operators and ICANN will consider all comments and review this proposal.

These changes are unacceptable to NeuStar for the following reasons:

First, Bylaws can be changed by the ICANN Board of Directors at any time and therefore, although the Bylaws may have these provisions, there is no guarantee that these provisions will remain in the Bylaws or that they will remain in their current form.

Second, each of the review processes set forth as accountability measures above are nothing more than advisory in nature to the ICANN Board, who in turn is free to ignore the decisions of the Ombudsman, Reconsideration Committee and even the Independent Review Panel. In no way do these so-called accountability measures in the Bylaws provide any meaningful accountability measures that are normally in place between private parties in a contractual arrangement.

Third, if the elimination "would not affect ICANN obligations with regard to existing or new registries," then why delete the language in the first place? The only logical conclusion that can be reached is that ICANN does not want to subject itself to disputes in arbitration by persons outside of its jurisdiction on these provisions and be forced to implement those decisions regardless of whether or not it agrees with those decisions.

Finally, ICANN makes the argument that this will not affect the existing agreements and implies that existing operators should not be concerned about this language because it would not apply to them. Although that is true for now, it stands to reason that ICANN will attempt to have the existing registries sign similar agreements to the base form upon renewal. Neither party would want to be in a position in 2012 when the .biz agreement comes up for renewal of having to argue for a fundamentally different agreement than the base agreement.

In short, if ICANN intends to abide by these obligations, then we see no reason to not include these fundamental representations.

¹ See <http://www.icann.org/en/topics/new-gtlds/draft-expanded-summary-changes-02dec08-en.pdf>

2. Ability of ICANN to unilaterally modify the Agreement

In the draft base agreement, ICANN has proposed that it have the right to unilaterally amend *any* provision of the contract with 30 days notice unless 2/3 of the affected registries or 2/3 of the GNSO oppose the change. Even in such a scenario, ICANN has reserved the right to override such opposition if the Board finds a security or stability reason to do so.

i. NeuStar opposes the right to unilaterally modify the Agreement

As ICANN has heard over and over again, not just from the existing gTLD Registries, but from a number of members of the Internet community, the unfettered unilateral right to modify any provision of the contract is not only unreasonable, but runs completely contrary to the notion that these agreements are private in nature as opposed to government-type regulatory agreements. Further, even when governments retain the right to amend agreements, there are usually provisions in such agreements allowing for a private party to receive fair and reasonable compensation for those modifications.

In an attempt to justify this unnecessary and over-reaching power, ICANN has explained that it needs some flexibility to react in an emergency situation to have the ability to take certain actions to prevent some of the issues that ICANN encountered in dealing with a “Register-Fly” type situation. The problem is that ICANN has not identified any situation in which the absence of this right has hindered ICANN’s ability to perform its mission. In fact, as pointed out in the gTLD Contract Statement, ICANN already possesses the right to impose new obligations on registry operators by using the Temporary Policies provisions of the registry agreement. ICANN has not demonstrated why this is not enough.

In addition, ICANN has not explained why it should be the burden of the gTLD Registries to veto (by a 2/3 vote) any provision ICANN seeks to amend as opposed to the opposite; namely ICANN could only impose an obligation on gTLD Registries if a supermajority of those registries agreed to the change. NeuStar is not advocating the latter position, but it would be a much more reasonable option when changes fall outside the scope of the “picket fence” and therefore outside of the consensus policy process. In other words, if something falls within the picket fence, the consensus policy process *must* be used. If outside the scope of the picket fence, and not within the enumerated exceptions set forth in the agreements², then NeuStar may be amenable to a separate process whereby a change could be imposed on all gTLD operators if and only if that change had the affirmative vote of a substantial supermajority of gTLD Operators (75-80%). NeuStar would be happy to participate in a constructive dialogue on this type of an approach should ICANN choose proceed down this path.

ii. NeuStar opposes giving the GNSO Council any further role in gTLD Registry Agreements.

As a side note to this Section, NeuStar was extremely surprised to see ICANN include a provision in the draft agreement that allowed for a modification to be overturned by a 2/3 vote of the *GNSO Council*. The GNSO Council is a “policy-development body”³ and not a legislative body with expertise in the management of registry contracts. At a time when the Board Governance Committee of ICANN has recommended that the legislative-type power of the

² See Section 3.1(b)(v) of the .Biz Agreement (<http://www.icann.org/en/tlds/agreements/biz/registry-agmt-08dec06.htm>)

³ See Article X of the ICANN Bylaws (<http://www.icann.org/en/general/bylaws.htm#X>).

GNSO be eliminated⁴, the ICANN staff has potentially created a dramatic shift in the opposite direction. Not only does ICANN create a new role for the GNSO, but it does so in a way that emphasizes a 2/3 vote of the GNSO. In light of the Board Governance Committee's unambiguous sentiment reflected on page 32 of the Report of the Board Governance Committee GNSO Review Working Group on GNSO Improvements, we believe this proposed change is unacceptable. It states:

In addition, as the Council moves from being a legislative body to a strategic manager overseeing policy development, the current emphasis on formal voting should be significantly reduced.

Therefore, not only does the report instruct the ICANN community to stop using the GNSO Council as more than policy managers, but it also was explicit in reducing formal votes. Both of these rules were ignored when drafting this provision of the model agreement.

NeuStar opposes any involvement by the GNSO Council in any of the gTLD Registry Agreements except for the limited role already afforded to it as part of serving as the managers of the policy development process as it relates to the consensus policy provisions of the agreements.

3. *Fees in Section 6.1 need to be reflective of the true costs of ICANN to support a TLD*

In Section 6.1 of the new TLD Base Agreement, ICANN essentially states that each new gTLD Registry Operator shall owe the greater of (i) \$75,000 per year or (ii) five percent of the domain name registration fee ("including all bundled products or services that may be offered by Registry Operator and include or are offered in conjunction with a domain name registration). Although ICANN states that this fee "would pay for additional support required for new TLDs, including compliance, registry liaison, possible increased registrar activity, and possibly other registry support activities," it does not provide any information on how it determined that it would cost ICANN a minimum of \$75,000 per year per TLD to support.

Although NeuStar supports the notion of a small revenue share with respect to the registration, renewal and transfers of domain names, it do not support ICANN attaching any revenue share obligation to other products and services associated with the domain name. NeuStar understands that there will be a number of new business models proposed in the new gTLD rounds, some of which may involve giving out domain name registrations for free. However, ICANN has not demonstrated why the minimum fee would not cover ICANN's costs in supporting that TLD.

ICANN has not demonstrated why it believes that it is entitled to five percent of domain name transaction fees. In fact, many of the incumbent registries, especially the unsponsored

⁴ See <http://www.icann.org/en/topics/gnso-improvements/gnso-improvements-report-03feb08.pdf> page 24. It states, "This work by the Council would be consistent with its new focus on developing as a strategic manager – reflecting the Bylaws' charge that it be "responsible for **managing** the policy development process of the GNSO" – rather than functioning as a legislative body (emphasis added)." See also page 28, "In this Section, we suggest concrete steps to help the Council move from being a legislative body towards becoming a more strategic body with strengthened management and oversight of the policy development process."

ones, pay much less than five percent per year. This has been more than sufficient to not only cover ICANN's costs, but to help build a significant reserve fund for ICANN. NeuStar would suggest this figure is too high and would like ICANN to explain how they arrived at the five percent figure.

In addition, ICANN has also not shown why it deserves five percent of any fees generated by services that may be completely unrelated to the domain name registration other than perhaps that they are offered as part of a package. To take an extreme example, if one were to include a dot-apple domain name with the purchase of an Apple computer, ICANN seems to assert that it would be entitled to five percent of the price paid for the Apple Computer. This makes absolutely no sense. Rather than trying to take a revenue share on associated services that could likely be unrelated to any ICANN activities, ICANN should propose a model to support its true costs. If ICANN is able to demonstrate that the more registrations contained within a registry, the more money it costs ICANN to support, then perhaps it can have a tiered minimum pricing based on the number of registrations instead of a revenue share tied to services. It could lower the minimums for smaller registries and possibly even increase the minimums for the larger ones. For example, if the concern is that a \$75,000 minimum would not be enough for a registry that has over 1,000,000 domain names, then we would not oppose a tiered minimum fee structure for registries such that TLDs with higher numbers of registrations could have a higher minimum payment regardless of the amount of fees charged to registrars (if applicable) for the domain names; provided that such higher minimum actually reflects what ICANN can demonstrate are its true costs to support the TLD.

4. *Section 2.9 which Imposes Obligation on Registry Operator to enforce Registrar Accreditation Requirement needs to be deleted.*

Section 2.9 of the base agreement states that "Registry Operator shall ensure through its Registry-Registrar Agreement that each ICANN-accredited registrar authorized to sell names in the TLD will clearly display at the time of registration a link to an ICANN-designated web page that ICANN will develop describing registrant rights and responsibilities and a link to Registry Operator's Registry Services Policies." NeuStar agrees with the proposition that Registry Operators that use registrars to sell their domain names should ensure that such registrars make its customers aware of all of the registry policies and that registrants contractually agree to such policies.

However, it is unclear to us why ICANN is mandating that *registries* ensure that registrars have a link to an *ICANN-designated* page on registrant rights and responsibilities. It seems to us that this requirement, which is in the proposed Registrar Accreditation Agreement ("RAA") modifications, is really for ICANN to handle. Such an enforcement obligation on the registries seems excessive and is likely to dramatically increase the operating costs of a gTLD registry. Therefore, NeuStar recommends the elimination of this requirement.

5. *ICANN's Audit Provisions are Excessive*

Section 2.10 proposes an unfettered right to audit new gTLD Registries to "assess compliance with the terms" of the Agreement. ICANN asserts that it may do this with as little as five days notice and mandates that registries "timely provide all responsive documents, data and any other information necessary to demonstrate Registry Operator's compliance with this Agreement." As the RyC statement points out, ICANN already has the right to audit fee

arrangements and the technical and functional specifications. This additional provision is not only unnecessary, but will impose significant costs on registry operators (in terms of preparation and resources). We believe that audits above and beyond financial and technical should only be allowed when a bona fide complaint is received by ICANN that involves a potential material violation of the registry agreement. Although ICANN has a growing staff devoted to nothing but contractual compliance, most registry operators are not able to have staff and resources available to ICANN's compliance group's beck and call waiting around to respond in five days to ICANN requests.

If a need arises to do an audit on a particular aspect because of a complaint, then we understand ICANN needs the ability to respond. However, with the exception of the audit on fees and technical performance, we do not believe that ICANN should be conducting random audits on domain name registries simply because they can. Absent sufficient justification, the need to respond to a bona fide complaint, or a documented issue of security and stability, ICANN should be limited in the audits it conducts.

6. *Renewal of Agreement should be more explicit on the terms and conditions under which renewals will take place.*

Section 4.2 makes it clear that unless there has been an uncured material breach, the registry agreements will be renewed upon expiration. However, it does not state the terms and conditions that would be applicable to the registry operator upon renewal. The agreement should state that the terms and conditions shall be substantially similar to the existing agreement except as modified by consensus policies that have been passed since the commencement of the registry agreement.

7. *Section 2.7 should be eliminated and replaced with a representation that the Registry will implement the protection mechanisms described in its TLD application*

Section 2.7 of the base agreement states that "Registry Operator must specify a process and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties ("Rights Protection Mechanisms"), which shall at a minimum include those provisions set forth [in specification 7]." NeuStar believes that not only is this clause unnecessary, but it is overly broad, cannot be enforced, and places a substantial burden on the registry operator.

We believe ICANN misconstrued the output of the GNSO working group, of which we were a member, in this matter. The group did not come to any consensus as to what mechanisms were appropriate, but rather the group wanted to make sure that applicants proposed mechanisms to protect the rights of others, and that these mechanisms included some form of authentication and dispute resolution. In those discussions, we believe that the group wanted ICANN in its evaluation of an applicant's proposal to make sure that each TLD had these mechanisms in order to pass the evaluation. Once they passed the evaluation, then the applicant would be obligated to implement what it proposed. The group never intended to impose a broad obligation to "protect the rights of others." Such a broad obligation in the agreement would be subject to too much interpretation by third parties who would complain to ICANN that they did not believe that the registry was adequately protecting their rights (however they interpret that phrase). We can envision third parties complaining to ICANN that the registry did not take action according to its ICANN agreement to protect third parties' intellectual

property rights, or to protect them from fraud, abuse, libel, slander, phishing, counterfeiting, harassment, etc.

For the reasons above, we recommend deleting Section 2.7 in favor of a requirement to implement the rights protection mechanisms set forth in the registry's application. If you wanted it to be more specific, you could include those mechanisms in an Exhibit to the Agreement, but that would not be required as the registry's application should be incorporated by reference into the body of the agreement. If for whatever reason those mechanisms are not deemed sufficient by ICANN, then the application itself should not pass the initial evaluation.

II. Comments on the CRAI Report

These comments relate to the CRA International Report entitled "Revisiting Vertical Separation of Registries and Registrars" (the "CRAI Report"). In addition to the comments submitted in the gTLD Registries Constituency statement, NeuStar would like to add the following:

A. Cross-Ownership

According to ICANN's Bylaws, ICANN has an obligation to promote competition in the registration of domain names⁵. In addition, Section 3.2(b) of the .biz Registry Agreement mandates that "ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause."⁶ It is imperative that the decisions made with respect to the new round of gTLDs are not made in isolation without adequate consideration of the effects of such decisions on the existing generic top-level domain registries.

For over a year now, NeuStar has emphasized the importance of the registry-registrar cross ownership issue. Meeting after meeting, NeuStar has asked ICANN to set forth the rules regarding cross ownership in the new TLD round. It has pointed out that the existing registries are currently prohibited from serving as an ICANN-Accredited Registrar and therefore have no direct access to registrants for marketing or promoting its own gTLD. Despite the fact that .biz constitutes less than two percent (2%) of the gTLD market, NeuStar has been given the same restrictions on conducting direct marketing campaigns to prospective domain name registrants as ICANN has given to dominant registry operator that controls 85% of the gTLD market. For .Biz, registrars are the only ones currently that are able to do so and therefore have built up large customer bases over the past eight years.

These registrars, or affiliates of these registrars, do not have any prohibitions on applying to become registries directly or indirectly. As a result, existing registrars have been actively luring prospective registries to serve as their back-end registry operator under the premise that unlike the current registry operators, they could deliver to prospective registries an established customer base, prominence on their website and guaranteed marketing designed to reach ultimate end users. In other words, unlike NeuStar, who is contractually prohibited from having directly communicating with registrants and serving as the platform from which consumers can purchase domain name registration services, these registrars can promise to

⁵ See Section 2 of ICANN's Bylaws found at <http://www.icann.org/en/general/bylaws.htm#I>.

⁶ <http://www.icann.org/en/tlds/agreements/biz/registry-agmt-08dec06.htm>

deliver what existing registries cannot: a direct marketing relationship with the ultimate registrant.

In addition, while the existing registries fight for “shelf space” with ICANN-Accredited registrars and to get their TLD actively marketed, current registrars that are allowed to become registries (either directly or indirectly as a back-end provider), can promise to deliver the prospective registries actual shelf space and TLD prominence. In fact, several large existing registrars in Cairo were directly touting their ability to directly market to consumers to prospective registries seeking back-end operators. Statements made to the effect of “[Incumbent Registry A] is good technical operator, but by virtue of the fact that we own a registrar, we can provide [Prospective Registry] with a guaranteed distribution channel along with the incentives to market your TLD.” These benefits are not conferred on the existing TLD Operators.

This has already placed the existing registries in a substantial competitive disadvantage. Allowing registrars to own new registries, but not allowing existing registries to own registrars is not only fundamentally unfair, but will materially impair existing registries’ ability to compete with the registrars entering the registry market place. Despite being asked to address this issue over a year ago by NeuStar and clarifying the ambiguity surrounding this issue, ICANN has perpetuated this impairment on the existing registries.

B. Price Cap Flexibility and Relationship to Cross Ownership

The CRAI Report recommends two test cases for the relaxation of cross-ownership restrictions. Although not explicitly stated in the report, it implies that such liberalization of the vertical separation and equal access requirements should only apply to registries that are not subject to a price cap. As stated in the RyC Statement, although Appendix A of the CRAI Report explains the rationale in general for and against price caps, it does not analyze which existing or new TLDs merited a price cap other than stating that concerns of excessive pricing meriting price caps are strongest for TLDs that have market power.

It is interesting to note that in the current form of the new TLD Agreement, and as was confirmed by ICANN in the new gTLD call on December 8, 2008, ICANN does not and will not require new TLDs to be price capped. Therefore, if the conclusions of the CRAI Report are adopted by ICANN, ICANN will likely take steps towards relaxing vertical separation and equal access requirements for all new TLDs.

In the event that price caps are not included for the new gTLDs, NeuStar believes that price caps must be removed from the .biz registry agreement. NeuStar asserts that the only reason .biz is under a price cap is because it is one of the existing gTLDs. There was never any market analysis done to determine whether .biz should be under a price cap. If in fact a market analysis were done today, such analysis could not justify the application of a price cap to a gTLD that currently has less than two percent of the total market for gTLDs. Price caps may be appropriate for larger TLDs that have a much higher percentage of the market (namely .com and .net), but are not appropriate for gTLDs that do not have any real market power.

In other words, if there are any material changes for the newer TLDs with respect to vertical separation and equal access requirements, because the new TLDs are not price capped, then such changes *must* be applied to NeuStar, unless justified by substantial and

reasonable cause. Not only is this required under the existing .biz Registry Agreements, but it is also required under ICANN's existing Bylaws. Failure to eliminate price caps absent substantial and reasonable cause would violate the Registry Agreements, ICANN's Bylaws, and run contrary to the principles of competition as set forth in the White Paper out of which ICANN was created.