



November 21, 2006

Board of Directors
Internet Corporation for Assigned Names and Numbers

RE: Possible Board Approval of INFO/ORG/BIZ Agreements on November 22, 2006

Dear Members of the Board:

In a note to the GNSO Council on November 20, 2006 Vint Cerf, Chair, ICANN Board wrote:

“Our discussions lead me to a conclusion that a delay in a vote is not justified by either a pending policy development process or awaiting additional public comment. ICANN is compelled to implement a Board-approved consensus policy but is also compelled to carry on business as new policy is being developed. The timeline for approval of the pending agreements cannot, in fairness to the parties, carry on up to the last months of an existing agreement. The process has to conclude sometime before the termination date.”

The Chair's comments are disturbing to say the least. The very ICANN body established to develop policy pertaining to the generic name space has advised the board to wait. There is no constituency we are aware of, outside of the Registries themselves, who support moving forward with these agreements as revised. Public comment is also overwhelmingly against them.

There is no good reason why approval of these agreements cannot wait. If necessary, an extension could be arranged. The current INFO/ORG/BIZ agreements allow ICANN, in its sole discretion, to decide whether or not to call for competing bids (see section 5.2.1 and 5.2.2 of all three agreements). If the incumbent Registry Operators should choose not to negotiate with ICANN Staff on any necessary extension to allow time to appropriately address the concerns of the GNSO and the Public, so be it. The Board may then decide to start the re-bid process. I suspect that that would not be necessary. The Board should expect and direct the Staff to act in the best interest of the Internet community as a whole as required by Article 4 of ICANN's Articles of Incorporation, and not in the sole interests of a single stakeholder.

Sections 5.2.1 and 5.2.2 in the existing agreements should make it clear to any reasonable person that there are no “tough” negotiations going on here. The Chair refers to fairness to the parties. What about fairness to the Internet community as a whole? Surely that should be the Board's first concern. The Staff holds a pat hand and should play it accordingly to the benefit of the community.

We are also concerned about the fact that the Nominating Committee has now announced that three of the voting Board members will be replaced at the end of the annual meeting in Sao Paulo, Brazil. We believe it is unwise for exiting Board members with only two weeks left in their terms to be voting on issues of such long term and serious impact on the Internet community. We request, in the spirit of openness and transparency, that the Board meeting of the 22nd be transcribed and the transcript made publicly available. The Board had promised that meetings would be transcribed some time ago. To our knowledge that has never taken place.

Finally, we would like to remind the Board of three outstanding issues that have not been appropriately addressed in these revised agreements.

1. Resolution Regarding New Studies – On October 18, 2006 the Board approved the following resolution:

“Resolved (06.__), after having considered the public comments and the responses from the registries, the President and the General Counsel are hereby requested to renegotiate the proposed agreements relating to: competition-related concerns (in particular price increase restrictions); traffic data and review mechanisms resulting from the introduction of new studies or additional information.”

We would be interested in understanding how the individual Board members interpret their resolution quoted above regarding “new studies” We understood the intent to be that the agreements would be renegotiated to allow for the implementation of recommendations made by these “new studies” or “additional information.” However, what the Staff and Registries are proposing is more or less meaningless. What does “consider and discuss” mean? It appears to be an attempt to placate the community and the Board without putting any real teeth into it. Is this what the Board intended? We don’t believe so.

We urge the Board to direct the Staff to follow its instructions as stated in the resolution. The Staff must negotiate language that ensures any recommendations as a result of these “new studies” and “additional information” can be implemented if the Board should approve them. Otherwise, what is the point of spending time and money on the commission of the independent study on the economic questions posed by the Board?

2. Presumptive Renewal – Community concerns over the form of presumptive renewal in these agreements still have not been addressed. Neither the Board nor the Internet community, in whose benefit the Board is supposed to act, should be satisfied with the renewal conditions proposed in these agreements.

It is obvious to any reasonable person that these proposed agreements do not simply provide a presumptive renewal; they virtually guarantee renewal in perpetuity without any reasonable opportunity for the Board to ever consider re-bidding these agreements regardless of the conduct or performance of the incumbent registry operator. In fact, the registry operator is allowed to repeatedly breach the agreement without limitation as long as they cure each breach within the specified time periods. The consequences of such repeated breaches regardless of their nature is not failure to renew, it is simply monetary damages.

We urge the Board to direct the Staff to put appropriate renewal conditions back into these agreements, or in the interest of openness and transparency explain more fully to the Internet community why the Board believes it is in the community's best interest not to do so and allow appropriate time for community feedback. The conditions that we request be included are those similar to section 25.B of the current COM agreement, in particularly items (b), (c), and (d), and the conditions stated in 16.C of the current COM agreement (or the similar conditions stated in section 5.4 of current BIZ and INFO agreements).

3. Uses of Traffic Data – The proposed changes to this section are inconsequential to the concerns that have been expressed. It appears to attempt to further protect Personal Data that a registry collects through its provision of domain name registration services. However it fails to take in account the following:

- Registries may at some point collect personal data through its provision of new registry services that are approved through the newly established funnel process for that purpose. The language should state that the Registry Operator is not permitted to disclose any Personal Data in conjunction with Traffic Data no matter how it may be collected, including but not limited to domain name registration services or any new Registry Services as defined in the agreement and subsequently approved through the funnel process.
- The changes still do not reconcile with the Staff statement regarding the intended use of Traffic Data. The Staff stated (emphasis ours):

“Consistent with the proposed new .COM registry agreement, each of the proposed .BIZ, .INFO and .ORG registry agreements contains a Section 3.1(f) on ***the use for statistical purposes only of ‘traffic data.’***”

Yet Section 3.1(f) actually states (emphasis ours):

“Nothing in this Agreement shall preclude Registry Operator from making commercial use of, or collecting, traffic data regarding domain names or nonexistent domain names ***for purposes such as, without limitation ...*** and promoting the sale of domain names ...”

Clearly there is still a conflict between the Staff's statement regarding the intended uses of Traffic Data, and the actual language of the agreements. No explanation or clarification has been offered. We again urge the Board to direct the Staff to clear up this conflict by either publishing a statement of their true intent or by clarifying the language in the agreement.

Tim Ruiz
Vice President
Corporate Development and Policy
GoDaddy.com