



August 25, 2006

GoDaddy.com comments regarding the proposed .BIZ, .INFO, and .ORG gTLD Registry Agreements

I. The Timing of the Proposed New Agreements

A. PDP-Feb06

The most glaring problem with the timing of these proposed agreements is that there is a Policy Development Process underway within the GNSO on policies for contractual conditions regarding existing gTLDs (PDP-Feb06).

1. PDP-Feb06 is a direct result of the lack of process that the ICANN Staff and Board undertook to revise the .net and .com agreements. There has been substantial discussion and controversy within the GNSO community around both agreements. It is clear that all interested parties within the ICANN community, except perhaps the Registries themselves, believe that changes executed in the .net agreement, and the similar changes proposed in the .com, .org, .biz, and .info agreements, represent significant policy changes that the ICANN Staff and Board should not be making unilaterally.
2. The GNSO Council has wisely recognized that issues such as permanent assignment of namespaces to specific registry operators, consensus policies, price controls (which may or may not include caps), and use of traffic data may in fact be policy issues. The GNSO recognizes that it may be more appropriate to have policies that apply to all gTLDs on some of these issues rather than treating them as matters to negotiate behind closed doors on a contract by contract basis.
3. PDP-Feb06 was appropriately initiated in full accordance with ICANN's bylaws. The PDP-Feb06 Task Force has been pressing hard to complete its work far enough in advance of the upcoming expiry of the 2001 gTLD agreements to allow the ICANN Staff and Board to consider its recommendations prior to finalizing the renewals for these registry agreements. The .biz and .info agreements do not expire until the end of June 2007, and the .org agreement does not expire until 2009.

4. Acting on these proposed agreements prior to the completion of PDP-Feb06 would further demonstrate the Board's disregard for the bottom-up, consensus-building process it is bound to in the ICANN's bylaws.

B. Exiting Board Members

Another problem with the timing is that the term of three current ICANN Board members expires at end of this year.

1. Given the likely timing of any vote by the Board on these proposed agreements, these potentially exiting Board members will be voting on these agreements as their parting act.
2. These three Board seats will be filled by the Nominating Committee well in advance of the expiration of these registry agreements.
3. It appears as though there is a rush to allow the Board as presently composed to make the decision on these proposed agreements. However, given the significant policy changes represented in these proposed agreements it would not be in the community's best interest to have exiting Board members make such monumental decisions.

II. Policy Changes Proposed in the Agreements

A. Presumptive Renewal

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 ICANN to ever consider re-bidding these agreements regardless of the conduct or performance of the incumbent registry operator.

1. The Staff makes the statement, *"The proposed new .BIZ, .INFO and .ORG registry agreements each provide for presumptive renewal, absent material and repeated breach of the agreement by the registry operator. This is consistent with each of the 2005 .NET registry agreement, and the proposed new .COM registry agreement."* However, this statement is only partly true.

2. It is true that the renewal conditions, or rather the lack thereof, in these proposed agreements are indeed consistent with those in the .net agreement and proposed .com agreement. It is also true that the Staff has conveniently left out the fact that there was considerable opposition to the lack of appropriate renewal conditions from within the international Internet community, and that even several representatives within the US Congress have voiced concerns over the proposed .com agreement in part due to the lack of appropriate renewal conditions. It is as though the Staff and Board hope that if they keep proposing the same ideas often enough we'll all get tired of pointing out the flaws and let it go.

3. There are several conditions in the current agreements that allow ICANN latitude to possibly re-bid them. These should be a part of all gTLD registry agreements. For example, section 25.B. of the current .com agreement states:

“(a) Registry Operator is in material breach of this Registry Agreement, (b) Registry Operator has not provided and will not provide a substantial service to the Internet community in its performance under this Registry Agreement, (c) Registry Operator is not qualified to operate the Registry TLD during the renewal term, or (d) the maximum price for initial and renewal registrations proposed in the Renewal Proposal exceeds the price permitted...”

4. Of particular importance in 25.B. as quoted above are items (b) and (c). These concepts are completely absent in the proposed agreements, as they are in the as yet unapproved new .com agreement. As a result, if the agreements are approved as they stand the registry operator only need not be in breach or bankruptcy and their registry agreement will be renewed. They are not required to show that they continue to be qualified or demonstrate that they have provided, and will continue to provide, a substantial service to the Internet community. It is not in the public's best interest for ICANN to give up these concepts.

5. What is not true in the Staff's statement is that each of the proposed agreements *“provide for presumptive renewal, absent material and repeated breach of the agreement by the 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.

6. In addition, as has been pointed out by us and others in regards to the proposed new .com agreement, there is no allowance for ICANN to consider re-bid of these agreements should the registry operator engage in or be convicted of serious offenses related to its financial activities. For example, the current .com agreement section 16.C. allows for termination by ICANN if:

“(i) Registry Operator:

a) is convicted by a court of competent jurisdiction of a felony or other serious offense related to financial activities, or is the subject of a determination by a court of competent jurisdiction that ICANN reasonably deems as the substantive equivalent of those offenses ; or

(b) is disciplined by the government of its domicile for conduct involving dishonesty or misuse of funds of others.

(ii) Any officer or director of Registry Operator is convicted of a felony or of a misdemeanor related to financial activities, or is judged by a court to have committed fraud or breach of fiduciary duty, or is the subject of a judicial determination that ICANN deems as the substantive equivalent of any of these, and such officer or director is not immediately removed in such circumstances.”

7. We urge the Board to not approve these agreements until these serious and potentially embarrassing deficiencies have been corrected.

B. Lifting of Price Controls on Registry Services

The Staff makes the statement, *“Following extensive consideration and discussion, each of the proposed new .BIZ, .INFO and .ORG registry agreements provide for the lifting of price controls formerly imposed on the pricing of registry services.”*

1. Following extensive consideration and discussion with whom? If this refers to the public comment and discussion that has taken place regarding similar provisions in the .net and proposed .com agreements the Staff should add that their decision is in total disregard for the overwhelming opinion of the international community. Their recognition of that opinion is apparent in that both .net and proposed .com agreement contained the same lifting of price controls, but both, on separate occasions, were modified to include limitations based on overwhelming community outcry. The .net agreement price increases are now limited to 10% per year, and the proposed .com agreement increases are limited to 7% with cost justification required in some cases.

2. In addition, the referenced Staff statement is completely deceptive, intended or not. The use of the word *“imposed”* implies that its some terrible, onerous imposition wrongly placed upon the registries that need to be rectified. While limited ability to increase prices under certain conditions may be a valid expectation, limitless rights is simply a recipe for disaster and results in an even greater imposition on the rest of the Internet community.

3. The Staff further states, *“However, in order to protect incumbent domain name registrants and allow time for planning by those in the registry and registrar communities, the form of registry-registrar agreement proposed with each of the new registry agreements requires six months advance notice by the registry operator of any price increase in registry services.”*

4. A six month notice is not sufficient protection for incumbent registrants when considering the totality of the pricing provisions in these proposed agreements. There appears to be no requirement for the registry operator to charge the same for renewals as they do for new registrations. In fact it also appears that the registry operator has the latitude to set different fees for each individual second level string. This lack of notice, price controls, and clarity raise the following potential impositions:

a. Established incumbent registrants find it difficult and costly to switch to another TLD. They need to consider issues related to trademarks, name availability, marketing investments, name recognition, and on and on, all of which takes considerable time to affect. Six months hardly gets them started. The impact may be lessened for those who chose to register for longer periods, but even then only as it relates to the time they may have to make a switch.

b. Incumbent registrants, as captive patrons, could be charged much higher prices to keep their domain names. That could happen even today by individual registrars, but registrants have a wide variety of choice in registrars and have the ability to switch without sacrificing what they have invested. That is not true if the registry operator should decide to charge considerably more for renewals than they do for new registrations.

c. Registry operators could use selective pricing to push certain incumbent *elements* out of their name space, or to simply capitalize on existing high traffic names whether the traffic is inherent to the string or has been built up by the incumbent.

5. Clearly, the proposed pricing provisions lack clarity and sufficient safeguards for incumbent registrants. The lack of price controls and sufficient notice needs to be corrected. The ICANN Board and Staff should consider what is in the best interest of the Internet community as a whole, as required in Article 4 of its Articles of Incorporation.

C. Use of Traffic Data

The Staff states that *“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.”*”

1. Intended or not, that statement is completely misleading. No where in 3.1(f) is the phrase or concept of *“statistical purposes”* used. To be clear, that section states (emphasis mine):

*3.1 (f) Traffic Data. **Nothing in this Agreement shall preclude Registry Operator from making commercial use of, or collecting, traffic data regarding domain names or non-existent domain names for purposes such as, without limitation, the determination of the availability and health of the Internet, pinpointing specific points of failure, characterizing attacks and misconfigurations, identifying compromised networks and hosts and promoting the sale of domain names, provided however, that such use does not disclose domain name registrant or end-user information or other Personal Data as defined in Section 3.1(c)(ii) for any purpose not otherwise authorized by this agreement. The process for the introduction of new Registry Services shall not apply to such traffic data.** Nothing contained in this section 3.1(f) shall be deemed to constitute consent or acquiescence by ICANN to an introduction by Registry Operator of a service employing a universal wildcard function. To the extent that traffic data subject to this provision is made available, access shall be on terms that are nondiscriminatory.*

2. If the intent of the Staff members that negotiated this section is to limit the use of Traffic Data to statistical purposes only, that intent did not make it into the text. In fact, use of the data is without limitation and any related service the registry operator may dream up does not need to go through the registry services approval process. It is not clear at all that the Staff, the registry operators, and the community are in agreement with, or even understand, what this provision intends.

3. In addition, it appears it could be construed to permit a registry to use traffic data that includes Personal Data in any way it desires without limitation. The clause reads, in essence, that the registry operator may use traffic data in any way, limited only from uses that do *"not disclose domain name registrant or end-user information or other Personal Data ... for any purpose not otherwise authorized by this agreement."* The issue is with the *"not otherwise authorized by this agreement"* clause. The first part of Section 3.1(f) specifically authorizes the Registry Operator to make commercial use of traffic data. Would this not then permit the registry from using traffic data in ways that would disclose domain name registrant or end-user information or other Personal Data? We believe the intent was not to create a potential loophole, but the drafting could certainly be better to make the intent more clear.

4. This Traffic Data provision is poorly written and its intent is unclear. It previously existed only in the as yet unapproved new .com agreement. Further, it is a subject of review for PDP-Feb06. It is premature to include it as a standard provision in all gTLD agreements and should be removed.

D. Use of ICANN Accredited Registrars

Section 3.6 of the current unsponsored gTLD agreements for .info, .biz, and .org clearly provides that registrations in the TLD will take place only through ICANN Accredited Registrars except under very specific conditions.

1. In these proposed new agreements that requirement is neither implied nor specifically stated. The agreements state that the registry operator must allow all ICANN Accredited Registrars who enter into the Registry-Registrar Agreement access to its registry services. But it does not state that only ICANN Accredited Registrars are allowed such access.

2. The Board should direct the Staff to correct this ambiguity prior to approving these agreements.

III. Summary of Recommendations

A. PDP-Feb06 and Exiting Board Members

The Board should not take action on these proposed agreements until (1) the GNSO has completed its work with PDP-Feb06, (2) the Nominating Committee has made its pending appointments to the Board, and (3) that revised Board has reviewed and considered the recommendations of PDP-Feb06.

B. Correcting Deficiencies

If the Board should decide to ignore PDP-Feb06 in violation of the ICANN bylaws and push ahead with these early renewals, it should direct the Staff to:

1. Correct the deficiencies in the renewal conditions as noted in II.A above.

2. Incorporate appropriate price controls. Incumbent registrants deserve and expect some predictability in the cost of maintaining their registrations. There should, at the least, be an annual limit on the increases that can be imposed on renewal and transfer fees. There should also be no fear that incumbent registrants will be targeted with exorbitant fees based, for any reason, on the second level string they have selected.

3. Remove the provision for the use of Traffic Data until its true purpose is clearly understood and agreed upon by the Staff and Board, the registry operator, and the community whose data is being targeted.

4. Add clear language that the registry operator may only offer registration services through ICANN Accredited Registrars.

Tim Ruiz
Vice President
Corporate Development and Policy
GoDaddy.com