

On behalf of Network Solutions, LLC, I am writing in response to proposed revisions to the .biz, .info, and .org registry agreements.

I. ICANN Should Not Renew These Agreements at this Time

Network Solutions remains deeply concerned that renewal of these proposed registry agreements at this time would be premature. The existing .org registry agreement does not expire until 2009; the .biz and .info contracts expire in late 2007. There is no contractual or policy reason that compels ICANN to act now on these important issues without awaiting input from the economic expert retained per the Board's direction or from the Generic Names Supporting Organization's policy development process. If necessary, the current .biz and .info agreements easily could be extended to terminate at the same time as the .org agreement, giving ICANN sufficient time to receive and consider such important information.

We laud the Board's adoption of a Resolution at its October 18 meeting to direct ICANN's President to commission an independent study by an economic consulting firm to deliver findings on economic questions related to domain registration marketing. To make the exercise relevant and a worthwhile expense, however, ICANN must reserve the opportunity to learn from and react to such expert economic advice. This is especially critical because key concerns in these registry proposals, including the potentially anti-competitive ramifications of automatic renewals, remain unresolved and must be addressed before the Board approves these agreements.

Similarly, it is imperative that the GNSO, which has primary responsibility for developing gTLD policy, be afforded a reasonable opportunity to deliver recommendations as part of a policy development process to identify consensus policy for renewals of existing gTLD contracts. The PDP Feb 06 Task Force has been working extremely hard and is making progress. It would be inappropriate to the hard working individuals who are sitting on this Task Force and send the wrong message to the ICANN community for the Board to take premature action on these proposals.

Entering into the proposed agreements at this time would be especially problematic as the draft agreements themselves are essentially permanent. The renewal provisions, for example, cannot be amended by ICANN or Consensus Policy without the consent of the registries. Before ICANN enters into a permanent agreement, it should have the benefit of advice from the economist and input from its policy-making arm. The proposed agreement does include a provision requiring that ICANN "consider and discuss" with each Registry Operator "appropriate changes to pricing and related terms under the Agreement in the event ICANN shall obtain further independent data from professional experts providing analysis of the pricing of domain name registrations and competitive market considerations." The provision does not have sufficient teeth, however, as "the failure by a Registry Operator to agree to an increase in registry fees *or other terms* [based on the expert data] shall not constitute a violation of this provision." [emphasis added]

In other words, new information on competitive market considerations received *after* approval of these agreements would not require the registry operators or ICANN to take

action. Thus, it is critical that such information be taken into account in a full, transparent manner *before* Board approval to ensure these proposed agreements enable ICANN to abide by its core values of competition, accountability and transparency.

II. Concerns About Presumptive Renewal Remain Unanswered

ICANN's draft summary of public comments of the proposed .biz, .info and .org agreements noted that one of the "key elements" of comments were "concerns that renewal provisions are too lenient."

Yet the proposed revisions do not alter the "automatic renewal" provisions, which essentially guarantee these agreements would continue in perpetuity. ICANN's request for public comment on the proposed revisions fails to provide any explanation – either on policy or economic grounds – as to why provisions such as automatic renewals would remain intact.

ICANN staff has incorrectly suggested that "[t]he 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."

<http://www.icann.org/announcements/announcement-2-28jul06.htm>

In fact, the proposed agreements would be renewed even with the material and repeated breach of the agreement by the registry operators. The only limitation on renewal is in the case of a material breach of one of just three sections of the agreement, the failure to cure upon notice, and even then renewal would occur unless an arbitrator has ruled that the operator has breached one of the three provisions and such breach had not been cured again after the arbitrator's award.

The automatic renewal provisions in these proposed agreements also mark major departures – without explanation – from the renewal provisions in the existing .biz, .info, and .org registry agreements. In existing agreements, the operator must submit a Renewal Proposal to ICANN, which can decide to accept it at its "sole discretion." In the Renewal Proposal, each operator must justify the renewal request with a detailed report on registry operations, proposed improvements or changes in price or other terms. After a mandatory review period, ICANN, at its sole discretion, may seek competing proposals, including a bid from the incumbent, assessing factors such as its "enhancement of competition for registry services." The selection among proposals is solely at ICANN's discretion.

Registry operators themselves have failed to demonstrate a public policy or other rationale for automatic renewal, instead asserting that it is needed to provide incentives for long-term infrastructure investments that ensure security and stability of registry operations. Such unqualified assertions are meaningless without evidence that the present renewal provisions have discouraged registry operators from making infrastructure expenditures to ensure stability and security.

The automatic renewal provisions in the proposed .com agreement have been a key concern of various ICANN and governmental stakeholders who have urged that the

contract proposal should not receive final approval until such competition issues are adequately addressed. For example, Congressman John Dingell (D-Michigan), who is presently the ranking Democrat on the House Energy and Commerce Committee, noted at an ICANN hearing in September that concerns remain regarding automatic renewal provisions in the proposed .com contract: “The proposed contract is worrisome in part because it would remove the prospect of competitive bidding for the dot-com registry and the better services and lower prices that may result.”

On October 18, 2006, the Board approved a Resolution regarding changes to the proposed .info, .org and .biz registry agreements that asked ICANN’s President and General Counsel to renegotiate the proposals “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.” Nonetheless, this renegotiation appears to have overlooked the widespread questions by the ICANN community about what the demise of future competition in these agreements would mean for ICANN oversight. Review of past performance and rebidding ensures good behavior by providing market-based incentives for accountability and the security and stability of the registries.

III. Pricing Proposals Lack Adequate Analysis and Justification

The revisions to these proposed registry agreements include a 10 percent cap on price increases, which the Board has described as “along the lines of the .NET and proposed .COM registry agreements.” The proposed selection of a 10 percent price cap, however, does not appear to have been based on advice from external experts on the economic and competition implications of this cap.

Further, ICANN’s comparison of the 10 percent cap to the pricing mechanisms in the .net registry agreements and the proposed .com renewal is neither comparable nor apt. In the case of .net, as part of the competitive bid process, VeriSign agreed to drop registration fees from \$6 per domain name to \$3.50. For the proposed .biz, .info and .org agreements, the proposed price increases would be added to the existing price of \$6 without the benefit of competition or cost justification. Understandably, the registry operators argue for parity when it comes to taking advantage of the contractual provisions that they like in the .net contract, but not those that they don’t like as well.

Regarding the comparison to the proposed .com agreement, this proposal remains pending before the U.S. Department of Commerce for final approval or disapproval. The .com registry proposal has drawn widespread concern and criticism, in part because there was not adequate explanation or evaluation (i.e., through a cost-based justification) as to why the proposal would allow automatic price increases in most years of the contract.

IV. Security Must Be Addressed in Registry Agreements

Additional time is also needed to ensure that the proposed contracts address the basic elements of a good security model, including requirements for timely disclosure and mitigation of any security breach; disclosure of the level and type of any serious security

breach attempts and remediation plans; disclosure and mitigation of any suspected security-related failures, and security testing and/or auditing.

The proposed agreements' lack of competition, coupled with inadequate oversight and security requirements, would mean the continued success of these registry operations from a security and stability standpoint is left to each operator's good will, not contractual requirements. This falls far short of maintaining robust, proactive safeguards to protect the DNS. Troublingly, this lack of oversight over basic security safeguards deviates from best practices in other industries that are less vulnerable from a single point of failure, such as banking and brokerage, which face considerably more stringent regulatory requirements for cybersecurity than registry operators do.

V. Conclusion

The Board had directed ICANN to renegotiate these proposed agreements as they related to "review mechanisms resulting from the introduction of new studies or additional information." This explicit direction by the Board is at odds with a renegotiation process that has resulted in proposed changes that have either ignored concerns raised by commenters, in the case of automatic renewal provisions, or have discarded in advance the input of the pending economic study and the GNSO Task Force recommendations.

Why would the Board direct an independent study by an economic consulting firm on issues such as whether domain name registration is one market or whether each TLD functions as a separate market if the proposed .biz, .info and .org agreements were to be approved before such a study could even begin? The results of such independent analysis are necessary and important but would be irrelevant and a waste of resources should they come *after* these TLD agreements were approved with automatic renewals.

For the above-mentioned reasons, renewal of these proposed agreements at this time remains premature. Only a false sense of urgency would compel the Board to act on these proposals so far in advance of their renewal dates or prior to the delivery of the GNSO Task Force recommendations and the results of the pending economic expert report. The October 18 Board resolution stated that the "GNSO is currently conducting a policy-development process that includes study of some of these issues, but ICANN has pressing operational questions relating to its bilateral contracts with registry operators that need to be resolved, separate from any generally applicable new policies on this subject that might be recommended through the GNSO process."

It is hard to understand what these "pressing operational questions are" given that the current .org registry agreement does not expire until 2009 and the .biz and .info agreements expire in late 2007. Pressing policy questions related to competition, security, accountability and transparency warrant that ICANN take the time needed to seek and analyze advice from experts as well as public comments from ICANN stakeholders. This is especially important because the proposed .com agreement, which is used to justify pricing and renewal provisions in these proposed agreements, has not received final approval and has not addressed myriad criticisms raised by virtually every corner of the Internet community.