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By E-Mail to [comments-mobi-renewal-23dec16@icann.org](mailto:comments-mobi-renewal-23dec16@icann.org)

Internet Corporation for Assigned Names and  
Numbers 12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

Re: Proposed Renewal of .MOBI Sponsored Registry Agreement

Dear ICANN:

I am writing on behalf of the members of the Internet Commerce Association (ICA). ICA is a not-for-profit trade association representing the domain name industry, including domain registrants, domain marketplaces, and direct search providers. Its membership is composed of domain name registrants who invest in domain names (DNs) and develop the associated websites, as well as the companies that serve them. Professional domain name registrants are a major source of the fees that support registrars, registries, and ICANN itself. ICA members own and operate approximately ten percent of all existing Internet domains on behalf of their own domain portfolios as well as those of thousands of customers. ICA is a longstanding member of the GNSO's Business Constituency.

This letter addresses the Proposed Renewal of .MOBI Sponsored Registry Agreement that was [published](#) for public comment on December 23, 2016.

### **Executive Summary**

- **ICA has no objection the registry fee reduction contained in the revised RA.**
- **However, the (difficult to determine) net annual financial benefit to be realized by registry operator Afilias brings into question whether its agreement to other GDD-proffered provisions of the RA was truly “voluntary”, given this permanent fee reduction and the ability of GDD staff to deny a final agreement unless their initial negotiating position of new gTLD RPM acceptance was agreed to.**
- **The 2016 launch of the PDP Review of All Rights Protection Mechanisms in All gTLDs, which is tasked with recommending whether new gTLD RPMs should become Consensus Policy for legacy gTLDs under its GNSO Council-approved Charter, makes it particularly inappropriate for GDD staff to continue seeking that de facto policy result in non-transparent, bilateral RA negotiations that contravene the policymaking process set forth in the Bylaws.**
- **GDD staff should demonstrate their clear commitment to ICANN’s bottom-up policymaking process by ceasing and desisting from seeking top-down imposition of new gTLD RPMs in legacy gTLD RA negotiations until the RPM Review WG has completed its work reviewing those RPMs and its final recommendations – including whether those RPMs should become Consensus Policy -- have been acted upon by the GNSO Council and ICANN Board.**
- **In the absence of such GDD self-restraint, the ICANN Board should declare an immediate moratorium on the imposition of new gTLD RPMs on legacy gTLDs through RA renewal negotiations until the above referenced PDP has been concluded, the GNSO Council has acted upon its recommendations, and any implementation and transition issues have been addressed.**

### **Reduction of Per Transaction Registry Fee**

ICA has no objection to the principal material benefit provided by the revised RA to Afilias, the registry operator for .Mobi, which is a reduction of its annual minimum registry fee from the current level of \$50,000 to \$25,000 through adoption of the standard registry fee of \$0.25 and relayed measures. Assuming it is justified, GDD should properly have approved the annual fee reduction without pressing for additional unrelated concessions by Afilias as conditions for approval.

We note that it is impossible to calculate the full value of the monetary benefits being reaped by the registry operator as the request for comment fails to provide an acceptable level of transparency and relevant information in regard to the full economic impact of the registry fee changes. The relevant provision of the request for public comment states:

Fees (Section 6): The proposed .MOBI renewal registry agreement includes the same fee schedule new gTLD Registry Operators are subject to. Accordingly, the current registry fixed fee for .MOBI TLD will decline from the minimum level of 12,500 USD to 6,250 USD and also .MOBI TLD will be subject to registry-level transaction fee of 0.25 USD (applicability as explained in Section 6.1 of the base new gTLD Registry Agreement).

However, the redline version of the proposed new registry [agreement](#) shows no changes in the language of Section 6.1, "Registry-Level Fees", making it impossible to fully evaluate the potential economic benefits of the new fee structure to the registry operator. We have located the original [2007 registry agreement](#) but the complex variable fee provisions of its section 7.2(b) reveal that it not possible to gauge the full economic impact absent knowledge of the current average price of .mobi registrations. We believe that ICANN should have provided a complete redline of the fee section as well as a good faith calculation of its potential benefits to the registry operator for the sake of full transparency and community understanding.

The only further guidance we have found in this regard is in an industry publication, which [states](#):

Afilias has agreed to take on many of the provisions of the standard new gTLD RA that originally did not apply to gTLDs approved in the 2000 and 2003 rounds, including the URS.

In exchange, its fixed registry fees will go down from \$50,000 a year to \$25,000 a year and the original price-linked variable fee of \$0.15 to \$0.75 per transaction will be replaced with the industry standard \$0.25.

From that description we can deduce that the fee changes are worth at least \$25,000 per year to the registry operator, but may well be worth substantially more. We wish to make it clear that the ICA is not objecting to the adjustment of the fee schedule of any legacy gTLD to the now prevailing fee schedule established for new gTLDs. What we do object to is GDD staff using the economic leverage of substantial fee reductions to induce registry operators to accept non-economic provisions of the new gTLD RA that clearly have important policy implications. In addition, we believe this approach is unseemly, as from an accounting perspective there is absolutely no difference between granting fee concessions to a registry operator or writing an annual check to the operator in exchange for its acceptance of other RA changes.

Surely ICANN would not wish to be perceived as offering monetary inducements to registry operators to agree to renewal RA provisions that have been designated by the GNSO Council as policy matters, as such a perception can only have negative implications for ICANN's overall reputation. In this regard, we cannot help but note that within the next few months the community will be asked to comment on a renewal of the .Net RA, and that Verisign now pays ICANN a \$0.75 per domain fee to ICANN under its current RA as compared to the standard \$0.25 fee, with the differential to be devoted in large part to "a special restricted fund for developing country Internet communities to enable further participation in the ICANN mission by developing country stakeholders [and] a special restricted fund to enhance and facilitate the security and stability of the DNS".

We have no idea whether Verisign will seek a fee reduction for the .Net registry, and we are taking no position at this time on whether such reduction should be granted by ICANN. What we are pointing out is that a potential .Net fee reduction of \$0.50 would have an annual value of \$7.6 million at current registration levels, and that an economic inducement of this scale provides GDD with massive negotiating leverage. As observed above, the use of such leverage to extract concessions on non-economic matters having undeniable policy implications would, in our view, create a highly unseemly perception that will damage to ICANN's reputation. Imposition of the URS on the second most populous gTLD registry would also constitute a massive intrusion into the decision-making process of the RPM Review WG just prior to the very time when it will be considering whether to recommend whether any or all of the new gTLD RPMs should become Consensus Policy applicable to legacy gTLDs. The import of that recommendation will be most consequential for .Com and .Net, the top two gTLDs based on total domain registrations.

Returning to the .Mobi RA, the financial benefit to be reaped by Afilias illustrates precisely why the concept of "voluntary" agreement by a registry seeking beneficial changes in its RA in closed door, non-transparent negotiations with GDD staff is a false but convenient fiction. In this instant case we have two negotiating parties. Afilias, presented with the opportunity for retaining substantial additional domain revenues, cannot be expected to take the integrity of maintaining bottom-up, multistakeholder policy development into sole account and elevate it over its own financial interest. And GDD staff has repeatedly demonstrated its willful blindness to the inappropriate policy implications of pressing legacy gTLDs to adopt new gTLD (RPMs) prior to their adoption as Consensus Policy.

The request for comment provides no transparent explanation of how the proposed RA was arrived at, instead cryptically stating:

Afilias requested to engage in good faith negotiations regarding possible changes to the terms of the Agreement ... [where] Afilias informed ICANN that Afilias would agree to add . . . additional safeguards contained in the new gTLD Registry Agreement.

This statement provides no insight regarding the process and rationale that led to this conclusion, but merely states the outcome. Such lack of transparency underscores why these policy decisions must be made through the open and inclusive procedures required of the GNSO under ICANN's Bylaws. Absent additional information regarding the substance of the negotiations, it is impossible to avoid the perception that Afiliis may have accepted the URS provision in exchange for the economic benefits of the revised fee structure. Businesses have a duty to their shareholders or investors to maximize return, which is exactly why ICANN should avoid the perception that GDD staff has used the granting of economic concessions to leverage acquiescence on unrelated RA provisions.

That is especially true given the statement made by GDD head Akram Atallah during the November 8th Public Forum in Hyderabad, in which he [conceded](#):

**The registries come and ask for something and we tell them please adopt the new gTLD contract.**

That statement makes clear that GDD's negotiating posture in RA renewals is to condition the granting of benefits to the registry operators, including substantial monetary benefits, on acceptance of provisions that are not yet Consensus Policy and that have been identified by the GNSO as having substantial policy implications.

**Thus, two parties with no central role in ICANN's policy development process are effectively permitted to collude in closed door negotiations on a decision with broad policy implications. With each legacy TLD revision in which GDD staff succeeds in imposing new gTLD provisions that are not yet ICANN Consensus Policy they create de facto consensus policy, one negotiation at a time. This is wrong and it should stop.**

### **De Facto Consensus Policy Established Through Non-Transparent Contract Negotiations**

The underlying policy issue created by GDD pursuit of the imposition of new gTLD RPMs on legacy gTLDs through contract negotiations was raised to a high profile within the ICANN community in 2015 when the revised RAs for .Travel, .Cat and .Pro were challenged by multiple segments of the ICANN Community.

ICA's .Travel [comment letter](#) of June 21, 2015 stated in part:

The ICA is strongly opposed to the inclusion of new gTLD rights protection mechanisms (RPMs), particularly Uniform Rapid Suspension (URS), in this renewal agreement (RA) for a legacy gTLD. We believe that this attempt by ICANN contracting staff to create de facto Consensus Policy via individual registry contract, absent a relevant Policy Development Process (PDP), is a glaring example of the type of top down, unaccountable action that should

be targeted by enhanced accountability measures accompanying the IANA transition proposal. Contracts with legacy gTLDs can contain and enforce Consensus Policy, but it is an impermissible violation of ICANN's Bylaws for contracts to attempt to create Consensus Policy.... The potential addition of these RPMs to legacy gTLDs through this inappropriate avenue will have a substantial and deleterious effect on ICANN's policymaking process going forward, will create a new and dangerous precedent whereby de facto Consensus Policy can be created by contractual fiat in violation of ICANN Bylaws, and will substantially and adversely affect third parties around the world consisting of the existing registrants of more than one hundred million legacy gTLD domains.

In addition to ICA, that general line of reasoning was [echoed](#) by the Electronic Frontier Foundation and IP Justice, as well as ICANN's Business Constituency (BC) and Non-Commercial Stakeholders Group (NCSG).

On July 31, 2015 GDD staff [published](#) its Report of Public Comments regarding the Proposed Renewal of .TRAVEL Sponsored TLD Registry Agreement. In defense of the inclusion of the URS in the proposed .Travel Registry Agreement and other RAs, the report stated:

*Although the URS was developed and refined through the process described here, including public review and discussion in the GNSO, it has not been adopted as a consensus policy and ICANN staff has no ability to make it mandatory for any TLDs other than those subject to the new gTLD registry agreement. **Accordingly, ICANN staff has not moved to make the URS mandatory for any legacy TLDs, and it would be inappropriate for staff to do so. In the case of .TRAVEL and other legacy TLD registry agreement renewals (.JOBS) and proposed renewals for .CAT and .PRO registry agreements, inclusion of the URS was developed as part of the proposal in bilateral negotiations between the registry operator and ICANN.** (Emphasis added)*

This self-serving justification takes the position that GDD's opening position in these negotiations is not an attempt to make any particular revision "mandatory", and that a registry's agreement to a GDD request is entirely "voluntary" within the context of balanced, bilateral negotiations. It is true that under ICANN's new standard registry agreement any registry operator has a presumptive right of renewal of its RA – but only of the exact same RA, with no material changes in its terms and conditions. But all three of the registries accepting URS in their 2015 renegotiations sought and received material beneficial changes in their RAs that GDD staff had the exclusive power to approve, and to condition upon the acceptance of other unrelated revisions.

To the collective dismay of ICA and other parties that objected to the 2015 actions, ICANN's Board chose to back GDD staff rather than defend the community-based policymaking process. On February 3, 2016, in response to "Reconsideration Requests 15-19 (the ICANN Business Constituency & the ICANN Noncommercial Stakeholder Group (NCSG) and 15-20 (The Internet Commerce Association)",

ICANN's Board adopted the Board Governance Committee's denial of the two referenced Requests.

That [action](#) was based upon the flimsy rationale that—

The inclusion of the new gTLD RPMs in the Renewed Registry Agreements is part of the package of agreed-upon terms resulting from the bilateral negotiations between ICANN and each registry operator, and not, as Requesters claim, a "unilateral decision by ICANN contractual staff." The Requesters present no evidence to the contrary – i.e., that applying the new gTLD RPMs to the Renewed Registry Agreements was based on a unilateral decision by ICANN staff. The Requesters suggest that the Board should have reviewed all of ICANN staff's communications with the .CAT, .TRAVEL, and .PRO registry operators in order to confirm that the negotiations were in fact bilateral. Such contention, however, does not support reconsideration.

The Board's decision was based upon the false premise that the negotiations between a registry operator requesting material and beneficial alterations in its RA can be bilateral and balanced when GDD staff have placed requested changes on the table at the start of negotiations and have the unrestricted power to deny the requested RA changes unless their requests are acceded to. The Board also failed to review the full record of communications between the negotiating parties to judge whether the final draft agreement was coerced by GDD staff.

**The myth of “voluntary” acquiescence to GDD negotiating demands is even more stark in the present case, in which Afilias stands to reap substantial monetary benefit simply by acquiescing to them. The interest of the ICANN community in maintaining a transparent and bottom-up policy development process that is not influenced by private economic interests was not represented by either party to this negotiation.**

### **Launch of the PDP Review of All Rights Protection Mechanisms in All gTLDs**

From a policy development perspective, the principal difference between the 2015 actions and the instant case is the intervening creation of the PDP Review of All Rights Protection Mechanisms in All gTLDs. The Working Group's (WG) [Charter](#) was approved by the GNSO Council on March 15, 2016.

That Charter's "List of Potential Issues for Consideration in This PDP" includes this overarching one:

**Should any of the New gTLD Program RPMs (such as the URS), like the UDRP, be Consensus Policies applicable to all gTLDs, and if so what are the transitional issues that would have to be dealt with as a consequence?**

The actions of GDD staff in proposing adoption of new gTLD registry provisions by incumbent gTLDs severely prejudices the work of the PDP by creating de facto policy decisions in advance of its preliminary report and recommendations.

Further, the GDD's position in RA negotiations is materially flawed in that it fails to consider and address important "transitional issues", including the necessary legal steps to bind legacy gTLD registrants to use of the URS when it has not been adopted as a Consensus Policy through proper PDP methodologies.

I spoke to this matter in my Public Forum Statement at ICANN 57 in Hyderabad, stating (as captured in the session transcript):

SO I'LL END WITH THIS QUESTION: I DON'T KNOW WHAT THE RPM WORKING GROUP IS GOING TO RECOMMEND ON URS BECOMING CONSENSUS POLICY. MY OWN MIND IS COMPLETELY OPEN ON THIS POINT DEPENDING ON WHAT OUR WORK FINDS AND WHAT CHANGES MIGHT BE MADE IN IT.

BUT IF WE WERE TO RECOMMEND THAT URS SHOULD NOT BE CONSENSUS POLICY ... WOULD GDD STAFF CONTINUE THIS PRACTICE IN NEGOTIATIONS? IF THE ANSWER IS NO, THEN I MAINTAIN IT'S INAPPROPRIATE FOR THEM TO DO IT NOW. AND IF THE ANSWER IS THAT THEY'RE GOING TO KEEP DOING IT EVEN IF WE COME OUT AGAINST IT BEING CONSENSUS POLICY, THEN DOESN'T THAT RENDER THAT PART OF OUR CHARTER WORK A SOMEWHAT IRRELEVANT EXERCISE IN FUTILITY?

In response, Mr. Atallah stated:

IF THE POLICY COMES BACK AND SAYS THAT THE URS IS NOT SOMETHING THAT WE WANT TO HAVE AS A POLICY, OF COURSE, WE WOULD SUPPORT THAT.

Although the response is a tad ambiguous, read in its best light it indicates that GDD staff might cease its practice of suggesting adoption of new gTLD RPMs by legacy TLDs in RA renewal or revision negotiations if the WG recommends against their adoption as Consensus Policy.

If that is a correct reading of GDD's position, then the proper action for it to take going forward is to cease and desist from urging legacy gTLDs to adopt those RPMs in RA negotiations while the RPM Review WG is active, because a recommendation of the WG that the RPMs not become Consensus Policy would merely be an extension of the current status quo. If it is an incorrect reading, then the PDP deliberations of the WG on this central question are indeed an irrelevant exercise in futility and make a mockery of ICANN's purported commitment to a bottom-up policymaking process that is set forth in ICANN's Bylaws.

**In the absence of such GDD self-restraint, the ICANN Board should declare a moratorium on the imposition of new gTLD RPMs on legacy gTLDs until the above referenced PDP has been concluded, the GNSO Council has acted upon its recommendations, and any implementation and transition issues have been addressed.**



For the record, ICA has taken no position on whether URS or any other relevant new gTLD RPM should become ICANN Consensus Policy applicable to .Com, .Net and other legacy gTLDs. Our position on that matter shall be based upon the PDP's review and findings regarding the actual implementation of the URS, and particularly whether it is being uniformly administered as a narrow supplement to the UDRP in which bad faith registration and use are demonstrated by clear and convincing evidence. Our position will also be dependent on whether any alterations of the URS are recommended – and, in particular, whether a domain transfer option is recommended, given its potential to turn the URS into a rapid and inexpensive means of hijacking valuable legacy domains.

(For the record, while I am one of three Co-Chairs of the RPM Review WG, that position gives me a co-equal voice solely on administrative matters, and no authority whatsoever to steer that very large WG to reaching consensus on any particular policy recommendation.)

### **Conclusion**

**Unfortunately, while we have no objection to granting Afiliias the .Mobi registry fee reduction it has sought, we must object to the proposed RA's approval given GDD's imposition of extraneous new gTLD RA provisions into a legacy TLD agreement, and the consequent de facto creation of policy in regard to matters that are presently under consideration by a GNSO-chartered PDP. We can support Board adoption of the proposed RA only if Section 2.8 and Specification 7 are deleted.**

**Given the history of flimsy and self-serving justifications by GDD staff and the ICANN Board for similar actions taken in 2015, we are under no illusion that this comment letter will likely be successful in effecting removal of the URS and other new gTLD RA provisions from the revised .Mobi RA. Nonetheless, we strenuously object to this GDD action that intrudes upon and debases ICANN's legitimate policymaking process, and urge the GDD and Board to reconsider their positions, and to ensure that GDD staff ceases and desists from taking similar action in the context of future RA renewals and revisions until the RPM Review WG renders the community's judgment as to whether the URS and other new gTLD RPMs should become Consensus Policy, and such recommendation is reviewed by both the GNSO Council and the ICANN Board.**

**The ICANN Board should declare a moratorium on the imposition of new gTLD RPMs on legacy gTLDs as requested above. Failure to do so risks**

**substantial harm to ICANN's perceived commitment to acting in an accountable manner that strictly adheres to its Bylaws, and tarnish ICANN's reputation by creating the clear impression that monetary benefits are traded for unrelated contract concessions in closed door RA renewal negotiations.**

We appreciate the opportunity to provide these comments on the proposed revision of the .Mobi RA. We hope they are helpful to the further consideration of this matter by ICANN and its community.

Sincerely,

Philip S. Corwin

Counsel, Internet Commerce Association