



Via Email: comments-biz-renewal-03apr19@icann.org

April 30, 2019

ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, California
90094-2536, USA

Attn: Mr. Russ Weinstein, Global Domains Division

Dear Mr. Weinstein:

Re: Proposed Renewal of .biz Registry Agreement

I write to you on behalf of members of the Internet Commerce Association. Founded in 2006, the Internet Commerce Association (the “ICA”) is a non-profit trade organization representing domain name registrants, including domain name investors, domain name secondary marketplaces, domain name brokers, escrow service companies, and related service providers. The ICA’s mission is to assist with the development of domain name related policy. ICA members own a substantial percentage of all Internet domains and provide crucial domain name-related services to millions of Internet users.

We are pleased to provide herein, our comments on the Proposed Renewal of the .biz Registry Agreement (the “Proposed Renewal Agreement” or the “Agreement”).

1. **ICANN Should Seek Community Input *Before* Negotiating Registry Agreement Renewals**

The Proposed Renewal Agreement was ostensibly already negotiated and agreed to by ICANN and Afiliias before seeking input from stakeholders on the very serious policy matters that arise from the Agreement. At this point, ICANN seeks public comment not to renegotiate the Agreement, but only to make a report of public comments “available for the ICANN Board in its consideration of the proposed renewal agreement”. This puts the cart before the horse. Prior to negotiating and agreeing on any such Agreement, ICANN should be seeking community input as otherwise ICANN will not have the benefit of understanding what stakeholders want or need will

thereby not be responsive to the stakeholders that it is mandated to serve. That is precisely what has regrettably occurred here.

2. ICANN Once Again Circumvents Dedicated Volunteers When it Comes to URS and So-Called “Bottom-up Multi-Stakeholder” Policy Development

ICANN prides itself on bottom-up multi-stakeholder policy development, but yet again, ICANN staff has attempted to circumvent the established policy development process. The Proposed .biz Renewal Agreement includes Uniform Rapid Suspension (“URS”) when ICANN Staff are well aware that the question of whether URS should become a Consensus Policy is currently undergoing extensive review by the Rights Protection Mechanism Working Group (the “RPM WG”). In fact, the question of whether URS should be applicable to all gTLD’s as a Consensus Policy is one of the primary questions that numerous experts from the ICANN community have been engaged in for the last two years. These experts have dedicated thousands of person hours to determining whether URS should be a Consensus Policy and yet ICANN Staff has purported to circumvent them and render all these efforts largely moot with the unilateral implementation of URS in registry agreements as they come up for renewal.

It is an affront to the ICANN Community, and in particular to those dedicated volunteers that are following the established policy development process, that right under the noses of the ICANN Board, ICANN Staff continue to subvert and circumvent the required procedures by unilateral implementation of policy. This is at least the 7th instance where the Global Domains Division (“GDD”) has circumvented the policy development process by unilateral introduction of the URS and ICANN has been put on notice through Comments by various parties on each occasion.ⁱ

The question then becomes whether there is any point in continuing to engage in the established “bottom-up multi-stakeholder model” if efforts from volunteers, included members of the Internet Commerce Association, are ostensibly engaged in mere “busy work” at tremendous expense and opportunity cost, when the actual policy making happens behind closed doors by ICANN Staff.

Given that ICANN Staff has ignored all previous entreaties to abide by the established policy development procedure when it comes to URS, it must be concluded that ICANN pays mere lip service to the bottom-up multi-stakeholder model and putting the Proposed .biz Renewal Agreement out for public comment is mere window dressing.

Nevertheless, once again, and despite every indication that ICANN Staff remains intent upon continuing their unilateral policy making mission and circumventing its dedicated volunteers, we must demand that ICANN await the completion of the Working Group’s deliberations on the inclusion of URS as a Consensus Policy and refrain from unilateral imposition.

3. There are Major Oversights Within the Agreement Leaving Registrants Unprotected

a) The Agreement does not require that existing registrants receive notice of pending increases or renewal increases from the Registry Operator or registrars. Sections 2.10(a) and 2.10(b) merely require that the Registry Operator provide notice to registrars, not registrants. Accordingly, registrants may not receive adequate notice, and this is an example of how ICANN has made sure to look after registrars, but not registrants.

b) There is no requirement that registrants be afforded the opportunity to renew a domain name for up to 10 years. Section 2.10(b) merely provides registrars with the option (i.e. in their “discretion”) to offer up to ten year renewals. That means that a registrar may decide in its discretion, to only allow their customer to renew for a single year rather than ten, so that they can charge more after the one-year renewal term. Again, nobody at ICANN adequately looked out for registrants, but merely looked after its own service providers.

4. Does ICANN Care About Registrants and the Public Interest?

We are very troubled by the what appears to be ICANN Staff’s complete disregard for registrants and the public interest when it comes to the removal of all price caps in the Proposed .biz Renewal Agreement.

New gTLDs created entirely new namespaces where any registrant knew that they were subject to price changes and price increases at the whim of the new gTLD operator. It was clearly ‘buyer beware’ in the new gTLDs. In contrast, with legacy extensions such as .biz, the name spaces were not bought and paid for by the registry operator and the reasonable expectation of .biz registrants was that prices would be capped in order for pricing to remain stable and reasonable. The operators of legacy extensions such as .biz don’t “own” those name spaces. They were created for the public at large and are to be administered in the public interest by ICANN as essentially a trustee. The contracted registry operators are merely providing a service of maintaining the database and the underlying infrastructure on behalf of ICANN which is the caretaker of the public interest in the name spaces.

That is why it is so surprising and concerning that ICANN Staff expressly stated that the ostensible objective in removing the price caps on .biz registrations under the existing Registry Agreement, was to “align” it with the current “base registry agreement”. First of all, the crucial problem with this purported “alignment” is that in effect it constitutes a fundamental policy-making initiative that is beyond the scope of ICANN Staff without the support of the established policy development process.

Second, this purported “aligning” totally disregards the fact that .biz is a legacy registry that is supposed to be operated in the public interest. Although “alignment” may be convenient from an administrative perspective, there is no factual or legitimate policy basis for treating the .biz registry the same as all others, when it is clearly different. So, other than conveniently “aligning” registry agreements to purportedly treat all registries alike despite their respective and dramatically different mandates, registrant base, and histories, what justification is there for unlimited price increases? There is no evidence whatsoever that the .biz registry requires unlimited additional funds to maintain reliable operations. There is no evidence that the .biz

registry needs unlimited funds in order to “compete” with other registries. There is simply no justification for permitting the .biz registry operator to raise prices at all, let alone with a sky-is-the-limit approach.

Moreover, .biz registrants can’t simply pick up and move to a different domain name if prices are jacked up. For example, a business or non-profit or individual registrant who chose to “build a home” in .biz and who invested heavily in web development, branding, and marketing all connected to the .biz extension, did so with the reasonable expectation that ICANN would ensure, as the trustee of the .biz registry in the public interest, that reasonable prices would be maintained. If a registrant is faced with a substantial price increase for renewing their domain name they would have little choice but to pay it or face the potentially even greater costs of moving locations, rebranding, and remarketing, not to mention to potentially massive issue of losing their original email address. Similarly, if a new business wants to take its place in the .biz as a suitable namespace for its enterprise, and is met with a totally unjustifiable and expensive registration fee, it will force them to take their place in another less suitable registry. As such, existing registrants are a captive audience with little practical means of avoiding a registry-imposed price hike, and prospective registrants would be hugely disadvantaged if the price of a .biz domain name became unaffordable.

5. ICANN Misapprehends its Role and Ignores the Department of Justice

The rationale that GDD staff are putting forth for removing price caps is that ICANN does not want "to become a price regulator". This is a misleading formulation since ICANN as a trustee of the public interest for the legacy domains has set prices within the legacy extensions. Has ICANN throughout its history been overstepping its authority when it entered into agreements that included terms governing pricing?

The US Department of Justice viewed ICANN's role as creating competitive mechanisms, such as putting registry agreements out for rebid, to keep prices low for registrants, and failing that, the DOJ clearly stated it was ICANN's role to manage the TLDs in a manner that "safeguards the interests of registrants in obtaining high quality domains at the lowest possible prices."ⁱⁱ

The DOJ expressly stated that ICANN should set price caps in the absence of putting out registries for competitive bid:

"Because ICANN's proposed registry agreement lacks any [pricing] safeguards,... ICANN should consider revising the proposed registry agreement, at least for instances where there is not competitive bidding to operate a new gTLD, to include provisions designed to limit the ability of the registry operator to exercise market power, i.e., price caps..."

The DOJ called for agreements that included a maximum price and limitations on price increases:

"ICANN's requests for bids [to operate a new gTLD] should expressly call for bids to specify an initial maximum price that would be charged by the operator for domain registrations, as well as limitations on price increases over time.."

The DOJ knew that relying on market forces and competition were not adequate where registries had market power. The DOJ found that .com and other gTLD registry operators had market power:

"our investigation of the .com agreement found evidence that other gTLD registry operators may possess a degree of market power. The market power inherent in other gTLDs is less than the market power in .com, but is still material.."

And;

"Further, the introduction of new gTLDs is not likely to constrain the market power by existing gTLDs..."

ICANN has apparently totally ignored this longstanding advice and direction of the DOJ. Although .biz may have less market power than .com or .org, for example, it still has a degree of market power and no economic studies have been conducted by ICANN prior to purporting to eliminate all price caps.

ICANN is therefore wading into treacherous territory, as by removing all price caps after it created an anti-competitive environment by not enabling competition via a tender process and by on top of it, by providing perpetual contracts with presumptive rights of renewal, it is unwittingly or perhaps negligently, created an egregious situation which may compel the DOJ to once again intervene. As the DOJ has stated, "ICANN should take steps to protect consumers from the exercise of market power by gTLD operators", and has abjectly failed to do so with the proposed Agreement.

Lastly, ICANN should not blithely state that it is "not a regulator" when the fact is that it is more than a regulator – it is the effective owner and trustee of registries. As such, it is entirely within its purview to set prices in the public interest. It is nonsensical to rely on the truism that it is 'not a regulator' (only governments are regulators), when the fact is that it has the right to set prices, subject to complying with its obligation to create a competitive environment and pricing in the interest of the public. In other words, nobody – especially the DOJ - would complain (other than the registries who receive ICANN's largess through uncompetitive and perpetual contracts) if ICANN maintained low prices incrementally above the cost of operating registries in the public interest.

Yours truly,

INTERNET COMMERCE ASSOCIATION



Per:
Zak Muscovitch
General Counsel, ICA

ⁱ See for example “Comments Run Overwhelmingly Against ICANN Staff Attempt to Impose URS on Legacy gTLD’s, June 22, 2015 (<https://www.internetcommerce.org/comments-oppose-dottravel-urs/>); see also “Comment on Proposed Renewal of .Coop Sponsored Registry Agreement, Business Constituency Submission, July 27, 2018 (https://www.bizconst.org/assets/docs/positions-statements/2018/2018_07July_27%20BC%20Comment%20on%20COOP%20Sponsored%20Registry%20Agreement.pdf); See also: “ICA Files ICANN Comment on Proposed .Museum RA Renewal”, October 22, 2017 (<https://www.internetcommerce.org/ica-files-icann-comment-on-proposed-museum-ra-renewal/>).

ⁱⁱ <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>