



Via Email: globalsupport@icann.org

January 15, 2020

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

Attn: Cyrus Namazi

Dear Mr. Namazi:

Re: Proposed Amendment 3 to the .COM Registry Agreement

We are writing to you in response to your request for public comments (“Public Comments”) on the above-noted proposal (the “Proposed Amendment”).

Introduction

1. We trust that you can appreciate that your request for Public Comments must be viewed with considerable skepticism considering that the last time that you requested feedback from the public on an amendment to a registry agreement¹, public comment resulted in exactly *zero* changes to the .org Registry Agreement despite near universal opposition and condemnation from stakeholders. Your failure to pay more than lip service to the multi-stakeholder model resulted in what is now widely considered to be the “.Org Fiasco”. This has called into question whether ICANN is actually capable of representing the public interest.²

In the future, should ICANN genuinely seek public comment on something as crucial as a multi-billion dollar service agreement that involves crucial policy questions, it would seem to make sense to request such feedback, or even engage a policy development process, *before* “reaching a proposed agreement”, which is not the case now. In fact, on January 3, 2020, you announced that you had *already* “reached a proposed agreement”, whereas it would make far more sense and be far more credible, if you

¹ See ICANN Report of Public Comments on Proposed Amendment to .Org Registry Agreement (<https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>).

² See for example, ICA Letter to ICANN, November 15, 2019 (<https://www.icann.org/en/system/files/correspondence/muscovitch-to-icann-board-15nov19-en.pdf>), and also see “Internet World Despairs”, The Register, November 20, 2019 (https://www.theregister.co.uk/2019/11/20/org_registry_sale_shambles/)

sought community input *before* reaching any proposed agreement. Otherwise, ICANN’s position is already firmly entrenched and its direction already established, thereby putting the cart before the horse.

Nevertheless, in case there is someone with a decision-making capacity at ICANN Org or on the ICANN Board of Directors who is prepared to actually receive public comments with a view to possibly reconsidering the Proposed Amendment, we are submitting our comments herein.

ICANN is Under No Legal Obligation to Permit Verisign to Raise its Prices to the Maximum or At All

2. ICANN has expressly claimed that the Proposed Amendment “fulfills commitments that ICANN and Verisign made in 2016 when they previously amended the .COM RA”.³

This is false. ICANN never committed to raising the Maximum Price that Verisign was permitted to charge for .com registrations. All that ICANN committed to in the First Amendment to the 2016 .COM Registration Agreement, was to “cooperate and negotiate in good faith to amend the terms of the Agreement “as may be necessary for consistency with changes to...the Cooperative Agreement”.

Amendment 35 to the Cooperative Agreement merely stated that “the yearly price for the registration and renewal of domain names in the .com registry *may* be changed” [emphasis added], and that” ICANN *may* agree to amend” the Maximum Price [emphasis added]. NTIA’s Statement⁴ on Amendment 35 expressly stated that Amendment 35, under the heading of “Pricing Flexibility”, merely “*permits Verisign to pursue with ICANN an up to 7 percent increase in the prices of .com domain names*” [emphasis added].

It is therefore clear from the .COM Registry Agreement, Amendment 35, and NTIA’s Statement, that NTIA did not require or impose a 7% increase in price and that it remains up to ICANN whether to agree to give Verisign any increase at all, or if an increase is to be granted, whether it should be within the maximum of 7% instead of at the maximum. Since Amendment 35 requires no increase in price whatsoever, and at most provides “flexibility” of up to a maximum 7% annual increase in 4 out of 6 years, it would be consistent with Amendment 35 *if no changes at all* were made to the .COM Registry Agreement. At most, all that ICANN is required to do pursuant to its .COM Registry Agreement obligations is to consider whether allowing Verisign to charge more, is justifiable. It is not.

It is an extraordinarily serious concern that ICANN would apparently assume that it “has no choice” but to give Verisign permission to raise its prices, when there is no such legal obligation. If ICANN has been led to believe that its hands are tied by the existing terms of the .COM Registry Agreement or that NTIA required ICANN to permit Verisign to raise its prices all the way to the permitted Maximum, it is nothing short of a multi-billion dollar error.

³ See; “ICANN and Verisign Announce Proposed Amendments to .COM Registry Agreement”, January 3, 2020 (<https://www.icann.org/news/announcement-2-2020-01-03-en>).

⁴ See: NTIA Statement on Amendment 35 (<https://www.ntia.doc.gov/press-release/2018/ntia-statement-amendment-35-cooperative-agreement-verisign>)

We previously highlighted to you the absence of any obligation to permit Verisign to raise prices in our letter dated November 16, 2018.⁵ We are once again reiterating this crucial understanding of ICANN's legal obligations, and in light of this it is incumbent upon you to reconsider your options and proceed pursuant to your actual legal obligations instead of pursuant to your misapprehended ones. You should also cease misrepresenting to stakeholders that the Proposed Amendment is in any sense "required" of you under a mistaken notion of "consistency", as opposed to it being an entirely gratuitous concession to your contracted .COM registry service provider.

There is No Factual Justification for Permitting Verisign to Raise its Prices

3. At the outset, it should be clear to you that no one other than Verisign (and perhaps other contracted registry operators) want increases in .COM prices. There is obviously no stakeholder outcry to increase prices on registrants. Registrants themselves obviously don't want to pay more. *So who does the proposed price increase stand to benefit?* Only Verisign. It stands to reap billions of dollars more, all paid for by registrants, and for no genuine reason whatsoever.

Verisign is entitled to a reasonable fee for running the registry on behalf of ICANN. Verisign currently charges \$7.85 per .com domain name per year. The cost to operate the registry, after taking into account the expensive infrastructure necessary to provide reliable and secure operations and high overhead, has been estimated at \$1.00⁶ to \$3.50⁷ per domain name per year.

If the proposed fee increases go into effect, by the end of the six-year agreement term, the fee for each .com domain name will increase to \$10.29 per year, a 30% jump from current levels.⁸ Even conservatively assuming that in six years' time there are only 140 million .com domain name registrants, that increase of \$2.44 per year, per domain name, would result in **\$341,000,000 more revenue for Verisign per year**. Bear in mind, that without any price increase and as things already stand now, Verisign, has a market capitalization of nearly \$25 billion dollars and had net income in 2017 of US \$457 million on revenue of \$1.14 billion.⁹ Making things even more remarkable is that Verisign enjoys an incredible operating margin of around 60%.¹⁰

Despite benefiting from the economies of scale from operating the largest domain name registry together with the .net registry, Verisign already charges *far more* for its registry services than other registry operators. For instance, as reported by Domain Name Wire, a recent bid to manage the registry for India's .in domain name was made by Neustar at just 70 cents per domain name per year, and registry operator Afilias offered to run it for \$1.65 per domain name per year.¹¹ Afilias runs the much smaller .org registry, with its 10 million domain names under management for approximately \$1.80 per domain name per year.

Accordingly, by any reasonable estimation, Verisign is not suffering for lack of revenue nor is it deserving of increased revenue. The current rate of \$7.85 is already far in excess of market rates as

⁵ See ICA Letter to ICANN, November 16, 2018 (<https://www.icann.org/en/system/files/correspondence/muscovitch-to-marby-et-al-16nov18-en.pdf>)

⁶ See; https://www.theregister.co.uk/2018/11/02/dotcom_domains_pricing/

⁷ See; <https://domainnamewire.com/2018/09/11/verisign-coperative-agreement/>

⁸ See; https://www.theregister.co.uk/2018/11/02/dotcom_domains_pricing/

⁹ See; See; <http://stopthepriceincreaseof.com/>

¹⁰ *Ibid.*

¹¹ See; <https://domainnamewire.com/2018/09/11/verisign-coperative-agreement/>

determined through competitive bidding processes elsewhere. **Simply put, there is no justification for increasing prices, whatsoever.**

If ICANN is to be trusted as the steward of the .COM Registry on behalf of the global public interest, ICANN must ask itself why it would effectively hand over billions of dollars in registrant money to its contracted service provider? Verisign is merely your manager of the .COM Registry – it has no business dictating the price, particularly when it is already handsomely paid and others could do it for far less. As we saw with the .Org Fiasco, bad things happen when a registry operator treats the registry as an asset that belongs to it, rather than acting as a mere contracted manager.

The Refrain That ICANN Is Not a Regulator is a Dangerous and Misguided Red Herring

ICANN repeatedly and apparently reflexively, repeats the mantra, that “ICANN is not a price regulator”, as if it makes any sense. It does not. The latest reflexive utterance of this misguided mantra regrettably appears in the background info on the Public Comments Page.¹²

First, no matter how many times this mantra is repeated, doesn’t make it any more meaningful or truthful.

Second, at most it is a statement of a purported policy, not of a fact.

Third, ICANN has been setting prices for years. It sets prices every time it enters into a contract with a service provider and has consistently set prices for legacy TLDs.

Fourth, ICANN as the steward of the .COM Registry, is of course entitled to determine what its service provider, Verisign, can charge in respect of a public resource that ICANN is supposed to manage in the public interest.

Fifth, if there was ever any hope that the new gTLDs would present such effective competition to .COM that prices would naturally be constrained by market forces, the results are in and it didn’t happen. The Antitrust Division of the U.S. Department of Justice specifically determined in 2008 that Verisign possesses significant market power as the operator of the .COM Registry because many registrants do not perceive .com and other gTLDs and ccTLDs to be substitutes. That has not changed. Verisign still has market power due to the unique market position of .COM. This market power means that Verisign is not constrained by competitive forces from raising prices on its captive base of .COM registrants especially given the prohibitive switching costs for registrants. Further, as there is no genuinely adequate substitute TLD for .COM, Verisign is the only source for new registrants wishing to enjoy the distinct benefits of branding on a .COM domain name. Because of Verisign’s market power, and in the absence of putting the .COM Registry out for bid, price caps are necessary to protect the public from Verisign’s ability to abuse its market power by raising prices far above levels that would exist in a market where there was effective competition. Verisign’s prices already far exceed market levels. Any further increases are unjustified.

Sixth, to the extent that being a “regulator” by definition entails being a government agency, then of course ICANN is not a “price regulator” per se. But ICANN needn’t be a price regulator to negotiate with its supplier a reasonable price on .COM domain names, as ICANN was entrusted with the DNS to operate it for the public benefit.

¹² See <https://www.icann.org/public-comments/com-amendment-3-2020-01-03-en>

Seventh, if ICANN is not a price regulator, then who is? The Department of Commerce does not set prices for the .COM Registry. Rather, it leaves it up to ICANN. And if neither the DOC nor ICANN sets prices, then who gets to set prices? Verisign, the service provider with market power? That is an absurd situation which if allowed to occur, would surely cause untold damage to the public interest.

Eighth, setting prices is a policy matter when it comes to the .COM Registry. If ICANN intended to adopt such a radical policy of permitting Verisign to set its own prices, that is a matter for stakeholders to determine, and there has never been any such policy development nor agreement amongst stakeholders.

Ninth, to the extent that ICANN took a hands-off approach to pricing when it came to new gTLDs, that is an entirely different situation than with legacy registries. New gTLDs were, for better or worse, 'bought and paid for' by new gTLD applicants who were determined as a matter of consensus policy, to be able to charge what they wanted. But as we have seen with the .Org Fiasco, when it comes to long-established legacy TLDs, stakeholders and registrants in particular want price stability and certainty. They want prices that are as low as possible while maintaining reliable DNS services.

Lastly, fair, stable, and certain pricing when it comes to legacy TLDs, is a core mission of ICANN despite what you may have been told or have come to believe. In ICANN's Announcement regarding the Proposed Amendment, ICANN expressly acknowledged, in the very same statement wherein ICANN stated that "it is not a price regulator", that "*pricing certainty* [will be achieved] by limiting the potential maximum wholesale price for .COM domain names". ICANN goes on to state, "the .COM TLD is *an important part of global commerce, making its continued secure, stable and resilient* operation a top priority for both ICANN and Verisign". Accordingly, by its own admission, ICANN itself implicitly acknowledges that it has a crucial role to play in maintaining stable pricing in order to ensure .COM's important place in the public interest.

Yours truly,
INTERNET COMMERCE ASSOCIATION



Per:
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