



Comment on Proposed Renewal of .MOBI Sponsored Registry Agreement

Status: FINAL

Version: 2

1-Feb-2017

Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. Promotes end-user confidence because it is a safe place to conduct business;
2. Is competitive in the supply of registry and registrar and related services; and
3. Is technically stable, secure and reliable.

Comment on Proposed Renewal of .MOBI Registry Sponsored Agreement

This comment regards the “Proposed Renewal of .MOBI Sponsored Registry Agreement” posted for public comment on 23-Dec-2016 (<https://www.icann.org/public-comments/mobi-renewal-2016-12-23-en>).

The ICANN Global Domains Division (GDD) has proposed renewal of the .MOBI Sponsored Registry Agreement that incorporate elements of the base new gTLD registry agreement. The multi-stakeholder community has not, however, had an opportunity to fully deliberate on whether these elements should be required of the legacy sTLDs like .MOBI. This is the 5th instance in which the GDD has proposed such an amendment to a legacy TLD registry agreement.¹ The BC sustains its procedural objection to these proposals, through which GDD staff unilaterally seeks to establish a new *status quo* for registry agreements. By substituting its judgment for established policy, we respectfully believe that staff exceeds its powers and overrides safeguards intended to preserve transparency and inclusion within the multi-stakeholder community.

The amendments in question require the .MOBI sTLD to *inter alia* adopt new rights protection mechanisms (RPMs) from the new gTLD Registry Agreement, specifically the PPDRP and the URS.² The GNSO only recently initiated a Policy Development Process (PDP) to review all RPMs at all gTLDs, and the working group Charter specifically tasks it with recommending whether any of the new gTLD program RPMs should become Consensus Policy and thereby applicable to legacy gTLDs. The working group tasked with evaluating these new RPMs does not expect to complete the task until late 2017.³ We wish to make clear at the outset that the BC’s concern is not in regard to the adoption of new gTLD rights protection mechanisms (RPMs) for legacy gTLDs. The BC has been a strong advocate for these RPMs as applied to new gTLD

¹ See e.g. “Proposed Renewal of .TRAVEL Sponsored TLD Registry Agreement” (<https://www.icann.org/public-comments/travel-renewal-2015-05-12-en>) posted on May 12, 2015, “Proposed Renewal of .CAT TLD Registry Agreement” (<https://www.icann.org/public-comments/cat-renewal-2015-05-28-en>) and the “Proposed Renewal of .PRO Un-sponsored Registry Agreement” (<https://www.icann.org/public-comments/pro-renewal-2015-05-28-en>), both posted for public comment on May 28, 2015.

² See ICANN, Amendment No. 4 to the .MOBI Registry Agreement, at Section 1(c) and Appendix 8, available at <https://www.icann.org/sites/default/files/tlds/MOBI/MOBI-amend-4-12oct16-en.pdf> (October 12, 2016).

³ See ICANN, RPM Review PDP Work Plan, available at <https://community.icann.org/display/RARPMRIAGPWG/Work+Plan> (updated July 12, 2016).

registries and this PDP continues to consider fundamental questions about how the new RPMs should function and how they could evolve in the future.⁴

The GNSO may ultimately articulate a Consensus Policy that calls for different measures for legacy gTLDs than are now being used with the new gTLDs. If the GDD persists in forcing registries to adopt these pre-Consensus Policy RPMs, it may widely implement procedures that do not align with the GNSO's ultimate conclusions. Further, as ICANN policy staff has recognized, application of the RPMs to legacy gTLDs raises certain transition issues that are not addressed by implementation via contract. Finally, in the absence of such RPMs being Consensus Policy, registrants may have legal grounds to question their imposition.

GDD personnel continue to set substantive policy for gTLDs by adopting elements of the new gTLD registry agreement into amended and renewed RAs for legacy gTLDs. This pattern is particularly clear in the context of proposed amendments to the .MOBI RyA, which trigger implementation of the new gTLD RPMs in .MOBI "within 30 days following the first Registry Level Transaction Fee Adjustment Approval Date." That approval date, and effectively the implementation of these new gTLD RPMs within the .MOBI TLD, is further conditioned upon the "sole discretion" of ICANN that "no unresolved compliance issues" remain after "a contractual compliance audit" tied to *inter alia* child protection obligations of the registry.⁵

While this is a worthy goal, the BC believes it is important that any significant fee reduction process be data driven, with clear measurable criteria that promotes internet security and a healthy domain name ecosystem. The development of such criteria should be done in a transparent manner, and may involve ICANN CTO/IS-SSR staff, and security and domain name analytics experts.⁶ We also note that the revised RA would eventually result in a substantial registry fee reduction, providing a powerful incentive for Afilias to agree to other modifications proposed by GDD.

In this regard, the request for comment fails to provide acceptable transparency 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).

⁴ See ICANN, RPM Review PDP Charter, available at <https://community.icann.org/display/RARPMRIAGPWG/WG+Charter> (adopted March 9, 2016).

⁵ See ICANN, Proposed Amendment to .MOBI Registry Agreement to Transition to New Fee Structure and to Adopt Additional Safeguards, available at <https://www.icann.org/public-comments/MOBI-amendment-2016-10-12-en> (October 12, 2016).

⁶ See Business Constituency Comment on Proposed Amendments to Base New gTLD Registry Agreement, available at http://www.bizconst.org/assets/docs/positions-statements/2016/2016_07july_20%20bc%20comment%20on%20proposed%20gTld%20base%20registry%20agreement%20final.pdf (July 20, 2016)

However, the redline version of the proposed new registry agreement⁷ 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 agreement⁸ 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.

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 \$0.25.⁹

From that description we can deduce that the fee changes are worth at least \$25,000 per year to the registry operator, but may be worth substantially more. We wish to make it clear that the BC is not necessarily 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 potentially substantial fee reductions to induce registry operators to accept substantive provisions of the new gTLD RA that clearly have substantial 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 other RA changes. Surely ICANN would not wish to be perceived as using monetary incentives to induce registry operators to agree to renewal RA provisions that have been designated by the GNSO Council as policy matters.

Moreover, the ICANN Bylaws reserve the power to set gTLD policy to the GNSO. The new RPMs have not, in their current form, received the uniform support from GNSO constituents and, as discussed above, have not undergone the procedure set forth in the Bylaws to become Consensus Policies. While greater consistency as between registry agreements is a worthwhile goal, and convenient for ICANN in terms of contractual compliance, it cannot supersede consistency of action in accord with ICANN’s Bylaws.

By circumventing ICANN Bylaws, GDD personnel are undermining the fundamental principles of transparency and inclusion that are core tenets of ICANN’s mission. GDD personnel are effectuating policy through bilateral negotiations with registry operators, which are only subject to the larger community’s review by way of these proposed amendments and public comments. The limitations of this comment procedure are only underscored by apparent efforts by the GDD to conceal its conduct, after previous criticism from BC. The BC notes that in earlier proposed registry agreement amendments and renewals, the GDD stated:

⁷ <https://www.icann.org/sites/default/files/tlds/mobi/mobi-proposed-renewal-redline-23dec16-en.pdf>

⁸ <https://www.icann.org/resources/unthemed-pages/registry-agmt-mobi-2007-01-01-en>

⁹ <http://domainincite.com/21373-urs-comes-to-mobi-as-icann-offers-afilias-lower-fees>

With a view to increase the consistency of registry agreements across all gTLDs, **ICANN has proposed** that the renewal agreement be based on the approved new gTLD Registry Agreement as updated on 9 January 2014.¹⁰ (Emphasis added).

The above language clearly stated that ICANN had proposed the change and why. The instant proposal cryptically states instead:

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.¹¹

This statement provides no insight on the process and rationale that led to this conclusion, but merely states the outcome. A lack of transparency underscores why these policy decisions must be made through the open and inclusive procedures required of the GNSO. Absent additional information regarding the substance of the negotiations, it is impossible to avoid the perception that Afilias 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 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”.¹² 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 economic benefits, on acceptance of provisions that are not Consensus Policy and that have substantial policy implications.

Therefore, the BC again wants to make it clear that we oppose the renegotiation of material economic aspects of Registry and Registrar Agreements, while also trying to induce the registry or registrar to adopt non-consensus policy. The policies of ICANN are set by its stakeholders. The economics of contracts are ultimately decisions of the ICANN Board, even though stakeholder groups and constituencies have the opportunity to comment on such modifications. ICANN staff and the ICANN board should seek to bifurcate any such discussions about economic and policy matters during contract renegotiations, so as to preserve the integrity of the policy-making decisions of ICANN’s SOs and ACs.

Conclusion

ICANN’s disregard for its own contractual obligations and that of its registries undermines the credibility of ICANN’s multi-stakeholder model. At the same time, there is political pressure to move ICANN’s functions to multilateral governmental appendages, such as the ITU. The decision by GDD staff to use

¹⁰ See ICANN, Proposed Renewal of .CAT TLD Registry Agreement,” available at <https://www.icann.org/public-comments/cat-renewal-2015-05-28-en> (May 28, 2015).

¹¹ See ICANN, Proposed Amendment to .MOBI Registry Agreement to Transition to New Fee Structure and to Adopt Additional Safeguards, available at <https://www.icann.org/public-comments/MOBI-amendment-2016-10-12-en> (October 12, 2016).

¹² <http://www.internetcommerce.org/ica-on-the-record-at-icann-57-hyderabad/>

the base new gTLD Registry Agreement as the starting point for the renewal of legacy gTLDs is beyond its power and substitutes staff decisions for bottom-up policy development required by the ICANN Bylaws. Therefore, the additional Section 2.8 and Specification 7 of the proposed renewal registry agreement for .MOBI should be deleted.

The BC looks forward to the outcome of the ongoing GNSO RPM Review PDP. This PDP will determine, in a manner consistent with ICANN Bylaws, how new RPMs should be applied to legacy gTLDs.

--

This comment was drafted by Phil Corwin, Beth Allegretti, and Steve DelBianco.

It was approved in accord with the BC Charter.