November 4, 2024

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

Attn: globalsupport@icann.org

Dear Sir or Madam:

Re: Public Comments on Proposed Renewal of the Registry Agreement for .COM

I write to you on behalf of the members of the Internet Commerce Association (the "ICA"). Founded in 2006, the ICA is a non-profit trade association representing domain name registrants and investors, secondary market participants, and related service providers. The ICA's mission is to assist with the development of domain name related policy.

The Proposed Renewal of the Registry Agreement for .COM (the "Renewal Agreement") is of substantial importance due to the sheer volume of .COM domain name registrations involved as well as the massive cumulative cost of registrations and corresponding revenue for Verisign, that it represents. The ICA is therefore pleased to provide its Public Comment below.

1. <u>Accessing ICANN's Public Comment Process</u>

The ICA is greatly concerned with the diminished accessibility of the ICANN Public Comment procedure. When ICANN last requested Public Comments on the .COM Registry Agreement in 2020, over 9,040 Public Comments were received.[1] The response from the public was amongst the largest, if not the largest, that ICANN has ever received. In fact, that Public Comment period produced nearly three times the number of comments received during the preceding comment period on the .org registry agreement (3,332), which itself was nearly unprecedented.

[1] https://circleid.com/posts/20200306_report_and_analysis_of_public_comments_submitted_to_icann_part_i/

The record volume of diverse comments demonstrated the substantial public interest in the.com Registry Agreement which governs the dominant global TLD which then had over 140 million registrations and which now has over 156 million.[2] The record interest also reflected the enormity of the proposed price increases which ICANN ended up approving despite the record number of objections from the public, and which cumulatively amounted to nearly $1 billion over the subsequent four years, followed by a perpetual cycle of further compounding price increases.

Egregiously, ICANN's Ombudsman called the submitted Public Comments "akin to spam"[3]. ICANN's response to the massive volume of public comments - which overwhelmingly opposed ICANN's proposed .ORG renewal terms as well as ICANN's proposed Amendment 3 to the .COM Registry Agreement - was to take steps to quell public comments going forward.

On February 7, 2020, ICANN's Sr. Vice President, Policy Development & Support, notified stakeholders that ICANN would now require members of the public to create a cumbersome account with ICANN and submit comments exclusively through ICANN's website, rather than via email.[4] This had the obvious and intended effect of severely limiting public participation by making it more onerous for members of the public to submit comments to ICANN. As a result of ICANN's steps to quell public comments, ICANN can now expect a vastly decreased volume of comments and will not receive a genuine gauge of the public's concerns.

We therefore express our profound disappointment with this Public Comment process which we believe is not intended to genuinely capture the nature and volume of public dissatisfaction with the Renewal Agreement and demand that ICANN reconsider permitting a robust and open Public Comment procedure that facilities and welcomes widespread public feedback.

2. Seeking Stakeholder Input *Before* Negotiating Agreements

ICANN should seek community input *before* negotiating registry agreement renewals. As with all previous instances of ICANN putting renewals or amendments of crucial registry agreements out for "Public Comment", we are not content to merely comment *after* ICANN has *already* negotiated and approved changes.

ICANN's failure to do so demonstrates its continuing disregard for community input and is very concerning. Moreover, it is extremely disheartening to community members such as us, who are asked to provide public comments, when we know full-well that ICANN has *already* negotiated and approved the terms of the Agreement.

[2] https://dnib.com/media/downloads/reports/domain-name-report-Q32024.pdf

[3] https://circleid.com/posts/20190914_what_is_the_purpose_of_icanns_comment_periods/; and also see https://domainincite.com/24720-org-price-cap-complaints-more-like-spam-says-ombudsman

[4] https://www.icann.org/en/blogs/details/improving-the-public-comment-feature-an-information-transparency-initiative-update-7-2-2020-en

The ICA requests that ICANN solicit community input *before* it enters negotiations with contracted parties so that ICANN understands the priority concerns of stakeholders when it negotiates on their behalf.

3. Cooperation With ICANN Economic Studies

In ICANN's request for Public Comment, ICANN expressly stated that the renewal proposal "incorporates important concepts from the Base RA, including both recent amendments to the Base gTLD Registry Agreement (Base RA), bringing these enhanced obligations to the largest TLD".[5]

Notably, one of the key features of the Base RA is Section 2.15, a provision requiring the registry *to reasonably cooperate with an economic study* if initiated or commissioned by ICANN.[6]

Given that one of the express purposes of the proposed Renewal Agreement is to incorporate important concepts from the Base RA, we are concerned with this glaring omission. Cooperation with any such economic study is all the more crucial for the .COM registry given that it accounts for the overwhelming majority of domain name registrations overseen by ICANN. Any economic study missing .com registration data would be of substantially less utility.

We therefore call upon ICANN to include a provision for cooperation with economic studies, consistent with Section 2.15 of the Base RA in the proposed renewed Agreement.

4. Actually Conduct an Economic Study

Not only should ICANN include a provision in the Renewal Agreement so that the registry operator is required to cooperate with ICANN economic studies, but ICANN should actually conduct an economic study.

Mere data collection is insufficient as it is not a substitute for a genuine and professional economic study. The Base Registry Agreement implicitly acknowledges the importance of ICANN conducting formal and professional economic studies yet there is no economic study being undertaken prior to entering into the Proposed Renewal Agreement despite ICANN apparently having agreed to the Maximum [permitted] Price.

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[5] See: https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-the-registry-agreement-for-com-26-09-2024

[6] See: https://www.icann.org/en/registry-agreements/base-agreement

ICANN's failure to conduct appropriate economic studies in relation to legacy TLD pricing is well known. In the recent Final Declaration of the Independent Review Process ("IRP") Panel in *Namecheap, Inc. v. ICANN* (December 23, 2022), the Panel noted that ICANN *failed* to address whether it had conducted an appropriate economic analysis or explain why such an analysis was unnecessary" in relation to the removal of .org price caps.

The ICA is very concerned that ICANN is *once again* agreeing to terms without any apparent economic basis.

We therefore call for ICANN to immediately commission a professional and comprehensive economic study on gTLD pricing and in particular, .COM pricing, and to openly and publicly share the economic report and its inputs, with all stakeholders.

5. ICANN Needs to Provide Transparency to Stakeholders

The National Telecommunications and Information Administration ("NTIA") and Verisign have a Cooperative Agreement[7]. Amendment 35 to that Cooperative Agreement stated that *"Verisign and ICANN may agree to amend Section 7.3(d)(i) (Maximum Price) of the .com Registry Agreement"… to increase the Maximum Price charged by Verisign for each yearly registration or renewal of a .com domain name up to seven percent over the highest Maximum Price charged in the previous calendar year"* for four out of every six years.[8]

In the proposed .COM Renewal Agreement, ICANN allows the maximum price permitted under the Cooperative Agreement, *i.e. the full maximum of 7%* "in the final four Pricing Years of every six year period" (p. 19 of redlined version)

Any price that is willingly negotiated between ICANN and Verisign that is within the permitted maximum price cap under the Cooperative Agreement, should be justified with an explanation by ICANN as to ***why*** the price is required, especially if it is an increased price.

We note that when it comes to increasing the fees charged by ICANN itself to Verisign, namely the Registry Level Fees under Section 7.2(d) of the Proposed Agreement, ICANN has linked any such increase to the Consumer Price Index. If ICANN believes that tying the fees which *it* receives to the Consumer Price Index ("CPI") is fair and reasonable, why does it believe that 7% - a much higher number – is fair and reasonable when it comes to fees ultimately paid by registrants?

Increased Registry Level Fees that are tied to the CPI implicitly provides a meaningful explanation for such increased fees since it is apparent that the intention is to raise fees by the amount that the CPI rises in order to maintain overall revenue stability despite an economic climate of rising costs.

[7] https://www.ntia.gov/program/verisign-cooperative-agreement

[8] https://www.ntia.gov/files/ntia/publications/amendment_35.pdf

Similarly, any increase in .COM registration fees should be linked to a concrete reason and rationale.

We note that on September 1, 2024, the price for .COM registration fees went up once again, this time to $10.26. That means that since Amendmdent 35 went into effect, the wholesale price of .com domain name registations and renewals has increased from $7.85 to $10.26, an increase of $2.41 in the aggregate for each of the nearly 160 million .com domain name registrations. This represents a 30% increase in price since 2020, despite no economic rationale or justification. Moreover, when this increase is applied to the nearly 160 million .com domain name registrations, this increase results in an approximately $385,000,000 annual windfall for Verisign based upon the increase in costs since 2020. We believe that the price negotiated and accepted by ICANN should have some relation to both the cost of operating the .COM registry and a reasonable operating margin for your operator.

It is crucial to be aware of the enormity of the economic consequences of the Proposed Renewal Agreement. Based upon the current 156 million registered .COM domain names, over the course of the upcoming proposed six-year term and with the proposed price increase of 7% in the final four years, the Proposed Renewal Agreement will generate an estimated. $10.794 billion dollars for the registry operator. In contrast, if the Maximum Price were to be reduced to $7.85, this would save registrants over $3.44 billion over the six years. Even if fees were capped at $10.26 for each of the next six years instead of the current proposed terms which permits 7% compounded increase in 4 out of 6 years - this would save customers $1.190 billion.[9]

It has been conservatively estimated by various analysts that the actual cost to provide the .com registry services is under $3.50 per domain name per year. Even adopting this generous figure, the current .COM registry operator receives an unwarranted windfall approaching $1 billion per year from overcharging consumers and businesses, solely as a result of its sole-source license with ICANN.

Please do not lose sight of the fact that ICANN is supposed to be negotiating on behalf of domain name registrants. Domain name registrants should feel confident that ICANN is negotiating a satisfactory deal on their behalf rather than acquiescing to what their registry operator has requested.

We therefore request that ICANN provide its explanation and justification for permitting the maximum price permitted under the Cooperative Agreement rather than *lowering* the price permitted under the Cooperative Agreement.

We ask ICANN to explain why the price of .COM service fees has to go up, instead of going down.

[9] Also see the ICA's letter to the Department of Commerce dated, November 27, 2012.

6. Don’t Worry, ICANN is not a Price Regulator

ICANN appears to be poised again, to merely “rubber-stamp” the Maximum Price instead of having negotiated a lower amount based upon any economic study or understanding. ICANN’s consistent refrain to the accusation that it does nothing but rubber stamp the Maximum Amount under the Cooperative Agreement, is that “ICANN org is not a price regulator”.

The fact is however, that ICANN need not be a “price regulator” to get involved in pricing the services which it contracts for. The act of “regulating” and “setting” a price are two entirely different things. Only government authorities can “regulate” a price, and ICANN is not a governmental authority. But pricing between two corporations regarding service fees can be negotiated and agreed upon, and that is exactly what NTIA directed ICANN and its operator to do – to agree on a price, so it makes no sense to claim that ICANN ‘plays no role in setting the price’. The “Maximum Price” under the Cooperative Agreement is just that – a maximum, and though an increase in the price is permitted, it need not necessarily be the absolute maximum amount.

ICANN participates in and negotiates prices virtually every day. In fact, just the other day, ICANN announced that it was raising the ICANN fee payable by registrars on behalf of registrants, from $0.18 to $0.20[10]. Moreover, in the Proposed Renewal Agreement, ICANN negotiated with its registry operator, a fee increase of Registry Level Fees *tied to the CPI* at Section 2.7.

Moreover, pursuant to the Letter of Intent between ICANN and the registry operator, the registry operator is currently paying $4.0 million per year to ICANN which will now be extended, meaning that ICANN will receive another block payment of $20 million in 2026 – 2030.[11] When it comes to ICANN negotiating fees for itself from the operator, ICANN appears to do very well. But when it comes to negotiating lower costs for registrants, ICANN appears to voluntarily agree to the absolute Maximum Price despite being under no obligation from the Cooperative Agreement to do so.

ICANN negotiates handsome fees for itself and even sometimes ties them to the CPI. What is the reason that it is not negotiating well for registrants with registration fees? Registrants deserve to know that ICANN is negotiating well on their behalf.

7. Creating a Mechanism to Determine a Fair Market Price

ICANN’s Bylaws[12] require it to act in a fiscally responsible manner and promote competition, such as;

[10] See https://domainincite.com/30497-icann-says-it-will-raise-its-domain-taxes-soon

[11] https://itp.cdn.icann.org/en/files/global-domains-division-gdd-operations/proposed-second-amendment-to-the-letter-of-intent-between-icann-and-verisign-26-09-2024-en.pdf

[12] https://www.icann.org/resources/pages/governance/bylaws-en

a) that ICANN must operate "through open and transparent processes that *enable competition"* (Commitments - 1.2(a));

b) Where feasible and appropriate, depending on market mechanisms to *promote and sustain a competitive environment* in the DNS market (Core Values -1.2(b));

c) *Introducing and promoting competition* in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process (Core Values – 1.2(b)(iv)); and

d) *ICANN shall have the ability to negotiate*, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission (Mission – 1.1(d)(iv)). [emphasis added]

Despite ICANN's Bylaws, there is unfortunately no competitive bidding process for the operating rights to the .COM registry since ICANN agreed to a virtually perpetual contract with a presumptive right of renewal. This is despite the fact that ICANN previously put the .net registry out for bid in 2005 and it received several tenders, including from Afilias, Denic, and NeuLevel and ultimately gave the contract to Verisign, and the competitive bidding process resulted in ICANN lowering the service fees payable to Verisign from $6.00 to $3.50 per domain name. It was the tendering process itself which provided ICANN with the opportunity to make an informed assessment of suitable service fees. As such, ICANN is well acquainted with its actual mandate and responsibility to promote competition this and surely this does not make ICANN "a price regulator", but rather a responsible contracting party operating in the public interest.

The refrain that ICANN is "not a competition authority or a price regulator" is nothing but misdirection. As set out above, ICANN has a responsibility to foster competition. As the manager of the .COM registry, ICANN is perfectly entitled to negotiate service fees with its contracted service providers. That *does not* make ICANN a "regulator" at all per se, but rather a responsible steward of the domain name system who undertakes ordinary commercial negotiation of contracts on behalf of the public interest.

NTIA has expressed it is interested in .COM market pricing as demonstrated by its public letter to ICANN's .COM registry operator dated, August 2, 2024.[13] In its letter, NTIA advised inter alia, that it is interested in discussing "possible solutions that benefit end-users, both businesses and consumers, and serve the public interest".

What is ICANN doing to find possible pricing solutions that benefit end-users, both business and consumers, and serves the public interest?

Our concern is not with who the operator of the .COM registry is. The current operator has operated the .com registry to-date, in a secure and stable manner. Rather, we believe that regardless of who the operator is, .COM pricing should have some relation to the cost of operating the .com registry

[13] https://www.ntia.gov/other-publication/2024/ntia-letter-verisign

while still providing the operator with a reasonable, and even an attractive operating margin. However, in the absence of actual competitive market forces determining price, it is crucial that an economic study be conducted to determine what a reasonable price would be for .COM registrations.

In addition to commissioning an independent economic study, ICANN should identify the best combination of quality services and low prices available in the marketplace by seeking *conditiona*l bids of the .COM registry Agreement, as previously advised in our letter to the ICANN Board of Directors, dated June 27, 2023[14]. This procedure would of course be initiated by ICANN as the service *requester* that is contracting a service provider to operate ICANN's .COM registry, and not as a regulator. If the current operator declined to operate the .COM registry on the basis of the aforementioned competitive market-based price determination process, then the current operator is free to go and ICANN can then award the contract to the successful conditional bidder. After all, while the *term* of the Registry Agreement is unfortunately perpetual, the *terms* are subject to negotiation and revision - as is demonstrated by the terms that ICANN has itself proposed be revised in the Proposed Renewal Agreement.

Only once ICANN has obtained crucial pricing data through an economic study and by the aforementioned competitive market-driven price determination process, can ICANN undertake meaningful negotiations of service fees with the current operator.

Sincerely,
INTERNET COMMERCE ASSOCIATION

Per:
Zak Muscovitch
General Counsel, ICA

[14] https://www.internetcommerce.org/wp-content/uploads/ICA-Letter-to-ICANN-Board-of-Directors-June-27-2023-Re-Public-Comments-on-.NET-Renewal.pdf

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