

GNSO Issues Report Proposed .COM Registry Agreement

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A. Summary

1. At its 17 January 2006 meeting, the GNSO Council resolved to request an Issues Report on some areas identified by Constituencies regarding the .COM agreement. This resolution followed the 24 October 2005 posting of a proposed new .COM registry agreement about which there was detailed discussion at ICANN's December 2005 Vancouver meeting.
2. This Report is based on the statements provided by the individual GNSO Constituencies in conjunction with the discussion sessions in Vancouver.
3. Staff does not recommend the launch of a dedicated PDP on this matter as framed by the GNSO Council. There are aspects identified by the GNSO Constituencies which could be used to inform policy development within the framework of the ongoing PDP regarding new gTLDs.

B. Objective

1. This report is submitted in response to the GNSO Council's request for an Issues Report "related to the dot COM proposed agreement in relation to the various views that have been expressed by the constituencies."
2. The format and content of this report are based on the Section 2 of Annex A of the ICANN Bylaws ("GNSO Policy-Development Process").

C. Background

1. On 24 October 2005 ICANN announced a proposed settlement of its outstanding legal disputes with VeriSign and opened a forum for public comments on the proposed settlement documents <<http://www.icann.org/announcements/announcement-24oct05.htm>>.
2. The settlement documents included a proposed new .COM Registry Agreement <<http://www.icann.org/tlds/agreements/verisign/settlement-agreements.htm>>. Prior to the negotiation and posting of the proposed .COM agreement, ICANN entered into several agreements that included some of the provisions currently discussed in the context of the .COM posting. For examples, please refer to the Annex 3 to this report.
3. On 10 November 2005, the Chair of the ICANN Board invited each ICANN constituency to meet with the Board to discuss views on the proposed VeriSign settlement. On 21 November 2005 an additional explanatory posting was done at: <http://www.icann.org/announcements/announcement-21nov05.htm>.
4. Each GNSO Constituency produced a statement identifying its issues with the proposed agreement. These issues were discussed with the Board at meetings during the ICANN Vancouver meeting from 30 November to 2 December 2005. The statements have been compiled by Staff in Annex 1.
5. At its meeting on 2 December 2005, the GNSO Council passed a resolution stating that:

"Whereas the GNSO constituencies participated in a review of the proposed settlement and have detailed statements on issues of concern;

Whereas the GNSO Council supports the conclusion of the litigation between ICANN and Verisign;

Whereas the GNSO Council does not support all articles within this proposed settlement;

Whereas the GNSO Council believes that there are broader questions raised in the proposed settlement that need to be first addressed by the GNSO;

The GNSO Council resolves:

That the ICANN Board should postpone adoption of the proposed settlement while the Council fully investigates the policy issues raised by the proposed changes."

6. On 17 January 2006, the GNSO Council passed the following resolution:

"That the Council solicit an Issues Report related to the dot COM proposed agreement in relation to the various views that have been expressed by the constituencies."

D. Discussion of Proposed Issues

1. Pursuant to the Council's resolution of 17 January 2006, the "proposed issue raised for consideration" in this report is "the dot COM proposed agreement in relation to the various views that have been expressed by the constituencies." The ".COM proposed agreement" refers to the version of the proposed .COM Registry Agreement posted in association with ICANN's 24 October 2005 proposed settlement announcement.

2. The individual GNSO Constituency statements relating to the 24 October 2005 proposed .COM agreement are referenced in full in Annex 1. Ordinarily questions about one particular agreement would not be the subject of an effort to develop broadly applicable policy, so therefore the following issue areas are described in terms that could be applicable to all future ICANN gTLD registry agreements. An analysis of the statements shows that the following issue areas on the substance of the proposed .COM agreement have been identified by one or more constituencies:

1. Registry agreement renewal – several ICANN agreements include a presumptive right of renewal. Should presumptive renewal be included in all registry agreements?
 - a. Does a presumptive right of renewal serve to promote ICANN's core mission and values, including the promotion of competition and DNS stability and security?
 - b. Does a presumptive right of renewal encourage a long-term view of registry operations in terms of investment and infrastructure production?
 - c. If implemented, under what conditions should the presumption of renewal be overcome?
2. Should registry agreements provide that consensus policies may not affect certain terms of the agreement? Current registry agreements include varying limitations

- on scope and applicability of consensus policy. Should future agreements be restricted to a uniform scope and applicability of consensus policies?
- a. Should certain contract provisions be immune from consensus policy development in any case? How is that determined?
 - b. Should sponsored TLDs retain policy-making authority now delegated in their agreements?
3. Should ICANN's registry agreements prescribe or limit the prices for registry services?
- a. Do price controls contribute to ICANN's core mission, especially the promotion of competition?
 - i. What are the net effects of price controls on end users?
 - ii. To what extent do price controls enhance competition in the DNS?
 - iii. To what extent do price controls detract from competition in the DNS?
 - iv. What conditions might justify price controls for particular registries?
 - b. If a price increase should be "justified," what is an objective measure for testing the application for a price increase? Can it be based on incremental cost, total cost? What profit margins are "reasonable" under such a test?
4. Are ICANN fees defined in registry agreements subject to policy discussion?
- a. Should fees be tailored to registry business models?
 - b. How does the public budgeting process play into the negotiation of fees?
5. Should the uses of traffic data, available to registries as a consequence of registry operation, be restricted?
- a. What are the differences in data available to "thin" and "thick" registries?
 - b. What, if any, privacy rights exist in the data?
 - c. How can the use of traffic data enhance services to registry clients?
 - d. What, if any, allowances should be made for non-discriminatory access to traffic data?

6. Should registry agreements require specific investment levels in the areas of development and infrastructure?
 - a. Will such specificity promote ICANN's core mission?
 - i. Ensuring DNS stability and security?
 - ii. Promoting competition?
 - b. Should security and stability goals be written into the agreements in the forms of customer service levels, rather than investment targets?

E. Staff Recommendations

1. ICANN Staff does not recommend that the GNSO launch a policy development process directed at one specific registry agreement. The issues identified by the GNSO Constituencies, as referenced in Annex 2 may serve as grounds for developing substantive policies of general applicability to all future ICANN gTLD registry agreements.

2. *General Counsel's Opinion*: The General Counsel's opinion is that "the dot COM proposed agreement in relation to the various views that have been expressed by the constituencies" is not "properly within the scope of the ICANN policy process and within the scope of the GNSO."

3. ICANN Bylaws, Annex A, Section 2 (e) sets out the requirement for the General Counsel's opinion relating to the scope of the issue proposed to initiate the PDP. The provision from that Bylaws Annex in pertinent part, reads as follows:

"...Each Staff Recommendation shall include the opinion of the ICANN General Counsel regarding whether the issue proposed to initiate the PDP is properly within the scope of the ICANN policy process and within the scope of the GNSO."

4. *GNSO's Proposed Issue*: On 17 January 2006, during the GNSO Council Meeting, the Council requested the following:

“That the Council solicit an Issues Report related to the dot COM proposed agreement in relation to the various views that have been expressed by the constituencies.”

5. On 24 October 2005, ICANN posted for public comment a set of settlement documents relating to various lawsuits currently filed between ICANN and VeriSign. The 24 October 2005 settlement documents included a proposed .COM Registry Agreement between ICANN and VeriSign (referred to herein as the “2005 Proposed .COM Registry Agreement”). The GNSO Council’s reference to the “dot COM proposed agreement” could have only been a reference to the 2005 Proposed .COM Registry Agreement, as no other agreement had been posted.

6. On 29 January 2006, a newly proposed set of settlement documents were posted for public comment, including a newly revised Proposed .COM Registry Agreement between ICANN and VeriSign (referred to herein as the 2006 Proposed .COM Registry Agreement).

7. General Counsel’s Review Considerations: Section 2.e of Annex A of the ICANN Bylaws provides that “In determining whether the issue is properly within the scope of the ICANN policy process, the General Counsel shall examine whether such issue:

- 1. is within the scope of ICANN's mission statement;*
- 2. is broadly applicable to multiple situations or organizations;*
- 3. is likely to have lasting value or applicability, albeit with the need for occasional updates;*
- 4. will establish a guide or framework for future decision-making; or*

5. implicates or affects an existing ICANN policy.”

8. In its unambiguous meaning, the specific request from the Council on 17 January 2006 is that an Issues Report be created relating to the 2005 Proposed .COM Registry Agreement. This appears to be clearly out of scope based upon the following three criteria that the General Counsel is required to review in any Staff Recommendation relating to an Issues Report:

a) any such issues resulting from this request are specifically targeting the 2005 Proposed .COM Registry Agreement, and therefore such policies do not apply to multiple situations or organizations;

b) any such issues resulting from this request are specifically targeting the 2005 Proposed .COM Registry Agreement will not have lasting value or applicability, particularly where that agreement has already been supplanted by the 2006 Proposed .COM Registry; and

c) any such issues resulting from this request are specifically targeting the 2005 Proposed .COM Registry Agreement are unlikely to provide a guide or framework for future decisions making, particularly as in this case where the proposed version of the agreement for which the comments have been raised has already been supplanted and amended (where possible) in response to the community feedback.

9. Additionally in support of this review, it is important to note that the 2006 Proposed .COM Registry Agreement is currently available for public comment. Such a public comment process, where feasible, has typically been used to accept community feedback relating to specific agreements. (Note: the GNSO Council has recommended to the ICANN Board a Bylaws change that would establish a 21-day comment period as a

suitable mechanism for review of an agreement between ICANN and a contracting party.) Where possible, the 2006 Proposed .COM Registry Agreement has been drafted following negotiations and public comment relating to provide amendment to the 2005 Proposed .COM Registry Agreement in response to concerns raised by the GNSO Constituencies and other members of the larger Internet community relating to the 2005 Proposed .COM Registry Agreement.

10. As for the other two criteria to be evaluated by the General Counsel in determining whether the issue is properly within scope it appears that:

1) issues relating to a gTLD registry are generally within the scope of ICANN's Mission Statement, in that ICANN's Bylaws at Article I, Section 1, Paragraph 1. Provides in pertinent part that ICANN is to "Coordinate the allocation of and assignment of...", "a. Domain Names (forming a system referred to as the "DNS");...", so this does not have an impact on the overall review of the scope other than to indicate that the issue area is within ICANN's purview; and

2) it does not appear that there are existing ICANN policies which are implicated or affected by this proposed issue, other than a general concern about whether it is ever appropriate or was intended that the PDP apply to specific gTLD agreements.

11. Relevance of Staff Manager's Advice on General Issues Being Raised: Although the Staff Manager's report has attempted to rehabilitate this request into a review of possible gTLD policy related issues relating to concerns raised by the GNSO Constituencies during the Constituency groups' review of the 2005 Proposed .COM Registry Agreement, it is clear that this is an attempt by ICANN policy staff to help the GNSO frame a PDP that might be consistent with the scope contemplated in the ICANN Bylaws. Although useful to future actions of the GNSO this is merely informative and does not

create a set of issues that are within scope in a manner consistent with the GNSO's request.

Annex 1 – GNSO Constituency statements regarding .com, Vancouver

A. gTLD Registries Constituency

<http://www.gtldregistries.org/news/2005/2005-12-06>

The gTLD Registries Constituency Statement concerning the VERISIGN SETTLEMENT AGREEMENT

This statement responds to the request from Vint Cerf dated November 10, 2005, for constituency input on the VERISIGN SETTLEMENT AGREEMENT.

I. Constituency Position

The Registry Constituency welcomes the progress made to date between ICANN and VeriSign to settle the .COM litigation and to develop a more constructive relationship for the future.

The Registry Constituency supports the approval of the proposed settlement of the pending litigation.

While the registry constituency does not have a consensus position concerning the merits of individual terms of the proposed .com agreement, inclusion of certain terms exclusively in this agreement and without any apparent commitment by ICANN that such improvements will be offered to other registries, raises a question.

To eliminate the possibility that the settlement could afford the dominant player an unfair competitive advantage, ICANN should commit to extend certain specific contract improvements, such as presumptive renewal, to similarly situated registry operators on an equitable and non-discriminatory basis. While the diversity of registries precludes an exhaustive list of specific terms, principals of equity and fairness should guide ICANN's contractual relationships with registries.

II. Method for Reaching Agreement on RyC Position

The Registries Constituency position was adopted by the Constituency's members at a meeting dated 1 December 2005. VeriSign and NeuLevel abstained from voting.

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B. Registrars Constituency

We, the undersigned registrars, recommend against ICANN signing the proposed .com Registry Agreement. The following reflects those issues that are of foremost concern to registrars:

1. New Registry Services

The proposed .com contract locks ICANN and VeriSign in for three years on a version of the consensus policy covering the standards and process for consideration of new registry services. The new registry

services consensus policy process that recently was approved by the ICANN board is untested, and it is likely that the ICANN community will need to refine and improve it after it is implemented. A three year lock will unnecessarily handcuff ICANN and the ICANN community.

We recommend the deletion of Sections 3.1(b)(v)(B) and 3.1(b)(v)(C), and allowing the existing ICANN policy development and refinement process to be used during the term of the agreement.

2. Registry Agreement Renewal

According to its own Bylaws and the Memorandum of Understanding between ICANN and the United States Department of Commerce, one of ICANN's core missions is to promote competition. We understand that the current .com contract contains a "presumptive renewal" provision, which by its nature hinders competition. The proposed .com contract, however, goes much farther than the existing contract by strengthening the presumptive renewal and termination provisions on behalf of VeriSign, thereby making it virtually impossible for VeriSign to lose the .com registry and impossible to reap the benefits of competition. VeriSign should be appointed as the administrator of the .com registry, not its owner.

We recommend reverting from Section 4.2 of the proposed .com agreement to the renewal terms of Section 25 of the current .com agreement, which requires a six month review of a "Renewal Proposal" provided by VeriSign and only under terms that are in "substantial conformity with the terms of registry agreements between ICANN and operators of other open TLDs. . ." ICANN also should strengthen the termination provisions currently contained in Section 6.1 of the proposed agreement by using the relevant text from Sections 16(B-E) of the current agreement.

3. Registry Fees

The proposed .com contract would permit VeriSign to unilaterally raise registration fees by 7% per year. The existing .com contract and all gTLD registry agreements (other than the .net agreement with VeriSign, which was entered into without community input in violation of ICANN's Bylaws) require the registries to cost-justify any price increases. In an industry where the economics suggest that fees should be going down when there is competition, it is particularly troublesome and anti-competitive to grant a monopolist or a single source provider the unilateral right to increase costs without justification. Unfortunately, these fee increases would result in cost increases to individual registrants. We note that in the recent competitive process for .net, VeriSign significantly lowered its registry fees. There is no reason for unilateral cost increases for the larger .com registry.

We recommend that the Board delete the current text of Section 7.3(d)(ii) and replace it with Section 22(A) of the current .com agreement requiring VeriSign to justify and ICANN to approve any proposed fee increase. If there is a dispute between ICANN and VeriSign over a cost increase, ICANN should have the right to seek competitive price proposals from other registry operators to ensure that the ICANN community receives the benefits of competition.

4. New ICANN Fees

ICANN and VeriSign propose a new ICANN fee that would be assessed on VeriSign and passed on to the registrars. This fee would result in excess of approximately \$150 million dollars to ICANN, and would be an end run around the existing ICANN budget approval process. As proposed, ICANN staff has removed an important check on the ICANN budget process. All ICANN fees that impact registrants should be subject to the ICANN budget approval process and should not only be the subject of negotiations between VeriSign and ICANN.

In addition to the changes suggested in number 3 above, we recommend the removal of Sections 7.3(g-h) in the proposed contract. Any transaction fees that ICANN needs to collect from registrars (and hence

registrants) should be assessed through the current transaction fees charged by ICANN to registrars and be subject to the existing budget approval process.

While we understand the desire to finalize the litigation, it should not be done so without a sufficient review process nor at the expense of major tenets of ICANN's mission. In its current form, it is a bad settlement for ICANN, the ICANN community, and the public-at-large. We, therefore, urge the ICANN Board to take advantage of the six month review of a "Renewal Proposal" contemplated in the existing .com agreement, which doesn't expire until November 2007. The Board should use this time to review the complicated contracts in their entirety, have a public comment period commensurate with the importance of the issue, and make the changes necessary to improve the agreement.

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Signatories to this Statement
=====

- AAAQ Inc
- Ace of Domains
- Active 24
- Ascio
- AvidDomains
- Blue Razor
- Bulkregister
- CoolHandle Hosting
- CORE
- CSIRegistry
- Directi
- Domain Bank
- Domain Contender
- Domain Name Sales Inc
- DomainClip
- DomainHip
- DomainPeople Inc
- Domains Only
- DomainSystems, Inc.
- DotRegister
- Dotster
- EasyDNS
- Encirca
- Enom
- EPAG
- GMO
- GoDaddy
- Hosting.com
- Intercosmos
- Joker.com
- Key-Systems
- Melbourne IT
- Misk.com
- Moniker Online Services
- Name Intelligence, Inc
- Name.com
- Namebay

Namesecure
NameScout Corp
NameShare
NameStream.com, Inc
Network Soln
Nominalia
PSI-USA, Inc
PSi-Japan
RallyDomains
Register.com
Register.it SpA
SaveMoreNames.com
Schlund+Partner
Spot Domain LLC
SRSPPlus
Total Registrations
Tucows
Vivid domains
Wild West Domains
! #1 Host Kuwait, Inc
! #1 Host Malaysia, Inc.
! #1 Host United Kingdom, Inc
!!! \$0 CostDomains

C. Business Constituency

http://www.bizconst.org/positions/ICANN_Verisign_Agreement_BCPosition12-2005.doc

Business Constituency Position

2005 ICANN and Verisign Settlement: December 2005

Background

Bilateral negotiation between ICANN management and Verisign has resulted in a settlement agreement comprising several papers on 24 October 2005 (hereafter “the settlement”). See ICANN web site:

<http://www.icann.org/tlds/agreements/verisign/settlement-agreements.htm>

For ICANN, this settlement would:

§ End six years of litigation with VeriSign and commits Verisign to binding international arbitration for future disputes on issues concerning ICANN’s technical coordination role. This confers a cost and manpower benefit to ICANN.

For Verisign, this settlement confers a series of commercial benefits relevant to:

§ A revised .com Registry Agreement.

§ A new Root Server Management Transition Agreement to coordinate future planning in the updating of the root zone.

The Business Constituency (BC) has been invited to comment on the agreement initially within a 24 day public comment period starting 26 October 2005. Following a request by the BC along with other ICANN constituencies and other stakeholders, this has since been extended.

Broad questions

The settlement raises some broad questions for the GNSO Council and the BC.

Process and precedent

§ Are there issues in this bi-lateral settlement that should have been considered first within the existing policy development role of the GNSO? The BC believes there are such issues and these are explored below.

§ Are there issues in this bi-lateral settlement that might constrain the future policy development role of the GNSO? The BC believes there are such issues and these are explored below.

Impact on ICANN

§ Are there issues in this bi-lateral settlement that might constrain the future oversight role of the ICANN community and Board? The BC believes there are such issues and these are explored below.

Impact on users

Are there changes that might have an impact on business users? The BC believes there are both advantages and disadvantages to users in the settlement.

Advantages to commercial users

§ The BC welcomes the principle of ending the litigation because it removes a distraction to ICANN management and removes unnecessary cost.

§ The BC welcomes a commitment to a future process of binding arbitration because this is a means of dispute settlement more in keeping with global norms.

§ The BC welcomes steps towards the stable funding of ICANN because a stable ICANN is an effective ICANN.

Potential disadvantages to commercial users

1. The inclusion of a different text for new registry services

§ The settlement, in section 3.1b, defines a process for new registry services that is different to the process already agreed to by the ICANN Board as part of ICANN consensus policy development.

§ The settlement, in section 3.1b(v)C, confers a three-year exemption for Verisign from the normal check of ICANN consensus policy on registry services.

This has potential disadvantages for users related to legal certainty and stability. There seems to be no public interest justification for offering VeriSign different terms for new registry services to any other registry, especially given the fact that a universal process for introducing such services already exists.

Moreover, this issue appearing in a bi-lateral settlement is a policy question that sets a bad precedent that might constrain the future policy development role of the GNSO.

2. The presumptive right of renewal for .com

§ The settlement, in section 4.1, increases the period of extensions to Verisign's management of .com from 4 to 7 years.

§ The settlement, in section 4.2, in effect confers a right to perpetual renewal.

§ This perpetual right of renewal is combined with a potential 7% annual increase in the price for Registry services per name that Verisign collects from Registrars from the current \$6 to a potential \$9 per name by the end of the first 7-year period.

This has a potential disadvantage to users related to competition. Centralisation of what amounts to over 50% of all names in one registry for perpetuity embeds a significant competitive dominance in the market. Long-term supplier dominance typically runs contrary to user interests.

The bi-lateral agreement to raise the registry fee would provide an immediate financial benefit on top of the market dominance. And the fee increase comes at a time that the Registry fees for other Registries are falling. Although the impact per single user would be small, the overall cost increase if passed on to users

of a change from \$6-\$9 over seven years for today's 40.3 million .com names is around \$0.4 billion. This is a substantial aggregate detriment.

Moreover, the question of whether there should be perpetual renewal of the franchises for any registry is a policy question that should have been considered first within the existing policy development role of the GNSO.

3. The exclusive right to data

§ The settlement, in section 3.1f, confers on Verisign certain intellectual property rights to traffic data from the .com zone file.

The implication of this contract change is unclear. Does it simply concern an expected commercial benefit accruing to any Registry with respect to zone file data? Or is it going further? It would appear that the effect would be to enable the Registry to leverage its natural upstream monopoly position (being the sole registry of .com domain names) into downstream competitive markets (eg. registrars and search engines). It is not in the interest of users to have competitive markets monopolised through capture of upstream inputs by a monopolist. Any bi-product of the monopoly registry service should be made available on a non-discriminatory basis to any and all downstream competitors. In other words, is this change establishing what may become sui generis (a unique order of) intellectual property rights? If the latter interpretation is correct, then a broader policy question is raised that should be first considered in greater depth.

4. The creation of special funds

§ The settlement, in section 7.2d, establishes a registry-level transaction fee payable to ICANN of 37c per name (rising to 50 cents) with the revenues designated to special funds.

Replacing the ICANN multi-stakeholder consensus process with bi-lateral contract sets a bad precedent. This risks undermining one of ICANN's fundamental pillars. In this respect the creation of special funds in the settlement may be seen as a way of circumventing the usual oversight process of the ICANN community and Board in the strategic planning and budget review processes. Further, there is not ICANN community consensus support for special funds. Risks to the ICANN consensus process would be to the detriment of commercial users.

Other risks of detriment

Risks to ICANN

The process for the renewal of the .com agreement is set out in the existing agreement. This covers the date, period of notification and character of any new agreement. It would appear all three of these have been contravened in the proposed settlement. Moreover, ICANN has amalgamated a renewal process, a settlement process and a pricing process. Such issues should be undertaken through ICANN's bottom-up consensus policy development process rather than through bilateral contract negotiations.

Risk of litigation from other parties.

If other Registries or Registrars believe they will suffer a competitive detriment because of the Verisign settlement, there is a strong risk of litigation by these parties. Further litigation would weaken ICANN. This would be to the detriment of commercial users. The proposed settlement has indeed resulted in new litigation.

Risk of adverse political reaction.

In conversation between BC members and national government representatives in Europe and elsewhere it is clear that there are suspicions about an inappropriate degree of alignment between the US department of commerce, ICANN management and VeriSign. The reassignment of the .net registry back to Verisign

contributed to those suspicions. There is a real risk the settlement will push certain government further in opposition to ICANN in favour of ICANN's role being taken over by an inter-governmental organisation. This would be to the detriment of commercial users.

BC recommendations

The BC supports an amicable resolution of the litigation between Verisign and ICANN, but does not support the proposed settlement in its present form. The BC seeks the following five changes before it can support adoption of the settlement by the ICANN Board:

1. Services. The BC calls for the deletion of both the sections on registry services and the exemption period for registry services from the settlement, as well as the insertion of a reference to ICANN consensus policy on new registry services.
2. Renewal. The BC calls for a deletion of the presumptive right of renewal in the current settlement, and for the ICANN Board to initiate a GNSO policy development process (PDP) on the issue of presumptive renewal of Registry contracts.
3. Data. The BC calls for an amendment of the settlement sections related to traffic data. The BC will also propose that the issue of the ownership rights relating to traffic data is incorporated into the GNSO policy development process (PDP) on new gTLDs.
4. Funds. The BC calls for a confirmation by the ICANN Board that any special funds are indeed explicitly incorporated into the ICANN strategic planning process and the ICANN budget review.

Root Server Management Transition Completion Agreement - potential disadvantages to commercial users

This agreement has many positive points, but it also describes what may be a special relationship for one root server operator over all others.

BC recommendation:

5. Oversight. The BC calls for the insertion of an oversight clause specifying the methodology whereby the broader community's interests will be represented.

D. Intellectual Property Constituency

RE: Proposed New .COM Registry Agreement

Revised Statement of Intellectual Property Constituency, 12/7/05

The Intellectual Property Constituency appreciates this opportunity to comment on the proposed settlement agreement between ICANN and Verisign, and in particular on the proposed revised .com registry agreement that forms part of this settlement.

IPC applauds the efforts of ICANN and Verisign to achieve an amicable resolution of the legal disputes between them. A successful settlement should plug, to a significant degree, the draining of limited ICANN resources into litigation. To the extent that this resource drain is responsible for ICANN's shortfalls in critical areas such as (but not limited to) contract compliance and enforcement efforts, IPC calls on ICANN

to re-direct those resources constructively and efficiently. We believe the freeing up of these resources for such critical but apparently neglected tasks may be the most important consequence of the settlement for copyright and trademark owners in their relationship to ICANN and to the Domain Name System.

Beyond this, IPC has identified the following areas where the interests of its members may be directly affected by the settlement. In general, these are the areas in which further questions need to be answered, or more concrete commitments or reporting obtained. Of course, this is not necessarily an exhaustive list, and as we participate in the further discussion within ICANN about the settlement and the proposed new .com agreement, we hope to learn more that may result in additions to (or deletions from) this list.

1. Impact on ICANN finances: As we understand it, the registry fees set forth in the proposed new .com agreement are likely to have an impact on ICANN in two main ways. First, the budgetary resources ICANN can expect to have available in future years will be dramatically increased. Second, a much higher proportion of ICANN's revenue will come from a single source -- Verisign -- in comparison to the current system, in which fees paid by registrars make up the bulk of ICANN's revenue. The effect of these changes on ICANN is almost certain to be significant and may well be profound.

In order to assess this impact, it would be useful for ICANN to present to the community some projections about the size and sources of the ICANN budget over the next few years, first under the current system, and second under the funding system contemplated by the proposed .com agreement. Of course both sets of projections are subject to a number of assumptions, but it should be possible to get at least a general picture of the magnitude of the shift.

If in fact it is correct that ICANN will, after this settlement, have much greater revenue and be much more dependent on a single source for that revenue, IPC believes that this calls for fundamental changes in the way ICANN budgets, prioritizes, and spends. Much greater transparency and accountability will be necessary than under the current system. The perception -- justified or not -- that "he who pays the piper calls the tune" can only be dispelled through a system in which ICANN budget and priority decision are shielded, as much as possible, from manipulation by its sole major funder. We believe it essential that the much larger pie be divided up with much greater input from ICANN's constituencies, especially the GNSO constituencies and particularly the user constituencies, including IPC, whose members (as gTLD registrants) are the ultimate source of this funding. Indeed, the significant changes in ICANN's funding levels and sources may call for significant restructuring of ICANN itself. In other words, we believe the Board should recognize that approving this agreement may usher in the era of ICANN 3.0.

PROPOSED RECOMMENDATION: (A) ICANN staff should develop and make public the revenue projections summarized above. (B) ICANN'S budgeting procedure should be modified to reduce the risk of perceived or actual control by a dominant single funder, and to increase the role of constituencies representing gTLD registrants. NOTE: We are not calling under this point for changes in the registry agreement but rather in ICANN policy and procedures if the new registry agreement goes into effect in its current form.

2. Process for approval of new registry services: IPC representatives to the GNSO Council were deeply engaged in the process of devising procedures for the approval of new registry services (indeed, an IPC proposal provided the original template for these procedures). We are engaged in a comparison between those procedures, as developed in the Policy Development Process, and the procedures put in place in the proposed new .com agreement. We are advised that ICANN staff has prepared such a comparison but it has not yet been made public.

PROPOSED RECOMMENDATION: (A) ICANN should publicly post its analysis of the differences between the contractual and PDP-approved procedures for review of new registry services. (B) The procedure for approval of new registry services in .com should be conformed as much as feasible to those adopted by the GNSO Council and approved by the Board for gTLD registries generally. The necessity for any deviations should be explicitly stated.

3. Fate of Appendix W: In an appendix to the current .com agreement, Verisign promised to invest at least \$200 million in research, development and infrastructure improvements, a “substantial proportion” of this prior to November 2007. Verisign also pledged to prioritize in this effort the design and development of “a Universal Whois Service that will allow public access and effective use of Whois across all Registries and all TLDs.” Appendix W does not appear to be carried forward in the new agreement.

PROPOSED RECOMMENDATION: (A) Verisign should account to the community for its actions to carry out Appendix W before the new .com agreement takes effect.

E. Non Commercial Users Constituency

NCUC response to the ICANN-VeriSign settlement

Impact on noncommercial users

The specific changes proposed for the .com contract will not have a major impact on noncommercial users because most of us do not register in .com. However, the method by which this decision was reached may have lasting and major effects on the way ICANN operates. The effects potentially go far beyond .com. Specifically, we see private bargaining between ICANN staff and its contractors replacing the policy development process of ICANN’s constituencies. While we do not believe that every change in registry contracts should be subject to collective oversight, in this case we believe that ICANN staff has crossed the boundary between contracting and policy making. We also see a dangerous conflict between ICANN’s putative oversight role and its incentive to negotiate generous financial agreements with a contractor that is at the same time ICANN’s main source of revenue.

Therefore we propose the following actionable items to the Board:

1. We would like to see the “no criticism of ICANN” provisions stricken from the settlement agreement.

We are concerned about a pact between a large, dominant business and the policy setting authority in which one of the parties agrees not to criticize the other. We find this threatening to the free and robust dialogue about policy that should take place within ICANN.

2. We would like to see ICANN’s GNSO initiate a policy development process of the issue of registry renewal expectancy, and produce and adopt a uniform policy that would apply equally to all registries

Some within the NCUC accept the idea of stable property rights in a TLD registry, in which registries have renewal expectancy unless they engage in serious service breakdowns or malfeasance. Others support regular rebids of the right to operate the domain. A similar difference of opinion probably exists in other constituencies. This issue should not be resolved by the ICANN staff in secret bargaining sessions. Nor should it be resolved on a piecemeal basis. Moreover, all registries should be treated equally in this regard. Therefore a policy should be set via the ICANN process, and used as the basis for staff negotiations with registries.

3. We would like to see a policy development process on the issue of price caps for registries.

Here again, arguments can be made for and against the elimination or relaxation of contractual price caps. The best policy probably would apply to all registries, or might depend on the market power of the relevant registry. This issue should not be resolved by the ICANN staff in secret bargaining sessions. Nor should it be resolved on a piecemeal basis. Moreover, all registries should be treated equally in this regard. Therefore a policy should be set via the ICANN process, and used as the basis for staff negotiations with registries.

4. As a general principle, we support the transfer of DNS root zone signing authority from VeriSign to ICANN, but believe that ICANN's legitimacy, independence and representational structures need improvement.

E. ISP Constituency

<http://gnso.icann.org/mailing-lists/archives/ispcp/msg00180.html>

ICANN ISPCP Constituency

Comment on proposed Verisign Settlement and New.COM Agreement

The ISPCP has considered the proposed settlement agreement posted on the 24th October <http://www.icann.org/tlds/agreements/verisign/settlement-agreements.htm> and the subsequent information paper posted on 21st November <http://www.icann.org/tlds/announcements/announcement-21nov05.htm>, and hereby submits the following views for consideration by the ICANN board and community at large...

The ISPCP welcomes some specific aspects of this proposed settlement, none more so than the end of the six year litigation process which has proved to be a major distraction from the core business of ICANN and has done little to enhance the standing of either party with the outside world. The benefits to ICANN from this settlement are clearly recognisable, including the ending of the substantial costs this action has, and would continue to incur. However, despite the foregoing and the additional clarifying information provided in by ICANN staff at <http://www.icann.org/tlds/announcements/announcement-21nov05.htm> there remain important questions and fundamental aspects of the settlement which give serious cause for concern.

Settlement of the Verisign Lawsuit

The ISPCP is pleased to see that as part of this proposed settlement, Verisign will be advocating for the private sector solution to the coordination of Internet names and addresses. Of course, Verisign's agreement to do so begs the question that but for this settlement, does Verisign intend to advocate against a private sector solution of which it is such a vital participant? Likewise, in the absence of this settlement, is Verisign's intent to encourage and support third party activities that undermine ICANN's role in the technical coordination of the domain name system (DNS). Because if these questions are answered in the affirmative, it seems to the ISPCP that it is not appropriate to craft a settlement with a party whose goal it is to undermine and destabilize the greater ICANN community. Putting that issue aside, the ISPCP is most concerned about the wisdom of linking the lawsuit settlement with a decidedly unrelated renewal of the .COM registry agreement.

The New Registry Agreement

The .COM domain is, by far, the largest registry operation within the DNS. Whilst accepting that the stability of such an important part of the system is essential, the guaranteed long term dominance of one supplier in that space runs counter to the principles of competitiveness, innovation, and accountability.

These are core principles which are not only important to all ICANN stakeholders, but are the very measures on which ICANN will be judged by the outside world.

In the view of the ISPCP it is inappropriate to link the settlement agreement with a new registry agreement. By agreeing to include a new registry agreement as part of the settlement, it seems that ICANN is bowing to unwarranted pressures to resolve this dispute; and in so doing, it is compromising its core mission and responsibility to the Internet community.

A bilateral agreement between the two parties which result in a non-competitive arrangement, whereby one party has the right to a presumptive renewal, coupled with the guaranteed potential to increase prices annually runs counter to ICANN's responsibility to the greater community at large. This is particularly damaging as it comes at a point in time where competition within the market place is driving prices down, not up. One of the aims of ICANN is to promote and sustain a competitive market environment that will result in benefits for providers and users alike. The above situation contradicts this goal and goes against ICANN's own stated values.

Although it has been stated that the presumptive right of renewal already exists in the current .COM agreement, in fact the reality is that the current renewal terms are not comparable to the ones in the proposed agreement. The conditions that would allow ICANN to re-bid the .COM contract are so limited by the proposed agreement, that they essentially guarantee Verisign's control over the .COM domain in perpetuity.

This provision is tantamount to a guarantee that Verisign is handed total dominance of more than 50% of the name space, together with a guaranteed and continual increase return on capital. It is the view of the ISPCP that perpetual renewal of any gTLD registry contract raises policy issues that should be considered within the gNSO prior to inclusion in a proposed agreement.

Likewise, the notion of exclusive rights to data obtained from the operation of the .COM domain needs to be clearly defined and qualified so that any associated policy aspects are adequately understood and dealt with in the appropriate forum, i.e., the gNSO. The lack of clarity in the potential uses and effects of such data raises serious concerns to the ISP community. Without additional specificity in paragraph 3.1(f), there is large scale potential for abuse.

ISPCP Recommendations

- 1) The Board should not adopt the proposed settlement at this time; but rather, a decision should be reserved at least until the next ICANN meeting in Wellington. The ISPCP has heard broad consensus within the community that there are grave concerns with this proposed settlement and it is not appropriate to adopt this settlement without adequate deliberation accompanied by major revisions.
- 2) The Board should exclude the presumptive right of renewal as currently drafted in the proposed registry agreement. As currently drafted, the terms under which the contract would be rebid are so extreme that they are actually meaningless, and that is not appropriate. To the extent there is some automatic renewal process, it should be accompanied by guaranteed investment levels, improvements and/or other assurances that continued control of the .COM space by Verisign is in fact in the continued best interest of the Internet community. If Verisign is unwilling to sign a contract under such terms, there is no shortage of other organizations that would be eager to bid for the contract and make the appropriate commitments to ICANN.
- 3) It is not the view of the ISPCP that all contract negotiations are subject to the PDP process. However, some provisions of the proposed registry agreement are so different from agreements currently in

effect with any other registry, as well as the current .COM contract in effect with Verisign, that they in fact represent changes in policy. The language surrounding treatment of new registry services is one example of a contract term that may translate into new policy, and as such, should not be included in any agreement until and unless the gNSO has gone through its policy development process. New policy is not the domain of negotiations conducted by staff, but rather, the domain of the gNSO process.

4) There should be no granting of exclusive use or intellectual property rights in traffic data associated with operation of the .COM domain. There is not sufficient clarity in the types or uses of data included in this provision, nor is there a sufficient explanation of the policy outcomes resulting from such grant.

Conclusion

The terms of this settlement and the superfluous inclusion of an unrelated issue, the .COM agreement, leads to the perception that ICANN is bending to the demands of one party over the interest of the greater community. This can only cause harm to ICANN's long term viability and provide ICANN's detractors with additional arguments to support their case. For the foregoing reasons, the ISPCP strongly urges the ICANN Board not to adopt the proposed settlement and to adopt the proposals above.

Additional References

The following documents, all retrievable also via <http://www.icann.org/topics/verisign-settlement.htm>, may be informative:

1. The ALAC statement, 2 December 2005, at <http://www.alac.icann.org/announcements/announcement-02dec05.htm>
2. The ICANN CEO presentation at the Vancouver meeting Open Forum on 2 December 2005, at: <http://www.icann.org/meetings/vancouver/twomey-settlement-presentation-02dec05.pdf>
3. The announcement from the ICANN Board on 4 December 2005; "Next Steps on Proposed .COM Settlement" at: <http://www.icann.org/announcements/announcement-05dec05.htm>
4. The ccNSO resolution on 8 December 2005, at: <http://www.ccnso.icann.org/announcements/ccnso-resolution-08dec05.pdf>

5. The public comments posted, at: <http://forum.icann.org/lists/settlement-comments/>

6. The summary of comments, 11 December 2005, at: <http://www.icann.org/topics/vrsn-settlement/comments-summary-11dec05.pdf> and the analysis of public comment, 11 December 2005, at <http://www.icann.org/topics/vrsn-settlement/comments-analysis-11dec05.pdf>

Annex 2 – Issues relating to the 2005 Proposed .COM Agreement identified by the GNSO Constituencies

1. The individual GNSO Constituency statements issued during and following the public comment period for the 2005 Proposed .COM Registry Agreement are referenced in full in Annex 1 to this report. An analysis of the statements shows that the following issue areas on the substance of the proposed .com agreement have been identified by one or more constituencies:

1. Registry agreement renewal
2. New registry services
3. Registry fees/price caps
4. New ICANN fees and special funds
5. Rights to traffic data
6. Investment and “whois” commitments

In the following, the issues identified in the statements by the GNSO Constituencies (abbreviated as follows; RyC, the Registrars, BC, IPC, NCUC and ISPCP) are reflected in excerpts from the statements, presented by issue area in the above order.

2. It should be noted that the GNSO Constituency statements also address other matters than those related to the proposed .com registry agreement, inter alia procedural aspects, the pro’s and con’s of reaching a settlement between ICANN and Verisign and the root server management transition agreement. For the full texts of the statements see Annex 1.

1) Registry agreement renewal

3. The RyC states that: *“To eliminate the possibility that the settlement could afford the dominant player an unfair competitive advantage, ICANN should commit to extend certain specific contract improvements, such as presumptive renewal, to similarly situated registry operators on an equitable and non-discriminatory basis.”*

The RyC comments on a more general note that: *“While the registry constituency does not have a consensus position concerning the merits of individual terms of the proposed .com agreement, inclusion of certain terms exclusively in this agreement and without any apparent commitment by ICANN that such improvements will be offered to other registries, raises a question.*

While the diversity of registries precludes an exhaustive list of specific terms, principals of equity and fairness should guide ICANN’s contractual relationships with registries.”

4. The Registrars state: *“According to its own Bylaws and the Memorandum of Understanding between ICANN and the United States Department of Commerce, one of ICANN's core missions is to promote competition. We understand that the current .com contract contains a "presumptive renewal" provision, which by its nature hinders competition. The proposed .com contract, however, goes much farther than the existing contract by strengthening the presumptive renewal and termination provisions on behalf of VeriSign, thereby making it virtually impossible for VeriSign to lose the .com registry and impossible to reap the benefits of competition. VeriSign should be appointed as the administrator of the .com registry, not its owner.*

We recommend reverting from Section 4.2 of the proposed .com agreement to the renewal terms of Section 25 of the current .com agreement, which requires a six month review of a "Renewal Proposal" provided by VeriSign and only under terms that are in "substantial conformity with the terms of registry agreements between ICANN and operators of other open TLDs. . ." ICANN also should strengthen the termination provisions currently contained in Section 6.1 of the proposed agreement by using the relevant text from Sections 16(B-E) of the current agreement.”

5. The BC states initially that: *“The settlement, in section 4.1, increases the period of extensions to Verisign’s management of .com from 4 to 7 years.*

The settlement, in section 4.2, in effect confers a right to perpetual renewal.

This perpetual right of renewal is combined with a potential 7% annual increase in the price for Registry services per name that Verisign collects from Registrars from the current \$6 to a potential \$9 per name by the end of the first 7-year period”.

A subsequent BC comment reads: *“This has a potential disadvantage to users related to competition. Centralisation of what amounts to over 50% of all names in one registry for perpetuity embeds a significant competitive dominance in the market. Long-term supplier dominance typically runs contrary to user interests.*

Moreover, the question of whether there should be perpetual renewal of the franchises for any registry is a policy question that should have been considered first within the existing policy development role of the GNSO.”

Finally, the BC recommends as follows: *“The BC calls for a deletion of the presumptive right of renewal in the current settlement, and for the ICANN Board to initiate a GNSO policy development process (PDP) on the issue of presumptive renewal of Registry contracts.”*

6. The NCUC states: *“We would like to see ICANN’s GNSO initiate a policy development process of the issue of registry renewal expectancy, and produce and adopt a uniform policy that would apply equally to all registries.*

Some within the NCUC accept the idea of stable property rights in a TLD registry, in which registries have renewal expectancy unless they engage in serious service breakdowns or malfeasance. Others support regular rebids of the right to operate the domain. A similar difference of opinion probably exists in other constituencies. This issue should not be resolved by the ICANN staff in secret bargaining sessions. Nor should it be

resolved on a piecemeal basis. Moreover, all registries should be treated equally in this regard. Therefore a policy should be set via the ICANN process, and used as the basis for staff negotiations with registries.”

6. The ISPCP states: *“A bilateral agreement between the two parties which result in a non-competitive arrangement, whereby one party has the right to a presumptive renewal, coupled with the guaranteed potential to increase prices annually runs counter to ICANN’s responsibility to the greater community at large. This is particularly damaging as it comes at a point in time where competition within the market place is driving prices down, not up. One of the aims of ICANN is to promote and sustain a competitive market environment that will result in benefits for providers and users alike. The above situation contradicts this goal and goes against ICANN’s own stated values.*

Although it has been stated that the presumptive right of renewal already exists in the current .COM agreement, in fact the reality is that the current renewal terms are not comparable to the ones in the proposed agreement. The conditions that would allow ICANN to re-bid the .COM contract are so limited by the proposed agreement, that they essentially guarantee Verisign’s control over the .COM domain in perpetuity.

This provision is tantamount to a guarantee that Verisign is handed total dominance of more than 50% of the name space, together with a guaranteed and continual increase return on capital. It is the view of the ISPCP that perpetual renewal of any gTLD registry contract raises policy issues that should be considered within the gNSO prior to inclusion in a proposed agreement.”

The ISPCP recommends that: *“The Board should exclude the presumptive right of renewal as currently drafted in the proposed registry agreement. As currently drafted, the terms under which the contract would be rebid are so extreme that they are actually meaningless, and that is not appropriate. To the extent there is some automatic renewal process, it should be accompanied by guaranteed investment levels, improvements and/or other assurances that continued control of the .COM space by Verisign is in fact in the continued best interest of the Internet community. If Verisign is unwilling to sign a*

contract under such terms, there is no shortage of other organizations that would be eager to bid for the contract and make the appropriate commitments to ICANN.”

2) New registry services

7. The Registrars state: *“The proposed .com contract locks ICANN and VeriSign in for three years on a version of the consensus policy covering the standards and process for consideration of new registry services. The new registry services consensus policy process that recently was approved by the ICANN board is untested, and it is likely that the ICANN community will need to refine and improve it after it is implemented. A three year lock will unnecessarily handcuff ICANN and the ICANN community. We recommend the deletion of Sections 3.1(b)(v)(B) and 3.1(b)(v)(C), and allowing the existing ICANN policy development and refinement process to be used during the term of the agreement.”*

8. The BC states: *“The settlement, in section 3.1b(v)C, confers a three-year exemption for Verisign from the normal check of ICANN consensus policy on registry services. This has potential disadvantages for users related to legal certainty and stability. There seems to be no public interest justification for offering Verisign different terms for new registry services to any other registry, especially given the fact that a universal process for introducing such services already exists.*

Moreover, this issue appearing in a bi-lateral settlement is a policy question that sets a bad precedent that might constrain the future policy development role of the GNSO.”

The BC recommendation reads as follows: *“The BC calls for the deletion of both the sections on registry services and the exemption period for registry services from the settlement, as well as the insertion of a reference to ICANN consensus policy on new registry services.”*

9. The IPC states: *“IPC representatives to the GNSO Council were deeply engaged in the process of devising procedures for the approval of new registry services (indeed, an IPC proposal provided the original template for these procedures). We are engaged in a comparison between those procedures, as developed in the Policy Development Process, and the procedures put in place in the proposed new .com agreement. We are advised that ICANN staff has prepared such a comparison but it has not yet been made public.”*

The IPC recommends that: *“(A) ICANN should publicly post its analysis of the differences between the contractual and PDP-approved procedures for review of new registry services. (B) The procedure for approval of new registry services in .com should be conformed as much as feasible to those adopted by the GNSO Council and approved by the Board for gTLD registries generally. The necessity for any deviations should be explicitly stated.”*

10. The ISPCP states: *“It is not the view of the ISPCP that all contract negotiations are subject to the PDP process. However, some provisions of the proposed registry agreement are so different from agreements currently in effect with any other registry, as well as the current .COM contract in effect with Verisign, that they in fact represent changes in policy. The language surrounding treatment of new registry services is one example of a contract term that may translate into new policy, and as such, should not be included in any agreement until and unless the gNSO has gone through its policy development process. New policy is not the domain of negotiations conducted by staff, but rather, the domain of the gNSO process.”*

3) Registry fees/price caps

11. The Registrars state: *“The proposed .com contract would permit VeriSign to unilaterally raise registration fees by 7% per year. The existing .com contract and all gTLD registry agreements (other than the .net agreement with VeriSign, which was entered into without community input in violation of ICANN's Bylaws) require the registries to cost-justify any price increases. In an industry where the economics suggest that fees should be going down when there is competition, it is particularly troublesome and anti-competitive to grant a monopolist or a single source provider the unilateral right to increase costs without justification. Unfortunately, these fee increases would result in cost increases to individual registrants. We note that in the recent competitive process for .net, VeriSign significantly lowered its registry fees. There is no reason for unilateral cost increases for the larger .com registry.*

We recommend that the Board delete the current text of Section 7.3(d)(ii) and replace it with Section 22(A) of the current .com agreement requiring VeriSign to justify and ICANN to approve any proposed fee increase. If there is a dispute between ICANN and VeriSign over a cost increase, ICANN should have the right to seek competitive price proposals from other registry operators to ensure that the ICANN community receives the benefits of competition.”

12. The BC states: *“The bi-lateral agreement to raise the registry fee would provide an immediate financial benefit on top of the market dominance. And the fee increase comes at a time that the Registry fees for other Registries are falling. Although the impact per single user would be small, the overall cost increase if passed on to users of a change from \$6-\$9 over seven years for today’s 40.3 million .com names is around \$0.4 billion. This is a substantial aggregate detriment.”*

13. The NCUC states: *“We would like to see a policy development process on the issue of price caps for registries. Here again, arguments can be made for and against the elimination or relaxation of contractual price caps. The best policy probably would apply to all registries, or might depend on the market power of the relevant registry. This issue*

should not be resolved by the ICANN staff in secret bargaining sessions. Nor should it be resolved on a piecemeal basis. Moreover, all registries should be treated equally in this regard. Therefore a policy should be set via the ICANN process, and used as the basis for staff negotiations with registries.”

14. The ISPCP states, in conjunction with its comment on renewal (see D.1 above) that: *“A bilateral agreement between the two parties which result in a non-competitive arrangement, whereby one party has the right to a presumptive renewal, coupled with the guaranteed potential to increase prices annually runs counter to ICANN’s responsibility to the greater community at large. This is particularly damaging as it comes at a point in time where competition within the market place is driving prices down, not up. One of the aims of ICANN is to promote and sustain a competitive market environment that will result in benefits for providers and users alike. The above situation contradicts this goal and goes against ICANN’s own stated values.”*

4) New ICANN fees and special funds

15. The Registrars state: *“ICANN and VeriSign propose a new ICANN fee that would be assessed on VeriSign and passed on to the registrars. This fee would result in excess of approximately \$150 million dollars to ICANN, and would be an end run around the existing ICANN budget approval process. As proposed, ICANN staff has removed an important check on the ICANN budget process. All ICANN fees that impact registrants should be subject to the ICANN budget approval process and should not only be the subject of negotiations between VeriSign and ICANN.”*

16. The BC states: *“The settlement, in section 7.2d, establishes a registry-level transaction fee payable to ICANN of 37c per name (rising to 50 cents) with the revenues designated to special funds.*

Replacing the ICANN multi-stakeholder consensus process with bi-lateral contract sets a bad precedent. This risks undermining one of ICANN's fundamental pillars. In this respect the creation of special funds in the settlement may be seen as a way of circumventing the usual oversight process of the ICANN community and Board in the strategic planning and budget review processes. Further, there is not ICANN community consensus support for special funds. Risks to the ICANN consensus process would be to the detriment of commercial users."

The BC recommendation is as follows: *"The BC calls for a confirmation by the ICANN Board that any special funds are indeed explicitly incorporated into the ICANN strategic planning process and the ICANN budget review."*

17. The IPC states: *"As we understand it, the registry fees set forth in the proposed new .com agreement are likely to have an impact on ICANN in two main ways. First, the budgetary resources ICANN can expect to have available in future years will be dramatically increased. Second, a much higher proportion of ICANN's revenue will come from a single source -- Verisign -- in comparison to the current system, in which fees paid by registrars make up the bulk of ICANN's revenue. The effect of these changes on ICANN is almost certain to be significant and may well be profound.*

In order to assess this impact, it would be useful for ICANN to present to the community some projections about the size and sources of the ICANN budget over the next few years, first under the current system, and second under the funding system contemplated by the proposed .com agreement. Of course both sets of projections are subject to a number of assumptions, but it should be possible to get at least a general picture of the magnitude of the shift.

If in fact it is correct that ICANN will, after this settlement, have much greater revenue and be much more dependent on a single source for that revenue, IPC believes that this calls for fundamental changes in the way ICANN budgets, prioritizes, and spends. Much greater transparency and accountability will be necessary than under the current system.

The perception – justified or not – that “he who pays the piper calls the tune” can only be dispelled through a system in which ICANN budget and priority decision are shielded, as much as possible, from manipulation by its sole major funder. We believe it essential that the much larger pie be divided up with much greater input from ICANN’s constituencies, especially the GNSO constituencies and particularly the user constituencies, including IPC, whose members (as gTLD registrants) are the ultimate source of this funding. Indeed, the significant changes in ICANN’s funding levels and sources may call for significant restructuring of ICANN itself. In other words, we believe the Board should recognize that approving this agreement may usher in the era of ICANN 3.0.”

The IPC recommendation reads: *“(A) ICANN staff should develop and make public the revenue projections summarized above. (B) ICANN’S budgeting procedure should be modified to reduce the risk of perceived or actual control by a dominant single funder, and to increase the role of constituencies representing gTLD registrants. NOTE: We are not calling under this point for changes in the registry agreement but rather in ICANN policy and procedures if the new registry agreement goes into effect in its current form.”*

5) Rights to traffic data

18. The BC states: *“The settlement, in section 3.If, confers on Verisign certain intellectual property rights to traffic data from the .com zone file. The implication of this contract change is unclear. Does it simply concern an expected commercial benefit accruing to any Registry with respect to zone file data? Or is it going further? It would appear that the effect would be to enable the Registry to leverage its natural upstream monopoly position (being the sole registry of .com domain names) into downstream competitive markets (eg. registrars and search engines). It is not in the interest of users to have competitive markets monopolised through capture of upstream*

inputs by a monopolist. Any bi-product of the monopoly registry service should be made available on a non-discriminatory basis to any and all downstream competitors. In other words, is this change establishing what may become sui generis (a unique order of) intellectual property rights? If the latter interpretation is correct, then a broader policy question is raised that should be first considered in greater depth.”

The BC recommendation reads: *“The BC calls for an amendment of the settlement sections related to traffic data. The BC will also propose that the issue of the ownership rights relating to traffic data is incorporated into the GNSO policy development process (PDP) on new gTLDs.”*

19. The ISPCP states: *“Likewise, the notion of exclusive rights to data obtained from the operation of the .COM domain needs to be clearly defined and qualified so that any associated policy aspects are adequately understood and dealt with in the appropriate forum, i.e., the gNSO. The lack of clarity in the potential uses and effects of such data raises serious concerns to the ISP community. Without additional specificity in paragraph 3.1(f), there is large scale potential for abuse.*

There should be no granting of exclusive use or intellectual property rights in traffic data associated with operation of the .COM domain. There is not sufficient clarity in the types or uses of data included in this provision, nor is there a sufficient explanation of the policy outcomes resulting from such grant.”

6) Investment and “whois” commitments

20. The IPC states: *“In an appendix to the current .com agreement, Verisign promised to invest at least \$200 million in research, development and infrastructure improvements, a “substantial proportion” of this prior to November 2007. Verisign also pledged to prioritize in this effort the design and development of “a Universal Whois Service that*

will allow public access and effective use of Whois across all Registries and all TLDs.”

Appendix W does not appear to be carried forward in the new agreement.”

The IPC recommends that: *“(A) Verisign should account to the community for its actions to carry out Appendix W before the new .com agreement takes effect.”*

21. The ISPCP addresses this aspect as follows in conjunction with its statement on rights of renewal (see D.1 above): *“To the extent there is some automatic renewal process, it should be accompanied by guaranteed investment levels, improvements and/or other assurances that continued control of the .COM space by Verisign is in fact in the continued best interest of the Internet community. If Verisign is unwilling to sign a contract under such terms, there is no shortage of other organizations that would be eager to bid for the contract and make the appropriate commitments to ICANN.”*

Annex 3 – Background Information on ICANN gTLD Registry Agreements

All of these agreements included some right to presumptive renewal of the agreement. The .cat, .jobs, .mobi and .travel agreements do not include price controls for registry services such as domain name registration. The .net agreement provided for a maximum 10% annual price increase. None include specific investment requirements or a provision for the creation of a centralized Whois service. All agreements contain provisions for ICANN fees developed in bilateral negotiations that vary from registry to registry based upon the registry business model and discussions during the negotiations. The timing of these agreements are:

.JOBS agreement

On 13 Dec 04, the ICANN Board authorized staff to enter into negotiations with .jobs applicant

<http://www.icann.org/minutes/resolutions-13dec04.htm>.

On 24 Mar 05, the proposed .jobs agreement was posted by ICANN

<http://www.icann.org/tlds/agreements/jobs/proposed-jobs-agmt-24mar05.pdf>

On 8 Apr 05, the ICANN Board approved the proposed .jobs agreement

<http://www.icann.org/minutes/resolutions-08apr05.htm>

.TRAVEL agreement

On 18 Aug 04, the ICANN Board authorized staff to enter into negotiations with .travel applicant

<http://www.icann.org/minutes/minutes-18oct04.htm>.

On 24 Mar 05, the proposed .travel agreement was posted

<http://www.icann.org/tlds/agreements/travel/proposed-travel-agmt-24mar05.pdf>.

On 8 Apr 05, the ICANN Board approved proposed .travel agreement

<http://www.icann.org/minutes/minutes-08apr05.htm>.

.MOBI agreement

On 13 Dec 04 the ICANN Board authorized staff to enter into negotiations with .mobi applicant

<http://www.icann.org/minutes/resolutions-13dec04.htm>.

On 3 Jun 05, the proposed .mobi agreement was posted

<http://www.icann.org/announcements/announcement-03jun05.htm>

On 28 Jun 05, the Board approved proposed the .mobi agreement

<http://icann.org/minutes/resolutions-28jun05.htm>.

.CAT agreement

On 18 Feb 05 the ICANN Board authorized staff to enter into negotiations with .cat applicant

<http://www.icann.org/minutes/minutes-18feb05.htm>.

On 9 Aug 05, the proposed .cat agreement was posted by ICANN

<http://www.icann.org/tlds/agreements/cat/proposed-cat-agmt-09aug05.pdf>.

On 16 Aug 05 the ICANN Board vote deferred to allow time for further clarification of terms of agreement

<http://www.icann.org/minutes/resolutions-16aug05.htm>.

On 15 Sep 05 the ICANN Board approved the proposed agreement and authorized President to enter into agreement

<http://www.icann.org/minutes/resolutions-15sep05.htm>.

.NET agreement

On 28 Mar 05, the proposed .net registry agreement is posted

<http://www.icann.org/tlds/dotnet-reassignment/draft-net-agreement-9mar05.pdf>

On 7 Jun 05, the ICANN Board approved VeriSign as net registry operator and approved the proposed agreement

<http://www.icann.org/minutes/minutes-07jun05.htm>

On 15 Jul 05 – 21 Sep 05 Registrars, ICANN, VeriSign worked on revisions to agreement

<http://www.icann.org/announcements/announcement-19aug05.htm>.

On 22 Sep 05 – 10 Oct 05 the proposed amendment to .net agreement was posted for public comment

<http://www.icann.org/announcements/announcement-22sep05.htm>.

On 12 Oct 05 the ICANN Board approved the amendment to .net agreement

<http://www.icann.org/minutes/resolutions-12oct05.htm>

TLD	TLD Type	Date Posted	Presumptive Renewal?	Consensus Policies Limited?	Price Controls?	ICANN Fees?	Traffic Data?	Investment mandates?
AERO	sTLD	2001	Yes	Yes	No	US\$5000	No provision	No
BIZ	restricted uTLD	2001	No	Yes	Yes	US\$132k	No provision	No
CAT	sTLD	2005	Yes	Yes	No	US\$10k + US\$1.00*	No provision	No
COM	unrestricted uTLD	2001	Yes	Yes	Yes	US\$150k	No provision	Yes
COM(2)	unrestricted uTLD	2005	Yes	Yes	Yes*	US\$0.50*	Permitted	No
COM(3)	unrestricted uTLD	2006	Yes	Yes	Yes*	US\$6 mm - 12 mm	Permitted, restricted	No
COOP	sTLD	2001	Yes	Yes	No	US\$5000	No provision	No
INFO	unrestricted uTLD	2001	No	Yes	Yes	US\$150k	No provision	No
JOBS	sTLD	2005	Yes	Yes	No	US\$10k + US\$2.00*	No provision	No
MOBI	sTLD	2005	Yes	Yes	No	US\$0.75*	No provision	No

Policy Development

MUSEUM	sTLD	2001	Yes	Yes	No	US\$5000	No provision	No
NAME	restricted uTLD	2001	No	Yes	Yes	US\$132k	No provision	No
NET	restricted uTLD	2005	Yes	Yes	Yes*	US\$0.75*	No provision	No
ORG	unrestricted uTLD	2003	No	Yes	Yes	US\$150k	No provision	No
PRO	restricted uTLD	2002	No	Yes	Yes	US\$132k	No provision	No
TRAVEL	sTLD	2005	Yes	Yes	No	US\$10k + US\$2.00*	No provision	No