



Comments on Proposed Final New gTLD Registry Agreement

Status: FINAL
Version: 2
11-June-2013

Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC). While the BC includes a diverse range of businesses—including some who have applied for new gTLDs—these comments are solely from the perspective of business users and registrants, as defined in our Charter¹:

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

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

ICANN opened a public comment period on the Proposed Final New gTLD Registry Agreement.

The BC is commenting here on changes or lack thereof to 4 parts of the February 5, 2013 version of the New gTLD Registry Agreement, based on the BC's prior comments² regarding same, those parts being:

Specification 11: Public Interest Commitments

Base Agreement Article 4: Transition of Registry upon Termination of Agreement

Base Agreement Article 7: Amendments to the Registry Agreement

Specification 5: Reserving County and Territory Names at the Second Level

Specification 11: Public Interest Commitments

Sections 2 and 3 of Specification 11 provide a way for applicants to list commitments and statements of intent that would become part of the Registry Agreement and thereby enforceable by ICANN.

The BC has stated that it supports this previous change to the Registry Agreement, as helpful to add the capability for enforceable public interest commitments contained within various applications. However, the BC notes with disappointment that, despite numerous applicants being the subject of GAC Advice³, only 506 applicants added any commitments to their Specification 11.⁴

In addition, many applicants have included clauses which allow Registry Operator, in its sole discretion, to modify or discontinue Public Interest Commitments for any substantial or compelling business need.⁵ The BC believes that such language defeats the purpose of Specification 11, which is meant to ensure that ICANN can enforce any relevant commitments made during the application process, as part of the new registry agreement. Accordingly, the BC recommends that ICANN develop a community participation process where Registry Operators may seek amendments or withdrawals to their Public Interest Commitments.

The BC encourages applicants to insert relevant commitments into Specification 11, and continues to encourage the GAC and ICANN to ensure that the community can hold registry operators to any relevant commitments that are important to protect consumer and business interests in these new gTLDs. The

¹ Business Constituency Charter, at <http://www.bizconst.org/charter.htm>

² Comments on New gTLD Registry Agreement, Including Public Interest Commitments Specification, March 20, 2013 <http://forum.icann.org/lists/comments-base-agreement-05feb13/pdf/CfvczBL34.pdf>.

³ GAC Communiqué – Beijing, People's Republic of China, April 11, 2013 at <https://gacweb.icann.org>.

⁴ As of May 30, 2013 at <http://newgtlds.icann.org/en/>.

⁵ See e.g., 1-1336-51768_Donuts PIC STD Final.pdf at <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/896>.

importance for applicants to heed this recommendation is evident in the recent GAC advice on safeguards for new gTLDs, as noted in the BC's comments on GAC advice⁶.

Base Agreement Article 4: Transition of Registry upon termination of Agreement

The BC commends ICANN on its addition to Section 4.5, which states: "ICANN will take into consideration any intellectual property rights of Registry Operator (as communicated to ICANN by Registry Operator) in determining whether to transition operation of the TLD to a successor registry operator..." The BC had previously recommended that single-registrant TLDs, which are operated by entities whose IP rights survive any termination of their registry operating agreement with ICANN, be taken into special consideration in regard to transition and/or transfer of registry data to a new operator designated by ICANN.⁷ This change brings the Registry Agreement closer to meeting the BC's position in this regard.

The BC notes with concern that ICANN still retains sole discretion for transferring control if the registry had allowed any non-affiliates to use domains it had registered, under Section 4.5(ii)(B) which reads (emphasis added):

"ICANN shall determine whether or not to transition operation of the TLD to a successor registry operator in its sole discretion...provided, however, that...(ii) if Registry Operator demonstrates to ICANN's reasonable satisfaction that...(B) Registry Operator does not sell, distribute or transfer control **or use** of any registrations in the TLD to any third part that is not an Affiliate of Registry Operator."

The BC had recommended that ICANN strike "**or use**" from Section 4.5(ii)(B) of the Registry Agreement, to accommodate use by entities that are not Affiliates of the operator (such as subscribers and customers).⁸ The BC maintains its objection to the phrase "or use" in this context and renews the above recommendation.

Base Agreement Article 7: Amendments to the Registry Agreement

The BC notes the substantial changes made to Section 7.6, in reply to substantial community concern regarding the proposal to allow unilateral amendments to the new gTLD registry agreement if approved by supermajority of the ICANN Board.

The BC remains committed to the multi-stakeholder decision making process, and continues to assert that there is no need for a separate process for amendment on top of the current PDP process. The BC believes that this section of the agreement creates a new, unnecessarily complex, convoluted and cumbersome process for amendment. The BC encourages ICANN to simplify the process by using existing procedures to solicit community input and involvement in the amendment of the new gTLD registry agreement.

The BC had also requested that ICANN should not be empowered to unilaterally amend all registry agreements if that would interfere with some registries' prior obligations to enforce registrant restrictions

⁶ <http://www.bizconst.org/Positions-Statements/BC%20Comment%20on%20GAC%20Advice%20for%20new%20gTLDs%20FINAL%5B4%5D.pdf>

⁷ p. 10, BC Comments on New gTLD Applicant Guidebook – April 2011 Discussion Draft, May-2011 at <http://www.bizconst.org/Positions-Statements/BC+on+Final+App+Guidebook+May+2011+v3.pdf>.

⁸ p. 4, Comments on New gTLD Registry Agreement, Including Public Interest Commitments Specification, March 20, 2013 <http://forum.icann.org/lists/comments-base-agreement-05feb13/pdf/CfvczBL34.pdf>.

and policies.⁹ We note that, in addition to the larger changes regarding unilateral amendment, Section 7.6(h) allows Registry Operators to apply for exemption from any approved amendments. This is adequate to address BC concerns in this regard.

Specification 5: Reserving Country and Territory Names at the Second Level

The BC notes that its recommendation to allow single-registrant TLDs (a TLD where the Registry Operator is the registrant of record for all domain names in the TLD)¹⁰ to register domains containing reserved country and territory names (Section 4), is not addressed in the Proposed Final New gTLD Registry Agreement.

The BC reiterates its request for an exception that allows single-registrant TLDs to register domains for their markets and operations based in countries and territories, without the requirement to obtain express authorization from governments for each country/territory name.¹¹ The BC also reiterates its request that, if an exception is not possible, ICANN should implement a centralized mechanism where single-registrant TLDs can request authorization from all governments in a consolidated request.¹²

Conclusion

The BC applauds ICANN's continued effort to satisfy the concerns of the ICANN community in relation to developing a thorough, predictable and enforceable agreement.

These comments were prepared in accordance with the BC Charter.
The BC held member discussions on this issue on May 22 and June 6.
Elisa Cooper acted as rapporteur.
The present text was deemed approved on 11-Jun-2013

⁹ p. 6, Comments on New gTLD Registry Agreement, Including Public Interest Commitments Specification, March 20, 2013 <http://forum.icann.org/lists/comments-base-agreement-05feb13/pdf/CfvczBL34.pdf>.

¹⁰ p.8, BC Comments on New gTLD Applicant Guidebook – April 2011 Discussion Draft, May-2011 at <http://www.bizconst.org/Positions-Statements/BC+on+Final+App+Guidebook+May+2011+v3.pdf>

¹¹ p.7, BC Comments on New gTLD Applicant Guidebook – April 2011 Discussion Draft, May-2011 at <http://www.bizconst.org/Positions-Statements/BC+on+Final+App+Guidebook+May+2011+v3.pdf>.

¹² p. 7, Comments on New gTLD Registry Agreement, Including Public Interest Commitments Specification, March 20, 2013 <http://forum.icann.org/lists/comments-base-agreement-05feb13/pdf/CfvczBL34.pdf>.