

October 03, 2017

Akram Atallah, President
ICANN Global Domains Division

Dear Akram:

Thank you for your letter of 29 August in reply to our 14 March proposal to use a small part of the excess application fees from the 2012 round to offset new gTLD registry fees.

The Registries Stakeholder Group (RySG) recognizes that the ICANN organization believes there could be further unanticipated costs associated with the 2012 new gTLD round. Such a position is not incongruent with continuing discussions on potential uses of the almost \$100 million fund and distributing the fund in phases. Just as the community has embarked on a discussion on uses of auction proceeds (even without knowing the ultimate size of that fund), now is an appropriate time to do the same with regard to excess application fees.

Accordingly, the RySG requests a meeting with you to discuss this issue in Abu Dhabi. In the meantime, this letter sets forth a number of questions and requests for ICANN to address so that those discussions can be fully informed.

Trademark Clearinghouse (TMCH) fees

An obvious request relates to an apparent double charging and a refund of the additional \$5,000 ICANN collected from each registry operator to set-up the TMCH. You note in your letter that application fees were used on various initiatives, such as the implementation of the TMCH. Unfortunately, you failed to mention that ICANN assessed registry operators an additional \$5,000 (per gTLD), over and above the application fee, to set up the TMCH. All other systems and programs related to the New gTLD Program were funded from application fees. The TMCH should have been no different and there was no reason to “double-charge” registries for this one piece of the program.

Your letter states that registry operators knew about the fee structure from the start and implies that changes of circumstance should be irrelevant. The TMCH charge, however, was *not* detailed in the applicant guidebook. ICANN added it on its own after all applications were accepted and without community input. Therefore, ICANN is very much in a position to refund registry operators for this overcharge, and we request that ICANN do so. Essentially, you would be refunding the amounts we paid with our own application fees, which should have been used to set up the TMCH in the first place.

Universal Awareness/Acceptance

Your letter discusses ICANN’s commitment to supporting the new gTLDs and how ICANN demonstrated support thus far:

“We sympathize with the financial challenges that some new gTLD registry operators may be facing in the early periods of these new businesses. New gTLD Operators face a challenging task of building consumer awareness and this can and may take significant time and effort. ICANN remains committed to supporting the evolution of the robust, stable and trusted domain name marketplace, and new gTLDs are part of this evolution. ICANN recognizes the challenge you cited related to universal acceptance of TLDs, in particular IDN TLDs. ICANN has established the Universal Acceptance Steering Group to help address some of these challenges.”

This effort is being funded from the New gTLD program application fees. By the end of FY18 ICANN will have committed several million dollars to this effort.”

While we appreciate the commitment that ICANN has given to technical issues related to IDNs, it is unfortunate that ICANN has not been as pro-active in supporting the awareness of the new gTLDs to promote acceptance in the marketplace. The long term success of the program is dependent on global awareness of the new gTLD extensions and the financial ability of end-users to adopt the new gTLDs. We think that ICANN should launch a broad awareness campaign for the new gTLDs to support global awareness and global acceptance. Such a campaign would be a legitimate use of excess new gTLD application fees.

Fee Reduction Waiver

In support of denying temporary fee reduction support to the new gTLD registry operators, your letter states that the current fee structure “... was subject to several rounds of public comment from the wider ICANN community as part of the AGB development process, and the fee structure and amount have not changed since the ICANN Board approved the AGB in 20112.”

However, the Registry Agreement itself discusses a temporary reduction of registry fees:

“6.7 Fee Reduction Waiver. In ICANN’s sole discretion, ICANN may reduce the amount of registry fees payable hereunder by Registry Operator for any period of time (“Fee Reduction Waiver”). Any such Fee Reduction Waiver may, as determined by ICANN in its sole discretion, be (a) limited in duration and (b) conditioned upon Registry Operator’s acceptance of the terms and conditions set forth in such waiver.”

This letter requests a fee reduction of the exact type contemplated in Section 6.7 of the Registry Agreement, which has been the subject of public comment. The Registry Agreement provision was also subject to several rounds of public comment and approved by the ICANN Board.

Revenue Losses

The TMCH fees were not the only change in the Applicant Guidebook, where any change violated the Consensus Policy that:

“All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.”

Instead, names collision processes, withholding two-letter names, barring other short names, the unpredictable GAC Advice procedure, new trademark protections and other changes cost applicants considerable revenue and substantially increased their costs.

The RySG would like to work alongside ICANN to approximate the total cost to new gTLD operators due to applicant guidebook changes where the operators relied on the ICANN Policy to create a predictable process and use some of our excess application fees accordingly.

Program Costs

Your letter also highlights various costs borne by our application fees, including:

“...formation and coordination of Universal Acceptance Steering Group, Emergency Back-End Registry Operator Program operations, studies and mitigation plans relating to Name Collision, implementation of the Trademark Clearinghouse, support for the administration of ICANN Accountability Mechanisms, and legal fees and costs relating to the New gTLD Program.”

Your letter further alludes to non-specific future costs:

“The remaining Program funds are intended to cover operating expenses and future unanticipated costs such as those listed above, which continue to occur on an ongoing basis.”

It would be helpful and appropriate for ICANN to provide the RySG with a detailed accounting of expenses to date. Organizational operating expenses are line items more suited to ICANN's regular budget. If the ICANN organization anticipates further spending our application fees in this or other manners, we request, first, a reasonable forecast for their likely use, and second, deeper involvement in the associated budgeting process. The RySG does not necessarily presume the cogency of such expenditures.

The RySG is confident there are many helpful ways for these excess application funds to be deployed (e.g., an EBERO insurance fund to protect registrants, awareness efforts, refunds to applicants). Such funds could be used in phases to protect ICANN from unforeseen expenses (which are reduced as time passes). Such a request for dialogue and a phased approach is reasonable and warranted.

Timing is important, as we stated in our March letter. ICANN has held these funds for over five years. The time is right to plan for the disbursement of these excess funds. Therefore, to carry this matter forward at a more businesslike pace, I will be in touch shortly to schedule an in-person discussion in Abu Dhabi. In the near term, we anticipate your more immediate reply regarding the TMCH fees request and an accounting of costs to date and potential future costs.

Sincerely,

Paul Diaz
RySG Chair