



Via Email: Correspondence@icann.org

April 2, 2020

ICANN Board of Directors
c/o Maarten Botterman, Chair
12025 Waterfront Drive, Suite 300
Los Angeles, California
90094-2536, USA

Dear Mr. Botterman:

Re: Public Comments on Proposed Amendment to .COM Registry Agreement

Thank you for your letter of March 24, 2020,¹ wherein you stated that ICANN management was conducting an in-depth review of the substance of the comments and would then consult with the Board in a deliberative process to review the community feedback received.

Two days later, on Thursday, March 26, 2020, ICANN management published a Staff Report summarizing and analyzing the 9,000+ comments received during the Public Comment period.² The Staff Report noted that “the comments about the proposed changes to the maximum allowable wholesale price for .COM registry services were nearly unanimous in voicing disagreement or concern”, with opposition coming primarily from registrants and registrars amongst other stakeholders.

Less than 24 hours after the Staff Report was published – late on a Friday in the middle of a pandemic – ICANN management announced³ its approval of the proposed amendment without a single revision to the originally proposed terms. The rapid approval and the failure to incorporate any modifications in response to the numerous substantive objections raised in the unprecedented public response which was nearly unanimous in its opposition to the terms proposed by ICANN management, reveals the promised consultative and deliberative process to have been a sham.

¹ See: <https://www.icann.org/en/system/files/correspondence/botterman-to-muscovitch-23mar20-en.pdf>

² See: <https://www.icann.org/en/system/files/files/report-comments-com-amendment-3-26mar20-en.pdf>

³ See: <https://www.icann.org/news/blog/icann-decides-on-com-amendment-and-proposed-binding-letter-of-intent-between-icann-and-verisign>

A meaningful consultation with a 16-member Board reviewing the numerous detailed, substantive, well-supported arguments in opposition to the proposed terms could not have been conducted overnight. This rapid rubber-stamping of the proposed amendment belies any claim that the Board had conducted a meaningful consultation with Staff, let alone that there was serious deliberation or reconsideration of Staff's original approach based upon stakeholder feedback. It is now clear that ICANN no longer wishes to maintain even the pretense that Public Comment has any genuine impact on decision making. The Public Comment process, far from being "important and integral",⁴ is entirely a charade.

On February 11, 2020, ICANN President and CEO, Gören Marby proclaimed that "Public Comment is an important part of ICANN's processes and is fundamental to the multistakeholder model of Internet governance" and "encourage[d] all stakeholders to get involved and submit their comments". Moreover, in your aforementioned letter of March 24, 2020,⁵ you stated that the "Board believes that public comments are an important and integral part of the ICANN multi-stakeholder model". It is hard to reconcile the above statements with the treatment of the Public Comment by ICANN management and by the Board. It is unfortunate, that you as well as Mr. Marby encouraged the public to participate in the Public Comment process, thereby misleading thousands of people who cumulatively devoted countless hours to sharing their views with ICANN, unaware that they were engaging in a sham process where their views would receive no serious consideration.

You indicated that ICANN cares less about the quantity of the comments but rather more about the quality of the substance of the comments. Yet the Staff Report disregarded two of the most noteworthy submissions; from lawyer Arif Ali and from economist Greg Rafert, respectively, which provided the most substantive analyses of the policy issues arising from the proposed amendment from their respective areas of expertise.

The substance of the detailed comment submitted by Arif Ali⁶ is entirely missing from the Summary Report despite the Report noting that Mr. Ali's comment had been received. Mr. Ali's comment provided an in-depth legal explanation as to why ICANN itself is ultimately responsible for negotiating prices with its contracted registries, as to why there is no legal or other justification for merely deferring to the Department of Commerce when the Department of Commerce expressly stated that Amendment 35 "permits Verisign to pursue with ICANN an up to 7 percent increase in the prices for .com domain names, in each of the last four years of the six-year term of the .com Registry Agreement" (emphasis added). In other words, there was no order or prescription to ICANN to increase prices, let alone all the way up to the new maximum. Accordingly, the purported "Objective", as stated in the "Decision Paper"⁷, of "alignment with Amendment 35 of the Cooperative Agreement" does not require raising the Maximum Price, but rather has been misrepresented by Staff as doing so.⁸ By incorrectly framing Amendment 35 as tying ICANN's hands, Staff has preordained its desired outcome.

⁴ See: <https://www.icann.org/en/system/files/correspondence/botterman-to-muscovitch-23mar20-en.pdf>

⁵ See: <https://www.icann.org/en/system/files/correspondence/botterman-to-muscovitch-23mar20-en.pdf>

⁶ <https://mm.icann.org/pipermail/comments-com-amendment-3-03jan20/attachments/20200213/2d94b832/2020.02.13-Commenton.COMPriceChanges.pdf>

⁷ <https://www.icann.org/sites/default/files/tlds/com/com-decision-document-27mar20-en.pdf>

⁸ See also the ICA's own Public Comment at <https://mm.icann.org/pipermail/comments-com-amendment-3-03jan20/attachments/20200115/336fd30f/LettertoCyrusNamazi-January152020.pdf>

The Staff Report also failed to include the Economic Analysis submitted by Greg Rafert of Alpine Start Advising⁹ which concluded that there is no economic rationale for increased prices and that consumers would likely be harmed. Mr. Rafert's 23-page analysis was by far the most comprehensive comment submitted on this topic, yet it was not incorporated into the Staff Summary, despite ICANN having previously relied upon Mr. Rafert's work and despite being well aware of his expertise on economic issues.¹⁰ Mr. Rafert's analysis is helpful in understanding the flaws in the competition arguments offered by ICANN management in support of the proposed amendment. By suppressing Mr. Rafert's comment, Staff kept the Board in the dark and deprived the Board of Mr. Rafert's conclusion that there is an absence of genuine competition for the .com TLD and his explanation of the basic economic truism that effective competition would lead to lower prices, not cause them to be raised.

The omissions of Mr. Ali's and Mr. Rafert's comments from the Staff Report point to an apparent effort by Staff to avoid facts and arguments that rebut Staff's stated rationales for its predetermined course of action. Had the Board been made aware of these two detailed and well-supported submissions in the Staff Report, it may have changed the Board's view, even in the few hours that were apparently made available for consultations between the Board and ICANN Org. Yet it is apparent that the Board had no intention of ever seriously discussing, considering or evaluating the substance of the Public Comment. Rather, it merely rubber-stamped the Staff's own self-interested approach, elevating Staff's interests over that of a public united in opposition to those harmful policies.

Your letter and the "Decision Paper" assert that "ICANN is not a price regulator". This statement, which has become a reflexive refrain from ICANN management, deserves considerable scrutiny. It has never been the subject of any multistakeholder policy development process and appears to be a self-serving means of ICANN avoiding taking responsibility for its actions. If by "price regulator" you mean that ICANN is not a "government agency", then of course ICANN is not a price regulator per se. But you have not offered a definition, and that argument would be a red herring, because ICANN has been setting prices for contracted parties since its inception. As a party to a registry agreement, ICANN has acted and can continue to act as a principal to a contract by negotiating prices - and must do so in the public interest - not in the interest of a contracted party. Moreover, NTIA expressly left it to ICANN to set the price, so ICANN's position is effectively contradicted by the U.S. Government itself.

As predicted in our March 17, 2020 letter, the Staff Report, once again, is a biased and self-serving document, rather than a genuine, substantive report and analysis. As pointed out in the recent The Register article of March 30, 2020,¹¹ "Rather than address those concerns in a constructive and objective manner, the staff-produced summary instead picks sides. It goes out of its way to diminish the arguments made against the changes as being self-interested, and actively argues that

⁹ <https://mm.icann.org/pipermail/comments-com-amendment-3-03jan20/attachments/20200214/153335a1/RafertResponsetoProposedAmendment3tothe.COMRegistryAgreement.pdf>

¹⁰ <https://www.analysisgroup.com/news-and-events/news/icann-releases-final-report-by-analysis-group-in-the-independent-review-of-the-security-and-stability-advisory-committee/>

¹¹ https://www.theregister.co.uk/2020/03/30/dotcom_price_rises/

the volume of comments is not a cause for concern but a nefarious effort to influence the process.” In our view and in the view of many ICANN stakeholders, it is unconscionable that the Board and ICANN community would rely on a Staff Report that sidesteps key facts and arguments and that only serves to attempt to justify Staff’s own decisions in the first place, rather than provide an objective and meaningful analysis.

As you are people of good will who are ostensibly trying to do the right thing on behalf of the global public interest, we would suggest that it is time to take a step back and reevaluate your entire approach with a view to establishing sound, fair processes and rational decision making.

Before embarking on a decision affecting 140 million registrations and imposing a burden on consumers in the hundreds of millions of dollars, you could have easily consulted with stakeholders. By “before”, we mean before negotiating a revised Registry Agreement, rather than seeking comment afterwards.

You could have undertaken an economic study to fulfill your mandate to act in the public interest and to ensure that increasing prices is helpful to the public, rather than solely for your registry operator.


You could have studied and identified if there were any reasonable views to be considered that were contrary to your adopted view that “ICANN is not a price regulator”, and you may even have adopted such different views.

You could have taken stock of the nearly unanimous opposition to price increases from registrants, and determined that based upon public feedback, you should change course in order to serve the public interest.

Instead, you negotiated a controversial price increase, inter alia in exchange for a \$20 million payment, prior to seeking any public feedback. When you received feedback, you did not reconsider or change course whatsoever. You empowered Staff to make decisions rather than take responsibility yourself.

It need not be this way. ICANN can reclaim its place as a multistakeholder, transparent, responsive, and credible institution of integrity.

Sincerely,
INTERNET COMMERCE ASSOCIATION



Per:
Zak Muscovitch
General Counsel, ICA

cc: Göran Marby, President and CEO, ICANN
cc: Theresa Swinehart, SVP, Multistakeholder Strategy & Strategic Initiatives, ICANN
cc: David Olive, SVP, Policy Development Support