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BY E-MAIL

September 17, 2014

Arif H. Ali
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Internet Corporation for Assigned Names and Numbers
Attn: Cherine Chalaby
Chair, ICANN New gTLD Program Committee (NGPC)
12025 Waterfront Drive, Suite 30
Los Angeles, CA 90094-2536
Email: didp@icann.org

Re: DIDP Request for any Communications or Written Agreement between Donuts, Inc. and ICANN Relating to Extending the Time for Donuts to File an IRP

Dear Mr. Chalaby:

On behalf of fTLD Registry Services, LLC (“fTLD”), I request the documents described below, pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).

Background

fTLD is the sole community applicant for the generic Top-Level Domain (“gTLD”) .INSURANCE. Three non-community applicants also applied for the string, including Auburn Park, LLC, (“Auburn”), an affiliate of Donuts, Inc. (“Donuts”). Last winter, fTLD prevailed against Auburn and the other applicants, after one applicant withdrew its application and the experts appointed by the International Centre for Expertise of the International Chamber of Commerce (“ICC”) issued their respective determinations sustaining the community objections lodged against Auburn and the other remaining applicant. The ICC expert’s determination on the community objections filed against Auburn’s application was posted to ICANN’s website on January 17, 2014.

Two months later, Donuts emailed the ICANN Ombudsman and indicated that it wished to submit a complaint. Nearly two months after that, the ICANN Ombudsman informed fTLD that Donuts had filed a complaint regarding the community objections. As a result, ICANN placed fTLD’s application “on hold” for the duration of the Ombudsman’s investigation. On July 7, 2014, the Ombudsman dismissed Donuts’ complaint and, on July 12, 2014, ICANN changed the contention resolution status of fTLD’s application to “resolved.”

At this point, fTLD had prevailed in string contention and expected to proceed to the contracting and delegation phase for .INSURANCE. On August 12, 2014, however, ICANN notified fTLD that its .INSURANCE application would be placed “on hold” again. Apparently, Donuts’ had invoked the Cooperative Engagement Process (“CEP”) with ICANN on July 18, 2014, with regard to seven gTLD applications, including its affiliate’s application for .INSURANCE. As fTLD formally raised with ICANN in its letter of August 28, 2014 (to which ICANN has not yet responded), any request by Donuts to commence a CEP or an Independent Review Process (“IRP”) is time-barred with regard to claims relating to .INSURANCE.

During this period, Donuts and its affiliate, Pioneer Willow, LLC (“Pioneer”), which applied for and entered into a registry agreement with ICANN to operate .INSURE—a competing string—have benefitted immensely from the delays suffered by fTLD. Earlier this month, .INSURE entered into general availability without any competition from .INSURANCE.

Requested Documents

fTLD requests that ICANN produce a copy of any communications or written agreement between ICANN and Donuts relating to extending the period for Donuts to engage in the CEP or to file an IRP, including the terms of any such extension. Although ICANN has not made any such communications or written agreement publicly available to date, they are appropriate subjects of a DIDP Request because pursuant to ICANN’s Bylaws they must exist, they are not subject to any privilege, and any harm that may be caused by their disclosure (and we have not identified any) is outweighed by the interest of the affected applicants and the Internet community in learning the terms of the IRP tolling agreement between ICANN and Donuts.

Rationale

Setting aside the fact that any request by Donuts for a CEP relating to .INSURANCE is untimely and improper, any new purported time period for commencing an IRP also has expired, unless ICANN has afforded Donuts extra time. The CEP procedures incorporated by reference into ICANN’s Bylaws expressly state that “*in no event, absent mutual written agreement by the parties, shall the extension be for more than fourteen (14) days.*”¹ As of the date of this request, Donuts’ CEP has continued for nearly two months without any indication from ICANN or Donuts when the period for Donuts to file an IRP relating to these seven strings, including .INSURANCE, will expire. As a result, fTLD’s application for .INSURANCE remains “on hold.”

¹ Bylaws, Art. IV, § 3(14); ICANN Cooperative Engagement Process – Requests for Independent Review, p. 2 (11 April 2013) (emphasis added).

ICANN can resolve this uncertainty simply by making the tolling agreement public. Because ICANN's Bylaws require ICANN and Donuts to enter into a *written agreement* in order to extend Donuts' deadline to file an IRP, the requested communications or document necessarily must exist and must be in ICANN's possession.

Furthermore, there is no reason why ICANN cannot make the tolling agreement publicly available. First, neither the agreement itself nor any communications with Donuts are privileged. Second, fTLD seeks only information regarding the procedural extension that ICANN has granted to Donuts, not the content of the CEP. While the proceedings of the CEP are confidential under the ICANN Bylaws, the procedure and timing are not. The Bylaws clearly set forth the timeline and deadlines for participating in a CEP and IRP. Moreover, during an IRP, all procedural information and deadlines are made public.

Third, fTLD seeks information that would be readily available to it, had ICANN and Donuts not entered into a tolling agreement. ICANN posted on its website the date on which Donuts commenced a CEP with ICANN relating to the seven gTLD strings, including .INSURANCE (July 18, 2014). This created a reasonable expectation for fTLD (and for the applicants competing with Donuts for the other six strings as well as members of the Internet community) that the deadline for Donuts to file an IRP relating to .INSURANCE would expire on or before August 31, 2014 (setting aside the fact that the period for Donuts to engage in these accountability mechanisms should have expired in or around February 2014). Instead, Donuts apparently continues to participate in the CEP with ICANN, while fTLD and the other affected applicants have no way of determining when the period for Donuts to file any IRP will expire. There is no reason why a tolling agreement between ICANN and Donuts allowing Donuts more time to file its IRP should deprive fTLD and the other affected applicants of any knowledge of Donuts' deadline for filing an IRP.

To the extent that ICANN deems that the written agreement, or any of the communications that comprise it, falls into one of the defined conditions for non-disclosure, ICANN should nonetheless disclose the information, as the public interest in disclosing the information outweighs any harm (and none is apparent) that might be caused by its disclosure. In addition, any purported harm may be avoided by redacting the information that is either not responsive to this DIDP request or confidential.

gTLD applicants, such as fTLD, have a right to know the timeframes for the accountability mechanisms directly affecting their applications. Moreover, all applicants interested in pursuing ICANN's accountability mechanisms—or applicants concerned that competitors might do so—have a right to know if ICANN is unable to comply with the deadlines set forth in its Bylaws and the extent to which they can expect such accountability mechanisms to be delayed. Because ICANN is tasked through its Bylaws and Articles of Incorporation with operating in a transparent and accountable manner, fTLD urges ICANN to provide a copy of the information requested herein.

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fTLD reserves all of its rights at law and in equity, including, but not limited to, its right to obtain this or other information from ICANN.

Sincerely,

A handwritten signature in black ink, appearing to read 'Arif H. Ali', with a stylized flourish at the end.

Arif H. Ali

cc: Craig Schwartz, Managing Director, fTLD Registry Services, LLC