Comments of the Registries Constituency
Contract Provisions Contained in Version 2 of the Draft
Guidebook for new gTLDs
April 13, 2009

The Registries Constituency of the GNSO (RyC) is pleased to provide these comments on contract provisions in Version 2 of the Draft Applicant Guidebook for new Generic Top-level Domains (the "Guidebook"). The comments that follow represent a consensus position of the RyC as further detailed at the end of the document.

Introduction

These comments focus specifically on the terms and conditions of the registry agreement that an applicant would be required to sign, and also the terms and conditions of the application itself.

For ease of reference, the versions of the registry agreements discussed will be as follows:

"05-07 Registry Agreement" will refer to the 2005-2007 form gTLD Registry Agreement, as was used by ICANN in comparing the v1 Registry Agreement in version 1 of the Draft Applicant Guidebook for New gTLDs

"v1 Registry Agreement" will refer to the draft Registry Agreement associated with version 1 of the Draft Applicant Guidebook for New gTLDs

"v2 Registry Agreement" will refer to the draft Registry Agreement associated with version 2 of the Draft Applicant Guidebook for New gTLDs

Our comments consist of an annotated copy of the draft registry agreement that appears in the Guidebook, followed by an annotated copy of the draft application terms and conditions. The ICANN text appears in black, while the constituency comments appear in blue. Specific language additions appear in bolded blue text.

Summary

The constituency appreciates the changes that ICANN did make from the v1 Registry Agreement to the v2 Registry Agreement. The RyC also acknowledges ICANN's explanations and justifications for some of those changes in the Draft Applicant Guidebook: What You Told Us that accompanied version 2 of the Guidebook, as well as at the Mexico City and other public meetings. However, the RyC believes that many more significant changes are necessary to address RyC's concerns.

For example, despite strenuous objections by the RyC and the broader community, ICANN has continued to assert a *unilateral* right to change the terms and conditions of the registry agreement, with its own board able to ultimately uphold any such changes.

This goes well beyond ICANN's mandate, is an abuse of power, and guts the important limitations on ICANN's ability to impose new terms and conditions.

In many instances, the RyC offers specific edits and language refinements, while in others areas, such as protection of legal rights of third parties, there are still conceptual gaps that needs to be narrowed. The RyC looks forward to working with ICANN to move toward a registry agreement that is more even-handed and mutually agreeable.

REGISTRY AGREEMENT

This REGISTRY AGREEMENT (this "Agreement") is entered into as of _____ (the "Effective Date") between Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation ("ICANN"), and _____ a _____ ("Registry Operator").

RyC suggests that ICANN do a sweep of the document, including Specifications, to ensure the consistent use of either the defined term "Agreement" or "Registry Agreement" – currently both references are used.

ARTICLE 1 DELEGATION AND OPERATION OF TOP–LEVEL DOMAIN

Section 1.1   Domain and Designation. The Top-Level Domain to which this Agreement applies is ____ (the "TLD"). Upon the Effective Date and until the end of the term as defined in Section 4.1), ICANN designates _____ as the registry operator for the TLD, subject to the requirements and necessary approvals for delegation of the TLD and entry into the root-zone.

Section 1.2   Technical Feasibility of String. While ICANN has encouraged and will continue to encourage universal acceptance of all top-level domain strings across the Internet, certain top-level domain strings may encounter difficulty in acceptance by ISPs and webhosters and/or validation by web applications. Registry Operator shall be responsible for ensuring to its satisfaction the technical feasibility of the TLD string prior to entering into this Agreement.

Section 1.3   Statements of Registry Operator. Registry Operator represents and warrants that all material information provided and statements made in connection with the registry TLD application and during the negotiations of this Agreement were true and correct in all material respects at the time made, and that such information or statements continue to be true and correct in all material respects as of the Effective Date except as otherwise disclosed in writing by Registry Operator to ICANN.

The representations and warranties regarding Organization, Due Authorization and Execution should be re-instituted into the v2 Registry Agreement. Each party in the transaction should have assurances about the other party with whom they are contracting, including the laws under which such party is organized, and good standing under those laws. This is particularly important given the potentially large number of applicants for new gTLDs all around the world. These provisions should be mutual and

should be located in the actual Registry Agreement, and not just an applicant-only requirement in the application form. Such provisions serve an important legal purpose and are common in most contracts. Accordingly, the mutual clauses from the 05-07 Registry Agreement should be added back to the v2 Registry Agreement (and appropriately re-numbered):

> **"Section 2.1 Registry Operator's Representations and Warranties.**
> **2.1(a) Organization; Due Authorization and Execution. Registry Operator is a _____, duly organized, validly existing and in good standing under the laws of _____, and Registry Operator has all requisite power and authority to enter into this Agreement. All corporate approvals and actions necessary for the entrance by Registry Operator into this Agreement have been obtained and this Agreement has been duly and validly executed and delivered by Registry Operator.**
>
> **…**
>
> **Section 2.2 ICANN's Representations and Warranties.**
> **2.2(a) Organization; Due Authorization and Execution. ICANN is a nonprofit public benefit corporation duly organized, validly existing and in good standing under the laws of California. ICANN has all requisite power and authority to enter into this Agreement. All corporate approvals and actions necessary for the entrance by Registry Operator into this Agreement have been obtained and this Agreement has been duly and validly executed and delivered by ICANN."**

The representation and warranties in Section 1.3 of the v2 Registry Agreement are overly broad, and confusing as to whether they are bounded in time. While it is appropriate for an applicant to be required to represent and warrant the accuracy of its application, it is not reasonable to require the same for all statements made "during the negotiations." Negotiators would otherwise be required to do a full corporate pre-vetting before each utterance, and there could be messy disputes about verbal statements outside the four corners of the official application documents. Thus, Section 1.3 of the v2 Registry Agreement should be deleted and replaced with the following:

> "**Registry Operator represents and warrants that all material information provided and statements made in its registry TLD application are true and correct in all material respects as of the Effective Date, except as otherwise disclosed in writing by Registry Operator to ICANN.**"

 With respect to Registry Operator's representation and warranties, the limitation on remedies from the v1 Registry Agreement should be re-instated: **"A violation or breach of this subsection shall not be a basis for termination, rescission or other equitable relief, and, instead shall only give rise to a claim for damages."**

ARTICLE 2 COVENANTS OF REGISTRY OPERATOR

Registry Operator covenants and agrees with ICANN as follows:

Section 2.1   Compliance with Consensus Policies and Temporary Policies. Registry Operator shall comply with and implement all Consensus Policies and Temporary Policies found at <http://www.icann.org/general/consensus-policies.htm>, as of the Effective Date and as may in the future be developed and adopted in accordance with ICANN's Bylaws, provided such Consensus Polices and Temporary Policies are adopted in accordance with the procedure and relate to those topics and subject to those limitations set forth at [see specification 1]*.

RyC will comment below on Specification 1. Among other comments, care should be taken to ensure that the terms "Security and Stability" and "Registry Services" are used in their precise, capitalized, defined meanings, rather than lower-case.

Section 2.2   Data Escrow. Registry Operator shall comply with the registry data escrow procedures posted at [see specification 2]*.

As the v2 Registry Agreement states that "THIS INTERIM DRAFT SPECIFICATION IS UNDER DEVELOPMENT", RyC will reserve comment until ICANN publishes a more fully-baked draft Specification 2.

 Section 2.3   Monthly Reporting. Within 20 days following the end of each calendar month, Registry Operator shall deliver to ICANN a report in the format posted at [see specification 3]*. ICANN may audit Registry Operator's books and records relating to data contained in monthly reports from time to time upon reasonable advance written notice, provided that such audits will not exceed one per quarter. Any such audit will be at ICANN's cost, unless such audit is related to a discrepancy or discrepancies in the data provided by Registry Operator in excess of 5% to ICANN's detriment. In the latter event, Registry Operator shall reimburse ICANN for all reasonable costs and expenses associated with such audit, which reimbursement will be paid together with the next Registry-Level Fee payment due following the date of transmittal of the cost statement for such audit.

"discrepancies in the data provided by Registry Operator" should be changed to "discrepancies in the **fees paid** by Registry Operator", as it doesn't make sense to say that the audit would be at ICANN's cost unless discrepancies in excess of 5% of *data* to ICANN's detriment were revealed. It is unclear how data discrepancies could even be measured in terms of percentages and RyC believes this to be a typographical error.

Section 2.4   Publication of Registration Data. Registry Operator shall provide public access to registration data in accordance with the specification posted at [see specification 4]*.

RyC will comment below on Specification 4. Among other comments, RyC is concerned that if it is required to enter into Zone File Access Agreements with "any Internet user" and that it must provide "access to the zone file to user at no cost", there is a potential for unreasonable, illegitimate, abusive or excessive requests to enter into such agreements or access the zone file which could be very costly and time consuming for registries. RyC suggests that a limitation be applied to allow all reasonable or legitimate requests for agreements and/or access.

Section 2.5   Reserved Names. Except to the extent that ICANN otherwise expressly authorizes in writing, Registry Operator shall reserve from initial (i.e. other than renewal)

registration all strings that appear on the Schedule of Reserved Names posted at [see specification 5]*.

As the v2 Registry Agreement states that "the contents of this schedule is the subject of continuing community discussion", RyC will reserve comment until ICANN publishes a more fully-baked draft Specification 5.

Section 2.6   Functional and Performance Specifications. Functional and Performance Specifications for operation of the TLD will be as set forth at [see specification 6]*. Registry Operator shall comply with and keep technical and operational records sufficient to evidence compliance with such specifications for at least one year, which records ICANN may audit from time to time upon reasonable advance written notice, provided that such audits will not exceed one per quarter. Any such audit will be at ICANN's cost.

RyC will comment below on Specification 6. The text above, "comply with and" should be deleted, so that it reads, "**Registry Operator shall keep technical and operational records…**" since it does not make sense to have Registry Operator "comply with" records.

Section 2.7   Protection of Legal Rights of Third Parties. Registry Operator must specify a process and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties ("Rights Protection Mechanisms"), which shall at a minimum include those provisions set forth at [see specification 7]*. Any changes or modifications to Registry Operator's Rights Protection Mechanisms following the Effective Date must be approved in advance by ICANN.

As the v2 Registry Agreement states that "the scope of these requirements is the subject of continuing community discussion", RyC will reserve comment until ICANN publishes a more fully-baked draft Specification 7.

As to the text of Section 2.7, RyC repeats the comments it made to the v1 Registry Agreement,

"This provision is duplicative and unnecessary, and could potentially dramatically expand registry liability. Currently, 3rd party protections for launch and sunrise are contained in the application itself and incorporated into the start up plan, which is an attachment to the registry agreement (and thereby enforceable under that agreement). These provisions reflect input from other ICANN stakeholders, which may vary from registry to registry. Registry operators are, in addition, subject to the Consensus Policy UDRP. Section 2.7 of the proposed new registry agreement adopts a new, ongoing obligation to "protect the legal rights of third parties," which goes beyond the current commitment to take specified and agreed-upon steps to protect such rights. It creates potential liability for infringement that is neither practical nor consistent with established law. Such liability would not exist, for example, in the United States, under either case law (i.e., LOCKHEED MARTIN CORPORATION, v. NETWORK SOLUTIONS, INC., (9th Cir. 1999)) or the Lanham Act (15 U.S.C. S 1114).

If additional tools are needed to address behavior that falls within the prescribed areas for which Consensus Policy may be developed, they can and should be developed as Consensus Policy. If tools to address behavior outside of the scope of Consensus Policy are desirable, those can be discussed and negotiated, but should not be confused with Consensus Policy."

By way of further explanation as to why registries should not be required to shoulder the huge burden of protecting the legal rights of third parties, RyC reminds that registries are required to use the ICANN-accredited registrar channel, and that, thick or thin, the registries have no relationship with registrants. Even if they did, proxy whois services permit registrars to keep necessary contact data about registrants. Even ICANN's own economic expert, Dennis Carlton, argues that limitations should not be placed on technology based on a perceived problem of rights of third parties. (See, Preliminary Report of Dennis Carlton Regarding Impact of New GTLDs on Consumer Welfare, March 2009, pp. 14-21). Finally, the US Court of Appeals, in the Lockheed decision, noted that registries are not capable of assessing what domain names should or should not be registered under trademark laws, including because they cannot monitor or control the selection of domain names in what is a fully automated process.

Section 2.8   Use of Registrars. Registry Operator must use only ICANN accredited registrars in registering domain names. Affiliates of Registry Operator may be ICANN-accredited registrars authorized to register names in the TLD, provided, however, that together they may act as registrar for no more than 100,000 names registered in the TLD. Registry Operator may not itself act as an authorized registrar for the TLD through the same entity that provides registry services. Registry Operator must provide non-discriminatory access to registry services to all ICANN accredited registrars that enter into and are in compliance with Registry Operator's registry-registrar agreement for the TLD. Registry Operator must use a uniform agreement with all registrars authorized to register names in the TLD, which may be revised by Registry Operator from time to time, provided however, that any such revisions must be approved in advance by ICANN.

The RyC will comment separately or individually on Section 2.8.

Section 2.9   Transparency of Pricing for Registry Services. Registry Operator shall provide no less than six months notice in advance of any price increase for domain name registrations, and shall offer domain name registrations for periods of up to ten years. Registry Operator is not required to give notice of the imposition of the Variable Registry-Level Fee set forth in Section 6.4. Registry Operator shall ensure through its Registry-Registrar Agreement that each ICANN-accredited registrar authorized to sell names in the TLD will clearly display at the time of registration a link to an ICANN-designated web page that ICANN will develop describing registrant rights and responsibilities. [**Note: subject to continuing community discussion.**]

The final sentence should be deleted: "Registry Operator shall ensure … that each ICANN-accredited registrar …will clearly display at the time of registration a link to an ICANN-designated web page…describing registrant rights and responsibilities." This is not properly a registry obligation, but rather a registrar obligation, which ICANN should enforce through its Registrar Accreditation mechanism.

RyC reserves the right to comment further upon conclusion of the "continuing community discussion" and subsequent memorializing into a later draft of the Registry Agreement.

Section 2.10   Contractual and Operational Compliance Audits. In addition to those audit rights set forth in Sections 2.3 and 2.6, ICANN may from time to time, at its expense, conduct contractual compliance audits to assess compliance by Registry Operator with its covenants contained in Section 2 of this Agreement. As part of any contractual compliance audit and upon request by ICANN, Registry Operator shall timely provide all

responsive documents, data and any other information necessary to demonstrate Registry Operator's compliance with this Agreement. Upon no less than five days notice (unless otherwise agreed to by Registry Operator), ICANN may, as part of any contractual compliance audit, conduct site visits during regular business hours to assess compliance by Registry Operator with its covenants contained in Section 2 of this Agreement.

After "from time to time" in the first sentence of this section, the following text should be inserted: "(not to exceed once per year)".

After the first sentence of this section, the following text should be inserted: "Audits shall be tailored as narrowly as possible to achieve the purpose of assessing compliance. ICANN shall give reasonable advance written notice of any such audit, and shall include in each notice as much specificity as is reasonably possible about the documents, data and other information it is requesting."

Each time ICANN requests an audit, registries are forced to expend considerable time and resources to gather all information which *may* be relevant, and often end up guessing at what ICANN might be looking for. The more narrowly focused ICANN can make its audit requests, the more quickly and efficiently registries will be able to assemble the information ICANN is seeking. This would promote a more collaborative relationship between ICANN and the registries.

(Section 2.11   [Note: for Community-Based TLDs Only] <u>Obligations of Registry Operator to TLD Community</u>. Registry Operator shall establish registration policies in conformity with the application submitted with respect to the TLD for: (i) naming conventions within the TLD, (ii) requirements for registration by members of the TLD community, and (iii) use of registered domain names in conformity with the stated purpose of the community-based TLD. Registry Operator shall operate the TLD in a manner that allows the TLD community to discuss and participate in the development and modification of policies and practices for the TLD. Registry Operator shall establish procedures for the enforcement of registration policies for the TLD, and resolution of disputes concerning compliance with TLD registration policies, and shall enforce such registration policies.)

ARTICLE 3 COVENANTS OF ICANN

ICANN covenants and agrees with Registry Operator as follows:

Section 3.1   <u>Open and Transparent</u>. Consistent with ICANN's expressed mission and core values, ICANN shall operate in an open and transparent manner.

Section 3.2   <u>Equitable Treatment</u>. ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause.

Section 3.3   <u>TLD Nameservers</u>. ICANN will use commercially reasonable efforts to ensure that any changes to the TLD nameserver designations submitted to ICANN by Registry Operator (in a format and with required technical elements specified by ICANN at http://www.iana.org/domains/root/ will be implemented by ICANN within seven days or as promptly as feasible following technical verifications.

A sentence should be added at the end of Section 3.3, essentially re-instating text that was in the 05-07 Registry Agreement: "**In the event and to the extent that ICANN is authorized to set policy with regard to an authoritative root server system, it will ensure that the authoritative root will point to the TLD nameservers designated by Registry Operator for the Registry TLD throughout the Term of this Agreement.**"

This is a fundamental basis of the bargain of this Registry Agreement and should be overtly stated, rather than silently implied.

Section 3.4   Root-zone Information Publication. ICANN's publication of root-zone contact information for the Registry TLD will include Registry Operator and its administrative and technical contacts. Any request to modify the contact information for the Registry Operator must be made in the format specified from time to time by ICANN at http://www.iana.org/domains/root/.

ARTICLE 4 TERM AND TERMINATION

Section 4.1   Term. The term of this Agreement will be ten years from the Effective Date.

Section 4.2   Renewal. This Agreement will be renewed upon the expiration of the term set forth in Section 4.1 above and each successive term, unless an arbitrator or court has determined that Registry Operator has been in fundamental and material breach of its covenants set forth in Article 2 of this Agreement, or in default of its payment obligations under Article 6, and such breach or breaches remain uncured following notice by ICANN to Registry Operator.

RyC repeats the comments it made to the v1 Registry Agreement:

"*The current registry agreements place modest constraints on ICANN's rights to refuse to renew, which ICANN proposes to eliminate in the draft. The draft also eliminates existing provisions regarding the terms under which such renewals will take place. The current agreement assures ICANN that it can bring renewal agreements in line with contract changes that have been implemented during the term, but provides the degree of stability and predictability registry operators need to operate their businesses, both with respect to terms and pricing. Those protections should be maintained.*"

The construct for renewal contained in the 05-07 Registry Agreement should be re-instated.

At a minimum, the v2 Registry Agreement text should be edited as follows:

"…unless **(i) following notice of breach to Registry Operator in accordance with Section 4.3 and failure to cure such breach with the time period prescribed in Section 4.3,** an arbitrator or court has determined that Registry Operator has been in fundamental and material breach of its covenants set forth in Article 2 of this Agreement, or in default of its payment obligations under Article 6, and **(ii) following the final decision of such arbitrator or court, Registry Operator has failed to comply within ten days with the decision of the arbitrator or court, or within such other time period as may be described by the arbitrator or court** ~~such breach or breaches remain uncured following notice by ICANN to Registry Operator~~."

Further, the v2 Registry Agreement, as compared to the 05-07 Registry Agreement, would have the effect of newly allowing non-renewal for uncured breach of many more categories, including: Data Escrow, Monthly Reporting, Publication of Registration Data, Protection of Legal Rights of 3rd Parties, Use of Registrars, and Contractual and Operational Compliance Audits. Per its comments in Article 2 above, RyC believes that changes need to be made to several of these provisions, such as removing the requirement for Protection of Legal Rights of 3rd Parties, and the draconian remedy of non-renewal (in addition to increased liability and litigation risks) underscores the importance of such removal. RyC submits that material breach determinations should be limited to those breaches that materially affect Security and Stability.

Section 4.3   Termination by ICANN. ICANN may terminate this Agreement if Registry Operator fails to cure any fundamental and material breach of Registry Operator's covenants set forth in Article 2 or its payment obligations set forth in Article 6 of this Agreement within thirty (30) calendar days after ICANN gives Registry Operator written notice of the breach, which notice will include with specificity the details of the alleged breach and an arbitrator or court has determined that Registry Operator is, in fundamental and material breach and has failed to cure such breach. Failure of Registry Operator to complete all testing and procedures necessary for delegation of the TLD into the root zone within 12 months of the Effective Date shall be considered a material and fundamental breach of Registry Operator's obligations hereunder and shall entitle ICANN, in its sole discretion, to terminate the Agreement with no further obligations of either party. Registry Operator may request an extension for up to additional 12 months for delegation if it can demonstrate that Registry Operator is working diligently and in good faith toward successfully completing the steps necessary for delegation of the TLD. Any fees paid by Registry Operator to ICANN prior to such termination date shall be retained by ICANN in full.

In the first sentence of Section 4.3, edit the text so that it reads: "ICANN may terminate this Agreement if **and only if (i)** Registry Operator fails to cure any fundamental and material breach of Registry Operator's covenants set forth in Article 2 or its payment obligations set forth in Article 6 of this Agreement within thirty (30) calendar days after ICANN gives Registry Operator written notice of the breach, which notice will include with specificity the details of the alleged breach, and **(ii) (a)** an arbitrator or court has **finally** determined that Registry Operator is **(or was**), in fundamental and material breach and has failed to cure such breach **within the prescribed time period and (b) following the decision of such arbitrator or court, Registry Operator has failed to comply with the decision of the arbitrator or court**."

While the v2 Registry Agreement added back some limitations on ICANN's termination rights, the edits to the text above should be made in order to preserve the important protections in previous versions of the Registry Agreement. As the RyC stated in its comments to the v1 Registry Agreement, "*Given that ICANN controls access to an essential asset (or at the very least, has the means to prevent access to that asset), the limitations in the existing agreements are reasonable and appropriate and should be retained.*"

The v2 Registry Agreement, as compared to the 05-07 Registry Agreement, would have the effect of newly allowing termination for uncured breach of many more categories, including: Data Escrow, Monthly Reporting, Publication of Registration Data, Protection

of Legal Rights of 3rd Parties, Use of Registrars, and Contractual and Operational Compliance Audits. Per its comments in Article 2 above, RyC believes that changes need to be made to several of these provisions, such as removing the requirement for Protection of Legal Rights of 3rd Parties, and the draconian remedy of termination (in addition to increased liability and litigation risks) underscores the importance of such removal. If, for consistency, ICANN requires that material breach of all Article 2 covenants are terminable offenses (even the relatively minor offense of filing monthly reports), then the edits to the text of Section 4.3 suggested by RyC above are a reasonable and appropriate protection. RyC submits that material breach determinations should be limited to those breaches that materially affect Security and Stability.

Section 4.4   Transition of Registry upon Termination of Agreement. Upon any termination of this Agreement, Registry Operator shall agree to provide ICANN or any successor registry authority that may be designated for the TLD with all data regarding operations of the registry for the TLD necessary to maintain operations and registry functions that may be reasonably requested in addition to that data escrowed in accordance with Section 2.2.

In the first sentence, after "this Agreement", insert "**as provided in Section 4.3**" This edit is necessary to ensure that the transition assistance is to be provided upon proper termination, having followed the appropriate termination procedures.

ARTICLE 5 DISPUTE RESOLUTION

Section 5.1   Cooperative Engagement. Before either party may initiate arbitration pursuant to Section 5.2 below, ICANN and Registry Operator, following initiation of good faith communications by either party, must attempt to resolve the dispute by engaging in good faith discussion over a period of at least fifteen (15) calendar days.

Delete the first reference to "good faith" so that it reads: "…following initiation of communications by either party", so as not to have "good faith" communications layered on top of "good faith" discussions.

Section 5.2   Arbitration. Disputes arising under or in connection with this Agreement, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce ("ICC"). The arbitration will be conducted in the English language in front of a single arbitrator and will occur in Los Angeles County, California, USA. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrators shall include in their awards. In any proceeding, ICANN may request the appointed arbitrator award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations) in the event Registry Operator shall be shown to have been repeatedly and willfully in fundamental and material breach of this Agreement. In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Los Angeles County, California, USA; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction.

RyC repeats the comments it made to the v1 Registry Agreement:

"The registry operators object to mandating a single arbitrator. The ICC rules provide for panels of one or more and registry operators believe that the arbitration provisions should retain this flexibility.

Moreover, we see no grounds for substituting a blanket right to seek extraordinary damages for the limited right set out in Section 4.4 of the current registry agreement (Failure to Perform in Good Faith), which provides procedural and substantive safeguards to prevent abuse."

It is contrary to normal commercial dealings to allow a single ICC arbitrator to determine important disputes. Indeed, the philosophy of the ICC rules, and most other arbitral authorities, is clearly to the contrary. Among other things, use of a single arbitrator in all disputes would inject large uncertainty into the process of dispute resolution for ICANN as well as the registries. Judgments as to registry agreements should have the benefit of three learned individuals and should not risk the potential talent or bias of a single person chosen by none of the parties. Although ICANN's motive for moving to one arbitrator – speed and economy – is a laudable one, it is appropriate to remember the caution, "you get what you pay for." Fast and cheap is not a good trade off for fair and reasoned justice. At a minimum, the provision should be changed so that a normal, three person arbitral panel is used for important disputes, such as, for example, disputes regarding renewal or termination, or in which ICANN seeks punitive damages, or where claims exceed a certain dollar threshold (such as $1,000,000).

As to the punitive damages clause, RyC advocates a return to the following language (to be re-numbered as necessary): "**Failure to Perform in Good Faith. In the event Registry Operator shall have been repeatedly and willfully in fundamental and material breach of Registry Operator's obligations set forth in Sections 3.1(a), (b), (d) or (e); Section 5.2, and arbitrators in accordance with Section 5.1(b) of this Agreement repeatedly have found Registry Operator to have been in fundamental and material breach of this Agreement, including in at least three separate awards, then the arbitrators shall award such punitive, exemplary or other damages as they may believe appropriate under the circumstances."** In footnote 29 to the comparison between the 05-07 Registry Agreement and the v1 Registry Agreements, ICANN said, "This section was removed as unnecessary." RyC disagrees. Punitive damages are an extraordinary measure that are virtually always excluded from commercial contracts. If allowed in Registry Agreements, there must be protective limitations.

Section 5.3   Limitation of Liability. ICANN's aggregate monetary liability for violations of this Agreement will not exceed the amount of Registry-Level Fees paid by Registry Operator to ICANN within the preceding twelve-month period pursuant to this Agreement (excluding the Variable Registry-Level Fee set forth in Section 6.4, if any). Registry Operator's aggregate monetary liability to ICANN for violations of this Agreement will be limited to the amount of fees paid to ICANN during the preceding twelve-month period (excluding the Variable Registry-Level Fee set forth in Section 6.4, if any), and punitive and exemplary damages, if any, in accordance with Section 5.2.

Because of the broad indemnification obligations proposed by the v2 Registry Agreement, such obligation must be capped under the Limitation of Liability. Thus, in the second sentence, insert the following text after "Agreement" and before "will": **", and**

its aggregate indemnity obligations,".   The Guidebook analysis suggests that ICANN intended the indemnity to be subject to the cap, so this language will merely clarify that objective. (See, Guidebook, p. 138, "…ICANN revised to allow ICANN to recover in an indemnification proceeding an amount equal to fees paid in the last 12 months…")

The restriction on punitive damages, indirect damages, etc., should be re-instated, subject to the returning the language suggested in the comment to Section 5.2 above. Further, warranty disclaimers are important, as they may otherwise be implied by law, and are routinely disclaimed in commercial transactions.

Thus, the second sentence in Section 5.3 should be ended with a period after, "if any)." and the remaining language should be deleted. The following text should be added immediately thereafter, "**In no event shall either party be liable for special, indirect, incidental, punitive, exemplary, or consequential damages arising out of or in connection with this Agreement or the performance or nonperformance of obligations undertaken in this Agreement, except as provided pursuant to Section [5.2; Failure to Perform in Good Faith] of this Agreement. EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT, REGISTRY OPERATOR DOES NOT MAKE ANY WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO THE SERVICES RENDERED BY ITSELF, ITS SERVANTS, OR ITS AGENTS OR THE RESULTS OBTAINED FROM THEIR WORK, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY, NON-INFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE.**"

ARTICLE 6 FEES

Section 6.1   Registry-Level Fees. Registry Operator shall pay ICANN a Registry-Level Fee equal to (i) the Registry Fixed Fee of US$6,250 per calendar quarter and (ii) the Registry-Level Transaction Fee. The Registry-Level Transaction Fee will be equal to the number of annual increments of an initial or renewal domain name registration (at one or more levels, and including renewals associated with transfers from one ICANN-accredited registrar to another, each a "Transaction"), during the applicable calendar quarter multiplied by US$0.25, provided, however that the Registry-Level Transaction Fee shall not apply until and unless more than 50,000 domain names are registered in the TLD and shall apply thereafter to each Transaction.

RyC repeats the comments it made to the v1 Registry Agreement:

"The GNSO policy on new gTLDs recommends that ICANN take a consistent approach to registry fees, but in no way mandates that ICANN impose a one-size-fits-all model. Registry operators strongly reject this model. The proposed mechanism seems to abandon any cost-recovery obligations and, in the end, amounts to a revenue share. Pricing is not a stability or security issue and thus not within the bounds of the picket fence. It is a matter on which each registry is free to agree via contract, but it is not an appropriate matter for Consensus Policy."

Section 6.2   Cost Recovery for RSTEP. Requests by Registry Operator for the approval of new or modifications to existing registry services are reviewed by ICANN and referred as appropriate to the registry services Technical Evaluation Panel ("RSTEP") pursuant to that process at http://www.icann.org/en/registries/rsep/. Registry Operator shall remit to ICANN the invoiced cost of the RSTEP review for new or modified registry services that are

referred to the RSTEP within ten (10) business days of receipt of a copy of the RSTEP invoice from ICANN.

In this section, as in others throughout the v2 Registry Agreement, "Registry Services" should be used in its defined and capitalized form.

RyC repeats the comments it made to the v1 Registry Agreement:

"Registry operators urge ICANN to reconsider this provision in light of the strongly negative affect it could have on innovation in the TLD space.

The RSEP process is a function of ICANN's primary role in "preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet." ICANN's mission and core values specifically obligate it to respect creativity and innovation, and to rely on market mechanisms to promote and sustain competition. The RSEP process supports ICANN's core functions, and should be treated as an integral part of ICANN's operations, and not as an adjunct, pay-as-you-go service. It imposes a fee on innovation, creates a free-rider problem, and to the extent that registries with limited resources (i.e., smaller, community based registries) are the source of innovation, it reduces the likelihood that the community will enjoy the benefit of such innovation.

In addition, this would make it less likely that registries would seek to introduce new registry services that benefit consumers but do not produce additional revenue to registries. A perfect example of this is the PIR request to introduce DNSSEC in .ORG. Moreover, by creating a user fee for the RSEP process, ICANN is eliminating any incentives it may have to use the RSEP process efficiently."

Section 6.3   Payment Schedule. Registry Operator shall pay the Registry-Level Fees specified in Section 6.1 and Section 6.4, if applicable, on a quarterly basis comprised of four equal payments by the 20th day following the end of each calendar quarter (i.e., on April 20, July 20, October 20 and January 20 for the calendar quarters ending March 31, June 30, September 30 and December 31) of the year to an account designated by ICANN.

Section 6.4   Variable Registry-Level Fee. For fiscal quarters in which ICANN does not collect a variable accreditation fee from all registrars, upon receipt of written notice from ICANN, Registry Operator shall pay ICANN a Variable Registry-Level Fee. The fee will be calculated by ICANN, paid to ICANN by the Registry Operator in accordance with the Payment Schedule in Section 6.2, and the Registry Operator will invoice and collect the fees from the registrars who are party to a Registry-Registrar Agreement with Registry Operator. The fee will be required to be collected from all ICANN accredited registrars if collected from any. The amount of the Variable Registry-Level Fee will be specified for each registrar, and may include both a per-registrar component and a transactional component. The transactional component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board for each ICANN fiscal year but shall not exceed US $0.25.

RyC notes that the reference to 6.2 in Section 6.4 above is erroneous and that the correct reference is 6.3 (Payment Schedule).

RyC repeats the comments it made to the v1 Registry Agreement:

"this provision would appear to obligate registries to pay registrar fees with no phase in period to allow registries to first collect the fees from registrars. Registries should not have to compensate ICANN for fees due by Registrars unless they have had the opportunity first to collect those fees."

Moreover, just as the v2 Registry Agreement includes a cap for the transactional component, there should also be a cap on the per-registrar component.

After an appropriate cap is included, the following language should be added to Section 6.4, "**Registry Operator shall only be required to remit to ICANN the fees described in this Section 6.4 that it actually receives from registrars after submitting invoices for such fees. Registry Operator shall not be deemed in any way to be a "guarantor" for registrars, and has no obligation to make affirmative collection efforts beyond those made in its sole discretion in the ordinary course of business. Registry Operator's failure to collect any such funds from registrars shall not be deemed a material breach of this Agreement.**"

RyC notes that there is no clear reasoning or justification provided in the Analysis of Public Comment for the proposed arrangements set out in Section 6.4.

Section 6.5   Additional Fee on Late Payments. For any payments thirty days or more overdue pursuant to Section 6.2, Registry Operator shall pay an additional fee on late payments at the rate of 1.5% per month or, if less, the maximum rate permitted by applicable law.

ARTICLE 7 CHANGES AND MODIFICATIONS

[Note: Article 7 remains subject to continuing community discussion. For v2 of the proposed agreement, Sections 7.1 and 7.2 reflect proposed changes from the October 2008 version of the agreement intended to address public commentary on the proposed Article. These changes include adopting proposals to allow the veto of changes by a majority vote (greater than 50%) of the affected registry operators, prohibiting use of Article 7 to effect changes to certain provisions of the agreement, and providing for a "pre-consultation" period with registry operators regarding proposed changes.]

Section 7.1   Evolution of Terms and Specifications. During the term of this Agreement, certain provisions of the Agreement and the specifications incorporated into this Agreement may be amended, modified, supplemented or updated in accordance with changing standards, policies and requirements pursuant to the process set forth in this Article 7, provided, however, that ICANN may not utilize this Article 7 to implement changes, modifications or amendments to Article 3 or Section 2.1 of the agreement or specification 1, or to change the process for adoption and implementation of new or modified Consensus Policies or Temporary Policies generally.

Section 7.2   Process for Changes. The process for any changes, modifications or amendments to this form of registry agreement permitted by Section 7.1 shall be as follows:

i. ICANN will provide an opportunity of no less than thirty (30) days for consultation with and consideration of input from registry operators that would be subject to the change;

ii. ICANN will publicly post on its web site for no less than thirty (30) days formal notice of any proposed changes, modifications or amendments to this form of registry agreement;

iii. Following such public notice period and ICANN Board approval with respect to material changes to the Agreement, Registry Operator will be provided notice of the final terms of any changes, modifications or amendments to the terms of this Agreement, and/or the requirements, specifications, or processes incorporated into this Agreement at least ninety (90) days prior to the effectiveness thereof by the posting of a notice of effectiveness on ICANN's web site;

iv. Any such proposed changes, modifications or amendments may be disapproved within sixty (60) days from the date of notice of effectiveness of the change by a vote of more than half of the registry operators subject to the change;

v. In the event that such change, modification or amendment is disapproved by affected registry operators pursuant to the process set forth herein, the ICANN Board by a two-thirds vote shall have thirty (30) days to override such disapproval if the modification or amendment is justified by a substantial and compelling need related to the security or stability of the Internet or the Domain Name System.

RyC reserves the right to comment further at a later time in light of ICANN's note that "Article 7 remains subject to continuing community discussion."

RyC strongly objects to the proposed paradigm whereby ICANN could make unilateral changes to Registry Agreements at any time. The ability of one party to make changes to a contract is contrary to fundamental contract principles: there must be a meeting of the minds, and there must be certainty as to duties and obligations. RyC does not regard the proposed "safeguards" as a suitable check on this abuse of power. ICANN wants to be able to implement changes quickly without having to individually re-negotiate each registry agreement. While it may "want" this flexibility as a matter of administrative convenience, it must remember that there are two parties to each contract – ICANN must not use its position to "force feed" contract changes, particularly when it already has the Consensus Policy mechanism by which to enact critically important changes.

Unilateral Change of Registry Agreement Terms and Conditions Prevents Certainty In Contracting and Operations. First, it would make it more difficult for applicants to attract capital and measure the commensurate amount of capital required to sustain operations; it would also make it more difficult for existing Registry Operators to prioritize necessary investment for continued operations against what may be an unnecessary operational change for specific purpose TLDs. Financial markets abhor uncertainty. Operations people do too. It is hard to do modeling and planning with a moving target, and unilaterally changeable contract terms are the antithesis of certainty.

Second, the current Consensus Policy mechanism is sufficient for critical changes and ensures that any implementation is appropriately balanced across multiple constituencies and stakeholder groups. RyC understands that the world is dynamic and that it is impossible to foresee and plan for all eventualities. Consensus Policies allow

adjustment for change, while at the same time limiting the changing duties and obligations to things that really matter (and that are within the scope of ICANN's mandate): issues affecting Security and Stability. Truly important and time sensitive issues can be addressed extremely quickly via Temporary Policies, and those can become permanent changes through Consensus Policies. It may help for ICANN to explain the specific things it needs to amend outside the current Consensus Policy scheme, as it has offered no compelling justification to date.

Third, the proposed safeguards in the v2 Registry Agreement fall short of providing a sufficient check on ICANN's abuse of power in making unilateral changes. For example, a change to pricing and economics could put registries in a problematic alliance under antitrust laws if they collectively rejected a change, so the registries would be left with no recourse. Moreover, even if more than 50% of registries reject a change, the ICANN Board could still override any such veto. Thus, ICANN would effectively have the last word on whether a unilateral ICANN change to a contract was acceptable, and no check and balance really exists.

<u>Unilateral Change of Terms and Conditions by One Party is an Unsuitable Approach for Private Contracting</u>. ICANN is not a regulator. It is a private, non-profit corporation. However, even regulated utilities possess more protections than ICANN is proposing. The proposed v2 Registry Agreement would allow unilateral changes with only limited public notice posting, but no requirements of fact finding, public hearings, neutral appeals or due process. There is a well-established method for making changes to private contracts – they may be amended at any time by *mutual consent* of the parties. This mutuality preserves the meeting of the minds necessary to form the basis of a sound contract. Unilateral changes to a contract by one private party could even result in the contract being declared an unenforceable contract of adhesion. RyC believes ICANN's proposed ability to make unilateral changes goes well beyond its mandate and is an unfair abuse of power.

Although the v2 Registry Agreement made some changes from v1 (such as requiring a more than 50% veto rather than 2/3), RyC's comments to the v1 Registry Agreement remain relevant:

"This is completely unnecessary, and an extraordinary act of over-reaching on ICANN's part.   ICANN has described this provision as providing necessary flexibility, but has not identified any situation in which the absence of this right has hindered ICANN's ability to perform its mission.   But the fact is that ICANN already possesses authority to impose new obligations on registry operators through the Consensus Policy provisions of the agreement, and has emergency authority to do so using the Temporary Policy provisions of the registry agreement. These provisions give ICANN the authority at all times to make changes necessary to preserve the stability and security of the Internet and the DNS. ICANN has not – because it cannot – point to any situation where it needed the kind of blank check it is requesting here. ICANN's expanded comments speak to the need to address market changes that would affect "the even playing field" for all registries. While we agree that ICANN is obligated to treat all registries in a non-discriminatory way, this suggests a far more affirmative role in regulating competition among contracted parties than is appropriate or necessary. This isn't about mission creep, it is about "mission leap." Further discussion follows Section 7.2 below.

Registries are also concerned that this provision introduces ambiguity with respect to the involvement of the ICANN Board in contract amendments. What would not be a "material change"? Are there any circumstances in which modifications, supplements, or updates would not be amendments? For example, could staff change Specification 1 without specific authority from the Board for a particular change?

Registry operators understand that the current approach to negotiating registry agreements is not likely to work in an environment where hundreds of new registries are added in quick succession. But giving ICANN unilateral authority of this sort is not a good answer. Rather, registries believe that we should focus now on crafting an agreement that is fair, gives ICANN the tools it needs to achieve its limited mission, and gives registries the stability and predictability they need to operate businesses. Provisions under which changes to the fee provisions of each registry's agreement should be negotiated on an individual basis, as appropriate.

RyC also restates its v1 Registry Agreement comments pertaining to Section 7.2:

This provision is completely unacceptable, for the reasons articulated with respect to Section 7.1. ICANN may argue that the override rights protect registry operators from ICANN's over-reaching, but that is not the case.

First, there is no justification for shifting the burdens in the way this provision does. Currently, ICANN can force certain changes on stability and security grounds, but ICANN has to first make the case that Consensus Policy is needed. In addition, through the policy development process, registries may agree – but are not obligated - to abide by policies that extend into areas outside the picket fence, and registries have demonstrated their willingness to do so. Under the arrangement proposed by ICANN, however, ICANN can impose any changes it wants, and the burden is on registries to block those that regulate activities outside the picket fence.

Second, even if such burden shifting could be supported, the requirement of a vote of two-thirds of the number of registries to overturn such changes is not an effective check in an environment involving hundreds, if not thousands, of TLDs employing many different business models. Registries already operate under widely varied business models and even now, with only a handful of non-cc registries, and it is easy to imagine changes that all registries are "subject to" but for which the cost impact varies tremendously from registry to registry. Registrant authentication obligations, for example, might impose relatively small costs on registries serving a pre-identified and pre-authenticated user base like, for example, .MUSEUM, but extraordinary costs on the larger commercial registries that would have to implement costly new procedures. There is no particular reason for registries that are only minimally impacted by a change to object to it, indeed, the incentive for such registries would be to preserve political capital by going along with a change. In addition, this provision requires a relatively high level of participation by all registries in the ICANN process by registry operators. Even today that is not always the case.
…

Registry operators do not believe there is any justification for giving ICANN unilateral authority to require registry operators to bear costs and adopt irrelevant business models."

ARTICLE 8 MISCELLANEOUS

Section 8.1 <u>Indemnification of ICANN</u>. Registry Operator shall indemnify and defend ICANN and its directors, officers, employees, and agents (collectively, "Indemnitees") from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to Registry Operator's operation of the registry for the TLD or Registry Operator's provision of registry services; provided that Registry Operator shall not be obligated to indemnify or defend any Indemnitee to the extent the claim, damage, liability, cost, or expense arose due to a breach by ICANN of any obligation contained in this Agreement. This section will not apply to any request for attorneys' fees in connection with any litigation or arbitration between or among the parties.

This indemnification obligation is uncapped and is overbroad. Per its comments to Section 5.3 above, RyC has offered language that would clarify that the indemnity obligation is under the Limitation of Liability. A cap is especially necessary given the breadth of the indemnity required in the v2 Registry Agreement.

Notwithstanding objections made by the community to the v1 Registry Agreement, as currently written, ICANN could tender an indemnification request against registry operators for virtually any and every claim a third party might bring against ICANN. The indemnification obligation is so broad it could even lead to indemnification claims where registry operator complied to the letter with all ICANN-imposed policies. One of the primary factors in determining whether one party or the other should bear a particular risk is the ability of the party to control that risk. In many foreseeable circumstances, it is ICANN, and not a registry operator, who controls risks that may result in third party claims. It is unjust for ICANN to require that registry operators pick up the tab for essentially all third party claims.

In the Guidebook analysis at p.138, ICANN states that it "specifically focused on provisions that could be simplified to the benefit of both parties…" and that "[r]egarding the topics on which the proposed Registry Agreement requires the Registry Operator to indemnify ICANN, as compared to existing gTLD agreements, the provision does not include the several other grounds for which ICANN could claim indemnification." A list is then included of the omissions. RyC asserts that those omitted grounds are not to the benefit of both parties, because those are limiters: in the 05-07 Registry Agreement, those are the *only* grounds which would give rise to indemnification claims. Instead, the v2 Registry Agreement allows for indemnification for claims "arising out of or relating to … operation of the registry … or … provision of registry services." It would be hard to conceive of claims that do not fit that broad category.

To limit the breadth of the indemnification obligation to a more appropriate allocation of risk, RyC advocates, at a minimum, the following edits: insert "**reasonable**" before "legal fees"; insert "**directly**" before "relating to"; delete "to the extent the claim, damage, liability, cost, or expense arose due to a breach by ICANN of any obligation contained in this Agreement" and replace with "**for any claim, damage, liability, cost or expense arising, in whole or in part, out of any conduct of ICANN inconsistent with ICANN's obligations.**" Further, re-instate the previous language: "**For avoidance of doubt, nothing in this Section 8.1 shall be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for the costs associated with the negotiation or execution of this Agreement, or with the monitoring or management of the parties' respective obligations under this Agreement. Further, this section**

shall not apply to any request for attorney's fees in connection with any litigation or arbitration between or among the parties."

Finally, RyC repeats its comment to the v1 Registry Agreement:

"Moreover, any indemnification provision should include the protections contained, for example, in the .BIZ registry agreement that provide as follows:

> *For any claims by ICANN for indemnification whereby multiple registry operators (including Registry Operator) have engaged in the actions or omissions that gave rise to the claim, Registry Operator's aggregate liability to indemnify ICANN with respect to such claim shall be limited to a percentage of ICANN's total claim, calculated by dividing the number of total domain names under registration with Registry Operator within the TLD (which names under registration shall be calculated consistently with Section 7.2 hereof for any applicable quarter) by the total number of domain names under registration within all TLDs for which the registry operators thereof that are engaging in the same acts or omissions giving rise to such claim. For the avoidance of doubt, in the event that a registry operator is engaged in the same acts or omissions giving rise to the claims above, but such registry operator(s) do not have the same or similar indemnification obligations to ICANN as set forth in 8.1(a) above, the number of domains under management by such registry operator(s) shall nonetheless be included in the calculation in the preceding sentence."*

Section 8.2 <u>Indemnification Procedures</u>. If any third-party claim is commenced that is indemnified under Section 8.1 above, the party against which such claim is commenced shall provide written notice thereof to the other party as promptly as practicable. Registry Operator shall be entitled, if it so elects, in a notice promptly delivered to ICANN, to immediately take control of the defense and investigation of such claim and to employ and engage attorneys reasonably acceptable to ICANN to handle and defend the same, at Registry Operator's sole cost and expense, provided that in all events ICANN will be entitled to control at its sole cost and expense the litigation of issues concerning the validity or interpretation of ICANN policies or conduct. ICANN shall cooperate, at Registry Operator's cost and expense, in all reasonable respects with Registry Operator and its attorneys in the investigation, trial, and defense of such claim and any appeal arising therefrom, and may, at its own cost and expense, participate, through its attorneys or otherwise, in such investigation, trial and defense of such claim and any appeal arising therefrom. No settlement of a claim that involves a remedy affecting ICANN other than the payment of money in an amount that is fully indemnified by Registry Operator will be entered into without the consent of ICANN. If Registry Operator does not assume full control over the defense of a claim subject to such defense in accordance with this Section, ICANN will have the right to defend the claim in such manner as it may deem appropriate, at the cost and expense of Registry Operator.

Section 8.3 <u>No Offset</u>. All payments due under this Agreement will be made in a timely manner throughout the term of this Agreement and notwithstanding the pendency of any dispute (monetary or otherwise) between Registry Operator and ICANN.

Section 8.4 <u>Change in Control; Assignment and Subcontracting</u>. Registry Operator will provide no less than ten (10) days advance notice to ICANN in accordance with Section 8.8 of any event or change of circumstance anticipated to result in a direct or indirect change of ownership or control of Registry Operator. Neither party may assign this

Agreement without the prior written approval of the other party, which approval will not be unreasonably withheld. Notwithstanding the foregoing, ICANN may assign this Agreement in conjunction with a reorganization or re-incorporation of ICANN, to another nonprofit corporation organized for the same or substantially the same purposes. Registry Operator must provide notice to ICANN of any material subcontracting arrangements, and any agreement to subcontract portions of the operations of the TLD must mandate compliance with all covenants, obligations and agreements by Registry Operator hereunder.

The first sentence should be deleted as it may cause many registries problems with Securities and Exchange laws, and other similar restrictions. In the third sentence, insert after "organized" the text "**in the United States**". This is in keeping with ICANN's recommendation 1.11.1, in its February 26, 2009 Implementation Plan for Improving Institutional Confidence, that ICANN retain its headquarters in the United States "to ensure certainty about ICANN's registry…agreements."

Section 8.5   <u>Amendments and Waivers</u>. Except as set forth in Article 7, no amendment, supplement, or modification of this Agreement or any provision hereof will be binding unless executed in writing by both parties. Irrespective of the provisions of Article 7, ICANN and Registry Operator may at any time and from time to time enter into bilateral amendments and modifications to this Agreement negotiated solely between the two parties. No waiver of any provision of this Agreement will be binding unless evidenced by a writing signed by the party waiving compliance with such provision. No waiver of any of the provisions of this Agreement or failure to enforce any of the provisions hereof will be deemed or will constitute a waiver of any other provision hereof, nor will any such waiver constitute a continuing waiver unless otherwise expressly provided.

The references to Article 7 are inappropriate in this section. As RyC stated with regard to Article 7, ICANN should not be allowed to make unilateral changes to the terms and conditions of the Agreement.

Section 8.6   <u>No Third-Party Beneficiaries</u>. This Agreement will not be construed to create any obligation by either ICANN or Registry Operator to any non-party to this Agreement, including any registrar or registered name holder.

Section 8.7   <u>General Notices</u>. All notices to be given under or in relation to this Agreement will be given either (i) in writing at the address of the appropriate party as set forth below or (ii) via facsimile or electronic mail as provided below, unless that party has given a notice of change of postal or email address, or facsimile number, as provided in this agreement. Any change in the contact information for notice below will be given by the party within 30 days of such change. Notices, designations, determinations, and specifications made under this Agreement will be in the English language. Any notice required by this Agreement will be deemed to have been properly given (i) if in paper form, when delivered in person or via courier service with confirmation of receipt or (ii) if via facsimile or by electronic mail, upon confirmation of receipt by the recipient's facsimile machine or email server. Whenever this Agreement specifies a URL address for certain information or notice provided by ICANN, Registry Operator will be deemed to have been given notice of any such information when electronically posted at the designated URL. In the event other means of notice become practically achievable, such as notice via a secure website, the parties will work together to implement such notice means under this Agreement.

　　　　If to ICANN, addressed to:

Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina Del Rey, California 90292
Telephone: 1-310-823-9358
Facsimile: 1-310-823-8649
Attention: President and CEO
With a Required Copy to: General Counsel
Email: (As specified from time to time.)

If to Registry Operator, addressed to:
[_____]
[_____]
[_____]
Telephone:
Facsimile:
Attention:
With a Required Copy to:
Email: (As specified from time to time.)

Section 8.8   Entire Agreement. This Agreement (including those specifications and documents incorporated by reference to URL locations which form a part of it) constitutes the entire agreement of the parties hereto pertaining to the operation of the TLD and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, between the parties on that subject.

Section 8.9   English Language Controls. Notwithstanding any translated version of this Agreement and/or specifications that may be provided to Registry Operator, the English language version of this Agreement and all referenced specifications are the official versions that bind the parties hereto. In the event of any conflict or discrepancy between any translated version of this Agreement and the English language version, the English language version controls. Notices, designations, determinations, and specifications made under this Agreement shall be in the English language.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

By: _____
[_____]
President and CEO
Date:

[Registry Operator]

By: _____
[_____]
[_____]
Date:

SPECIFICATION 1

CONSENSUS POLICIES AND TEMPORARY POLICIES SPECIFICATION

All instances where "security and stability" and "registry services" are used should be capitalized and carefully reference where those terms are defined. Consider adding those definitions to the main body of the v2 Registry Agreement, as it is not easy to find them currently. For example, "Security" and "Stability" are defined in the RSEP, which now requires following a web link. The contract should be self-contained for clarity and ease of reference.

"Registry Agreement" and "registry agreement" references should be made consistent with the definition of the "Agreement" in the main body of the v2 Registry Agreement.

1.3.4   maintenance of and access to accurate and up-to-date information concerning domain name registrations; and procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD affected by such a suspension or termination.

This subsection should end after "; and" with subsection 1.3.5 starting thereafter, "1.3.5 procedures to avoid…"

1.4 In addition to the other limitations on Consensus Policies, they shall not:

1.4.1 prescribe or limit the price of registry services;

1.4.2   modify the terms or conditions for the renewal or termination of the Registry Agreement;

1.4.3 modify the limitations on Temporary Policies (defined below) or Consensus Policies;

1.4.4 modify the provisions in the registry agreement regarding fees paid by Registry Operator to ICANN; or

1.4.5 modify ICANN's obligations to ensure equitable treatment of registry operators and act in an open and transparent manner.

Add additional subsections as follows:

> "**1.4.6 modify the standards for consideration of proposed Registry Services, including the definitions of Security and Stability and the standards applied by ICANN;**
>
> **1.4.7 modify ICANN's obligations to Registry Operator under Article 3 of the Agreement.**"

2. Temporary Policies.

2.1.2   If the period of time for which the Temporary Policy is adopted exceeds 90 days, the Board shall reaffirm its temporary adoption every 90 days for a total period not to exceed one year, in order to maintain such Temporary Policy in effect until such time as it becomes a Consensus Policy. If the one

year period expires or, if during such one year period, the Temporary Policy does not become a Consensus Policy and is not reaffirmed by the Board, Registry Operator shall no longer be required to comply with or implement such Temporary Policy.

In the second sentence, insert after "If" the following: "**the Board does not reaffirm a Temporary Policy, or**" and delete "and is not reaffirmed by the Board". The current language otherwise suggests that the Board could re-affirm a Temporary Policy and push it out beyond a year.

SPECIFICATION 2

DATA ESCROW REQUIREMENTS

Note: this interim draft specification is under development by ICANN and registry technical teams

As the v2 Registry Agreement states that "THIS INTERIM DRAFT SPECIFICATION IS UNDER DEVELOPMENT", RyC will reserve comment until ICANN publishes a more fully-baked draft Specification 2.

By way of preliminary observation, the draft Section 6, Release of Deposits allows for far too easy a trigger for release of the escrowed data. For example, release upon "termination" would need limitations that the agreement was fully, finally and legally terminated per the termination procedures in the Agreement (ruling by court or arbitrator, etc.)

SPECIFICATION 3

FORMAT AND CONTENT FOR REGISTRY OPERATOR MONTHLY REPORTING

No comment.

SPECIFICATION 4

SPECIFICATION FOR REGISTRATION DATA PUBLICATION SERVICES

3. Zone File Access

3.1 Zone File Access Agreement. Registry Operator will enter into an agreement with any Internet user that will allow such user to access an Internet host server or servers designated by Registry Operator and download zone file data.
…
3.6 No Fee for Access. Registry Operator will provide access to the zone file to user at no cost.

RyC is concerned that if it is required to enter into Zone File Access Agreements with "any Internet user" and that it must provide "access to the zone file to user at no cost", there is a potential for unreasonable, illegitimate, abusive or excessive requests to enter

into such agreements or access the zone file which could be very costly and time consuming for registries. RyC suggests that a limitation be applied to allow all "reasonable" or "legitimate" requests for agreements and/or access.

SPECIFICATION 5

SCHEDULE OF RESERVED NAMES AT THE SECOND LEVEL IN GTLD REGISTRIES

[Note: the content of this schedule is the subject of continuing community discussion]

RyC will reserve comment until ICANN publishes a more fully-baked draft Specification 5.

SPECIFICATION 6

REGISTRY INTEROPERABILITY, CONTINUITY, AND PERFORMANCE SPECIFICATIONS

1. **Standards Compliance**

Registry Operator shall implement and comply with relevant existing RFCs and those published in the future by the Internet Engineering Task including all successor standards, modifications or additions thereto relating to (i) Internet protocol (including Extensible Provisioning Protocol), the DNS and nameserver operations including without limitation RFCs 3735, 3915, and 4390-4394; and (ii) registration data publication operations for top-level domain registries in conformance with RFCs 1033, 1034, 1035, and 2182.

Before the period at the end of the last sentence, add the text, "**as Registry Operator deems reasonably necessary**". Registries should not have to comply with unreasonable modifications.

2. **Registry Services and Continuity**

Registry services are, for purposes of the Registry Agreement, defined as the following:

This should be drafted very precisely, such that it should read, "**"Registry Services" are, for purposes**…"

Registry Operator will conduct its operations using geographically diverse, redundant servers (including network-level redundancy, end-node level redundancy and the implementation of a load balancing scheme) to ensure quality service in the case of technical failure (widespread or local), business insolvency or an extraordinary occurrence or circumstance beyond the control of the Registry Operator.

The phrase "to ensure quality service" is too subjective, and open to interpretation that could lead to dispute. Because Specification 6 already has objective criteria in Section 4 (Performance Criteria) as to what represents "quality service", that phrase should be deleted here and replaced with "**to allow continued operation**".

4. **<u>Performance Specifications</u>**

DNS Service Availability. Service availability as it applies to the DNS service refers to the ability of the nameservers, as a group, to resolve a DNS query from an Internet user. The committed performance specification is 99.999% measured on a monthly basis, and must respond within 1.5 seconds for 95% of queries each month.

This performance specification is very simple, but eliminates many of the protections for registries as to allowances for things beyond their control, allowances for planned outages and upgrades, methods for measuring and testing, and cure periods for failure. The standard of 99.999% availability only allows 5 minutes of downtime per year, and there is no discussion of what happens in the event that standard is missed. For example, would doubling the allowed minutes of downtime (i.e., 10 minutes of downtime) result in a material breach and termination of the contract? This standard requires further community discussion as to what is an appropriate standard for reliability and appropriate penalty for failure to perform. There should also be a discussion as to whether every TLD should be subject to the same standards.

SPECIFICATION 7

[Note: the scope of these requirements is the subject of continuing community discussion]

RyC will reserve comment until ICANN publishes a more fully-baked draft Specification 7. RyC notes that it is strongly against the scheme of requiring registries to be responsible for protecting the legal rights of third parties, as registries are not in a position to do so, and it would place an undue burden on registries.

Module 6

Top-Level Domain Application – Terms and Conditions

By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

1. Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and

representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) will reflect negatively on this application and may cause ICANN and the evaluators to reject the application.

RyC suggests deleting "and oral statements made" in Section 1 as this would lead to disputes about verbal statements outside the four corners of the official application documents.

2. Applicant warrants that it has the requisite organizational power and authority to make this application on behalf of applicant, and is able to make all agreements, representations, waivers, and understandings stated in these terms and conditions and to enter into the form of registry agreement as posted with these terms and conditions.

3. Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review and consider an application to establish one or more gTLDs is entirely at ICANN's discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.

RyC acknowledges the edits ICANN made in response to its v1 comments, but believes the draft still leaves open the possibility of inequitable treatment by singling out particular applicants and/or particular applications within a new gTLD. If ICANN wishes to preserve its discretion not to go forward with a particular new gTLD or with new gTLDs altogether, that should be clarified.

RyC also repeats its v1 comments:

"Section 3 also calls out ICANN's right to reject any application it is prohibited from considering under applicable law or policy. Registry operators do not question ICANN's obligation to do this, but in conjunction with the provisions discussed below, the reference to ICANN policy is a major concern. ICANN uses the word "policy" to justify virtually all of its actions. For instance, in other settings ICANN has argued that it is obligated to follow GAC advice. Registry operators acknowledge that ICANN must consider and respond to GAC advice, but reject the notion that the Bylaws give the GAC a veto. This provision, however, insulates ICANN from liability for reading its "policies" any way it likes."

4. Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application. Applicant acknowledges that the initial fee due upon submission of the application is only to obtain consideration of an application. ICANN makes no assurances that an application will be approved or will result in the delegation of a gTLD proposed in an application. Applicant acknowledges that if it fails to pay fees within the designated time period at any stage of the application

review and consideration process, applicant will forfeit any fees paid up to that point and the application will be cancelled.

RyC repeats its v1 comments:

"Applicants are required to acknowledge that the initial fee … is paid only "to obtain consideration" of an application. Applicants are not entitled to expect that the … fee will buy them even reasoned or fair consideration."

5. Applicant shall indemnify, defend, and hold harmless ICANN (including its affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, collectively the ICANN Affiliated Parties) from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to: (a) ICANN's consideration of the application, and any approval or rejection of the application; and/or (b) ICANN's reliance on information provided by applicant in the application.

RyC repeats its v1 comments:

"This provision requires an applicant to indemnify ICANN from claims in any way arising from its consideration, approval, or rejection of the application. Taken literally, this means that even if an applicant overcomes the barricades discussed above, it could be required to assume ICANN's liability for the complained of acts or omissions."

ICANN should have to stand on its own two feet and pay for claims relating to the new gTLD initiative itself, and the process of doling out new gTLDs.

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FOR A ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER START-UP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD.

RyC repeats its v1 comments:

"Applicants must agree to release ICANN from liability for any acts or omissions in any way connected with its consideration of the application, no matter how outrageous those acts or omissions may be. In fact, applicants must check their rights at the door, and

promise that they will not challenge a final decision by ICANN for any reason. This provision goes so far as to prevent applicants who are harmed by ICANN's failure to comply with its bylaws to seek independent review. Finally, ICANN requires applicants to waive any equitable rights they may otherwise have with respect to a string that they have applied for but been denied. Thus, in the event of a dispute regarding ICANN's acts or omissions, ICANN would be insulated from liability for delegating the string to another party."

RyC has no comment as to the remainder of Module 6.

GNSO gTLD Registry Constituency Statement of Support with regard to These Comments

A supermajority of 11 RyC members supported this statement:

- Total # of eligible RyC Members[1]: 14
- Total # of RyC Members: 14
- Total # of Active RyC Members[2]: 14
- Minimum requirement for supermajority of Active Members: 10
- Minimum requirement for majority of Active Members: 8
- # of Members that participated in this process: 14
- Names of Members that participated in this process:
  1. Afilias (.info)
  2. DotAsia Organisation (.asia)
  3. Dot Cooperation LLC (.coop)
  4. Employ Media (.jobs)
  5. Fundació puntCAT (.cat)
  6. mTLD Top Level Domain (.mobi)
  7. Museum Domain Management Association – MuseDoma (.museum)
  8. NeuStar (.biz)
  9. Public Interest Registry - PIR (.org)
  10. RegistryPro (.pro)
  11. Societe Internationale de Telecommunication Aeronautiques – SITA (.aero)
  12. Telnic, Limited (.tel)

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[1] All top-level domain sponsors or registry operators that have agreements with ICANN to provide Registry Services in support of one or more gTLDs are eligible for membership upon the "effective date" set forth in the operator's or sponsor's agreement (Article III, Membership, ¶ 1). The RyC Articles of Operations can be found at http://www.gtldregistries.org/about_us/articles .

[2] Per the RyC Articles of Operations, Article III, Membership, ¶ 4: Members shall be classified as "Active" or "Inactive". A member shall be classified as "Active" unless it is classified as "Inactive" pursuant to the provisions of this paragraph. Members become Inactive by failing to participate in a Constituency meeting or voting process for a total of three consecutive meetings or voting processes or both, or by failing to participate in meetings or voting processes, or both, for six weeks, whichever is shorter. An Inactive member shall have all rights and duties of membership other than being counted as present or absent in the determination of a quorum. An Inactive member may resume Active status at any time by participating in a Constituency meeting or by voting.

13. Tralliance Corporation (.travel)
14. VeriSign (.com, .net & .name)

- Names & email addresses for points of contact:
  a. Chair: David Maher, dmaher@pir.org
  b. Alternate Chair: Jeff Neuman, Jeff.Neuman@Neustar.us
  c. Secretariat: Cherie Stubbs, Cherstubbs@aol.com

Regarding the issue noted above, the level of support in the RyC for the Constituency statement is summarized below.

1. **Level of Support of Active Members**: Supermajority

   1.1. # of Members in Favor: 11

   1.2. # of Members Opposed: none

   1.3. # of Members that Abstained: none

   1.4. # of Members that did not vote: 3

2. **Minority Position**(s): Not applicable