

Statement of the gTLD Registry Constituency

DRAFT TERMS OF REFERENCE FOR A PDP TO GUIDE CONTRACTUAL CONDITIONS FOR EXISTING GENERIC TOP LEVEL DOMAINS

The registry constituency believes that the draft terms of reference (TOR) for the policy development process (PDP) to guide contractual conditions for existing generic top level domains reflects a serious misperception about the extent to which the ICANN community as a whole can and should have authority to impose obligations on registries and registrars and/or dictate the terms and conditions contained in ICANN's commercial agreements with DNS service providers. In the view of the Registry Constituency, the misperception threatens fundamental checks and balances built into the ICANN process that are an important source of ICANN's legitimacy and must, accordingly, be preserved.

A Brief History of ICANN's Policy Authority

ICANN was conceived from the beginning as an organization with a limited charter. This understanding is reflected in ICANN's by-laws, which contemplate policy development only on issues within ICANN's mission statement. As specifically set forth in ICANN's by-laws, only mission-related issues are properly the subject of a PDP.

As articulated in its mission statement, ICANN is responsible for coordinating specified technical functions including:

1. The allocation and assignment of domain names, IP addresses and numbers, and protocol port and parameter numbers; and
2. The operation and evolution of the DNS root name server system.

ICANN is also responsible for policy development "reasonably and appropriately related to these technical functions."

The limited nature of ICANN's mission is also reflected in the original contracts between ICANN and NSI, and in every registry agreement and registrar accreditation agreement (RAA) executed since that time. In its original agreements with ICANN, for example, NSI agreed to comply with "consensus" policies adopted by ICANN provided (i) that such policies did not unreasonably restrain competition and (ii) that the policies related to:

1. Issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, technical reliability and/or stable operation of the Internet or domain-name system;
2. Registry policies reasonably necessary to implement Consensus Policies relating to registrars (or vice versa in the case of the RRA), or

3. Resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names).

The parties also acknowledged that ICANN should have policy-making authority in certain other areas (e.g., to develop the UDRP) involving issues that, while specifically discussed in the White Paper, may not have been strictly technical in nature. To avoid subsequent disagreements about these issues, the original registry agreements and RAAs contained a list of areas in which ICANN was deemed to have legacy policy authority, as follows:

1. Allocation principles (e.g., first-come/first-served, timely renewal, holding period after expiration; surviving registrars);
2. Prohibitions on warehousing or speculation;
3. Reservation of SLD names that may not be registered initially or that may not be renewed due to reasons reasonably related to (a) avoidance of confusion among or misleading of users, (b) intellectual property, or (c) the technical management of the DNS or the Internet (e.g., "example.com" and single-letter/digit names); and
4. Dispute resolution policies related to registration of domain names.

Taken together, the general policy making authority granted to ICANN to preserve the stability and security of the DNS and the legacy policy authority described above created a “picket fence” around ICANN’s authority. ICANN could establish policy and/or best practices affecting issues outside the picket fence, but could not mandate registry and registrar compliance with such policies.¹ ICANN’s ability to impose policy prospectively on registries and registrars was further constrained by procedural safeguards (ICANN’s first PDP) designed to demonstrate the presence of a “true consensus” - *i.e.*, the absence of substantial objections.

When the first new TLDs came online in 2001, the “picket fence” was retained, with only minor refinements for unsponsored domains. The sponsored TLDs included in the proof-of-concept round (.aero, coop, and .museum) were likewise bound to comply with ICANN-adopted policies involving stability, security, and interoperability but given delegated authority to develop policies in the “legacy” aspects of the picket fence. This was no accident. Even though sponsors and operators of the new registries had virtually no bargaining power, the agreements reflected a settled understanding about ICANN’s authority. ICANN was empowered to impose policies - even prospectively - on

¹ Of course, registries and registrars remained free to comply with best practices or other voluntary standards.

DNS service providers in a limited number of areas related to interoperability, technical reliability, operational stability, the safety and integrity of the Registry Database.²

By 2002 it was widely (but not universally) conceded that the standard for measuring consensus laid out in the Registry Agreements and the Registrar Accreditation Agreements was unworkable. The standard by which consensus was measured - the absence of significant opposition - proved to be an unacceptable barrier to policy development. Accordingly, as part of ICANN's "evolution and reform" process, ICANN amended its by-laws to include the GNSO PDP process. Under that process, ICANN could develop and adopt consensus policies - even in the face of substantial opposition - so long as the policy area was within ICANN's mission statement and ICANN followed specified procedures in developing those policies.³

The ERC process not only embraced the concept of the "picket fence" - it incorporated those substantive constraints into its bylaws in the form of a mission statement. Post-ERC registry and registrar agreements continued - as they do to this day - to limit the scope of permissible topics for mandatory specifications and policies. In effect, registrars, registry operators and sponsors confirmed their agreement to abide by subsequently developed ICANN policies so long as such policies were (i) necessary to facilitate interoperability, technical reliability, operational stability on the DNS or the Internet, and the safety and integrity of the Registry Database, or (ii) were covered by ICANN's legacy authority (except in those cases where the TLD charter delegated policy authority to the sponsor).

Some might argue that the constraints on ICANN's policy authority are artificial, and should be abandoned. That would be a mistake. The protections of the picket fence and the procedural safeguards are today - just as they were when first agreed - the ultimate source of ICANN's legitimacy. Private commercial actors - registries and registrars - voluntarily ceded to ICANN, via contractual undertakings, the authority it needed to fulfill its agreed upon, and therefore legitimate, mission. Moreover, ICANN's authority is legitimate because the delegation of authority was necessary, but no more than needed, to create policy in areas requiring coordination. ICANN is recognized as a legitimate private standards setting body because its authority does not exceed that needed to perform its legitimate coordinating functions. Absent these constraints, ICANN's authority would be vulnerable to challenges under the competition laws of most countries participating in ICANN through the GAC.

² For unsponsored registry's ICANN's legacy policy authority with respect to intellectual property protection likewise did not change.

³ In December of 2002, however, the GNSO PDP could not be used to impose policy on any registry operator, each of whom had the contractual right to insist on the original formulation. The first registry agreement to adopt the new by-law procedure was .org. Since that time, registry operators, including Verisign, have agreed to be bound by policy adopted in accordance with the GNSO PDP in ICANN's post-ERC by-laws.

The Draft Terms of Reference

The GNSO has recently undertaken to draft terms of reference for a PDP to establish the terms and conditions under which existing registry agreements will be renewed. This is presumably motivated by dissatisfaction about the new registry agreements, including the proposed agreement for .com, .net, and the 2004 round of sTLDs. From a fundamental policy perspective, however, the new agreements do not depart radically from the old agreements.

- First, the new agreements obligate registries to agree in advance to comply with applicable consensus policies as they are developed in the future.⁴
- Second, the new agreements include a picket fence not dissimilar to those found in every registry agreement since 1999. Registries must promise to comply with existing and prospective “consensus policies” relating to a very familiar set of issues, including:
 1. Issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or DNS;
 2. Functional and performance specifications for the provision of registry services;
 3. Security and stability of the registry database for the TLD;
 4. Registry policies reasonably necessary to implement consensus policies relating to registry operations or registrars; or
 5. Resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names).

As before, the agreements specifically grandfather policies relating to name allocation, warehousing, speculation, IP protection, Whois data, and registration disputes, subject to any delegation of authority to a sponsoring organization.

We understand that some members of the community object to the presumptions of renewal and pricing authority contained in the new agreements. But unless those who object can make a reasonable case that those terms and conditions threaten ICANN’s ability to preserve interoperability, stability, and security, they are not properly

⁴ The qualifier “applicable” is important. While policy related to interoperability, stability, and security are always within the picket fence, the specific boundaries of the picket fence in other areas can vary, *i.e.*, authority with respect to issues unrelated to interoperability, stability, and security are excluded where the authority is delegated to a sponsoring organization.

developed through ICANN consensus policy-making.⁵ As discussed above, consensus policies must fit within the constraints ICANN has acknowledged from the start - *i.e., in order to be binding on registries and registrars, the resulting policies must be reasonably necessary to facilitate interoperability, security and stability of the Internet or the DNS, or (subject to any delegation of authority to sponsoring organizations) relate to the resolution of disputes regarding the registration (as opposed to the use) of domain names.* The draft TOR, however, seems to ignore these constraints.

We offer a few examples from the draft TOR illustrating our concerns.

The draft TOR asks “What benefits does the ICANN community derive from presumptive rights of renewal?” This is, simply put, the wrong question. Absent a reasonable argument that such presumptions pose a threat to interoperability, security, and/or stability, the question of renewal presumptions must be resolved through commercial negotiations. Accordingly, the draft PDP TOR might appropriately ask:

Do presumptions of renewal pose a threat to interoperability, security, and stability of the Internet and DNS, or undermine existing consensus policies on name allocation, warehousing, Whois data, and registration disputes?⁶

The draft TOR also asks whether registry contract provisions should ever be immune from the obligation to abide by consensus policies. That could be an interesting question, and properly constructed, within the scope of a PDP.⁷ But the

⁵ The ICANN Board nonetheless can - and regularly does - affect registry or registrar behavior in these areas by contract. But issues outside of ICANN’s core mission must be resolved through arms-length commercial negotiations, and in these areas the ICANN Board must remain free to exercise its reasoned judgment consistent with its fiduciary duty to the organization, keeping in mind that individual registries require flexibility in order to comply - as they must - with the laws and regulations applicable in the jurisdiction in which they are established.

⁶ The registry constituency believes that the answer is a rather emphatic “no.” We believe that renewal presumptions are quite positive. The registry agreements give ICANN the right to terminate for breach. As a practical matter, absent a breach, there is little justification for redelegation and a decision not to renew an agreement would create enormous liability for ICANN. At the same time, the possibility of redelegation, however remote, undermines the ability of registry operators to raise capital. No one - especially consumers - are well served by the current arrangement.

We expect, as a matter of equity and common sense, that the renewal presumptions and other provisions of the new agreements will be extended to all existing registry operators. While, as explained, the boundaries of the picket fence not related to stability, security, and interoperability vary, as a baseline principle we believe that registry operators that are similarly situated should be similarly treated.

⁷ The proper construction would be “Do carve-outs from the general obligation of registry operators to abide by consensus policy pose a threat to interoperability, security, and stability of the Internet and DNS, or undermine existing consensus policies on name allocation, warehousing, Whois data, and registration disputes?” With respect to any properly constructed consensus policy, moreover, the answer should be yes.

question is entirely theoretical as it is simply not on the table in connection with the new registry agreements: nothing in any of the new sTLD agreements, the .net agreement, or the proposed .com agreement would permit a registry operator to ignore a policy that is (1) adopted in accordance with the PDP procedures, and (2) necessary to preserve the interoperability, security, and stability of the Internet.

For example, whatever one thinks about proposed agreement between ICANN and Verisign for the .com registry, it does not except Verisign from the obligation that all registry operators have to comply with consensus policies. To the extent that the proposed contract has language that does not appear in other new agreements, that language is nothing more than a belt-and-suspenders exercise that, given the circumstances under which this contract was negotiated, should surprise no one. The fact that ICANN cannot expand the scope of its consensus policy authority beyond interoperability, stability, and security and applicable legacy policy authority areas is consistent with ICANN's mission statement and reflected in every registry agreement ever negotiated. Simply put, ICANN does not have the authority to adopt a new mission and then unilaterally obligate registries or registrars to comply with related policies.⁸

The GNSO is, of course, free to recommend whatever course of action its members agree on. Likewise, individual members of the ICANN community are free to express their views. But the community should understand that an issue outside the picket fence cannot be moved inside simply by considering it under the procedural rules set out in the GNSO PDP. Policies and policy recommendations related to issues outside the picket fence simply are not "consensus policies" and are not, as a result, binding on either registries or registrars except as a result of commercial negotiations.

In our view, many of the issues referenced in the draft TOR are not within the picket fence. Those issues have been, to date, addressed in commercial negotiations. Attempting to create "policy" on those issues is simply an attempt to limit the negotiating flexibility of the ICANN Board. The GNSO Council is, through the TOR, essentially demanding a seat at the negotiating table to determine issues outside of ICANN's mission.

This demand is nonsensical and should be resisted by the Board. Tempting as it may be to avoid controversy, in this case critiques must be addressed head on to avoid setting a precedent that will hobble ICANN for years to come.

The job of the ICANN Board is to serve the community by exercising its informed judgment based on the best available information. Some of that important information may be proprietary, and not on the public record. Some of that information may relate to the fiduciary obligations of the ICANN Board. Some of that information may relate to legal matters that should not be on the public record. Acceding to the demands of a few

⁸ For example, ICANN could not decide that its mission now includes the prevention of online gambling and require registries or registrars to delete any domain registration used for that purpose.

with respect to commercial issues outside of ICANN's core mission deprives the community of the Board's informed judgment, limits its future negotiating flexibility and, at the same time, makes it increasingly difficult to resist those who would use ICANN's agreements with DNS service providers to create an anti-competitive regulatory regime. In negotiating agreements with registry operators and sponsors, ICANN must retain the authority to respond to the commercial realities in which any particular registry operates. This requires that ICANN have the ability to modify its position with respect to fees, renewal terms, the introduction of new registry services, and other issues that may well vary from registry to registry. The Board must retain the authority to actually make a deal that the registry operators or the sponsoring organizations on the other side of the table can rely on.

While ICANN's mission includes the promotion of competition, this role is best fulfilled through the measured expansion of the name space and the facilitation of innovative approaches to the delivery of domain name registry services. Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators. Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances.