

Policies for Contractual Conditions:

Existing Top Level Domains

Rapporteur Group B: Working Materials

This is a working document of Group B

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A. Background

1. In order to assist the PDP Feb 06 Taskforce in completing its work, the Taskforce established two Rapporteur Groups -- Group A analyzing Terms of Reference 1, 2 and 5 and Group B analyzing Terms of Reference 3, 4 and 6.
2. Every Task Force member – as well as any other constituency member -- was invited to join Rapporteur Group B. During this process, we have had participation from members of the Registrar Constituency, the Registry Constituency, the Business Constituency, the NCUC, ALAC, and from the Nominating Committee representatives. Transcripts of all meetings are available.
3. All recommendations found below are ‘straw proposals’ after discussion conducted on four telephonic meetings – October 11, October 13, October 19, and October 26.

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B. Term of Reference 3 – Policy for price controls for registry services

3a. Examine whether or not there should be a policy regarding price controls, and if so, what the elements of that policy should be. (note examples of price controls include price caps, and the same pricing for all registrars)

3b. Examine objective measures (cost calculation method, cost elements, reasonable profit margin) for approving an application for a price increase when a price cap exists.

There appears to be interest in achieving a policy related to pricing for registry services. The intent of such a policy would be to provide more certainty for users, protect them against the high switching costs of domain names, and protect them against potential monopolistic pricing by dominant actors. This interest in protection is even greater in the face of a predominance of renewal expectancy contracts in that in such cases the market is not constrained through competitive bid processes. Another theme of any policy would be to continue the system of equitable pricing for registrars.

Unlike a telephone number in the United States and many other countries, there is no portability of domain names from one registry to another. The registrant of rapporteur.biz for example, must remain with NeuStar and may not port that name to another registry. Due to the competitive registrar market, there is an opportunity to transfer the name from one registrar to another, but not from one registry to another. Registrants make substantial investments in their domain names and would need to make similar investments if they were forced to transfer to a new domain name. Therefore, many registrants are “locked-in” to a specific name with a specific registry, as the costs of switching to a different name (even the same second level name with a different tld) would be cost prohibitive.

Protections for new registrants also are important when a registry is dominant – enjoys a position of market power (i.e. the registry occupies a market position such that it is able to set prices in excess of cost and sustain this

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without loss of market share). Due to the lack of market constraints on such dominant actors, set contractual pricing provisions may be warranted. Similarly, when a registry is not dominant, many posit that there should not be pricing provisions with regard to new registrations because the market itself will constrain non-dominant registries and protect the end users, but that there should be pricing constraints on domain name renewals.

If there are pricing provisions, the issue arises as to how such prices are changed if necessary. While at least one constituency believes that a governmental competition authority might be involved in the setting or increasing of contractual pricing provisions with registries, others believe that the global nature of gTLD registration means that the jurisdictional and timeliness issues associated with such reviews would make it unworkable. Some constituencies argue that prices may be increased if there is cost justification, which should be determined by ICANN or a third party contractor (e.g. accounting firm). The registries argue that they need to be able to respond quickly to the changes in the market. They and the NCUC do not recommend a long and expensive cost justification process

There also has been much discussion related to “differential pricing” of domain names at the time of initial registrations and renewal. There is strong support that any policy should address such issues for the protection of registrants. The general principle should be that there is no differential pricing. The proposed concerns raised in the public comment period related to differential pricing in the draft .biz, .info, and .org registry agreements may be addressed if there were set pricing provisions in the contracts.

Policy Recommendations –

During the discussion of the Rapporteur Group, two potential policy options surfaced as potential consensus policies.

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Option 1

When a registry contract is up for renewal, there should be a determination whether that registry is market dominant. That determination should be made by a panel of competition experts including competition lawyers and economists. This panel would operate similarly to the panel that reviews the security and stability implications of new registry services.

If the panel determines that there is a situation of market power, then the registry agreement must include a pricing provision for new registrations, as currently is included in all of the largest gTLD registry agreements. If the panel determines that there isn't market power, then there would be no need for a pricing provision related to new registrations, as is the practice in the recent round of sTLD registry agreements.

Regardless of whether there is market dominance, consumers should be protected with regard to renewals due to the high switching costs associated with domain names. Therefore, this policy recommendation is to continue the system of pricing provisions in the current unsponsored TLD agreements with regard to domain name renewals.

The price for new registrations and renewals for market dominant registries and for renewals for non-market dominant registries should be set at the time of the renewal of the registry agreement. Such a price should act as a ceiling and should not prohibit or discourage registries from providing promotions or market incentives to sell more names. In agreeing on such a price ceiling, ICANN should consider the domain name market, the price of names in the prior agreement, the market price in cases of competition through rebids, and the specific business plans of the registry.

The pricing provision should include the ability for an increase if there is cost justification for such an increase, as is required in the current registry agreements with pricing provisions. Such increases should be evaluated and

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approved by a third party entity, such as an accounting or financial analyst firm.

Differential pricing between domain names should be prohibited whenever there is a set price/price cap and should be permitted when there isn't such a price constraint. In other words, non-dominant registries may differentially price for new registrations, but not for renewals. Dominant registries may not differentially price for new registrations or renewals.

Finally, as is the current practice, all registries should provide equitable pricing opportunities for all registrars and at least six months notice before any price increase.

Option 2

The NCUC has argued that it is premature to formulate policy in the area of pricing without having had the benefit of an intensely focused study on this topic. They believe that a new PDP is required to address the specific issue of price controls. ("We believe that existing price caps should be left in place for the short term, and another, separate PDP inaugurated on methods and criteria for changing, raising or eliminating price caps in the future.")

Thus, another option is to keep the status quo by encouraging ICANN to continue with existing pricing provisions and initiating a targeted PDP on this issue alone taking into account the upcoming economist's report (<http://www.icann.org/minutes/resolutions-18oct06.htm>).

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C. Term of Reference 4 - ICANN fees

4a. Examine whether or not there should be a policy guiding registry fees to ICANN, and if so, what the elements of that policy should be.

There should be a policy or guidelines regarding registry fees to ICANN. Individual negotiations of such fees create a problematic negotiating position between ICANN and the registries and hampers ICANN accountability. Achieving certainty in the process would enable more effective business planning for both registries and ICANN. Furthermore, such a policy or guidelines should ensure equitable treatment of the registries. Understanding that equitable treatment is not the same as equivalent treatment, similarly situated registries should not be treated differently. Any deviation from true consistency needs to be justified in the interest of fairness to the registries and accountability of ICANN. This is necessary to avoid arguments that ICANN has exerted undue influence over an individual registry or has given a registry preferential treatment in other terms of the agreement in exchange for generous payments to ICANN.

Policy Recommendation – In order to improve ICANN accountability and effective business planning by registries, ICANN staff should immediately implement a system of ICANN fees from registries that avoids individual negotiations of ICANN fees and provides consistency unless there is established justification for disparate treatment.

4b. Determine how ICANN's public budgeting process should relate to the negotiation of ICANN fees.

The use of individually negotiated registry contracts to collect fees from registrars without input from registrars is problematic from at least a registrar and an ICANN accountability perspective. Increasing budgetary transparency and accountability are laudable goals of any policy, especially considering the

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newly approved Joint Project Agreement between ICANN and the U.S.

Department of Commerce.

ICANN fees should be determined by ICANN's budgeted costs and approved operational and strategic plans. This will assist in promoting transparency and accountability in the setting of budgets and help ensure that ICANN fees relate to ICANN's actual costs. This requires that ICANN's operational and strategic plans and budget are approved prior to fees being set. ICANN fees would then be based on the approved budget.

With that said, it is clear that ICANN's budgeting process is extremely large and complex and is worthy of detailed analysis and review in a separate multi-stakeholder process.

Policy Recommendation – The ICANN Board should establish a Task Force or Advisory Committee to examine budgeting issues, including the manner and allocation of revenue collection, budget oversight, and budget approval processes. This group should solicit and review public comments on the issues.

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D. Term of Reference 6 -- Investments in development and infrastructure

6a. Examine whether or not there should be a policy guiding investments in development and infrastructure, and if so, what the elements of that policy should be.

There appears to be a split of the constituencies of whether there should be mandated investment requirements at all. Some constituencies are in favor of investment requirements, especially if there are presumptive renewals of registry agreements. Others oppose mandatory investment requirements regardless of whether there is competition inserted through a bid process. It is also clear that there are insufficient security and stability safeguards in the current registry agreements.

A middle-ground policy emerged in which ICANN sets baseline requirements for the security and stability of the registries and anything above that would be negotiated on a case-by-case basis, if necessary. For example, baseline guidelines could include requirements for: (1) specific security reporting to ICANN; (2) detailed security plans and regular testing of DNS defenses; (3) auditing provisions permitting ICANN to assess capabilities regarding potential and ongoing DNS security breaches; (4) ICANN to be able to conduct risk analysis of the operations and regular security reviews. While this would be important in registry renewals, these types of guidelines would be even more important for new registries without a performance track record. Such baseline requirements should be recommended to the Board by the Security and Stability Advisory Committee (“SSAC”).

Policy Recommendation – The Board should seek recommendations from the SSAC to provide baseline security and stability requirements in registry agreements. In determining these requirements, the SSAC should solicit and review public comments.