

Policies for Contractual Conditions: Existing Top Level Domains

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[HTTP://WWW.GNSO.ICANN.ORG/ISSUES/DELETES/REPORT-FINAL-17JUN03.SHTML](http://www.gns0.icann.org/issues/deletes/report-final-17jun03.shtml).....62

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A. Background

1. This document reflects updated inputs from the Taskforce's second meeting on Tuesday 6 June 2006¹. At the meeting, the Taskforce discussed the first draft of the *Preliminary Taskforce Report*² and agreed to conduct the third Taskforce meeting on 24 June 2006 during the ICANN Marrakech meeting.
2. In December 2005, the GNSO Council initiated a policy development process [PDP-Dec05] to develop policy about whether to introduce new generic top level domains and, subsequently, to determine the selection criteria, allocation methods and policies for contractual conditions for any new top level domains.
3. During 2005, ICANN commenced a process of revising the .net and

¹ The draft minutes of the meeting were not available at the time of publication.

² The MP3 recording of the meeting can be found at <http://forum.icann.org/lists/pdp-pcceg-feb06/msg00099.html>.

.com agreements. There was discussion amongst members of the GNSO community about the .net agreement (found at <http://www.icann.org/tlds/agreements/net/>), and the proposed .com agreements (found at http://icann.org/topics/verisign-settlement.htm#amended_agreements). As a result, the GNSO Council recognized that there may have been a broader set of policy issues around contractual conditions for existing gTLDs. It was thought that it may be more appropriate to have policies that apply to gTLDs generally on some of the matters raised by GNSO members, rather than be treated as matters to negotiate on a contract by contract basis.

4. On 17 January 2006, GNSO Council requested that the ICANN Staff produce an *Issues Report* “related to the dot COM proposed agreement in relation to the various views that have been expressed by the constituencies.” This *Issues Report* can be found at <http://gns0.icann.org/issues/gtld-policies/issues-report-02feb06.pdf>
5. Section D of the *Issues Report* outlines a discussion of many of the concerns that had been raised by the GNSO community in response to the proposed revisions to the .com agreement. In the *Issues Report*, ICANN’s General Counsel advised that it would not be appropriate nor within the scope of the GNSO’s policy development

remit to consider a policy development process that specifically targeted the .com registry agreement alone.

6. At its meeting on 6 February 2006³, to accommodate the concerns communicated by ICANN's General Counsel, the GNSO Council members amended their request for an *Issues Report* to seek information on the broader policy issues relating to the contractual conditions of gTLD agreements, which had been expressed within constituency discussions.
7. The GNSO Council recognized that, while the PDP initiated in December 2005 [PDP-Dec05] included within its terms of reference the topic of contractual conditions, a possible outcome of that PDP would be that there should be no additional gTLDs. As a consequence, the Council could not depend on PDP-Dec05 to address the new issues raised by the GNSO.
8. At its 6 February 2006 meeting, the GNSO Council, by a super-majority decision, decided to initiate a separate PDP [called PDP-Feb06] to look at specific policy areas to guide the development of contractual conditions of existing gTLDs. The terms of reference can

³ The minutes are found at <http://gnso.icann.org/meetings/minutes-gnso-06feb06.shtml> and MP3 recording of the meeting found at <http://gnso-audio.icann.org/GNSO-Council-20060206.mp3>.

be found at <http://gns0.icann.org/issues/gtld-policies/tor-pdp-28feb06.html>.

9. It was agreed to form a Taskforce, under the GNSO PDP Bylaws found at <http://www.icann.org/general/archive-bylaws/bylaws-08apr05.htm#AnnexA>. The next sections set out the early work of the group and the membership of the Taskforce.

B. Meeting Processes and Procedures

1. The PDP Feb 06 Taskforce's first meeting was held in Wellington on 29 March 2006. The minutes of that meeting are available at <http://forum.icann.org/lists/pdp-pcceg-feb06/msg00062.html>.
2. The members of the Taskforce include GNSO Council members and Constituency representatives. The full Taskforce membership is listed below. Those listed in italics are alternate members with each Constituency entitled to three full members.

Business Constituency (BC): Marilyn Cade, Alistair Dixon,
Mike Roberts

Intellectual Property Constituency (IPC): Ute Decker, Lucy
Nichols, Kiyoshi Tsuru

Internet Service Providers (ISPC): Greg Ruth, Anthony
Harris, Tony Holmes

Non-Commercial Users' Constituency (NCUC): Mawaki
Chango, Paula Bruening, Milton Mueller

Registrars' Constituency (RC): Ross Rader, Jeff Eckhaus,
Jon Nevett

Registries' Constituency (RyC): Cary Karp, Ken Stubbs,

David Maher, *June Seo*

Council members appointed by the Nominating

Committee (NomCom): Sophie Bekele, Maureen
Cubberley, Avri Doria

At Large Advisory Committee (ALAC) Liaison: Bret
Fausett

3. In summary, the main decisions from the first meeting were to elect Maureen Cubberley (appointed to the GNSO Council by the Nominating Committee) to chair the Taskforce; confirm the Taskforce Charter (by adopting the agreed Terms of Reference found above) and to agree a timeline for the Taskforce work which corresponded with the PDP Guidelines.

C. Terms of Reference Responses

1. Under the PDP rules, each GNSO Constituency is required to file a formal Constituency Statement. In addition to input from the Constituencies, a mandatory Public Comment Period (found at <http://forum.icann.org/lists/gtld-policies-tor/>) was announced and closed on 30 April 2006. No public comments were received. An additional Call for Expert Papers was made (found at <http://www.icann.org/announcements/announcement-11apr06.htm>) as agreed by the Taskforce. The Call for Expert Papers closed on Friday 5 May 2006 with one response.
2. The Registries' Constituency submitted its Statement in conformance with the PDP guidelines⁴.

⁴ The Registry Constituency submitted a statement prior to the vote by the GNSO Council on the Terms of Reference stating that the draft Terms of Reference "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". The Registry Constituency also stated that "any further proceedings on this PDP are outside the legal powers of the GNSO, and can have no effect on the subject matter of contractual conditions for existing generic top level domains." In

3. The Registrars' Constituency submitted a draft position and then completed a formal vote on the Statement after the deadline for submission of statements had passed.
4. The Intellectual Property Constituency sought and received an extension for submission of their Statement. The Constituency provided some general introductory comments which included that *"[The IPC] presents the following position statement on elements of the Terms of Reference for this PDP as our initial views. We look forward to considering the views of other constituencies and working toward a mutually acceptable recommendation. (2) IPC recognizes the value of consistency and even uniformity among the agreements entered into by ICANN with the various gTLD registries. However, it is a fact that not all gTLD registries are comparably situated, with regard to size or dominance, and it is not always appropriate to treat them as if they were. Consistency is only one of several factors that should be taken into account in fashioning a policy*

submission of the constituency statement re-iterated that "the participation of the RyC in commenting on the proposed text of the ToR should be viewed in the context of this preface. Any comments are without prejudice to the position of RyC that the proceedings are out of scope and without legal foundation..." (For further background, see <http://www.gtldregistries.org/news/2006/2006-03-02-01> and <http://www.gtldregistries.org/news/2006/2006-03-02-02.pdf> and <http://www.gtldregistries.org/news/2006/2006-04-27-01>).

regarding registry agreements.”

5. A set of preliminary positions was submitted by the Non Commercial Users' Constituency in place of a formal Constituency Statement.
6. The Business and Commercial Users submitted a formal Statement on 31 May 2006.
7. The Internet Service Providers' Constituency submitted a formal Statement on 6 June 2006.
8. One response to the Call for Papers was submitted from Mr Matt Hooker, President of LowestPriceDomain, a domain name supplier found at <http://www.lowestpricedomain.com/>. Lowestpricedomain.com is not listed as an ICANN accredited Registrar or as a member of the Registrars' Constituency.
9. It was clear from the submissions that the complexity of the Terms of Reference require further examination and refinement. Some recommendations about possible directions are found at the end of document. The following sections set out some background materials in areas within the Terms of Reference. The Taskforce may wish to consider taking further advice on some of the specialist areas outlined here. It should be noted that the information provided here is also relevant to the PDP Dec 05 on the introduction of new top level domains which is also underway.

D. Expert Materials⁵

1. It is clear that Taskforce Members (and those who are dealing with the related PDP Dec 05 Term of Reference on Contractual Conditions) are concerned that ICANN follows an agreed and publicly available process. This is consistent with ICANN's Bylaws and ICANN's Mission and Core Values. It is also consistent that any process ICANN uses to conduct its operations is as transparent as possible, barring the need to keep commercially sensitive information appropriately protected. There is also an expectation from the Taskforce Members (and the broader ICANN community) that there be consistency in the treatment of ICANN's contracted parties. This does not mean "equal" treatment but rather

⁵ The Registry Constituency submitted comments after the second meeting that suggested that "paragraphs 4-8 provide examples of policies from various regions of the world related to pricing, licensing, renewal provisions, and anti-trust provisions. It should be made clear that none of these topics are included in the so-called 'picket fence' contained in the registry agreements [see Section 3.1 (b)(iv) of the .jobs agreement]. With regard to the topic of contract termination and renewal terms, this statement...should not be interpreted to mean that the RyC supports automatic renewals of contracts in cases where the registry operator or sponsor is in breach of its agreements, but it does seem clear that the topic of contract renewal is not a topic for consensus policies that registries/sponsors would be contractually required to follow".

equitable and predictable treatment of any entity that enters into commercial negotiations with ICANN.

2. The list below is by no means exhaustive and is still under consideration as the *Preliminary Report* is developed.
3. The first set of information relates to a set of processes that guide the selection of service providers in a variety of settings. The Asian Development Bank⁶ provides a detailed handbook that sets out, for example, the Terms of Reference, the Invitation for Proposals, Evaluation of Proposals and Contract Negotiation. The World Bank⁷ provides similar guidance. The OECD's "Instructions to Tenderers" are very similar to those used by ICANN in the sTLD 2004 process and in the Request for Proposal for the GNSO Review⁸. In all three examples, it is evident that a pre-published, predictable and transparent process for any procurement of new services is required.
4. These terms and conditions are only part of the equation of "process, transparency and consistency". The references set out below are relevant to this PDP as they address pricing and licensing issues which are part of the Terms of Reference. For example, the Australian

⁶ (<http://www.adb.org/Documents/Guidelines/Procurement/default.asp?p=prcrmnt>)

⁷<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0..pagePK:84271~theSitePK:84266.00.html>

⁸ http://www.oecd.org/site/0,2865,en_21571361_33635822_1_1_1_1_1,00.html

Competition and Consumer Commission (ACCC) has produced *Model Terms and Conditions* for its interconnection agreements⁹. The ACCC is required to publish “by written determination non-binding model terms and conditions of access for each of the ‘core’ services, defined as: the domestic public switched telephone network (PSTN) originating and terminating access services; the domestic public switched telephone network terminating access service; the unconditioned local loop service (ULLS); the local carriage service (LCS); and any additional core service specified in regulations by the Minister. The ACCC may take into account any model terms and conditions it sets when conducting any future arbitrations”. These conditions give the ACCC fairly broad license to determine what terms and conditions are relevant at any particular time.

5. In addition, the ACCC provides a statement on assessing price modifications¹⁰ for those agreements which, in practice, are negotiated working groups of interested stakeholders.
6. In the same vein, Singapore’s Infocomm Development Agency (IDA) provides publicly available information about a range of issues around

⁹ <http://www.accc.gov.au/content/index.phtml/itemId/337341>.

¹⁰ <http://www.accc.gov.au/content/index.phtml/itemId/700599/fromItemId/557546>

competition¹¹, its interconnection pricing negotiations¹² and the policy framework for price control¹³. In addition, Singapore's policy framework for price control is available on their website. IDA say that "in a fully competitive environment, market forces are more effective than regulations in providing consumers with a wide choice of services at reasonable prices. Hence, price regulation is imposed only on dominant operators that have the potential to abuse their market power and engage in anti-competitive practices. For instance, dominant operators must file the price of any telecommunication service they intend to offer with IDA and obtain IDA's prior approval before offering the service/price to end-users. While non-dominant operators need not file tariffs with IDA for prior approval, they must publish the prices, terms and conditions for their standard telecommunication services for end-users' information. Dominant operators are also subject to price control arrangements where operators are required to comply with benchmark prices set to ensure that key telecommunication services that have yet to experience

¹¹<http://www.ida.gov.sg/idaweb/pnr/infopage.jsp?infopagecategory=codepractice:pnr&versionid=30&infopageid=1488>

¹²<http://www.ida.gov.sg/idaweb/pnr/infopage.jsp?infopagecategory=interconnection:pnr&versionid=5&infopageid=13539>

¹³<http://www.ida.gov.sg/idaweb/pnr/infopage.jsp?infopagecategory=competition:pnr&versionid=1&infopageid=11313>

full-fledged competition, but are vital to promoting the competitiveness of businesses in Singapore or have wide public impact, remain internationally competitive vis-a-vis other major financial centres, NIEs and neighbouring countries. While IDA sets the benchmarks, it does not set the commercial prices so long as the benchmarks are met.”

7. Some Taskforce Members referred to licensing guidelines which may help the Taskforce. These include the World Bank report on mobile license renewal¹⁴ which says that “...a major challenge facing regulators...is the need to strike the right balance between ensuring certainty for market players and preserving flexibility of the regulatory process to accommodate the rapidly changing market, technological and policy conditions. This challenge applies across a wide range of regulatory instruments and vehicles including license renewal...”.
8. A comparative paper¹⁵, again from Singapore, sets out its licensing guidelines and deals with renewal and pricing issues. The guidelines also provide, on line, a list of licensees in a similar way to that where ICANN lists registry providers.

¹⁴http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2005/09/23/000016406_20050923113019/Rendered/PDF/wps3729.pdf

¹⁵http://www.ida.gov.sg/idaweb/doc/download/11300/FBO_Guidelines-14Dec2005.pdf

9. There are other reports that Taskforce Members may find useful including the US Federal Trade Commissioner's plain English guide to anti-trust provisions in the US¹⁶. The FTC explain their role as a "consumer protection agency with two mandates under the FTC Act: to guard the marketplace from unfair methods of competition, and to prevent unfair or deceptive acts or practices that harm consumers. These tasks often involve the analysis of complex business practices and economic issues. When the Commission succeeds in doing both its jobs, it protects consumer sovereignty -- the freedom to choose goods and services in an open marketplace at a price and quality that fit the consumer's needs -- and fosters opportunity for businesses by ensuring a level playing field among competitors. In pursuing its work, the FTC can file cases in both federal court and a special administrative forum."
10. The European Commission provides similar information¹⁷ about its role within the European Union. Article 81¹⁸ and Article 82¹⁹ are the cornerstones around which anti-competitive conduct in the European marketplace is treated.

¹⁶ <http://www.ftc.gov/bc/compguide/index.htm>.

¹⁷ <http://ec.europa.eu/comm/dgs/competition/mission/>.

¹⁸ http://ec.europa.eu/comm/competition/legislation/treaties/ec/art81_en.html

¹⁹ http://ec.europa.eu/comm/competition/legislation/treaties/ec/art82_en.html

11. Article 81 prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”
12. Article 82 defines “abuse” as “(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by

their nature or according to commercial usage, have no connection with the subject of such contracts.”

E. Term of Reference 1 – Registry Agreement

Renewal

1a. Examine whether or not there should be a policy guiding renewal, and if so, what the elements of that policy should be.

RyC... *“The Constituency believes that an attempt to set a policy guiding renewal is not properly within the scope of a GNSO PDP.”²⁰*

²⁰ The Registry Constituency, in their 11 June 2006 supplementary comments, said that “As already noted..., this topic is not a possible topic for consensus policies that registries/sponsors would be contractually required to follow. The last sentence of the ‘commentary’ paragraph of Section 1a says, “Further analysis is required about the nature of competition in the market for registry services.” As with renewal provisions, it should be noted that the topic of competition is not a possible topic for consensus policies that registries/sponsors would be contractually required to follow. With regard to Section 1b [determine whether or not these conditions should be standardized across all future agreements], the RyC agrees with the well articulated comments submitted by the IPC in this regard: “...it is a fact that not all gTLD registries are comparably situated, with regard to size or dominance, and it is not always appropriate to treat them as if they were. Consistency is only one of several factors that should be taken into account in fashioning a policy regarding registry agreements.”

In general, the overall goal of this PDP should be limited to a determination of what policies are (a) appropriate for the long term future of gTLDs - specifically within the context of ICANN's mission to preserve the stability and security of the DNS, and (b) relate to certain specific issues identified below.

In particular, the interests of the various constituencies that make up the GNSO are diverse and may well, from time to time, be in conflict with the goal of establishing a stable and effective contractual framework for agreements between registries and ICANN. If a policy concerning renewals is determined by the ICANN Board to be within the limitations specified above, then such policy can, legitimately, only be set by the ICANN Board.”

RC... *“There should be a policy guiding renewals, and we believe that the initial term of the registry agreement should be of commercially reasonable length. We are not opposed to renewing registry operator agreements, but oppose presumptive renewals. The registry operator should justify its renewal and meet certain qualifications and standards. Even if the registry operator meets these standards, ICANN should still have the choice to seek out a bid at its discretion.”*

IPC... *“There should be a general presumption that a registry operator that performed competently during the initial term of the agreement should have a preferential status in any review that occurs prior to renewal. This will promote continuity and encourage long-term investment. However, the presumption can be overcome if there have been significant problems with the operator’s performance (including non-compliance with terms of the registry agreement) or if there have been significant intervening changes in circumstance.”*

NCUC... *“We believe that it is in the public interest for there to be a renewal expectancy for parties who have been delegated generic top-level domains. By “renewal expectancy” we mean that those who were originally assigned a top level domain should retain the assignment unless there is a significant problem, such as criminal activity, breach of contract, repeated failure to meet service standards, or serious noncompliance with applicable ICANN rules and policies. In this view, reassignment of the domain is punishment for malfeasance -- not an attempt to run a periodic beauty contest to determine who is the “best” operator.*

We believe that presumptive renewal as described above is required for a long-term view of value-creation and investment in a domain name and the

associated infrastructure. Continuity and stable expectations about who will be in control is required for the development of a community. This is especially true for sponsored or nonprofit domains. Operators who succeed in creating value, identity or a community around a domain should not have that taken out from under them. They should be able to reap the benefits of their creation of value, and be able to build on it into the future.

We accept the importance of the principle of competition. We do not, however, believe that it requires taking established domains and throwing them up for grabs every five years or so when there are no major problems with the operation of a domain. Registrar-level competition helps to ensure that retail services associated with any gTLD registry will be competitive, and cross-gTLD diversity will ensure users a variety of naming alternatives (or "intermodal" competition). Those are the most important forms of competition. Reassigning a gTLD simply substitutes one operator with exclusive control of the domain for another. While this can put pressure on the incumbent to perform better in a short-term time horizon, we believe that on the whole the amount of time and resources spent on fighting over the control of the domain would outweigh the prospective benefits. We also note that achieving improved performance from a new operator can only be a promise, and that transfers of control inherently involve costs and risks."

BC:... *"It is the view of the BC that there should be a set of policies that govern registry agreements, developed by the GNSO, through a PDP process which provides for consultation with the community. Included in those policies should be a policy that guides the decisions related to renewal of registry agreements in the generic TLD space, whether these are sponsored, open, restricted, or other categories. The elements of such a policy should include, among other elements, establishing an environment which promotes competition among registries and both competition and co-existence in the underlying registry infrastructure. Policy recommendations are the purview of the GNSO and will, once developed, be subject to acceptance by the ICANN Board. To promote appropriate levels of business certainty and investment, the registry agreement should be of a reasonable length. It possible that an initial term might be between 7 and 10 years, with subsequent awarded terms of 5 years.*

In general, the BC members do not support presumptive renewals for gTLDs; we find that presumptive renewal is inconsistent with the objective of promoting competition. They do agree that there can be different renewal standards, depending on characteristics of a registry. For instance, it may be appropriate to have different renewal qualifications for sponsored TLDs where

there is a significant investment of a sponsoring organization in policies for the TLD. Such a possibility should be further examined during the PDP process.

The policy should address the different considerations of stability that are inherent in the role of a registry in operating a TLD, and in providing underlying infrastructure for said operation. Competition is important for promoting the stability of the Internet through promoting diversity of infrastructure. ICANN should therefore take seriously the need for a considerable degree of “choice” in registry infrastructure. In decisions on renewal of contracts a key question should be how the renewal, or re-bid, contributes to the investment in new registry infrastructures that can support further competition at the registry infrastructure level.

To restate, the BC does not support an “automatic” or presumptive right of renewal. As the .net bid illustrated, there are tangible benefits in having a competitive process, even if the TLD is re-awarded to the incumbent, as happened with .net. In particular, significant improvements in commitments and in pricing to registrars resulted from the competition process. The BC again notes the appropriateness and the need for special consideration of the circumstances of sponsored, due to their policy role as sponsoring entities.

Comparisons have been made with renewal policies in other industries, especially telecommunications. While there are some common considerations around renewal of contracts between these industries and registries, such as recognition of the importance of business certainty, the presumption for renewal in these industries arises because they involve capital-intensive investments in very long-life assets and often include high licensing or authorization fees of hundreds to millions of dollars, which is not the case with gTLD registries. Many countries require additional provision of services or investment, such as contributions to a universal service fund, or build out in high cost areas, as a requirement to qualify for a license, and some countries require a very strong failsafe provision before providing the authorization or license. Similar requirements are not imposed on gTLD registries.

It should also be noted that a presumption of renewal is not the norm for supply of services in most industries. If anything, there is a presumption of competition for provision of services at the conclusion of a contractual term, and provision of registry services to ICANN should be no different.”

ISP: ...”*The ISPCP Constituency opposes presumptive renewal of contracts*

as blatantly anti-competitive. A registry should provide so high a quality of service during the course of its contract that it will be in a strong position to win an open competition for contract renewal. Presumptive renewal provides a disincentive to strive for excellence. Furthermore, we consider the argument that without presumptive renewal registries will not be motivated to make long term investments in infrastructure development as utterly spurious. They will in fact be highly motivated to make such an investment if they wish to win renewal in open competition when their contracts expire. Sponsored TLDs may be an exception. In some cases registries with a limited community have made a substantial investment in policy development and implementation. It may be appropriate to hold these registries to a different standard vis à vis renewal.”

Commentary: It is clear that there is at least an expectation that registry contracts would be renewed, barring performance failure. The further question of how that process would take place will, in part, be addressed by the policy development process on new top level domains. Further analysis is required about the nature of competition in the market for registry services.

1b. Recognizing that not all existing registry agreements share the same Rights of Renewal, use the findings from above to determine whether or not these conditions should be standardized across all future agreements.

RyC... *“...for the reasons stated above, this is not a proper question for this PDP.”*

RC... *“...yes, the renewal terms should be standard across all future registry agreements.”*

IPC... *“...From comment (2) under “General Approach” above regarding standardization. The IPC recognizes the value of consistency and even uniformity among the agreements entered into by ICANN with the various gTLD registries. However, it is a fact that not all gTLD registries are comparably situated, with regard to size or dominance, and it is not always appropriate to treat them as if they were. Consistency is only one of several factors that should be taken into account in fashioning a policy regarding registry agreements.”*

NCUC... did not address this question directly.

BC... *“The BC is well aware that not all existing registry agreements share the same rights of renewal, however, we do not believe uniformity in this area is appropriate or necessary. We have noted that sponsored registries require special consideration, due to their role as in developing a community to support the launch of a TLD, the role in policy development and the delivery of services to the “sponsoring community”. We do not support a “one size fits all” approach to this issue but would suggest that renewal terms within the different categories of TLDs should be consistent.”*

ISP... *“The ISPCP Constituency holds that rights of renewal should be standardized across all future agreements.”*

Commentary: There is a divergence of views within the Constituency Statements as some argue for a standardized approach and others include additional factors which should be taken into account. Reference should also be made to some of the early conclusions within the PDP Dec 05 discussion.

F. Term of Reference 2 – Relationship between registry agreements and consensus policies

2a. Examine whether consensus policy limitations in registry agreements are appropriate and how these limitations should be determined.

RyC... *“...consensus policy limitations are appropriate only to the extent that they may undermine the interoperability, security, and stability of the Internet and DNS. Any determination of the appropriateness of particular limitations should be limited to review of their impact on these three subjects.”*

RC... *“...there are some limitations in registry agreements that may be appropriate, such as the price of registry services and fees that the registry must pay to ICANN. Beyond these, there should not be contractual limitations on consensus policies in registry agreements.”*

IPC... *“to the extent feasible, the terms of registry agreements should be aligned with policies adopted by the GNSO Council and approved by the*

Board for gTLD registries generally. The necessity for any deviations should be explicitly stated and justified in the agreement.”

NCUC... *“This is an issue that NCUC feels has not been discussed or debated adequately. One point is that we must distinguish carefully between the problems raised by one dominant operator's registry agreement (.com) and policies that are appropriate as a general rule for all registries. We look forward to listening to the views of other constituencies and the public on this question. We believe that existing sponsored domains should retain the policy-making authority. We say this not because we support the concept of sponsored domains per se, but because we support greater diversity and decentralization of policy making authority.”*

BC... *“Consensus policies are recommendations that are built on the hard work of the community to reach agreement. It is not simple to reach consensus, and when such policies are developed, it is in the context of the participation of all parties, including the active and full engagement of the registries themselves, as well as other constituencies. The BC believes that consensus policies are appropriate. Consensus policies should be applicable from the time of renewal of the contract. This would*

ensure that they were not applied retrospectively and would give the registry considering whether to seek renewal the option of not doing so if it had major concerns in relation to consensus policies.

Overall, the BC does not see a rationale for using contractual terms to limit consensus policy in registry agreements. The BC would like to hear what justifications exist for creating exceptions to consensus policy. The BC is very concerned that to date, ICANN staff have sometimes chosen to create contractual terms, rather than taking the responsibility of raising an issue to the GNSO and seeking guiding policy.”

ISP... *“The ISPCP Constituency maintains that every registry contract should in all cases require that registry to conform to consensus policies developed by ICANN. These policies are developed by the community of all stakeholders, of which the registries are full members; indeed, in the policy development process of the GNSO, the registry constituency has been given a double vote.”*

Commentary: There is insufficient information provided by the Constituencies to identify any possible consensus position although there is a general thrust to avoid limitations on the application of consensus policies.

Reference could be made to some of the early conclusions reached in the PDP Dec 05 discussions.

2b. Examine whether the delegation of certain policy making responsibility to sponsored TLD operators is appropriate, and if so, what if any changes are needed.

RyC... *“...it would be legitimate to examine whether the diversity of sponsored TLD policy making poses a threat to the interoperability, security, and stability of the Internet and DNS and if so, under what circumstances should changes be applied.”*

RC... *“...delegation of the GNSO’s policy development responsibilities to outside parties such as a registry operator is inappropriate. The Registry Operator should have the authority to modify its charter, in accordance with the terms of change in its agreement with ICANN, but should have no specific policy making responsibility outside of this area.”*

IPC... *“...such delegation is appropriate only to the extent it does not conflict with ICANN policies (or is specifically justified, see preceding answer). The gatekeeping/charter enforcement role of sponsored TLD operators should be given paramount importance”.*

NCUC... made no further direct comment on this section.

BC... *“The BC is a strong supporter of the function of sponsored TLDs, and has seen the evolution of this concept as a very positive step for the introduction of new TLDs in a way that we believe can contribute to limiting the need for duplicate and non productive protective registrations. We support the role of the sponsoring entity in the development and implementation of certain policies and the continued need to publish these proposed policies at the time of the registry application for consideration by the broad community.*

It is possible that there needs to be more clarity in what limitations on policy making exist for sponsored TLDs, but in general, we support the delegation of certain limited policy making responsibilities, keeping in mind the need to maintain end to end interoperability, and the security and stability of the Internet, and the need to have full transparency on what the policy scope is, and what limitations exist, and what remediation mechanisms ICANN has. Sponsored gTLDs should not be exempt from consensus policy, for instance. And of course, policies need to be consistent with ICANN bylaws.”

ISP... *“The ISPCP recognizes that sponsored TLDs may need to establish policies regarding membership in their respective communities. These policies should be developed according to a well-defined, transparent process in cooperation with the GNSO.”*

Commentary: It is clear from these comments that it is not yet possible to identify a consensus position.

G. 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)

RyC... *“...Price controls are another example of a subject that is not properly within the scope of GNSO proceedings and this PDP. It is clearly improper for the various constituencies comprising the GNSO to be in the position of resolving their conflicting interests by setting price policies for another constituency”²¹.*

²¹ The RyC submitted additional comments on 11 June 2006 that included the following. “As already noted in the comments to Section D above, this topic is not a possible topic for consensus policies that registries/sponsors would be contractually required to follow. The ‘Commentary’ paragraph at the end of Section 3a says, “...It would be helpful to retain expert economic advice to provide a report on the impact of price controls in industries such as registry services. It would helpful if the Taskforce considered registry services agreements in the context of other regulated industries such as the telecommunications or electricity sectors”. Considering the topic is out of scope for consensus policies as defined in registry agreements, it does not appear to be a wise use of resources to hire outside expertise in this regard. Moreover, considering the uniqueness of the Internet especially with regard to how it

RC... *“...if a TLD has Market Power or Pricing Power, then there should be price controls and cost justification requirements for any price increases. All registries should provide equitable pricing opportunities for all registrars and at least six months notice before any price increase.”*

IPC... *“...there should be a general presumption against price caps in registry agreements. Exceptions to this presumption should be explicitly justified. There should be a general presumption in favour of “price controls” aimed at preventing discrimination among registrars; exceptions should be explicitly justified. Also favored should be “price controls” aimed at provided transparency and equal access to information about pricing policies.”*

NCUC... *“...we recognize that price caps can be justified as a way of protecting consumers in markets with high switching costs. Domain name registrations do have high switching costs. Rather than making specific policy recommendations, however we make these starting observations:*

a) We must not assume that ICANN contracts are the proper mechanism for price controls. Regulatory authorities in national governments have some

has flourished with minimal regulation, comparing registry agreements to agreements in other economic sectors such as telecommunications or public utilities seems like a questionable tactic”.

ability to respond to this problem, either through antitrust laws or through sector-specific regulations. We believe that the pros and cons of a global vs. national approach should be debated and discussed in this pdp.

b) The case for or against price controls must recognize the difference between the interests of end users/registrants and the interests of intermediaries in the domain name supply chain, and not let the latter speak for the former.

c) Permitting increases in the price of .com registrations may have the salutary effect of encouraging users to migrate to new gTLDs and discouraging the concentration of users in .com.

d) Permitting registries to sell registrations for much longer terms, or registrations that do not expire, is another way to handle the lock-in problem in a way that helps consumers.”

BC... *“The BC supports the concept of having pricing guidelines, and in particular, a ceiling above which prices cannot be raised, without public notice and the presentation, to the board, of justification for such increases. This is particularly the case for TLD operators that are able to price substantially*

above cost, i.e. that are in a dominant market position, or that are able to use the dominant market position in other ways that may create other barriers to market success by competitors. This is not an undue burden upon a registry. It may be appropriate to have certain restrictions that apply to registries of certain size or certain characteristics – such as being a sponsored gTLD, or being a very small TLD, or being a very large TLD with dominance or market power. Fairness in competition does not always equate to “equal” treatment. When prices are raised, there should be sufficient notice to the community in a public process.”

ISP... *“The ISPCP Constituency advocates price controls, narrow contractual limits beyond which a registry cannot raise its prices without appeal to and review by the ICANN board. The consideration process for price raises should be open and transparent. The entire ICANN community should be notified and detailed economic justifications should be well documented and open to public examination. A registry holds a public trust and is thus liable to public scrutiny, especially in the matter of a change of contractual terms.”*

Commentary: It would be helpful to retain expert economic advice to provide a report on the impact of price controls in industries such as registry services. It would be helpful if the Taskforce considered registry services

agreements in the context of other regulated industries such as the telecommunications or electricity sectors. See the Recommendation section below for further information.

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.

RyC... *“...If there are objective measures, the GNSO is not the appropriate body to determine them.”*

RC... *“...a registry must justify any price increases if there are price caps in the registry agreement. Such justification should be objectively evaluated by an independent 3^d party”.*

IPC... *“...this should be handled on case by case basis in situations in which the presumption against price caps is overcome.”*

NCUC did not provide any further specific comments relating to this section.

BC... *“The BC believes that it is possible for such objective measures to be developed and taken into account in approving an application for a price increase when a price cap exists. In general, to date, the responsibility for developing a rationale, and supporting argumentation has rested with the registry, and some limited openness has been given to accepting comments from others on the rationale.*

In broad terms, the onus should be on the registry to demonstrate that the price cap results in the registry being forced to price below cost. The definition of cost should include an allowance for a reasonable rate of return, taking into account the degree of risk inherent in the registry business. Establishing a framework upon which to base such decisions would be helpful. To support that framework development by the GNSO, it would be helpful for ICANN to provide financial support to the GNSO to consult external independent experts to advise the GNSO in its consideration of these issues. The BC has provided a suggestion for such an approach in its introductory statement to this comment.”

ISP...” The ISPCP Constituency believes that it is possible to develop objective measures for the justification of raising registry fees. However, given that there is a wide diversity of registries’ situations, these should not be too rigid. The operative principle here is that the burden of the proof is on the registry and the Board, in representing the best interests of the Internet community, are the final arbiters.”

Commentary: More detailed economic analysis is required to facilitate further discussion within the task force. See the comments about price

controls above.

H. 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.

RyC... *"...The inappropriateness of this question can best be demonstrated by rephrasing it: "Should there be a policy guiding [registrar] [ISP] [any other constituency] fees to ICANN?"*

RC... *"...yes, there should be a policy guiding registry fees to ICANN. The policy should include a requirement that all ICANN fees charged to the Registries be borne by the Registries themselves and not passed on to third parties."*

IPC... *"...the presumption should be that registry fees paid to ICANN (above a modest base amount related to ICANN's costs) should be proportional to the size of the registry; deviations from this presumption should be explicitly justified."*

NCUC... *"...the fees and budget of ICANN are policy issues in and of*

themselves. Control of the purse strings is one of the most important forms of leverage over policy. NCUC believes that ICANN fees should be applied to registries on a uniform basis and not individually negotiated. This is important for the accountability of ICANN as well as for fairness and the independence of registries.”

BC... *“There should be a policy guiding registry fees to ICANN. Among those elements should be that staff does not add in additional fees for services or programs that are not already an approved part of the ICANN Operational Plan and Strategic Plan. Neither Registries nor ICANN should use the registry negotiation process to establish new charges to support non registry services.*

Registry fee negotiations should also not be used to create undue financial dependence upon a single registry, at the expense of destabilizing ICANN's budget when payment is delayed, or withheld. Fees – in structure, in purpose, and in amount -- should be published for public comment as part of the registry award process. When the Operational Plan and Strategic Plan process creates a form of fee that is deemed by the community, based on public comment process and support from the stakeholders to be part of ICANN's budget, such fees may include elements that are then made part of the registry fee. The rationale that has been practiced in the past of

allocating different amounts of “special fees” to different registries has not been transparent, and should be made so by ICANN.”

ISP... *“The ISPCP Constituency favors the development of policy regarding registry fees paid to ICANN. Fees must be uniform across registry contracts. ICANN must make a convincing case for any change to fees, based on its operating and strategic plans. The process of raising fees must be open and transparent.”*

Commentary: It is clear that no consensus exists on this issue. The issue of how ICANN receives fees from contracted parties in the GNSO community may need to be considered in the wider context of ICANN's overall revenue structure.

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

RyC... *“...only the ICANN Board can determine how its budgeting process should relate to the negotiation of any fees charged to any constituency.”*

RC... *“...all ICANN fees charged to the Registries should be borne by the Registries themselves and not passed on to third parties. Any registrar obligation to ICANN should be approved by registrars during the public budgeting process pursuant to the terms of the Registrar Accreditation Agreement and should not be assessed by ICANN indirectly through the registries.”*

IPC... *“...safeguards should be introduced to minimize the risk that registries contributing disproportionately large fees to ICANN’s budget will be able to exercise disproportionate control over budgeting decisions. ICANN’s budgeting process should give priority to input from GNSO and its constituencies (at least so long as fees derived from gTLD registrations provide the bulk of ICANN’s funding), and particularly to user constituencies as the ultimate source of ICANN’s funds (i.e., gTLD registrants).”*

NCUC... offered no further comments on this Term of Reference.

BC... *“The public budgeting process must be transparent, and provide sufficient detail that the community understands the expenses that ICANN is proposing, and the various forms of revenue/income that can meet that budget.”*

ISP... *“ See 4a.”*

Commentary: There is clearly a difference of opinion between the Registries' and Registrars' constituencies and insufficient commentary from others to indicate any consensus position. It would be helpful to have further discussion on this area, focusing closely on how existing Constituency positions equate to ICANN's Mission and Core Values.

I. Term of Reference 5 -- Uses of registry data

Registry data is available to the registry as a consequence of registry operation. Examples of registry data could include information on domain name registrants, information in domain name records, and traffic data associated with providing the DNS resolution services associated with the registry.

5a Examine whether or not there should be a policy regarding the use of registry data for purposes other than for which it was collected, and if so, what the elements of that policy should be.

RyC... *“...The answer to this question requires recognition that laws governing the capture and use of data vary around the world. Any policy on this subject should be sensitive to the need for a registry to conform to the laws of the jurisdiction where it is located”.*²²

²² The RyC submitted further comments on this area. “As already noted in the comments to Section D above, this topic is not a possible topic for consensus policies that registries/sponsors would be contractually required to follow”.

RC... *“...there should be a policy limited the use of Registry data to just the purpose for which it was collected”.*

IPC... *“...the general rule should be that gTLD registry data may be used for any lawful purpose. For registry data that consists of personally identifiable information, a modified rule may be required, which permits its use for purposes not incompatible with the purpose for which it was collected, and which takes into account other public policy interests in use of the data. Use of gTLD registry data by the registry itself for the development or support of new registry services should generally be subject as well to the procedures for new registry services adopted by the GNSO Council and approved by the Board for gTLD registries. Deviations from the above general principles should be explicitly justified.”*

NCUC... *“...the privacy aspects of this issue need to be raised and discussed. As a starting point, we oppose non-discriminatory access to registry traffic data. It would make Internet users’ activities an unending target of data mining”.*

BC... *“There should be policies regarding the use of registry data for purposes other than that for which it was collected. Thus, if data about end users is collected during a registrar/registry interaction in order to complete a*

transfer, or some other process involving end users, there are very limited situations where there would be any collection of data by a registry, given the “arms length” relationship between registrants and registries, e.g. the intermediary role of the registrar in these interactions.

All registries should be subject to the process for approval of new registry services, without exception. The BC was involved, as were all constituencies in the development of a balanced set of procedures to deal with the approval of new registry services. If further refinements are needed in this policy or indeed any other consensus policy, or where there is a lack of policy in a critical area, as has been suggested by the ICANN staff from time to time, then it is the responsibility of the ICANN staff to present a recommendation to the GNSO, noting the areas of clarification needed. And the GNSO should be asked for expedited response in such circumstances,

Overall, the purpose of collecting such data should be limited to the fulfillment of the business functions within the delivery of registry services—e.g. the purpose for which the data is gathered.”

ISP... *“The ISPCP Constituency strongly recommends the establishment of policy regarding the use of registry data for purposes other than the execution of registry operations as required by contract. This includes account*

information and usage data (e.g. the frequency with which a name is looked up in the DNS). All proposed use of registry data for extra-operational purposes must be subject to ICANN approval according to a process similar to that for approval of new registry services.”

Commentary: There is insufficient information contained here to identify any consensus position, although Taskforce members may find it useful to examine the different kinds of registry data which is collected by a range of registries.

5b Determine whether any policy is necessary to ensure non-discriminatory access to registry data that is made available to third parties.

RyC... *“...this is also an area where local law must be considered”.*

RC... *“...there should be a policy limiting the use of Registry data to just the purpose for which it was collected. To the extent that this purpose includes sharing the data with third parties, it should be made available on a non-discriminatory basis”.*

IPC... *“... There should be a mechanism for distinguishing between proprietary and non-proprietary registry data, and non-discriminatory access should be guaranteed to the latter but not the former. This mechanism could take the form of a policy spelled out in the agreement; a procedural step in the consideration of proposed new registry services pursuant to ICANN policies; or both. Deviations from this general rule should be explicitly justified.”*

NCUC had no further comments to add on this part.

BC... *In general, the BC supports the need for non-discriminatory access to registry data that is made available to third parties, or that is used by the registry for any purpose other than that for which the data is collected. In this question, there is no definition of “registry data”, and we would note that is a term that is broader than “traffic data”. If there is a rationale not to make such data available, it should be the responsibility of the registry to make the case as to why restrictions are necessary.*

Traffic data itself, depending on what it entails or is used, is a sensitive area. The BC is concerned that a registry may have a unique and unfair ability to exploit traffic data in ways that may limit the development of other services or byproducts by other third parties. Since the traffic data is available to the registry by virtue of their sole source contract with ICANN, the BC believes that there should be appropriate access to traffic data, when such traffic data is aggregated, and gathered by the registry. In the well-known telephone world, users are used to being able to get “white pages” from different sources, not just the “phone company”. This happens because the “data” is required to be made available at non-discriminatory terms and conditions and for only a cost recovery fee in order to promote competitive outcomes.”

ISP... *“The ISPCP Constituency believes non-discriminatory access to*

registry data that is made available to third parties is essential.”

Commentary: See commentary in the section above although there is a strong connection to the activities and expertise of competition authorities in various jurisdictions.

J. 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.

RyC... *"...the question of a policy guiding such investments is closely related to the question of price controls and the setting of ICANN fees. It is equally inappropriate for the various constituencies comprising the GNSO to be in the position of resolving their conflicting interests by setting investment policies for another constituency".*

RC... *"...there should not be a policy guiding investments in development and infrastructure. It should be determined as a matter of contract and/or commercial discretion. However, it is appropriate for ICANN to consider such investments when determining if the registry operator qualifies for renewal of its agreement."*

IPC... *"... A general policy on this topic may not be needed. Commitments*

regarding such investment will generally be an appropriate factor in the selection of registry operators. Contractual commitments to such investment should be considered on a case-by-case basis. Any commitment entered into should be transparently disclosed, and effectively enforced.”

NCUC... *“...it is completely inappropriate for ICANN to dictate specific investment levels in infrastructure. Investment levels themselves are an inappropriate metric of quality, what matters is performance. Clever applications of technology could provide better performance with less investment. ICANN contracts should not attempt to micromanage registry infrastructure development. If ICANN dictates infrastructure levels it could thwart competition and innovation by imposing a dull uniformity on the industry.”*

BC... *“Competitive bids in .org and .net have led to commitments and delivery on these commitments in investment in development and infrastructure. If there is a truly competitive environment where registries are always re-bid without presumption of renewal, then the pressure of a competitive bid will support investments in development and infrastructure.*

In the absence of a competitive bid process, then there will need to be guidelines for policy for investment. Guidelines would need to ensure that

investment is sufficient to maintain the stability of infrastructure and ensure quality levels are maintained. The BC is considering further what the elements of such policy might be. In the end, though, our strong preference is for a mandatory re-bid process, with the awareness that there can be special characteristics for sponsored gTLDs.”

ISP... *“The ISPCP Constituency encourages registry investments in capability development and infrastructure. We propose that such investments be made a criterion in the evaluation of registry bids. If registry awards are based on free and open competition, with no presumptive right of renewal, then this will motivate bidders to include provisions for the development of capabilities and infrastructure in their proposals.”*

Commentary: It is clear from these early comments that there is no need to develop a consensus policy in this area.

K. Recommendations²³

1. It is clear that, since the initiation of the PDP, events have moved beyond the Terms of Reference. The policy development process on new TLDs has progressed beyond the question of whether to have new TLDs or not, and has done some preliminary work on reaching a consensus position with respect to contractual conditions for new TLDs.
2. It is recommended that the Taskforce consider the progress made on a consensus positions with respect to contractual conditions for new gTLDs and determine whether there are any special characteristics of existing TLDs that would be different with respect to same policies for new gTLDs.

²³ In their supplementary comments, the Registry Constituency says “The recommendations should be considered in light of the comments above [in various sections]. In conclusion, it is probably helpful to understand an opinion that was expressed by some in Brussels: Whereas there are limitations on what consensus policies registries/sponsors are required to follow, the GNSO may still develop policies that could be used as guidelines instead of contractual requirements”.

- 3.** It is recommended that the Taskforce undertake further discussion on whether to make a request to the GNSO Council to amend the Terms of Reference. Such amendments have been made by other Taskforces and Taskforce members may find the Deletes Taskforce report useful where the Taskforce provided recommendations on two of the four Terms of Reference. That report can be found <http://www.gnsso.icann.org/issues/deletes/report-final-17jun03.shtml>
4. It is recommended that the Taskforce notify that, with respect to some of the Terms of Reference, no policy is required (for example, in relation to Term of Reference 6) or where no consensus was possible.
5. It is recommended that the Taskforce also:

 - a.** Identify the types of registry data, beyond the commonly used registrant contact information, and that those concerned about registry data should clearly identify the types of data (with examples) and for those advocating adhering to purpose, to define the purpose more clearly.

- b.** Get a better understanding of the definitions of market power and whether policy is required to guide whether ICANN needs to continue to have some role with respect to setting prices for existing TLDs. Outside expert advice would be useful. There is also an opportunity to consider what the role of competition authorities and where additional advice could be provided.
- c. Refer to the ICANN Operating Plan and Budget which illustrates ICANN's current funding model. A separate working group could be formed to analyse the existing funding model and the possibility of identifying alternate funding sources and whether that would have any policy impact

Bibliography

Guermazi, Boutheina and Isabel Neto, *Mobile License Renewal: What are the issues? What is at stake?*, available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2005/09/23/000016406_20050923113019/Rendered/PDF/wps3729.pdf

Matsui, Masayuki, *Comparing Domain Name Administration in OECD Countries*, available at <http://www.oecd.org/dataoecd/46/38/2505946.pdf>

Paltridge, Sam and Masayuki Matsui, *Generic Top Level Domain Names: Market Development and Allocation Issues*, available at <http://www.oecd.org/dataoecd/56/34/32996948.pdf>

Perset, Karin and Dimitri Ypsilanti, *The Secondary Market for Domain Names*, available at <http://www.oecd.org/dataoecd/14/45/36471569.pdf>