Subsequent Procedures PDP Consensus Designation

A. I do not support:

Recommendation 9.10: *RVCs must continue to be included in the applicant's Registry Agreement.*

> *Implementation Guidance 9.11: The Public Interest Commitment Dispute Resolution Process (PICDRP) and associated processes should be updated to equally apply to RVCs.*

Rationale for 9.9:
 ...."*The working group further agreed that there must be a mechanism to transform these application statements into binding contractual commitments.*"
"*....The Working Group believes that the recommended approach is broadly supported and addresses the key concerns raised in public comment and Working Group deliberations. *"

c. New issues raised in deliberations since publication of the Initial Report, if applicable.
"*....In such cases, it is understood that using an independent third party as an arbiter to determine whether there has been a violation of the commitment would be consistent with ICANN's mission even if ICANN were ultimately required to rely on that third party decision to enforce a pre-arranged contractual remedy, which could include sanctions and/or termination of the Registry Agreement.*"

For the following reasons:

1. The Subsequent Procedures PDP WG was not provided adequate time to deliberate the ramifications of the ICANN bylaws on the proposed recommendations. The following text impacts parties to a registry contract. All of it premiered in the final report after the public comment period on the draft final report closed. It was not subject to review by anyone outside of the WG. It should not be considered part of a consensus recommendation.

   > *In response to the Draft Final Report, the ICANN Board commented that it was concerned that the current ICANN Bylaws language (which differs from that which existed during the 2012 New gTLD round) could "create issues for ICANN to enter and enforce any content-related issue regarding PICs or Registry Voluntary Commitments (RVCs)." It then asked the Working Group whether it had "considered this specific language in ICANN's Bylaws as part of its recommendations or implementation guidance on the continued use of PICs or the future use of RVCs? Can the PDP WG provide guidance on how to utilize PICs and RVCs without the need for ICANN to assess and pass judgment on content?"[1]*

   > *During subsequent Working Group discussions, the Working Group decided not to alter its recommendations with respect to the PICs or RVCs. The Working Group will respond to the ICANN Board's specific concerns under separate cover. In short:*
   >> a) *To the extent that existing PICs are used as PICs (or RVCs) in subsequent rounds, these are specifically "grandfathered" into the current Bylaws mission.*
   >>
   >> b) *The Working Group also agreed that to the extent that RVCs or PICs address eligibility rules for the registration and/or renewal of domain names, these would not involve the need for ICANN to assess and pass judgement on content (as set forth in the Bylaws).*

        c)   *To the extent that some registries will want to make voluntary commitments in response to public comments, Government Early Warnings, GAC Advice, etc., it is understood by the Working Group that having these commitments reflected in Registry Agreements even if they fall outside of ICANN's core mission is consistent with the Bylaws where neither ICANN itself nor any third party under ICANN's control is required to pass judgment on 'content'. In such cases, it is understood that using an independent third party as an arbiter to determine whether there has been a violation of the commitment would be consistent with ICANN's mission even if ICANN were ultimately required to rely on that third party decision to enforce a pre-arranged contractual remedy, which could include sanctions and/or termination of the Registry Agreement.*

        In short, the PDP Working Group stands by its recommendations and implementation guidance which envisage the use of PICs / RVCs to resolve issues that arise through the public comments, objections, Government Early Warnings, GAC Advice or other concerns expressed by the community. The commitments must be enforceable through contracts entered into between registry operators and ICANN. The Working Group therefore urges the IRT to work with ICANN org to implement the recommendations and implementation guidance set forth herein in a manner consistent with ICANN's current Bylaws."

The WG did not have sufficient time to explore this issue fully or develop a consensus solution. Other solutions may be possible, such as an accountability mechanism that is not directly included in the registry contract. The recommendations are unenforceable, unpredictable, undesirable, and untenable. The Board will not be able to accept them as written.

2. The application of the PICDRP and associated processes to RVCs introduces profound changes to the balance of rights and obligations in the registry contract.

3. The recommendations lack critical clarification and do not fully address the public comment concerns that the RVCs *"should only be permitted if they fall within the scope and mission of ICANN as set out in the New Bylaws."*

4. I agree with the concerns raised by the ICANN Board that the recommendation could *"create issues for ICANN to enter and enforce any content-related issue regarding PICs or Registry Voluntary Commitments (RVCs).",* and that adopting this recommendation could cause parties to the registry contract to be in violation of the ICANN Bylaws.

5. This statement has neither been tested, nor reviewed by impartial legal experts. *"using an independent third party as an arbiter to determine whether there has been a violation of the commitment would be consistent with ICANN's mission even if ICANN were ultimately required to rely on that third party decision to enforce a pre-arranged*

contractual remedy, which could include sanctions and/or termination of the Registry Agreement."
Speculating legal obligations makes for bad policy.

6. Outsourcing ICANN's responsibility to enforce contracts does not abdicate ICANN of the responsibilities in the contract.

7. *"The Working Group will respond to the ICANN Board's specific concerns under separate cover."* This work has yet to be started. Fulsome analysis and conversation on the concerns raised by the Board could produce new ideas or potential solutions which should be included in the Final Report.

Topic 9: RVCs should be given the full attention it deserves considering the profound impact it could have on the base registry agreement. The PDP 3.0 guidelines suggest targeted PDPs with narrow scope for such matters. This issue could be addressed by a tightly focused group of contract experts in order to create a policy that does not put ICANN's integrity at risk.

B. I do not support including the text "*including private auctions*" in Recommendation 35.2.
Recommendation 35.2: Consistent with the Application Change processes set forth under Topic 20: Application Change Requests, the Applicant Guidebook (AGB) must reflect that applicants will be permitted to creatively resolve contention sets in a multitude of manners, including but not limited to business combinations or other forms of joint ventures and private resolutions (including private auctions).

Private resolutions should not include private auctions. Unresolved contention should be settled by ICANN Auction of last resort. Private auctions in the 2012 round were leveraged by some applicants solely for profit, with no intention of winning or operating the TLD. The distribution of private auction funds back to portfolio applicants funded the defeat of single TLD applicants thereby stifling competition, one of the key purposes of the program. The WG was asked to propose a solution that would prevent the gaming and profiteering that happened in the 2012 round. The best way to do this is to forbid private auctions.

C. I do not support
Recommendation 35.3: Applications must be submitted with a bona fide ("good faith") intention to operate the gTLD. Applicants must affirmatively attest to a bona fide intention to operate the gTLD clause for all applications that they submit.
 • *Evaluators and ICANN must be able to ask clarifying questions to any applicant it believes may not be submitting an application with a bona fide intention. Evaluators and ICANN shall use, but are not limited to, the "Factors" described below in their consideration of whether an application was submitted absent bona fide intention. These "Factors" will be taken into consideration and weighed against all of other facts and circumstances surrounding the impacted applicants and applications. The existence of any one or all of the "Factors" may not themselves be conclusive of an application made lacking a bona fide use intent.*

This recommendation was created when the WG tried to break gridlock over how to address the gaming that occurred in the 2012 round, yet still allow for private auctions. It is bad policy.

Proving intent is incredibly difficult, and intentions change. It places ICANN in a position of having to pass subjective judgement over competing applications, using information or factors that change over time.

D. I do not support
Recommendation 35.5: Applicants resolving string contention must adhere to the Contention Resolution Transparency Requirements as detailed below. Applicants disclosing relevant information will be subject to the Protections for Disclosing Applicants as detailed below.

Specifically:

"For Other Forms of Private Resolution: Where contention sets are privately resolved through a mechanism other than a private auction, the following must be disclosed:
- *The fact that the contention set (or part of a contention set), has been resolved privately (and the namesof the parties involved).*
- *Which applications are being withdrawn (if applicable);*
- *Which applications are being maintained (if applicable);*
- *If there will be a change in ownership of the applicant, or any changes to the officers, Directors, key personnel, etc. along with the corresponding information.*
- *All material information regarding any changes to information contained in the original application(s) (if any)."*

The list of disclosures is missing the VALUE of the exchange. If this recommendation is adopted, it should include the same transparency requirements as all other contention resolution methods.

E. Topic 23: Closed Generics designation as "No Agreement" properly represents the outcome of the WG discussion. Unfortunately, we failed the task assigned to us - to develop a policy going forward for Closed Generics. There was no agreement within the WG on what the default for closed generic applications would be if we failed to recommend a policy. The 2012 AGB allowed for closed generics, but the 2012 implementation did not. This matter should be addressed in a focused PDP.