

Cheryl and Jeff,

Thank you for your leadership of the SubPro WG through these many days, months and years.

We write because we know that each step of our efforts is important, and that you would expect us to challenge a designation if we felt it fell short. We feel that the Co-Chairs' designation of Topic 9 and specifically Recommendation 9.10 fall into the category of consensus designations for your review and reconsideration.

We respectfully submit that you may have misread the oppositions to Topic 9. In stating that Kathy Kleiman's was the only objection to the recommendation in his email of 1/12 to the WG, Jeff overlooked opposing statements to other Topic 9 recommendations submitted by Working Group Members received during the Consensus Call. We are concerned that Jeff's views, expressed on 1/12, reflect a misreading of comments that was part of the consensus designation on 1/11. Accordingly, we re-present the Consensus Call objections and oppositions that you received from diverse and active WG members and request a re-evaluation of the designation level of Topic 9, and particularly Recommendation 9.10.

When you re-read the emails and arguments below, we respectfully submit that you will find Strong Support, but also Significant Opposition to Topic 9, and specifically Recommendation 9.10, both in numbers and substance, and therefore we request that the finding of "Consensus" be changed accordingly. After new information was received, the WG did not have sufficient time to explore this issue fully or develop a comprehensive solution. We are concerned that parts of Topic 9 are unenforceable and could introduce significant unpredictability to the registry contract.

Consensus Call emails show diverse and significant opposition from the WG

During our Consensus Call, the WG read oppositions from WG members on Topic 9, and specifically Recommendation 9.10: *RVCs must continue to be included in the applicant's Registry Agreement*.

1. On January 8th, active WG member **Elaine Prujs** clearly opposed to Recommendation 9.10 and wrote:

"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."

We will not repeat all of her reasoning, but note among other bases for objection:

"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 closed. It was not subject to review by anyone outside of the WG. **It should not be considered part of a consensus recommendation.**" [emphasis in last sentence added]

"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.”

And Elaine concluded:

“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 policy that does not put ICANN’s integrity at risk. [emphasis added]

Respectfully, she and we submit this is strong opposition to Recommendation 9.10 in Topic 9.

2. On January 8th, **Jim Prendergast** similarly wrote in opposition to Recommendation 9.10.

He noted in his opening, prefacing his deep concerns about Recommendation 9.10 that this recommendation, in Topic 9, was one of the three “exceptions” to his otherwise “proud” support of the final report.

3. On January 8th, **Jessica Hooper** wrote of her concerns about Topic 9, and listed it clearly as one of her “Areas of Non-Support”.

She raised her objections to the reasoning underlying Topic 9, and specifically cited section c, *New issues raised in deliberations since publication of the Initial Report, if applicable*, including the language of Final Report, p.48:

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?”

Afterwards the Working Group decided not to alter its recommendations with respect to the PICs or RVCs.

Jessica raises questions about possible contradictions about Bylaws, unfounded findings about third party arbitration and other issues underlying the recommendations of Topic 9, and especially Recommendation 9.10, and wrote to the WG:

“This section of Topic 9 was developed after the public comment period closed on the Final Report. This text has a direct impact on the Registry Agreement yet wasn’t reviewed by the community. Section C above should not be included in the Final Report as it is speculative (ex: “...it is understood”) and hasn’t gone through legal review.

Furthermore, the ICANN Board has concerns about the contradictions with the Bylaws and those concerns need to be addressed. The WG didn’t have enough time to deliberate on possible

solutions. As set forth in the PDP 3.0 guidelines, a narrow-scoped PDP could be constituted to look at the Bylaw concerns from the Board more closely rather than punting it to the IRT to solve.”

Jessica’s opposition is quite clear and in co-authoring this document she notes that the instructions presented by Staff and Leadership charged WG members to “specifically identify the Specific Recommendations and/or Implementation Guidance within the Outputs that you do not support and why”, however those instructions failed to indicate that simply objecting to a specific recommendation would not be considered opposition for the topic in whole. Each recommendation, particularly in Topic 9, is uniquely tied to the next. For example, Recommendations 9.1, 9.2, 9.8, and 9.10 impact the Registry Agreement directly while other recommendations address how RVCs are formulated prior to inclusion in the Registry Agreement, but that 9.10 most succinctly and *specifically* addressed concerns regarding inclusion in the Registry Agreement. Jessica further notes that her “Areas of Opposition” submission to the Consensus Call was constructed following the instructions to the best of her knowledge.

Jessica wants the whole of Topic 9 as her objection and calling for the RVC issue to go to a new PDP for research, discussion and resolution as a PDP 3.0 process.

4. On January 10th, with extension approved by the Co-Chairs, **Kathy Kleiman** wrote in opposition to sections 9.9 and 9.10. Her statement included a question about what 9.10 allows to be put into RVCs, as RVCs in response to GAC Early Warnings and GAC Advice are already addressed by Recommendation 30.7 and RVCs to settle Objections are handled by Recommendation 31.16?

Kathy wrote that Recommendation 9.9 (and 9.10): “continue the process of undermining ICANN processes, policies and bylaws started in 2013 and 2014... it will undermine ICANN’s integrity and independence to go forward in a similar manner.”

There is a real resonance to these objections.

5. Finally and admittedly after the Consensus Call, **George Sadowsky**, longtime ICANN Board member re-iterated concerns – already expressed to the WG in our closing WG discussion - about RVCs and his objection to “Topic 9 about RVCs, and specifically oppose draft recommendations 9.9 and 9.10.”

George wrote about his opposition to Recommendations 9.9 and 9.10 and also his sense of “consensus”:

- “I do not think these recommendations have consensus without absolute clarity and determination that PICs and RVCs must not and will not violate the scope and mission of ICANN.”
- “I share the current Board members worries, and the dilemma that ICANN will be asked to enforce things outside its scope and mission, which it cannot do (directly or through a third party). The Board members who have contributed their views on this are right; we cannot allow this to happen.” And
- “I do not think these recommendations have consensus to move forward - under any definition of consensus that I know. This certainly would not pass the carefully considered consensus evaluation of RFC 7282, which is in my opinion one of the most careful and considerate studies of the factors that are relevant and important in assessing a degree of consensus.”

While George's email may have been out of time, it reflects comments heard often during the discussion of Topic 9 and specifically 9.10. Outside of the uses endorsed by Recommendation's 30.7 and 31.16, there is calls for research, discussion, review and clarity expressed as part of the opposition to Recommendation 9.10.

Consistency and Import

Topic 9 is a critical issue. We ask the Co-Chairs to flag for the GNSO Council and the ICANN Community that this is a topic that we tried hard to solve and could not in full. Critical issues were raised for which we simply did not have the answers: can Registry contracts contain provisions that fall outside the scope and mission of ICANN? Can ICANN assign to its own dispute resolution system (as currently set up) or to a third-party dispute resolution system resolutions of these issues? Can it enforce that which is outside its scope and mission? What is the impact on the balance of rights of the parties to the contracts, and those who are not parties to the contracts?

We respectfully submit that we simply could not get it all done. The issues raised in Topic 9 deserve more thorough deliberations and independent legal input. This is not a deficiency of the Chairs or the Working Group, but a result of the transition, the new Bylaws, and important new questions and concerns. Once the WG, through the re-evaluation of the designation by the Co-Chairs, raises the issue clearly to the Council, the Board and the Community, we are certain a process and resolution will be undertaken.

In the meantime, if one objection can lower an entire topic from "Full Consensus" to "Consensus," then we respectfully submit that the diverse and significant opposition of individuals and arguments outlined above should be sufficient to move Topic 9, and especially Recommendation 9.10, from "Consensus" to "Strong Support but Significant Opposition." This fulfills our mission to provide the GNSO Council with an accurate assessment of the WG opposition and opens the opportunity for others to assist where we could not find all the answers.

Elaine Puis, Kathy Kleiman, and Jessica Hooper