

To: Members, RPM Review Working Group

From: WG Co-Chairs

Subject: Views of the Co-Chairs Regarding the Proposed “Broken” Rule and the Exploration of Voluntary Mediation for the PDDRP

The Co-Chairs of the PDP WG to Review all RPMs in all gTLDs have considered the suggestion that the WG adopt a rule to only consider and make inquiry into possible modifications of existing RPMs if such mechanisms are “broken”, and to apply this rule to negate a proposed sub-team investigation of factors relevant to a potential recommendation for encouragement of voluntary mediation within the PDDRP. The consensus view of the Co-Chairs follows.

### **1. Adoption of a “Broken” Rule**

It has been suggested that the WG should only consider modifications of existing RPMs where there is substantial proof that they are “broken”.

The Co-Chairs do not believe that this proposed standard would be useful or appropriate. Further, adoption of this proposed Rule would make it impossible for the WG to fulfill the mission outlined by its [Charter](#).

The relevant dictionary definitions of the word “broken” include:

- shattered
- disrupted by change
- weak or infirm
- not functioning properly
- fragmentary or incomplete
- damaged and no longer able to work

Thesaurus synonyms for “broken” include busted, crippled, damaged, defective, and shredded.

Overall, the clear meaning of adoption of a “broken” standard by this WG would be that we could only inquire into, and suggest revisions of, an RPM that was so ineffective, dysfunctional, outdated, or incomplete that it was useless or nearly so.

The Chairs know of no existing RPM that would meet this definition. All of them, while imperfect, are working as designed and providing substantial protections. The relevant question

is not whether they are functional but whether they can be improved to better serve the overarching policy goals they were meant to advance, as well as whether additional policy recommendations are advisable to create a more comprehensive framework for their exercise.

Adoption of a “broken” standard would also prevent the WG from fulfilling its Charter responsibilities. The Charter is this WG’s Constitution – it sets forth our goals, mission, and required outputs. While a WG has flexibility in regard to how it meets its Charter, it has no ability to alter that Charter on its own volition – all Charter modifications must be proposed to and approved by the GNSO Council.

The Mission and Scope statement contained in this WG’s Charter states in part:

[B]y the completion of its work, the Working Group will be expected to have also considered **the overarching issue as to whether or not all the RPMs collectively fulfill the purposes for which they were created, or whether additional policy recommendations are needed**, including to clarify and unify the policy goals.

At a minimum, in each Phase of this PDP, the Working Group is expected to **first assess the effectiveness** of the relevant RPM(s)... The Working Group should also consider the interplay between and complementary roles of each RPM in seeking to more fully understand their **overall functioning and effectiveness**.

In public comments to the UDRP Final Issue Report, the RPM Staff Paper and the Preliminary Issue Report for this PDP, various community groups and participants had identified a number of issues that they considered appropriate for review in a PDP. As such, and following its preliminary assessment of the effectiveness of the relevant RPM(s) in each phase of its work, **the Working Group should consider the suggestions that have been made to date by the community regarding improvements or modifications to the RPM(s) in question**. These community suggestions are attached to this Charter and they **are intended to provide a framework and starting point for the PDP Working Group at the appropriate stage in its work, with further modifications, additions and deletions to be determined by consensus of the Working Group**. (Emphasis added)

The Charter also requires that this WG coordinate with related parallel efforts:

In particular, this PDP Working Group shall maintain a close working relationship with the Competition, Consumer Trust and Consumer Choice (CCT) Review Team and the PDP Working Group on New gTLDs Subsequent Procedures... In addition, the RPM PDP Working Group should also take into consideration the work/outcome of the TMCH

Independent Review, the CCT Review, and any other relevant GNSO policy development projects.

The Objectives and Goals portion of our Charter states:

In addition to **an assessment of the effectiveness of each RPM**, the PDP Working Group is expected to consider, at the appropriate stage of its work, **the overarching issue as to whether or not all the RPMs collectively fulfill the purposes for which they were created, or whether additional policy recommendations are needed**, including to clarify and unify the policy goals. If such additional policy recommendations are needed, the Working Group is expected to develop recommendations to address the specific issues identified.

The Working Group is also directed to bear in mind that a fundamental underlying intention of conducting a review of all RPMs in all gTLDs is to **create a framework for consistent and uniform reviews of these mechanisms in the future**. (Emphasis added)

As can be seen, the Charter directs the working group to evaluate the RPMs across a nuanced continuum that includes room for enhancement of the overarching policy framework, as well as for suggesting enhancements of any RPM's functionality and effectiveness. The Charter also directs us to work toward creation of an evaluative framework that can be utilized in any future RPM reviews. A "broken" standard, which would only permit inquiry into and recommendations for RPMs that are not working, or are at least clearly dysfunctional, is not compatible with these Charter directives.

In addition, the Charter requires this WG to "consider the suggestions that have been made to date by the community regarding improvements or modifications to the RPM(s) in question". While the WG may, at its discretion, decide that certain community-posed suggestions and questions are not worthy of pursuit, and may also add additional topics to that community-provided list, the Chairs believe that the WG must at least consider whether each of those community suggestions merits WG attention. A review of the dozens of community suggestions appended to the Charter indicates that the vast majority would not be accommodated by a review standard that only permitted inquiry and recommendations in regard to "broken" RPMs.

Finally, concerns have been expressed that failing to adopt a "broken" standard will unnecessarily extend the time required for this WG to complete its task. Yet, so far the WG has adhered tightly to its scheduled work plan, and has adopted a methodology to assist in staying on that schedule. That methodology consists of forming voluntary sub-teams to gather data in advance of full WG engagement on major issues. At the same time, issues that have been largely explored, such as the PDDRP, can be set aside and then revisited when similar sub-

teams come back to the full WG with the information and analysis required for completion of their consideration.

In light of the above analysis, the Co-Chairs cannot endorse the adoption of a WG standard that would only permit this WG to pursue aspects of RPMs deemed to be “broken”, as our Charter clearly requires us to take a more nuanced approach in regard to the policy framework for, and potential improvements and enhancements to, the RPMs we are charged to review.

## **2. Sub team inquiry into practical aspects of a voluntary mediation enhancement of the PDDRP**

Several members of the WG have raised objections to any further investigation of the merits and potential means by which voluntary online mediation might be added as an available option to the PDDRP. The basis of these objections has been that the PDDRP has not been proven to be “broken” and therefore no consideration should be given to any modification of it, even one that merely supplements it and does not change its basic structure and standards.

For the reasons provided in the first section of this memo, the Co-Chairs do not believe that a “broken” standard is appropriate or useful for decision-making purposes within this WG. We observe that the PDDRP is unique among all the RPMs we shall be addressing as it is the only one that has never been used, and therefore there is no data available regarding its real world utilization. The WG has been unable to conclusively determine whether this lack of use is due to the absence of any type of infringement-related conduct on the part of registries targeted by this RPM, or is explained by barriers to its use and weaknesses in its remedies that deter potential PDDRP complainants. Just as the lack of past use does not argue for elimination of the PDDRP as an available potential tool for addressing future abusive conduct, neither does it argue for rejecting consideration of any enhancement that might make it more useful when employed.

While the Co-Chairs would better understand objections to suggestions for substantial revision of the PDDRP given the lack of usage data, that is not what is being considered in an exploration of voluntary mediation. Further, a decisive 3-1 majority of those WG members who engaged in the recent [Doodle poll](#) (20-7) voted in favor of the question “At this stage of the PDP, I support adding voluntary online mediation to the TM-PDDRP.” The Co-Chairs believe that a vote by 27 members of the WG constitute a large enough, statistically significant sampling to reflect overall WG sentiment and that such expressions of WG sentiment should be generally respected.

During the WG call of August 17<sup>th</sup> the presiding Co-Chair suggested that, in light of the poll results, a sub-team be established to explore the practicality of implementing an online mediation option, and that it subsequently report back to the full WG so that information could inform a final decision on whether to recommend a voluntary mediation amendment of the PDDRP. To be clear, the purpose of the sub-team is not to design a detailed implementable mediation plan – such precise implementation details should properly be left to an implementation review team dealing with all of the Recommendations that may ultimately be made by this WG and subsequently approved by Council and the Board. Rather, the goal would be to perform an initial exploration of the precedents for such an option, availability and cost of such online services, and other relevant considerations that should be taken into account by the WG when making a final decision as to whether to adopt such a recommendation. The creation of this sub-team should not be taken as an indication that the WG has tentatively decided to recommend the addition of a voluntary mediation option for the PDDRP; instead, its purpose is to assist the WG in making a fully informed decision.

Given the inapplicability of a “broken’ standard as well as the indications of majority support from WG members for further exploring the practicalities of this option, the Co-Chairs appreciate the indications of interest from several WG members regarding participation in such a sub-team and encourage them to engage in that effort -- for a limited time and for the narrowly defined purpose articulated in the preceding paragraph.

### **3. Final thoughts**

In light of the many complex questions and issues with which this WG will grapple over the next few years, the Co-Chairs wish to make clear their view that the WG should **not** attempt to replicate the lengthy process by which the new gTLDs were created through the work of the IRT, STI-RT, and Applicant Guidebook development; nor is it to evaluate every decision trend developed through twenty years of UDRP usage.

Rather, our task is to take these RPMs as they are, locate and review pertinent available data, and evaluate means by which they may be made more effective within the current policy context, as well as consider whether any additional policy considerations should apply -- all in light of the actual results of usage of these RPMs to date. Adhering to that general approach will best assure that we fulfill our Charter obligations in a timely manner.

We hope this memo has been found useful by WG participants, and we welcome any comments or questions during our call of August 31<sup>st</sup>, or by email.