



February 21, 2013

Marika Konings, Senior Director - Policy Development Support
International Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: Request for Public Comment: Policy v. Implementation

Dear Ms. Konings:

Thank you for the opportunity to comment on ICANN's procedures for policy development. An effective framework should have the following two characteristics: (1) ICANN should craft a sustainable framework, looking at the long term rather than any particular policy debates before it right now; and (2) ICANN should base its framework on fundamental principles of fairness, notice, and due process. To that end, several concepts from administrative law provide useful guidance. Although references to administrative law do not provide perfect analogies, several of guideposts established by the courts have stood the test of time and provided parties with certainty as they navigate rule-based obligations.

I. ICANN Should Craft a Sustainable Policy

In crafting a procedural framework, ICANN should focus on developing a policy that will last in the long term. While it may be tempting to craft a framework by working backward from desired outcomes to policy dilemmas currently before ICANN, such an approach is fundamentally shortsighted. ICANN instituted this public comment process because it recognized that stakeholders did not have a clear and uniform view of how to distinguish policy from implementation. It proposed the framework specifically to "facilitate dealing with similar questions in the future." Therefore, ICANN should use a holistic, forward-looking approach toward developing the framework. It should address current policy decisions within the lens of a proposed framework, as opposed to tailoring the framework to the decisions.

II. ICANN Should Rely on Notions of Fairness, Notice and Due Process in Developing its Policy Frameworks.

ICANN should develop procedures based on norms of fairness, notice, and due process. These norms are nearly universal.¹ They require that ICANN give community members input into the rules that affect them, provide community members advance notice of any change in their obligations, and allow members to contribute to and invest in the Internet community because they build confidence in the system. A fundamental precept of due process is that parties must be provided adequate notice before they are bound by new rules.

A. The Policy Development Process Establishes the Fundamental Set of Policies that Guide ICANN's Work.

The Policy Development Process (PDP), established in ICANN's bylaws, provides the mechanism by which policies can be established or changed. Policies created through the bottom-up, multistakeholder PDP establish expectations as to how domain names will be governed and represent the view of the entire community. As such, those policies established through the PDP can only be modified or repealed through another PDP. Further, in the absence of a policy developed through the PDP, ICANN has no basis to take action in other areas.

Many policies developed through the PDP still leave considerable room for implementation details to be established after the adoption of the policy. For example, in November 2005 the GNSO Council adopted a consensus policy that called for the creation of a procedure for "dealing with the situation in which a registrar or registry can credibly demonstrate that it is legally prevented by local/national privacy laws or regulations from fully complying with applicable provisions of its ICANN contract regarding the collection, display and distribution of personal data via the gTLD WHOIS service."² Subsequently, ICANN staff developed the procedure, which is now documented at: http://gns0.icann.org/en/issues/whois-privacy/whois_national_laws_procedure.htm. These details of the procedure are not part of the policy formed by the PDP and do not require a new PDP to be amended; however, if the community decided that such a procedure were no longer required, a PDP would be necessary in order to rescind the need for such a procedure.

Other policies developed through the PDP include some details that may be viewed as implementation,

¹ See, e.g., International Covenant on Civil and Political Rights, Sept. 8, 1992, 999 U.N.T.S. 171; U.S. Const., amend. V, XIV; S. Afr. Const., ch. 2, 1996.

² <http://gns0.icann.org/en/meetings/minutes-gns0-28nov05.shtml>

but nonetheless represent the consensus view of the community and can only be modified through a future PDP. For example, the *Add Grace Period (AGP) Limits Policy*³ specifies a specific threshold of 10% of all net new registrations during a month as the point at which a registrar becomes ineligible for refunds under the AGP. Because these details often represent carefully considered compromises during the PDP, such details that are included as part of the policy--even when a reasonable person may conclude that they are a matter of implementation--can only be changed through another PDP. Participants in the PDP should be conscious of this and attempt to defer such details to the implementation phase where they do not form an essential element of the policy.

B. Independent of the Policy Development Process, Changes to Parties' Obligations Should Be the Subject of Rigorous Notice and Comment.

A fundamental precept of due process is that parties must be provided adequate notice before they are bound by new rules. Therefore, even if a policy or policy change does not fall into the category of subjects requiring a PDP, ICANN should adopt a rigorous notice and comment process whenever it imposes new obligations on parties. The categories of "policy" or "implementation" are less important than ensuring parties receive sufficient notice and ensuring their views are considered in crafting the rule.

Administrative law principles -- all of which attempt to give effect to the broader principles discussed above -- can provide useful guidelines for a baseline of when procedural protections are invoked and what process is required.

- In administrative law, a new rule is subject to mandatory notice-and-comment when it creates a new binding obligation on parties. As a parallel, this circumstance alone should be a sufficient condition for rigorous notice-and-comment in the ICANN process. By contrast, mere statements that are not binding on members of the ICANN community -- or on relevant stakeholders in the administrative law process -- do not constitute new rules and need not be submitted for the same type of community review. Similarly, ICANN actions, which merely clarify or explain existing policies, need not be subjected a notice-and-comment process.
- The draft framework also recognizes that changing existing rule can significantly alter community members' expectations. Again, several administrative laws may be relevant here. The draft framework put together by the ICANN staff suggests that a change in rule⁴ based on new information may be considered mere "implementation." To the extent that suggests such rules

³ <http://www.icann.org/en/resources/registries/agp/agp-policy-17dec08-en.htm>

⁴ We use the term rule to mean any action by the ICANN staff, board, or other governing bodies that imposes a new binding obligation on parties, regardless of whether that action is called policy or implementation.

should not be subjected to the same level of discussion and scrutiny as the original rule, Google disagrees. The fact that circumstances or facts have changed may be grounds for changing a rule, but it should not be grounds for circumventing the original process. In administrative law, any change in rule should required reasoned explanation, and in fact, a rule rests upon new factual findings or a rule change that upsets serious reliance interests that must be taken into account typically requires greater adherence to process, rather than less. ICANN should similarly recognize that changed circumstances will sometimes merit a change in direction, but the requirements for notice and a formal opportunity to comment should not be waived merely just because new facts have come to light.

- A proper notice-and-comment process will also have certain characteristics: (1) the notice should describe either the terms or substance of the proposed rule or an adequate description of the subjects and issues involved; (2) participants in the community must be afforded meaningful opportunity to comment; and (3) the final rule should be accompanied by a reasoned explanation. To give stakeholders an idea of the rigor that accompanies this process, many notices of proposed rulemaking and orders adopting final rules are tens to hundreds of pages in length and cite both the comments of parties and outside studies, analyses, or data.

C. ICANN's Procedures Should Provide Predictability.

Basic notions of fairness also require that parties understand the procedural rules governing ICANN's actions in advance of ICANN taking action. Therefore, ICANN should use this opportunity to clearly lay out what circumstances call for a PDP, what circumstances call for notice-and-comment (and what protections that process affords in the ICANN context), and what circumstances permit staff action without consulting stakeholders. Because of current confusion around how ICANN implements any kind of change -- whether policy, implementation, or something else -- stakeholders cannot form clear expectations as to (1) whether or how they will be asked to participate in the development of ICANN's policies and (2) whether and how their obligations might change at any time. This lack of clarity undermines confidence in the system.

We believe adhering to the precepts set forth above will help provide adequate notice and an opportunity to proposed changes, thereby strengthening confidence in ICANN and its decision-making and encouraging members of the community to contribute to the development of ICANN policy and to the continued growth and development of the Internet itself.

Please do not hesitate to contact us if you have further questions about this submission.

Very truly yours,

A handwritten signature in blue ink that reads "Aparna Sridhar". The signature is written in a cursive style with a large, stylized initial 'A'.

Aparna Sridhar
Policy Counsel
Google Inc.