TO: IOT - iot@icann.org
on behalf of; Sam Eisner
28 September 2021 @ 12:52 PM/CT

Hi everyone –

Susan asked me if I could help distill some of the thoughts I'd been presenting on behalf of ICANN org as part of the IOT tolling conversation. Looking forward to our further conversations on this.

1. **RELATIONSHIP WITH RECONSIDERATION:** Stopping all clocks for IRP when there's a potentially related Reconsideration is not supported by the Bylaws and creates the two as sequential processes, when they are two separate processes with two different standards and two different outcomes. The Reconsideration Process and IRP have co-existed together with overlapping timing since 2002, and this staying one to allow the other proceed has never been introduced before.

   What does Sam mean by "sequential"?: I understand we might have different views of the word "sequentially", so for clarity, when I use the term, I mean using the Reconsideration process and the IRP to challenge the exact same action of ICANN. That is what the current tolling conversation would create as a result. This is different from how claimants currently move from the Reconsideration process to the IRP process, which would not be impacted at all by this tolling conversation and is still possible under the Bylaws and processes as they exist. Frequently we see a party first choose to use the Reconsideration process, asking for a reconsideration of the decision because a process or policy was not followed. If the desired relief is not provided through the Reconsideration process, then the Board action on Reconsideration is then a NEW act of the Board, and the claimant often avails itself of a new timeframe for starting an accountability mechanism, and the subsequent IRP filings challenge how ICANN acted in alignment with its Bylaws/Articles in its action on Reconsideration. I do not consider this challenge of a new action as "sequential" as I've been using the word.

   Historically, the timing overlaps of Reconsideration and IRPs have essentially precluded sequential challenge of the SAME act. For example, pre-2016, the quickest time frame in which a Request for Reconsideration could be filed and concluded was 105 days (15 days after resolution posting; 30 day BGC; 60 day Board). That could easily run past the time for filing an IRP (30 days after posting of minutes). In reality, the Reconsideration process took a LOT longer, so the time for filing IRPs challenging that action would essentially always clock out. This has never stopped claimants from challenging the "new" action. There have been opportunities for the community to change the accountability mechanisms to consider whether there should be availability to challenge the same action in sequence, and they have not to date. That would appear to require a Bylaws change from our view.

2. **Are we focusing on the right question?** If the purpose of the tolling conversation is to make sure there is sufficient time to file an IRP, while still allowing for meaningful opportunity to limit the issues within an IRP, are we focusing on the right question when we're discussing stopping the clock? How much time is needed after the conclusion of one process in order to then move into a different process, and where is the balance of efficiency of process? In the current

version of the CEP, there will always be at least 15 days left after the CEP closes for a claimant to file an IRP. Even assuming we do toll for Reconsideration – does the Reconsideration claimant need a full 120 days after the conclusion of the Reconsideration process to file its IRP, which is on a topic that the claimant is already on notice about? Could the claimant then initiate CEP on the 105th day and toll? That could be over 260 days from the action before ICANN is even put on notice that there's an intention to file an IRP (30 days to file Reconsideration; 135 days for Reconsideration; 105 to CEP). What is the role of notice to ICANN and obligation of the claimant?

3. **Do we require unique tolling provisions for multiple events, or do we already have a tolling mechanism that could address the need to preserve an IRP claim?** Are there tolling considerations that couldn't be addressed through allowing tolling in CEP? For example, if you have a pending reconsideration but you believe the same conduct might support an IRP, could you put ICANN on notice through initiation of a CEP if your IRP filing window was coming to a close and the Reconsideration was pending?

Best regards,

Sam
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