

Dear members of the IRP IOT:

Here below is my suggestion for handling comments we have previously discussed, and which are on our Excel table as, Rewriting Consensus Policy.

The public comments repository for the proposed rules can be accessed here<<https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>>.

This suggestion deals with these specific comments:

1. From Fletcher, Heald & Hildreth PLC (Fletcher comment<<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfAkzQ0N4xz2.pdf>>); and
2. From the NCSG (NCSG comment<<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfLoCFUVHjfn.pdf>>).

Summary of Comments:

1. The Fletcher comment requests these changes to the USPs:
  - a. Provide notice to the ICANN SO, SG, WG Chairs and ICANN community that developed the consensus policy in issue.
  - b. Mandatory right to intervene for those who helped create the consensus policy and those whose interests are represented in/affected by it.
  - c. Limit what the IRP panel can do when overturning a consensus policy - standard of review and remedies.
2. The NCSG comment says, in part:

Similarly, for a challenge to a Consensus Policy, the Supporting Organization and its Stakeholder Group must be in a position to defend their work. The negotiation of the PDP in a Working Group takes months and even years. The research done, the negotiations made, the public comment received, and the compromises sought are all part of the record which the Stakeholder Groups will know. No single party, perhaps a company upset with the compromise, should be allowed to unilaterally challenge or seek to renegotiate a Consensus Policy without all other equally-engaged parties being allowed on an equal basis into the "IRP Room."

Draft USP Rule:

The draft rule being commented upon is section 7. Consolidation, Intervention, and Joinder, which does not provide for mandatory rights as currently drafted (footnote omitted):

At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a

panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.

In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.

Our IRP IOT role:

As we do our work we are instructed by the bylaws, among other things, to provide rules that will facilitate the "just resolution of disputes" (Bylaw Section 4.3(a)(vii)) and ensure "fundamental fairness and due process" (Bylaw Section 4.3(n)(iv)).

My recommendations (as participant, not as lead):

I recommend that we create a mandatory right of intervention for the SO whose policy is under challenge. And I recommend that we treat it along the lines I recommended for other Joinder issues, specifically as follows:

\*\*\*\*\* That such SO receive notice from a claimant of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN; and

\*\*\*\*\* That such SO have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such SO to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status a chance to file an amicus brief on the requested relief or terms of settlement.

\*\*\*\*\* I therefore suggest we stop short of providing such notice to SGs, WG Chairs and community members, and "those who helped create the consensus policy and those whose interests are represented in/affected by it."

\*\*\*\*\* I do not see the need to limit what a panel can do with respect to challenges to consensus policy inasmuch as bylaw section 4.3(o) seems well suited to address the matter.

Differing views:

If you have a concern with what I propose or have another suggestion, please make it on list as soon as possible and as specifically as possible. Please couch it in terms/language that can be acted upon as a decision if adopted

(i.e. in language that would be a sufficient instruction to our outside lawyers that they could draft appropriate language).

Best regards - and I will send an agenda tomorrow for our call Thursday at 13:00 UTC,

David