PDP Feb 06: Policies for Contractual Conditions

Term of Reference One: Registry Agreement Renewal

Date: 25 September 2006

REGISTRY AGREEMENT RENEWAL

Examine whether or not there should be a policy guiding renewal, and if so, what the elements of that policy should be.

- 1. This section sets out materials that relate to the renewal of licensing agreements in a variety of different industry sectors to provide some comparison to the way in which ICANN renews its agreements with registry operators.
- 2. The full list of ICANN's existing GTLD registry agreements can be found at http://www.icann.org/registries/agreements.htm.
- 3. The three agreements which are being renewed in 2006, .biz, .info and .org, are currently the subject of a public comment period, can be found at http://www.icann.org/announcements/announcement-2-28jul06.htm.
- 4. The key policy elements that have emerged from a related policy development process to enable the introduction of new top level domains
 - a. Predictability of process
 - b. Reasonable commercial terms and contract length
 - c. Public comment processes on commercial negotiations
- 5. There are several elements to renewing registry agreements that are similar to licensing arrangements in the broadcasting or telecommunications industry. The examples provided below are all consistent with pre-published procedures for service provider selection; simplified systems and pre-published contractual terms and conditions.
- The Asian Development Bank (found at http://www.adb.org/Documents/Guidelines/Procurement/default.asp?p=prc rmnt) provides a detailed handbook that sets out, for example, the Terms of Reference, the Invitation for Proposals, Evaluation of Proposals and Contract

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Negotiation.

- 7. The World Bank (found at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0, pagePK:84271~theSitePK:84266,00.html) provides similar guidance.
- 8. The OECD's "Instructions to Tenderers" (found at http://www.oecd.org/site/0,2865,en_21571361_33635822_1_1_1_1_1_1,00.html) are very similar to those used by ICANN in the sTLD 2004 process and in the Request for Proposal for the GNSO Review. In all three examples, it is evident that a prepublished, predictable and transparent processes would be consistent with best practice in other industries.
- 9. Turning now in particular to licensing renewals. The first four examples illustrate the way in which licensing is handled in four different jurisdictions. The second set of examples refers to expert materials that discuss licensing in different environments. Licensing and licensing renewal is a very broad topic that necessarily includes discussion of process, proposed terms and conditions and limitations on applicants.
- 10. The UK's Office of Communications (found at www.ofcom.co.uk) is an integrated communications services regulator that manages broadcasting, radio communications and telecommunications. Ofcom lists online all the possible licenses across the radio, broadcasting, TV and Internet industries. It sets out the terms and conditions of each of the licenses and the online system of applying for, varying or renewing a license.
- 11. The Australian Communications and Media Authority (found at www.acma.gov.au) follows a similar integrated licensing structure.
- 12. The New Zealand Commerce Commission (found at http://www.comcom.govt.nz) principally regulates competition in New Zealand. It also has regulatory responsibility for network industries such as electricity and telecommunications.
- 13. The Canadian Radio, Television and Telecommunications Commission (found at http://www.crtc.gc.ca/eng/welcome.htm) manages the licensing of all communications services in Canada. It streamlines the application process for licenses through a central processing point and provides opportunities for online applications (for both open and closed rounds of applications) to be submitted through the website. Like the regulators listed above, the CRTC also lists its decisions online and provides the opportunity for complaints to be handled electronically.
- 14. European Union member states and industries are supervised from a fair competition perspective by the European Commission (see

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http://ec.europa.eu/comm/dgs/competition/mission/) applying the EU Treaty Articles on competition. Article 81 (found at

http://ec.europa.eu/comm/competition/legislation/treaties/ec/art81_en.html⁾ and Article 82 (found at

http://ec.europa.eu/comm/competition/legislation/treaties/ec/art82_en.html) are the cornerstones around which anti-competitive conduct in the European marketplace is treated.

- 15. Article 81 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."
- 16. Article 82 defines "abuse" as "(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."
- 17. There is also a wide variety of sector specific regulation which covers pricing issues within each of the EU's areas of interest including, for example, pharmaceuticals and agricultural products.
- 18. Taskforce members may find the US Federal Trade Commissioner's plain English guide to anti-trust provisions in the US useful http://www.ftc.gov/bc/compguide/index.htm. The FTC explain their role as a "consumer protection agency with two mandates under the FTC Act: to guard the marketplace from unfair methods of competition, and to prevent unfair or deceptive acts or practices that harm consumers. These tasks often involve the analysis of complex business practices and economic issues. When the Commission succeeds in doing both its jobs, it protects consumer sovereignty -- the freedom to choose goods and services in an open marketplace at a price and quality that fit the consumer's needs -- and fosters opportunity for businesses by ensuring a level

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playing field among competitors. In pursuing its work, the FTC can file cases in both federal court and a special administrative forum."

- 19. Some other helpful sources of information about licensing and license terms and conditions include the ACCC's Model Terms and Conditions for its interconnection agreements¹. In addition, the ACCC provides a statement on assessing price modifications² for those agreements which, in practice, are negotiated by working groups of interested stakeholders not dissimilar to the model which ICANN uses to arrive at consensus policy decisions.
- 20. Singapore's Infocomm Development Agency (IDA) provides publicly available information about a range of issues around competition³, its interconnection pricing negotiations⁴ and the policy framework for price control⁵. In addition, Singapore's policy framework for price control is available on their website. IDA says that "in a fully competitive environment, market forces are more effective than regulations in providing consumers with a wide choice of services at reasonable prices. Hence, price regulation is imposed only on dominant operators that have the potential to abuse their market power and engage in anti-competitive practices. For instance, dominant operators must file the price of any telecommunication service they intend to offer with IDA and obtain IDA's prior approval before offering the service/price to end-users. While non-dominant operators need not file tariffs with IDA for prior approval, they must publish the prices, terms and conditions for their standard telecommunication services for end-users' information. Dominant operators are also subject to price control arrangements where operators are required to comply with benchmark prices set to ensure that key telecommunication services that have yet to experience full-fledged competition, but are vital to promoting the competitiveness of businesses in Singapore or have wide public impact, remain internationally competitive vis-a-vis other major financial centres. NIEs and neighbouring countries. While IDA sets the benchmarks, it does not set the commercial prices so long as the benchmarks are met."
- 21. The next section focuses on materials that examine licensing guidelines. These references are not exhaustive but do touch upon issues raised by some Taskforce

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¹ http://www.accc.gov.au/content/index.phtml/itemId/337341.

² http://www.accc.gov.au/content/index.phtml/itemId/700599/fromItemId/557546

³http://www.ida.gov.sg/idaweb/pnr/infopage.jsp?infopagecategory=codepractice:pnr&versionid=30 &infopageid=1488

⁴http://www.ida.gov.sg/idaweb/pnr/infopage.jsp?infopagecategory=interconnection:pnr&versionid= 5&infopageid=13539

⁵http://www.ida.gov.sg/idaweb/pnr/infopage.jsp?infopagecategory=competition:pnr&v ersionid=1&infopageid=I1313)

Members.

- 22. The World Bank report on mobile license renewal⁶ which says that "...a major challenge facing regulators...is the need to strike the right balance between ensuring certainty for market players and preserving flexibility of the regulatory process to accommodate the rapidly changing market, technological and policy conditions. This challenge applies across a wide range of regulatory instruments and vehicles including license renewal...".
- 23. A comparative paper⁷, again from Singapore, sets out its licensing guidelines and deals with renewal and pricing issues. The guidelines also provide, on line, a list of licensees in a similar way to that where ICANN lists registry providers.
- 24. Some Taskforce members provided suggestions about academic authors whose work may be helpful:
 - a. Dr Martin Cave, University of Warwick Business School. See in particular, *The Economics of the Internet: Infrastructure and Regulation* (found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=443442).

See a full list of publications at http://www.wbs.ac.uk/faculty/members/martin/cave.

- b. Dr Andrew Odlyzko, University of Minnesota. See in particular *Pricing* and architecture of the Internet: Historical perspectives from telecommunications and transportation (A full list of his publications can be found at http://www.dtc.umn.edu/~odlyzko/doc/networks.html).
- c. Dr Sam Paltridge and Karine Perset, OECD. See in particular *Internet Traffic Exchange: Market Developments and Measurements of Growth* (found at http://www.oecd.org/dataoecd/25/54/36462170.pdf) and *The Secondary Market for Domain Names* (found at http://www.oecd.org/dataoecd/14/45/36471569.pdf).
- d. Dr Michael Katz, Haas School of Business, University of California, Berkeley. See in particular *Your network or mine? The economics of routing rules* (found at http://faculty.haas.berkeley.edu/katz/Your%20Network%20or%20Mine%2 0posted.pdf)
- e. Professor Rob Frieden, Penn State University. See in particular Managing Internet-driven change in international telecommunications

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⁶http://wwwwds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2005/09/23/0000 16406_20050923113019/Rendered/PDF/wps3729.pdf

http://www.ida.gov.sg/idaweb/doc/download/I1300/FBO Guidelines- 14Dec2005.pdf

(found at http://www.personal.psu.edu/faculty/r/m/rmf5/)



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PDP Feb 06: Policies for Contractual Conditions

Term of Reference Three: Policy for Price Controls for Registry Services

Date: 25 September 2006

POLICY FOR PRICE CONTROLS FOR REGISTRY SERVICES

Examine whether or not there should be a policy regarding price controls, and if so, what the elements of that policy should be. (note examples of price controls include price caps, and the same pricing for all registrars)

- 1. The recently posted .BIZ, .INFO and .ORG contracts (http://www.icann.org/announcements/announcement-2-28jul06.ht) contain specific notice that price controls have been lifted for those agreements consistent with the .NET registry agreement and the proposed .COM agreement. The public consultation notice says "...following extensive consideration and discussion, each of the proposed new .BIZ, .INFO and .ORG registry agreements provide for the lifting of price controls formerly imposed on the pricing of registry services. However, in order to protect incumbent domain name registrants and allow time for planning by those in the registry and registrar communities, the form of registry-registrar agreement proposed with each of the new registry agreements requires six months advance notice by the registry operator of any price increase in registry services. This is consistent with the notice period required under the registryregistrar agreement implemented with the 2005 .NET registry agreement, and the registry-registrar agreement included with the proposed new .COM registry agreement."
- Specific provision has been made in the new agreements specifying the term of new agreements. "Term of New Agreements. The proposed .BIZ, .INFO and .ORG registry agreements provide for an initial six year term. Each of the proposed .BIZ and .INFO agreements would expire, absent renewal, at the end of December 2012, and the proposed .ORG agreement would expire at the end of June 2013, absent renewal".

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- 3. In addition, an explanation has been provided about presumptive renewal which reads "...Presumptive Renewal. The proposed new .BIZ, .INFO and .ORG registry agreements each provide for presumptive renewal, absent material and repeated breach of the agreement by the registry operator. This is consistent with each of the 2005 .NET registry agreement, and the proposed new .COM registry agreement. With respect to the terms of any subsequent agreement negotiated with the registry operators for the continued operation of the .BIZ. .INFO and .ORG registries, the proposed agreements provide that adaption [sic] of renewal terms will be via comparison to the five "most reasonably comparable" gTLDs, as compared to the "five largest gTLDs" language of the 2005 .NET agreement and the proposed new .COM agreement."
- 4. Price controls are a regular feature of many markets including those for toll roads and shipping, telecommunications services and the petroleum industry. In Australia, the Competition and Consumer Commission monitors pricing across a wide range of industries (http://www.accc.gov.au/content/index.phtml/itemId/3671) and provides advice about and compliance with pricing arrangements in the context of broader competition policy principles.
- 5. Hong Kong's OFTA (http://www.ofta.gov.hk/en/report/r-gen/95i141d.html) has an interesting comparative report on price controls in the context of the regulation of telecommunications. The report shows that identifying the objective of a price control regime and keeping a short time frame for the review of any price caps are important considerations. The report compares Australia, the United Kingdom and the United States to draw conclusions about price controls in Hong Kong which features very low regulatory barriers and limited pricing controls across the economy.
- The OECD provides many detailed reports about price controls across a variety of member countries. The *International Regulation Database* provides comprehensive statistics between 1998 and 2003 and show how price controls are used in a variety of sectors.
- 7. A new OECD report on structural separation (http://www.oecd.org/dataoecd/19/50/37318693.pdf) may be of interest to the Taskforce which could identify parallels between the registry and registrar industries and the effect of competition separation between those two industry sub-sets. For more historic background, the Competition Committee's 2004 report on access pricing in telecommunications is helpful. http://www.oecd.org/dataoecd/26/6/27767944.pdf.
- 8. The International Telecommunications Union has detailed information on the use and

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applicability of price caps and price controls, in the context of telecommunications services. In particular, the ITU-T study groups have conducted wide ranging work which can be found http://www.itu.int/ITU-T/study groups have conducted wide ranging work which can be found http://www.itu.int/ITU-T/publications/recs.html. Study Group 3 manages the ITU's work on economic issues in the global telecommunications industry (http://www.itu.int/ITU-T/studygroups/com03/index.asp) and, in particular, is focusing on work about economic and policy factors for the efficient supply of telecommunications services.

9. The APEC Telecommunications Working Group has, over many years, conducted a wide range of work on liberalizing markets and free market systems. That work has been conducted in the context of broader consideration of the World Trade Organisation's free trade agenda. The APEC TEL WG has resources on interconnection pricing; internet peering and pricing and, for broader context, stocktakes of progress towards fully liberalized markets with the APEC region. Taskforce members may find some older and more detailed reports beneficial and the full set of reports can be found at http://www.apectelwg.org/)



PDP Feb 06: Policies for Contractual Conditions

Term of Reference Five: Uses of Registry Data

Date: 25 September 2006

POLICY FOR USES OF REGISTRY DATA

Examine whether or not there should be a policy regarding the use of registry data for purposes other than for which it was collected, and if so, what the elements of that policy should be?

Registry data is available to the registry as a consequence of registry operation. Examples of registry data could include information on domain name registrants, information in domain name records, and traffic data associated with providing the DNS resolution services associated with the registry.

- 1. The GNSO's question about whether or not there should be a policy regarding the use of registry data for purposes other than that for which it was collected refers to areas that are outside the constraints of the GNSO's policy making authority which is constrained by the "picket fence" of consensus policy making. The protection of privacy of individual data resides under a variety of privacy acts in national jurisdictions. Almost without exception, individual data can only be used for the purpose for which it was collected. Registries and registrars are obliged to follow the rules of the countries in which they operate.
- 2. The following links provide some useful information:
- In Europe, the Data Protection Directive, (found at http://www.cdt.org/privacy/eudirective/EU_Directive_.html

 is clear in its intent to protect the privacy of individuals.
- 4. In the US, the *Privacy Act*, can be found at http://www.usdoj.gov/foia/privstat.htm.
- 5. In Australia, the *Privacy Act* (found at http://www.privacy.gov.au/act/privacyact/index.html) and the Australian

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Privacy Principles (http://www.privacy.gov.au/publications/ipps.html) are consistent with both the *Data Protection Directive* and the US *Privacy Act*. A further two examples are the Canadian *Privacy Act*, (found at http://www.privacy.act, (found at http://www.privacy.com.hk/) and the Hong Kong Privacy Act, (found at http://www.privacy.com.hk/)

6. The charts below show the different kinds of information displayed by different registry operators. Work within the WHOIS Taskforce and members of that Taskforce who are also in this group will have detailed knowledge of data requirements for the purposes of WHOIS discussions.

.com.au

Domain Name: google.com.au

Last Modified: 03-Feb-2005 01:10:25 UTC

Registrar ID: R00012-AR
Registrar Name: TPP Internet

Status: OKegistrant: Google INC

Registrant ID:

Registrant ROID: C2426072-AR
Registrant Contact Name: Domain Admin

Registrant Email: dns-admin@google.com

Tech ID: C2426055-AR
Tech Name: Domain Admin

Tech Email: dns-admin@google.com

Name Server: ns1.google.com
Name Server: ns2.google.com
Name Server: ns3.google.com
Name Server: ns4.google.com

co.uk

Domain name:

google.co.uk

Registrant:

Google Inc

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```
Registrant type:
   Non-UK Corporation
Registrant's address:
    2400 Bayshore Parkway
   Mountain View 94043 CA
Registrant's agent:
    eMarkmonitor Inc. t/a Markmonitor [Tag = MARKMONITOR]
    URL: http://www.markmonitor.com
Relevant dates:
    Registered on: 14-Feb-1999
    Renewal date: 14-Feb-2007
   Last updated: 18-Jan-2005
Registration status:
    Registered until renewal date.
Name servers:
    ns.google.com
   ns2.google.com
```

google.de

Domain: google.de Domain-Ace: google.de Google Inc. Descr:

1600 Amphitheatre Parkway Descr:

94043 Mountain View Descr:

Descr: US

ns1.google.com Nserver: Nserver: ns2.google.com ns3.google.com *Nserver:* ns4.google.com Nserver:

Status: connect

Changed: 2005-08-04T00:02:49+02:00

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[Admin-C]

Type: PERSON

Name: Lena Tangermann

Address: Google

Address: ABC-Strasse 19

Pcode: 20354
City: Hamburg

Country: DE

Changed: 2005-06-20T11:44:06+02:00

[Tech-C]

Type: PERSON

Name: Google Inc. Address: Google Inc.

Address: 1600 Amphitheatre Parkway

Pcode: 94043

City: Mountain View

Country: US

Phone: +1-6503300100 Fax: +1-6506188571

Email: dns-admin@google.com

Changed: 2005-05-19T18:02:06+02:00

[Zone-C]

Type: PERSON

Name: Domain Billing
Organisation: MarkMonitor

Address: PO Box 155 10400 Overland Road

Pcode: 83709
City: Boise
Country: US

Phone: +1-2083895740 Fax: +1-2083895799 Email: ccops@markmonitor.com

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Changed: 2006-04-06T17:26:24+02:00

google.org

determining the contents of a domain name registration record in the Public Interest Registry registry database. The data in this record is provided by Public Interest Registry for informational purposes only, and Public Interest Registry does not guarantee its accuracy. This service is intended only for query-based

NOTICE: Access to .ORG WHOIS information is provided to assist persons in

access. You agree that you will use this data only for lawful purposes and that, under no circumstances will you use this data to: (a) allow, enable, or otherwise

support the transmission by e-mail, telephone, or facsimile of mass unsolicited, commercial advertising or solicitations to entities other than the data recipient's own existing customers; or (b) enable high volume, automated, electronic processes that send queries or data to the systems of Registry Operator or any ICANN-Accredited Registrar, except as reasonably necessary to register domain names or modify existing registrations. All rights reserved. Public Interest Registry reserves the right to modify these terms at any time. By submitting this query, you agree to abide by this policy.

Domain ID:D2244233-LROR

Domain Name: GOOGLE.ORG

Created On:21-Oct-1998 04:00:00 UTC

Last Updated On:08-Oct-2005 02:41:52 UTC

Expiration Date:20-Oct-2012 04:00:00 UTC

Sponsoring Registrar: EmarkMonitor Inc. (R37-LROR)

Status: CLIENT DELETE PROHIBITED

Status: CLIENT UPDATE PROHIBITED

Registrant ID:mKn-1340143

Registrant Name: DNS Admin

Registrant Organization: Google Inc.

Registrant Street1:2400 E. Bayshore Pkwy

Registrant Street2:

Registrant Street3:

Registrant City: Mountain View

Registrant State/Province:CA

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```
Registrant Postal Code: 94043
Registrant Country: US
Registrant Phone: +1.6503300100
Registrant Phone Ext.:
Registrant FAX:+1.6506181499
Registrant FAX Ext.:
Registrant Email:dns-admin@google.com
Admin ID:mKn-1340142
Admin Name: DNS Admin
Admin Organization: Google Inc.
Admin Street1:2400 E. Bayshore Pkwy
Admin Street2:
Admin Street3:
Admin City: Mountain View
Admin State/Province:CA
Admin Postal Code: 94043
Admin Country: US
Admin Phone: +1.6503300100
Admin Phone Ext.:
Admin FAX:+1.6506181499
Admin FAX Ext.:
Admin Email:dns-admin@google.com
Tech ID:mKn-1340144
Tech Name: DNS Admin
Tech Organization: Google Inc.
Tech Street1:2400 E. Bayshore Pkwy
Tech Street2:
Tech Street3:
Tech City: Mountain View
Tech State/Province:CA
Tech Postal Code: 94043
```

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Tech Country: US

Tech Phone: +1.6503300100

Tech Phone Ext.:

Tech FAX:+1.6506181499

Tech FAX Ext.:

Tech Email:dns-admin@google.com

Name Server: NS2.GOOGLE.COM

Name Server: NS1.GOOGLE.COM

Name Server: NS3.GOOGLE.COM

Name Server: NS4.GOOGLE.COM

google.com

The Data in MarkMonitor.com's WHOIS database is provided by MarkMonitor.com for information purposes, and to assist persons in obtaining information about or related to a domain name registration record. MarkMonitor.com does not guarantee its accuracy. By submitting a WHOIS query, you agree that you will use this Data only for lawful purposes and that, under no circumstances will you use this Data to: (1) allow, enable, or otherwise support the transmission of mass unsolicited, commercial advertising or solicitations via e-mail (spam); or (2) enable high volume, automated, electronic processes that apply to MarkMonitor.com (or its systems). MarkMonitor.com reserves the right to modify these terms at any time. By submitting this query, you agree to abide by this policy.

Registrant:

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```
Google Inc. (DOM-258879)
   Please contact contact-admin@google.com 1600 Amphitheatre Parkway
   Mountain View CA 94043
    IJS
Domain Name: google.com
    Registrar Name: Markmonitor.com
   Registrar Whois: whois.markmonitor.com
    Registrar Homepage: http://www.markmonitor.com
Administrative Contact:
   DNS Admin (NIC-14290820) Google Inc.
    1600 Amphitheatre Parkway
   Mountain View CA 94043
    US
    dns-admin@google.com
    +1.6506234000
   Fax- +1.6506188571
Technical Contact, Zone Contact:
   DNS Admin (NIC-1340144) Google Inc.
    2400 E. Bayshore Pkwy
   Mountain View CA 94043
   US
    dns-admin@google.com
    +1.6503300100
   Fax- +1.6506181499
Created on....: 1997-Sep-15.
Expires on..... 2011-Sep-14.
Record last updated on..: 2006-May-17 11:10:55.
```

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Domain servers in listed order:

NS3.GOOGLE.COM

NS4.GOOGLE.COM

NS1.GOOGLE.COM

NS2.GOOGLE.COM

7. Information collected by a registry operator, which does not identify individuals, would be for their own use in managing network load and correctly provisioning their network and managing bulk customer data.



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Domains

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