# At-Large's Subsequent Procedures Scorecard: Objections

## CPWG SubPro Small Team

Shared on At-Large Consolidated Policy Working Group (CPWG) Call
On Wednesday, 16 September 2020, 19:00 UTC

# DISPUTE RESOLUTION

| Topic/Area: | **[32] OBJECTIONS [2.8.1]** | | Priority: | **HIGH** | Settled On: | (14.09.2020) |
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| Related: | • Community Objection criteria – definition of "community"<br>• Independent Objector – conflict of interest risk<br>• Appeal Mechanism |
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| Key Issues: | How does the Objections mechanism affect us?<br><br>• Standing, ability of ALAC, Independent Objector to file Community Objections, Limited Public Interest Objections<br>• Processes for handling objections should be transparent and clear.<br>• In order to ensure a fair process for all parties, panelists, evaluators, and Independent Objectors must be free from conflicts of interest.<br>• Costs should be reduced where feasible without sacrificing the quality of proceedings<br>• Improvements to String Confusion Objections |
| Policy Goals: | Updates to 2007 policy, as necessary (see below) |
| Assigned CCT-RT Rec's: | Rec. 35: Consider new policies to avoid potential inconsistent results in string confusion objections; in particular: ….<br><br>2) Avoiding disparities in similar disputes by ensuring that all similar cases of plural vs singular strings are examined by the same expert panelist<br><br>3) Introducing a post dispute resolution panel review mechanism |
| References: | • 14. SubPro Objections – CPWG consensus building, 2 September 2020<br><br>• 12. SubPro Objections – CPWG consensus building, 25 August 2020<br><br>• Sub_Pro Draft Final Report, 20 August 2020<br><br>• 11. SubPro Objections – CPWG consensus building, 27 July 2020<br><br>• 07. SubPro Objections – CPWG consensus building, 15 June 2020<br><br>• 05. SubPro Objections – CPWG consensus building, 15 June 2020 |

| What has SubPro PDP WG concluded? | **What is SubPro PDP WG recommending?** | Is this acceptable? If not, why so? What else needs to be done and by/with whom? |
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| 1. Re: deliberations on Objections in general <u>including those involving ALAC's ability to file Community Objections</u> | <u>Affirmation 31.1</u>: WG affirms from 2007:<br><br>• Rec #6 "Strings must not be contrary to generally accepted legal norms relating to morality and public order that are enforceable under generally accepted and internationally recognized principles of law". Egs cited – Paris Convention, UDHR<br><br>• Rec #20 "An application will be rejected if it is determined, based on public comments or otherwise, that there is substantial opposition to it from among significant established institutions of the economic sector, or cultural or language community, to which it is targeted or which it is intended to support."<br><br>• IG H "External dispute providers will give decisions on objections"<br><br>• IG P (specific to Community Objection): "The following process, definitions and guidelines refer to Rec #20<br><br>**Process**<br><br>Opposition must be objection based<br><br>Determination will be made by a DR panel constituted for the purpose<br><br>Objector must provide verifiable evidence that it is an established institution of the community<br><br>**Guidelines**<br><br>Task of DR panel is the determination of substantial opposition<br><br>a) substantial – in determining substantial, panel will assess: significant portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment | Our main concerns revolve around:<br><br>• <u>AGB text</u> – The manner in which the 2012 AGB provides for standing vs eligibility to file Community Objections leading to confusion to DRS panellists.<br><br>• More importantly, a lack of clarity or omission in policy which could effectively prevents the ALAC from filing Community Objections on account of "standing".<br><br>• By virtue of Implementation Guidance P, ALAC is an established institution for purposes of a Community Objection. The ALAC is also an Empowered Community within ICANN and is the ICANN stakeholder group charged with advocating the interests of Internet end-users. The ALAC should be equal in standing to the Independent Objector<br><br>• Any Community Objection filed by the ALAC should be determined on the merit of the reasons for the objection without regard to |

| | | b) significant portion – in determining significant portion, panel will assess balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. Panel will assess significance proportionate to the explicit or implicit targeting | whether the ALAC can invoke any community it refers to. |
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| | | c) community – community should be interpreted broadly and will include, for eg., an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted. | |
| | | d) explicitly targeting – explicitly targeting means there is a description of the intended use of the TLD in the application | |
| | | e) implicitly targeting – implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use. | |
| | | f) established institution – an institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years. | |
| | | Exceptional circumstances include but are not limited to a re-organization, merger or an inherently younger community. | |
| | | The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO. | |
| | | g) formal existence – formal existence may be demonstrated by appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organization or similar. | |
| | | h) detriment – the objector must provide sufficient evidence to allow the panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely." | |

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| • IG Q "ICANN staff will provide an auto reply to all those who submit public comments that will explain the objection procedures."<br><br>Affirmation with Modification 31.2: Rec #12 "Dispute resolution and challenge processes must be established prior to the start of the process." Consistent with IG 31.12, WG affirms Rec #12 with modification, "Dispute resolution and challenge processed must be established prior to the start of the process, details of which must be published in the Applicant Guidebook." | Yes |
| Affirmation with Modification 31.3: IG R "Once formal objections or disputes are accepted for review there will be a cooling off period to allow parties to resolve the dispute or objection before review by the panel is initiated". WG modifies this Implementation Guideline to "Once a response to the objection has been filed by the applicant(s), there may be a cooling off period for negotiation or compromise by agreement of both parties if formally submitted to the arbitration forum."<br><br>Affirmation 31.4:<br><br>• WG affirms overall approach to the Public Objection and Dispute Resolution Process described in 2012 AGB s. 3.2, subject to the recommendations below.<br><br>• WG further affirms that parties with standing should continue to be able to file formal objections with designated third-party dispute resolution providers on specific applications based on the following grounds: (i) String Confusion Objection (ii) Existing Legal Rights Objection (iii) Limited Public Interest Objection (iv) Community Objection. | No objection |
| Implementation Guidance 31.5: Where possible, costs associated with filing an objection should be reduced while maintaining the quality and integrity of the objections process. | Yes to IGs 31.5, 31.6 and 31.7 |

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| | Implementation Guidance 31.6: Info about fees charged by dispute resolution service providers in previously filed formal objections should be accessible for future review. | |
| | Implementation Guidance 31.7: Consideration should be given to whether there were barriers to filing an objection in the 2012 round, and if so, whether those barriers can and should be reduced in subsequent procedures. Specifically, WG suggests further consideration of the time required to file an objection, the expertise required, and limited awareness of the opportunity to file. | |
| 2. Re: deliberations involving the Independent Objector | Affirmation 31.8: <br><br> • Affirms role of Independent Objector (IO) in subsequent procedures, subject to changes introduced from other recs and IG below <br><br> • IO should be given opportunity to file only Community and/or Limited Public Interest objections when doing so serves best interests of the public who use the global Internet. | Yes to both Affirmation 31.8 and IG 31.9 |
| | Implementation Guidance 31.9: A mechanism should be established (eg. Standing panel of multiple IO panelists) that mitigates the possible conflict of interest issues that may arise from having a single panelist serving as the IO. | In principle, yes, although this raises further questions about the budget/ resources to be afforded to a panel of Independent Objectors as opposed to a single Independent Objector. |
| 3. Re: deliberations involving Dispute Resolution panels and panelists | Recommendation 31.10: For all types of objections, parties to a proceeding must be given opportunity to mutually agree upon a single panelist or a 3-person panel, bearing the costs accordingly. Absent agreement from parties, default is single panelist. | Yes to all Recommendations 31.10, 31.11 and IGs 13.12, 13.13 and 13.14 |
| | Recommendation 31.11: ICANN must provide transparency and clarity in objection filing and processing procedures, including resources and supplemental guidance used by DRP panelists to arrive at decision, expert panelist selection criteria and processes, and filing deadlines. | |

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| | Implementation Guidance 31.12: All criteria and/or processes to be used by panelists for the filing of, response to, and evaluation of each objection, should be included in AGB. | |
| | Implementation Guidance 31.13: Information about fees and refunds for DR processes should be readily available prior to commencement / opening of the application submission period. | |
| | Implementation Guidance 31.14: Prior to launch of application submission period, to the extent DR panelists draw on other guidance, processes and/or sources of information to assist them, such information should be made publicly available and easily found – respective website or preferably, a central location. | |
| 4. On eliminating abuse of process, and allowing Registry Voluntary Commitments | Recommendation 31.15: "Quick look" mechanism which applied only to LPI Objection, must be developed by the IRT to all objection types. It's designed to identify and eliminate frivolous and/or abusive objections. | Yes |
| | Recommendation 31.16: <br><br> • Applicants must have opportunity to amend application or add RVCs in response to concerns raised in objection. <br><br> • All these amendments and RVCs submitted after application period closes shall be considered as Application Changes – so subject to Application Change Request procedures (including public comment) per ICANN's standard procedures and timeframes. | Yes |
| | Recommendation 31.17: To extent RVCs are used to resolve an objection either (a) as a settlement between objector(s) and applicant(s) or (b) as remedy ordered by an applicable DR panelist, those RVCs must be included in the applicable Applicant RA as binding contractual commitments enforceable by ICANN through PICDRP. | Absolutely, yes. |

| 5. On String Confusion Objection | Recommendation 31.18: ICANN must reduce risk of inconsistent outcomes in String Confusion Objection Process, especially where objector seeks to object to multiple applications for the same string.<br><br>Implementation Guidance 31.19: ICANN should allow a single String Confusion Objection to be filed against all applicants for a particular string, rather than requiring a unique objection to be filed against each application. Specifically:<br><br>• An objector may file a single objection that extends to all application for an identical string<br><br>• Given that an objection encompassing several applications would require more work to process and review, the String Confusion DRSP could introduce tiered pricing structure for these sets. Each applicant for that identical string would still prepare a response to the objection.<br><br>• Same panel to review all documentation associated with the objection, each response to be reviewed on its own merits<br><br>• Panel would issue a single determination that identified which applications would be in contention. Any outcome that resulted in indirect contention would be explained as part of the panel's determination. | Yes, we support these changes needed to eliminate inconsistencies arising from 2012 round, and is consistent with CCT-RT Rec #35. |
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| Main Positions of Concern: | Our main concerns revolve around Affirmation 31.1 and Implementation Guidance P:<br><br>• AGB text – The manner in which the 2012 AGB provides for standing vs eligibility to file Community Objections is confusing, and is likely to cause confusion to a Dispute Resolution panellist determining a Community Objection filed by the ALAC. In particular, s.3.2.2 Standing to Object provides that in effect that, established institution associated with a clearly delineated community has standing to object, while s.3.2.2.4 provides that established institution associated with clearly delineated communities as eligible to file a community objection but must still prove 2 elements to qualify for standing for a community objection.<br><br>• More importantly, a lack of clarity or omission in policy could effectively prevent the ALAC from filing Community Objections on account of "standing". The action that the ALAC takes in filing a Community Objection (or a Limited Public Interest Objection, for that matter) is derived from a stringent consultative process involving all 5 Regional At-Large Organizations) and therefore is not one that the ALAC takes lightly. | |

- By virtue of Implementation Guidance P, it is clear that ALAC is an established institution for purposes of a Community Objection. The ALAC is also an Empowered Community within ICANN and is the ICANN stakeholder group charged with advising on and advocating the interests of individual Internet end-users. As such, the ALAC should be equal in standing to the Independent Objector insofar as not having to prove a link to the community invoked in its Community Objection.

- Therefore, any Community Objection filed by the ALAC should be determined on the merit of the reasons for the objection without regard to whether the ALAC can invoke any community it refers to.

An additional question which arises is in respect of the Implementation Guidance 31 19. In principle, we support the initiative to mitigate possible conflict of interest issues that may arise from having a single panelist serving as the Independent Objector. However, it raises further questions about the budget/ resources to be afforded to a panel of Independent Objectors as opposed to a single Independent Objector.