UPDATE & CONSULTATION ON
New gTLD Subsequent Procedures
Consensus Building on Recommendations

ROLE OF APPLICATION COMMENT & APPLICATION CHANGE REQUEST (v2)

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Key Issues

Role of Application Comment

- To what extent can the Application Comment process be improved?
- Who should the Application Comment System benefit?
- What is the impact of received comments on a corresponding application in respect of standard applications vs. Community-based applications?
- Should resolution of comments include allowance for application changes?

Application Change Request

- What Implementing Guidance should be provided for change requests intended to resolve (i) string contention and/or (ii) application comments: What should be allowed and how to hand such requests?

Role of Application Comment: Consensus Building

Key Issues

- To what extent can the Application Comment process be improved?

- Who should the Application Comment System benefit?

- What is the impact of received comments on a corresponding application in respect of standard applications vs. Community-based applications?

- Should resolution of comments include allowance for application changes?**

** Should one outcome of Application Comment Period (process) be to allow applicants to submit an Application Change Request to address an unfavourable comment? ** The same question could theoretically apply to address GAC Advice (i.e. via a PIC) or GAC Early Warning or even an Objection in which the objector prevails (i.e. via a PIC or RVC).

ALAC STATEMENTS have touched on:

Improvement

- Improvements needed to the Application Comment system:
  - ❑ verification of commenter's identity;
  - ❑ better filtering and/or sorting of comments to support needs of all users;
  - ❑ ability to include attachments

Evaluation

- Clarification needed in AGB on impact of public comments on application review / evaluation scoring and applicant having reasonable opportunity to respond to comments
  - ❑ Short time period post Application Comment period warranted for late comments

Fairness in CPE

- Importance for Community-based applications to not be subjected to unfair protracted comment period or one which is inadvertently extended into the CPE process.

RELATED SubPro Areas/Topics include:

- Systems
- Community Applications
- Application Change Request **

COMPETITION, CONSUMER CHOICE & TRUST (CCT) RECOMMENDATIONS

- None

SubPro PDP WG

Affirmation #1

- WG affirms Implementation Guidance C from 2007, "ICANN Will provide frequent communications with applicants and the public including comment forums."
- AGB s. 1.1.2.3, "ICANN will open a comment period (the Application Comment Period) at the time applications are publicly posted on ICANN's website … will allow time for the community to review and submit comments on posted application materials." WG affirms that community members must have the opportunity to comment through the Application Comment Period on applications submitted and comments must continue to be published online for all to review.
- When application comment might cause an evaluator to reduce scoring, ICANN must issue a Clarifying Question (CQ) to the applicant and give the applicant an opportunity to respond.

WG's Rationale
- Agree on importance for ICANN to maintain lines of communication with applicants and public through Application Comment

WG's Rationale (Cont'd)
- Agree that where application comment may impact on evaluation scoring, applicant should have opportunity to respond through CQs to ensure evaluators take into account different perspectives and information before making adjustments to a score

For At-Large Consensus Building

Impact
- Applications subject to Application Comment Period, allowing community to review and comment.
- Where evaluation scoring impacted, applicant must have opportunity to respond

Evaluation

Additional intervention
- Any concerns? What else needs to be done?

From SubPro PDP WG, not limited to recommendations, but also affirmations and implementation guidance

SubPro PDP WG

Recommendation #2

For purposes of transparency and to reduce possibility of gaming, there should be clear and accurate information available about the identity of a person commenting on an application as described in the IG below

Implementation Guidance
- System used to collect application comment should continue to require that affirmative confirmation be received for email addresses prior to use in submission of comments. ICANN org should seek to verify the identity of the person submitting comment, as far as possible.
- Each commenter should be asked whether they are employed by, are under contract with, have a financial interest in, or are submitting the comment on behalf of an applicant and to reveal such relationship.

WG's Rationale
- Recognizing that evaluation panelists perform due diligence in considering application comment, need feasible ways for ICANN Org to identify commenters for transparency, against risk of gaming.

Impact
- Seeks improvement on verification of commenter's identity – to weed out frivolous comments, conflict of interest whether perceived, potential or actual
- Especially where evaluation scoring impacted, commenter's true identity / relationship to applicant is important consideration

Improvement   Evaluation

Additional intervention
- Any concerns? What else needs to be done?

Impact of SubPro Recommendations as at 11 Apr 2020

SubPro PDP WG

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Recommendation #3

Systems supporting application comment should emphasize usability for those submitting comments and those reviewing comments submitted. This is consistent with PIRR rec. 1.3.a, "Explore implementing additional functionality that will improve the usability of the Application Comment Forum."

Implementation Guidance
- Application Comment System (ACS) should better support filtering and sorting of comments to help those reviewing comments find relevant response – eg. to search comments for substantive text within the comment itself.
- ACS should allow those submitting comments to include attachments – ICANN Org to investigate on commercially reasonable mechanisms.

WG's Rationale
- To address concerns about usability challenges with Public Comment Forum, needing ways to improve it.

Impact
- More attention paid to system to be user-friendly for submission, review, searchability of comments as well as responses to comments.

| Improvement | Evaluation |

Additional intervention
- Usability improvements should not favour applicants over reviewers.
- What else needs to be done?

SubPro PDP WG

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Recommendation #4

The New gTLD Program should be clear and transparent about the role of application comment in the evaluation of applications.

Implementation Guidance
- IRT should develop guidelines about how public comments are to be utilized or taken into account by the relevant evaluators and panels, and these guidelines should be included in the AGB.
- Must be clear to what extent different types of comments will or will not impact scoring, and where scoring is affected, to give the applicant an opportunity to respond.

WG's Rationale
- Lack of clarity in 2012 round about use of application comments in application evaluation process to be rectified – guidelines needed and to be included in AGB for greater transparency and accountability in evaluation process.

Impact
- Clarity, transparency and accountability improvements in evaluation process.

Evaluation

Additional intervention
- The guidelines developed by IRT must be guided by or subject to community input.
- What else needs to be done?

SubPro PDP WG

Recommendation #5

Applicants should have a clear, consistent, and fair opportunity to respond to the public comments on their application prior to the consideration of those comments in the evaluation process.

Implementation Guidance
- Applicants should be given a fixed amount of time to respond to the public comments on their application prior to the consideration of those comments in the evaluation process.

WG's Rationale
- WG believe evaluators should as far as possible, have full picture of the different perspectives on an application including arguments or evidence from applicant.
- If applicant proposes changes to its application in response to public comments, additional processes apply, including additional public comment period, where applicable.

Impact

Evaluation

Additional intervention
- IG should allude to allowance for reasonable time after close of public comment period to address late submissions of comments during the public comment period – eg if a comment is submitted within the last week of the public comment period.
  - ☐ Should commenters then be allowed to reply to applicant's response? And end process there? Or should commenters be made to rely on the objections process?
- What else needs to be done?

Although need to balance ability to resolve issues from comments by allowing requests for application changes

Also picked up later under "Omissions".

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Recommendation #6

ICANN must create a mechanism for third-parties to submit information related to confidential portions of the application, which may not be appropriate to submit through public comment. At a minimum, ICANN must confirm receipt and that the information is being reviewed.

WG's Rationale
- Third parties may want to submit information pertaining to confidential portions of an application also on a confidential basis – information for background screening; ICANN should allow this

Impact

Improvement

Additional intervention
- What else needs to be done?

Role of Application Comment:
New Issues & Omissions as at 11 Apr 2020

For At-Large Consensus Building

❑ 1. On whether the public comment period for applications opting for CPE should be longer than for standard applications

Fairness in CPE

WG discussed whether public comment period for Community-based applications opting for CPE should be longer than for standard applications (as was the case in 2012 round) or if the period should be equal for all applications. No agreement, therefore no recommendation.

❑ 2. On whether the community should have opportunity to comment following window for applicant's response to (original) comments
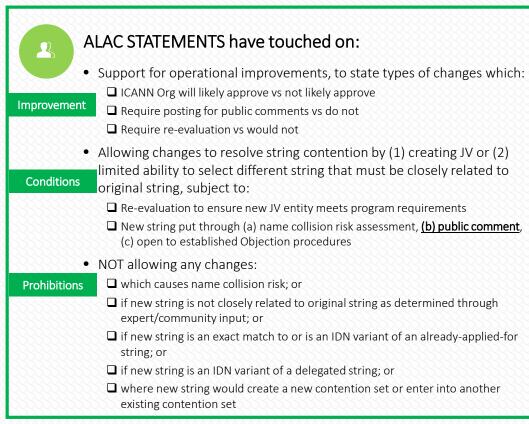
With reference to IG for Recommendation #5, WG discussed this question but did not come to a conclusion. Notes this may be an item for consideration in implementation phase.

Additional intervention
- We proposed allowance for reasonable time after close of public comment period to address late submissions of comments during the public comment period.
- Also, consider impact of comments in the Application Comment Period submitted for a Community application in contrast to letters of opposition against a Community application during CPE. Important for such applications to not have to defend against an opposition if the nature or subject matter of that opposition has been satisfactorily resolved earlier during the Application Comment process, GAC Advice or GAC Early Warning or Objection processes.
- From a practical standpoint,
  ❑ If letters of opposition were submitted as a comment during the Application Comment Period, then applicants and commenters / community could address / monitor its impact or resolution within the Application Comment Period process, and there would not be a need for such submissions as part of the CPE process; and can avoid having CPE panellists deal with letters of opposition which may have already been resolved.
  ❑ If letters of opposition were not limited to being submitted as a comment during the Application Comment Period, then a safeguard needs to be put in place to prevent CPE panellists from inappropriately taking into consideration any letters of opposition which may have already been resolved.
- What else needs to be done?

Application Change Request: Consensus Building

Key Issues

- Implementation Guidance for Change Requests intended to resolve string contention sets only
  - What should be allowed
  - How to handle such requests

ALAC STATEMENTS have touched on:

Improvement

- Support for operational improvements, to state types of changes which:
  - ❑ ICANN Org will likely approve vs not likely approve
  - ❑ Require posting for public comments vs do not
  - ❑ Require re-evaluation vs would not

Conditions

- Allowing changes to resolve string contention by (1) creating JV or (2) limited ability to select different string that must be closely related to original string, subject to:
  - ❑ Re-evaluation to ensure new JV entity meets program requirements
  - ❑ New string put through (a) name collision risk assessment, **(b) public comment**, (c) open to established Objection procedures

Prohibitions

- NOT allowing any changes:
  - ❑ which causes name collision risk; or
  - ❑ if new string is not closely related to original string as determined through expert/community input; or
  - ❑ if new string is an exact match to or is an IDN variant of an already-applied-for string; or
  - ❑ if new string is an IDN variant of a delegated string; or
  - ❑ where new string would create a new contention set or enter into another existing contention set

RELATED SubPro Areas/Topics include:

- Role of Application Comment
- Community Applications
- Registry Voluntary Commitments (RVCs)
- Private Resolution of Contention Sets

COMPETITION, CONSUMER CHOICE & TRUST (CCT) RECOMMENDATIONS

- None

SubPro PDP WG

Recommendation #1

WG supports maintaining a high-level, criteria-based change request process, as was employed in the 2012 round. **

Implementation Guidance
- ICANN org should provide guidance on both changes that will likely be approved and changes that will likely no be approved.
- ICANN Org should document the types of changes which are required to be posted for public comment and which are not required to be posted for public comment.
- Additional Registry Voluntary Commitments should require public comment.
- Community Members should have the option of being notified if an applicant submits an application change request that requires a public comment period.
- ICANN should identify in the AGB the types of changes that will require a re-evaluation – all, some parts, none.

From SubPro PDP WG, not limited to recommendations, but also affirmations and implementation guidance

*** https://newgtlds.icann.org/en/applicants/advisories/change-request-set-05Sep14-en*

WG's Rationale
- Agreed on importance to have a framework for considering and responding to change requests that is clear, consistent, fair and predictable.
- Helpful for ICANN Org to provide additional specific information to applicants about the way different types of change requests will be handled in order to increase predictability and clarity, specifically:
  - ❑ guidance on types of requests that will be accepted or rejected,
  - ❑ those that will or will not be subject to public comment, and to introduce mechanism to inform community when an application change request triggers public comment; and
  - ❑ those which or will not require evaluation.

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Impact

Improvement

Additional intervention
- Any concerns? What else needs to be done?

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Linked to Recommendation #1

The high-level, criteria-based change request process, as was employed in the 2012 round: **

1. Explanation: Is a reasonable explanation provided?

2. Evidence that original submission was in error: Are there indicia to support an assertion that the change merely corrects an error?

3. Other third parties affected: Does the change affect other third parties materially?

4. Precedents: Is the change similar to others that have already been approved? Could the change lead others to request similar changes that could affect third parties or result in undesirable effects on the program?

5. Fairness to applicants: Would allowing the change be construed as fair to the general community? Would disallowing the change be construed as unfair?

6. Materiality: Would the change affect the evaluation score or require re-evaluation of some or all of the application? Would the change affect string contention or community priority?

7. Timing: Does the timing interfere with the evaluation process in some way?

Additional intervention
- Consideration on case-by-case basis and on the merits of each case, using existing 7 criteria with 2 minor tweaks:
  - ❑ #1: Reasonable explanation – can be supplemented by letter of support from non-applicant interested stakeholder
  - ❑ #7: Timing – interference with evaluation process should carry least weight

** *https://newgtlds.icann.org/en/applicants/advisories/change-request-set-05Sep14-en*

SubPro PDP WG

Recommendation #2

- Allowing application changes to support settling of contention sets through business combinations or other forms of JV.
- In the event of such a combination or joint venture, ICANN Org may require that re-evaluation is needed to ensure that the new combined venture or entity still meets the requirements of the program. The applicant should be responsible for additional, material costs incurred by ICANN due to re-evaluation and the application could be subject to delays

WG's Rationale
- There may be benefits to supporting applicants seeking means other than an auction of last resort to resolve a contention set. In particular, WG sees merit in allowing applicants in a contention set to form a joint venture and make corresponding changes to the application, even if this may cause delays and require re-evaluation, in order to reduce need for auction of last resort.
- Note: AGB Module 6 "Terms and Conditions" – "Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application" will need to be reconsidered.

Impact
- Matches our **support for allowing changes to resolve string contention by (1) creating JV** …, subject to:
  - ❑ Re-evaluation to ensure new JV entity meets program requirements
  - ❑ Additional costs and delays due to re-evaluation should not be unreasonable.

Conditions

Additional intervention
- To restate guardrails on cost and delay being reasonable
- Any concerns? What else needs to be done?

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Omissions

❑ **1. On allowing change to applied-for string where original string is in a contention set**

WG considered public comments to Supplemental Initial Report etc to this issue. There was both support and opposition.

Support
❑ Effective measure for eliminating contention while avoiding need for auction
❑ Subject to caveats eg. (i) if new string does not create a new contention set or result in application entering into another existing contention set; and (ii) new string should be closely connected to original string

Opposition
❑ Encourage gaming, allowing applicants to cherry-pick uncontended strings, providing unfair advantage over those who followed standard application process
❑ Makes it difficult for public / ICANN community to monitor applications and raise objections where appropriate
❑ Necessitates repeat of string similarity evaluation, causing delays and disruptions to all (other) applications, impacting program timelines and costs

Additional intervention
- We supported allowing application changes to resolve string contention by limited ability to select different string that must be closely related to original string, subject to:
  ❑ Re-evaluation to ensure new JV entity meets program requirements with applicant carrying burden of any re-evaluation cost and accepting reasonable delay if need be
  ❑ New string put through (a) name collision risk assessment, (b) public comment, (c) open to established Objection procedures
  ❑ Additional costs and delays due to re-evaluation should not be unreasonable.

- But NOT allowing changes:
  ❑ Which causes name collision risk; or
  ❑ If new string is not closely related to original string as determined through expert/community input; or
  ❑ If new string is an exact match to or is an IDN variant of an already-applied-for string; or
  ❑ If new string is an IDN variant of a delegated string

- Public comment has important role of in considering change requests