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

OBJECTIONS (v09)

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Objections in SubPro: Background

- **What is the New gTLD Subsequent Procedures ("SubPro")?**
  - ❖ The set of rules and mechanisms applicable to the <u>next round</u> for New gTLDs, i.e. they DO NOT apply to legacy TLDs, ccTLDs, or delegated new gTLDs or those still unresolved from the 2012 application round
  - ❖ "An update" to the 2012 Round rules and mechanisms

- **Recap of Objections in 2012 Round**
  - ❖ 4 Objection Grounds – (1) String Confusion (2) Legal Rights (3) Limited Public Interest (4) Community; triggers dispute resolution proceedings
  - ❖ Grounds determine standing to file objection – ALAC and Independent Objector both qualify for (3) and (4)
    - ❑ (3) Limited Public Interest – open to anyone, subject to 'quick look' mechanism to weed out frivolous or abusive objections; review on the merits
    - ❑ (4) Community – open to "established institutions" with "clearly delineated communities"
  - ❖ ALAC had a stringent process, involving RALOs, for considering and approving objections to be filed, funded by ICANN
  - ❖ Independent Objector acts independently and in public interest, funded by ICANN, subject to limitation
  - ❖ DRSPs are all external third parties selected and contracted by ICANN Org

Key Issues in SubPro

Objections

- Standing, ability of ALAC, Independent Objector to file Community Objections, Limited Public Interest Objections

- Processes for handling objections should be transparent and clear.

- In order to ensure a fair process for all parties, panelists, evaluators, and Independent Objectors must be free from conflicts of interest.

- Costs should be reduced where feasible without sacrificing the quality of proceedings

- Improvements to String Confusion Objections

Objections: Consensus Building

ALAC STATEMENTS have touched on:

Process

- General aspects for Objection process – Code of Conduct & COI Guidelines, guidance for panelists & IO

Panel

- 1-or-3 person panels

IO

- Continued provision for & role of IO

ALAC

- Continued provision for & role of ALAC

Comm. Obj.

- Community Objections

String Confusion

- String Confusion Objections

* Did not comment on Legal Rights Objections

RELATED SubPro Areas/Topics include:

- RVCs and PICDRP
- Application Change Requests
- Limited Challenge / Appeal Mechanism
- String Similarity

COMPETITION, CONSUMER CHOICE & TRUST (CCT) RECOMMENDATIONS

- Rec 12:
  - ❖ Create incentives and/or eliminate current disincentives that encourage gTLD registries to meet user expectations … *re String Confusion*

Impact of SubPro Recommendations * as at 7 July 2020

SubPro PDP WG

Affirmation #1.1

- Subject to the following recommendations/implementation guidance, WG affirms the following recommendations and implementation guidance from 2007:
  - ❑ Rec #2 "Strings must not be confusingly similar to an existing top-level domain."
  - ❑ Rec #3 "Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law." Examples cited – Paris Convention, UDHR, ICCPR
  - ❑ 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". Examples cited – Paris Convention, UDHR
  - ❑ 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."
  - ❑ ==Implementation Guideline P (specific to Community Objection): "The following process, definitions and guidelines refer to Rec #20==

Affirmation #1.2 with modification

- Rec #12 from 2007 "Dispute resolution and challenge processes must be established prior to the start of the process." Consistent with Implementation Guidance , 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._"

- Implementation Guideline R from 2007 "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._"

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

Details of Implementation Guidance P – Community Objection

Process

Opposition must be objection based

Determination will be made by a DR panel constituted for the purpose

Objector must provide verifiable evidence that it is an established institution of the community

Guidelines

Task of DR panel is the determination of substantial opposition

a) substantial – in determining substantial, panel will assess: significant portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment

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

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."

Comm. Obj.

ALAC

SubPro PDP WG on <mark>Process</mark>

For At-Large Consensus Building

Affirmation #1.3

- WG affirms overall approach to the Public Objection and Dispute Resolution Process described in 2012 AGB s. 3.2, subject to the recommendations below.

- 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

Implementation Guidance
- Where possible, costs associated with filing an objection should be reduced while maintaining the quality and integrity of the objections process.

- 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.

Impact
- Generally, approach from 2012 round to be retained, with some changes
- Use of third-party DRP retained
- The 4 Objection grounds remain, to determine standing
- Issues of costs, lowering barriers including time to file, expertise required and awareness of objection filing opportunity punted to IRT

Additional intervention

<mark>Process</mark>

- <mark>Reinforce that "parties with standing" should mean that ALAC has standing and therefore none ALAC-filed Community Objection should be dismissed on grounds of "no standing"</mark>
- <mark>Any other concerns?</mark>

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Fixing ALAC's Issues with 2012 AGB Community Objection?

s. 3.2.1 Ground for Objection

"Substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted"

Eligibility vs. Standing

s. 3.2.2 Standing to Object

"Established institution associated with a clearly delineated community"

- s. 3.2.2.4
  - ❑ "Established institution associated with clearly delineated communities are <u>eligible</u> to file a community objection"
  - ❑ "To qualify for <u>standing</u> for a community objection, the objector must prove both (1) it is an established institution and (2) it has an ongoing relationship with a clearly delineated community"

- ALAC is an established institution, not required provide verifiable evidence that it is an established institution of the community (per Implementation Guidance P)
- ALAC has an ongoing relationship with At-Large via RALOs which is a clearly delineated community
- Therefore ALAC must be BOTH ELIGIBLE AND HAVE STANDING to file Community Objections
- DRSP panelists must be educated on ALAC's standing to object – there should be no dismissal on the basis of "no standing", and there must be avenue to appeal against any such determination of "no standing"

Fixing ALAC's Issues with 2012 AGB Community Objection?

RE: AGB s. 3.5.4, does it mean that in SubPro, for ALAC to succeed, it only need prove it meets THREE tests?

1. The community invoked by the objector is a clearly delineated community	2. Community opposition to the application is substantial	3. There is a strong association between the community invoked and the applied-for gTLD string	4. The application creates a likelihood of material detriment to the rights or legitimate interest of a significant portion of the community to which the string may be explicitly or implicitly targeted

Community

- ALAC is an established institution, not required provide verifiable evidence that it is an established institution of the community (per Implementation Guidance P)
- ALAC has an ongoing relationship with At-Large via RALOs which is a clearly delineated community

Substantial Opposition - within At-Large community (of end-users)

- No. of expressions of opposition relative to composition of community
- Representative nature of those expressing opposition
- Level of recognized stature/ weight among sources of opposition
- Distribution of diversity among sources of opposition – regional, subsectors, leadership, membership
- Historical defence of community in other context
- Costs incurred, other channels to convey opposition

Targeting

- Statements in application
- Other public statements by applicant
- Associations by the public

Detriment

- Nature & extent of reputation damage to community
- Evidence that applicant not acting or does not intend to act in interest of community / users – no effective institution of security protection for user interests
- Interference with core activities of community resulting from operating string
- Dependence of the community represented on DNS for its core activities
- Nature & extent of concrete or economic damage to community resulting from operating string
- Level of certainty that alleged detrimental outcomes would occur

~ New gTLD Review Group

Impact of SubPro Recommendations as at 7 July 2020

SubPro PDP WG on <mark>Independent Objector</mark>

For At-Large Consensus Building

Affirmation #1.4

- WG affirms role of Independent Objector (IO) in subsequent procedures, subject to changes introduced from other recommendations and Implementation Guidance below.

- WG further affirms that IO should be given opportunity to file Community and/or LPI objections when doing so serves best interest of the public who use the global Internet.

Implementation Guidance
- 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.

Impact
- Role of Independent Objector to continue – standing panel of multiple IOs to handle conflict of interest risk
- IO can file Community and/or LPI objections

IO

Additional intervention
- <mark>Any concerns?</mark>

SubPro WG Rationale for Affirmation #1 & IG

- WG believes that the ground for objections and the general approach taken in the 2012 round to objections processes continues to be appropriate in subsequent procedures, and therefore affirms relevant recommendations and implementation guidelines from 2007, as well as the relevant sections of the 2012 Applicant Guidebook, subject to the recommendations and implementation guidance included in this report.

- It expressed concerns about the effectiveness and execution of the Independent Objector (IO), but believes that the role should be maintained, with similar rules and procedures in place, though it notes that stricter adherence to constraints may improve effectiveness.
- WG agreed that there may be conflict of interest issues with relying on a single panelist to serve in the IO role. While it did not reach agreement on the specific mechanism to mitigate conflicts of interest for the IO, it nevertheless recognized the need for a mechanism.

- WG modified Recommendation 12 from 2007 to clarify that the details of dispute resolution and challenge processes must be published in the AGB. This modification updates the recommendation to be consistent with the Implementation Guidance in this section of the Final Report.
- WG modified Implementation Guideline R from 2007 to indicate that a cooling off period for negotiation or compromise should only apply if both parties to an objection agree and request such a period. It does not believe that it is necessary or appropriate to universally mandate a cooling off period, which was required in the 2012 round.

SubPro PDP WG on <mark>Panel</mark>

For At-Large Consensus Building

Recommendation #3

- 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 to have 3-person panel, default is single panelist.

Recommendation #4

- ICANN must provide transparency and clarity in objection filing and processing procedures, including the resources and supplemental guidance used by DRP panelists to arrive at decision, expert panelist selection criteria and processes, and filing deadlines.

Implementation Guidance
- 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.
- Information about fees and refunds for DRP should be readily available prior to commencement / opening of the application submission period.
- 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 central location.

Impact
- Parties can choose 1 panelist or 3-person panel, but default is single panelist

  Panel

- Transparency, clarity in filing, processing procedures

Additional intervention
- <mark>Any concerns?</mark>

SubPro WG Rationale for Recommendations #3 & #4

Recommendation #3

- WG acknowledges that there are potential costs and benefits to dispute resolution provider panels composed of one or three expert panelist(s). Panels containing three panelists may be more reliable and less likely to result in the inconsistent application of objection criteria, procedures, or outcomes compared to panels composed of a single expert.
- At the same time, these larger panels are more costly. WG believes that parties to the proceeding are in the best position to weigh the potential tradeoffs between cost and consistency and make this decision, and therefore recommends that they should collectively have the option to mutually agree whether the objection is considered by a one or three expert panel, bearing the costs accordingly.

Recommendation #4

- WG put forward recommendations and implementation guidance aimed at increasing transparency and clarity in the objection filing and processing procedures.
- WG believes that by publishing all objections criteria and detailed processes, along with any supplemental information from the Dispute Resolution Service Providers, ICANN will provide greater transparency and clarity in the objections processes
- WG believes this is critical to ensuring that parties to objections have equal access to procedural information and clearer expectations on what may be required of them. In doing so, it may also help to ensure that outcomes of objections decisions are as consistent as possible in subsequent application rounds.
- Also in service of clarity and transparency, WG provided Implementation Guidance regarding the publication of information about fees and refunds for the dispute resolution processes, as well as the publication of any guidance, processes and/or sources of information used by Dispute Resolution Service Providers to assist them with making decisions.

SubPro PDP WG on <mark>Eliminating Abuse of Process, Allowing RVCs</mark>

For At-Large Consensus Building

Recommendation #5

- "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.

Recommendation #6

- Applicants must have opportunity to amend application or add RVCs in response to concerns raised in objection.
- 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) in accordance with ICANN's standard procedures and timeframes.

Implementation Guidance

- 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.

Impact

- Extending "quick look" mechanism to all objections

- Amendments to application or addition of RVCs for resolving concerns raised in objection – subject to Application Change Request procedures
- RVCs included in RA as binding contractual commitments enforceable through PICDRP

Additional intervention

- <mark>Any concerns?</mark>

SubPro WG Rationale for Recommendations #5 & #6

Recommendation #5

- WG believes that the "quick look" mechanism was an important tool in the 2012 application round to identify frivolous objections quickly at the beginning of the Limited Public Interest Objection process, and thereby avoid unnecessary delays and costs to the applicant.

- WG believes that the "quick look" mechanism can provide similar benefits for other objection types, and therefore recommends extending the mechanism to all objections processes in subsequent rounds.

Recommendation #6

- WG agreed that it is important for applicants to have an opportunity to make commitments or change an application in response to concerns that have been raised through the objections process.

- WG believes that by providing greater flexibility to applicants, the process may allow mutually satisfactory outcomes, and if successful, allow the application to move forward. Mitigating concerns in objections in this manner may also reduce the number of objections that require formal proceedings to reach resolution.

- In service of accountability, these RVCs should be included in the applicable Applicant(s) Registry Agreement(s) as binding contractual commitments enforceable by ICANN through the PICDRP.

SubPro PDP WG on **String Confusion Objection**

Recommendation #7

- 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.

Implementation Guidance
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:
- An objector may file a single objection that extends to all application for an identical string
- 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.
- Same panel to review all documentation associated with the objection, each response to be reviewed on its own merits
- 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.

Impact
- Seeks to resolve key issues arising from String Confusion Objections from 2012 round

String Confusion

Additional intervention
- **Any concerns?**

SubPro WG Rationale for Recommendation #7 & IG

Recommendation #7

- Following the 2012 round, concerns were raised about perceived inconsistent outcomes of String Confusion Objections.

- WG reviewed key developments regarding the String Confusion Objection in the 2012 round, including publication of the Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections and the New gTLD Program Committee (NGPC) resolution identifying three String Confusion Objection Expert Determinations as not being in the best interest of the New gTLD Program and the Internet community.

- WG also considered concerns regarding cases of singular and plural versions of the same string. It reviewed relevant documentation, including the NGPC resolution, determining that no changes were needed to the existing mechanisms in the AGB to address potential consumer confusion resulting from allowing singular and plural versions of the same string.

- Noting that some community members remain concerned that there is not sufficient guidance on this issue, WG put forward a recommendation and Implementation Guidance that seeks to reduce the risk of inconsistent outcomes by allowing an objector to file a single objection that would extend to all applications for an identical string.