



UPDATE & CONSULTATION ON
New gTLD Subsequent Procedures

ACCOUNTABILITY MECHANISM (APPEALS)

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5 October 2019

SNAPSHOT OF KEY ELEMENTS

Accountability Mechanism (Appeals)



ALAC STATEMENTS support or have touched on:

- New substantive appeal mechanism specific to New gTLD Program
- Improvement to the post-delegation DRP - need for accessible, expeditious, **limited appeals process** which considers elements of accessibility, fairness, filtering of frivolous appeals, dealing with COI
- Standing to appeal
- Remedies
- Arbiter



RELATED SubPro Areas/Topics include:

Substantive vs Procedural appeals

- Objections – incl. distinction b/n Community Objections and opposition in CPE
- Application Evaluation
- Bylaw-related procedural appeals



COMPETITION, CONSUMER CHOICE & TRUST (CCT) RECOMMENDATIONS

- Rec. 35: SubPro PDP should consider adopting new policies to avoid potential for inconsistent results in string confusion objections. In particular, consider
 - ❖ 3) Introducing a post dispute resolution panel review mechanism.

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at 5 Oct 2019

- SubPro WG deliberations on public comments to Initial Report on topic of Accountability Mechanisms (i.e. Appeals) took on 1 & 3 Oct 2019 and will continue/likely to end on next call on Mon 7 Oct 2019 at 15:00 UTC.
- Applicable 2007 policy
 - Rec #12 “Dispute resolution and challenge processes must be established prior to the start of the process.”
 - Implementation Guideline 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.”
- Other Policy goals
 - Dispute resolution and challenge processes should be transparent, fair and cost effective

Special Note to CPWG

- *When we speak of “Accountability Mechanisms”, we mean per Bylaws, Request for Reconsideration, Independent Review Process, Ombudsman*
- *Within SubPro context, we are looking at rights and forms of appeals to decisions made during evaluation, objections either by ICANN Org/Board, external evaluators, external third party DRSPs, as well as post-delegation dispute resolution procedures.*

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at 22 Aug 2019

In General

ALAC STATEMENT support:

- 3 Oct 2018
 - ❖ New substantive appeal mechanism specific to New gTLD Program for looking beyond ICANN violations of Bylaws to include whether (original) action was in line with AGB.
 - ❖ Process must be transparent, panellist, evaluators, IO free of COI
 - ❖ Post-delegation DRP: call for clearer, more detailed, better-defined guidance on scope and adjudication process of proceedings, role of parties involved prior to initiation of DR procedures; single or 3-person panel subject to agreement between parties to dispute
- Departure from 30 May 2017 CC2 comment
 - ❖ Existing accountability mechanisms (RfR, IRP, Ombudsman) adequate avenues to address issues in New gTLD Program. #
 - ❖ If appeals allowed, then only for error of fact that ICANN had available at the time.

SUBPRO WG Deliberations:

High Level Agreement:

- If a new substantive appeal mechanism is established, the process must be transparent and ensure that panelists, evaluators, and independent objectors are free from conflicts of interest – *what is the applicable standard?*
- New substantive appeal mechanism must not be a substitute for, nor act as a replacement of, the accountability mechanisms in the ICANN Bylaws - namely, those looking into whether ICANN (staff or Board) violated the Bylaws by making (or not making) a certain decision.
- Post-delegation DRP: The parties to a proceeding should be given the opportunity to agree upon a single panelist or a three-person panel - bearing the costs accordingly.
- Post-delegation DRP: Clearer, more detailed, and better-defined guidance on scope and adjudication process of proceedings and the role of all parties must be available to participants and panelists prior to the initiation of any post-delegation DRP

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at Oct 2019

In General – Cont'd

ALAC STATEMENT supports:

- Limited Appeals Process:
 - ❖ Should cover both substantive and procedural appeals, since can be difficult to distinguish strict rights to either types
 - ❖ Also consistent with outcomes of CCWG on Enhancing ICANN Accountability which led to similar changes to ICANN Bylaws
 - ❖ **# Should apply to all decisions made by ICANN, evaluators, DRSPs in connection to program - from 2012 round appeal mechanisms were clearly insufficient to properly facilitate challenges to decisions on evaluations (e.g. ASP), objections and contention resolution (i.e. CPE)**

SUBPRO WG Deliberations:

Outstanding Items / New Ideas:

- In general, no opposition to prelim recommendation to establish a new substantive appeal mechanism specific to the New gTLD Program. But what form, how?
- **Recognised CCT-RT Rec #35 ... 3) Introducing a post dispute resolution panel review mechanism**
- How would it differ to ICANN's existing Accountability Mechanisms? When would either apply?

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at 5 Oct 2019

Elements of New Appeal Mechanism

What are the types of actions or inactions that should be subject to this new limited appeals process?

ALAC STATEMENT supports:

- Limited Appeals Process:
 - ❖ Should cover both substantive and procedural appeals, since can be difficult to distinguish strict rights to either types
 - ❖ Should apply to all decisions made by ICANN, evaluators, DRSPs in connection to program - from 2012 round appeal mechanisms were clearly insufficient to properly facilitate challenges to decisions on evaluations (e.g. ASP), objections and contention resolution (i.e. CPE)
 - ❖ Eg: decision-maker not providing justification/reason, weak reason; inactions, delays in decision/action leading to prejudice

SUBPRO WG Deliberations:

Comments range in support of Limited Appeals Process:

- Just substantive appeals – misinterpretations of application text, unsupported claims/assumptions by evaluators for withholding points, unsupported claims/misuse of facts, decisions by ICANN Org, Board, evaluators, dispute panels
- narrow appeals process for all applicants where parties identify either a reasonable inconsistency in outcome or a specific argument as to why the panel failed to apply the proper standard.
- decisions of ICANN, evaluators, and dispute panels by parties directly impacted by the decision
- Substantive appeal for redress of broad spectrum decisions e.g. qualification as a Community Applicant, Objections, CPE

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at 5 Oct 2019

Elements of New Appeal Mechanism (Cont'd)

Who should have standing to file an appeal? Does this depend on the particular action or inaction?

What measures can be employed to ensure that frivolous appeals are not filed? What would be considered a frivolous appeal?

ALAC STATEMENT states:

- Limited Appeals Process available to any party which is directly aggrieved by an event of action or inaction. The appeal is likely to depend on the particular action or inaction
- Conduct an administrative check to establish that filing fee is paid and the appeal contains at least one ground of appeal

SUBPRO WG Deliberations:

Comments:

- Generally, parties directly impacted by the decision has standing:
 - Directly impacted parties, which may include an applicant not directly a party to the original decision (for example because they are in a contention set)
 - The losing party in an objection process who can identify either a reasonable inconsistency in outcome (as compared to similarly situated objections/parties) or a specific argument as to why the panel failed to apply the proper standard
 - Should ACs have standing to file an appeal? If not, why not?**
- To stem frivolous appeals:
 - Apply quick look mechanism
 - Incorporate a summary judgment process

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at 5 Oct 2019

Elements of New Appeal Mechanism (Cont'd)

If there is an appeals process, how can we ensure that we do not have a system which allows multiple appeals?

Who should bear the costs of an appeal?

ALAC STATEMENT states:

- Clearly lay out appeals process paths and include a stipulation that disallows multiple appeals
- (Does not object to “loser pays” model but) the costs of an appeal should be fixed in advance and all parties involved should be given prior notice of the same.
- *Could also allow consolidation of related appeals to control costs*

SUBPRO WG Deliberations:

Other Comments:

- Use an approach comparable to a court of final appeal, for example by designating that there is only one round of appeal on any decision.
- Limit the number of appeals where appropriate to ensure that appeals are handled as efficiently as possible -- have a "final decision" rule so that appeals are only available based on a final decision rather than allowing parties "interlocutory" appeals as the process progresses
- General support for “loser pays” model

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at 5 Oct 2019

Elements of New Appeal Mechanism (Cont'd)

What are the possible remedies for a successful appellant?

Who will be the arbiter of such an appeal?

ALAC STATEMENT stated/suggested:

- Remedy depends on the nature of the appeal
- Board Accountability Mechanisms Committee could be arbiter, supported by a subject matter expert if need be

SUBPRO WG Deliberations:

Other suggestions on remedies:

- Remedy to be required to be included in written appeal.
- Reinstatement of an otherwise disqualified application
- Removal from contention set if decision led to such placement
- Generally the appropriate remedy would likely be the reversal of the appealed decision
- General support for “loser pays” model

Other suggestions on arbiter:

- Standing panel populated with individuals experienced in appellant case proceedings / Independent organization with sufficient expertise
- Independent third-party dispute resolution provider, but different to original decision-maker

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at 5 Oct 2019

Elements of New Appeal Mechanism (Cont'd)

In utilizing a limited appeal process, what should be the impact, if any, on an applicant's ability to pursue any accountability mechanisms made available in the ICANN Bylaws?

ALAC STATEMENT suggested:

- If the Board Accountability Mechanisms Committee is made the arbiter of a limited appeals process, then accountability mechanisms made available in the ICANN Bylaws would automatically be incorporated

SUBPRO WG Deliberations:

Other comments:

- ❑ Use of appeals process should not limit access to accountability mechanisms. Reinstatement of an otherwise disqualified application
- ❑ Unsuccessful appeal would substantially reduce the likelihood of successfully pursuing these other mechanisms.