

Statement of the Non-Commercial Stakeholders Group on the Supplemental Initial Report on the New gTLD Subsequent Procedures Policy Development Process (Overarching Issues & Work Tracks 1-4)¹

1. The Non-Commercial Stakeholders Group (NCSG) welcomes the opportunity to comment on the Supplemental Initial Report on the New gTLD Subsequent Procedures Policy Development Process Working Group that was published by ICANN org on 30 October 2018. We participated in earlier community consultations on this topic by submitting a comprehensive public comment² to the (a) Community Comment 2 (CC2) questionnaire developed by ICANN org to assess possible changes or additions needed to the existing new gTLD policy recommendations back in May 2017 and also (b) the ICANN org questionnaire presented at the [Initial Report on the New gTLD Subsequent Procedures Policy Development Process](#) back in September 2018.³
2. Our comments today are consistent with the comments presented two months ago. To summarize, the NCSG continues to support the introduction of new generic top-level domain names for two reasons. Firstly, it represents an answer to a long-standing demand from potential applicants for additional new top-level domains. Secondly, it aids consumer choice through the potential to promote competition in the provision of registry services, market differentiation, and geographical and service-provider diversity. These are all factors which should be taken into consideration by the ICANN community.
3. Having said that, we would like to highlight several points about the Supplemental Report.

Auctions: Mechanism of Last Resort

4. With regards to question 2.1.e.1 - whether auctions of last resort are inherently unfair and should be restricted or modified - the NCSG believes that auctions are a fair and traditional method of distributing valuable items, such as spectrum and gTLDs, among equally positioned bidders. In this case, the gTLD applicants 'going to auction' will all have passed the operational, technical, and financial evaluations. As between the other applicants, they are equally positioned.
5. Further, auctions ask equally-situated applicants to pay the value of the resource they are seeking. Auction participants will bid what they think the gTLD is worth — the applicant gets a contested gTLD at a fair price (they bid it) and the Community benefits with funds that provide for other programs and projects. Again, among equally-situated applicants, this is a fair and equitable way to allocate resources — and one practiced in many different fields, including telecommunications.

¹ <https://www.icann.org/public-comments/new-gtld-subsequent-procedures-supp-initial-2018-10-30-en>

² NCSG Contribution to the New Subsequent Procedures PDP Community Comment 2: <https://www.ncsc.org/wp-content/uploads/2017/05/NCSGproposedCommentonCC2.pdf>

³ See Questionnaire/Public Comment Response from the Non-Commercial Stakeholders Group: https://docs.google.com/document/d/1SxCa4cn-NEiS_tea-jUP02DSG6IEzf_O4_MBPLUtxZs/edit

6. In the article “Cap-and-Trade: Why Auctions are Better than Give-Aways,” Deborah Lambe, Senior Policy Associate, UC Berkeley School of Law, summarizes the economic and fairness arguments for auctions⁴:

(a) “Auctions are fair because they avoid windfall profits. The free allocation of allowances hands over valuable rights to lucky recipients at the expense of consumers and new entrants. Auctions let new entrants compete on the same playing field as older firms.

(b) “Auctions allocate efficiently. Auctions put the allowances at the outset in the hands of the party that will pay most for them. And auctions make later trading more efficient, too, by creating what economists call a “price signal”—an indication of what should constitute a fair price.

(c) “Auctions are transparent. They make apparent to the public and to prospective purchasers the value of the allowances being distributed, and they help expose any hoarding by recipients.”

7. Moving on to question 2.1.e.2: *Should other aspects (e.g., non-financial) be introduced to make auctions of last resort more “fair”? (...)*. Initially, we would like to note that weighing bids is a financial incentive. Yes, providing measures, both financial and non-financial, to make auctions of last resort ‘more winnable’ by applicants from the Global South and those serving underserved groups in other areas would absolutely support important principles and community goals.

8. The NCSG agrees with the introduction of new aspects in order to make auctions of last resort more “fair”. Weighting and other handicap mechanism should protect not only applicants from the Global South, but underserved groups, communities and regions across the world, including Native(US) tribes and those serving minority groups. We note that “handicapping” larger players in auctions is not a new idea. The US Federal Communications Commission ensured that a major spectrum auction in 2014 handicapped the major players and ensured that smaller ones would win spectrum to serve rural areas and underserved communities. In passing this run, the FCC Chairman stated:

“What this rule does is prevent those with current low-band spectrum from monopolizing the market in the auction by assuring that some spectrum will be available for those with insufficient amounts of spectrum to serve rural areas and penetrate buildings,” explained FCC Chairman Tom Wheeler. (FCC Votes to Handicap Larger Carriers in Upcoming Spectrum Auction, <https://www.technobuffalo.com/2014/05/15/fcc-votes-to-handicap-larger-carriers-in-upcoming-spectrum-auction/>)

9. On the question about what other measures should be considered by the Working Group to enhance “fairness” (question 2.1.e.3), we advise that the Working Group should consult with auction specialists. This is clearly a matter that was discussed and deliberated by experts in the

⁴ <http://legal-planet.org/2012/11/16/cap-and-trade-why-auctions-are-better-than-give-aways/>

field. In all events, weighting Global South and other underserved community bidders affirmatively is a good start.

10. Regarding the possible elimination and replacement of auctions of last resort with a comparative evaluation process (question 2.1.e.4), we would like to note that in other sectors, such as US radio and television broadcasting, comparative evaluations have been eliminated as time-consuming, expensive, and difficult. It is completely fair for the ICANN system to decide to prioritize community applicants, minority-supported applicants, Global South applicants, and other applicants of underserved regions. If we want to bring those applications ‘to the top of the stack’ and grant them first, that would be a fair and legitimate method of evaluation and treatment — and one we would support. However, among equally-situated applicants, e.g., those passing the technical, operational, and financial criteria (and not otherwise falling into an underserved category), auctions remain the best method of allocation for the reasons set out above — they are fair, efficient, transparent — and relative to comparative evaluations, they are inexpensive.
11. On the possible means of avoiding the mechanism of becoming a way of deep-pocketed applicant to secure all strings within a given market, present in question 2.1.e.5, the NCSG agrees with the potential solution raised within the Working Group. Limiting how many auctions an applicant may participate may well create more opportunity for newcomers and underserved communities in future rounds of auctions.

Private Resolution of Contention Sets (including Private Auctions)

2.2.e.1: Do you believe private resolutions should be continued in the future? If so, should the funds be distributed amongst the remaining applicants within the auction or in some other method i.e. charity, ICANN, etc? If so, what methods are most appropriate?

12. Moving on to the topic of Private Resolutions, and our considerations regarding the continuation of the mechanism, found in question 2.2.e.1, the NCSG believes that private auctions should not be continued in the future. As noted in the Subsequent Procedures Initial Report (SPIR), private auctions were not envisioned in New gTLD Applicant Guidebook used for the 2012 application round. It is absolutely true, as the SPIR notes, that “hundreds of millions of dollars that might otherwise have been put to use for the public benefit if such auctions were held by ICANN as auctions of last resort,” were pocketed by private companies. We see no reason why applicants should make money for not getting a gTLD. Also important to note that, in response to question 2.2.e.2, at the present moment we do not envision any sort of private auction to be fair for any type of gTLD.

2.2.e.3: Do you agree with many Working Group members who believe that prohibitions in the Applicant Guidebook, Terms & Conditions, and in the Registry Agreement are the best way to prevent private resolutions in the future. In other words, participation in a private resolution, including private auction, where applicants may profit from withdrawing their applications would result in a cancellation of your application (if discovered during the application process) or forfeiture of its TLD (if it is discovered after the TLD is awarded). Do you agree?

Do you believe other suggested mechanisms (e.g., increasing application fees), may be more effective, or could be used in tandem?

13. Question 2.2.e.3 is too broad and far-reaching. As stated in paragraph 12 above, NCSG agrees with those in the SubPro WG who state that it should be against the future applicant guidebook rules to hold private auctions in which winners pay their fees not to ICANN (for the benefit of the Internet Community), but to other gTLD applicants.

We are confused why increasing application fees is even being offered as a more effective option. Application fees and auction fees are two entirely different things. Auction fees are a way to resolve contentions (and as we have noted, ICANN auctions do that in a fair way with direct benefit for the Community). Application fees (as proposed by the SubPro WG, and as NCSG agrees) cover the approximate cost of reviewing new gTLD applications (including technical, operational and financial fitness to be a registry). Auction fees and application fees are apples and oranges and not matters to be considered at the time -- they address entirely different issues and concerns.

Further, NCSG does not agree with increasing application fees above cost (including for this very odd notion that it would have some ameliorating factor in contention sets). We oppose any artificial increases in application fees as unfair, including to the Global South and underserved communities (who are often far less wealthy).

Regarding other forms of private resolution (by definition designed to enrich the applicant in some way), the question posed by the report mixes the concepts of private auctions with other forms of private resolution (not using auctions), such as mutual agreement. There may be some private resolutions that are appropriate, e.g., where a large applicant agrees to work with a Global South applicant or applicant from another underserved community. There may be private resolutions that are entirely win-wins. These should be taken under consideration.

14. Question 2.2.e.4 asks *if we believe that private resolution overall are potentially problematic and whether there is any practical way to prevent private resolution that allows losing applicants to receive a financial benefit*. There may be some private resolutions that are appropriate, e.g., where a large applicant agrees to work with a Global South applicant or applicant from another underserved community. There may be private resolutions that are entirely win-wins and such models should be taken under consideration. In all events, private resolutions should be open and transparent — and their terms and conditions shared with the community (in order to prevent private auctions which enrich only the losing applicants and not the ICANN and Internet Communities). The need for more transparent and accountable private resolutions and the possibility of making them more sensible to applicants from underserved areas are also answers to question 2.2.e.5.
15. Increasing application fees in order to deter applicants from applying for TLDs (question 2.2.e.6.) should not be done. While this might seem a feasible solution to the private resolutions problem, at the same time higher fees would risk losing applications from underserved regions. Therefore we believe that there should be a solution for avoiding such practice without adopting a solution that would be prejudicial to the diversity of applicants.

All auctions must be open and go through ICANN. It's a simple rule and easy, clear, fair, and enforceable solution. Any private auctions result in the forfeiture of all applications by all involved. Raising fees so that only the largest companies can apply serves no meaningful goal.

Role of Application

2.3.e.1: The Working Group has noted that while there was a cutoff for application comments to be considered by evaluators, the cutoff for Community Priority Evaluation was far later in the process, allowing for a much longer period of time for comments to be received for this evaluation element. The longer period of time allowed was due to the timing of CPE (i.e., only after program elements like Initial Evaluation, Extended Evaluation, and objections conclude). Is this, or other factors, valid reasoning and/or fair to have the comment period for CPE extend longer than for Initial Evaluation? Do you believe it makes sense to shorten this particular application comment period, perhaps just having it run in parallel to the Initial Evaluation comment period?

16. With regards to the Community Priority Evaluation (question 2.3.e.1), the NCSG finds that CPE is a useful evaluation mechanism and we do not support the idea of shortening its period. Ideally, the time frame would be long enough to allow non-commercial organisations to make their observations and, thereby, broadening the pool of commercial interest inputs.

2.3.e.2: In the 2012 round, applicants were given the opportunity through Clarifying Questions to respond to comments that might impact scoring. From one perspective, this may have reduced the incentive for applicants to respond to all input received through the public forum, including comments that may be perceived as negative. Do you consider this an issue that needs to be addressed? If so, what measures do you propose in response to this problem?

17. The NCSG believes that if applicants are allowed to respond to comment, commenters should be allowed another round of comments (question 2.3.e.2). As noted in the Deliberation, some comments are frivolous, but others are quite serious. They are raising key comments and concerns from the public and those impacted by the nature of the gTLD (open, restricted, etc). "Clarifying Questions" may or may not be sufficient to address concerns of a public seeking to understand what lawyers are including in a gTLD application. If the applicant responds, the public must be allowed to respond as well. Otherwise, false, misleading, or incorrect information may be provided by an applicant in response to legitimate concerns and questions raised by commenters.

2.3.e.3: If there is a application comment period prior to evaluations, should applicants be given a certain amount of time to respond to the public comments prior to the consideration of those comments. For example, if there is a 60-day public comment period, should an additional time period of 7-10 days be added solely for the purpose of providing an opportunity for applicants to respond to the comments if they so choose?

18. Wrapping up the 'Role of Application' section of the supplemental report, question 2.3.e.3 comments on the possibilities of (a) allowing an application comment period prior to evaluations, and (b) Applicants be given a certain amount of time to respond to the public

comments prior to the consideration of those comments. The NCSG agrees that applicants should be given a short period of time to respond to comments. On the length and purpose of the period, we would like to note that applicants should indeed respond to more relevant comments and be allowed to include attachments. Additionally, this timeframe for applicant response should not be longer than 10 days - to be included in the public comment period. Last but not least, the broader community should be allowed to respond, critique and comment on the applicant's response. It is very important to have this public response period, following applicant's and something past experience shows it is critical for the future applicant guidebook to include.

Change Requests

19. On the subject of changes to applications, the NCSG believes it should not include changes to the gTLD string itself. On the hypothesis of a string contention in which those responsible for the string contention objection wins, we support the withdrawal of the other applicant as a fair and reasonable method of handling the conflict. This is exactly what was done in the 2012 round. What the question is suggesting here, if we read it correctly, is going to create a very difficult situation for applicant and an almost impossible one for the public and the ICANN Community to monitor. We note and have included below the long list of concerns raised by the SubPro WG members below in the SPIRS. At the outset, the changing of strings mid-way into evaluation will cause confusion and delay. For example, if there are eleven applicants for .CLOUD, and the applicants all agree, then one can be .CLOUDY, and one can be .CLOUD1, and one can be .iCLOUD, and one can be .CLOUDS, etc. No, such an outcome is not fair, not reasonable, not envisioned by the rules, and not a valid way of proceeding. It will require re-evaluation, re-commenting, another round for objections, and a thoroughly difficult situation for the applicants to handle as well as the public and Community to handle and when a gTLD string variation is rejected, the entire process will start again. This type of contention should go to open auction. To do otherwise, is to completely skirt the rules, to create turbulence in the rounds (and to litter the DNS with confusion).
20. With regards to question 2.1.e.1.1, numerous changes of applications might be fair and reasonable, especially those in response to comments from regions, groups and the public to be served by these new gTLDs. In our opinion, many types of business model and other changes, provided they are fairly, openly, and transparently shared with the community, and the community is given a full and fair opportunity to comment and even to disagree and dissent, is fair. Prohibiting business model and other changes stifles innovation in the domain name system. But not string changes to the gTLD — once a gTLD string is chosen, it is fixed. That is the way it was in Round 1, and there is no evidence that it does not work. Further, allowing changes to the string of the gTLD itself will create massive problems of gaming and confusion, as discussed above.
21. However, other forms of changes, e.g., to the application's public sections themselves, are fine and such suggested types of changes pose more fairness towards the applicants, as they allow for feasible alternatives to be found in concern and objections, without necessarily leading to complete withdrawal of an application by one of the parties. If approved, they would create a kind of compromise solution for the parties, where even if not getting the initially targeted string, the chances

of not being left behind the process until the next round opens (which, as the practice shows might take years) are getting much higher. Such change must all, of course, be put on public notice, and we recommend they do so with a note from the Applicant summarizing the changes (to call attention to the public including the ICANN Community), and limiting their changes to those addressed in the summary letter. This will save time in the review of changes for the public and community who are trying to watch closely and serve the important role of monitors in this process.

22. We similarly believe that competing applicants creating a joint venture may be a more transparent and equitable alternative to auction proceedings. The suggested types of changes make the process of getting a gTLD accessible and affordable not only for big corporations and well-known brands, but also for smaller companies and communities. We note that, should the changes be extensive, and/or involve parties not already part of the process, the applicant may need to pay some additional evaluation fees (for a re-review under the changed circumstances). The SubPro WG must establish clear criteria for a) what changes are allowed to the application, b) what changes are not allowed to the application, c) what changes require additional evaluation fees, and d) importantly, how all materials changes will be fully and fairly reviewed by the public and the ICANN Community (to ensure that changes are not made to bypass the public review process).
23. At the same time, opening the opportunity for using application changes would help to diversify the pool of new gTLDs, and as a result of new registries within the same application round, and without creating any unnecessary delays. In case of joint venture creation, the Implementation Guidance refers to re-evaluation that might lead to delays. We want to point out here that any mentioning for any delay should be defined by time frame, not left open and undefined, which creates the situation of uncertainty for the applicants. Material costs, at least the range, incurred by ICANN should be defined as well. Provided that a new string is subject to name collision risk assessment, the standards for such risk assessment should be pre-defined and known to the applicant. We further believe that the guidance on types of application changes to be and not to be allowed, as well as those that might require the re-evaluation should be of complementary nature to standard seven criteria, as mentioned in section (b), and can't be used as a substitution thereof.
24. Even being of positive nature, the suggested changes are extremely generic, and require specification in terms of applicable procedures and timelines in order to avoid any gaming attempts. This is especially important when the references are made to re-evaluation and delays, without providing any predefined time frame and deadlines. The more ambiguity would be in the process itself, the higher would be the chances for gaming, fraud, and extortion. The more difficult also for public and community review and evaluation.(question 2.4.e.1.2).
25. In response to question 2.4.e.1.3, the NCSG notes that gTLD string modification must not be allowed, for the reasons set out in 2.4.e.1.1: above. Further, we note the severe reservations of this idea stated by the SubPro WG itself, as reflected in the SPIR, and the potentially endless rounds of public review that a new round of gTLD string introductions and evaluations would involve . From the SPIR:

“Another Working Group member suggested that the WG should review why it was not permitted to change the applied-for TLD to avoid contention in the 2012 round, as

this may inform the group's deliberations. A key reason raised included concerns about applicants essentially submitting a placeholder application, aware that they might be able to change their applied-for string after submission, which is viewed as a gaming concern. While there appeared to be support to allow a change of string in some limited circumstances, the Working Group noted that criteria would be needed to prevent gaming. Others noted that allowing string changes would also introduce operational challenges for anything related to the applied-for string. For instance, ICANN org would likely need to perform a re-evaluation of the new applied-for string in all string related evaluation elements (e.g., DNS Stability, String Contention, etc.) and the application for the new string would be subject to string related objections (e.g., String Confusion Objections, Legal Rights Objections, etc.). Another Working Group member noted that in allowing for a string change, the new string would need to be (a) subject to name collision risk assessment, (b) put out for public comment and (c) open to established Objection procedures. Accordingly, the applicant could be responsible for additional, material costs incurred by ICANN due to re-evaluation and the application could be subject to delay.” (Supplemental Initial Report, pp. 31-32).

26. For all changes to the application, we believe the same rules should be applied as to the original application, which would help to avoid any confusion, any gaming and ensure ongoing public and community oversight and review. (question 2.4.e.2 and 2.4.e.3).
27. Thank you again for opening this conversation up to the community. We are grateful to ICANN for this opportunity to share our perspectives on this important issue that impacts the introduction of new generic top-level domain names, and we trust you will find our recommendations helpful. Finally, the NCSG would be happy to continue to contribute to the New Subsequent Procedures Working Group and we make ourselves available in case the working group needs any clarifications regarding the contents of this document.

About the NCSG

The NCSG represents the interests of non-commercial domain name registrants and end-users in the formulation of Domain Name System (DNS) policy within the Generic Names Supporting Organisation (GNSO). We are proud to have individual and organisational members in over 160 countries, and as a network of academics, Internet end-users, and civil society actors, we represent a broad cross-section of the global Internet community. Since our predecessor's inception in 1999 (the Non-Commercial Domain Name Holders Constituency, NCDNHC), we have facilitated global academic and civil society engagement in support of ICANN's mission, stimulating an informed citizenry and building their understanding of relevant DNS policy issues. We believe our evidence-informed public interest-orientated contributions provide balance against state and market interests to protect non-commercial interests in ICANN's policy development process.