

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

Introduction

The Non-Commercial Stakeholders Group (NCSG) welcomes the opportunity to comment on the Initial Report on the New gTLD Subsequent Procedures Policy Development Process (Overarching Issues & Work Tracks 1-4) that was published by ICANN org on 3 July 2018. The NCSG participated in an earlier community consultation on this topic, submitting a comprehensive public comment contribution¹ to the the 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.

Our comments today are consistent with our comments six months ago, and in summary, the NCSG supports 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.

We have structured our statement around the structure of the Initial Report:

Work Track 1 - Overall Process, Support, and Outreach

2.2.2 The Predictability Framework Proposal is Not Fair, Balanced, or Consistent with our Policy Development Process

The Predictability Frame is concerning to the NCSG because it gives inordinate and unprecedented power to the Implementation Review Team (IRT) of the Subsequent Procedures Policy Development Process Working Group. The proposal creates a Super-IRT not just to roll-out the details of the implementation — but to judge and rule on all issues that arise. To quote the Initial Report, *“as part of the Predictability Framework, a Standing Implementation Review Team (IRS) should be constituted after the publication of the Applicant Guidebook to consider changes in the implementation, execution and/or operations of the new gTLD program after its launch, and the introduction of any further evaluation guidelines not available to applicants when applications were submitted.”*

¹ <https://www.ncuc.org/wp-content/uploads/2017/05/NCSGproposedCommentonCC2.pdf>

Disproportionate representation in IRTs

We note that IRTs are mostly small groups, disproportionately represented by registries and registrars — those knowledgeable and concerned about the technicalities of the technical policy we have created at ICANN. Rarely does the NCSG, for example, have the ability or bandwidth to serve on an IRT — and such service should not be needed if the IRT remains to be the technical implementation arm of a community-driven, community-consensus policy development process.

IRT cannot be used as a tool for bypassing GNSO PDPs

As highlighted above, such groups are often composed by members of the technical community - or people who are expert in the technical implementation details of the field - and lack a more proportional representation of the ICANN Community. Their job is to execute what the Community as a whole (or a Supporting Organization such as the GNSO) have adopted in time-consuming Policy Development Processes that often take years, and to assess any technical barriers offered to the implementation of such policies. Unfortunately, IRTs have already massively overreached in other areas, and engaged in policy changes and policy interpretation. For instance, the original Rights Protection Mechanisms IRT for the first Applicant Guidebook has been severely criticized in the current Review of All Rights Protections Mechanisms PDP Working Group for its overreach in this area.

Once a policy hits a post-launch problem, it is not a matter for any Implementation Review Team (IRT) to resolve, even this Super-IRT, because that would be highly unfair. Implementation Review Teams “implement” — they absolutely don’t create new policies or even interpretations with overwhelmingly policy-oriented interpretations. That’s simply not their mandate, goal, or expertise

This attempt to create this “third element,” this Predictability Framework, is and will become a policy bypass and overreach mechanism. It is created as such to handle newly-arising issues in the New gTLD Program — and ones, as noted above, likely to involve far-reaching or international policy issues. It is not for the industry to resolve (or likely remove) the issue by seeking to set it aside, or interpreting it away, under the guise of “operations and execution.”

For all the reasons above, the **NCSG strongly rejects the proposal of a Framework and the massive expansion of the scope and breadth of the Subsequent Procedures Implementation Review Team**. IRTs should retain their limited mandate and not be given super powers to change policies through process innovation, and especially not in the midst of new rounds of gTLDs.

To the questions asked by the WG (with request for the full wording of our comments above to be applied to each one):

2.2.2.e.1 Does the concept of a Predictability Framework make sense to address issues raised post launch? Our short answer would be no.

2.2.3 Applications Assessed in Rounds

The NCSG supports the introduction of new gTLDs in rounds, and not on a rolling or ongoing basis. Rounds allow ICANN to publicize a fixed event with an application deadline and to engage in focused training, outreach, and encouragement of organizations to apply.

Rounds also allow the public and worldwide community to have a date fixed at which to view all newly-applied for and ‘newly-revealed’ applications (since applications are likely to be secret in subsequent rounds, as they were in the first round, until a ‘reveal day’ at a date following the submission deadline). Also, as highlighted in the NCSG input to Community Comment 2, the introduction of new gTLDs in rounds would allow ICANN to better advertise the process and announce the new round via a webinar or an open call for an application tutoring process prior to the submission dates directed to the different regions and communities. Holding rounds of applications would enable clearer evaluation periods, instead of a single continuous process, as well as clearer dates in which the PDP recommendations were adopted by the ICANN Board. So rounds are a critical part of the public notice and comment of new gTLDs, and for notice of commentary and objections. We will always need this process of review and input.²

It is this worldwide community oversight that played an important role in the first round of new gTLDs. The global community reviewed the applications, and the proposed commitments and proposals of the public portion of the new gTLD applications, for the very purpose of this form of public review is to gather commentary and critique. Accordingly, the only optional answer to 2.2.3.d.3 is Yes: conduct all future new gTLD procedures in rounds separated by predictable periods for the purpose of course corrections indefinitely, for the reasons mentioned above.

- We note that such an orderly process keeps policy-making authority where it belongs, provides time for it, and eliminates the need to have an Implementation Review Team empowered to use the implementation process to adjust the policies in alternative directions. Policy control must be tight and through the appropriate mechanisms put in place by the multistakeholder community.
- We note further, given the huge imbalance of applications between the Global North and the Global South in the first round of new gTLDs, that ‘first-come, first-served

²<https://mm.icann.org/pipermail/comments-subsequent-procedures-22mar17/2017-May/000026.html>

applications’ is a way of ensuring that companies in the US and Western Europe will continue to dominate the applications, and delegations, of new gTLDs and will take virtually all interesting and available top level domains before the Global South can meaningfully and fully participate. This problem needs to be addressed.

2.2.6 Accreditation Programs (Registry Service Provider Pre-Approval)

The work of registry service providers who offer back-end registry services to new gTLD applicants make new gTLDs accessible to a range of applicants, regardless of technical abilities, and will provide access to various communities, now and in the future. It is critical that new gTLD applicants, especially those with the greatest barriers to participation, know as early as possible what back-end Registry Service Providers (RSPs) are pre-approved by ICANN.

Pre-approval Process

As part of our consent to 2.2.6.1, the pre-approval process should be clear and transparent. The checklist from which ICANN Staff evaluates an RSP for pre-approval should be clear and its results published, along with the dates on which the review took place. With regard to the approvals, we believe that mechanisms should be put into place in order to enable a) regular reviews of RSPs, b) public cataloging of receipts against RSPs, and c) investigation and response taken to the complaints. There must be a process for rejecting approved RSPs as well as pre-approving RSPs. If Subpro WG undertakes one step, it must undertake both. Otherwise, the results are unfair and biased for those new gTLD Applicants who are relying on this pre-approval list – which may have become badly out-of-date.

Concerning point 2.2.6.c.2 it appears that the WG is recommending that the RSPs are “pre-approved” by ICANN (to provide back-end services) and such results published at least three (3) months prior to the opening of the application period. While the concept makes sense, the details do not, and our response is an **emphatic “NO” to the three (3) month period as far too short.**

At a minimum, ICANN should start the pre-approval process of back-end RSPs at least a year before the roll-out of a new application round, so that ICANN can post publicly its list of pre-approved RSPs at least six months before the roll-out of a new application round. This is the minimum amount of time that is necessary to help the noncommercial and new groups (exactly who these back-end RSPs are designed to help) find them, interview them, budget for their services, and work cooperatively with them (as will be necessary) in the preparation of new gTLD applications.

Regarding point 2.2.6.c.4 The request here is contradictory and should be made clear and consistent.

We agree that: “The RSP pre-approval process shall have technical requirements equal to the Technical and Operational Capabilities Evaluation (as established in section 2.7.7 on Applicant Reviews; Technical/Operational, Financial and Registry Services)”

We do not agree that the RSP pre-approval process: “will also consider the RSP's overall breadth of registry operator support.”

ICANN should establish a single process for pre-approval of all back-end Registry Services Providers, and perhaps an expedited review or re-approval process. This would take into account complaints that may have been received by ICANN and shared publicly by the new gTLD Registries who use these back-end RSP services.

We note that the questions of 2.2.6.e.1 through e.5 are largely variations of the issues raised and addressed above, and ask that the answers above be applied to these specific questions as well.

2.5.2 Variable Fees

Applicant support is a critical issue for non-commercial organizations and applicants. Changing the fees midway in the evaluation process will result in noncommercial and non-profit organizations having to drop out of the New gTLD round for reasons completely unrelated to the merits of their application – because they may be unable to raise increased funds in the now-suddenly-increasing “variable fee” environment.

To the specific questions:

Regarding the question 2.5.2.d.1 around what an acceptable fee and percentage would be when the number of applications exceed capacity limits and project processing costs, the NCSG considers that there should not be any increase to capacity limits and processing costs as the idea of raising the application cost midway and in the midst of an application evaluation would eventually result in a non-commercial or non-profit organizations having to give up of the application. This point posits that the smallest new gTLD applicants will subsidize the largest ones.

On the note of the fees imposed for changing the type of application (point 2.5.2.d.2), we note one exception to the fixed-fee rule that is warranted. If pre-approved (and re-approved) back-end RSPs are used it is likely that would actually be a clear cost savings to ICANN for all applications using pre-approved back-end RSPs, and that savings should be passed on upfront and in a standardized way to all applicants using pre-approved RSPs. There should be a fixed new gTLD application fee for applicants falling into this category – and such clarity

and savings will help non-commercial organizations to apply for new gTLDs. Further, this application fee discount, applied to all new gTLD applicants using pre-approved RSPs, seems both fair and equitable.

2.5.4 Applicant Support

The NCSG continues to defend the importance of granting support for applicants from developing countries as a key aspect given the fact that it increases global diversity and reduces the disadvantages that may keep applicants from these regions from participating in the new gTLD program. In that sense, a better advertisement of the Applicant Support Program to these countries or the implementation of an exclusive round for applicants from developing countries would raise awareness and have the potential to result in increasing the number of new gTLD applications.

Regarding the period of application and evaluation, it would be clearer if there were rounds of applications followed by evaluation periods, instead of a single continuous process. Another suggestion would be to announce either via a webinar or an open call for an application tutoring process prior to the submission dates. Also, the effort of having a more extensively publicized Applicant Guidebook directed to developing countries and also translating it to as many languages as possible would help in outreaching to as many prospective applicants as possible, acknowledging that Applicant Guidebook was translated to the UN languages.

The applicants should be given ample time and prior notification as to when a call for new gTLDs is going to be issued.

2.6.1 Application Queuing

We note that this section raises many of the same issues and questions in terms of rounds or first-come, first-served. We trust that those of us who addressed these issues in response to earlier questions will have their answers applied here. Accordingly, our responses will be brief in addressing previously-covered ground.

In regards to how ICANN should implement the process, if there is a first-come, first-served process used after the next application window under point 2.6.1.e.1, we believe there must not be a first-come, first-served process, and the SubPro WG early in this report already said that it favors clear, specific, and designated rounds for new gTLDs.

Concerning point 2.6.1.e.2 around Internationalized Domain Names (IDNs) and/or other types of strings receiving priority in processing, the NCSG believes that the SubPro WG should provide the ICANN Community with this data, rather than seek it at the late date of the Initial Report. Prioritizing IDNs made a big difference in the first round of new gTLDs. It

led to the processing first of those new gTLD applications which brought diverse new groups and regions into the gTLD system. The first 108 processed new gTLD applications in the round were IDNs, and while some came from well-known DNS participants, the vast majority were from groups and participants largely new to the DNS – and that's exactly what we had been hoping would happen.

IDNs represent the first time in history that a company or organization could register a gTLD in non-Latin/non-ASCII characters, and the first time the world will be able to register domain names in their own script in an IDN generic top level domain (note: ccTLDs did serve as testbeds for IDN rollout, but this round was the first for IDN generic TLDs). Apply they did, in an array of IDN gTLDs in Mandarin Chinese, and also in Arabic, and Russian, among others.

With regards to question 2.6.1.e.3 the NCSG does not agree with the idea of reintroducing first-come, first-served processing when the SubPro WG and the Community have already recommended and agreed on the support for applications in rounds. On the note of prioritization on processing certain types of applications, present in question 2.6.1.e.4, present in the first round, only IDNs should be prioritized. However, we have no objections to allowing an applicant to choose which among their applications, they would like to receive their lowest priority number.

WT2 - Legal, Regulatory and Contractual Requirements

2.3.2 Global Public Interest

No one, on the face of it, could oppose the “global public interest,” however, the most outrageous and highly non-public-interested material has been shoved into this category and must be extricated immediately. We are concerned that the SubPro WG has not yet narrowed the label to that which is truly an issue of global public interest so and offer the following discussions as a guide -- there are many more abuses and problems buried in existing New gTLD applications.

Voluntary PICs should absolutely be barred from the New gTLD process as something that circumvents the bottom-up consensus process and creates a constant incentive to force ICANN outside its scope and mission. They have allowed New gTLD Registries to throw “the kitchen sink” into their applications, including the absurdity of: (a) Content Regulation (outside the scope of ICANN’s mission and mandate); (b) Additional Trademark Protections (above and beyond the many rights protections mechanisms created for the New gTLD

program via the community process); (c) banning of proxy and privacy services -- although they are fully part of the consensus policy process and provide critical privacy protection for individuals and noncommercial organizations; (d) Deletions of domain names entirely without due process; and (e) Work with law enforcement outside of law and due process.

The Mandatory PICs, however, may be expanded with a place to *narrowly and specifically* add a few items if so required as a narrowly-tailored compromise with the GAC, the Board or the Community to settle an application that has been otherwise blocked from moving forward (e.g., the highly-regulated industries pointed out in dozens of GAC Early Warnings, and to which substantive changes to the New gTLD were part of the compromise to move these applications forward). Note: such PICs would not then be “voluntary.” Thus, to the questions: 2.1.2.e.1 - Only Mandatory PICs and settlements with GAC, Board and Community. 2.3.2.c.3, 2.3.2.c.4, 2.3.2.e.5 - No Voluntary PICs -- for the reasons set out above.

Work Track 3 - String Contention Objections and Disputes

2.3.3 Applicant Freedom of Expression

Principle G *From 2007 Final Report of ICANN's New gTLD Policy:*

“The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law.”

The goal of protecting applicants’ freedom of expression rights in the TLD process and settled by the Final Report on new gTLDs must continue with special attention given to how the GAC's Advice, Community processes and the reserved names processes have impacted this goal. ICANN committed to protecting human rights in its most recent legal bylaws update, including protection for freedom expression, which is enshrined Article 19 in the Universal Declaration of Human Rights³ (among other international and national legal instruments). Given ICANN’s unique nature as the guardian of Internet’s domain name system, the world’s most critical communications tool, ICANN has a heightened duty to ensure its policies do not violate long standing and internationally recognized freedom of expression principles.

Internet domain names are ultimately speech, a shared meaning of words that are used to locate information of a diverse array of topics. Courts of law throughout the world have held that domain names are protected speech. As such freedom of expression rights are a very

³ UDHR Article 19: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

transversal subject and impact many different gTLD policy issues, accordingly, NCSG views on this specific subject are further elaborated in our comments related to other items of the Working Group initial report such as the comment paragraph on GAC Objections and community processes. Having said that, it is important to note that NCSG considers that Freedom of Expression rights should be fully implemented and dispute resolution providers and staff facilitators should be instructed to respect applicant's freedom of expression rights as promised by Principle G of ICANN's New gTLD Policy. GAC Advice, community processes, and brand privileges can infringe free expression so care must be taken to ensure free expression principles are not subjugated to GAC advice or these other processes - as elaborated further here within

Dispute resolution providers, ICANN staff, and other process facilitators should be given the same guidance to ensure the protection for freedom of expression as they have been given to ensure the protection of other legal rights such as intellectual property in the New gTLD Program. Civil society experts on free expression should be included in the development of such materials in order to ensure that the freedom of expression rights promised in Principle G are finally and equally protected in the implementation of the policy. DSPs should be explicitly instructed to consider the applicant's freedom of expression rights in their evaluations of the rights and issues at play. Full explanations of legal rights such as free expression, fair use, fair dealing, etc. should be included in the materials to assist facilitators in the protection of this important interest. The fundamental right to criticize power is built into ICANN's New gTLD Policy via Principle G, but the omission of any instructions or guidance to DSPs or within ICANN's internal processes has rendered it entirely toothless and pure window dressing.

2.7.4. String Similarity

Concerning String Confusion Objections, as highlighted in NCSG's contribution to the Community Comment 2 (CC2) questionnaire: *"String evaluation should be consistent and effective in avoiding confusion and loss of confidence in the DNS with the eventual delegation of strings similar to existing TLDs or reserved names. Therefore the adoption of efficient and fair resolution mechanisms is key. Last but not least, **there should be longer periods for applicants to submit String Confusion Objections based on the String Similarity Review given the possibility of receiving delayed reviews caused by unique factors such as the high volume of unique strings**".*

Recommendation 2 states that *Strings must not be confusingly similar to an existing top-level domain*, and such understanding applies both to existing top-level domains and reserved strings. It is also important to note that the AGB perceives similar strings as the ones who present the possibility of user confusion in case more than one of the strings is delegated into the root zone.

Discussions on types of string similarity that we might need to push back on is of high importance to NCSG, given that consumer “confusion” is presumed when the prohibition of plurals and singulars of the same word⁴ in the same script are discussed with regards to preliminary recommendations. Thus NCSG would like to make the case that this presumption not be the baseline for a decision regarding plurals and singulars and for further mechanisms to be introduced in order to guarantee fairness in due process.

2.8.1. Objections

NCSG agrees that GAC Advice on objections must include a clearly articulated rationale, including the national or international law upon which it must be based. NCSG also agrees that future GAC Advice, and Board action thereupon, for categories of gTLDs must be issued *prior* to the finalization of the next Applicant Guidebook. Any GAC Advice issued after the application period has begun must apply to individual strings only, based on the merits and details of the application, not on groups or classes of applications. Special care must be taken to ensure that ICANN’s decision to follow GAC Advice would not infringe an applicant’s freedom of expression rights, which are explicitly protected in ICANN’s New gTLD Policy, its legal bylaws, and international legal treaties. ICANN should refrain from taking sides in political disputes and should reform the policy to prevent governments from using the gTLD objection process as a handy means to control or eliminate certain speech in the Internet’s domain name system.

The GAC Early Warning System could use a number of important improvements in the next round. The application process should define a specific time period during which GAC Early Warnings can be issued and require that the government(s) issuing such warning(s) include both a written rationale with a legal basis and specific reasonable action requested of the applicant. The applicant should have an opportunity to engage in direct dialogue in response to such warning and amend the application during a specified time period. The public and ICANN Community should be given notice of these proposed modifications-- and the opportunity to comment to agree, disagree, or modify such proposals. Nothing should be bilateral or done in secret; all modifications to the gTLD applications must be done openly and publicly with the opportunity to review, comment, and contest.

Otherwise we will find ourselves again facing a series of “kitchen sink” voluntary Public Interest Commitments where, not only does an applicant address the narrow concerns voiced by a Government in an Early Warning, but the applicant throws in completely unmerited intellectual property and law enforcement (thus violating due process, legal limits of

⁴ Recommendation 2.7.4.c.1.1 of the initial report: Prohibiting plurals and singulars of the same word within the same language/script in order to reduce the risk of consumer confusion. For example, the TLDs .CAR and .CARS could not both be delegated because they would be considered confusingly similar.

intellectual property protection, and giving utterly undeserved handouts to various ICANN Stakeholders).

On the grounds of GAC's role and the weight of its advice we offer the following comments:

- a. 2.8.1.d.4 => Public Interest Commitments must be very narrowly-tailored to the specific government concern voiced in the Early Warning and must be shared with the public for notice, comment, critique, and revision. This must not be a two-party negotiated change between the applicant and government when issues of due process, content, intellectual property, free expression, and other legal rights are involved.
- b. 2.8.1.e.1 ⇒ NCSG Agrees that Section 3.1 of the AGB creates a “veto right” for the GAC to any new gTLD application or string and that such “veto right” is inappropriate as a matter of law and policy and should be reformed to take into account other legitimate interests.
- c. 2.8.1.e.2 ⇒ NCSG agrees that there is no longer the need to extend the GAC Advice the same weight in light of the recent changes to the ICANN Bylaws with respect to the Board’s consideration of GAC Advice.
- d. 2.8.1.e.3⇒ Yes, the presumption of that a “string will not proceed” severely limits the ability to facilitate a solution that both accepts GAC Advice and does not unfairly prejudice other legitimate interests. The presumption creates both the means and the incentive for governments to demand unfair extractions from applicants who have zero leverage against inappropriate demands.

Role of the Independent Objector

The Independent Objector was created with a good intention of to act solely “in the best interests of global Internet users” and “lodge objections” in appropriate cases “where no other objection has been filed.” The Independent Objector can file objections based on:

- Limited Public Interest - when the applied-for gTLD string violates generally accepted legal norms of morality and public order recognized under principles of international law, and
- Community objections - when there is substantial opposition to the gTLD application from a significant portion of the community that the gTLD string is targeting.

As for the Role of the Independent Objector, the role should be eliminated (or at the very least, significantly reduced) as it does not hold a successful track record in the overall process and is quite expensive to maintain. It would probably help if ICANN Staff did not engage someone completely foreign from the ICANN Community and its issues, and if ICANN Legal provided more guidance and communication (not on the special issues that would be involved in an Independent Objector’s filing, but in answering questions the IO might have about ICANN rules, contracts, history and DNS terms). Furthermore, there must be complete

transparency of the actions of any IO and any proceedings conducted by the IO. The IO should not be able to make an objection to a gTLD unless there has been an official and publicly documented request to the IO from at least one party harmed before the IO may consider making that objection (should the IO role continue).

In light of these general comments, we offer the following input to specific questions:

2.8.1.e.7 - Given the significant cost of the Independent Objector, we see no reason to have multiple ones (unless there is an actual conflict of interest, where the Independent Objector has an interest in the outcome of the proceeding).

2.8.1.e.8 *Some members of the ICANN community believe that some objections were filed with the specific intent to delay the processing of applications for a particular string. Do you believe this to be the case?* Yes, we need to build safeguards into the objection process that protect against potential gaming and other manipulations of the process that lead to unfair and unintended results. The working group should spend time before the next version of the report considering appropriate mechanisms that will discourage gaming of the objection process.

2.8.1.e.9 - A “quick look” mechanism is a critical component to ensuring that frivolous objections do not backlog the system, consume limited resources, and unfairly keep a gTLD on hold. The mechanism is a critical accountability mechanism that ensure fairness in the overall process. All objections should be first evaluated by a “quick look” mechanism to ensure that it is appropriate for the objection to go forward and is not filed frivolously, without merit, or a vexatious litigation tactic.

2.8.1.e.10 *ICANN agreed to fund any objections filed by the ALAC in the 2012 round. Should this continue to be the case moving forward?* No. It is not recommended that any groups be provided special rights and privileges to interject in the objection process unless they have been found to have legitimate legal standing in the dispute at issue. Otherwise, the policy can incentivize gaming and the invitation from gTLD competitors offering rewards to groups who agree to object on their behalf.

2.8.1.e.11 *Should applicants have the opportunity to take remediation measures in response to objections about the application under certain circumstances?* Yes, it would be fair to allow applicants to make corrections and adjustments to their applications in order to address the concerns raised in an objection. However such revisions must be done publicly such that other impacted parties have a right to comment on the proposed amendment. A policy allowing such amendments ensures that large investments and manpower hours will not be entirely lost, when a simple amendment that satisfies concerns raised would allow an otherwise undisputed gTLD to go forward.

Community Objections

2.8.1.e.13 *In 2012, some applicants for community TLDs were also objectors to other applications by other parties for the same strings. Should the same entity be allowed to apply for a TLD as community and also file a Community Objection for the same string? If so, why? If not, why not?*

The practice of filing for a community TLD and filing a community objection for the same string is an inappropriate form of “double-dipping” that should be discouraged in the next round as it encourages wealthy objectors to file multiple actions for the same goal and overwhelm a competitor with ICANN objection processes. The issue of community should be properly adjudicated in a single forum that applies to all claimants equally.

2.8.1.e.14 *Many Work Track members and commenters believe that the costs involved in filing Community Objections were unpredictable and too high. What can be done to lower the fees and make them more predictable while at the same time ensuring that the evaluations are both fair and comprehensive?* We look forward to seeing the SubPro WG’s suggestions in Initial Report-2 so that the NCSG, and others in the Community, have a basis for review and response. For this evaluation, we would suggest that: a) the arbitrator forums might want to provide some education and DNS background for their arbitrators before bringing them into Objection proceedings. Such a process -- especially if it would be done upfront for the pool of possible arbitrators, and before any specific objection were brought, might help shorten the learning curve each arbitrator must face in reviewing New gTLD Objections.

2.8.1.e.15 *In the Work Track, there is a proposal to allow those filing a Community Objection to specify Public Interest Commitments (PICs) they want to apply to the string. If the objector prevails, these PICs become mandatory for any applicant that wins the contention set. What is your view of this proposal?* NCSG respectfully submits that this is a terrible idea. There is no boundary, definition or reasonable delimitation of what Public Interest Commitments can be submitted -- and so these may not be “public interest” commitments at all, but private, self-serving commitments forced on an applicant by an objector and utterly unreasonable, unfair to the rest of the Community, in violation of traditional norms and traditional due process protections (see NCSG objections to voluntary PICs generally). It also utterly changed the Community Objection into a “strong arm” tactic to get things that no Community Objection would provide. The proposal also utterly defies what a Community Objection is -- namely, a proceeding when “there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.” (Module 3, Applicant Guidebook) The Objector must show a) it represents a clearly delineated community, and b) that opposition in the Community to the application is substantial, and that there is a strong association between the community and the applied-for gTLD string, and d) the application creates a likelihood of material detriment to the rights or legitimate interest so a significant portion of the

community to which the string may be explicitly or implicitly targeted. If the Objector wins, the applicant must withdraw their application.

NCSG notes that absolutely nothing in the current rules prevents the Applicant working with the Objector to modify the application to accommodate the interests and concerns of the objecting Community. However, under the current system, when such a modification happens, it must be a) filed with ICANN, b) made public to the ICANN Community as a modification to a pending gTLD application, and c) subject to notice, review and comment. It's a checks and balances process, with the Community at the helm, rather than a private negotiation to which to many private deals may be given. We urge this suggestion be rejected as worse than the current system.

2.8.2 Accountability Mechanisms & Post-Delegation Dispute Resolution Procedures

NCSG submits that the SubPro WG must take into consideration the work and recommendations issued by the Cross-community Working Group on enhancing ICANN's Accountability in any revision or drafting of these new types of New gTLD application appeal and accountability mechanisms. It is important to note that in the previous round all ICANN standard accountability mechanisms were inundated with New gTLD applicants who wanted their denial reevaluated for one reason or another. ICANN's capacity to handle such claims was stretched and other types of accountability issues could not be dealt with due to the heightened burden from the gTLD program. Nor were ICANN's existing accountability mechanisms designed with this specific purpose in mind and as a result are ill-equipped to handle such complaints or the volume of them. Bearing that in mind, developing accountability mechanisms and/or a reconsideration process that is specific to the needs and requirements of the NGTLD program would be a significant improvement

In the next Report, NCSG looks forward to reviewing what the SubPro WG proposes for its "limited appeals mechanisms" and how such a mechanism will not effectively operate as an unbounded appeals mechanisms for those with very deep pockets to challenge until a less-well-funded objector must withdraw.

2.9 Deliberations and Recommendations: String Contention Resolution

2.9.1 Community Applications

In NCSG's view, the definition of "Community" should be narrowly defined and not awarded automatic "priority" over other legitimate interests. NCSG believes it is unfair to award automatic priority to any single group, especially in a situation such as here where there is little agreement on which interests and values should be prioritized over others, and such determinations inevitably lead to arbitrary and contradictory decisions. Accordingly, the definition of "community" for these purposes should be properly narrowed to "marginalized"

interests, non-commercial interests, and those who can show a legitimate need for special assistance in the application process. The group should consider alternative “awards” for being considered a “community” such as financial or technical support as the type of assistance provided. An award of automatic prioritization of a fuzzy concept is a rather blunt instrument that has led to widespread disappointment with the outcome of the “community” process. NCSG recommends that there should be a balancing of all legitimate interests in the gTLD process, rather than auto deference to any group, including "communities".

We believe that the Community Priority Evaluation and the Panel must be more transparent in its activities and decision making processes as there have been significant doubts and uncertainties regarding the Panel's decision making process and widespread dissatisfaction with the results by the community-based applicants and their competitors in the last round.

We are also concerned about the impact on freedom of expression rights created by the “community” application process. It is important for evaluators to take into account that people have a legal right to identify themselves in ways of their own choosing. Resultingly we caution against maintaining a community-based policy that devolves into a “beauty contest” between applicants and burdens ICANN with having to make arbitrary decisions that privilege one group over another in the domain name system.

Additional Sections of the SubPro WG Initial Report on which NCSG Provides Additional Comments, Discussion and Concern

2.7.7 Applicant Reviews: Technical & Operational, Financial and Registry Services

2.7.7.c.12: On Page 144, under “For Financial Evaluation,” in 2.7.7.c.12, assessing applicant’s proposed business models and financial strength, the SubPro WG proposed:

d. “If any of the following conditions are met, an applicant should be allowed to self-certify that it has the financial means to support its proposed business model associated with the TLD:

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“ii. If the applicant and/or its Officer are bound by law in its jurisdiction to represent its financials accurately.”

This makes no sense. Regardless of local law, the applicant has an obligation to prove to the ICANN evaluators that it has the wherewithal to ensure long-term survivability of the registry. Nothing less is fair to the registrants (potentially millions of them) who may come to register within the registry. Just because a jurisdiction may have laws to represent its financials to its own government officials accurately does not mean that these laws and regulations automatically extend to a private entity such as ICANN.

Further, it's unfair to waive these showings by the largest companies and require them by the smallest. That's an unequal playing field with costs of application (under the rules as Subpro WG proposes them here) becoming much higher for new entrants, smaller entrants, and entrants from the Global South -- and dramatically lower costs (and higher assumptions of good faith) from applicants in the US and Europe. These proposed rules are unfair.

2.7.7.c.15 -- in this section, non-technical submissions are buried amidst technical language and must be removed. At the outset, this section is about an applicant's proof of technical, operational and financial readiness to offer a New gTLD in a stable and secure manner on the Internet. That does not mean that the applicant has any right to extend any form of content control and excessive intellectual property protection into its evaluation and registry agreement -- and that's exactly what SubPro WG has buried in this section.

This is a massive debate and concern that the SubPro WG has the obligation to flag and discuss in a clear and meaningful way. The Globally Protect Marks List is viewed by NCSG and many others in the ICANN Community as a bastardization of the Policy Development Process. The NCSG -- and the GNSO -- and the ICANN Board flatly rejected the proposal of the Intellectual Property Constituency that certain strings be considered so sacred that they would be protected across all New gTLDs regardless of the meaning and context of that gTLD. We rejected that idea as an ICANN Community because it is completely inconsistent with trademark law as we know it. Fox Media does not own the word "fox," Orange Telecom does not own the color or fruit of "orange," and McDonalds Corporation does not own the popular last name of McDonalds.

That a few registries were able to slip in these widely-disputed and highly-controversial proposals via the Voluntary Public Interest Commitments and later the RSEP technical modification process does not make them technical, financial or operational commitments in any way, shape or form. These are in fact clear violations of the ICANN Bylaws and the limits that ICANN set to itself and the Community when it entered the transition from US government control.

Accordingly, NO, 2.7.7.c.17 must not include the GPML in its list of "additional registry service that are critical to the operation and business plan of the registry." And these highly controversial, much maligned, previously approved registry service **MUST BE CLEARLY FLAGGED IN THE NEXT ROUND OF INITIAL REPORTS AND DEBATED FOR WHAT IT IS** -- a violation of the Multistakeholder Process and the Policy Development Process we all agreed to.

But given the lack of any policy development process in this area, the lack of any clarity (even the absence of explaining the GPML acronym and its controversy) to the Community in this Initial Report, and the huge controversy surrounding this intellectual property issue,

the proposals must properly be removed from the technical, operational and financial section in which it has unfortunately been buried -- and jettisoned completely from the future New gTLD Applicant Guidebook as outside and contrary to any consensus policy or community decision.

To 2.7.7.e.9 NO,, there are no additional registry services that should be considered “pre-approved” and NCSG vehemently contests that protected marks lists remains on this list at all.

Conclusions

We are dismayed that SubPro WG believes it will move forward from this Initial Report to a Final Report. Far too few proposals were made; far too little data was presented, far too many issues remain open and will need further comment as more finalized answers emerge. We join others in strongly urging the SubPro WG to treat this as a Preliminary Report and issue and Initial Report at the end of the next process. That will provide a full and fair opportunity to comment on proposed policy changes before they become part of a final report.

About 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.