

[WORKING DRAFT FOR DISCUSSION] Applicant Guidebook Language: Appeals of Objection Expert Determinations

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Procedure for Appeals of an Objection Expert Determination

Article 1. ICANN's New gTLD Program

- (a) The Internet Corporation for Assigned Names and Numbers ("ICANN") has implemented a program for the introduction of new generic Top-Level Domain Names ("gTLDs") in the Internet, in accordance with terms and conditions set by ICANN (the "New gTLD Program").
- (b) The New gTLD Program includes a Dispute Resolution Procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD on the grounds of: String Confusion, Legal Rights, Limited Public Interest, and Community (an "Objection") are resolved in accordance with the ICANN New gTLD Dispute Resolution Procedure (the "Objection Procedure").
- (c) The New gTLD Program also includes a limited right for relevant parties to seek an appeal of an Expert Determination issued in an Objection proceeding in accordance with this ICANN New gTLD Program Objection Appeals Procedure (the "Appeals Procedure"). A party to an Objection wishing to challenge an Expert Determination may file an appeal ("Appeal").
- (d) An Appeal provides a one-time basis for all relevant parties to challenge an Expert Determination issued in an Objection proceeding based on a claim that the relevant Objection Panel: (1) failed to follow the established Objection procedures; (2) failed to consider or solicit necessary material evidence or information submitted by the parties; or (3) both (1) and (2), and as a result, the Appellant should have prevailed in the relevant Objection proceeding.
- (e) An Appeal of an Expert Determination issued in an Objection proceeding shall be administered by the same Dispute Resolution Service Provider ("DRSP") where the underlying dispute was administered in accordance with this Appeals Procedure and the applicable DRSP Rules that are identified in [x].
- (f) By applying for a new gTLD, an Applicant accepts the applicability of this Appeals Procedure and the applicable DRSP's Rules that are identified in Article [x]. The parties cannot derogate from this Appeals Procedure without the express approval of ICANN and from the applicable DRSP Appellate Rules without the express approval of the relevant DRSP.

Article 2. Definitions

- (a) The “Appellant” is a person or entity who was a party to an Objection and files an Appeal to challenge the Expert Determination issued in an Objection proceeding.
- (b) The “Respondent” is the party responding to the Appeal.
- (c) The “Appeals Panel” is the panel of Experts, comprising one or three “Experts,” that has been constituted by a DRSP in accordance with this Appeals Procedure and the applicable DRSP Rules that are identified in Article [x].
- (d) The “Expert Determination” is the decision upon the merits of the underlying Objection that is the subject of the appeal.
- (e) “DRSP Appellate Rules” are the rules of procedure of a particular DRSP that have been identified as being applicable to an appeal of an Expert Determination issued in an Objection proceeding.

Article 3. Dispute Resolution Service Providers

The various categories of appeals shall be administered by the following DRSPs:

- (a) Appeals of String Confusion Objection Expert Determinations shall be administered by [x].
- (b) Appeals of Legal Rights Objection Expert Determinations shall be administered by [x].
- (c) Appeals of Limited Public Interest Objection Expert Determinations shall be administered by [x].
- (d) Appeals of Community Objection Expert Determinations shall be administered by [x].

Article 4. Applicable Rules

- (a) All proceedings before the Appeals Panel shall be governed by this Appeals Procedure and by the DRSP Appellate Rules that apply to a particular category of Appeal. The outcome of the proceedings shall be deemed an Appellate Expert Determination, and the members of the Appeals Panel shall act as experts.
- (b) The applicable DRSP Appellate Rules are the following:

[TBD]
- (c) In the event of any discrepancy between this Appeals Procedure and the applicable DRSP Appellate Rules, this Appeals Procedure shall prevail.

- (d) The place of the appeal proceedings, if relevant, shall be the location of the DRSP that is administering the proceedings.
- (e) In all cases, the Appeals Panel shall ensure that the parties are treated with equality, and that each party is given a reasonable opportunity to present its position.

Article 5. Language

The language of all submissions and proceedings under this Appeals Procedure shall be English.

Article 6. Communications and Time Limits

- (a) All communications by the Parties with the DRSP and Appeals Panel must be submitted electronically. A Party that wishes to make a submission that is not available in electronic form shall request leave from the Appeals Panel to do so, and the Appeals Panel, in its sole discretion, shall determine whether to accept the non-electronic submission.
- (b) The DRSP, Appeals Panel, Appellant, and Respondent shall provide copies to one another of all correspondence (apart from confidential correspondence between the Appeals Panel and the DRSP and among the Appeals Panel) regarding the proceedings.
- (c) For the purpose of determining the date of commencement of a time limit, a notice or other communication shall be deemed to have been received on the day that it is transmitted in accordance with paragraphs (a) and (b) of this Article.
- (d) For the purpose of determining compliance with a time limit, a notice or other communication shall be deemed to have been sent, made or transmitted if it is dispatched in accordance with paragraphs (a) and (b) of this Article prior to or on the day of the expiration of the time limit.
- (e) For the purpose of calculating a period of time under this Appeals Procedure, such period shall begin to run on the day following the day when a notice or other communication is received.
- (f) Unless otherwise stated, all time periods provided in this Appeals Procedure are calculated on the basis of calendar days

Article 7. Filing of the Appeal

- (a) A party to an Objection shall have fifteen (15) days from the date the Expert Determination is issued by the DRSP in the Objection proceeding to provide notice to

the DRSP of its intent to appeal the Expert Determination (the “Notice of Appeal”). The Notice of Appeal must specify those elements of the Expert Determination are being appealed and must contain a brief statement of the basis for the Appeal.

- (b) The Appellant will have fifteen (15) days from the date of filing the Notice of Appeal to pay the required fees as established in Article [8] and file the Appeal.
- (c) The DRSP shall provide notice to the relevant parties and ICANN of the receipt of the Notice of Appeal when the filing requirements have been satisfied as specified in Article [7(a) and (b)].
- (d) The Notice of Appeal and all subsequent documents concerning the Appeal must be filed with the appropriate DRSP, using a model form made available by that DRSP (if applicable), with copies to ICANN and the Respondent.
- (e) The electronic addresses for filing the Notice of Appeal shall be provided in the DRSP Appellate Rules.
- (f) An Appellant who wishes to appeal to Expert Determinations from more than one Objection proceeding must file separate appeals with the appropriate DRSP(s).

Article 8. Content of the Appeal

- (a) The Appeal shall contain, inter alia, the following information:
 - (i) The names and contact information (address, telephone number, email address, etc.) of the Appellant;
 - (ii) Identification of the underlying Objection being appealed; and
 - (iii) A description of the basis for the Appeal, including:
 - (1) A statement of the ground upon which the Appeal is being filed, as stated in Article [x] of this Appeals Procedure;
 - (2) An explanation of the validity of the Appeal and why the Appeal should be upheld.
- (b) The substantive portion of the Appeal shall be limited to 5,000 words, excluding attachments.
- (c) At the same time as the Appeal is filed, the Appellant shall pay a filing fee in the amount set in accordance with the applicable DRSP Appellate Rules and include evidence of such payment in the Appeal. In the event that the filing fee is not paid within ten (10)

days of the receipt of the Appeal by the DRSP, the Appeal shall be dismissed without prejudice.

Article 9. Administrative Review of the Appeal

- (a) The DRSP shall conduct an administrative review of the Appeal for the purpose of verifying compliance with Articles [5-8] of this Appeals Procedure and the applicable DRSP Appellate Rules, and inform the Appellant, the Respondent and ICANN of the result of its review within fourteen (14) days of its receipt of the Appeal. The DRSP may extend this time limit for reasons explained in the notification of such extension.
- (b) If the DRSP finds that the Appeal complies with Articles [5-8] of this Appeals Procedure and the applicable DRSP Appellate Rules, the DRSP shall confirm that the Appeal shall be registered for processing.
- (c) If the DRSP finds that the Appeal does not comply with Articles [5-8] of this Appeals Procedure and the applicable DRSP Appellate Rules, the DRSP shall have the discretion to request that any administrative deficiencies in the Appeal be corrected within five (5) days. If the deficiencies in the Appeal are cured within the specified period but after the lapse of the time limit for submitting an Appeal stipulated by [Article 7(a)] of this Appeals Procedure, the Appeal shall be deemed to be within this time limit.
- (d) If the DRSP finds that the Appeal does not comply with Articles [5-8] of this Appeals Procedure and the applicable DRSP Appellate Rules, and the deficiencies in the Appeal are not corrected within the period specified in Article 9(c), the DRSP shall dismiss the Appeal and close the proceedings, without prejudice to the Appellant's submission of a new Appeal that complies with this Appeals Procedure, provided that the Appeal is filed within the deadline for filing such Appeal. The DRSP's review of the Appeal shall not interrupt the running of the time limit for submitting an Appeal stipulated by Article 7(a) of this Appeals Procedure.
- (e) Immediately upon registering an Appeal for processing, pursuant to Article [9(b)], the DRSP shall post the following information about the Appeal on its website: (i) the proposed string to which the Appeal is directed; (ii) the name of the Appellant; (iii) a weblink to the Expert Determination from the underlying Objection proceeding; (iv) the grounds for the Appeal; and (v) the dates of the DRSP's receipt of the Appeal.

Article 10. Record on Appeal

- (a) The record on Appeal will consist of:
 - (i) the original papers and exhibits filed in the Objection proceeding; and
 - (ii) the transcript of Objection proceedings, if any.

- (b) The Parties will cooperate with the DRSP in compiling the record on Appeal, and the DRSP will provide the record to the Appeals Panel.

Article 11. Response to the Appeal

- (a) The Respondent may, but is not required, to file a response to an Appeal (the “Response”). The Response, if filed, shall be filed within thirty (30) days of the transmission of the notice by the DRSP pursuant to [Article 7(c)].
- (b) The Response must be filed with the appropriate DRSP, using a model form made available by that DRSP, with copies to ICANN and the Appellant.
- (c) If a Response is not filed, the Appeals Panel will presume that Respondent takes no position on the Appeal.
- (d) The Response, if filed, shall contain, inter alia, the following information:
 - (i) The names and contact information (address, telephone number, email address, etc.) of the Respondent; and
 - (ii) A point-by-point response to the statements made in the Appeal.
- (e) The substantive portion of any Response shall be limited to 5,000 words, excluding attachments.
- (f) At the same time as the Response is filed, the Respondent shall pay a filing fee in the amount set and published by the relevant DRSP (which shall be the same as the filing fee paid by the Appellant) and include evidence of such payment in the Response. In the event that the filing fee is not paid within ten (10) days of the receipt of the Response by the DRSP, any Response shall be disregarded and the Appeals Panel will presume that Respondent takes no position on the Appeal.
- (g) If the DRSP finds that the Response does not comply with this Articles 11 and the applicable DRSP Appellate Rules, the DRSP shall have the discretion to request that any administrative deficiencies in the Response be corrected within five (5) days. If the administrative deficiencies in the Response are cured within the specified period but after the lapse of the time limit for submitting a Response pursuant to this Appeals Procedure, the Response shall be deemed to be within this time limit.

Article 12. Consolidation of Appeals

- (a) When two or more parties are entitled to appeal an Objection Expert Determination, and their interests make joinder practicable, they may file a joint Notice of Appeal. They may then proceed on appeal as a single appellant.
- (b) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the DRSP or upon request of a party within fourteen (14) days the Notice of Appeal is published in the DRSP's website.
- (c) In deciding whether to consolidate Appeals, the DRSP shall weigh the benefits (in terms of time, cost, consistency of decisions, etc.) that may result from the consolidation against the possible prejudice or inconvenience that the consolidation may cause. The DRSP's determination on consolidation shall be final and not subject to further appeal.

Article 13. The Panel

- (a) The DRSP shall select and appoint the Panel of Expert(s) within [thirty (30)] days after receiving the Response.
- (b) There shall be a one-expert Panel, unless the Parties to the proceeding mutually agree upon a three-expert Panel, bearing the costs accordingly. The Parties must notify the DRSP via a joint letter within [ten (10) days] of the publication of the Notice of Appeal should they wish to have a three-expert Panel.
- (c) All Experts acting under this Appeals Procedure shall be impartial and independent of the parties. The applicable DRSP Appellate Rules stipulate the manner by which each Expert shall confirm and maintain their impartiality and independence.
- (d) The applicable DRSP Appellate Rules stipulate the procedures for challenging an Expert and replacing an Expert.
- (e) Unless required by a court of law or authorized in writing by the Parties, an Expert shall not act in any capacity whatsoever, in any pending or future proceedings, whether judicial, arbitral or otherwise, relating to the matter referred to expert determination under this Appeals Procedure.

Article 14. Costs

- (a) Each DRSP shall determine the costs for the proceedings that it administers under this Appeals Procedure in accordance with the applicable DRSP Appellate Rules. Such costs shall cover the fees and expenses of the members of the Panel, as well as the administrative fees of the DRSP (the "Costs").
- (b) Within ten (10) days of constituting the Appeals Panel, the DRSP shall estimate the total Costs. The Costs for an appeal in the first instance shall be borne by the Appellant. The

Appellant shall make its advance payment of Costs within ten (10) days of receiving the DRSP's request for payment and submit to the DRSP evidence of such payment.

- (c) The DRSP may revise its estimate of the total Costs and request additional advance payments from the parties during the proceedings.
- (d) If the Appellant fails to make the advance payment of Costs, its Appeal shall be dismissed and no fees that it has paid shall be refunded.
- (e) Upon the termination of the proceedings, after the Panel has rendered its Appellate Expert Determination, the DRSP shall refund to the prevailing party, as determined by the Appeals Panel, its advance payment(s) of Costs.

Article 15. Representation and Assistance

- (a) The parties may be represented or assisted by persons of their choice.
- (b) Each Party or Party representative shall communicate the name, contact information and function of such persons to the DRSP and the other Party (or Parties in case of consolidation).

Article 16. Oral Argument

Appeals under this Appeals Procedure and the applicable DRSP Appellate Rules will be determined upon the written documents submitted by the Parties and will be resolved without oral arguments.

Article 17. Standards

- (a) The Appeals Panel shall apply the "clearly erroneous" standard of review for each category of appeal as established in the New gTLD Program. Under a clearly erroneous standard of review, the Appeals Panel must accept the Objection Panel's findings of fact unless the Objection Panel failed to: (1) follow the appropriate procedures, or (2) consider or solicit necessary material evidence or information in the Objection proceeding.
- (b) The Appellant bears the burden of proving that its Appeal should be sustained in accordance with the applicable standard.

Article 18. Appellate Expert Determination

- (a) The DRSP and the Appeals Panel shall make reasonable efforts to ensure that the Appellate Expert Determination is rendered within [thirty (30)] days of the constitution of the Appeals Panel. In specific circumstances such as consolidated cases and in consultation with the DRSP, a brief extension may be allowed.

- (b) The Appeals Panel shall submit its Appellate Expert Determination in draft form to the DRSP's scrutiny as to form before it is signed, unless such scrutiny is specifically excluded by the applicable DRSP Appellate Rules. The modifications proposed by the DRSP to the Appeals Panel, if any, shall address only the form of the Appellate Expert Determination. The signed Expert Determination shall be communicated to the DRSP, which in turn will communicate that Expert Determination to the Parties and ICANN.
- (c) When the Appeals Panel comprises three Experts, the Appellate Expert Determination shall be made by a majority of the Experts.
- (d) The Appellate Expert Determination shall be in writing, shall identify the prevailing party and shall state the reasons upon which it is based. The Appeals Panel shall take one of the following actions: (1) adopt the underlying Objection Expert Determination as its own, or (2) substitute its own determination for the underlying Objection Expert Determination. The Appeals Panel may not order a new Objection proceeding or send the matter back to the original Expert Panel for corrections or further review.
- (e) The Appellate Expert Determination shall state the date when it is made, and it shall be signed by the Expert(s). If any Expert fails to sign the Appellate Expert Determination, it shall be accompanied by a statement of the reason for the absence of such signature.
- (f) In addition to providing electronic copies of its Appellate Expert Determination, the Appeals Panel shall provide a signed hard copy of the Appellate Expert Determination to the DRSP, unless the DRSP Appellate Rules provide otherwise.
- (g) Unless the Appeals Panel decides otherwise, the Appellate Expert Determination shall be published in full on the DRSP's website.

Article 19. Finality of Appeal

Upon the conclusion of the Appeal process, the Appellate Expert Determination shall become the final determination and not subject to further appeal.

Article 20. Exclusion of Liability

In addition to any exclusion of liability stipulated by the applicable DRSP Rules, neither the Expert(s), nor the DRSP and its employees, nor ICANN and its Board members, employees and consultants shall be liable to any person for any act or omission in connection with any proceeding conducted under this Appeals Procedure.

Article 21. Modification of the Appeals Procedure

- (a) ICANN may from time to time, in accordance with its Bylaws and by following the processes described in the Predictability Framework, modify this Procedure.
- (b) The version of this Appeals Procedure that is applicable to an appeal proceeding is the version that was in effect on the day when the relevant application for a new gTLD is submitted.