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# Intellectual Property Constituency Response to the New gTLD Subsequent Procedures Working Group's First Request for Community Comments (Community Comment 1)

## Subject 1. Additional new gTLDs in the future.

The 2007 GNSO Final Report and the Applicant Guidebook (AGB) are consistent in the position that the previous policy development process was intended to establish an ongoing mechanism for potential applicants to apply for gTLDs. As such, a deviation from this position, such as cancelling the program, would warrant policy work. If the decision is made to deviate from existing policy, it should be based on fact-based decision-making.

### Questions:

1.a: The 2007 consensus policy above expressed the commitment to an ongoing mechanism<sup>1</sup> for the introduction of new gTLDs. Are there any facts and/or circumstances that have changed such that you believe this should no longer be the policy? Please explain.

No. However, we note that there has, in fact, been no ongoing mechanism for which the policy called.

1.b: Would the absence of an ongoing mechanism have an anti-competitive effect for potential applicants?

Given ICANN's "monopoly" control over entry into the new gTLD marketplace, we believe that a failure to maintain an ongoing mechanism of some sort could potentially lead to anti-competitive effects.

Brand owner concerns remain about the impact of additional new gTLDs on consumer confusion and on trade mark protection, and these must be addressed during the PDP. Nevertheless, potential applicants, including potential .brand applicants, may have chosen not to apply during the 2012 application round on the understanding, from the language of the Applicant Guidebook, that there would be subsequent procedures: "ICANN's goal is to launch subsequent gTLD application rounds as quickly as possible. The exact timing will be based on experiences gained and changes required after this round is completed. The goal is for the next application round to begin within one year of the close of the application submission period for the initial round."

1.c: Are ongoing mechanisms for the introduction of additional new gTLDs necessary to achieving sufficient diversity (e.g., choice and trust) in terms of domain extensions? Please explain.

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<sup>1</sup> "Ongoing mechanism" will be a phrase that will be used throughout this document and should be considered to mean the subsequent procedures by which new gTLD applications will be received by ICANN in the future, without making any predetermination to the precise nature of those procedures. The use of the term "ongoing mechanism" stems from the following text in the GNSO's 2007 Final Report on the Introduction of New gTLDs: "This policy development process has been designed to produce a systemised and ongoing mechanism for applicants to propose new top-level domains."

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We offer no substantive comment on this, other than to refer you to our response to 1.b above. That said, we do believe that a streamlined approach for .brands has the potential to quickly enhance consumer trust in the domain name space.

1.d: Is it too early in the review cycle of the previous round to determine the full range of benefits of the 2012 round of new gTLDs? Should that impact the decision to introduce additional new gTLDs and/or the timing of ongoing mechanisms for new gTLDs?

While it may be too early in the review cycle to fully determine the full range of benefits (and harms) of the 2012 round, we refer you to our responses to 1.b and 1.c above. We also note that it is too early in the *life cycle* of the “previous” round to make such determinations, since the “previous” round is still ongoing in many respects, and should properly be viewed as the “current” round at this time. While these timing issues cannot be ignored in considering how and when to introduce additional new gTLDs, these are factors to consider and not absolute bars to moving forward.

1.e: What additional considerations should be taken into account before deciding on ongoing mechanisms for new gTLDs (e.g., to cancel ongoing mechanisms for new gTLDs via policy changes)?

It is prudent not only to diagnose the problems and errors discovered through the 2012 round, but also to anticipate the problems which may occur in the next “ongoing mechanism” (whether round(s) or other procedures) in order to fix those in advance, thus providing additional certainty to applicants.

1.f: Any other Issues related to this overarching subject:

We believe that an accreditation process for backend providers would greatly streamline the application process as well as the application review process.

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## Subject 2. Categorization or differentiation of gTLDs (for example brand, geographical, or supported/community) in ongoing new gTLD mechanisms.

Defining application categories was seen as too “challenging” during the development of the 2007 Final Report and the subsequent development of the Applicant Guidebook. However, the Applicant Guidebook did recognize that certain categories of TLDs deserved differential treatment in the application process, evaluation process, the string contention resolution process and in the ultimate Registry Agreement. The categories included geographic, community, and brand TLDs and those associated with governments or governmental organizations.

The Working Group intends to formally address this issue depending on the feedback provided by the community beyond simply identifying categories, the PDP-WG would need to consider the development of distinct and enforceable definitions, development of separate requirements and processes, validation and enforcement measures, and a process to switch categories post-delegation, among many other areas of work.

### Questions:

2.a: Should subsequent procedures be structured to account for different categories of gTLDs?

As mentioned above, we see some benefit in a streamlined process for .brand (Specification 13) applicants, since brands provide protection for consumers and do not raise many of the concerns of open gTLDs. We also believe that ICANN should consider a more substantial approach to subsidizing applications from underserved jurisdictions, which would be a highly appropriate use of the auction proceeds which ICANN is currently holding from the 2012 round.

Note, several possible categories have been suggested by PDP WG members, including:

- Open Registries
- Geographic
- Brand (Specification 13<sup>2</sup>)
- Intergovernmental Organization
- Community
- Validated - Restricted Registries with qualification criteria that must be verified
- Not-for-profit or non-profit gTLDs, NGOs
- Highly Regulated or ‘Sensitive’ TLDs
- Exclusive Use Registries (Keyword Registry limited to one registrant & affiliates) or Closed Generics
- TLD with applicant self-validated restrictions and enforcement via Charter Eligibility Dispute Resolution Policy, e.g. .name and .biz

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<sup>2</sup> Specification 13 to the Registry Agreement (RA) provides certain modifications to to the RA for applicants that qualify as a .Brand TLD. For additional information, please see the Specification 13 section here:

<https://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting>

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*The following questions refer to this list of possible categories:*

2.b: Are additional categories missing from the list? If so, what categories should be added?

None noted at this time.

2.c: Do all categories identified by the PDP WG members belong in the list?

Yes. There is no reason to narrow this list. Having this list does not necessarily mean that each type of TLD will have its own special process.

2.d: If categories are recognized, in what areas of the application, evaluation, contention resolution and/or contracting processes would the introduction of categories have a likely impact?

We believe that financial review would be affected since open, unrestricted TLDs, for example, would have more impact on consumers who build businesses on them than completely closed TLDs such as .brands. More generally, a number of aspects of the application requirements and the base registry contract were of little practical relevance to, or even were unduly onerous for, a .brand application and would merit review, which may well lead to the elimination or streamlining of these processes. The original process was largely “one size fits all,” other than the community process. More attention to fitting the process to specific types is encouraged.

2.e: If different categories of gTLD are defined, should all types be offered in each application window? Is it acceptable for an application window to open for only one or a limited subset of categories of gTLDs (e.g. a .Brands only application window)

We note that this question reverts to the old approach of “each application window” as opposed to the more inclusive “ongoing mechanism” found earlier in the document.

Whilst not specifically advocating at this stage for a special early entry for .brands, very few of the .brand applications were subject to the challenging issues encountered in the 2012 round which this PDP might be expected to seek to review and revise, for example string contention, singular/plural, GAC advice, RPMs issues etc. If the required policy work to create a streamlined process for .brands were to be completed whilst other aspects of the PDP working group’s work remained ongoing there may be no good reasons to hold up those .brand applications which are uncontroversial.

2.f: Any other issues related to this overarching subject:

We believe that the prior rights dispute mechanisms at the top level set forth in the 2012 Applicant Guidebook were inadequate and needs to be fixed in advance of the opening of any ongoing application mechanism.

We also note significant ongoing concerns regarding processes relating to community applications, in particular the CEP. These need to be fixed before further community applications are considered.

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## Subject 3. Future new gTLDs assessed in “rounds.”

Recommendation 13 of the 2007 Final Report stated that “Applications must initially be assessed in rounds until the scale of demand is clear.” However, it was acknowledged that Recommendation 13 could be modified, provided there is data and evidence that supports an alternative mechanism. This PDP WG may want to consider these suggested actions/questions to help determine if a change to the policy is warranted:

- Define, capture data, and analyze metrics to understand “scale of demand”
- Define, capture data, and analyze metrics other than “scale of demand” that may help in determining if an alternative application acceptance mechanism should be considered
- Determine if any other New gTLD Program reviews may benefit deliberations on this subject.

### Questions:

3.a: Should we continue to assess applications for new gTLDs in “rounds.” If not, how could you structure an alternative application window for accepting and assessing applications while at the same time taking into consideration public comments, objections, evaluation, contention resolution, etc.?

We believe that “rounds” have the potential to create false demand as they can create fear that a future round may not come promptly in the future (such fear is duly based on the actual history of ICANN’s various new gTLD efforts). On the presumption that there will be subsequent new gTLD application procedures, we believe that it is important to create an application process, and timing, that provides greater certainty, especially for the development of new brands and their corresponding .brands. IPC Member Paul McGrady states it this way in his treatise:

“It would be beneficial to brand owners for ICANN to normalize the schedule for future rounds as quickly as practical. It is conceivable that multinational brand launches could be scheduled around the application period of future rounds in order to ensure that a new “mega-brand” could, in fact, be expressed in a new gTLD. It is likely that counsel will need to “clear” new brands against the list of pre-existing TLDs in order to ensure that the brand will not encounter string preclusion. A brand owner who invests millions to launch a new mega-brand could be quite unhappy to learn later that its new brand is incapable of being expressed as a new gTLD registry because a pre-existing TLD precludes the new brand from being expressed as a .brand gTLD.” *1-3 McGrady on Domain Names § 3.02*

Having said this, we can envisage significant challenges were ICANN to move to a continuously open, transparent, first-come first-served application process, including administrative burdens on potential applicants, ICANN staff and all other members of the community who would wish to review and comment on applications, as well as significant technical challenges in dealing with the anticipated demand to be first, were such an application process to open. We believe that a suitable balance would best be achieved by having a series of discrete open application windows followed by discrete closed evaluation windows, before the application window opens back up. A potential timing of 3 months for an application window, followed by a 3 month evaluation window seems practical, although the timing of the windows could be longer and would be a matter for discussion. Such a series of rolling application windows would give certainty of timing for all members of the community, helping to reduce

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the artificial demand created by an individual round where there is no certainty on when the next one will be. It would remove some of the administrative burden on applicants that a first-come first-served application process would likely cause and certainly would reduce the technical risks. Further, this would allow ICANN some time to react to application volumes and to gear up resources for the next cycle if demand in a previous cycle proves high. It would also be respectful of the resource constraints of the wider ICANN community, some of whom might have difficulty reviewing applications on an ongoing basis if the application window were a permanently-open one.

An open question in establishing a continuous process is how to deal with multiple potential applicants for a single gTLD. In the current round, these are grouped into “contention sets.” A true “first come, first served” process would eliminate contention sets, which would lead to a number of consequences that need to be identified and evaluated. Alternatively, an ongoing process that held applications (similar to some Sunrise periods) for a period of time could be considered, which would provide an opportunity for additional applicants to apply for the same string (particularly if applications are public record). This would, of course, lead to different consequences that would also need to be identified and evaluated.

Whilst the IPC would favor moving to such a process as quickly as possible, given the length of time that there will have been since the 2012 round before new applications open, it might be necessary first to have another application round. If so, the intention to move to a rolling open phase and the timing should be committed-to at the outset.

3.b: How would the assessment of applications in a method other than in “rounds” impact rights holders, if at all?

If the applications in an ongoing application mechanism such as the rolling open process referred to above, were published for opposition, brand owners whose business models do not require a gTLD registry would have the ability to oppose the application without having to spend the money to block an abusive application and/or compete against that application in an auction process. In this regard, the ability to oppose an application should be clarified and potentially expanded. As mentioned in 3.a above, the ongoing application mechanism would allow for greater certainty in clearing new brands.

3.c: Does restricting applications to “rounds” or other cyclical application models lead to more consistent treatment of applicants?

As mentioned above “rounds”, as we currently understand and experience them, have the potential to create false demand since they encourage the filing of applications by brands purely for defensive purposes. Rounds may also encourage other applicants to rush to apply due to lack of certainty over when or if a future opportunity will arise. On the other hand, rounds (for better or worse) do create contention sets, which can lead to more consistent treatment of applicants. It may be worth considering “open” filings for rounds, rather than the “Black Box plus Reveal” approach taken in the current round.

3.d: Should “rounds” or other cyclical application models be used to facilitate reviews and process improvement?

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Reviews and process improvements should not be used as a justification for preferring rounds or other cyclical application models. Reviews and process improvements can also take place in an ongoing application process.

3.e Do “rounds” lead to greater predictability for applicants and other interested parties?

Not necessarily. They are likely to lead to less predictability in many respects, as discussed above, as compared to an ongoing application mechanism such as the rolling open process proposed above.

3.f: Do “rounds” add latency to the evaluation and approval of an application, leading to longer times to market?

We do not have sufficient data to determine this since there has never been an ongoing application mechanism against which to compare it. However, pooling applications into arbitrary groups would appear, at least facially, to lead to bottlenecks and resultant delays.

3.g: Do “rounds” create artificial demand and/or artificial scarcity?

Yes; please see above.

3.h: Does time between “rounds” lead to pent up demand?

We do not have sufficient data to determine this since there has never been an ongoing application mechanism against which to compare it. However, it is conceivable that artificially inhibiting applications through “rounds” could lead to pent up demand, as suggested in 3.c above.

3.i: What is an ideal interval between “rounds?” Please explain.

See answer to 3.a above.

3.j: Any other issues related to this overarching subject:

In order for an ongoing application mechanism to function appropriately and predictably, reasonable and appropriate timeframes for each of the “public comments, objections, evaluation, contention resolution” etc., would need to be determined and then strictly adhered to in advance of the opening of the application mechanism, with little to no exceptions being made.

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**Subject 4. Predictability should be maintained or enhanced without sacrificing flexibility. In the event changes must be introduced into the new gTLD Application process, the disruptive effect to all parties should be minimized.**

The PDP Working Group has discussed this issue and does not believe that there will need to be policy development with respect to this issue. It should be noted and taken into account that there have been measures taken in the wider ICANN community that may help address some of the issues related to the subject of predictability, including the advent of new liaisons between Supporting Organizations (SOs) and Advisory Committees (ACs) and the GNSO actively seeking early engagement with other SOs and ACs, particularly with the GAC. In addition, the new GNSO processes developed by the Non-PDP Policy and Implementation Working Group should help to resolve problems that are only identified at a later stage, in a more consistent, predictable, and transparent manner, for not only this PDP-WG, but future GNSO efforts.

#### Questions:

4.a: Was the round of 2012 sufficiently predictable given external factors, while balancing the need to be flexible? Please explain.

No. There were significant variations from the program as published in the Applicant Guidebook vs. how it was actually implemented by staff. For example, the midstream prohibition against closed generics, the announcement of and corresponding demise of digital archery as a prioritization methodology, the requirement to develop “on the fly” a process to address rights protections on the release of name collision names, and the ongoing challenges with creating a process for the treatment of country names and codes at the second level, etc.

4.b: Do the changes implemented as a result of the establishment of Cross Community Working Groups and the adoption of the principles and processes from the Policy and Implementation Working Group suffice to maintain predictability of the application process while at the same time provide for the needed flexibility to address changes of circumstances?

We don't know since those items were not in place in the 2012 round and they have not been applied to any future application process.

4.c: What are the impacts on applicants, users and related parties from a process that lacks predictability?

Real businesses are frustrated at long delays, aborted investments, and inexplicable changes of direction by ICANN. While businesses bear the costs of such unpredictable actions and outcomes, ICANN also bears the cost to its own credibility and reputation, which were at an extremely low point during the early days of the 2012 application process. The lack of predictability also creates an ongoing skepticism and distrust by applicants, users and others – not least, potential applicants.

4.d: Any other issues related to this overarching subject:

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## Subject 5. Community engagement in new gTLD application processes.

The subject of community engagement was not anticipated by the New gTLD Subsequent Procedures Discussion Group to require any type of policy development specific to New gTLDs. This issue is not isolated to New gTLDs, and as such, steps to increase opportunities for community engagement or outreach have already been implemented. For instance, the GNSO PDP Manual requires that outreach to Supporting Organizations (SOs), Advisory Committees (ACs), Stakeholder Groups, and Constituencies be conducted at certain intervals to ensure they are aware of the issue being discussed. In addition, many of the SOs and ACs maintain liaisons between their groups to ensure they remain informed and are able to communicate concerns back and forth. Beyond these proactive engagement measures, the PDP process is open and transparent, so any member of the community is welcome to participate. As well, the implementation of New gTLD policy via the AGB, allowed for participation from any aspect of the community, and this is expected to be the case for any subsequent implementation activities. Recognizing that no matter how much planning and coordination is done at the policy development and policy implementation stages, there will always be unforeseen issues, and these issues should be dealt with in a predictable fashion.

### Questions

5.a: Are there circumstances in which the application window should be frozen while unforeseen policy issues are considered and resolved? If so, should there be a threshold or standard that must be reached before considering freezing an application window?

First, this question presupposes “windows,” which should not be assumed. Second, policy questions arise with some regularity, and can be dealt with in the context of an ongoing process. The lightweight policy processes developed by the Policy & Implementation Working Group should help deal with these in a timely and orderly fashion. We can foresee no reason to freeze the application process for a policy issue. Any threshold to do so would have to be incredibly high – essentially cataclysmic.

However, there may be operational issues of a severity sufficient to freeze a round; for example, financial failure by ICANN, disaster and recovery, or external *force majeure*.

5.b: If the Board is faced with questions that cannot be addressed by the policy recommendations they were sent, must the Board bring the issue back to the GNSO and PDP process (e.g., the GNSO Expedited PDP or GNSO Guidance Process)?

Yes, but such a question should not trigger an “all stop” for applications already filed. The new policy can be developed and implemented on a date certain effecting only applications after that date – at least in a continuous process. This is how the development and adoption of consensus policy works.

5.c: Should a standard be established to discriminate between issues that must be solved during an open application window and those that can be postponed until a subsequent application window? Please give an example.

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Policy issues, no. Operational issues, yes. Our examples are mentioned above, e.g., financial crisis for ICANN.

5.d: Any other issues related to this overarching subject.

Stakeholders need to participate fully as policy is developed, rather than leaving the work to others and depending on *ex post facto* opportunities to make changes.

## Subject 6. Limiting applications in total and/or per entity during an application window.

Application limits were not discussed in the 2007 Final Report. In the event that the PDP-WG undertakes policy development with respect to application limits, it will need to define the application limitation mechanism, assess and resolve any questions related to the legality of the mechanism, establishing requirements, establishing validation and enforcement measures, among other elements. Limits to the total number of applications in an application window and/or total number of applications from a single entity, at a minimum, should be considered. For the total number of application in an application window, this could refer to the absolute number of applications accepted, the number of unique strings accepted (or delegated), or other limiting factor.

### Questions

6.a: Should a limit for the total number of applications for an application window and/or from a single entity be established? If so, what should be the limiting factor (e.g., total application, total number of strings, etc.) and why?

No. Please see our response to 1.b above.

6.b: If a limit for the total number of applications for an application window and/or from a single entity is established, how would the appropriate amount of applications be set to establish this limit?

N/A

6.c: If a limit for the total number of applications for an application window and/or from a single entity is established, what mechanism(s) could be used to enforce limit(s)?

N/A

6.d: How would a limit on the total number of applications for an application window and/or from a single entity impact fees?

Fees would have to increase as ICANN may have to defend itself against an antitrust claim. (However, we note that the current round fees appear to have included a very significant allocation for legal defense, so perhaps it is more accurate to say that fees may not decrease as they otherwise should.)

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6.e: Would limits to the total number of applications for an application window and/or from a single entity be considered anti-competitive? Please explain.

Please see our response to 1.b above.

6.f: Do limits to the total number of applications for an application window and/or from a single entity favor “insiders?”

If there is a closed window process similar to the 2012 window, it would definitely favor “insiders.” More broadly, any process that is complex and subject to rules that can be gamed will favor “insiders.”

6.g: Any other issues related to this overarching subject:

ICANN should avoid setting arbitrary limits to market entry.

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## Open Questions

1. Are there further overarching issues or considerations that should be discussed in the New gTLDs Subsequent Procedures PDP WG?

The IPC has no further overarching issues or considerations to provide at this time, but may do so as the process progresses.

2. Are there additional steps the PDP WG should take during the PDP process to better enable community engagement?

The IPC has no additional steps to propose to better enable community engagement at this time, but may do so as the process progresses.