

1.9 Deliberations and Recommendations: String Contention Resolution

String Contention Resolution		
1.9.1	Community Applications	Work Track 3

1.9.1 Community Applications

a. What is the relevant policy and/or implementation guidance (if any)?

Implementation Guideline F: "If there is contention for strings, applicants may: i) resolve contention between them within a pre-established timeframe ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and; iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels."

Implementation Guideline H: "External dispute providers will give decisions on complaints."

b. How was it implemented in the 2012 round of the New gTLD Program?

Applicants when applying could designate their application as community-based, one of only two application types available in the 2012 New gTLD Program round, with the other being standard. In the absence of string contention, claims to support a particular community were simply accepted, as recommended in Implementation Guideline H. However, the community-based commitments the applicant made in their application were captured as contractual requirements in Specification 12 of the Registry Agreement, regardless of whether any string contention resolution was needed.

In the event that there were multiple applicants vying for the same or similar string, the 2007 Final Report provided guidance for resolving that string contention when a community-based applicant was involved, as suggested in Implementation Guideline F.

According to Module 4, String Contention, of the Applicant Guidebook, in 4.2 Community Priority Evaluation, if there is no self-resolution of string contention for community-based applicants of identical or confusingly similar strings, a Community Priority Evaluation (CPE) may be requested. A community priority panel appointed by ICANN reviewed community-based applications to determine whether any of them fulfills the community priority criteria. If a single

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community-based application is found to meet the community priority criteria, that applicant will be declared to prevail in CPE and may proceed. If more than one community-based application is found to meet the criteria, the remaining contention between them will be resolved via auction, limited to only the community applications that passed CPE. If no applicants passed CPE in a contention set, then contention would be resolved via self-resolution or an auction of last resort.

c. What are the preliminary recommendations and/or implementation guidelines?

The Work Track had a number of extensive discussions on the topics of string contention and “communities.” In addition, it received a number of comments related to the treatment of communities during the 2012 New gTLD round in CC2.

Although the Work Track has yet to come to an agreement on any preliminary policy recommendations, based on many of the implementation related issues identified by the Work Track and wider community, it has come to some level of general agreement on the following Community Priority Evaluation (CPE) implementation guidance related suggestions:

- The CPE process must be more transparent and predictable.
- CPE evaluations should be completed in a shorter period of time.
- All evaluation procedures should be developed BEFORE the application process opens and made easily and readily available.
- The CPE process should include a process for evaluators to ask clarifying questions and where appropriate engage in a dialogue with the applicant during the CPE process.
- Less restrictive word count for communities to engage in clarifying and providing information.

d. What are the options under consideration, along with the associated benefits / drawbacks?

None being considered at this time.

e. What specific questions are the PDP WG seeking feedback on?

1. During its deliberations, a number of Work Track members expressed that they believed the “definition” of community, available in section 1.2.3.1 of the Applicant Guidebook, was deficient. A number of attempts were made by the Work Track to better define the term “community”, but no definition could be universally agreed upon¹. How would you define “community” for the purposes of community-based applications in the New gTLD Program? What attributes are appropriate? Do you have specific examples where demonstrable community support should or should not award priority for a string? Do

¹ One of those attempts can be found here: <https://docs.google.com/document/d/1yKuFzTqlel53nxM9tOWgoH6evMTk4wdxVreVH2m1t0o/edit#heading=h.wjdbiqxzhb4>

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you believe examples are useful in developing an understanding of the purpose and goals of any community-based application treatment?

2. Should community-based applications receive any differential treatment beyond the ability to participate in CPE, in the event of string contention?
3. Could/should alternative benefits be considered when scoring below the threshold to award the string (e.g., support in auction proceedings)?
4. What specific changes to the CPE criteria or the weight/scoring of those criteria should be considered, if the mechanism is maintained?
5. In the 2012 New gTLD Round, it was determined that community-based applications should have preference over non-community-based applications for the same string. Some have argued that this preference should continue, others have claimed that this preference is no longer needed. Should the New gTLD Program continue to incorporate the general concept of preferential treatment for "community applications" going forward? Is the concept of awarding priority for community-based applications feasible, given that winners and losers are created?
6. The Work Track also considered a report on CPE prepared by the Council of Europe,² which noted the need to refine the definition of community and re-assess the criteria and guidance for CPE in the AGB and CPE Guidelines. Although this paper has not been officially endorsed by the European Commission or the GAC, there are a number of recommendations in this report on community-based applications. The Work Track is seeking feedback from the community on this report and more specifically which recommendations are supported, not supported or which require further exploration.
7. Do you agree with the Council of Europe Report³, which in summary states, "Any failure to follow a decision-making process which is fair, reasonable, transparent and proportionate endangers freedom of expression and association, and risks being discriminatory." Did the CPE process endanger freedom of expression and association? Why or why not?
8. In regards to recommendation 1 in this section above, what does, "more transparent and predictable," mean to you? For what aspects of CPE would this apply in particular?

f. Deliberations

Many Work Track participants believe that the underlying values and ideas from the GNSO's implementation guidance relating to communities were sound. However, there were a number of issues identified related to the actual implementation, execution, and outcomes of the Community Priority Evaluation (CPE), which has led to some in the community questioning whether the mechanism is ultimately workable in the program. Some of those specific concerns are noted below, which the WT widely agrees require addressing before the mechanism is to be included in the future:

² See Council of Europe report here:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>

³ Ibid

- Excessively high scoring threshold in the Applicant Guidebook to prevail in Community Priority Evaluation;
- Evaluation procedures for applications, which were developed only after the 2012 application window had already opened;
- Actual cost of CPE was approximately double the estimated cost;
- Lack of transparency and predictability of Community Priority Evaluation (CPE), in terms of the process, documentation, and outcomes;
- Excessive time it took to review applications;
- Perception that the Panel misinterpreted the applications in evaluating them and/or improperly applied the CPE criteria;
- Lack of mechanism to seek redress for perceived substantive errors in the evaluation process (e.g., errors of facts, misinterpretation of information, issues with research relied upon by the CPE provider, etc.);
- Usage of a single provider, reducing the value of a secondary review (e.g., in the case of a successful Reconsideration Request);
- Potential conflicts of interest among panelists;
- Lack of clarifying questions or opportunity for dialogue in the CPE process; and,
- Concerns about the process for reviewing support/opposition letter (e.g., scope of review, party performing review).

In developing the CPE criteria contained in the AGB, the extensive community debate over the scoring criteria and threshold for success (i.e., 14 points or higher) were indicative of the challenge of balancing the desire to prioritize community-based applications without having the mechanism potentially abused. CPE was an aspect of the program that had the potential to create winners and losers. Given the high stakes, the Work Track was unsurprised by the number of issues identified and ultimately, the high number of reconsideration requests filed by parties to CPE proceedings.

The Work Track has taken note of the GAC's concerns with the implementation of CPE as well, many of which are consistent with those raised by others in the community (e.g., consistency of outcomes, transparency of process, cost, etc.), as detailed in a number of Communiqués (i.e., the GAC Communiqués from ICANN51 in Los Angeles, ICANN53 in Buenos Aires, ICANN54 in Dublin, ICANN56 in Marrakech, and ICANN58 in Copenhagen).

CPE was also the subject of a Board Resolution that asked ICANN Org "...to undertake an independent review of the process by which ICANN staff interacted with the CPE provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider.⁴" While there are many in the community and indeed, within the WT, that disagree with the findings of that independent review, the Scope 1 report concluded ..."that there was no evidence that ICANN Org had any undue influence on the CPE Provider with respect to the CPE reports..."⁵

⁴ See Board Resolution here: <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

⁵ See Scope 1 report here: <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>

The Scope 2 report concluded "...that the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook..."⁶

The Work Track also considered a report on CPE prepared by the Council of Europe,⁷ which noted the need to refine the definition of community and re-assess the criteria and guidance for CPE in the AGB and CPE Guidelines. In addition, the "...report grounds its examination from a human rights angle, with particular regard to the rights to freedom of expression, freedom of association, non-discrimination and due process." The report notes that a community-based gTLD can, "...create spaces for communication, interaction, assembly and association for various societal groups or communities. As such, community TLDs facilitate freedom of opinion and expression as well as freedom of association and assembly."

At a minimum, there is the perception that CPE produced negative outcomes. Views have been expressed that both i) some applicants who were awarded "community" status in the last round, should not have been; and also that ii) some applicants who were unsuccessful in being awarded a "community" TLD in the last round, should have been given one. There is a wide variety of opinions within the Work Track on who or what should be considered a "community" for these purposes. There is general agreement that a clearer definition of the term "community" is needed, as its ambiguity has caused some concerns and misunderstandings for applicants, objectors, and evaluators.

The need for a definition of community in the New gTLD Program was supported by the New gTLD Program Committee's (NGPC) resolution in identifying areas of possible policy work⁸.

The GAC has stated its position that community-based applications with demonstrable community support be given due preference (i.e., the GAC Communiqués from ICANN46 in Beijing, ICANN47 in Durban, and ICANN49 in Singapore). The PDP WG and Work Track 3 leadership have met with the GAC during multiple ICANN meetings to discuss the GAC's concerns. Specific guidance about how to improve the definition of community, as well as specific challenges with and improvements to the CPE criteria, have been sought and are still welcome from the GAC, or any other interested parties in the community.

As noted, there is a perception that CPE outcomes did not meet expectations. Acknowledging that the GAC has been invited to provide specific suggestions and input to improve the CPE evaluation criteria, the Work Track recognizes that this may be a worthwhile exercise for it to undertake as well. What may be useful in that regard is to look at specific evaluations where it is perceived that the outcome was incorrect and attempt to pinpoint where precisely the evaluation panel and/or evaluation criteria could be returned or adjusted.

⁶ See Scope 2 report here: <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>

⁷ See Council of Europe report here: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>

⁸ See Annex A here: <https://www.icann.org/en/system/files/files/resolutions-annex-a-17nov14-en.pdf>

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If the ICANN community still desires to have community-based applications receive priority over other applications for the same string, there is general agreement that a clearer definition of the term “community” is needed, though it has proven difficult in coming up with a mutually acceptable definition. In determining how to define “community” applicants, the Work Track has considered the overall purpose and goal of the “community” concept in the TLD process (i.e., what are we trying to achieve by giving certain groups preferential treatment in the TLD process?). By asking “what public interest goal are we intending to achieve?”, we can begin to understand how to define “community” in a way that guides its application in the TLD process.

One suggestion is that protecting minority or disadvantaged communities’ “identity” and their ability to self-identify, self-associate, and organize in the domain name system is among the goals of the “community” process. The Work Track developed a draft definition that has been discussed with the wider community, but it received minimal support.⁹ As a next step towards establishing a definition, the WT will take input from the community to better understand the purpose and goal of having community-based applications in the New gTLD Program.

The Work Track notes that CPE was a mechanism to award priority in contention sets, where a community-based application was involved - it was not intended to serve as “an indication the community itself is in some way inadequate or invalid.”¹⁰ As such, in addition to trying to refine the community definition, the PDP WG is also aware that it needs to consider the other factors related to community-based applications. For instance, it has considered the community’s connection with the chosen string and the type of community and whether that matters and should be accounted for in some form of differentiated treatment (some examples include language, cultural, commercial, non-commercial, geo-location based, etc.).

One way to think about the purpose and goal of the community-based application aspect of the program is to identify use cases where it seems that priority may make sense. The examples discussed in establishing the 2007 policy guidance for CPE were more clear-cut than the actual instances in 2012, and it is likely that future cases will also be less than obvious. Is showing “demonstrable community support”¹¹ alone enough to award a community-based application a string or do the other factors involved in the CPE review (e.g., community establishment, nexus with string, and registration policies) play an important role?

The Work Track recognizes that developing a better understanding of what is intended to be accomplished with community-based applications will be instrumental in developing a “definition” of community within the New gTLD Program.

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⁹ See “strawbunny” here:

<https://docs.google.com/document/d/1yKuFzTglel53nxM9tOWgoH6evMTk4wdxVreVH2m1t0o/edit?usp=sharing>

¹⁰ Section 4.2.3 of the AGB

¹¹ See: <https://gac.icann.org/contentMigrated/icann47-gac-communicue>

At the suggestion of comments received from its Community Comment 2, the Work Track has also considered whether priority has to only mean that the community-based application must be awarded the TLD. For instance, independent of any CPE mechanism, communities could be exempted from certain contractual obligations. Another idea received from Community Comment 2 was that perhaps additional outcomes could be included from CPE scores. For instance, scoring 14 points or higher would still result in allocation of the TLD, but thresholds below that could award a multiplier in auction to help the community-based applicant compete in string contention resolution.

While much of the discussion focused on community-based applications and CPE, there has also been discussion around community objections. However, much of the feedback there was more generally applicable to all objections (e.g., lowering costs, appeal mechanism, etc.). Please review the section on Objections for additional detail.

g. Are there other activities in the community that may serve as a dependency or future input to this topic?

None identified at this time.