

GAC Advice relating to Community-based New gTLD Applications

Introduction

There has been considerable discussion, review and analysis of the ICANN rules on community-based applications and how they were applied in the current new gTLDs round. Regrettably the GNSO's original policy intentions, which the GAC and the wider community of stakeholders generally supported, that applications for new gTLDs submitted by communities should be afforded a degree of prioritisation that would enhance the interests of community members - and thus the public interest - were not realised in the course of the application round. Arguably, in some cases the processes in fact worked against their interests.

The GAC generally supports the New gTLD Subsequent Procedures PDP Working Group undertaking a review of the concept of prioritisation for community-based applications in order to define more precisely the intended public interest values and goals that prioritisation was originally intended to secure, together with a more coherent and readily understood definition of "community." The GAC did not have the opportunity to examine these questions and its successive submissions of advice to the Board focussed on process implementation deficiencies, inconsistencies and failures.

However, Committee members noted in this regard that the ICANN Ombudsman likewise expressed concern in his Own Motion Report of 11 October 2015 that a key cause of the problem of unrealised expectations relating to communities that the experience of the current application round identified, was lack of clarity about the types of community that would benefit from prioritisation of their applications and how persons or organisations would benefit from the use of a community-based top level domain.

1. Issues of public interest concern identified by ICANN's Governmental Advisory Committee

The number of successful community-based applications for new generic top level domains (gTLDs) was very low, with a high percentage (75%) of rejections. Of the total of 1930 gTLD applications submitted in the current application round in 2013, only 84 applicants (4.4%) were community-based and most of these were geographical names. Of these, 46 were uncontested while 23 applications found themselves to be in contention with wholly commercially-based applicants and in

accordance with the rules set out in the Application Guidebook were submitted to the CPE process.

It became apparent in the roll-out of the Community Priority Evaluation (CPE) process that this proved to be very selective with a high bar set for successful approval against commercially-based applicants in contention for the same name or term, without recourse to an effective appeals process. Only five of these applications succeeded; 13 were rejected; and two were eliminated because of eligibility problems.

A common feature were costly delays brought about by competing commercially-based applicants through their resorting to pre-existing ICANN review and appeal procedures such as Reconsideration Request, CEP (Cooperative Engagement Process) and IRP (Independent Review Process Panel). These procedures in many cases intervened in the new gTLD delegation procedures requiring the applications to be put on hold and in so doing seriously disrupting communities' business planning and timelines. In many cases these delays added pressure to their already limited financial resources and funding provision.

In view of the range of problems experienced by community-based applicants, the GAC is in general agreement that the application process had not served the best interests of communities, many of which had limited resources to defend their interests and the aims of their proposals in comparison with wholly commercially-based competing applicants. The community applicants' experience of the ICANN processes was more problematic in comparison with the generality of new gTLD applicants. Despite successive reiterations of the GAC's advice with regard to ICANN's responsibilities in respect of prioritising applications with demonstrable community support, the evidence of failures and loopholes in CPE procedures signal that there are major lessons to be learnt, and corrections to policy and guidance for applicants that need to be implemented, before the next open gTLD application process is launched.

2. Previous GAC statements and advice in support of community-based applications on public interest grounds

The history of the GAC's advice during 2013-17 (summarised below) on the treatment of community-based applications shows the Committee's focus primarily on ICANN's procedural issues and how they can be improved, to ensure that:

- due preference was given to applications with *demonstrable community support*;

- there was *consistent application of criteria* when assessing community applications for priority;
- community evaluation processes *will be improved* in the light of the experience of some community applicants in the recent round;
- the recommendations of a report facilitated by the Council Of Europe on community applications, while not endorsed by the GAC, will be considered by the New gTLD Subsequent Procedures PDP Working Group.

Advice as submitted by the GAC in the following communiqués to the Board:

ICANN 46 Beijing, 4/2013

The GAC advised the Board that in those cases where a community which is clearly impacted by a set of new gTLD applications in contention has expressed a collective and clear opinion on those applications, such opinion should be duly taken into account, together with all other relevant information.

ICANN 47 Durban, 7/2013

i. The GAC reiterated its advice from the Beijing Communiqué regarding preferential treatment for all applications which have demonstrable community support, while noting community concerns over the high costs for pursuing a Community Objection process as well as the high threshold for passing Community Priority Evaluation.

ii. Therefore the GAC advised the ICANN Board to consider taking better account of community views, and improve outcomes for communities, within the existing framework, independent of whether those communities have utilized ICANN's formal community processes to date.

ICANN 49 Singapore, 3/2014

The GAC reiterated its advice from the Beijing and Durban communiqués regarding preferential treatment for all applications which have demonstrable community support.

The GAC advised ICANN to continue to protect the public interest and improve outcomes for communities, and to work with the applicants in an open and transparent manner in an effort to assist those communities. The GAC further noted that a range of issues relating to community applications would need to be dealt with in any future round(s).

ICANN 51 Los Angeles, 10/2014

The GAC expressed concerns about the consistency of the Community Priority Evaluation Process, following the rejection of a number of applications. There was a need to ensure that criteria for community priority treatment were applied consistently across the various applications.

The GAC requested the ICANN Board to look into this matter and urged the Board to examine the feasibility of implementing an appeal mechanism in the current round in cases where an applicant contested the decision of a community priority evaluation panel.

ICANN 53 Buenos Aires, 6/2015

The GAC continued to keep under review the community application process for new gTLDs, noting that it did not appear to have met applicants' expectations. The GAC looked forward to seeing the report of the ICANN Ombudsman on this matter following his inquiry and would review the situation at its meeting in Dublin.

ICANN 54 Dublin 10/2015

The GAC advised the Board that:

- i. the GAC reiterated previously expressed concerns that the Community Priority Evaluation (CPE) process had not met the expectations of applicants and noted that all the successful applications were currently the subject of dispute resolution procedures.
- ii. the GAC expected the current specific problems faced by individual applicants to be resolved without any unreasonable delay, and in a manner in which justified community interests were best served.
- iii. the GAC noted possibly unforeseen consequences for community applicants of recourse by competing applicants to other accountability mechanisms; and the specific challenges faced by some community applicants in auctions when in competition with commercial applicants.
- iv. the GAC stated it would take into account a) the final report of the ICANN Ombudsman on this issue when preparing the GAC's input into the GNSO's review of issues for improving procedures relating to community-based applications in the next gTLD round; and b) the Competition, Trust and Consumer Choice Review (CCT) under the Affirmation of Commitments.

ICANN 56 Marrakech 3/2016

The GAC noted the response of the ICANN Board to GAC advice in the Dublin Communiqué concerning community applications for new gTLDs and the Community Priority Evaluation process. The GAC stated that it intended to undertake data gathering and analysis on experiences with the current new gTLD round in this regard and to make appropriate contributions to the GNSO PDP on New gTLD Subsequent Procedures and to the CCT Review.

The Council of Europe comprising 47 Member States is an observer inter-governmental organisation on the GAC, and stated it would facilitate a study report. This was commissioned by the Council of Europe's Steering Committee on Media and Information Society (CDMSI) and appointed Eve Salomon, Lawyer and International Media Consultant, and Kinnya Pijl, PhD Researcher in Law at the European University Institute in Florence, to undertake the work.

ICANN 57 Hyderabad 11/2016

The GAC noted the release of a report commissioned by the Council of Europe on: "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective." The GAC stated that it would consider the report with a view to its use within the community as an input to new gTLD policy development work.

ICANN 58 Copenhagen 3/2017

Following the Council of Europe's submission to the GAC at ICANN 57 of their report "Applications to ICANN for community-based new gTLDs: Opportunities and Challenges from a Human Rights Perspective", a presentation of the report's recommendations was provided by one of the authors. While not endorsing the report's recommendations, the GAC expressed support for these recommendations going forward for further consideration.

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