

30 September 2020

RE: New gTLD Subsequent Procedures PDP WG Draft Final Report

Cheryl Langdon-Orr, Co-Chair
Jeff Neuman, Co-Chair
GNSO New gTLD Subsequent Procedures PDP Working Group

Dear Ms. Langdon-Orr and Mr. Neuman,

I am writing in response to your [letter](#) from 20 August 2020, in which you informed the Board of the new gTLD Subsequent Procedures PDP Working Group's (PDP WG) publication of the draft Final Report for public comment. The Board recognizes the PDP WG's dedication and hard work, including the PDP WG's alignment of GNSO Policy with existing advice, such as on Reserved Names (Topic 21) and Name Collisions (Topic 29). The Board appreciates the PDP WG's affirmation of the importance of Universal Acceptance, as well as its encouragement of the ongoing efforts taking place through the Universal Acceptance Initiative and the Universal Acceptance Steering Group. The Board also appreciates the organization of the draft Final Report, in which the PDP WG recognizes existing policy and affirms the existing Applicant Guidebook (AGB) and New gTLD Program Committee (NGPC) implementation practices in absence of new consensus policy modifying or clarifying existing policy recommendations. Overall, the Board is impressed with the progress that has been made since the publication of the Initial Report. On behalf of my fellow Board members, I would like to congratulate you and the members of the PDP WG on achieving this important milestone.

In your letter you encouraged the Board to review the draft Final Report and provide feedback on the draft recommendations and implementation guidance. In addition, you sought input from the Board specifically on the topics of private resolution of contention sets and closed generics. We hope that our input on these and other topics will provide you with helpful feedback, contributing to the successful conclusion of the PDP WG. In this context, the Board notes that our comments provided in this letter do not preclude us from providing additional comment or input at a later stage.

Topic 2: Predictability (Pg. 15-19)

- A. The Board welcomes recommendations to support predictability in future new generic top-level domains (gTLDs), and is encouraged by the thoughtful discussion that has taken place on this subject within the PDP WG.
- B. The Board encourages the PDP WG to provide as much detail as possible to ensure clarity around the roles and responsibilities of the GNSO Council, ICANN org, applicants, objectors, other SO/ACs as well as the Board vis-a-vis the predictability framework. To inform implementation, the PDP WG may find it useful to provide case studies to illustrate roles and responsibilities of these different actors if and when changes to future application round processes are proposed and/or required.

- C. With regard to the proposed Standing Predictability Implementation Review Team (SPIRT), the Board encourages the PDP WG to consider whether there are established processes within the GNSO (or within ICANN's multistakeholder model) that might serve the intended role(s) of the SPIRT, rather than creating new ones.
- D. The Board encourages the PDP WG to consider whether recommendations are needed to avoid any unintended impact of the predictability framework on the necessary effectiveness and flexibility of ICANN org when implementing future new gTLD rounds. In this context, the Board notes Annex E that states "The SPIRT shall strive towards achieving Consensus on all advice and/or recommendations from the SPIRT. Even if consensus is not reached, the SPIRT can provide input on any particular issue received, as long as the level of consensus/support within the SPIRT is reported using the standard decision making methodology outlined in section 3.6 of the GNSO WG Guidelines." The Board believes it might be helpful to recommend a timeframe by which the SPIRT needs to reach a decision. (Pg. 16)
- E. It may also be useful for the PDP WG to consider the role of precedent in the Predictability Framework, e.g., can SPIRT recommendations form a body of decisions to guide handling of issues and increase efficiencies? (Pg. 16)
- F. The Board notes that the Predictability Framework cannot replace the ICANN Board or org's need to act in emergency situations, including taking actions in line with the Board or officers' fiduciary responsibilities.

Topic 6: Registry Service Provider Pre-Evaluation (Pg. 28-33)

The Board notes the affirmation of the revenue-neutral approach for future new gTLDs. (Pg. 31)

Topic 9: Registry Voluntary Commitments/Public Interest Commitments (PICs) (Pg. 36-48)

- A. The Board notes that as part of the restatement of ICANN's mission as reflected in the post-IANA Stewardship Transition Bylaws, the current form of the Registry Agreements were explicitly excluded from challenge on grounds that they exceeded ICANN's mission. See Bylaws, Section 1.1(d)(ii)(A)(1) and (2). This exclusion was brought about in large part by concerns from some in the community that some of the PICs within the Registry Agreements were outside of ICANN's technical mission. The community did not wish to invalidate those contracts through the revised mission statement. The language of the Bylaws, however, could preclude ICANN from entering into future registry agreements (that materially differ in form from the 2012 round version currently in force) that include PICs that reach outside of ICANN's technical mission as stated in the Bylaws. The language of the Bylaws specifically limits ICANN's negotiating and contracting power to PICs that are "in service of its Mission." The Board is concerned, therefore, that the current Bylaws language would create issues for ICANN to enter and enforce any content-related issue regarding PICs or Registry Voluntary Commitments (RVCs). Has the PDP WG considered this specific language in ICANN's Bylaws as part of its recommendations or implementation guidance on the continued use of PICs or the

future use of RVCs? Can the PDP WG provide guidance on how to utilize PICs and RVCs without the need for ICANN to assess and pass judgment on content?

- B. In its comment on the Initial Report, the Board asked the PDP WG to give more clarity on how to frame “public interest” in the context of a PIC and the PIC Dispute Resolution Procedure (PICDRP). We note that this has not yet been developed. We would like to reiterate our view that clear guidance on this issue will be valuable, and we encourage the PDP WG to work to that end. Specifically, we ask that the PDP WG provide clear and consistent implementation guidance on “public interest” in this context, to ensure that objective enforceability lies within ICANN’s mission. (See also our comment on Topic 24 below.)

Topic 15: Application Fees (Pg. 62-66)

The Board notes the PDP’s Recommendation 15.7: *“In managing funds for the New gTLD Program, ICANN must have a plan in place for managing any excess fees collected or budget shortfalls experienced. The plan for the management and disbursement of excess fees, if applicable, must be communicated in advance of accepting applications and collecting fees for subsequent procedures.”* The Board asks the PDP to more carefully examine the concept of “excess” or shortage of fees, especially in the light of the likely need for ICANN org, a not-for-profit organization, to increase resources for the application process and the continued support of the new gTLD program. The proposed principle of cost recovery of the next round, as for the 2012 round is understood as a clear mechanism to state to the public that the fee to be paid by applicants is designed to only cover for the cost of the program and not to support non-program operations of ICANN org. the proposed principle does not require a dollar-to-dollar return of any potential excess. The lack of a clear definition of “closure” and “round” for any new gTLD subsequent procedures future ‘round’ is also problematic in this context and the Board encourages the PDP WG to contemplate including such definition in its Final Report. (Pg. 63)

Topic 17: Applicant Support (Pg. 67-79)

- A. The Board notes that *“The Working Group recommends expanding the scope of financial support provided to Applicant Support Program beneficiaries beyond the application fee to also cover costs such as application writing fees and attorney fees related to the application process”* (Recommendation 17.2). The expansion of applicant support to affirmative payments of costs beyond application fees could raise fiduciary concerns for the Board. We encourage the PDP WG to ensure that applicant support is well scoped by preventing, to the extent possible, the possibility of inappropriate use of resources, e.g. inflated expenses, private benefit concerns, and other legal or regulatory concerns. (Pg. 68)
- B. Implementation Guidance 17.14 states that “ICANN org should seek funding partners to help financially support the Applicant Support Program, as appropriate.” The ICANN Board notes that this would change the role of ICANN, as ICANN is not a grant-seeking organization. Alternatively, ICANN org – through the Pro Bono Assistance Program –

could act as a facilitator in the introduction of industry players or potential funding partners to the prospective entrants.

Topic 18: Terms and Conditions

- A. The Board notes that the PDP WG recommends “[u]nless required by specific laws, ICANN Board members’ fiduciary duties, or the ICANN Bylaws, ICANN must only reject an application if done so in accordance with the provisions of the Applicant Guidebook. In the event an application is rejected, ICANN org must cite with specificity the reason in accordance with the Applicant Guidebook, or if applicable, the specific law and/or ICANN Bylaws for not allowing an application to proceed. This recommendation constitutes a revision to Section 3 of the Terms and Conditions from the 2012 round.” (Recommendation 18.1). The Board is concerned that this recommendation may limit the Board’s authority to act as needed. The Board would like to understand what problems the PDP WG identified with regard to Section 3 of the Terms and Conditions in the 2012 Application Guidebook “*Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN’s discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.*” The revision, as proposed by the PDP WG in Recommendation 18, may bind the Board unless one of the specific conditions is met. Such limitations could lead to unforeseen challenges, and so we encourage the PDP WG to provide details on how the proposed text in Recommendation 18.1 addresses any identified problems in Section 3 and also provide guidance on how to avoid limitations on the Board’s authority to act in unanticipated circumstances. (Pg. 79)
- B. The Board notes Recommendation 18.3: “*In subsequent rounds, the Terms of Use must only contain a covenant not to sue if, and only if, the appeals/challenge mechanisms set forth under Topic 32 of this report are introduced into the program (in addition to the accountability mechanisms set forth in the current ICANN Bylaws).*” The Board understands the intent behind this recommendation, but is concerned that dissatisfied applicants or objectors might argue based on this policy recommendation that the covenant not to sue is not valid because they did not like the way the appeals/challenge mechanism was built or operated. Accordingly the Board asks the PDP WG to review this recommendation, as anything that could weaken the covenant not to sue might preclude the ability to offer the program due to an unreasonable risk of lawsuits. The Board also asks the PDP WG to provide guidance on who would make the determination that the conditions set forth in Recommendation 18.3 are met and how.

Topic 20: Application Change Request

The Board notes Recommendation 20.6: “The Working Group recommends allowing application changes to support the settling of contention sets through business combinations or other forms

of joint ventures. In the event of such a combination or joint venture, ICANN org may require that re-evaluation is needed to ensure that the new combined venture or entity still meets the requirements of the program. The applicant must be responsible for additional, material costs incurred by ICANN due to re-evaluation and the application could be subject to delays.” Also Recommendation 20.8: *“The Working Group recommends allowing .Brand TLDs to change the applied-for string as a result of a contention set where (a) the change adds descriptive word to the string, (b) the descriptive word is in the description of goods and services of the Trademark Registration, (c) such a change does not create a new contention set or expand an existing contention set, (d) the change triggers a new public comment period and opportunity for objection and, (e) the new string complies with all New gTLD Program requirements.”* The Board acknowledges that recommendations 20.6 and 20.8 may lead to more flexibility, permitting applicant changes while also increasing the complexity of future new gTLD procedures. We note that this increase in flexibility and complexity is likely to lead to higher costs beyond applicant fees and result in possible delays, thereby making subsequent rounds potentially less predictable.

Topic 22: Registrant Protections

The Board notes the PDP WG’s recommendation that *“TLDs that have exemptions from the Code of Conduct (Specification 9), including .Brand TLDs qualified for Specification 13, must also receive an exemption from Continued Operations Instrument (COI) requirements or requirements for the successor to the COI.”* In the rationale provided for Recommendation 22.7, the PDP WG also states that an Emergency Back-end Registry Operator (EBERO) event would not be necessary because “there are no registrants in need of such protections in the event of a TLD failure.” The Board encourages the PDP WG to provide more details in its rationale and to ensure there are no hypothetical cases in which an EBERO might be appropriate. In addition, the Board encourages the PDP WG to consider the potential impact on end users and consumers in the event of a short-term or long-term technical or business failure of a .BRAND TLD.

Topic 23: Closed Generics (also known as Exclusive Generics) (Pg. 96-102)

- A. As previously [noted](#) by the Board, we believe that *“[closed generics] require input from the GNSO through the bottom-up policy development process”* and we continue to appreciate the PDP WG’s work on this topic. As noted in our 2018 [letter](#), the questions on how to evaluate the public interest and public interest goals of an application have been pending for several years, and we continue to encourage the PDP WG to reach consensus¹ on one or more recommendations concerning closed generics, taking into account relevant public comment and advice from ICANN’s Advisory Committees.
- B. You quoted the language of a [2015 Board letter](#) in your communication that is based on a [2015 resolution](#) of the New gTLD Program Committee (NGPC), stating: *“Resolved (2015.06.21.NG02), to address the GAC’s Category 2.2 Safeguard Advice, the NGPC requests that the GNSO specifically include the issue of exclusive registry access for*

¹ Consensus here is referred to as defined in the [GNSO Working Group Guidelines](#).

generic strings serving a public interest goal as part of the policy work it is planning to initiate on subsequent rounds of the New gTLD Program, and inform the Board on a regular basis with regards to the progress on the issue.” You asked “whether this [resolution] meant that the ICANN Board resolved that all future closed generics must serve a public interest goal if they were to be allowed, or whether it was just attempting to understand the GNSO’s thoughts on closed generics in general.” While the NGPC requested a discussion on the issue of closed generics that serve a public goal, requesting a specific outcome of such a discussion lies outside the Board’s purview. Pursuant to the Bylaws, we will consider any consensus-based recommendation that is adopted by the GNSO Council and put before us and base our decision on whether we reasonably believe that the policy proposal is or is not in the best interests of the ICANN community and ICANN (Bylaws Annex A, Section 9 (a)).

- C. The PDP WG also enquired about the [three recent proposals](#) on the future treatment of Closed Generics and “whether any of these proposals at a high level are heading in a direction in line with the Board’s views.” The Board read all three proposals with great interest. As stated above, the Board is not in a position to request policy outcomes. It is therefore not in the Board’s purview to indicate a preference. As stated above, we will base our decision on whether we reasonably believe that the policy proposal is or is not in the best interests of the ICANN community or ICANN (Bylaws Annex A, Section 9 (a)), if and when such a policy is recommended by the GNSO Council and put before us.

Topic 24: String Similarity Evaluations (Pg. 102-109)

- A. The Board notes the PDP WG’s strong reliance on the intended use of applied-for strings when it comes to similarity evaluations in Recommendation 24.3: “*Applications will not automatically be placed in the same contention set because they appear visually to be a single and plural of one another but have different intended uses.*” The Board asks the PDP WG to include recommendations and implementation guidance for objective evaluation criteria to determine “different intended uses” because we believe this will be invaluable to ensure consistent and transparent processes regarding this element in string similarity evaluations. (Pg. 103)
- B. The Board notes Recommendation 24.5: “*If two applications are submitted during the same application window for strings that create the probability of a user assuming that they are single and plural versions of the same word, but the applicants intend to use the strings in connection with two different meanings, the applications will only be able to proceed if the applicants agree to the inclusion of a mandatory Public Interest Commitment (PIC) in their Registry Agreement. The mandatory PIC must include a commitment by the registry to use the TLD in line with the intended use presented in the application, and must also include a commitment by the registry that it will require registrants to use domains under the TLD in line with the intended use stated in the application.*” As noted in our comment on Topic 9, the Board is concerned that the proposed reliance on PICs to restrict the use and potentially the content of names registered in delegated TLDs raises questions about compliance with ICANN’s Bylaws,

which state that ICANN will not restrict “services that use the Internet’s unique identifiers or the content that such services carry or provide [...]”.

Topic 25: Internationalized Domain Names (IDNs) (Pg. 109-113)

- A. The Board sees IDNs as a critical part of ICANN’s mission to support global access to the domain name system, and therefore appreciates the affirmation that IDNs are “*an integral part of the New gTLD Program.*”
- B. The Board appreciates that Root Zone Label Generation Rules (RZ-LGR), which have been developed by the efforts of the various script communities, have been integrated into the program to validate and determine the variant labels of the applied-for strings and that many of the [Recommendations for Implementing Variant TLDs \[icann.org\]](#) (Variant TLD Recommendations) have also been incorporated. (Pg. 109-110)
- C. The Board suggests that any applied-for string in a script not integrated in the RZ-LGR should not be processed until its validity and variant labels can be determined by RZ-LGR, following the [Recommendation 5 \[icann.org\]](#) of the RZ-LGR Study Group. (Pg. 110)
- D. The Board also suggests that [Recommendations 5 and 6 \[icann.org\]](#) of Variant TLDs Recommendations also be considered by the PDP WG for implementing variant TLDs.
- E. The Board notes that using RZ-LGR and adopting the Variant TLD Recommendations may have impact on other processes, including string similarity reviews, managing reserved labels, changes of control, and more, as also [analyzed \[icann.org\]](#) in the Variant TLD Recommendations, which are not currently addressed in the draft Final Report. (Pg. 110)
- F. In the context of the point above, the Board is concerned that additional recommendations (and implementation guidance) are needed for effectively processing gTLD applications along with their variant labels. Therefore, the Board asks that impact on these processes be assessed and finalized either by the PDP WG or by the GNSO’s further follow-up work in time for planning and implementation of the next gTLD application round.
- G. The Board notes that ICANN org is finding that some IDN tables previously approved for gTLD registries may have security or stability issues, based on more recent work by the technical and script-based communities. Taking such findings into consideration, the Board asks the PDP WG to clarify which IDN tables “pre-vetted by the community” could still be used to remove IDN table testing for the new gTLDs. The Board suggests that the PDP WG considers Reference IDN tables being published by ICANN org as the candidate pre-vetted IDN tables. (Pg. 178)

Topic 29: Name Collisions (Pg. 128-133)

The Board encourages the PDP WG to provide details on how future NCAP study results should be dealt with in future rounds. Would these need to initiate new policy processes and how would such processes affect ongoing rounds?

Topic 30: GAC Consensus Advice and GAC Early Warning (Pg. 133-139)

The Board is committed to working closely with the GAC to encourage the issuing of advice prior to the finalization of the Applicant Guidebook (AGB), with the goal of reducing, if not eliminating, the need for wide-ranging GAC advice.

Topic 31: Objections

The Board notes that the PDP WG affirms *“that the role of the Independent Objector (IO) should exist in subsequent procedures”* (Affirmation 31.8). As the PDP WG seems to be affirming the role and use of the IO (which was not part of the earlier policy recommendations). The Board encourages the PDP WG to identify the purpose of continuing the use of the IO role and the problems that the continued use of the IO is expected to solve. The Board also encourages the PDP WG to consider how the IO role was exercised in the 2012 round to help illustrate this work. (Pg. 142)

Topic 33: Dispute Resolution Procedure After Delegation (Pg. 156-157).

The Board notes Recommendation 33.2 that states: *“For the Public Interest Commitment Dispute Resolution Procedure (PICDRP) and the Registration Restrictions Dispute Resolution Procedure (RRDRP), clearer, more detailed, and better-defined guidance on the scope of the procedure, the role of all parties, and the adjudication process must be publicly available.”* The Board encourages the PDP WG to provide clear problem statements detailing any concrete deficiencies with the PICDRP and the Registration Restrictions Dispute Resolution Policy (RRDRP). Such statements may help the PDP WG provide details on what aspects of the guidance concerning the scope of the procedure, the role of all parties, and the adjudication process should be clearer, more detailed, and better-defined.

Topic 34: Community Applications (Pg. 157-162)

- A. The Board notes that the PDP WG recommended very few substantive changes related to the community application process, and more specifically to the Community Priority Evaluation (CPE) process. The PDP WG simply recommends that the *“Community Priority Evaluation (CPE) process must be efficient, transparent and predictable”* (Recommendation 34.2) and that *“ICANN org should examine ways to make the CPE process more efficient in terms of costs and timing”* (Recommendation 34.4). The Board is concerned that these are not sufficiently detailed recommendations to address the issues that arose during the 2012 round. The Board asks the PDP WG to raise specific concerns that the PDP WG sees with the CPE process, considering the fact that many of the CPE determinations were challenged in the 2012 round. The Board believes these clarifications are required in order for the Board to assess whether it is in the best interests of ICANN and the ICANN community to proceed with CPEs in the next round.
- B. In this context the Board also encourages the PDP WG to consider the mission-limitation that derives from the Bylaws, which state that ICANN will not restrict “services that use the Internet’s unique identifiers or the content that such services carry or provide”

(Section 1.1 (c)). The PDP WG may want to review the impact this provision might have on ICANN's ability to enforce the content of community TLDs post delegation.

Topic 35: Auctions: Mechanisms of Last Resort/Private Resolution of Contention Sets
(Pg. 163-172)

- A. The Board notes Recommendation 35.2, which states “[...] *the Applicant Guidebook (AGB) must reflect that applicants will be permitted to creatively resolve contention sets in a multitude of manners, including but not limited to business combinations or other forms of joint ventures and private resolutions (including private auctions).*” The Board encourages the PDP WG to provide a rationale why the resolution of contention sets should not be conducted in a way such that any net proceeds would benefit the global Internet community rather than other competing applicants.
- B. The Board notes that if “private” resolutions will be allowed or encouraged in subsequent procedures, the PDP WG is requested to provide a rationale for why these private processes should only partially be brought into the program rather than be kept outside of the program or be brought into the program. The Board also encourages the PDP WG to provide guidance on the kinds of transparency requirements that it would like to see applied in practice around private resolutions of contention sets.
- C. Recommendation 35.3 states that “*Applications must be submitted with a bona fide (good faith) intention to operate the gTLD. Applicants must affirmatively attest to a bona fide intention to operate the gTLD clause for all applications that they submit.*” The Board is supportive of applications needing to be submitted with “bona fide” intentions to operate the gTLD. However, it is unclear from Recommendation 35.3 whether these are specific and enforceable promises or statements of current intent that can be changed at a later time.
- D. The Board acknowledges the “*potential non-exhaustive list of ‘factors’ that ICANN may consider in determining whether an application was submitted with a bona fide (good faith) intention to operate the gTLD.*” We note that this non-exhaustive list of “factors” may put ICANN org or the ICANN Board into the position of subjectively trying to determine the state of mind of applicants, and take decisions that are subject to possible challenges. The Board asks the PDP WG to consider providing a clear problem statement of what types of behavior or abuse the requirement of bona fide applications is meant to address. PDP WG members could then use such a statement to provide objective criteria for assessing the bona fide nature of an application. (Pg. 164)
- E. The Board notes that a statement of “bona fide” intentions would be expected for all applications, not only those involved in auctions, particularly since when an application is submitted the applicant likely will not know if it will be in contention. (Pg. 164)
- F. In this context, the Board suggests that the PDP WG consider the hypothetical scenario of an applicant intending to operate up to five gTLDs. To avoid contention sets the applicant might apply for 20 strings, with the expectation to drop 15 applications based on contention and their own preference. Would those 15 applications not be considered “bona fide,” and what would be the consequence for such an applicant? Similarly, a large number of applications could be submitted by separate corporations; would ICANN org be required to establish each applicant’s investor(s) and other controlling parties in

order to affirm bona fide intent? The Board believes it would be helpful for the PDP WG to address these questions and provide guidance on making objectively enforceable rules to establish what constitutes a bona fide intention to run a gTLD. (Pg. 164)

Topic 41: Contractual Compliance (Pg. 181-183)

- A. The Board is aware of the need for increased resources to ensure the enforcement of compliance on a significantly larger number of TLDs.
- B. The Board notes that much of the data reporting that is being recommended by the PDP WG is already being published, see [ICANN Contractual Compliance Dashboard](#). (Pg.182)

Again, the Board would like to thank the Subsequent Procedure PDP Working Group, its leadership, and the support team for its dedication and hard work. The Board remains available to respond to any specific questions or comments the PDP WG might have.

Best regards,



Maarten Botterman
Chair, ICANN Board of Directors