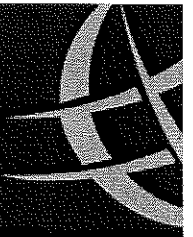


The ICANN GNSO “Business Constituency”



To: Cherine Chalaby, Chair, Sub Committee for new gTLD Initiative/program

CC: Board Chair and full Board

Akram Attalah, Interim Chief Executive Officer

Board Secretary – for distribution and posting to the Board Correspondence

Business Constituency Members

CSG Chairs

Date: September 5, 2012

As Chair of the Business Constituency at ICANN’s GNSO, I advise the Board Subcommittee on new gTLDs and the full ICANN Board and broader community regarding a concern about what appears to be a staff proposed change in the new gTLD Guidebook. We ask that this letter and our attachment with full details be posted on ICANN’s Correspondence Page and shared with all Board members.

Issue of Concern:

ICANN made a commitment in the new gTLD Program to provide robust processes to assure that the community as a whole – with particular opportunities for governments and rights holders – have the opportunity to raise objections that could lead to the rejection of applications.

This communication to ICANN, and to the full ICANN Board raises an objection to a recent [informal] statement by ICANN that implies a material change in a process established as part of the final Guidebook. This proposed change by staff appeared to change the time available for those who will need to file objections to applications, and to move that time frame from June/July 2013, to January 2013.

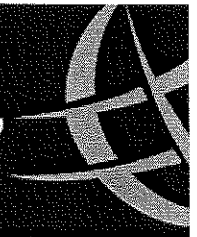
This letter identifies our concerns about such a proposed change; explains the rationale for our concerns, and asks for a confirmation that there is no change, or if there is a proposal to make a change, that the Board Sub Committee on new gTLDs mandate a public comment of a minimum of 30 days to address the implications for non applicants/objectors and that the concerns of non gTLD applicants are taken fully into account before making a material change of this nature.

Background:

According to the June 4th, 2012 version of the Applicant Guidebook <<http://newgtlds.icann.org/en/applicants/agb>> , the new gTLD Objection Filing period will close following the end of the Initial Evaluation period, with a two-week window of time between the posting of the Initial Evaluation results and the close of the Objection Filing period. The expected timing is July/July, 2013.

The clear intent of the Initial Evaluation Period is to screen out non compliant

The ICANN GNSO “Business Constituency”



applications. The community has expected that some/or perhaps many applications will not make it through the ICANN Initial Evaluation Period. Thus, fewer objection filings would be needed than if there is a requirement that the objection filings take place before the Initial Evaluation Period.

The expectation has been that the two week period would follow the Initial Evaluation Results posting – June/July, 2013. Companies and organizations who expect to have to raise objections have budgeted resources accordingly.

Concern:

Recently, it came to our attention that, during the New gTLD Webinar <<http://newgtlds.icann.org/en/applicants/webinar-09aug12-en>> Staff stated that the Objection Filing period will close January 12, 2013.

According to the Webinar staff statement: "we weighed whether the Objection Period should be open for over a year. We decided not to do that."

"We weighed the decisions against the goals of the program about fairness, transparency, predictability, smooth operations. We're concerned that applicants would have operations running for over a year while an objector would determine an objection, but would keep the objection in their pocket for a long period of time to see whether the application passed or failed."

BC Views:

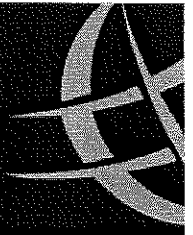
The BC members and those whom we are interacting with outside of ICANN from business raise concerns about such a change. Such a decision has material and negative implications for those who will have to raise objections. There was no public and transparent public comment process that could take into account the implications for those who may need to raise objections. It is possible that staff conversations or solicited comments from applicants may have called for such a change, raising concerns about their costs; however, ICANN's responsibility is to the larger community, and changes of this nature cannot be made without public and transparent comment processes, taking into account the implications for all parties.

Summary of Concerns:

-- With the additional two weeks AFTER the conclusion of ICANN's Initial evaluations, objectors would know whether or not the application had passed before they incurred the final expense of filing an objection. Although other extensive work would have been completed, the final decisions and the filing fees are not insignificant.

--Objectors expected a significant time frame available to undertake their analysis; do research; discuss with community or industry parties. This time frame was 'advertised' by ICANN as ending in June/July, 2013. This was part of the final Guidebook. The time that is required to develop an objection is resource intense and complexity is increased if it is an industry group that has to reach agreement

The ICANN GNSO “Business Constituency”



across diverse and competitive groups. This undoubtedly also extends to NGOs and other such groups, but we are not commenting on their behalf, only noting that others may share our identified concerns.

--There was not a public and transparent comment raising objections to this original plan in the new gTLD final guidebook that would call for or support such a change. *Informal comments* provided via *any* mechanism should not be used to justify such a major change in a process of such impact to non registrants.

-- There is not a transparent and widely available public notice to the broader community asking for input on such a change.

Analysis:

It is possible that the Board Sub Committee and even Staff did not understand the implications of this proposed ‘change’. This would indicate that it is critically important for the Sub Committee and staff to have fuller interactions with non applicants, and to ensure public comment discussions on what is material change, and on material change.

This particular change has significant impact to those who will need to file objections in both resources of time and finances: The impact on non applicants to new gTLDs, or to those who have legitimate concerns about applications and want to file objections are serious:

--Objectors will have to file objections without knowing whether an application has even passed Initial Evaluation. This has cost and resource implications to those who may need to raise objections.

--This will potentially mean that objections will be received at the same time as ICANN is investing resources and expenses in completing ‘Initial Evaluations’.

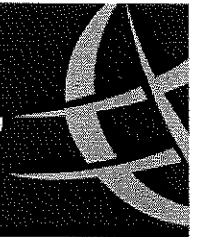
--As the Evaluators will accept no outside information, it is unclear what will happen to the objection information. If an application is ‘approved’ by ICANN, will the objection then be applied and the ‘evaluators reconsider approval or will the application be moved then into some secondary process?

- If an application is ‘not approved’, then what will ICANN do with the information provided by the Objector? Will it be acknowledged and documented or just disregarded as unnecessary? Will the fees paid by the objector in such a case be completely refunded?

Summary:

Objections are not easy to raise; will not be inexpensive in resources to the party/ies who need(s) to raise an objection, and particularly if they are complex, or require extensive community engagement to prepare a unified objection will incur extensive time resources and potential travel and communications and drafting costs that take significant time to finalize, with an additional payment of a fee to ICANN that will range from \$8,750 - \$124,000 for the final objection filing to ICANN.

The ICANN GNSO “Business Constituency”



The BC comments focus on implications for those who need to raise objections, and raise the BC's strong concerns about such a proposed change as proposed during the webinar. The impact on non applicants and on stakeholders transfers additional filing costs and time in resources and review of multiple applications that may not 'pass' the ICANN review process. It also significantly shortens the time available to objectors.

ICANN made a commitment in the new gTLD Program to 'provide robust processes to assure that the community as a whole – with particular opportunities for governments an rights holders – have the opportunity to raise objections that could lead to the rejection of applications.'

The BC has significant concerns that ICANN appears to have demonstrated a failure to understand the concerns and implications for objectors, many of whom may be business users. This proposed change by staff would impose a major change in the publicized and agreed to process in the Guidebook, without officially consulting the communities that are most affected -- users. We understand that objections can be filed by competitors, as well. However, any concerns ICANN have about competition between applicants should not override the concerns of the community more broadly.

In the interest of recognizing that it is possible that adjustments may be beneficial to both applicants and users/community, we ask that ICANN Board Subcommittee require a minimum of a 30 day public comment period on such a proposed change, and consider the comments received before supporting any staff proposal for such material changes. If concern about objections between competing applications is a priority concern to Staff/ICANN, the call for public comments can ask how to deal with different kinds of objections. However, as contention issues will have already moved many names outside the process for resolution of such contention, it is unclear how the objection process is implicated in this area of potential concern.

For our part, we will participate in such public comment processes and will widely promote the visibility of the opportunity to provide comments about the impact of such a proposed change. The public comment process should be a minimum of 30 days, and should be focused on any changes of this nature, as proposed by staff, or contemplated by staff. Any such material changes in the Guidebook processes, or in the new gTLD program deserve the same public comment opportunity for those who are after all most affected by the new gTLD program – users from all regions and all categories of stakeholders.

Marilyn Cade
BC Chair and on behalf of the Business Constituency