

Members of the Registry Stakeholder Group (RySG) took considerable interest in discussion at the ICANN 58 meeting in Copenhagen regarding the introduction of additional gTLDs, particularly with regard to the timing of the next round and the responsibilities of the ICANN Board, ICANN organization and the community to make this happen. We respectfully request the ICANN Board give this matter serious consideration and commit to setting a date that balances previous commitments made by the ICANN Board to introduce subsequent rounds as expeditiously as possible and the completion of reviews and work efforts associated with the 2012 new gTLD round.

Setting a date for the next application window will provide certainty for ICANN the organization and potential applicants alike, but also ensure that all work efforts are completed in a timely manner. Given many of the associated reviews and dependent work efforts have been, or are near completion, we believe it is becoming increasingly important that a date for a next round be set. Based on the information contained in the body of this letter, we believe the fourth quarter 2018 should be the target date for the next application window.

Key points:

- Setting a date provides predictability and certainty for ICANN the organization, the community and potential applicants.
- Setting a date provides a deadline for all existing work efforts and removes the risk of work efforts being used as a vehicle for delaying tactics.
- The ICANN Board committed to opening an application window for the New gTLD Program as expeditiously as possible, consistent with the existing policy.
- A new Applicant Guidebook can be developed in parallel with the subsequent procedures PDP WG effort

### **Existing commitments and policy**

It is important to recall that the current GNSO Policy on Introduction of New Generic Top-Level Domains<sup>1</sup> includes, as its very first principle the statement that “New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way” and further that “the Request for Proposals for the first round will include scheduling information for the subsequent rounds to occur within one year.” This principle was implemented in the 2012 round Applicant Guidebook<sup>2</sup> with the clear commitment that

“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.”<sup>3</sup>

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<sup>1</sup> <https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

<sup>2</sup> <https://newgtlds.icann.org/en/applicants/agb>

<sup>3</sup> Section 1.1.6 at page 1-20

The ICANN Board itself reiterated the commitment to allowing future applications for gTLDs in Resolution 2012.02.07.05<sup>4</sup>: “ICANN is committed to opening a second application window for the New gTLD Program as expeditiously as possible.”

This commitment to further predictable, timely applications for new gTLDs is the current policy of the GNSO, ratified by the Board. The fact that there are currently PDPs underway that may affect future introduction of new gTLDs does not change the commitment, any more than the fact that there are currently PDPs relating to Rights Protection Mechanisms (RPMs) or Registration Data Directory Services (RDDS) mean that registries and registrars are not bound by existing policies relating to UDRP or WHOIS.

### **Commitment to work plan**

Along with reaffirming its commitment to the introduction of additional gTLDs, in February of 2012, the Board also directed the CEO “to publish a document describing the work plan required prior to initiating a second application window for the New gTLD Program, specifically addressing the GAC requirement for assessment of trademark protections and root zone operation, and identifying other prerequisites to the next round of new gTLDs.”<sup>5</sup> A draft work plan was published on 22 September 2014, with a [revised work plan](#) published on 27 January 2015.

Most of the recommended work has been, or is near to being, completed and the policy development processes are well under way. According to the most recent [Program Reviews and Policy Timeline \(Projected\)](#) there are a number of policy development processes that are assumed on the critical path to a next round: we dispute the inclusion of the Privacy and Proxy Services Accreditation; IGO/INGO Access to Curative Rights Protection; and the next Generation Registration Directory Services PDP. We also believe that the review of the UDRP and URS to be conducted under the RPM PDP WG is not on the critical path to a next round.

### **Begin work on new guidebook**

ICANN’s current work plans imagine waiting for the Subsequent Procedures PDP to complete before beginning work on implementation of a new application process. However, the scope of the PDP’s work already includes implementation issues, and largely builds off of experience in the 2012 round. Therefore it should be possible to begin work on a new Applicant Guidebook in parallel to the work on various policy tracks. While the new guidebook could not be finalized until policy work is completed, the Initial Report is due to be published later this year and should provide a good basis for ICANN staff to begin to:

- Identify areas where changes were made to the application, evaluation and transition to delegation processes after the final guidebook was published and produce a guidebook that reflects the actual practice in the 2012 round (e.g., incorporating provisions around

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<sup>4</sup> <https://www.icann.org/resources/board-material/resolutions-2012-02-07-en#4>

<sup>5</sup> Resolution 2012.02.07.06

name collision). This document could be used as a starting off point for future applications.

- Work with PDP leadership to identify areas where consensus has already been achieved either that the 2012 implementation was satisfactory or that specific changes need to be made.
- Begin to produce a new guidebook that encompasses these areas where consensus has already been achieved. This in-progress guidebook could also clearly indicate areas where there are still open issues that are expected to be addressed prior to its finalization.

By beginning work on a guidebook in parallel with the completion of other work, it should be possible to move quite rapidly from final recommendations from the PDP to a new application round, which will substantially compress the timelines in the workplan.

**Registries have outlined an approach to identify a limited set of policy issues and to resolve key implementation issues.**

In a 2016 letter, the ICANN Board (“Board”), requested further clarification from the Generic Names Supporting Organization (GNSO) on what milestones should be completed prior to opening a new gTLD application process. Following Dr. Crocker’s correspondence, a working party was formed within the RySG to consider and establish registry positions on the questions posed by the Board. We devised an approach that would promote the timely introduction of new gTLDs, while supporting critical process improvements that benefit applicants and the community alike.

The working party reviewed the 2007 GNSO Policy and major issues raised during the 2012 New gTLD Application Round (“2012 Round”) to determine whether these issues were likely to require policy change and whether they were critical enough that they should be treated as a prerequisite for a future applications. We identified three issues that we believe met these criteria: (1) supporting applications from underserved regions, (2) exclusive-access TLDs and what contractual requirements should apply to these closed registries, and (3) whether “closed generic” applications should be permitted. As these issues are high-priority and may require changes to the established policy, they should be addressed through the work of the New gTLD Subsequent Procedures Policy Development Process (“Subsequent Procedures PDP”).

In addition, we identified four general issue areas where we believe that the 2007 GNSO Policy remains sound, but where implementation improvements could be made prior to allowing new applications without significant delay to a subsequent application process: application procedures, the objection process, strings, and community applications. Because many members of the RySG were involved with the 2012 round, we believe we can work with the ICANN organization and the rest of the community to improve the implementation of existing GNSO policy. Therefore, the working party formed subteams for each of these issue areas to develop recommendations for how the ICANN could improve their implementation within the

existing policy. We have included our recommended improvements as an attachment to this letter, and separately communicated them to the Subsequent Procedures PDP.

By focusing on a limited set of critical policy and implementation issues, it should be possible to efficiently move to a new application window. It is important to note that while we recommend defining a narrow subset of issues that should be addressed *prior* to a future gTLD application process, we do not believe that these are the *only* issues or improvements that can or should be pursued by the community. Other policy changes or process optimizations could be pursued on an ongoing basis through the GNSO Policy Development Process (PDP) or as iterative operational improvements without delaying new applications. This would have an added benefit as, where relevant, as changes would apply in perpetuity rather than being re-litigated with every potential application period. Further, where applicable, changes would apply to all gTLDs, rather than those from a particular round, eliminating the need for duplicative policy tracks (e.g. ongoing efforts to determine whether RPMs brought about by the 2012 Round should apply to “legacy” gTLDs). An iterative approach would be particularly effective in the event that the community departs from a rounds-based approach to new gTLD applications in favor of a continuous process.

## **Summary**

The Board and the community made commitments to open a second round of new gTLDs as expeditiously as possible. ICANN’s current timeline suggests that it will be late 2020 before a next round will open and we believe this is inconsistent with the existing policy. We therefore call on the ICANN Board to seriously consider setting a date in the fourth quarter of 2018 for the next application window, based on the path forward provided above. Setting a date will provide certainty and predictability for ICANN the organisation to ensure readiness for a next round as well as applicants. It will also provide a deadline for the completion of related work efforts, which is important to removing the risk of delaying tactics being used to prolong the introduction of more TLDs. In the event that the Board does not consider the fourth quarter of 2018 feasible, we request an explanation of why this cannot be achieved

## **ANNEX: LETTER FROM RYSG TO SUBSEQUENT PROCEDURES WORKING GROUP**

In a 2016 letter, the ICANN Board (“Board”), requested further clarification from the Generic Names Supporting Organization (GNSO) on what milestones should be completed prior to opening a new gTLD application process.<sup>6</sup> Following Dr. Crocker’s correspondence, a working party was formed within the Registries Stakeholder Group (RySG) to consider and establish registry positions on the questions posed by the Board. We devised an approach that would promote the timely introduction of new gTLDs, while supporting critical process improvements

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<sup>6</sup> See [Crocker to Bladel, 5 August 2016](#)

that benefit applicants and the community alike. The aggregated response<sup>7</sup> put forth by the GNSO noted the RySG's position that the existing 2007 GNSO Policy for the Introduction of New gTLDs ("2007 GNSO Policy") is generally sound and that only work required to address significant deficiencies in policy or implementation should be treated as a prerequisite for advancing a future gTLD application process.

Specifically, we reviewed the 2007 GNSO Policy and major issues raised during the 2012 New gTLD Application Round ("2012 Round") to determine whether these issues were likely to require policy change and whether they were critical enough that they should be treated as a prerequisite for a future applications. We identified three issues that we believe met these criteria: (1) supporting applications from underserved regions, (2) exclusive-access TLDs and what contractual requirements should apply to these closed registries, and (3) whether "closed generic" applications should be permitted.

We acknowledge that the GNSO could not reach consensus on what reviews and policy efforts should be treated as gating in its most recent correspondence, and that the Subsequent Procedures PDP (SubPro) continues to work on a broad range of issues. In addition to identifying required policy changes, we identified four general issue areas where we believe that the 2007 GNSO Policy remains sound, but where implementation improvements could be made prior to allowing new applications without significant delay to a subsequent application process: application procedures, the objection process, strings, and community applications. The working party formed subteams for each of these issue areas to develop recommendations for how the ICANN could improve their implementation within the existing policy. Our recommendations are described below and further elaborated in our attached annex.

It is important to note that while we recommend defining a narrow subset of issues that must be addressed *prior* to a future gTLD application process, we do not believe that these are the *only* issues or improvements that can or should be pursued by the community. Other policy changes or process optimizations could be pursued on an ongoing basis through the GNSO Policy Development Process (PDP) or as iterative operational improvements without delaying new applications. This would have an added benefit as, where relevant, changes would apply in perpetuity rather than being re-litigated with every potential application period. Further, where applicable, changes would apply to all gTLDs, rather than those from a particular round, eliminating the need for duplicative policy tracks (e.g. ongoing efforts to determine whether RPMs brought about by the 2012 Round should apply to "legacy" gTLDs). An iterative approach would be particularly effective in the event that the community departs from a rounds-based approach to new gTLD applications in favor of a continuous process.

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<sup>7</sup> See [Bladel to Crocker, 25 October 2016](#)

## Application Processes

Recommendations from the 2007 GNSO Policy described a number of principles that came into play during the 2012 new gTLD application and evaluation process. These included:

- **Recommendation 1:** ICANN must implement a process that allows the introduction of new top-level domains. The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process;
- **Recommendation 7:** Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out;
- **Recommendation 8:** Applicants must be able to demonstrate their financial and organisational operational capability;
- **Recommendation 9:** There must be a clear and pre-published application process using objective and measurable criteria;
- **Recommendation 10:** There must be a base contract provided to applicants at the beginning of the application process; [and]
- **Recommendation 18:** If an applicant offers an IDN service, then ICANN's IDN guidelines must be followed.

### *Application Change Request Process*

- **Issue:** During the 2012 application round, and subsequent evaluation period, there was no clear process for applicants to follow if they wanted or needed to make changes to their new gTLD applications. Given how long the evaluation process took, a number of applicants found it necessary to submit changes to their applications in order to maintain the accuracy of those applications. Without a clear procedure in place from the outset, ICANN staff was forced to create procedures on the fly, creating a burden on applicants to keep up with changes.
- **Recommendation:** A formalized procedure for making changes to a new gTLD application, based on what worked well during the 2012 Round, should be developed and made widely available to applicants prior to future application procedures.

### *Continued Operation Instrument (COI)*

- **Issue:** The criteria provided for the Continued Operation Instrument in the 2012 Applicant Guidebook were confusing and unclear, which resulted in 82% of all applications receiving one or more Clarifying Questions on Question 50 of the application, which addressed the COI. Moreover, ICANN Staff needed to publish four separate advisories to clear up remaining confusion about the COI. The lack of initial clarity resulted in applicants incurring additional costs to revise their COIs based on later advisories and guidance.

- **Recommendation:** For future application procedures, consider replacing the per-registry COI with an alternative mechanism to protect registrants, such as an Emergency Back-End Registry Operator (EBERO) fund to which all registry operators contribute. Additionally, because Specification 13 registries inherently do not have registrants to protect, consider making Specification 13 registries exempt from any COI requirements or EBERO funding requirements.

#### *Pre-Delegation Testing (PDT)*

- **Issue:** The information about Pre-Delegation Testing included in the 2012 Applicant Guidebook consisted of non-specific, high-level guidelines rather than a concrete procedure that new gTLD applicants needed to follow. Because this procedure was not finalized in advance, ICANN had to conduct beta testing and implement a pilot program, which lengthened the amount of time applicants had to wait between when they submitted their applications and when they could delegate their gTLDs.
- **Recommendation:** Prior to subsequent application procedures, the process for conducting PDT or its equivalent should be finalized and published for applicants. Future PDT procedures should also be streamlined over the system used in the 2012 round to eliminate the need to conduct redundant tests on the same registry back-end systems.

#### *Name Collision*

- **Issue:** The topic of Name Collision was not addressed by ICANN until approximately one year after the 2012 new gTLD application period closed and it took another year for ICANN to develop a process for mitigating against the risk of name collision that new gTLD applicants could follow. While the mitigation plan enabled most new gTLD applications to move forward through the delegation process, the ultimate mitigation framework recommended deferring of three gTLD strings, .HOME, .CORP and .MAIL from delegation indefinitely. As a result, these three strings have been suspended in a state of limbo for nearly five years.
- **Recommendation:** A clear and fair process for determining which strings will pose a risk for Name Collision should be developed and communicated to future applicants well in advance of any subsequent application procedures. For strings that may pose a risk, there should be a clear mitigation procedure that applicants can implement without incurring undue burden or delays in delegating their gTLDs. In the event that a new gTLD is applied for but later is disqualified because it poses too great a risk regarding Name Collision, then the applicant should have access to a refund.

Additionally, if ICANN selects a partner organization to measure the risk of Name Collision and develop mitigation procedures, this partner should be free of any conflicts of interest.

Finally, we believe there should be a formal review of the duration of the controlled interruption period, which was the key mitigation measure used for gTLDs in the 2012 Round. It is unclear whether a 90 day period is necessary in order to identify and

mitigate collisions. Such a review should include an analysis of TLDs that did require mitigation

### *Process and Procedure Changes*

- **Issue:** The Applicant Guidebook did not adequately anticipate many implementation challenges that arose during the 2012 Round, which resulted in ICANN staff needing to develop processes and procedures after the Guidebook was published. This often resulted in processes that were wildly different than what was anticipated in the Guidebook and in nearly every instance created delays to the timelines of each phase that followed the application submission period. The regular stream of new procedures and the delays made it impossible for applicants to have any predictability about the process to eventually delegate their gTLDs and created the need to constantly monitor ICANN's activities for new development that would materially impact their operations.
- **Recommendation:** For future gTLD application procedures, any implementation processes that will be carried over from the 2012 Round should be consolidated, documented, and made available to applicants, either through an Applicant Guidebook-type mechanism or another medium that is easily accessible for applicants. Additionally, an appeal process should be instituted that will allow an applicant to appeal a process or procedure decision made by ICANN that would adversely impact the viability of the applicant's application.

### *Registry Agreement*

- **Issue:** The 2012 Applicant Guidebook featured a baseline version of the new gTLD Registry Agreement, but the final text of the Agreement that new gTLD applicants eventually signed differed substantially from that published version.
- **Recommendation:** A final or near-final version of the baseline Registry Agreement should be published and made available to new gTLD applicants in advance of any future application procedures.

### *Internationalized Domain Name (IDN) Label Generation Rules (LGRs)*

- **Issue:** New LGRs were developed after the publication of the 2012 Applicant Guidebook, so applicants did not have these LGRs to follow in implementing IDNs in their new gTLDs.
- **Recommendation:** The Applicant Guidebook or any Applicant Guidebook-type mechanism that guides future application procedures should rely on the Label Generation Rules for the Root Zone that have been developed since the 2012 round.

## Objection Processes

Recommendations from the 2007 GNSO Policy described a number of principles that were implemented by way of the objection process. These included:

- **Recommendation 2:** Strings must not be confusingly similar to an existing top-level domain or a Reserved Name;



- **Recommendation 3:** Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law;
- **Recommendation 6:** Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law; [and]
- **Recommendation 20:** An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.

We support the continued use of objection processes to implement these recommendations. Notwithstanding, we believe that the objection process could be generally improved through a number of procedural changes to all four categories of objection proceedings.

Additional recommendations are made in the Strings and Objection Process subsections of this document that pertain to String Similarity and Community Objection procedures, respectively. Both the overall objection recommendations and contained herein, and the additional type-specific recommendations, should be applied to these objection types.

## Independent Objector

The Independent Objector continues to fill an important theoretical function in its ability to relay potential objections from third parties that would not otherwise have the financial capability to do so. However, in the 2012 Round, the behavior of the Independent Objector deviated from this intended function; the Independent Objector appeared to have an, activist agenda, rather than hearing, filtering, and advancing concerns of third parties that would otherwise not have been able to file on their own. Further, the Independent Objector's behavior in the 2012 Round raised questions of whether Conflict of Interest Procedures and other procedural guidelines were appropriately applied.

### *Require established support for objections by the Independent Objector*

- **Issue:** In the 2012 Round the Independent Objector appeared to act on an independent agenda that was not supported by the public, nor by particular affected parties that would have not been able to file an objection. Further, the low success rate for objections filed by the Independent Objector raises questions of whether concerns raised by the objected-to strings were sufficiently clear-cut to warrant objection through this process, particularly given the high cost of this office to ICANN.
- **Recommendations:** As part of the objection filing process the Independent Objector should be required to name one or more parties that initiated or support the objection but would otherwise be unable to file, in addition to meeting all other criteria for objection (e.g. affirmation that filing the objection is in the public interest).

### *Establish clear Conflict of Interest Procedures for the office of the Independent Objector*

- **Issue:** The 2012 Round witnessed potential Conflicts of Interest related to objections filed by the Independent Objector. While the conflicts were ultimately resolved, the failure to establish clear conflict of interest guidelines for the office of the Independent Objector at the outset resulted in additional delay and cost to affected parties. The lack of clear Conflict of Interest Procedures for the office of the Independent Objector in the Applicant Guidebook contradicts with the approach taken for other independent parties engaged in the application process, including application evaluators and objection evaluation panels.
- **Recommendation:** In light of this experience and in line with the overall goals of the program ICANN should implement a clear conflict of interest policy and associated procedures for the Independent Objector. The Conflict of Interest Guidelines used for application evaluators may be used as a model for these procedures.

*Require Independent Objector to withdraw duplicate objections*

- **Issue:** The 2012 Applicant Guidebook provided that, absent extraordinary circumstances, the IO should not be permitted to file an objection against an application was already filed on the same ground. We strongly support the principle but do not believe it was fully adhered to by the Independent Objector, who maintained some of his objections while third party objections against the same string and on the same grounds were pending and failed to defend why this followed from extraordinary circumstances.
- **Recommendation:** We urge strict adherence to this principle in a future round and recommending removing the carve out for extraordinary circumstances, as we do not believe that this standard was met or defended during the 2012 Round

## Fees/Cost Issues

*Implement and enforce a strict loser-pays model for all Dispute Resolution Panels.*

**Issue:** The 2012 Round proposed that objections should follow a loser-pays model, wherein fees are refunded to the winning party. We support the use of a loser-pays model, but are concerned that it was not fully applied by all providers.

**Recommendation:** While most providers refunded both the panel and the flat/administrative fees, one provider opted to retain the flat upfront fees from both parties. To address this, we suggest that clarifying language be added to make clear that both the administrative and panel fees will be refunded to the prevailing party. A possible redline could read: “3.4.7 After the hearing has taken place and the panel renders its expert determination, the DRSP will refund the advance payment of costs, including both the administrative and panel fees, to the prevailing party.”

*Strictly enforce objection page limits*

- **Issue:** One of the factors contributing to the high costs of objections during the 2012 round was a failure of the panels to curb submission of additional objection documentation. As panels are paid hourly they are incentivized to accept additional documentation even if it was not strictly necessary for the purpose of evaluating the substance of the objection. Further, in some instances, attachments were used to make

and support additional arguments not made in the body of the original objection, resulting in additional work and cost to respondents.

- **Recommendation:** We believe that the page caps proposed are appropriate and should be more strictly enforced as part of a subsequent application procedure. To these ends, we would welcome additional language clarifying that attachments should be limited to supporting documentation and must not be used to make additional arguments not covered within the 5,000 word/20 page limit and that, following submission of the initial objection, additional documentation will only be accepted if it is specifically requested by the Objection panel.

*Allow parties to jointly determine whether to use a one or three-Expert panel*

- **Issue:** The selection of a one or three-Expert panel raises tradeoffs related to cost and consistency. While one-Expert panels are lower cost, three expert panels may be more reliable and less likely to generate concerns around inconsistent application of objection procedures or outcomes.
- **Recommendation:** In light of these tradeoffs, we believe that, for all Objection types, Parties should be able to jointly determine whether to use a one or three-expert panel. In the event that the Parties fail to reach agreement the default will be to rely on a three-Expert panel.

## Consolidation

*Allow Parties to jointly determine whether objections involving the same strings and grounds should be consolidated.*

**Issue:** The 2012 Round allowed the Dispute Resolution Provider to determine whether objections should be consolidated without a clear standard for what situations will warrant consolidation. While a few objections were consolidated, many objections against identical strings were not. Another concern was raised by the emergence of seemingly inconsistent outcomes for highly-similar objections against identical strings that were not consolidated.

**Recommendation:** As the panel may have incentives or disincentives to consolidate an objection, particularly related to fees, we believe that the objector and respondent should, instead, jointly determine whether objections against identical strings and of the same objection type should be consolidated. If the Parties cannot reach an agreement as to whether the objection should be consolidated, the Dispute Resolution shall determine whether to consolidate the objection and will be expected to provide a short, written defense of its decision. Regardless of whether objections are consolidated, all objections of a single type, filed against identical strings, should be evaluated by the same Expert(s) to minimize the potential for perception of inconsistent outcomes.

## Appeals

Some of the objection processes for contested applications had common issues between them. The next gTLD rounds working group identified some of the problems that post-decision mechanisms, such as appeals, may help reduce or solve.

1. Lack of panelist training and consistency as evidenced by decisions that were decided differently, despite having substantially similar fact patterns,
2. Random opportunities to present new evidence or re-argue a position based on how vehemently a party insisted on the right.
3. No opportunity to have the merits of a case revisited – a problem where the providers didn't properly train panelists.

**Issue:** The perception of inconsistent outcomes led to overreliance on existing accountability mechanisms, particularly the Reconsideration Request process, which was ill suited to address the objection related issues as Reconsideration Requests are intended to address action or inaction by ICANN staff or the ICANN Board and not determinations by a third party panel. This situation was detrimental to applicants, who were left without adequate recourse mechanisms, and the ICANN Board's Governance Committee, which was inundated by an unprecedented number of reconsideration requests that it could not process on a reasonable time frame.

It also drove the creation of post-decision mechanisms which were only made available to a narrow subset of applicants who faced the most obviously inconsistent determinations. This situation was inadequate to address the larger issues identified above.

**Recommendation:** We recommend that, in a subsequent application process, a limited appeals process be introduced for the objection procedures for parties that identify either a reasonable inconsistency in outcome or a specific argument as to why the panel failed to apply the proper standard.

We propose below several models to consider for potential appeal options:

- **Delayed appeals:** For parties that were the first few cases under a new procedure or mechanism, allow the losing party to request a delayed review by panelists who have experience deciding similar cases under the new system, to cross-check for consistency.
  - **Pros:** Ensures the first cases are not prejudiced by early learnings by the first panels.
  - **Cons:** Prevents certainty for the prevailing party. Implies objections are subject to stare decisis.
- **Master panel:**<sup>8</sup> A traditional appeals process appears to simply substitute the judgment of panelist B for that of panelist A. Instead, hand-pick "master" panelists who have demonstrated consistent, sound judgment in the first round and ensure that they are provided with high-quality briefing materials regarding any changes in the next round. These materials should be approved by the community members who work on any changes to the AG. ICANN can use application fees to pay the Master panel to read every opinion to form its knowledge base. The Master panel may be responsible for providing routine panelist training on each objection process, to be paid by application fees. The Master panel can be retained by ICANN or by one of the Providers (subject to its ability to contract with each of the chosen master panelists). Master panelists may be forbidden from hearing objections in the first instance, to reduce conflict.

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<sup>8</sup> Preferred by work group participants in a straw poll.

- Pros: Uses proven experts to try to create more consistent outcomes. Application fees fund the effort toward consistency, but parties still pay for their own cases.
- Cons: No party control over master panel selection, risk of master panelists “going rogue.” Provider that offers the master panel may be at odds with other providers. ICANN- run master panel may invite conspiracy theories. Master panel appointment may become “political.”
- **ICANN Review:** A panel or team within ICANN could be established to conduct independent reviews of objection outcomes and to make follow up recommendations.
  - **Pros:** The cost would be borne by applicant fees. If the process is transparent, the community may trust the experts more than panelists hired by third-party providers.
  - **Cons:** ICANN- run review process may invite conspiracy theories and the experts may not receive community trust if ICANN is not transparent about how the review process works. Without an actual appeal mechanism where facts are re-heard, the community may feel like a review does not go far enough. Similarly, ICANN may be overly conservative in this review for fear of picking winners and losers as part of the application process.
- **Appeals:** A template exists for this in the URS, TM-PDDRP, and RRDRP. The community would need to decide if all appeals should be heard by a three member panel in order to avoid the perception that it’s always just another coin flip. Using those existing procedures as guides, the community could define the appeals process it wants. Some examples include: expedited timelines to avoid dragging out an objection, a rehearing based on the already-submitted data, the use of a short list of panelists who are generally conflict-free and available (similar to the master panel), and clearly-defined fees to be prepaid. Appeals could be limited to specific issues, as determined by the community – each objection process would need to come up with the types of appeals that would be acceptable.
  - **Pros:** Eliminates concerns about ICANN having the ultimate authority, allows Providers to perpetuate a consistency amongst the panelist list, and provides a basis of competition between panelists (pricing, time-to-decision, quality of training and opinions).
  - **Cons:** Additional, possibly uncapped, expense. If Panelist training problems persist, an appeals process is still a blind shot.
- **Existing accountability mechanisms:** Existing mechanisms are best utilized if a Provider goes rogue or underperforms, but the Board’s expertise is not policing the day to day work of ADR providers.

## Strings

We believe that the 2007 GNSO Policy establishing that “strings must not be confusingly similar to an existing top-level domain or a Reserved Name” is satisfactory. Nevertheless, there remain lightweight potential improvements to the processes designed in support of these policies.

Specifically, the 2012 Round saw several issues related to the handling of gTLD strings spanning the String Similarity Review, String Confusion Objection Process, as well as the systems put in place to help applicants identify potential contention sets and handle reserved names that we believe could be easily addressed in advance of a future application process.

## String Similarity Review

### *Consolidate single-plural pairs into a contention set through the String Similarity Review*

- **Issue:** The String Similarity Review played a limited role in the 2012 Round. Of the 1,400 unique applications submitted and the 232 contention sets formed, only two contention sets were identified by way of this review: .hotels and .hoteis and .unicorn and .unicom. Many applicants and community members expected the String Similarity Review to identify a broader set of contentions and weed out potential instances of user confusion, particularly with respect to applications for single and plural string pairs. This is evidenced in the fact that no applicant applied for both the single and plural variant of a particular string, as well as in the number of String Confusion Objections filed to address single and plural string pairs.
- **Recommendation:** The scope of the String Similarity Review should be broadened to encompass single/plurals of TLDs on a per-language basis in addition to the existing visual similarity standard. Contention sets would be formed on a per-language basis.

A dictionary should be the tool used to determine the singular and/or plural version of the string for the specific language. In this expanded process, applications for single/plural variations of each string would be placed in a contention set and applications for a single/plural variations of an existing string would not be permitted.

By way of example, if applications were submitted for the strings .gâteau, .gâteaux, .cake, and .cakes, then the strings .gâteau and .gâteaux (French) would be placed in contention with one another, but not with the corresponding translations .cake and .cakes (English), which would comprise a separate contention set. Additional contention sets could continue to be formed through the String Confusion Objection Process.

## String Confusion Objections

**Issue:** During the 2012 Round, the String Confusion Objection process resulted in indirect contention situations for identical strings proposing similar use cases. For example, in one objection determination, the strings .car/.cars were determined to be confusingly similar, while in another they were determined to not be confusingly similar. This resulted in a situation where the ability or inability for the two strings to coexist depended on which party prevailed at auction.

This outcome was seen as inconsistent by many in the community (both objectors and respondents) and saw late stage intervention by the ICANN board to introduce a limited appeals

process. The appeals process was only made available to the applicants who were placed in contention, and not to the party filing the objection.

**Recommendation:** We believe that these could be largely avoided by allowing a single String Confusion Objection to be filed against all applicants for a particular string, rather than requiring a unique objection to be filed against each application. We propose the following guidelines:

- An objector could file a single objection that would extend to all applications for an identical string.
- Given that an objection that encompassed several applications would still require greater work to process and review, the string confusion panel could introduce a tiered pricing structure for these sets.
- Each applicant for that identical string would still prepare a response to the objection.
- The same panel would review all documentation associated with the objection.
- Each response would be reviewed on its own merits to determine whether it was confusingly similar.
- The panel would issue a single determination that identified which applications would be in contention. Any outcome that resulted in an indirect contention would be explained as part of the panel's response.
- A limited appeals process (as described above) would be available to both the objectors and the respondents to handle any perceived inconsistencies.

## Sword Tool

### *Eliminate the Sword Tool*

- **Issue:** There was little correlation between the Sword Results and the actual outcomes of the String Similarity Review and String Confusion Objection Process and, thus, that the tool was more misleading to applicants than helpful. Further, it appeared that the scores produced by the Sword Tool were changed partway through the application process, resulting in further confusion to applicants.
- **Recommendation:** We recommend that ICANN do away with the Sword Tool that was presented to applicants as part of the 2012 Round.

## Reserved Names

### *Ensure that the application system automatically reflects all names banned by the Applicant Guidebook*

- **Issue:** Applicants encountered inconsistencies in ICANN's handling of reserved names. While some reserved names (e.g. strings that were identical to an existing TLD or an IANA reserved name) would be automatically rejected by the application systems, other applications that were altogether banned per 2.2.1.4.1 of the Applicant Guidebook were accepted by the application systems; further, no comprehensive list of these terms was provided requiring duplicative parallel review by applicants.

- **Recommendation:** ICANN should upgrade the application system such that it would automatically kick back applications for all banned names including identical strings, IANA reserved names, and the Country and Territory Names prohibited per 2.2.1.4.1 of the Applicant Guidebook.

## Communities

On the topic of communities, the 2012 Guidebook lays out procedures for both Community Objections, by which communities who would be negatively impacted by an application can prevent its delegation, and Community Priority Evaluation (CPE), which allows certain community applications to gain priority in a contention set. Community Objections were established by GNSO recommendation #20:

An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.

CPE was established by two Implementation Guidelines in the 2007 policy (F&G).

While the RySG agrees that communities deserve recognition in the application process, we have identified a number of improvements that could be made in the implementation of the GNSO policy, as described below.

*Communities should be limited to participating in either Objections or CPE, but not both.*

**Issue:** During the 2012 Round, some entities who were involved in TLD applications took "two bites of the apple" by filing both objections and participating in CPE for the same strings. This meant that they had two opportunities to potentially defeat a competitive application. We don't believe this matches the intent of the policy or the guidebook.

**Recommendation:** No individual entity should be able to participate in both an objection and CPE for the same string.

## Community Objections

*The cost of Community Objections should be lower and more predictable.*

**Discussion:** The costs associated with Community Objections were surprisingly high compared to other types of objections, and were hard to predict in advance of filing. This may have been particularly problematic for communities that chose to file objections with a low probability of success.

**Recommendation:** ICANN should prioritize cost in choosing a vendor. Costs should be transparent up front to participants in objection processes with a fixed fee absent extraordinary circumstances.



*Community Objections should generally be resolved by three panelists*

**Issue:** Unlike some other types of objections, community objections do not have existing legal basis to guide them. This makes them harder to adjudicate, and increases the risk of inconsistent decisions.

**Recommendation:** Community objections should default to three panelists, unless both parties agree to use one panelist.

*In some cases, applicants should be able to remediate impact identified in Community Objections*

**Issue:** In the 2012 Round, community objections were “all or nothing”. Even if the impact to the affected community could be corrected by the applicants, the panel had no option but to either allow the application to proceed or to terminate it. This made the standard to win an objection quite high, and also meant that some applications that probably could have been remediated were instead rejected.

**Recommendation:** Allow arbitrator to identify remedies or cures that would address the detriment to the community, which could be adopted by the applicant and would form a binding portion of the eventual registry agreement.

## Community Priority Evaluation

*Improve consistency across CPE decisions.*

**Issue:** In some case, individual CPE decisions seemed to result in different scoring for apparently quite similar sets of facts.

**Recommendations:**

- 1) Improved training for panelists. Objection process, legal rights process generally better. Look to those models for better training.
- 2) Similar review/appeals process for CPE decisions as we’re proposing for objections.

*Improve transparency in CPE decisions*

**Issue:** There was a lack of transparency in how CPE was evaluated. In many cases, materials evaluated were not available to the public or even to other applicants, or what factors or materials panels considered. It was also not clear what the roles for ICANN and EIU were.

**Recommendations:** Better documentation of roles and factors. Materials evaluated as part of the CPE process should be made public.

*Allow other applicants to review CPE applications*

**Issue:** There was little fact checking of CPE applications. As described in the guidebook, CPE is evaluated without input from other applicants in the contention set or other interested third parties, despite the fact that a successful CPE decisions eliminates other applicants from contention.

**Recommendations:** There should be a formal process by which other applicants or other interested third parties have an opportunity to comment on a CPE application and its supporting materials.

*Allow CPE models that are not all or nothing.*

**Issue:** CPE was difficult to achieve, with a low rate of success amongst applicants. Despite this fact, many CPE applications seemed to represent an attempt to game the system to gain an advantage over other applicants rather than representing bona fide communities.

**Recommendations:** CPE should not be decided on an “all or nothing” basis; instead should be based on a sliding scale. For example ICANN might provide a multiplier in auction process for “grey area” applications. Applications that clearly cross the threshold still automatically prevail in the contention set. If this approach is adopted, all applications in the contention set should be considered to determine whether they also partially meet the criteria for community status.