

December 21st, 2018

RE: Request for ICANN Org's Input on the Subsequent Procedures PDP Supplemental Initial Report (Five Additional Topics)

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

Dear Cheryl and Jeff:

As requested in your 6 November 2018 letter, ICANN org has performed a review of the Subsequent Procedure PDP Supplemental Initial Report (Five Additional Topics) and are providing implementation feasibility input that we hope will be helpful to the PDP Working Group in its continued deliberations to formulate final policy recommendations.

We appreciate the opportunity to provide input on the Supplemental Initial Report and have also submitted this input to the public comment forum so that it is available for review by the wider community. We remain available to answer any questions that the PDP Working Group may have as it works toward finalizing policy recommendations.

Sincerely,



Trang Nguyen
Vice President, Global Domains Division Strategic Programs
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Cc: Steve Chan, Policy Director, GNSO Support

Enclosure: ICANN Org Input on the Subsequent Procedures PDP Supplemental Initial Report (Five Additional Topics)

ICANN Org's Implementation Feasibility Input on the Subsequent Procedures PDP Supplemental Initial Report

21 December 2018

ICANN Org Input on the Subsequent Procedures PDP Supplemental Initial Report: Additional Topics

ICANN org appreciates the work completed by the PDP Working Group on the Supplemental Initial Report. As requested in the 6 November 2018 [letter from the Co-Chairs of the PDP Working Group](#), the following implementation feasibility input is intended to help the PDP Working Group in its continued deliberations to formulate final policy recommendations. The input is focused on the preliminary recommendations in the Supplemental Initial Report. Areas of the Supplemental Initial Report that are not addressed in this document are those where ICANN org does not have any significant concerns or input to provide at this time. As discussions progress and recommendations solidified, ICANN org may have additional implementation feasibility input.

2.1 Auctions: Mechanisms of Last Resort

(2.1.b) This section of the Supplemental Initial Report states: “[A]pplicants were precluded from making material changes to their applications, which prevented many types of voluntary arrangements (such as the creation of a joint venture) which would have been the natural result of a mutual agreement.”

It should be noted that the [change request criteria](#) from the 2012 round of the program to evaluate change requests were carefully developed to enable applicants to make necessary changes to their applications while ensuring a fair and equitable process for all applicants. The criteria described “Materiality” as “Would the change affect the evaluation score or require re-evaluation of some or all of the application? Would the change affect string contention or community priority consideration?” The change request criteria did not prohibit “Material” change requests. Per the criteria, a change that is determined to be material in and of itself will not cause a change request to be rejected. However, it will cause other criteria to weigh more when considered in conjunction with each other. In the 2012 round, ICANN org received and approved a large number of change requests to address issues that would have impacted scoring of applications, as well as change requests that required re-evaluations (i.e., change of RSPs). Both of these types of changes fall under the description of “Material” change.

Separately, Module 6 of the Applicant Guidebook, *Top-Level Domain Application – Terms and Conditions*, has a requirement that: “Applicant may not resell, assign, or transfer any of applicant’s rights of obligations in connection with the application.” ICANN org is providing this clarification so that in future deliberations and in making final recommendations, the PDP Working Group can be specific in referencing either the change request criteria/process or the *Top-Level Domain Application – Terms and Conditions*.

(2.1.c.1-2) This section of the Supplemental Initial Report states that the “Working Group believes ICANN auctions of last resort should remain in place within the program” and that “there should be additional options for applicants to voluntarily

resolve contention sets by mutual agreement before being forced into an ICANN auction of last resort.”

In assessing the implementation feasibility of this draft recommendation, ICANN org notes that it is possible that “mutual agreement” as a contention resolution mechanism could create an unintended secondary market for applications. The PDP Working Group might want to take this into consideration when discussing additional options for contention resolution.

With regard to the preliminary recommendation to allow “applicants to change certain elements of their applications as a potential way to resolve contention sets earlier in the process,” section 2.4.d.1 of the Supplemental Initial Report discusses the option of allowing applicants to form joint ventures or change the applied-for string to resolve contention. It would be helpful if the PDP Working Group could clarify what is meant by earlier in the process (i.e., does it mean that the string contention resolution process occurs after publication of the string similarity evaluation results in parallel with or before all other application evaluations?) Additionally, in the context of resolving contention earlier in the process it would be helpful if the PDP Working Group could clarify how new contentions created by the string confusion objection process, which occurs later in the overall program process, are to be dealt with (i.e., would string similarity evaluation need to be re-done once dispute resolution concludes for all string confusion objections? If so, this would hold up all applications including those not subjected to any objection or contention from proceeding to contracting pending outcomes of all string confusion objections.).

Regarding joint ventures as a mechanism to resolve contention, similar to the concern expressed in section 2.2.d.1 of the Supplemental Initial Report that “there will be some applicants that apply for new gTD strings for the sole purpose of being paid to withdraw their applications in a contention set for which the applicant receive compensation greater than the application fee,” joint ventures could be viewed by some prospective applicants as a mechanism that could be used for monetization purposes. The PDP Working Group might consider including this aspect in future discussions on this topic. Additionally, since joint ventures would put the application under new ownership and bring into question how this change should be addressed vis a vis other program processes such as applicant comment, GAC Early Warning, GAC Advice, and objection filing. For example, suppose the GAC didn’t object to an application for a particular string because of who the applicant is. But, if the applicant had been different, they might have objected. How would the new procedures being considered by the PDP Working Group address this? It would be helpful if the PDP Working Group could consider and provide clarification on this.

Regarding allowing changes to the applied-for string to resolve contention, ICANN org would like to note that this could cause major disruptions to the program. Any changes to the applied-for string would necessitate a re-do of the string similarity evaluation of all applications, causing delays and disruptions to all applications, including those that are not in a contention set. This would have major impacts to program timelines and costs,

and applicants' ability to move to the contracting phase of the program. Additionally, implementing this recommendation would also seem to mean that string confusion objection filing would need to be open throughout the program. This could add additional complexity to the string confusion objection process because string confusion objections could create new contentions, and if applicants are allowed to change the string to resolve such newly created contentions, there could be a circular loop of string change, string similarity re-evaluation, string confusion objection that would prevent the program from moving forward.

2.3 Role of Applicant Comment

(2.3.c.1) Preliminary recommendation 2.3.c.1 states that the Application Comment tool “should better ensure that the email and name used for an account are verified in some manner” and support “filtering and/or sorting.”

ICANN org would like to make the PDP Working Group aware that the Application Comment tool already provides these features. In order to submit a comment, users must first create an account by providing name, email address, and optionally affiliation. The system sends an email to the email address provided and affirmative confirmation from the email address must be received by the system before an account is created. The Application Comment tool also allows sorting of all of the columns of information (i.e., applicant, string, application ID, name of person who submitted the comment, subject of the comment, evaluation panel or objection ground the comment is directed to, and date of submission). A search by application status, applicant, string, evaluation panel or objection ground the comment is directed to, and name of person who submitted the comment can also be performed.

Preliminary recommendation 2.3.c.1 also suggests that the Applicant Comment tool allows for attachments to be provided. ICANN org would like to note that attachments are not searchable and sortable, which appears to conflict with the intent of the preliminary recommendation to make viewing of comments easier. Allowing for attachments would also mean more information that the evaluation and objection panels would need to review, impacting application processing costs and timelines. The PDP Working Group might want to take this into consideration as it continues discussions on this topic.

(2.3.c.2) Preliminary recommendation 2.3.c.2 states that “ICANN should be more explicit in the Applicant Guidebook on how public comments are to be utilized or taken into account by the relevant evaluators, panels, etc. and to what extent different types of comments will or will not impact scoring.”

It would be helpful if the PDP Working Group could clarify what is meant by being “more explicit” in how different types of comments will or will not impact scoring. In the 2012 round, it was the job of the evaluation and objection panels to review and determine the relevance of the comments, as well as whether they impact evaluation scores or the objection. Section 1.1.2.3 of the Applicant Guidebook states: “Evaluators will perform

due diligence on the application comments (i.e., determine their relevance to the evaluation, verify the accuracy of claims, analyze meaningfulness of references cited) and take the information provided in these comments into consideration.” As it relates to objections, this section of the Application Guidebook states: “These comments will be available to any may be subsequently considered by an expert panel during a dispute resolution proceeding.” Is it the view of the PDP Working Group that new rules and guidelines should be developed to govern the review and determinations of application comments? If yes, what should those new rules and guidelines be?

Preliminary recommendation 2.3.c.2 also states: “[T]o the extent that public comments are to be taken into account by the evaluators, panels, etc., applicants must have an opportunity to respond to those comments.” Section 1.1.2.3 of the Applicant Guidebook states: “In cases where consideration of the comments has impacted the scoring of the application, the evaluators will seek clarification from the applicant.” Accordingly, evaluation panels (except for Community Priority Evaluation (CPE) which has its own processes and procedures) issued clarification questions if a comment is determined to have a potential impact to the score of the application.

Given this, it would be helpful if the PDP Working Group could clarify the new requirement being recommended (i.e., is the new recommendation that clarifying question opportunities be extended to CPE applications if an application comment impacts scoring of the application?) Applicants were allowed to submit changes to their applications to address the clarifying questions. Is it envisioned that CPE applicants would be afforded the same opportunity? If so, considerations should be given to the objective of the CPE process and whether that objective can be achieved if CPE applicants are given opportunities to amend their applications. Considerations should also be given to the impact to other related processes (i.e., community objection, GAC advice), and how interested stakeholders can participate/engage meaningfully in the processes.

ICANN org thanks the PDP Working Group for the opportunity to provide this implementation feasibility input. We hope this input is helpful to the PDP Working Group and remain available to answer any questions that PDP Working Group may have.