AT&T Comments on New gTLD Draft Applicant Guidebook Version 4
July 21, 2010

AT&T appreciates the opportunity to comment on the new gTLD Draft Applicant Guidebook Version 4 ("DAG4"). We recognize that the DAG4 reflects a significant amount of work on the part of the community and ICANN staff, but significant issues remain unresolved and ICANN's overall implementation plan for new gTLDs is very much a work in progress. We also note that a number of significant issues continue to be addressed simultaneously in separate workstreams and are not yet reflected in the DAG4. AT&T's comments, therefore, address both the contents of the DAG4 and overarching issues and concerns raised by the introduction of large number of new gTLDs. ICANN ultimately must incorporate *all* of these issues into a holistic implementation plan for new gTLDs and develop a comprehensive set of safeguards to address them.

I. DAG4 Still Does not Provide Sufficient Trademark Protections to Protect Brand Holders and Consumers

One of AT&T's primary concerns is the fact that the trademark protections for top level domain names in DAG4 still do not provide brand holders with any meaningful proactive or preventative protections, but rather offer only secondary, after-the-fact remedies. AT&T believes this is a fundamental deficiency in the overall process that should be given high priority by ICANN. Clearly, the issues of trademark protection and other concerns, such as malicious conduct and potential consumer confusion, are inter-related. The importance of these issues should lead ICANN to develop an integrated and comprehensive set of safeguards that focus on prevention, as well as remedy.

A. Trademark Clearinghouse

AT&T is concerned about the continued absence of a Global Protected Marks List, which means that there is no proactive trademark protection provided with the launch of new gTLDs. The likely result will be to force businesses to resort to defensive registrations and after-the-fact remedies. The Trademark Clearinghouse offers no protection for TLD registrations and limited one-time protections for second level registrations. In addition, the revised proposal for the Trademark Clearinghouse still requires some important clarifications. Specifically, definitions or clarifications of a "text" mark and "substantive review" will eliminate confusion as to what types of marks qualify for the Trademark Clearinghouse.

B. Uniform Rapid Suspension

One of the main purposes of developing the Uniform Rapid Suspension ("URS") process was to create a simple, inexpensive and speedy alternative to other existing remedies, such as litigation or the UDRP ("Uniform Dispute Resolution Policy") arbitration process. AT&T believes two types of changes in the current draft of the DAG4 decrease the effectiveness of the URS by: (1) increasing the overall length of the

URS process; and (2) allowing for a 5,000 word complaint and response. These changes in the current draft make the URS an unappealing option as compared to what already exists today, particularly given that the invocation of the URS process removes the subject gTLD from availability.

DAG4 has enlarged the time periods throughout the URS process: the time to answer a URS complaint is now 20 day; the time to render a decision is now 3–14 days (with an indefinite time period for "extraordinary circumstances"); and the time to appeal a decision is now 20 days. In sum, the total time to render a decision has now been increased from 30 days to 50-70 days. Compounding this problem is the fact that the URS allows a defaulting party an extended time period of up to 2 years to file a *de novo* appeal of a decision.

The prior draft and original recommendation required a form complaint and response for URS proceedings. However, the current draft allows for a free-form complaint and response with a 5,000 word limit, which will slow down the process by the additional time required to review the lengthier complaint and response. AT&T recommends a return to the initial form complaint and response approaches. If any word limitation were to be used, AT&T suggests using something much smaller, such as 250 or 500 words, in order to keep the URS process streamlined.

Additionally, the current URS proposal removes the "loser pays" model. This revision removes a significant deterrent against malicious conduct of bad actors. At the very least, a losing party should be required to pay the URS fee.

The net result of these proposed changes to the URS process will not offer a speedy alternative for merely suspending the subject gTLD, and are unlikely to deter any malicious conduct.

C. Dispute Resolution Procedures

In reviewing the changes in the current drafts, many of the Post Delegation Dispute Resolution Procedures appear to be the same as the Registry Restriction Dispute Resolution Procedures. AT&T recommends both dispute resolution mechanisms be combined into one procedure.

II. A Comprehensive Implementation Plan is Needed for new gTLDs that Fully Addresses Overarching Issues and Concerns

AT&T filed comments on earlier draft versions of the new gTLD DAG and on separate comment proceedings involving the economic analysis, the root scaling study and trademark rights protection mechanisms. We are encouraged that ICANN has undertaken serious substantive efforts to address the four overarching issues that it identified over a year ago. But analysis of the overarching issues remains in development and ICANN just recently produced a number of documents that contain concrete policy

conclusions and recommendations. An essential step in the decision-making process will be for ICANN to incorporate all of these issues into a holistic implementation plan for new gTLDs and to develop a comprehensive set of safeguards to address them.

A. Malicious Conduct Study and Recommendations

ICANN has released a "discussion draft" of a Mitigating Malicious Conduct Study, which includes nine recommendations designed to reduce the potential for malicious conduct when new gTLDs are introduced. In addition, ICANN continues to explore other potential safeguards, such as high-security TLDs and enhanced access to gTLD zone file information. These malicious conduct issues have important implications for the DAG4 and ICANN's overall implementation plan for new gTLDs.

As AT&T repeatedly has pointed out, there is a direct linkage between trademark infringement involving well-known corporate brands and malicious conduct that harms consumers. Likewise, there is a clear inter-relationship between safeguards that protect against trademark abuse and mechanisms that protect consumers from malicious conduct. For example, the Mitigating Malicious Conduct Study recommends requiring thick WHOIS records as a key mechanism to combat fraud and abuse. This is a requirement that AT&T and others have long been calling for as a mechanism for helping to address trademark abuses.

AT&T urges ICANN to integrate its consideration of trademark and malicious conduct protections in order to fully and completely assess the nature of the problem and the safeguards that are needed. We also reiterate our concern that additional proactive measures are needed to keep deceptive gTLDs out of the system in the first place. Such measures should be an essential component of ICANN's comprehensive plan for avoiding end user confusion and the associated harms resulting from malicious conduct.

B. Economic Framework Analysis

AT&T and other stakeholders repeatedly have urged ICANN to undertake a fact-based economic analysis which is designed to thoroughly assess the potential costs and benefits of new gTLDs. Last year, ICANN released a high-level economic paper that was limited to examining the potential competitive benefits of new gTLDs on a theoretical basis. In response, AT&T submitted an assessment of the economic paper prepared by the Analysys Group, which was supported by industry data submissions and an analysis of actual domain name registrations.

ICANN has now released a new paper, "An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names" ("Economic Framework Paper") that surveys existing studies and discusses a proposed analytical framework for analyzing the costs and benefits of new gTLDs. The release of the Economic Framework Paper is a major step in the right direction, although it is a self-described initial economic analysis and it finds that existing studies of gTLD issues are

inconclusive. Indeed, one of the main conclusions of the paper is that more data and information is needed for ICANN to understand fully the costs and benefits of new gTLDs. The Economic Framework Paper provides analysis and recommendations that are directly relevant to the structure of ICANN's implementation plan for new gTLDs.

First, the Economic Framework Paper reiterates the need for ICANN to compile additional information to facilitate its assessment of the costs and benefits of new and gTLDs. The paper notes that existing studies are informative, but not conclusive. Accordingly, it proposes a set of empirical studies that would provide guidance for procedures and rules governing new gTLDs, and it recommends that ICANN create mechanisms for systematically collecting data about the experiences of new gTLDs.

AT&T fully supports the recommendations of the Economic Framework Paper that ICANN gather much more comprehensive data about new gTLDs. We continue to believe that valuable information can and should be obtained about existing TLDs *before* new gTLDs are introduced. The information about defensive registrations and trademark disputes that was submitted with the Analysys Group economic paper assessment was readily obtained from other companies, and this type of data compilation could be replicated on larger scale. The Economic Framework Paper also identifies several types of studies, including case studies, which could be undertaken to better understand the potential costs and benefits of new gTLDs.

Improvements in ICANN's data collection will have broader benefits beyond facilitating an economic analysis of the costs and benefits of new gTLDs. This type of information is critical to understanding malicious conduct and the associated economic and consumer costs that such conduct creates throughout the Internet ecosystem. Further, the data that ICANN collects will help to inform its decision-making on security, stability and resiliency issues.

Second, the Economic Framework Paper supports the need for trademark protections and other safeguards to mitigate potential consumer confusion and other externalities. The paper concludes that the potential for externalities imposed on third-parties implies that an open-entry delegation process may not lead to the socially optimal number of new gTLDs. It also analyzes the potential that new gTLDs will not make Internet navigation and search easier, but could increase potential consumer confusion and fragmentation of the Internet. Based on this analysis, the Economic Framework Paper concurs with the position of the U.S. Department of Justice that ICANN should craft rules for new gTLDs that are likely to enhance the benefits and minimize the external costs of new gTLDs.

Once again, there is a clear inter-relationship between trademark protections and safeguards that are needed to mitigate malicious conduct that causes harm to consumers. Moreover, as the Economic Framework Paper points out, the economic benefits of new gTLDs will flow from innovative business models and services, not from defensive registrations. While the Economic Framework Paper cites the fact that ICANN has

adopted several recommendations of the Implementation Recommendation Team to address trademark protections, it does not attempt to analyze the likely impact of these protections. AT&T urges ICANN to consider a comprehensive set of safeguards to address the related issues of trademark infringement, consumer confusion and malicious conduct.

Third, the Economic Framework Paper supports an implementation plan that introduces new gTLDs in discrete, limited rounds and that prioritizes the introduction of Internationalized Domain Names ("IDNs"). The paper notes that there are various factors indicating that there may not be large competitive benefits from introducing new gTLDs. Instead, the additional benefits are likely to come from innovative new business models, gTLDs that serve communities of interest and expansion of IDNs. The paper also notes that ICANN will be able to learn from experience to craft even better registry rules and procedures to increase net social benefits and address concerns. The Economic Framework Paper recommends that ICANN proceed by continuing to introduce new gTLDs in discrete, limited rounds and creating mechanisms for systematically collecting data about the experiences of new gTLDs.

AT&T supports the recommendations of the Economic Analysis Paper. By introducing new gTLDs in discrete, limited rounds, ICANN will be able to mitigate consumer confusion and make any necessary adjustments to the implementation plan based in its learnings from initial rounds. As the paper acknowledges, there simply is no way for ICANN to fully assess and understand all of the potential costs and implications of introducing new gTLDs. Moreover, by prioritizing the introduction of IDNs, ICANN will be facilitating new gTLDs that are likely to deliver new benefits to global Internet users.

C. Security and Stability Considerations

AT&T previously commented on the Root Scaling Study, which clearly has implications for the root zone itself and for the security and stability of the broader infrastructure and operation of the Internet. The Root Scaling Study concluded that more work was needed to fully understand the implications of the introduction of new gTLDs and develop effective responses to these concerns. Further, the Root Scaling Team recommended a staged approach to the introduction of new gTLDs as a way to help manage the risks to the Root Zone Servers.

III. Unique Procedures Are Needed for Single Registrant TLDs

As AT&T previously noted, there continues to be insufficient consideration given to single-registrant registries where the TLD holder is not going to operate as a traditional registry. Such single-registrant gTLDs need different requirements in the utilization of ICANN authorized registrars. For example, a corporate trademark holder would not be able to agree to the transfer of the trademarked string should the trademark holder decide, within a period of time to 'close' or cancel the registry operation. The DAG4 does not

address the types of unique procedures that are needed for these types of unique registries, which being used to increase online visibility of the TLD holder and not offering open registrations of second level names.

IV. Conclusion

AT&T is encouraged by the progress that has been made in addressing overarching issues raised by the introduction of large numbers of new gTLDs. We continue to be concerned, however, that the four overarching issues are not fully integrated into the DAG4 and ICANN's development of the implementation plan for new gTLDs. Accordingly, we urge ICANN to develop a holistic implementation plan that includes a comprehensive set of safeguards for addressing these issues. Consistent with the recommendations of the Economic Analysis Paper, ICANN also should prioritize the introduction of IDNs and introduce new gTLDs in discrete, limited rounds.