

Comments: Program Implementation Review

As a community based applicant in the current round of new gTLDs, we would like to lend our comment to the following sections of the "Program Implementation Review."

1. Application Processing

Comment period for Community Applicants:

Although the report acknowledges that the AGB did not specify more detail on when the comment period should close for community applicants, ICANN acknowledges they made the decision to keep it open until 14 days after the applicants elected to enter CPE. It does not appear that the ICANN community was able to comment on that decision before implementation by ICANN, nor was rationale provided in the report to support this decision.

ICANN has also acknowledged that even after comment closing, the correspondence page has been used to add additional comment and such comments have in some cases been considered by the EIU. ICANN's rationale for allowing such comments to be considered by the EIU seemingly points to the AGB statement that any public document is fair game for the evaluators. This perhaps indicates that having a specific comment period was wasted policy and misguided any such predictability for community applicants.

For dotgay LLC, it meant the comment period was essentially open for over 2.5 years (and possibly longer pending reconsideration), well beyond the length of the comment period for Standard applicants in the same contention set. This does not appear to be equal treatment, nor does it support fairness in the new gTLD program. It also creates a hostile environment that aids those applicants that benefit from having additional time to attack community applicants once their applications have moved beyond the phase where similar counter action against their applications could have effect.

ICANN must recognize that fairness is only achieved if each applicant in a contention set receives the same length of comment period against their application, regardless of the type of application they have submitted. Because ICANN has chosen to place the CPE at the end of the contention resolution spectrum and ICANN has chosen to allow the comment period to remain open until CPE commenced, it has created a much larger burden on community applicants and made them targets in the process.

It must be remembered the community applicants were required to build community consensus before submitting their application. Although we understand that opportunity for challenge or comment on all applications must exist, we do not believe that requiring community applicants to endure extended exposure beyond what standard applicants must endure is in alignment with the spirit or intent of the GNSO Policy Recommendations. CPE is a contention resolution process that gives advantage to communities, not a period of more punishment, abuse and game play simply because of where ICANN placed the CPE process in the program.

ICANN must consider the following when making implementation decisions:

1. How does ICANN make a comment period that treats each applicant equally?

2. How does ICANN ensure fairness is achieved by way of purpose in having a comment period to begin with?

2. Application Evaluation

Clarifying Questions:

On page 123 of the report CQs in CPE are described as being issued in instances where the panel required the applicant to “address any application comments that may impact the scoring of their application” and “address any letters of opposition.”

Reading of this statement would suggest that any applicant being threatened with point loss in CPE for Criteria #4 would have received a CQ from the EIU. This was certainly not the case for dotgay LLC in either of the CPEs we participated in where a point was lost for expressed opposition in both evaluations.

If this was not the intent of the language contained in the report or if we have somehow misinterpreted the language ICANN has used, it highlights the larger problem we have continued to encounter with language used by ICANN during implementation and in the AGB. It also highlights the lack of acknowledgment by ICANN that their chosen language could be interpreted in ways contrary to their actual intent, at no fault of the applicant.

Intent is not always clear through the use of simple language; however it should not become a barrier for those who through good will and effort have read and used words of the AGB and other ICANN materials on face value. ICANN has shown incredible inflexibility on this issue, specifically when implementing the CPE and how it addresses unique communities.

This calls into question the need for ICANN to improve the way in which it communicates its thoughts and ideas, especially when they could have substantial impact on applicants. ICANN must also consider providing flexibility where necessary to accommodate reasoned approaches and interpretations of its chosen language.

3. Objection & Dispute Resolution

Consolidation:

Not mentioned in the report is the opportunity for objection consolidation to occur, or be encouraged, when an objector files the exact same objection against multiple applicants in the same contention string. This occurred in Round One for .GAY. The objections were filed by a community organization as Community Objections and despite the ICC originally suggesting consolidation, which was also not opposed by some applicants, the ultimate decision was to not consolidate. The rationale provided by the ICC was that an applicant(s) expressed concern about confidential information being exposed that could somehow compromise their competitiveness.

Despite the community organization suggesting to the ICC that the panelist simply keep any inquiries to a specific applicant in a silo to protect confidentiality, the ICC elected to not respond to these recommendations. The decision that followed by the ICC was to assign the same panelist to all four

objections filed by the community organization. Although the ICC was comfortable consolidating the objections into one panelist, they were less comfortable providing the financial benefits of consolidation to the community organization.

Since the Community Objections contained no charges or expressed concerns about the confidential portion of the applications, and none were used in the applicants responses to the objections filed, the rationale of the ICC seemed completely misplaced and contrary to the appeal of the AGB.

Our comment and recommendation is that further conditions or standards be presented as criteria for cases worthy of consolidation in future rounds and that there be some form of appeal available for applicants and objectors to legitimately (not strategically) challenge consolidation decisions by the DRSPs that are not in alignment with the AGB.

Conditions:

As pointed out by dotgay LLC on multiple occasions, and referenced in this report issued by ICANN, it is imperative that conditions represented in determinations by DRSP be considered in new gTLD proceedings. The primary reason is that if an expert determination is made and accepted by ICANN that is based on assumptions around future action or outcomes in the new gTLD program, there must be accountability and/or acknowledgment somewhere in the process to ensure those assumptions were correct or come to fruition. If ICANN is not willing to be held accountable or acknowledge such conditions then DRSP should not be permitted to include them in their determinations and must rule only on what they know for certain.

The example highlighted by ICANN in the report focuses on .LGBT. In this instance the expert panelist was very clear in stating that based on the objection he believed harm to the gay community existed, especially if the gay community did not get their own gTLD to operate. Since the gay community applied for .GAY and not .LGBT the panelist however did not believe that he could interfere with competitive efforts and decided not to uphold the objection. The panelist's determination suggests that since the community was going to have .GAY to operate in alignment with their interests, the potential harm created by .LGBT would somehow be eliminated. It remains unclear however how the panelist could legitimately make these assumptions or use them as rationale. The condition was clear; however the panelist's assumption about .GAY being a guarantee to the gay community has yet to be realized.

Since the condition of .GAY being granted to the gay community has yet to be met, the harm acknowledged by the panelist because of .LGBT has yet to be eliminated. dotgay LLC requested that ICANN place .LGBT on hold until a confirmation was achieved that .GAY was awarded to the gay community via the community application, however ICANN rejected this request and allowed .LGBT to proceed to delegation without regard to the harm identified.

In essence, the only way for ICANN to ensure that harm (as identified by ICANN's own DRSP) is not imposed on the gay community at this point in time is to award .GAY to the gay community.

Our recommendation is that ICANN restrict DRSP to making decisions based on the facts, and not assumptions on future actions and outcomes, or that ICANN put in place a process to address any conditions represented in such proceedings. Either way, ICANN cannot continue to ignore the issue or use the excuse that each determination is independent of others.

Appeals:

Although it is unclear if ICANN supports an appeals process for applicants who disagree or question third party findings and determinations, it has become very clear that the lack of an appeals process has left applicants misunderstood and paralyzed in the process.

Through ICANN's own acknowledgement, the new gTLD program is new ground for all and to assume that every DRSP decision would be perfect was a gross oversight. Given the time, energy and investment made by applicants, especially those representing such diverse and misunderstood stakeholder modeled communities; it now clearly appears inhuman and suspect that no defense was provided. If serving public interest is the aspiration at ICANN, why is the public's voice being silenced and why hasn't ICANN intervened on this issue already.

Not only has the GAC offered advice to ICANN on appeals, but the applicant outcry has been substantial. Although we assume that the design or implementation of an appeals mechanism is not the real challenge in this instance, it is our recommendation that ICANN have the courage to do what is right and tackle this issue immediately.

4. Contention Resolution

CPE

Our comments are comprised of many made in other forums throughout our experience within the new gTLD program. In general however, our comment is focused on the general notion that during implementation of CPE it appears that ICANN actions or decisions have consistently presented additional burdens or disadvantage to community applicants and have less likely enhanced the experience of community applicants. These include:

- Not requiring the EIU to prepare and publish their CPE Guidelines prior to the closing of the application period, creating an unnecessary and unexplainable disadvantage for community applicants who were unable to make application changes at the point the CPE Guidelines were published. For purposes of fairness and equality, community applicants should have been evaluated using only materials that were publically available prior to application closing.
- Not cutting off the submission period for public comment to all applications at the same time it ended for standard applicants, which provided additional time for gaming and abuse against community applicants while they waited to enter CPE. For purposes of fairness and equality, each applicant should have received the same length of period for commenting.
- Not providing further and clearer representation of what ICANN would consider being "spurious activity" as it relates actions taken against community applications (noted very clearly in the AGB), including having a plan of action for items brought to their attention at any stage of the new gTLD program.
- Not commencing CPE until every applicant in the contention set was clear of objections, creating unnecessary delays for community applicants. Requests from applicants to get CPE started as soon as their application had cleared objections was originally denied by ICANN, and later changed at ICANN's discretion to accommodate ICANN's own urgency with moving the program forward. This is a clear example of an unwarranted ICANN decision against community applicant's requests that created unnecessary delays and disadvantage.

- Not following GNSO Policy Recommendations in CPE regarding principles of fairness, transparency and non-discrimination, instead choosing complete opaqueness.
- Not establishing predictability for community applicants by allowing the cost for CPE to more than double, without transparent efforts to hold the EIU accountable for prior estimates provided when they were hired in 2011.
- Not providing for a more transparent CPE process that reassures a community and their endorsed applicant that the application was understood properly, fully reviewed & considered, and void of any bias or false interpretations or counterclaims by the EIU.
- Not enforcing the use of CQs when CPE points were in jeopardy.
- Not providing for an appeals mechanism to address serious misunderstandings by the CPE panelists.
 - o The need is evidenced by the recent CPE results for .GAY that confirmed the EIU (by way of their own acknowledgement) had misunderstood the application in the first CPE. Only because dotgay LLC was successful with a reconsideration request were we able to point to interpretation errors around Authentication Partners to correct the EIU's understanding of their role, despite the application never supporting their interpretation and never receiving a CQ on the issue.
- Not properly regulating or overseeing the EIU to ensure that they followed the predetermined rules and processes for CPE in a proactive manner that would reduce or eliminate concerns that have arisen and been found as substantive.
- Not requiring the EIU to divulge the sources of their own research or data collection used to discount claims and evidence presented by the applicant within the application.

On page 119 of the report ICANN makes claim that CPEs have taken between 3-6 months, however this statistic is not representative of the timeline taken on the latest CPE conducted on .GAY which was published after the report was published. In the revised report to follow we request that this statistic reflect the most current data which extends the longest evaluation period for CPE to over 8 months in length.

In conclusion, dotgay LLC would like to emphasize what ICANN has emphasized on multiple occasions in the report repeated comments from the ICANN Board suggesting that the GNSO review the concerns and comments related to CPE. We fully support this suggestion from the ICANN Board and have made substantial comment during the public comment period for future rounds. Although the ICANN Board appears to have failed at recognizing and reacting to many of the injustices in the existing CPE process, we believe it highlights their understanding of the systemic problems with ICANN's implementation of the CPE.

Best regards



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