

## Introduction

Radix's comments are guided by the primary principles and policies of the new gTLD Program:

“New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.”

“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.”

<http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part1-08aug07.htm>  
(Principle A; Policy 1)

Predictable means achieving an expected result. Expectations are based on previous experience. Similar applications should achieve similar results in the evaluation, objection and CPE processes. Differences in outcomes should be a result in differences in the applications themselves. Unexpected outcomes are unfair because two similarly situated applicants are treated differently. The result can be that years of planning, investment and work by well intended stakeholders seeking to fulfill the goal of the program (to increase competition and choice) are discarded in a capricious way.

Our reading of this recommended action is that the Board seeks to address the most blatant and clear examples of unexpected results. However, the objection process, which is still underway, has yielded many unexpected results. The Board should expand their inquiry to ensure that the twin Policy goals of predictability and fairness are met. To do otherwise will impugn the integrity of the new gTLD process and program.

## Recommendations

In particular, we recommend that:

The scope of inconsistent objections must be expanded and the Board should agree to take up the issue of inconsistencies in Community and Limited Public Interest objections.

1. Limiting the inquiry to two instances<sup>i</sup> preserves unfair results in other objection results. The scope of inconsistent SCO determinations is limited to

the two examples selected by the Board. The Board has selected the “poster child” examples of the many inconsistencies demonstrated by others; see [http://dotzon.de/ICANN\\_ICDR\\_String\\_Confusion\\_Objections.pdf](http://dotzon.de/ICANN_ICDR_String_Confusion_Objections.pdf). Merely stating inconsistencies do not exist does not make it so. To pretend otherwise harms applicants that expected and have a contractual right to a predictable process.

The Board explanation that: “SCO Expert Determinations regarding singular and plural versions of the same string are not inconsistent Expert Determinations, as they are not Determinations on the same strings with different results,” is not satisfactory as it applies a very peculiar definition of “inconsistent.”<sup>ii</sup> To us, the SCO determinations yielded unpredictable (and inconsistent) results, even if the situation varied slightly from application to application. We do not see how the opposite can be reasonably claimed.

2. Most importantly, the Board determination of the universe of inconsistent SCO opinions must not affect its attention to other objections, particularly Community and Limited Public Interest objections. Decisions in these two types of objections demonstrate variances in approach that have led to unpredictable and unfair results. Panel members’ analyses vary widely from objection to objection. Some panelists adhere strictly to Guidebook criteria while others use other sources of authority. Additionally, different panelists have also interpreted the same Guidebook criteria in very different ways, leading to inconsistent and unexpected decisions.

While not as blatant as the two examples selected by the Board, some results in Community and Limited Public Interest objections are just as unfair. Even a brief survey of findings and results will demonstrate that (in certain cases) if two objections had switched panelists, there would be different outcomes.

The results and lack of an appeal mechanism have led to the filing of multiple Reconsideration requests and Ombudsman complaints as applicants escalate their attempts to seek a remedy. Copies of Reconsideration requests and their outcomes are available readily to the Board.

We can confirm that we ourselves have filed two Ombudsman complaints highlighting several specific instances of inconsistencies across decisions. It may be fitting for the Board to request an update from the Ombudsman on the nature and regularity of complaints such as ours which cite inconsistency in decisions. We sincerely believe that this would give the Board a clearer and wider picture of the extent of inconsistencies across community objection decisions.

## Conclusion

It is not Radix's place to decide which applicants have meritorious claims, but it is our position that, given the results to date, additional scrutiny is required or ICANN we will have failed to provide a predictable, fair process.

From the Board resolution, one cannot be sure whether the Board intends to take up the cases in objections other than SCOs. The Board should make it clear that it intends to take up these issues.

We believe that unpredictable objection results are unfair and a violation of policy. Given the number of objections in this area that involved similar circumstances, steps should have been taken to ensure the twin policy goals of fairness and predictability were met. Instead, this review mechanism should be designed to meet those policy goals.

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<sup>i</sup>Definition of Inconsistent SCO Expert Determinations (see, <http://newgtlds.icann.org/en/program-status/odr/proposed-sco-framework-principles-11feb14-en.pdf>)

☐ There is a limited universe of "Inconsistent" SCO Expert Determinations.

☐ "Inconsistent SCO Expert Determinations" have been defined as objections raised by the same objector against different applications for the same string, where the outcomes of the SCOs differ.

This situation is limited to two circumstances:

(i) the results of the .COM/.CAM objections, where three SCOs were filed by the same objector against separate applications for the .CAM string, each on the basis of confusion with .COM. In two of the SCOs, the applicant prevailed; in the third, the objector prevailed; and

(ii) the results of the .CAR/.CARS objections, where one applicant for the .CAR string, filed SCOs against three applications for the .CARS string. Two of the SCOs were determined in favor of the applicants; the third was in favor of the objector.

<sup>ii</sup><http://newgtlds.icann.org/en/program-status/odr/proposed-sco-framework-principles-11feb14-en.pdf>