



THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

MICHAEL A. CARDOZO
Corporation Counsel

KATHERINE WINNINGHAM
Phone: (212) 788-0959
Fax: (212) 571-4600
kwinning@law.nyc.gov

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Mr. Paul Twomey
President and CEO
ICANN
6 Rond Point Schuman, Bt. 5
B-1040 Brussels
Belgium

Re: Comments of the City of New York on gTLD Draft Applicant Guidebook

Dear Mr. Twomey:

The City of New York (the "City" or "NYC") has reviewed the publication "New gTLD Program: Draft Applicant Guidebook" (the "Guidebook") released by the Internet Corporation for Assigned Names and Numbers ("ICANN") on October 23, 2008.

NYC commends ICANN's desire to increase innovation in the Internet's addressing system and the detailed analysis behind issuance of the draft Guidebook. NYC also appreciates that ICANN's constituency involves the global Internet community as a whole and that ICANN has attempted to meet the disparate needs of that community in its formulation of the Guidebook.

NYC respectfully submits that the Guidebook overlooks certain essential needs of local governments in order for localities such as NYC to be comfortable participating in the gTLD process and, ultimately, sanctioning particular applicants to operate gTLDs that rely on the names and goodwill of localities. While the support and/or non-objection concept provided for in the Guidebook may have been intended to reassure governmental entities that their concerns will be addressed in the gTLD process, the lack of clarity in the Guidelines may have the effect of inducing governments not to support applications at all rather than risk being subject to procedures and panels that are not clearly defined or that lack clear standards to address their concerns.

The Guidebook does not establish a process to authenticate, or for a panel to consider challenges to, governmental statements of support or non-objection that may be presented by applicants

during the application process. The Guidebook contains no reference as to the composition of the panel reviewing applications or indications that the panel will accurately represent the varied interests of different types of governmental entities; no statement that a governmental entity will have status as a rights holder or a defined community for purposes of a community-based objection; and no standards for objection on morality or public order grounds. Accordingly, localities such as NYC will be put to considerable time and expense in objecting to a particular application and/or challenging the credentials of an applicant in an unfamiliar and expensive forum to which local governments may not readily have access.

ICANN should take particular note of the dire fiscal problems faced by governmental entities such as NYC (and other states and localities throughout the United States) at this time. NYC currently expects tax revenues for fiscal year 2009 to be down \$2.6 *billion* from tax revenues in fiscal 2008. Tax revenues for fiscal 2008 have declined to date by \$285 million. Further, NYC is currently forecasting a gap of \$1.3 *billion* for the 2010 fiscal year. Employment numbers for national and city economies in the United States have deteriorated and a recession has been officially recognized.

The costs of multiple dispute resolution processes and arbitral panels (as estimated in the Guidebook) are well beyond the means of smaller governments and, in a time of budget deficits and recessionary concerns, are not likely to be a priority for local governments who have primary responsibility for police protection, education and other critical services for their citizens. Failure of governmental entities to take advantage of an ICANN dispute resolution or arbitral process may adversely affect the credibility of a particular gTLD if the government associated with the location name represented by the gTLD is opposed to the gTLD or considers it to be unsanctioned or improperly sanctioned.

More specifically, the Guidebook adopts an ISO 3166-2 standard (which is not freely available for public review) for country and territory names, which in the United States is not comprehensive and fails to include several commonly used longer forms of address for localities. The City recommends that the Guidebook adopt an additional standard, specifically the United Nations Code for Trade and Transport Locations.

The City appreciates the opportunity to weigh in on the Guidebook and its detailed comments with respect to specific Modules of the Guidebook follow as an enclosure and are being submitted to the relevant addresses. Should further information about the City's comments be required, ICANN is encouraged to contact the undersigned.

Sincerely,



Katherine Winningham
Senior Counsel

Enclosure

COMMENTS OF THE CITY OF NEW YORK

Module 1 - Introduction to New gTLDs Application Process (email gtld-intro@icann.org)

Section 1.1.2.4 Objection Filing

Formal objections to applications can be filed on any of four enumerated grounds by parties with standing to object. The objection filing period will open after ICANN posts the list of complete applications as described in paragraph 1.1.2.2. Objectors will file directly with dispute resolution service providers (DRSPs). Refer to Module 3, Dispute Resolution Procedures, for further details.

Comment – As discussed more fully in separate comments, the four enumerated grounds for formal objection do not provide sufficient grounds to safeguard the interests of national, local and/or municipal governments in the preservation of geographic terms that apply to them. This section requires specific reference to such grounds.

Section 1.1.2.6 Dispute Resolution

Where formal objections are filed and filing fees paid during the objection filing phase, dispute resolution services providers will initiate and conclude proceedings based on the objections received. . . .

The Guidebook suggests that governmental objectors will be relegated to the standard dispute resolution process or other arbitral procedures used by all objectors/applicants. The estimated cost of the dispute resolution process set forth in the Guidebook will be onerous for governmental entities to bear, particularly during the severe fiscal and budgetary restraints currently faced by localities in the United States. Failure to provide a detailed and cost effective process to vindicate the *ex officio* interests of governmental entities in their names and geographic designations apart from any standard dispute resolution system is not conducive to full governmental participating in the gTLD process.

Section 1.1.2.7 String Contention

String contention applies only when there is more than one qualified applicant for the same or similar gTLD strings... In the event of contention between applied-for strings that represent

geographical names, the parties may be asked to follow a different process to resolve the contention.

Comment – The reference to “a different process to resolve the contention” has no other context or reference in the Guidebook or related materials. If a different and separate process is to be applied to the contention between geographically relevant strings, that process should be clearly defined. Such process should also include an invitation, through the relevant GAC representative of the geographic entity/entities concerned, to have any corresponding government entities that believe they may be affected by the decision participate in the process. In addition, the reference to “geographic names” should be changed to “geographic terms,” as more fully explained in other comments.

Section 1.2.2 Two Application Types: Open or Community-Based

All applicants are required to designate each application for a new gTLD as open or community-based.

Comment - The Guidebook is silent as to whether proposed gTLD strings that contain geographic terms should be treated automatically as open or as community-based applications. Unless the applicant clearly indicates to the contrary, any gTLD strings that contain geographic terms should be deemed community-based applications. This will ensure that gTLD applicants evidence the support of the community associated with the geographic term, including the following requirements from proposed Section 1.2.2.1:

1. Demonstrate an ongoing relationship with a defined community that consists of a restricted population.
2. Have applied for a gTLD string strongly and specifically related to the community named in the application.
3. Have proposed dedicated registration and use policies for registrants in its proposed gTLD.
4. Have its application endorsed in writing by an established institution representing the community it has named.

Section 1.2.2.2 Objection/Dispute Resolution

All applicants should understand that an objection may be filed against any application on community opposition grounds, even if the applicant has not designated itself as community-based or declared the TLD to be aimed at a particular community.

Comment – Absent a clearer explanation of the mechanism available for governments to object, it appears this provision is essential to protect the rights of governments connected with geographic terms that are the subject of gTLD applications and have passed through the initial reviews without objection. However, the right of governments to objection should be expressly indicated.

Section 1.2.2.2. Contract Execution and Post-Delegation

A community-based gTLD applicant will be subject to certain post delegation contractual obligations to operate the gTLD in a manner consistent with the restrictions associated with its community-based designation, once it begins operating the gTLD. ICANN must approve material changes to the community-based nature of the gTLD and any associated contract changes.

Comment - If an application for a gTLD containing a geographic term is supported by a letter of support or non-objection by a relevant government, a post-delegation material change to the gTLD, including a post-delegation assignment of rights to another party registry operator, should not be permitted without evidence of support, or evidence of non-objection, from the relevant government that submitted documentation during the application process.

Section 1.2.3 Required Documents

Some supporting documentation will be required only in certain cases:

- 1. Community endorsement – If an applicant has designated its application as community-based, it will be asked to submit a written endorsement of its application by an established institution representing the community it has named.*
- 2. Government support or non-objection – If an applicant has applied for a string that is a geographical term, the applicant is required to submit a statement of support or non-objection for its application from the relevant government(s) or public authorities. Refer to Section 2.1.1.4 for more information on the requirements for geographical names.*

Comment – Regardless of whether an application for a gTLD is community-based or contains a geographic term, it is essential that the support, or non-objection, by any relevant government entity related to the community or geographic term be obtained

and documented in the application process. In addition, the GNP process and decision should be published and communicated specifically to the GAC representatives who would be able to notify their sub-national government constituencies of any problematic applications. Any applications that are competing for the same string and that simultaneously evidence support or non-objection from a concerned government should also be rejected during the GNP review process.

Section 1.3 Information for Internationalized Domain Name Applicants

Applicants for IDN gTLDs will also be required to provide the following at the time of the application:

1. Short form of string (English). The applicant will provide a short description of what the string would mean in English.

Comment – Since applicants for Internationalized Domain Names might use a letter string that could correspond to a geographic term, thereby preventing a future similar string under the contention rules, paragraph 1 should be reworded to indicate that the short form must include an indication of the closest corresponding English letters, not just the English meaning, and must also include an indication of whether either the Internationalized string, or the corresponding short form English string, consists of a known geographic term.

Section 1.5.1 Breakdown of Fees and Amounts

Dispute Resolution Filing Fee – *This amount must accompany any filing of a formal objection and any response that an applicant files to an objection. This fee is payable to the applicable dispute resolution service provider in accordance with the provider's payment instructions. ICANN estimates that non-refundable filing fees could range from approximately USD 1,000 to USD 5,000 (or more) per party per proceeding . . . ICANN estimates that a proceeding involving a fixed amount could range from USD 2,000 to USD 8,000 (or more) per proceeding. ICANN further estimates that an hourly rate based proceeding with a one-member panel could range from USD 32,000 to USD 56,000 (or more) and with a three member panel it could range from USD 70,000 to USD 122,000 (or more).*

Comment - The amounts suggested by this section indicate that it is of utmost importance that governments be protected as early and automatically as possible in the application process without needing to resort to expensive dispute proceedings, which will incur substantial panel costs, as well as costs of representation that governments

cannot afford. This supports the view that governments should be protected at a different stage of proceedings and on a different level of protection so as to minimize the need for their proactive involvement in the process at any stage but maximize the opportunity to voice their objections economically and early in the process. It is entirely possible with the proposed process that a geographically significant gTLD string would get through the GNP process leaving an objecting government no alternative under the proposed structure than to pursue objection via one of the three available proposed dispute procedures and this is unacceptable.

Module 2 - Evaluation Procedures
(email gtld-evaluation@icann.org)

2.1.1.2 Review for Reserved Names

The Reserved Names review involves comparison with the list of top-level Reserved Names to ensure that the applied for gTLD string does not appear on that list.

Comment – ICANN should not be allowed to reserve its own names without offering the same opportunity to governments or non-governmental organizations. There is support among the GAC for such early listing opportunities and that possibility should be included.

Section 2.1.1.4 Geographical Names

ICANN will review all applied-for strings to ensure that appropriate consideration is given to the interests of governments or public authorities in country or territory names, as well as certain other types of sub-national place names. The requirements and procedure ICANN will follow is described in the following paragraphs.

Comment – This provision is not consistent with the recommendations of the GNSO which recommended, by a supermajority, that a dispute process be used and that governments and the GAC would have standing to file a dispute. The GNSO clearly contemplated the possibility of an *inter partes* dispute by governments against applications if necessary. However, ICANN has provided only an *ex officio* review, with unclear suggestions of alternate mechanisms and an ambiguous dispute process that does not expressly apply to governments. ICANN must clearly define what rights governments have to object and what mechanisms are available to assert such objections.

2.1.1.4.1 Requirements for Strings Intended to Represent Geographical Entities

Applications for any string that represents a subnational place name, such as a county, province, or state, listed in the ISO 3166-2 standard.

Comment – A review by ICANN for all applied-for strings is appropriate provided that the review is transparent and ensures compatibility with existing norms that determine geographical significance. However, reference to the ISO 3166-2 standard may not be completely appropriate. The ISO 3166-2 standard is not complete and is not freely available to the public.

In addition, the ISO 3166-2 standard is mostly inapplicable to proposed gTLDs. Under the *Policy Requirements for Generic Top-Level Domain*, the Guidebook states that “applied-for strings must be composed of three or more visually distinct letters or characters in the script, as appropriate.” The ISO 3166-2 standard consists of combinations of ISO 3166-1 country codes combined with two alphanumeric characters and in some cases three alphanumeric characters) designations of subdivisions. Examples include DK-025 for the Danish county Roskilde, IT-MI for the Italian province of Milan and MG-T for the Antananarivo province in Madagascar. Therefore, since the majority of the subdivision designations would not consist of “three or more visually distinct letters or characters in the script”, they would be ineligible to serve as gTLD strings. Accordingly, most references found in ISO 3166-2 would be meaningless. A better reference would be the United Nations Code for Trade and Transport Locations, which is universally accepted, with specific reference to the non ISO 3166-1 (two-letter) code elements used therein. This section should, therefore, be rephrased to read:

Applications for any string that represents a subnational place name or abbreviation, such as a county, province, or state, such as those listed in the ISO 3166-2 standard or the United Nations Code for Trade and Transport.

2.1.1.4.1 Requirements for Strings Intended to Represent Geographical Entities

Applications for a city name, where the applicant clearly intends to use the gTLD to leverage from the city name.

Comment - The limitation to “city name” is too restrictive and should be expanded to include “city name or abbreviation” consistent with the naming protocols of virtually all TLDs that are abbreviations for a longer designation. The requirement that an applicant must “clearly intend to use the gTLD to leverage from the city name,” places an unusual burden on municipalities. A more appropriate standard to safeguard the interests of municipalities would be to include “Applications for a string that contains a city name or abbreviation is likely to be associated with a city, unless the applicant can establish independent rights in the string.” Therefore, if the applicant were to demonstrate independent trademark or other IP rights in a string, such as a trademark for the letters NYC, the applied-for string (e.g. .NYC) would not be considered to fall into this category.

Finally, the Guidebook references the **New gTLD Program Explanatory Memorandum - Proposed Process for Geographic Name Applications** dated 22 October 2008. That Memorandum states “the capital cities of the countries or territories on the ISO 3166-1 list are more readily identifiable and will require evidence of support, or non-objection, from the relevant government of public authority for the use of the name.” This capital city requirement is not reflected in the Guidebook. Moreover, even a capital city requirement is inadequate to protect major cities of the world that may be important cities in a country, yet may not be the capital city, such as Mumbai, Sydney, Melbourne, Toronto, Rio, Shanghai, Zurich, Milan, Venice, Barcelona, Munich, Chicago, New York or Miami. These large cities have the populations that would be able to support a city-based gTLD yet there are inadequate protections for them should a third party propose a new gTLD containing a city designation. Reference to the United Nations Code for Trade and Transport discussed above would ameliorate this condition.

In view of the above, the phrase should be amended to read:

“Applications for a city name or corresponding abbreviation, in particular names or abbreviations of cities referred to in the United Nations Code for Trade and Transport, where the name or abbreviation is likely to be associated with a city, unless the applicant can establish independent rights in the string.”

2.1.1.4.1 Requirements for Strings Intended to Represent Geographical Entities

The evidence of support or non-objection from the relevant government or public authority should include a signed letter of support or non-objection from the minister with the portfolio responsible for domain name administration, ICT, foreign affairs or the Office of the Prime Minister or President of the relevant jurisdiction. If there are reasons for doubt about the authenticity of the communication, ICANN will consult with the diplomatic authorities or members of ICANN’s Governmental Advisory Committee for the government or public authority concerned on the competent authority and appropriate point of contact with their administration for communications.

The letter must clearly express the government’s or public authority’s support or non-objection for the applicant’s application and demonstrate the government’s or public authority’s understanding of the string being requested and what it will be used for.

The requirement to include evidence of support for certain applications does not preclude or exempt applications from being the subject of objections on community grounds (refer to section 3.1.1 of Module 3), under which applications may be rejected based on objections showing substantial opposition from the targeted community.

Comment – In order to ensure the rights of governments to object to applications that have passed the ICANN reviews yet do not satisfy the concerns of affected governments, the last sentence should be modified to read:

The requirement to include evidence of support for certain applications does not preclude or exempt applications from being the subject of objections on community grounds (refer to section 3.1.1 of Module 3), under which applications may be rejected based on objections showing substantial opposition from the targeted community, or from being the subject of objections by concerned governments.

2.1.1.4.2 Review Procedure for Geographical Names

A Geographical Names Panel (GNP) will be established to evaluate applications and confirm whether each string represents a geographic term, and to verify the authenticity of the supporting documentation where necessary. The Geographic Names Panel may consult with additional experts as they consider appropriate.

Comment – ICANN needs to define the membership of the Geographical Names Panel, in particular to define who the members will be, how many members there will be, how they will be chosen and what their qualifications must be. As drafted, this provision is wholly inadequate. Representation on the GNP should be required to include government representatives of not only national governments but also sub-national and/or municipal governments as well as include geographically diverse representation. NYC's experience is that there is almost no awareness of the issues potentially facing municipalities and other sub-national governments in the new gTLD process. Moreover, the interests of such governments are not actively represented in any ICANN panel or governing body.

2.1.1.4.2 Review Procedure for Geographical Names

2. ICANN forwards applications considered complete to the GNP for confirmation that:

- The strings are a meaningful representation of a country or territory name or a subnational place name*

Comment – This section should be modified in order to avoid ambiguity, in order to be consistent with the TLD naming philosophy regarding abbreviations, and in order to protect the rights of municipalities, consistent with Section 2.1.1.4.1, as follows:

“The strings are a meaningful representation of a country or territory name or abbreviation, or a subnational place or city name or abbreviation.”

2.1.1.4.2 Review Procedure for Geographical Names

3. *The GNP also reviews applications that are not self-identified as a geographical name to ensure that the applied-for string is not a meaningful representation of a country or territory name or a sub-national place name.*

Comment – This section should be modified in order to avoid ambiguity, in order to be consistent with the TLD naming philosophy regarding abbreviations, and in order to protect the rights of municipalities, consistent with Section 2.1.1.4.1, as follows:

“The GNP also reviews applications that are not self-identified as a geographical term to ensure that the applied-for string is not a meaningful representation of a country or territory name or abbreviation; or a sub-national place name or abbreviation; or, a city name or corresponding abbreviation, where the string is likely to be associated with a city, unless the applicant can establish independent rights in the string.”

2.1.1.4.2 Review Procedure for Geographical Names

The results of the evaluation will be publicly posted on ICANN’s website at the conclusion of the Initial Evaluation, and will also be available to applicants.

Comment – In view of the importance of preserving geographical terms from being used as new gTLDs without corresponding authorization from the respective governments, it is essential that governments be given the opportunity to object to decisions of the GNP. At a minimum, there should be an open period following the issuance of the GNP decision for governments, national and local, to file objections and in effect appeal the decision.

Module 3 - Dispute Resolution Procedures (email gtld-dispute@icann.org)

Section 3.1.1 Grounds for Objection

An objection may be filed on any one of the following four grounds:

String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied for gTLD string.

Legal Rights Objection – The applied-for gTLD string infringes existing legal rights of the objector.

Morality and Public Order Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under international principles of law.

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

The rationales for these grounds are discussed in the final report of the ICANN policy development process for new gTLDs. For more information on this process, see <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

Comment – Although the GNSO recommendations clearly stated that the guidelines should contain mechanisms for national or local governments to initiate a challenge to an objectionable gTLD string, such a procedure is not clearly stated in the grounds provided. A Legal Rights Objection may only be filed by a rightsholder and governments may not qualify under that criterion. It is entirely unclear whether an objection by a government on geographic grounds would constitute a “morality and public order objection.” Reference is made to the Explanatory Memorandum on Morality and Public Order Objection Considerations in New gTLDs dated 29 October 2008 yet that document is neither binding nor is it comprehensive. The definitions of parties that have standing to file a community objection do not expressly include governments in the context of geographically significant gTLD strings so it is unclear whether governments in that capacity could object on community grounds. Either ICANN should provide for a separate proceeding that addresses the objections of governments to the adoption of an objectionable gTLD application, or the Guidebook should clearly delineate which mechanism should be used for such objections. It should also be considered that many governments, whether national or local, may be small with limited economic resources and any corresponding fees to be paid should be minimized accordingly.

Section 3.4.6 Decision

The DRSPs' final decisions will be in writing and will include:

- *A summary of the dispute and findings; and*
- *The reasoning upon which the decision is based.*

Comment – In view of the lack of clear guidance on what objection mechanism would be available to governments, it is probably premature to comment on this.

Section 3.4.7 Dispute Resolution Fees

Comment – The costs envisioned by ICANN for Dispute Resolution proceedings would be a tremendous burden on governments, particularly during the severe fiscal and budgetary restraints currently faced by localities in the United States.

Section 3.5.3 Morality and Public Order Objection

Comment – This concept is wholly undefined and does not merit comment in its current form. NYC advocates that governments be expressly included in the parties who would have standing to bring a dispute under this ground.

3.5.4 Community Objection

Comment – This ground completely omits reference to governmental entities who may be the primary objectors to certain geographically significant gTLD strings, barring any other effective vetting procedures in the application process. Governments should be explicitly recognized as having standing to pursue a Community Objection.

Module 4 - String Contention Procedures
(email gtld-string@icann.org)

No comment

Module 5 - Transition to Delegation
(email gtld-transition@icann.org)

Section 5.4 Ongoing Operations

ICANN will continue to provide support for gTLD registry operators as they launch and maintain registry operations. ICANN's gTLD registry liaison function provides a point of contact for gTLD registry operators for assistance on a continuing basis.

The registry agreement contains a provision for ICANN to perform audits to ensure that the registry operators remain in compliance with agreement obligations.

Comment – Just as ICANN will have an ongoing interest in the successful and compliant operations of a registry operator, so will any governmental organization that provided support in connection with the operator's initial application. Consideration should be given to providing within the registry agreement a process for governmental entities to raise concerns as to operator compliance or which permits audit of the operations of a gTLD by the relevant government(s) or public authorities if the operator is granted a string that is a geographical term. Alternatively, ICANN should consider providing that an operator's departure from its obligations to the government or public authority shall constitute a material breach of its registry agreement obligations.

Module 6
(email gtld-terms@icann.org)

No comment

Glossary
(email gtld-guide@icann.org)

Issue/Analysis - The glossary contains no definition of a geographic term or geographic name. For the sake of consistency throughout the Guidebook, the term should be a defined term.

Comment – The Guidebook is inconsistent in its treatment of terms with geographic significance, at times referring to “geographical names”, at other times referring to “geographical terms” or “geographic term.” As a matter of consistency, ICANN should choose either the adjective form “geographic” or “geographical” and then use it consistently. The phrase “geographic(al) term” should replace “geographic(al) name” since “name” is too restrictive and does not include, for example, name abbreviations which are at the core of the existing gTLD naming conventions. Therefore, “geographic term” should be a defined term in the glossary that is defined as “a name, abbreviation or other indicator of geographic significance for a country, territory, subnational place or city.”