

New gTLD Draft Guidebook v.2 Comments for Modules 1-4

Draft 13 April 2009

The comments below are submitted on behalf of the gTLD Registry Constituency regarding the New gTLD Draft Applicant Guidebook Version 2 (DAG v.2) dated 18 February 2009. They begin with some general comments followed by comments organized chronologically by section numbers for each of the six modules. Note: Comments regarding the base registry agreement in Module 5 and the application terms and conditions in Module 6 will be submitted under separate cover.

General Comments

Timing of IDN TLDs

There has been large pent-up demand for IDN TLDs in both the gTLD and ccTLD areas for many years. At present it is not yet clear when either the New gTLD process, which includes IDN gTLDs, or the IDN ccTLD Fast Track Process will begin. The general intention to date has been to start both processes at relatively the same point in time but there is still a chance that the timing of the two processes could diverge significantly, thereby creating a competitive advantage for the TLDs that enter the root first and also causing unnecessary user confusion. Therefore it is recommended that efforts continue to be made to synchronize the two efforts as much as possible without causing undue delays for either process and to consider steps that can be taken in case a significant time gap between the two is unavoidable.

Module 1 – Introduction to New gTLDs Application Process

1.1.2.4 Objection Filing

Clarification in DAG v.2 that there will be a window of time between the posting of the results of Initial Evaluation and the close of the objection filing period is appreciated. The amount of time should be specified in the next version; it is recommended that it be a function of the number of applications with a minimum of two weeks.

1.1.2.6 Dispute Resolution

In DAG v.2 only a very minor improvement was made regarding the consolidation of objections; it simply says that it will be at the discretion of the DRSP. It is understandable that DRSPs need to be involved in this issue but it is unsatisfactory to simply leave it at their sole discretion. DRSPs should be strongly encouraged if not required to allow for consolidation of objections where possible and to thereby minimize expenses for applicants and objectors.

1.1.2.7 String Contention

The second sentence of the second paragraph says, “ICANN will resolve cases of string contention either through comparative evaluation or through an auction.” As clarified elsewhere in DAG v.2, this sentence probably should be modified something like the following: “ICANN will resolve cases of string contention either through comparative evaluation if a community-based applicant has requested it or through an auction.” Similar changes in Sections 4.1 and 4.1.1 are also recommended.

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1.2.2.1 Definitions

The definition of Community-based TLDs should be clear, measurable and concise and should not be subjected to “considerable subjective evaluation” as stated in the ‘ICANN CALL FOR EXPRESSIONS OF INTEREST (EOIs) for a New gTLD Comparative Evaluation Panel’ (<http://www.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>). Such criteria should ensure 1) a mere customer or subscriber base is not deemed to be a community and 2) to qualify as a community-based gTLD, an applicant must demonstrate that community members would likely self-identify themselves as a member of the community.” This clarification would add more objective criteria while at the same time making it clear that an organization or company couldn't take advantage of the community-based advantage just by claiming its customer base as a community. For example, the definition should preclude an applicant from claiming to be a community with an IDN version of an existing gTLD. It is strongly believed that these recommendations are consistent with the following statement in DAG v.2, Section 1.2.2.2, Implications of Application Designation: “Community-based applications are intended to be a narrow category, for applications where there are distinct associations among the applicant, the community served, and the applied-for gTLD string.”

We recommend the following definition of a Community-based TLD: “The term “community-based” TLD shall mean a TLD that is operated for the benefit of a defined existing community consisting of a restricted population which self-identify as members of the community. The following shall not be deemed to be a community: (i) a subscriber or customer base; (ii) a business and its affiliated entities; (iii) a country or other region that is represented by a ccTLD; or (iv) a language except in cases where the TLD directly relates to a UNESCO recognized language.”

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1.5.1 Description of Fees

In cases where a specific portion of the Initial Evaluation (e.g., Technical & Operational Capability, Financial Capability) is identical for multiple applications, applicant evaluation fees should be credited with the projected costs of that portion of the Initial Evaluation less any minor amount needed for evaluating such portion for multiple gTLDs. The costs of evaluation should reflect the actual cost of doing such evaluation and should not be based on a hypothetical average of projected total evaluation costs across all applicants.

Module 2 - Evaluation Procedures

2.1.1.1 String Confusion Review

The clarity added to the definition of string confusion in DAG v.2 is appreciated. In particular, the statement that “confusion based on any type of similarity (including visual, aural, or similarity of meaning) may be claimed by an objector” is helpful for both potential applicants and existing gTLD registry operators.

When performing the string confusion review against existing TLDs, an appropriate exception should be allowed in cases where the applicant is applying for an IDN version of its existing gTLD name.

2.1.1.3.2 String Requirements

The following requirement as applied to IDN gTLDs should allow for exceptions in Chinese, Japanese and Korean scripts: “Policy Requirements for Generic Top-Level Domains – Applied-for strings must be composed of three or more visually distinct letters or characters in the script, as appropriate.”

2.1.2.2 Evaluation Methodology

It is disappointing that the following sentence was not changed in DAG v.2: “Evaluators are entitled, but not obliged, to request further information or evidence from an applicant.” This position assumes that the Evaluation Questions and Criteria in Module 2 are perfectly clear and complete; if they are not, applicants are at the mercy of the evaluators, thereby making the process more subjective. It is one thing if information required is specifically stated in the Evaluation Questions and Criteria but, in cases where it is not explicit, evaluators should be easily able to identify that and should be required to request further information via an explicit request.

Module 3 - Dispute Resolution Procedures

3.1.2.4 Community Objection

One of the factors that may be considered in determining whether an institution is established is “Level of global recognition of the institution.” This seems fairly reasonable in the case of a global community but may not apply to local communities. It might be better to reword this something like the following: “Level of recognition of the institution within its community.”

3.1.5 Independent Objector

As stated in its Explanatory Memorandum, ICANN claims that the “need for an “Independent Objector” would arise when no objection is filed to a TLD that would be

considered objectionable across many jurisdictions." ICANN Staff state that they are attempting to simply provide an answer to the question of "What will be done if there is an application for a highly objectionable name but there are no objections within the process?" The simplest response is that if no one is willing to file an objection then clearly the proposed TLD is not objectionable.

Two situations are identified for which there may be a need for an "Independent Objector". The first is where "no objection is filed to a TLD that would be considered objectionable across many jurisdictions" and the second is where a government might have an objection but chooses not to utilize the independent dispute process and instead (because of political and perhaps sovereignty concerns) would use courts or an outside agency to attempt to block the application outside of the new gTLD process.

The real reason why no one might file an objection to what may be an objectionable TLD is that ICANN's proposed objection process may be flawed for one or both of these reasons: (i) requiring Objectors to be able to pay the dispute resolution fees (which in the instance of objections based on community or morality are likely to be on the high end because of the inherent contentious nature of the subject matter); (ii) expecting sovereign entities to be willing to submit to the Independent Dispute Resolution process with regard to matters that a country might view as relating to their religious, social or ethnic identity or otherwise relate to fundamental public policies.

Even the use of an Independent Objector to raise these concerns will not prevent a country or other governmental entity from resorting to courts or outside agencies to block an application it deems objectionable if the Independent Objector does not prevail in the Independent Dispute Resolution Process, thereby making the applicant in this instance having to argue their case in at least two forums.

However, the role of the Independent Objector may have some value where its role is limited to providing a means for those who are not financially able to file an objection to be able to be heard. However, the use of an Independent Objector in this manner must be tightly limited:

- First, a process would be needed for individuals and/or groups to submit a request that the Independent Objector file an objection on their behalf. Objectors would need to provide a statement of interest and be able to demonstrate that they are not financially able to file an objection themselves. An applicant should be able to object to an objector's standing. Under no circumstance should the Independent Objector be able to file an objection without a request from an outside group or individual -- no "sua sponte" "unidentified objectors" or "on its own behalf" objections may be filed by the Independent Objector.
- Secondly, ICANN's Board should establish the criteria that the Independent Objector must follow in choosing which objections, and at the time of filing the objection with a Dispute Resolution Provider, the Independent Objector would be required to provide the applicant with a written statement of how the objection

met the established criteria. A failure to follow the established criteria should be a basis for dismissal of the Objection by the Dispute Resolution provider.

- Third, the Independent Objector should not be allowed to file an objection if a third party has already filed an objection against an applicant for the same or substantially similar reasons.
- Fourth, Because ICANN would be essentially funding the objection, in all fairness, ICANN should also advance the applicant's share of the dispute resolution fees, requiring payment only in the event that the dispute resolution provider decides in favor of the Independent Objector

3.3.2 Consolidation of Objections

The first sentence of this section reads, “Once the DRSP receives and processes all objections, at its discretion the DRSP may elect to consolidate certain objections.” It is not clear that DRSPs should be given full discretion on this issue, but at a minimum, it would seem highly desirable for each DRSP to publish the criteria it will use to make such a decision and DRSPs should be encouraged to consolidate similar objections into one proceeding if requested by either the Applicant or any Objector.

3.3.3 Negotiation and Mediation

The following remained mostly unchanged in DAG v.2 even though comments were submitted to the contrary: “There are no automatic extensions of time associated with the conduct of negotiations or mediation. The parties may submit joint requests for extensions of time to the DRSP according to its procedures, and the DRSP or the panel, if appointed, will decide whether to grant the requests, although extensions will be discouraged. Absent exceptional circumstances, the parties must limit their requests for extension to 30 calendar days.” Except in cases where a time extension might negatively impact applicants who are not involved in a negotiation or mediation, granting a small time extension (e.g., not more than 30 days) would seem like a very reasonable step to take if all involved parties concur and that would likely encourage negotiation and mediation. Why shouldn't automatic extensions be granted for 30 days or less if all impacted parties agree and request them? Moreover, when disputes are settled by negotiation without DRSP intervention, all or a portion of DSRP fees should be refunded.

3.3.6 Expert Determination

Why was the following text deleted: “~~ICANN will strongly encourage DRSPs to use reasonable efforts to issue all final decisions within 45 days of the panel appointment date unless, after both parties have completed their initial submissions, the parties jointly request a short postponement of their adjudication date to accommodate negotiation or mediation or to accommodate other aspects of the proceedings, and the panel agrees.~~”? Timely action by DRSPs is an important part of the process. The deleted text did not set any firm requirements but at least gave DRSPs a target.

Attachment to Module 3 New gTLD Dispute Resolution Procedure

Article 4. Applicable Rules

The applicable rules and procedures that the different DSRP's will follow should be published and made subject to comment.

Article 13. The Panel

The following should be changed to provide the option for a 3-person panel: “(b) Number and specific qualifications of Panelist: (i) there shall be one Panelist in proceedings involving a String Confusion Objection.” It is contrary to normal commercial dealings to allow a single arbitrator to determine important disputes. Indeed, the philosophy of the ICC rules, and the rules of most other arbitral authorities, is clearly to the contrary. Among other things, use of a single arbitrator in all disputes would inject large uncertainty into the process of dispute resolution, for ICANN as well as the applicants and objectors.

Module 4 - String Contention Procedures

4.1.3 Self-Resolution of String Contention

The continued rejection of the formation of joint ventures seems unreasonable, especially in cases where there are no material changes in applications or need for re-evaluation.

GNSO gTLD Registry Constituency Statement of Support

Issue: Draft New gTLD Applicant Guidebook version 2, Modules 1-4

Date: 13 April 2009

General RyC Information

- Total # of eligible RyC Members¹: 14
- Total # of RyC Members: 14
- Total # of Active RyC Members²: 14

¹ All top-level domain sponsors or registry operators that have agreements with ICANN to provide Registry Services in support of one or more gTLDs are eligible for membership upon the “effective date” set forth in the operator’s or sponsor’s agreement (Article III, Membership, ¶ 1). The RyC Articles of Operations can be found at http://www.gtldregistries.org/about_us/articles.

² Per the RyC Articles of Operations, Article III, Membership, ¶ 4: Members shall be classified as “Active” or “Inactive”. A member shall be classified as “Active” unless it is classified as “Inactive” pursuant to the provisions of this paragraph. Members become Inactive by failing to participate in

- Minimum requirement for supermajority of Active Members: 10
- Minimum requirement for majority of Active Members: 8
- # of Members that participated in this process: 14
- Names of Members that participated in this process:
 1. Afilias (.info)
 2. DotAsia Organisation (.asia)
 3. DotCooperation (.coop)
 4. Employ Media (.jobs)
 5. Fundació puntCAT (.cat)
 6. mTLD Top Level Domain (.mobi)
 7. Museum Domain Management Association – MuseDoma (.museum)
 8. NeuStar (.biz)
 9. Public Interest Registry (.org)
 10. RegistryPro (.pro)
 11. Societe Internationale de Telecommunication Aeronautiques – SITA (.aero)
 12. Telnic (.tel)
 13. The Travel Partnership Corporation – TTPC (.travel)
 14. VeriSign (.com, .name & .net)
- Names & email addresses for points of contact:
 - Chair: David Maher, dmaher@pir.org
 - Alternate Chair: Jeff Neuman, Jeff.Neuman@Neustar.us
 - Secretariat: Cherie Stubbs, Cherstubbs@aol.com

Regarding the issue noted above, the level of support in the RyC is summarized below.

1. **Level of Support of Active Members:** Supermajority
 - 1.1. # of Members in Favor: 12
 - 1.2. # of Members Opposed: 0
 - 1.3. # of Members that Abstained: 0
 - 1.4. # of Members that did not vote: 2
2. **Minority Position(s):** None

a Constituency meeting or voting process for a total of three consecutive meetings or voting processes or both, or by failing to participate in meetings or voting processes, or both, for six weeks, whichever is shorter. An Inactive member shall have all rights and duties of membership other than being counted as present or absent in the determination of a quorum. An Inactive member may resume Active status at any time by participating in a Constituency meeting or by voting.