

COMMENTS OF .ORG THE PUBLIC INTEREST REGISTRY ON
DRAFT APPLICANT GUIDEBOOK FOR NEW GENERIC TOP-LEVEL
DOMAINS (gTLDs) - December 3, 2008
(corrected 15 December)

.ORG The Public Interest Registry (PIR) presents its comments on the Draft Applicant Guidebook for new Generic Top-level Domains (gTLDs) - December 3, 2008 (“Guidebook”).

Introduction

These comments are directed to certain critical issues raised by the Guidebook that are of paramount importance to PIR. The comments do not attempt to cover all of the issues and questions raised by the Guidebook and the documents issued by ICANN in connection with it, as listed at: <http://icann.org/en/topics/new-gtld-comments-en.htm>

PIR is an active member of the Registries Constituency that is also submitting comments on the contractual provisions contained in the Guidebook relating to the Application Process and the draft Base Agreement, and PIR supports those comments.

In general, PIR believe that much greater clarity is needed to assure open and transparent application procedures. The following comments urge that:

- The New gTLD Application Process set forth more clearly defined factors for the selection of applicants;
- The string contention dispute process be made subject to legal review;
- String contention be more clearly defined; and
- Consideration be given to a new Base Agreement modeled on existing registry agreements.

Issue 1 – The New gTLD Application Process

(a) The draft New gTLD Application Process includes elaborate procedures for dealing with the strong likelihood that there will be multiple applicants for many commercially desirable gTLD strings. The draft recognizes two categories of applicants, open and community-based, and provides for resolution of four categories of disputes:

- i. String Contention
- ii. Legal Rights
- iii. Morality and Public Order Objections, and
- iv. Community Objections

With respect to String Contention, there appears to be one overriding basis for resolution: “ICANN policy” states that the community-based application is always awarded priority (Sec. 4.2.1). This rule goes too far if it is intended to supersede whatever claim an applicant for an open gTLD might have for better service to the entire Internet

community. There may be cases when an open applicant has better credentials for serving the public interest than a community-based applicant. The automatic priority for community-based applications should be only one of a list of detailed and clearly explained factors that will be used by the Board to reach an ultimate decision to grant an application.

If there are multiple open applicants, and no community-based applicant, the draft provides two options: settlement by the parties or an auction. The latter procedure insures that the richest (open) applicant will win, but does not offer any assurance that an applicant with funds to bid in the auction has sufficient funds to manage the registry for the benefit of Internet users.

If there are multiple community-based applicants in a string contention, then a comparative evaluation process will be conducted. The draft includes an attempt at mathematical precision to guide this process (Sec 4.2.3), but recognizes that there may be cases where the parties are tied in the evaluation. In such case (and assuming that both parties reach a specified minimum score), the party representing the larger community takes priority (Sec. 4.2.3). This again should not be turned into an arbitrary and mechanical basis for the approval of an application. The ICANN Board is still obligated to weigh other factors in the selection of an applicant that best serves the public interest. As in the case of the automatic priority for community-based applications, the size of the community served should be only one of a list of detailed and clearly explained factors that will be used by the Board to reach an ultimate decision to grant an application.

(b) The draft also recognizes that there may be cases where it is not clear whether there really is string contention. The strings in a dispute may be similar but not identical. For example, one party believes that the similarity is strong enough to meet the standard, "probability of user confusion"; the other party disagrees. In this case, another module of the draft provides for filing an objection with a Dispute Resolution Service Provider ("DRSP"), in this case, the International Centre for Dispute Resolution. (Sec. 3.2) This creates a very serious legal problem by putting ultimate decision making authority in a single arbitration panelist appointed by an outside body. In general, arbitration decisions have the force of law. They are not appealable, and under applicable international treaties can be entered as final judgments in most national courts. String contentions are matters on which ICANN could make judgments but chooses not to. ICANN proposes to refer them to an international quasi-judicial system in which a single panelist can make a binding determination that has the force of law and is not subject to review by any government or national court. ICANN is attempting to do what governments do and turn itself into an international government above the laws of nations. This scheme puts ICANN in the position of being an international governmental body - executive, legislative and judicial, all wrapped up in one. The problem is exacerbated by the provisions of the draft (Module 6) that require all applicants to waive all legal rights including the right to bring suit to overturn arbitrary or groundless decisions by a panelist.

At the very least, the string contention procedures should follow the precedent of the UDRP and put in an "escape valve", appropriately reworded, along the lines of:

"The mandatory administrative proceeding requirements set forth in [Paragraph 4](#) shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded." (Section 4(k) of the UDRP)

(c) Finally, the draft Guidebook needs to identify more clearly the possibility of string contention based on factors other than visual similarity to an existing string (as informed by the algorithm). There can be string contention between two (or more) strings that are phonetically or conceptually similar, or there can be string contention based on *'confusion by any means whatever'* on the part of the public. GNSO Recommendation 2 on this subject (See http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm#_Toc43798015 for discussion) makes it clear that 'confusingly similar' should be broadly interpreted. This point is not adequately carried through to the draft Guidebook. This omission prevents applicants from conducting a proper risk assessment.

Issue 2 - The new Base Agreement

General observations - The introduction of an entirely new "base agreement" in the draft appears to be based only on a desire to simplify the form of agreement. With a few exceptions, it certainly does not stem from the recommendations in "Term of Reference Four – Contractual Conditions:

<http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm#_Toc35657640>

The resulting base agreement is so flawed in substantive provisions that consideration should be given to abandoning it in its entirety. At the very least, the Board should consider, as a possible starting point, the forms of registry management agreements in force for .ORG, .BIZ and .INFO.

The Comments of the Registries Constituency referred to above present a detailed analysis of the provisions of the draft base agreement and the Constituency's objections.

PIR believes that, of the many flawed aspects of the draft base agreement, the following highlights deserve special comment:

- (a) The base agreement eliminates ICANN's covenants that are fundamental for a bilateral agreement between ICANN and a registry. The base agreement should contain:

"Covenants of ICANN.

ICANN covenants and agrees with Registry Operator as follows:

- (a) Open and Transparent. Consistent with ICANN's expressed mission and core values, ICANN shall operate in an open and transparent manner
- (b) Equitable Treatment. ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause." (Art. III, Sec. 3.2 (a, b) of the .ORG agreement).

- (b) The base agreement eliminates the specified applicability of consensus policies and the limits on their applicability, *e.g.*, Art. III, Sec. 3.1(b) of the .ORG agreement. These provisions are essential for the protection of the registry from arbitrary policy changes. Past experience with the PDP shows that there can be differences of opinion on questions whether a given policy proposal is within the scope of ICANN's authority. It is essential to have a legal, contractual basis for testing such questions. ICANN's recent comments that registries should rely on ICANN's bylaws as protection do not address this issue.
- (c) Article 7 of the base agreement, "CHANGES AND MODIFICATIONS", converts what purports to be bilateral agreement into a unilateral "charter" with no limits on the scope and substance of changes that ICANN might choose to make.
- (d) Article 6, Section 6.2 of the draft base agreement, "COST RECOVERY FOR RSTEP" is unwarranted. This provision, as explained in the documents that accompany the draft Guidebook, would be the basis for the imposition of a flat fee on any and all proposals for new services that require RSTEP review. It is counterproductive to impose such a fee on a service intended to benefit Internet users. Further, the size of the proposed fee would certainly deter small community-based gTLDs from proposing new services.
- (e) The imposition of a flat quarterly fee (Art.6, Sec. 6.1 of the draft base agreement) is also unwarranted. The amount of the fee is so high that it will certainly deter many applicants, whether open or community-based, that wish to offer a specialized TLD with a limited market.

Conclusion

PIR urges ICANN staff:

- In the Application Process,
 - To define and publish for comment more clearly defined factors for the selection of applicants;
 - to add provisions for legal review of the string contention dispute process;
 - To clarify the definition of string contention so that it includes "confusion by any means whatever"; and
- To give strong consideration to a new Base Agreement, modeled on existing registry agreements, that takes account of the above comments.