

## SubPro ODP: Policy Question Set #4 (Overarching & Topic-Specific)

### Overarching Policy Question

1. Is it the Council's view that affirmations of 2007 policy in the SubPro Final Report be treated by the Board in the same way as new policy recommendations? (see, e.g., Rec 6.1).

#### RESPONSE

As a preliminary matter, the SubPro Final Report states:

In the event the Working Group was unable to recommend an alternate course of action, the Working Group operated on the basis that the “status quo” should remain in place as a default position. This status quo consists of the 2007 policy, the final Applicant Guidebook, and any implementation elements that were put into practice in the 2012 application round.

Further, according to the SubPro Final Report, “Affirmations indicate that the Working Group believes that an element of the 2012 New gTLD Program was, and continues to be, appropriate, or at a minimum acceptable, to continue in subsequent procedures.

Affirmations may apply to one or more of the following:

- Policy Recommendation, Implementation Guideline or Principle from the 2007 Policy
  - Existing provisions of the 2012 Applicant Guidebook; or
  - Other elements of implementation introduced after the release of the final Applicant Guidebook but applied to the 2012 application round.”
- a. With respect to your question, it would depend on the Affirmation. An Affirmation of a policy from the 2007 Policy is not a new policy.
  - b. An Affirmation of an implementation guideline or principle from the 2007 Policy is not new policy either since they relate to elements that were not policy to begin with, but rather guidelines or principles.
  - c. An Affirmation of an existing provision of the 2012 Applicant Guidebook or other elements introduced after the release of the final Applicant Guidebook but applied to the 2012 application round *may* be new policy, new implementation guidelines or new principles depending on the nature of the implementation guidelines and the context of the affirmation.

For example, Affirmation 6.1 is not a new policy in that it just affirms a Principle underlying the 2007 policy. Affirmation 5.1, on the other hand, may be a new policy since it is affirming what happened during the 2012 round, namely that there should be no limits placed on the number of applications in total or from any particular entity. This is because it was not a policy from the original 2007 Policy, but it was what was done during the 2012 round which the Working Group agreed with and which the working group intended to become a new policy for subsequent rounds. We are happy to discuss specific Affirmations should you have questions.

### **Policy Questions | TLD Types:**

Recommendation 4.1: The Working Group recommends differential treatment for certain applications based on either the application type, the string type, or the applicant type. Such differential treatment may apply in one or more of the following elements of the new gTLD Program: Applicant eligibility 20; Application evaluation process/requirements<sup>21</sup>; Order of processing; String contention<sup>22</sup>; Objections<sup>23</sup>; Contractual provisions.

- Different application types:
  - Standard
  - Community-Based (for different application questions, Community Priority Evaluation, and contractual requirements)
  - Geographic Names (for different application questions)
  - Specification 13 (.Brand TLDs) (for different application questions and contractual requirements)
- Different string types:
  - Geographic Names (for different application questions)
  - IDN TLDs (priority in order of processing)
  - Variant TLDs
  - Strings subject to Category 1 Safeguards
- Different Applicant Types:
  - Intergovernmental organizations or governmental entities (for different contractual requirements)
  - Applicants eligible for Applicant Support

### Recommendation 4.2

Other than the types listed in Recommendation 4.1, creating additional application types<sup>32</sup> must only be done under exceptional circumstances. Creating additional application types, string types, or applicant types must be done solely when differential treatment is warranted and is NOT intended to validate or invalidate any other differences in applications.

### Implementation Guidance 4.3

To the extent that in the future, the then-current application process and/or base Registry Agreement unduly impedes an otherwise allowable TLD application by application type, string type, or applicant type, there should be a predictable community process by which potential changes can be considered. This process should follow the Predictability Framework discussed under Topic 2. See also the recommendation under Topic 36: Base Registry Agreement regarding processes for obtaining exemptions to certain provisions of the base Registry Agreement.

### Questions on 4.1,4.2, and 4.3:

- A. Can the Council provide clarity on what the recommended differences are relative to the 2012 round with respect to the types of TLDs mentioned in Recommendation 4.1?

### Response

The SubPro PDP Working Group wanted to codify the certain types of TLDs that may not have been formally identified in the Applicant Guidebook at the start of the 2012 application round as well as those categories of TLDs that may have been recognized, but were not called out in the original 2007 Policy. For example, prior to the 2012 Round there was no formal construct for a Brand TLD nor was there any prohibition on <dot>Brand TLDs. However, based on the 2012 Round, the further work on Specification 13, and the subsequent amendment to Specification 13 (as part of the first Global Amendment to the Registry Agreement), we now have a formal category of <dot>Brand TLDs. The SubPro Final Report describes what the Working Group foresaw as the recommended differences, but did not set forth all the ways in which those differences could be facilitated in the implementation of subsequent rounds. For example, in the 2012 Round, designations of Specification 13 .Brand TLDs were done after all the evaluations, objections, contention resolution, but prior to transitions to delegation.

- B. Does the Council agree that the lists of application types and string types listed in 4.1 are not exhaustive and that some other applicant types already exist - wording in Rec 4.2 notwithstanding? Otherwise, for example, applicants requesting a Code of Conduct exemption might be grouped with Spec 13 applicants despite not being exactly the

same; similarly, IDNs do not just differ in prioritization, such strings will require different technical reviews.

### Response

Yes. Members of the SubPro PDP Working Group also wanted to ensure that there would be flexibility in the future to create new types of TLDs should that be deemed necessary and appropriate by the community. As stated in the SubPro Initial Report, members of the PDP Working Group were frustrated at the length of time and amount of resources it took to recognize the “Brand TLD type and to recognize that certain terms of the Base Registry Agreement, for example, were not appropriate for <dot>Brand TLDs. Therefore, they wanted to retain the possibility of new categories of TLDs in the future that may require differential treatment in one of the manners set forth in the Section 4 Recommendations and make it easier to accommodate such new categories. It should be noted that the SubPro PDP Working Group did not intend in any way to limit the differences in treatment of TLD categories to those specified in the SubPro Final Report, but rather referred to the example of <dot>Brand TLDs merely as an illustration.

## **Policy Questions | Conflicts of Interest:**

### Recommendation 8.1:

“ICANN must develop a transparent process to ensure that dispute resolution service provider panelists, Independent Objectors, and application evaluators are free from conflicts of interest. This process must serve as a supplement to the existing Code of Conduct Guidelines for Panelists, Conflict of Interest Guidelines for Panelists, and ICANN Board Conflicts of Interest Policy.”

### Questions on 8.1

- A. Does the Council have additional input on the Working Group’s position that provisions in the 2012 round were insufficient to effectively guard against conflicts of interest among dispute resolution service provider panelists, the Independent Objector, and application evaluators, as detailed in the Rationale for Recommendation 8.1?

The recommendation for a transparent process for ensuring that panelists, evaluators, and Independent Objectors are free from conflicts of interest has been put forward by the SubPro PDP Working Group since the Initial Report published in 2018. This topic was discussed at length by the SubPro PDP Working Group’s Work Track 3 in response to a review of Reconsideration Requests as well as the results from the objections and

dispute resolution process.<sup>1</sup>

The recommendations were also in response to the comments submitted in Community Comment 2 and to ICANN's own Program Implementation Review Report ("PIRR") which found that "Regarding expert panelist selection criteria and process, ICANN received comments citing the lack of transparency in the expert panelist selection process and in the experts' qualifications as they related to the dispute resolution proceedings. *To provide greater transparency in the process in future rounds, ICANN could ask the [Dispute Providers] to provide more information on their selection processes before Objections are filed.*"<sup>2</sup>

Further, Work Track 3 noted that the community perceived that the application of the objection process led to inconsistent results. In addition, in its review of reconsideration requests, Work Track 3 also noted that one of the issues frequently brought up in these reconsideration requests was that the requestor believed that one or more of the panelists or even the Independent Objector (as they sat for the 2012 Round), had a conflict of interest. Although Work Track 3 was unable to come to a definitive conclusion about the cause of these inconsistencies, its recommendations (which were contained in the SubPro Initial Report, Draft Final Report and the Final Report) essentially mirrored some of the recommendations in the ICANN Org PIRR, centering around providing more transparency in the process.

In the SubPro Final Report, the SubPro PDP Working Group noted in the deliberations section, that some comments to the draft Final Report "suggested drawing on best practice resources for the implementation of this recommendation, such as the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration"<sup>3</sup>

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<sup>1</sup> See

<https://gnso.icann.org/sites/default/files/file/field-file-attach/subsequent-procedures-initial-overarching-issues-work-tracks-1-4-03jul18-en.pdf> at Section 2.8.1 at p. 172.

<sup>2</sup> See [Program Implementation Review Report Section 3.2.4](#) p. 110

<sup>3</sup> See [Final Report](#) at p. 37.

## Policy Questions | PICs/RVCs:

### Recommendation 9.9

“ICANN must allow applicants to submit Registry Voluntary Commitments (RVCs) (previously called voluntary PICs) in subsequent rounds in their applications or to respond to public comment, objections, whether formal or informal, GAC Early Warnings, GAC Consensus Advice, and/or other comments from the GAC. Applicants must be able to submit RVCs at any time prior to the execution of a Registry Agreement; provided, however, that all RVCs submitted after the application submission date shall be considered Application Changes and be subject to the recommendation set Application Changes Requests, including, but not limited to, an operational comment period in accordance with ICANN’s standard procedures and timeframes.”

### Questions on 9.9

- A. Does the Council agree that there should be no other reasons than those listed in 9.9 because of which an applicant can submit a revised RVC?

Response: The GNSO Council is not in a position to agree or disagree with the notion that these are the only reasons for which an applicant can submit an RVC. Council is also unable to comment on “revised RVC” which is undefined.

- B. Does the Council agree that an applicant can amend an RVC?

#### Response

The Council refers to the Rationale set forth in Recommendation 9.9 which states that:

“The Working Group emphasizes the importance of transparency and accountability in the implementation of RVCs. By requiring an operational comment period on **any** changes to RVCs, the New gTLD Program will ensure that the community has an opportunity to provide input on any changes being proposed. These types of changes should be considered application change requests, which includes an operational comment period.”<sup>4</sup>

- C. If the Council’s answer is ‘yes’ to question 9.9 B, then the ODP team notes that allowing the change up until the execution of a Registry Agreement could lead to less predictability for stakeholders and added operational complexity for ICANN org, both of which may lead to additional processing time. This also provides an opportunity for applicants to resolve a contention set via the introduction or revision of the RVC, then submit another change request to revert back to its original RVC afterwards as a way to “cheat the system.” Does the Council have any concerns about the reduced predictability and transparency under such a scenario?

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<sup>4</sup> See Final Report at p. 46.

The Council notes that this question posed by the ICANN SubPro ODP Team appears to track closely with comments by ICANN Org in response to the Draft Final Report<sup>5</sup>. Council also notes that the SubPro PDP Working Group had carefully considered each and every comment it received through the Public Comment Proceedings for its Draft Final Report, and respectfully disagrees with the ICANN ODP team's statement that this process will lead to "reduced predictability and transparency." RVCs were conceived (and expanded upon) to provide a transparent and predictable process by which applicants/registries could respond to concerns expressed by the Community. During the 2012 round, there was a lack of transparency and predictability as to the process by which applicants could respond to such concerns and how those responses could be codified and enforced. The Council, which unanimously adopted this recommendation, does not believe the ODP Team's assessment is correct.

- D. Does the Council agree that if an RVC is utilized to address GAC Advice, prevailing objections, it will be up to the applicant and the objector or the GAC to mutually agree that the RVC addresses the original concern and to communicate to ICANN how the RVC addresses the original objection or GAC advice?

Response

The Council is not in a position to agree or disagree with whether an RVC that is proposed to address GAC Advice or prevailing objections requires mutual agreement. The Council notes that "voluntary" PICs (now called RVCs) for the 2012 Round were the result of the ICANN Board's adoption of resolutions that it believed addressed the applicable GAC Advice. Thus, they did not require the GAC to "agree", but rather, what was required was that the Advice was addressed.

With respect to "prevailing objections", we do not know what that term refers to as it does not appear in the SubPro Final Report. If you are referring to GAC Early warnings, such warnings cannot interfere with contracting the TLD, so it does not appear that any mutual agreement with any individual GAC member is required. If you are referring to other objections such as a legal rights objection, an applicant could attempt to negotiate a withdrawal of such an objection prior to a decision, but if the objector prevailed that would end the application process for that applicant.

- E. Does the Council agree with ICANN org's interpretation that in such a scenario, when no mutual agreement is reached, the application will not be able to proceed. If not, what is the way forward for the applicant according to the Council?

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<sup>5</sup> See [Letter from Theresa Swinehart](#) to SubPro Working Group dated September 2020

### Response

The SubPro Final Report recommended striking the language from the 2012 Applicant Guidebook stating that where there was GAC Advice on a particular string that this would be a presumption that the string will not proceed. Rather, the ICANN Board would treat GAC Advice in accordance with its Bylaws. Therefore, if there is no “mutual agreement”, the ICANN Board would have to consider the GAC Advice in accordance with its Bylaws.

### Recommendation 9.10

RVCs must continue to be included in the applicant’s Registry Agreement. Question on 9.10

- A. Does the Council agree that this means that RVCs must continue to be in the Registry Agreement after contract renewal or assignment and cannot be modified or removed from the Registry Agreement in the future.

### Response

The Council is not in a position to state that these RVCs once incorporated in a contract must always remain in a contract. This issue was not addressed by the SubPro PDP Working Group because its mandate was limited to addressing issues involving the New gTLD Program processes up to delegation of the TLD for a successful applicant. The issue of whether contractual obligations such as PICs / RVCs may be changed, and if so, under what conditions those changes should be allowed, is outside the scope of this SubPro ODP . .

### Recommendation 9.12

“At the time an RVC is made, the applicant must set forth whether such commitment is limited in time, duration and/or scope. Further, an applicant must include its reasons and purposes for making such RVCs such that the commitments can adequately be considered by any entity or panel (e.g., a party providing a relevant public comment (if applicable), an existing objector (if applicable) and/or the GAC (if the RVC was in response to a GAC Early Warning, GAC Consensus Advice, or other comments from the GAC)) to understand if the RVC addresses the underlying concern(s).”

### Questions on 9.12

- A. Is it expected that the RO cannot terminate a RVC mid-operation unless that was explicitly set forth at the time the RVC was made?

Please see Response above under Section 9.10

- B. Are there any scenarios under which an RVC can be changed?



Please see Response above under Section 9.10.

Recommendation 9.2: Provide single-registrant TLDs with exemptions and/or waivers to mandatory PICs included in Specification 11 3(a) and Specification 11 3(b).

Questions on 9.2:

- A. Can the Council provide guidance on the following: Recommendation 9.2 requires providing single-registrant TLDs with exemptions to Specification 11.3(a) and (b). Single registrant TLD is not defined among the TLD types under topic 4. Single registrant TLD does not appear to be defined in the report. Should this be considered an “additional application type” under Recommendation 4.2? What criteria are expected to be used to determine when this exemption applies?

Response

The Council notes that the SubPro PDP Working Group used the term “Single Registrant TLD” as shorthand for those TLDs that qualified for an exemption under section 6 of Specification 9 of the Registry Agreement. Namely, Section 6 states:

“Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN’s reasonable discretion, if Registry Operator demonstrates to ICANN’s reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for the exclusive use of Registry Operator or its Affiliates, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) application of this Code of Conduct to the TLD is not necessary to protect the public interest.”

The Council does not have an opinion as to whether being granted this exemption under the Code of Conduct denotes a separate category of TLD.

- B. ICANN org notes that Spec 13 and CoC exemptions are not only single registrant scenarios, as both include affiliates, too. Does this the Council agree that 9.2 applies to those type of TLD operators, too.

Response

Yes. The Council believes that the SubPro PDP Working Group understood the definitions of Specification 13 TLDs and those TLDs granted an exemption under the Code of Conduct.

- C. Can the Council provide guidance on the following: The rationale for Recommendation 9.2 notes that security threat monitoring should not apply for single-registrant TLDs because the threat profile is much lower compared to TLDs that sell second-level

domains. Given that single-registrant TLD is not defined, how can the level of risk be known?

Response

As stated above, the definition of a single-registrant TLD, as used by the SubPro PDP Working Group includes those TLDs that qualify for Specification 13 as well as those that meet the definition contained in Section 6 of Specification 9 (Code of Conduct) of the Registry Agreement.

**Policy Questions | Application Change Request:**

Recommendation 20.8:

“The Working Group recommends allowing .Brand TLDs to change the applied-for string as a result of a contention set where (a) the change adds descriptive word to the string, (b) the descriptive word is in the description of goods and services of the Trademark Registration, (c) such a change does not create a new contention set or expand an existing contention set, (d) the change triggers a new operational comment period and opportunity for objection and, (e) the new string complies with all New gTLD Program requirements”

Questions on 20.8:

- A. Does the Council agree that the intent of 20.8 is that only one single descriptive word - and not multiple descriptive words - can be added to the string? For example, .delta-faucets would be acceptable, whereas .delta-kitchen-faucets would not be acceptable.

Response

The Council does not believe that the SubPro recommendation was intended to be limited to “one word” per se. The intent is to allow the change to resolve a contention set or an objection. For example, if the descriptive term is “lawn mowers”, and the addition of that term (comprised of two words) as .deltalawnmowers, or .delta-lawn-mowers resolves an objection or contention set (and meets (c), (d) and (e) in Recommendation 20.8, that would be in line with the intent of the Recommendation.

- B. Does the Council agree that the descriptive word must be in the language of the relevant trademark registration and cannot be a translation or transliteration thereof? For example, if said company had its trademark registered only in Germany, .delta-wasserhahn\* would be acceptable, whereas .delta-faucet would not be. Similarly, if Delta had a trademark registration in German and English, then both those examples would be acceptable.

\*wasserhahn being the German translation of faucet.

#### Response

The Council notes that this is a matter for implementation, but it seems consistent with the recommendation that the descriptive term be contained in the trademark registration.

### **Policy Questions | Registrant Protection:**

#### Recommendation 22.7

“TLDs that have exemptions from the Code of Conduct (Specification 9), including .Brand TLDs qualified for Specification 13, must also receive an exemption from Continued Operations Instrument (COI) requirements or requirements for the successor to the COI.”

#### Question on 22.7:

- A. This Recommendation is based on the rationale that an EBERO event would not be necessary “in business models where there are no registrants in need of such protections in the event of a TLD failure.” ICANN org notes a concern that the inclusion of Specification 9 exemption or Specification 13 in a Registry Agreement does not ensure there are no registrants or other end users in need of protection. For example, a car manufacturer with a Specification 13 may allow individual/independent car dealerships and/or their customers to use registrations in that TLD.

#### Response

The Council understands the comments made by the ICANN SubPro ODP Team but believes that the recommendation speaks for itself. The SubPro PDP Working Group perhaps used shorthand in its rationale because of the length of the Final Report. The operative term is “registrants needing protection”. Because all of the registrants for a Specification 13 <dot>Brand TLD must have an affiliation with the Registry Operator (either a corporate affiliation or trademark license), the SubPro PDP Working Group did not believe that this was a scenario which necessitated an EBERO since those “affiliations” all related to the services/products of the Registry Operator as opposed to completely unaffiliated registrants.

- B. ICANN org notes the potentially significant impact on end users should any gTLD fail

without failover or continuity mechanisms in place. Is the Council comfortable that the broader risks, i.e., that such a failure might not reflect only on the specific brand/gTLD but also potentially undermines confidence in the stability of the DNS and the Internet, has been fully considered in the context of this recommendation? In this context, the Council may wish to provide further guidance on whether EBERO protections would be appropriate in some instances of TLDs with a Specification 9 exemption or Specification 13.

#### Response

The Council notes that these comments by the ICANN SubPro ODP Team were raised by ICANN Org in ICANN Org's comments to the Draft Final Report<sup>6</sup>. As before, Council notes that the SubPro PDP Working Group had carefully considered and addressed all comments received by the Working Group. and does not believe there is a need to re-consider these comments since the Council cannot substitute its own views for that of the SubPro PDP Working Group, which is a multi-stakeholder policy development process.

The Council, which unanimously approved the recommendation, believes that the SubPro PDP Working Group did consider all of the risks mentioned above and believes that the failure of a single <dot>Brand TLD would unlikely "undermine confidence in the Stability of the DNS and the Internet." As noted by the SubPro PDP Working Group in its deliberations after Community Comment 2, single entities fail every day on the Internet. The failure of one of these entities has never undermined the confidence in the stability of the Internet.

### **Policy Questions | Applicant Reviews: Technical and Operational, Financial and Registry Services:**

Implementation Guidance 27.8: A mechanism(s) should be established to meet the spirit of the goals embodied within Q30b - Security Policy without requiring applicants to provide their full security policy. The Applicant Guidebook should clearly explain how the mechanism meets these goals and may draw on explanatory text included in the Attachment to Module 2: Evaluation Questions and Criteria from the 2012 Applicant Guidebook.

#### Question on 27.8:

- A. Does the Council agree that, because there is no additional guidance on meeting the spirit of the goals embodied within Q30b, it is up to ICANN org to develop this as part of designing the evaluation process?

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<sup>6</sup> See <https://www.icann.org/en/system/files/correspondence/swinehart-to-langdon-orr-neuman-30sep20-en.pdf> at p. 25-26.

### Response

The Council does not understand the statement “it is up to ICANN org to develop this as part of designing the evaluation process.” The design of the evaluation process is developed during the implementation phase and reflected in the Guidebook which is subject to comment and review by the Community.

### Implementation Guidance 27.20:

The following is a tentative but exhaustive set of financial questions:

- “Identify whether this financial information is shared with another application(s)” (not scored).
- “Provide financial statements (audited and self-certified by an officer where applicable or audited and independently certified if unable to meet the requirements for self- certification)” (0-1 scoring) (certification posted).
- “Provide a declaration, self-certified by an officer where applicable or independently certified if unable to meet the requirements for self-certification, that the applicant will be able to withstand missing revenue goals, exceeding expenses, funding shortfalls, and will have the ability to manage multiple TLDs where the registries are dependent upon the sale of registrations” (0-1 scoring) (publicly posted).

### Question on 27.20:

- A. Can the Council provide clarity on how "tentative but exhaustive," is defined as noted in IG 27.20?

### Response

The Council notes that without context the language can appear to be contradictory. But the SubPro PDP Working Group labeled this as “Implementation Guidance.” Thus, it understood that like all “implementation guidance” the precise wording of the financial requirements could change from that presented in the Implementation Guidance described in this 27.20. That said, the Working Group, which initially addressed this issue in Work Track 4, wanted to make it clear that the Implementation Review Team did not add additional requirements (or questions) other than the three bullet points above.

In other words, although it recommended that ICANN provide guidance to applicants about what resources are required to operate a registry, it did not want ICANN to evaluate specific business models.

### **Policy Questions | Role of Application Comment:**

## Implementation Guidance 28.5

“In addition, each commenter should be asked whether they are employed by, are under contract with, have a financial interest in, or are submitting the comment on behalf of an applicant. If so, they must reveal that relationship and whether their comment is being filed on behalf of that applicant.”

### Questions on 28.5:

- A. Does the Council have any input on how the information obtained through the questions detailed in 28.5 would be used during the evaluation?

#### Response

In the Rationale for Implementation Guidance 28.5, the SubPro PDP Working Group stated the following:

*The Working Group noted commenters could potentially misrepresent who they were or who they represented and “game” the system to disadvantage certain applicants. Recognizing that evaluation panelists perform due diligence in considering application comment, and the challenge of confirming the true identity of all contributors to public comment, the Working Group nevertheless encourages ICANN to seek opportunities to verify the identity of commenters in a meaningful way to reduce the risk of gaming and further to require commenters to disclose any relationship with an applicant for the sake of transparency. The Working Group notes that further consideration may need to be given to specific implementation elements, for example whether there should be consequences to the applicant if a commenter does not disclose a relationship with that applicant.*

This IG is tied closely with Recommendation 28.9 and Implementation Guidance 28.10 which ask the Implementation Review Team to develop guidelines about how application comments are to be utilized or taken into account by the relevant evaluators and panels. The problem that the SubPro PDP Working Group had is that it did not know how, or even if, application comments were considered during the evaluations, objections, etc. That is why it recommended that ICANN provide more clarity on the role of application comments in such processes. When it provides such clarity, it should also include information as to how it would consider comments submitted by competitors or those that would have an interest in either pushing the application forward, or that would have an interest in seeing the application fail.

The Council believes that this should be worked out by the Implementation Review Team. That said, ICANN has had hundreds, perhaps thousands, of public comment periods throughout its nearly 25 year history. Comments are submitted all the time by those that have an interest in the outcome of those comment periods and we believe that ICANN Org

has likely developed guidelines for the organization to evaluate those comments with that context in mind. Therefore, it believes that ICANN in connection with the IRT should be able to provide more clarity to IG 28.5.

### **Policy Questions | Objections:**

#### Affirmation with Modification 31.3:

*For full text see Final Report pp.145-147*

#### Question on 31.3:

- A. Does the Council agree with the assumption that, once notified, the dispute resolution provider is not involved in any communication between the objecting party and applicant during the cooling off period?

#### Response

When read in connection with each of the other recommendations, IG and Affirmations in Section 31, the parties are encouraged to attempt to resolve their disputes / objections outside of the formal process during the cooling off period. The dispute resolution provider is not intended to get involved in the substance of the dispute/objection during the cooling off period unless mutually agreed by the parties. That said, the parties should have the ability to communicate with ICANN to provide guidance should the dispute be settled. Guidance should be provided on a) what steps to follow in the event a settlement is reached, (b) what would be needed to effectuate the settlement if that settlement may result in a change to one or more applications, (c) what changes to an application (or applications) would be acceptable, (d) the process to follow in terms of comment periods, etc.

Other than such guidance, the Council does not believe that the SubPro Final Report addresses other forms of communication. The Council notes also that the SubPro Final Report does not state whether or not there should be a ban on other communications with the dispute provider.

#### Implementation Guidance 31.6:

“Information about fees that were charged by dispute resolution service providers in previously filed formal objections should be accessible for future review.”

#### Questions on 31.6:



- A. Does the Council have further guidance on to whom, by whom, for what purpose the information “should be accessible for review”?

Response

The SubPro PDP Working Group noted in its Initial Report that it was unable to evaluate whether the fees charged for disputes/objections were excessive or not. It noted many commenters and members of the Working Group had the perception that the fees for all objections (other than perhaps the Legal Rights Objections whose fees were fixed and published) were excessive. However, the SubPro PDP Working Group had no information as to the amount of fees that were charged for each of the objections filed in the 2012 Round.

Many of the recommendations/Implementation Guidance in Section 31 center around increasing transparency in the process both to provide more predictability, but also to enable future review teams to be able to assess what this PDP was unable to do because of a lack of information. Therefore, the recommendation is that future review teams have access to information on the fees that were actually paid for objections, disputes, etc.

- B. Does the Council agree that the “previously filed formal objections” will not include objections from previous rounds nor any other type of objections administered by the dispute resolution provider in the past - but only apply to objections filed during each respective round of new gTLDs?

Response

The Council believes that the term “previously filed” should be interpreted using its plain meaning. If and when there is a review of the objection/dispute processes, that review team should be able to collect the data from all objections and disputes that have taken place prior to that review. If, for example, a review is done in 10 years, and there have been three application rounds prior to the review, then yes, the fee amounts from the 3 rounds that spanned those 10 years should be reviewable to assist that review team in its evaluation.

The SubPro PDP Working Group recommended that there be continuous rounds without an indeterminate break to conduct reviews. Therefore, if a review is being conducted while Round 4 was going on (assuming Round 1 was 2012), then it should be able to review the fees charged by dispute providers for Rounds 2, 3 and any disputes/objections already conducted during that current Round 4. Obviously, data/information is not available for Round 1.

### Implementation Guidance 31.12

“All criteria and/or processes to be used by panelists for the filing of, response to, and evaluation of each formal objection should be included in the Applicant Guidebook.”

#### Question on 31.12:

The ODP team believes that the provider documentation is the best source for applicants, not the AGB: Implementing 31.12 will require ICANN to contract with the dispute resolution vendors prior to finalizing the AGB to collaboratively create and finalize such criteria and/or process, in advance of the commencement of the application submission window. The ODP team notes that this will likely result in significantly higher costs for the program and may have additional resourcing impacts, too. Updating this information would also mean updating the AGB, which would invoke the Predictability Framework, leading to timing implications. For the ease of participants in any objection process, dispute resolution providers are the best source of information, as long as all relevant information is available in a timely manner. Does the Council agree that this would meet the intention of 31.12?

#### Response

The Council notes that these beliefs and comments from the SubPro ODP team are nearly identical to the comments filed by Theresa Swinehart to the Draft Final Report. As before, Council also notes that the SubPro PDP Working Group had carefully considered each and every comment it received through the Public Comment Proceedings for its Draft Final Report, and is not in the position to qualify Recommendation 31.12 as it reads.

### **Policy Questions | Dispute Resolution Procedures After Delegation:**

Recommendation 33.2: “For the Public Interest Commitment Dispute Resolution Procedure (PICDRP) and the Registration Restrictions Dispute Resolution Procedure (RRDRP), clearer, more detailed, and better-defined guidance on the scope of the procedure, the role of all parties, and the adjudication process must be publicly available.”

#### Question on 33.2:

- A. Does the Council agree that publishing all relevant guidance on the scope will be sufficient to implement this recommendation?

#### Response

No. The Council notes that the recommendation states that “clearer, more detailed, and better defined guidance on the scope of the procedure, *the role of all parties, and the adjudication process* must be publicly available.

- B. If not, can the Council provide guidance on any particular deficiencies or areas that the org should consider in developing “clearer, more detailed, and better-defined” in the context of this recommendation?

Response

As noted in ICANN Org’s comments to the Draft Final Report, the SubPro PDP Working Group was only able to assess the PICDRP process prior to the February 2020 updates. The Council acknowledges that ICANN Org’s February 2020 update did include more details on the PICDRP process. However, the IRT should assess whether the February 2020 updates satisfies this recommendation.