Public Comments-Report Template (v1.3)

> ***Overview***:
> *This template is being provided to assist Staff in the preparation of a report that summarizes and, where appropriate, analyzes community comments. Please save the document in either *.doc or *.pdf format and submit to: web-admin@icann.org. For presentation consistency and to preserve formatting, all Staff Reports will be uploaded to the forum in PDF format; text reports will no longer be supported.*

Instructions:

- **Title**: Please enter the exact title that was used in the original Announcement.

- **Comment Period**: Enter the original Open Date and Close Date/Time *(Format: Day Month Year, e.g., 15 June 2011; Time should be expressed in UTC).* Please note if any extensions were approved, e.g., "Extended to Day Month Year [UTC Time]".

- **Prepared By**: This field will accommodate a situation where a report is developed by an individual or group other than the principal Staff contact, e.g., a Working Group.

- **Important Information Links**: Do not enter any information in this section; Web-Admin will provide the appropriate links.

- **Section I: General Overview and Next Steps**

  Please use this area to provide any general summary or highlights of the comments and indicate the next steps following publication of the report. *(Note: this field will auto-text wrap).*

- **Section II: Contributors**

  Please use the tables provided to identify those organizations/groups and individuals who provided comments. It is not necessary to identify "spammers" or other commenters who posted off-topic or irrelevant submissions. In addition, if there is a large number of submissions, it is acceptable to characterize the respondent communities rather than attempt to list them individually in tables.

- **Section III: Summary of Comments**

  This section should provide an accurate, representative, and thorough review of the comments provided. As the disclaimer explains, this is a summary only of the contributions that the author determines appropriate to the topic's purpose. Authors are cautioned to be conscious of bias and avoid characterizing or assessing the submissions. If an analysis of the comments is intended, please use Section IV below. *(Note: this field will auto-text wrap).*

- **Section IV: Analysis of Comments**

  Please use this section for any assessments, evaluations, and judgments of the comments submitted and provide sufficient rationale for any positions that are advocated. If an analysis

will not be undertaken or, if one will be published subsequently, please add a note to that effect in this section. *(Note: this field will auto-text wrap).*

Note: You may also utilize, for this section, the Public Comment Issue Tracking Checklist template, which is available at:
https://wiki.icann.org/display/welcometoforms/Welcome+to+Forms.

Translations: If translations will be provided please indicate the languages below:												

Report of Public Comments

Title:	New gTLD Auction Rules
Publication Date:	05 March 2014
Prepared By:	Russ Weinstein

Comment Period:		Important Information Links
Comment Open Date:	17 December 2013	Announcement
Comment Close Date:	14 January 2014	Public Comment Box
Reply Close Date:	4 February 2014	View Comments Submitted
Time (UTC):	23:59 UTC	Report of Public Comments

Staff Contact:	Russ Weinstein	Email:	russ.weinstein@icann.org

Section I: General Overview and Next Steps

On 17 December 2013 the Auction Rules, Bidder Agreement, Bidder forms, and a Draft Auction Schedule were posted for public comment. These documents, complimented by the Applicant Guide Book, provide detailed rules and processes of Auctions, the Mechanism of Last Resort, to resolve string contention in the New gTLD Program. The Auctions Rules posted for public comment had been revised based on community feedback, including feedback received in Webinars and sessions at the ICANN 48 meeting in Buenos Aires.

Based on the feedback received in this public comment forum, the Auction Rules and related documents have been completed for implementation for use with direct contention sets and are published to the resources section of the Auctions page on the new gTLD microsite {http://newgtlds.icann.org/en/applicants/auctions#resources}. The addendum to the Auction Rules pertaining to sets with Indirect Contention will continue to be developed in parallel with the implementation of the Auction process. With the Auction Rules and related documents now ready for implementation, the Auction processes will be initiated soon.

Section II: Contributors

At the time this report was prepared, a total of [twenty three] (23) community submissions had been posted to the Forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.

Organizations and Groups:

Name	Submitted by	Initials
DOTPAY SA	Oleg Serebrennikov	DPSA
DotApp Inc	Valeriy & Oleksandr Kosovan	DA
.Music	Constantine Roussos	MUS
Latin American Telecom LLC	Rami Schwartz	LAT
Winston & Shawn LLP / Karsten Manufacturing Corporation	Paul D. McGrady Jr.	WSKMC
NCC Group/Artemis	Jean-Christophe Vignes	NCC
Google	Sarah Falvey	GOOG
Uniregistry	Bret Fausett	UNI
Donuts	Mason Cole	DON
Valideus Ltd	Brian Beckham	VAL
ARI Registry Services	Donna Austin	ARI
European Commission	Linda Corugedo Steneberg	EC
Thomsen Trampedach GmbH	Jannik Skou	TTG
GAC French delegation	Laurent Ferrali	GFD
dotStrategy, Co. / DOTPAY SA	Bill Doshier	DS
FairWinds Partners	Stephanie Duchesneau	FWP
NTAG	Jacob Malthouse	NTAG

Individuals:

Name	Affiliation (if provided)	Initials
Michael Palage		MP
Brian and Coral McHenry		BCMH

Section III: Summary of Comments

General Disclaimer: This section is intended to broadly and comprehensively summarize the comments submitted to this Forum, but not to address every specific position stated by each contributor. Staff recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

The following themes of comment were received, and each of these themes is explained in more depth below.

- The use of Auctions or the Ascending Clock Auction method prescribed in the Applicant Guidebook (AGB) to resolve string contention.

- Comments relating to timing, scheduling and Auction logistics.
- Suggestions to modify details of the Auction Rules and the Bidder's Agreement.
- The use of Auction proceeds.
- The handling of contention sets with indirect contention relationships.

The use of Auctions or the Ascending Clock Auction method prescribed in the AGB to resolve string contention.

Six public comments requested ICANN to change the AGB and not use Auctions to resolve string contention. These included comments suggesting Auctions and the Auction Rules (Rules) are not in line with ICANN's core values. These comments suggest that diversity and innovation of the Internet play a limited role in the outcome of the contention resolution process. Commenters assert that Auctions and the Rules are inappropriate, complicated and benefit profit maximization and therefore, should be [re]designed according to ICANN's core values. There are concerns about the negative impact Auctions may have for the preservation and enhancement of the operational stability, reliability, security and global interoperability of the Internet.

> In the comment period DPSA states "Effectively, the current auction rules are advantageous for portfolio applicants rather than for small and innovative applicants, which is at odds with the "diversity and innovation" ICANN policy." Later in the reply period the same commenter offers "The community, and ICANN, should also be concerned with the optics of an auction process where the outcome is a low number of large companies from the US owning a large number of generic terms as TLDs and applying a uniform model to operate them. This is detrimental to the New gTLD Program's ideals of diversity of use, business models and applicants." DPSA

> "The Auction Rules are Not Aligned with ICANN's Goals. The auction mechanism prepared by Power Auctions LLC for ICANN fails to address these core issues and align its Auction Rules to the Applicant Guidebook and ICANN's own Bylaws to promote competition, innovation and diversity." MUS and LAT

> "Therefore we will repeat again our concern about the negative impact that auctions may have for the preservation and enhancement of the operational stability, reliability, security and global interoperability of the Internet, as expressed during the Buenos Aires GAC meeting: 'The European Commission believes that in the new gTLD program, ICANN should aim not just to maintain, but also enhance the level of consumer protection and confidence in gTLDs.'" EC

> "The auction process should be designed according to these core values. Moreover, we think that the process of new gTLD public auctions should not be only driven by a revenue-maximization strategy. The revenue-maximization should not be the be-all-and-end-all of

ICANN new gTLD policy. At this stage, the fact that the one criteria used to decide on auctions is even more worrisome." GFD

"Because there is no recognition of the extent to which proposed strings may augment the diversity of services Internet users benefit from, improve those users' browsing experiences, increase their security online, enhance their own personal or professional lives or even increase the cultural and geographical diversity of content available online, the auction process as defined risks failing the New gTLD Program, its applicants and the users it aims to serve." DS

Suggestions were provided to change the Ascending Clock Auction process, as defined in the AGB. The following, although not exhaustive, touch on the proposed suggestions:

The reply from DPSA supported several alternatives proposed by others including "Require the auction winners to pay their own highest bids rather than the second highest bid, at least if such winner have used the unlimited bidding capability"… "Require portfolio applicants to prove via experts or arbiters approved by ICANN, at their own expense and for each contention set they are party to, that their intended use of the TLD string is aligned with the "public interest goal" and introduces more "diversity" and "innovation" than the intended use by their contenders" DPSA

"It is my view that ICANN should give all of the applicants involved in resolving contended names a deadline date that all must meet for their individual contentions to be resolved by Private Auction. Unresolved contentions after this date will go to ICANN to resolve under the exact same rules as the private auctions." BCMH

"We would like to adjust the time periods within which payments must be made by a winning applicant. We propose to leave the under $1 million payment to the proposed 20 days.   We then suggest a sliding scale of payments for a $1-5million bid to 30 days; a $5-10 million bid to 45 days and a $10 million and over bid to sixty days. We would also suggest a pre-negotiating phase to ensure that a private solution cannot be reached before forcing applicants to the ICANN auction." DA

"ICANN should incorporate a 'luxury' competitive balance tax on bidding for Portfolio Applicants according to the total number of uncontested strings Portfolio Applicants have plus the total number of strings Portfolio Applicants have won by resolving contention sets. Secondly, the most time-efficient and simple auction mechanism for ICANN to implement, which would also prevent the liability of ICANN revenue maximization, is the Second-Price Sealed-Bid auction with luxury competitive balance tax incorporated where the highest bidder wins the rights to the gTLD by paying the second-highest bid while considering luxury competitive taxes imposed on Portfolio Applicant bids to level the playing field." MUS and LAT

"…our recommendation is that ICANN should adopt a simple coefficient strategy in order to

assess and 'rank' applications for certain contested strings." NCC

During the reply comment period one commenter acknowledged:

> "For example, the introduction of a coefficient strategy seems like an interesting proposition to try and level the playing field between bidding applicants and steer the whole process away from its current "money is everything" mindset. Other proposals include a requirement to show a commitment to serving the public interest through a string, so as to avoid such TLDs applied for by smaller applicants from getting excluded by larger applicants whose large coffers are the only factor they are counting on." DS

Six similar comments state the Auction Rules provide an unfair advantage to larger, more affluent portfolio applicants by providing them with a strategy to remove the smaller, less affluent contenders:

> "The rules encourage applicants to compete solely on the strength of their financial power." DPSA

> "ICANN auction rules are unfair in that they provide substantially more favorable winning potential to the bigger, deep-pocketed players by providing them with a strategy to remove the weaker contenders." BCMH

> "This becomes a serious concern when public resources – such as semantic gTLDs – are given to a few, select companies who can afford to 'buy' up the entire generic, non-branded gTLD space at the expense of other smaller players who could offer a more specialized, niche approach – such as community applicants serving their corresponding communities with registration policies and rules that cater to those entities without the fear of commoditizing gTLDs, which is the goal of many portfolio companies." MUS and LAT

> "So-called 'portfolio applicants' with their vast financial resources have no reason to 'resolve string contention with contending applicants' since they are in an advantageous position when the auction comes down to price, despite having little link or relevance to the Program or its aims… As a result the Internet infrastructure would be less competitive by the end of 2014 than it was in 2012." NCC

During the reply comment period two commenters asserted:

> "It would be desirable to give these applicants a more even playing field when they come up against larger portfolio holders in the contention process." EC

> "As written, the rules are an encouragement for wealthy applicants to disregard any attempt at negotiation prior to the auctions." DS

Five comments state the rules do not encourage or incentivize applicants to negotiate and self-resolve contention prior to an Auction:

> The current policies and rules do not incentivize applicants to seek a "voluntary agreement among the involved applicants". As a result of this policy, certain portfolio applicants seem to have neglected the advice to settle contention "through voluntary agreement among the involved applicants" and rely on auctions significantly, if not exclusively. DPSA

> The Auction Rules have done little to incentivize partnerships and ICANN's role is constrained to "give time to applicants to negotiate amongst them", according to a response given by the head of the new gTLD program in the public forum in Buenos Aires. MUS and LAT

> Of course ICANN maintains that "Applicants are encouraged to resolve string contention cases among themselves prior to the string contention resolution stage" but such principle requires the other party to be willing to negotiate and to do so reasonably. NCC

> Over and above, there seems not to be any incentive for financially strong applicants to solve the contention "through voluntary agreement among the involved applicants". This solution places an unnecessary burden on applicants and departs from the artificial assumption that parties are eager to negotiate. EC

> As written, the rules are an encouragement for wealthy applicants to disregard any attempt at negotiation prior to the auctions. DS

Three comments requested clarification of the public policy implications prior to addressing contention set resolution.

> "We hereby respectfully submit that the proposed finalization of the Auction Rules and Auction Schedule is premature, and that such efforts should not be undertaken until after ICANN has completed a public comment period on the public policy implications of holding auctions to resolve string contention. Indeed, in the Governmental Advisory Committee's 20 November 2013 Buenos Aires Communiqué, the GAC formally requested a briefing on such public policy implications. It is imperative that a public comment period be opened regarding these public policy implications so that the ICANN community can inform the Board of its views on this subject and the Board, in turn, can adequately brief the GAC." WSKMC

>> During the reply comment period two commenter acknowledged:
>> "It is essential that the outcome of the briefing on the public policy implications of holding auctions requested in the Buenos Aires GAC Communiqué and the reflections of the GAC on this particular issue are fully taken into account when defining the Auction Rules." EC

>> "We regret that it appears very unlikely that the GAC gets this briefing before the

launch of the public auction procedure." GFD

Opposing the views expressed by those in favor of changing the Auctions prescribed in the AGB, some respondents said that proposals [to change the AGB] are inappropriate given the timing and establishment of the AGB as a product of the multistakeholder model, and asserted that those recommending change are attempting to favor specific business interests.

> Rather than providing comment on the topic of ICANN's proposed gTLD Auction Rules, several public comments suggest that ICANN should fundamentally change the Applicant Guidebook's auction mechanism. These suggestions are transparent attempts by participants in the gTLD application process to replace the process agreed upon by the community with an approach that favors their specific business interests. GOOG

> We note that some commenters—in a blatant attempt to change auction methodology to suit their business interests— already have argued that ICANN should not follow the requirements of the AGB, instead of following the rules agreed upon by the community and relied upon by applicants. Such suggestions are inappropriate and accordingly we will not comment further on their specifics. DON

> To the extent some applicants now take issue with the AGB auction rules and call for ICANN to undertake a subjective assessment amongst otherwise equally-competing non-community applicants or to apply new auction processes/rules (ostensibly in the name of competition or diversity), we question whether such approach would expose ICANN's New gTLD Program to unnecessary risk or delay by inappropriately discriminating against certain applicants and prejudging the merits of a range of new market opportunities. Moreover, such approach would contradict ICANN's deliberate decision to score only technical and financial application answers VAL

Comments acknowledged progress made to the preliminary Auction Rules (1 November 2013):

> "We appreciate the time ICANN staff took to gather community input during the Buenos Aires ICANN meeting as well as through meetings with various stakeholder groups as many of the critical issues as ICANN has addressed many of these issues in the current version of the auction rules." GOOG

> "We appreciate the progress made over the past few months and look forward to final resolution of these issues. Overall, we generally support the current draft Rules and Agreement, as they reflect the requirements of the Applicant Guidebook (AGB) and would result in a fair and efficient means to resolve string contention sets that remain unresolved by the applicants." DON

Comments relating to timing, scheduling and Auction logistics.

Five public comments seek clarity on the timeline for ICANN's distribution of Intent to Auction Notifications. Similarly, commenters requested that ICANN publish updated contention set information and resources to illustrate the Auction process, detailing the sequence of events.

> "When ICANN might update these auction batches to take into account successful objections and their impact on contention sets?" MP

> "Clarity on how far in advance of an Auction ICANN intends to distribute Intent to Auction notices would be greatly appreciated, in particular as this triggers bidding deposit timelines." VAL

> "It would be extremely helpful if ICANN could publish a document that outlined the Auction process from the time the Intent to Auction Notification is sent to Qualified Applicants through to ICANN announcing the winners and other details of each Auction Event." ARI

> During the reply comment period two commenters acknowledged:

>> "We support Valideus' comment that clarity is needed on how far in advance of an Auction ICANN intends to distribute Intent to Auction notices as this triggers bidding deposit timelines." TTG

>> "… we ask that ICANN also provide a clear overview of the timeline and process by which it plans to distribute Intent to Auction notices." FWP

A public comment suggested ICANN consider the timezones of Bidders around the world prior to scheduling Auction events.

> "We appreciate that in order to conduct an Auction Event, one time is necessary. However, as we believe the table above demonstrates, the UTC 1600 time represents a serious disadvantage to Bidders from parts of the Asia Pacific Region." ARI

Three public comments suggest ICANN add flexibility in scheduling those contention sets whose members mutually agree to postpone or advance an Auction. These same comments request the resolution of Auctions should be completed by the end of 2014. DON, GOOG, and NTAG

> "We think such an option [to postpone] should not be limited to a single request. If all members of a contention set would like a second postponement in order to finalize a private agreement, ICANN should not prohibit or discourage such efforts by mandating only one postponement. Similarly, if an entire contention set agrees to 'pull forward', or advance a set

from a later round to an earlier round, these sets should be permitted to fill any open slots in an earlier round (perhaps resulting from private resolution or postponement of other contention sets)." DON

"ICANN should allow all TLDs, which are impacted by the name collision mitigation plan, to have the option to delay going to auction until the final mitigation plan is released. However, ICANN could provide an 'opt in' option where if all applicants within the contention set would like to proceed to auction, they will be given the option to do so. We feel a more appropriate time window is to have all auctions completed within six months, which would still allow ICANN ample time to carry out auction events while at the same time not significantly disadvantaging applicants with higher draw numbers." GOOG

During the reply comment period the NTAG comments acknowledged:

> "The NTAG strongly believes that applicants should have both the right to advance the date of the auction for their contention set or to postpone the date of the auction, so long as all of the parties involved in the contention set agree. ICANN should accommodate requests by parties to add their strings to an earlier auction round in order to avoid unnecessary delays where applicants are pursuing alternate methods of contention set resolutions or await the resolution of name collision issues. Similarly, ICANN should permit a second extension given unanimous approval of the members of the contention set. Furthermore, ICANN should endeavor to have all auction rounds completed by the end of the 2014 calendar year absent applicant consent." NTAG

A public comment from WSKMC suggests ICANN implement a policy to stay an Auction when trademark litigation involving competing strings is commenced prior to the Auction date:

> "We hereby respectfully submit that ICANN should adopt a policy of automatically staying any such auctions in the event that trademark litigation involving competing strings is commenced prior to the auction date. "WSKMC

Three public comments assert that there is an inconsistency in the AGB regarding the timeline to execute a Registry Agreement. These comments state 90 days after an Auction is an insufficient amount of time for prevailing applicants that wish to negotiate their Registry Agreements.

> "AGB § 5.4 allows all applicants 9 months to execute the RA; in contrast, AGB § 4.3.2 provides that an applicant prevailing at auction may be declared in default if they do not execute the RA within 90 days. In the interest of fairness, ICANN should clarify that AGB § 5.4 prevails, and that all applicants will be given the same 9 months to execute the RA." VAL

During the reply comment period two commenters requested consistency in contracting

timelines for applicants who utilize last resort auctions as well as those who do not:

> "ICANN should clarify in the Auction Rules that winning bidders will be given a 9-month period to execute the Registry Agreement with ICANN, as well as a possible 9-month extension to this period." FWP

> "The NTAG believes that, out of fairness, applicants prevailing at auction should be given the same nine (9) months to execute the Registry Agreement as all other applicants, and that this should be made explicit within the auction rules." NTAG

Suggestions to modify details of the Auction Rules and the Bidder's Agreement.

Two public comments suggest a default will penalize the remaining applicants of a contention set. These comments suggest alternative processes. DPSA and TTG

> "If a winner defaults, the defaulting winner will be penalized at USD 2 million at most, yet the other contenders will also have been penalized by having to pay a potentially much higher price compared to the likely winning price if the defaulting winner had not participated in the auction. This is especially apparent in an auction with only two contenders, where one escalates bids severely, wins the auction and then defaults. We believe that the rules related to defaults must be modified to allow non-defaulting bidders to go to auction again if they choose so. [Suggestion] Abolish the limit on penalties for defaulting bidders, and introduce a legally binding liability when defaulting on excessive bids." DPSA

> "In a contention set consisting of only two applicants there is no legitimate reason why an applicant should be obliged to pay his Exit Bid to ICANN if the competing applicant chooses not to pay the Winning Price." TTG

Five public comments suggest the language regarding ICANN's or the Auction Manager's ability to amend the Rules is too broad. The comments suggest some limitations to ICANN or Auction Manager discretion to make adjustments to the Auction.

> "The ability for ICANN to amend the agreement at any time is particularly troubling when coupled with the potential for severe penalties for violations of the Bidder Agreement. Accordingly, notice regarding modified or additional language should also be published conspicuously by ICANN for all applicants on the New gTLD website, and the start of any auctions scheduled to take place within seven calendar days should be automatically delayed until seven days after notice so that Bidders may reevaluate their strategies to comport with the new rules. In addition, only changes made for legal reasons—such as developments in the governing law—should be effective immediately with notice given at least seven calendar days absent any retroactivity." GOOG

> "Section 7.6 should be revised to provide applicants with reasonable notice of amendments to

the auction rules. Allowing ICANN to amend the rules "at any time prior to the Deposit Deadline" provides too much uncertainty for applicants. If the rules are amended, at any time, all auctions should be postponed for a thirty (30) day period to allow applicants to review and, if necessary, revise their bidding strategies and deposits. The current language allows ICANN to change the rules up to the time deposits are made, even on language and rules that might impact a bidder's strategy for its deposit amount. A change made the day before a deposit deadline might not provide the bidder sufficient time to amend its deposit amount." UNI

"ICANN reserves the right in Section 7.6 of the Agreement to unilaterally change the bidder rules in its sole discretion, for any reason, up to the Deposit Deadline (one week before the auction is to be held). We do not believe this discretion is warranted or appropriate. After the Rules are approved, any proposed changes, at a minimum, should be announced publicly at least 30 days in advance of any auction, and should be for good cause based on some exigent circumstance." DON

   During the reply comment period two commenters asserted:

   "ICANN shall not be entitled in its sole discretion to amend these Auction Rules "for any auction at any time and for any reason prior to the deposit deadline for that auction". The abovementioned unilateral power to change the rules currently under negotiation only contributes to increase applicants' uncertainty. The European Commission fully supports that 'Any proposed changes, at a minimum, should be announced publicly at least 30 days in advance of any auction, and should be for good cause based on exigent circumstances'". EC

   "The final Auction Rules should limit ICANN's ability to amend the Auction Rules to exigent circumstances requiring such changes. As expressed in the Public Comment by Donuts, granting ICANN uncurbed discretion over the Auction Rules is not warranted and would bring about significant uncertainty for applicants involved in contention sets. Further, we echo Donuts' request that any amendment to the Auction Rules "should be announced publicly at least 30 days in advance of any auction," as allowing amendments to be made any time prior to the Deposit Deadline provides applicants with insufficient time to review changes before entering into auction." FWP

Two comments suggest the Anti-Collusion provision within the Bidder Agreement is vague and should be clarified to better explain the intention of the provision.

   "ICANN has now included anti-collusion language that not only prohibits negotiation once the contention set is formally sent to public auction, but may be perceived as discouraging alternative resolution prior to the last resort auction. Parties in contention may become Bidders in the auction, after having already engaged in negotiation. Further, applicants with more than one application will be concurrently negotiating resolution for some strings while

simultaneously being involved in auctions for other strings where such contact is prohibited. Concerns may arise over whether such previous or concurrent contacts create actual or apparent, explicit or tacit coordination between Bidders in the auction." GOOG

During the reply comment period one commenter acknowledged:

> "The NTAG believes that ICANN should add language to the Bidder Agreement that reaffirms ICANN's commitment to resolution of contention sets prior to the last resort auction and make clear that arrangements reached prior to the deposit deadline, including arrangements for joint bidding, do not violate the anti-collusion provision. Further, the language should be abundantly clear that negotiations prior to the Deposit Deadline are contractually appropriate and that the post-Deposit Deadline negotiation restriction is limited solely to the contention set that is in that upcoming auction. Applicants with multiple applications may be concurrently negotiating resolution for some strings while simultaneously being involved in auctions for others, wherein such contact is prohibited. Without further clarification, concerns may arise over whether previous or concurrent contacts create actual or apparent, explicit or tacit coordination between Bidders in the auction." NTAG

Two public comments suggest the indemnification provision within the Bidder Agreement is too broad. The public comments state the Bidder Agreement and Registry Agreement provide the Auction Manager with the ability to request uncapped punitive or exemplary damages, or operational sanctions in the event the arbitrator finds repeated and willful material breach. The comments state the language is inappropriate in the Bidder Agreement.

> "The agreement includes a unilateral indemnification provision with a singular limitation for cases of gross negligence or willful misconduct. First and foremost, the language in this provision is overly broad. Accordingly, the language must be circumscribed to limit indemnification to all claims raised by third parties which may arise from the Bidder's conduct…Although we believe Section 2.10 needs to be reworked, the penalties in Section 2.10 ultimately should be more than adequate to serve as a deterrent against repeated and willful breaches of the Bidder Agreement. We, therefore, propose removing the punitive damages, exemplary damages, and operational sanctions language from the dispute resolution provision. In the event punitive or exemplary damages remain in the Bidder Agreement, they should be mutual accounting for where the arbitrator finds repeated and willful material breach of the Auction Manager obligation to "make a good-faith effort to administer the Auction in accordance with the Auction Rules." GOOG.

> "Section 4.2 of the proposed bidder agreement requires applicants to release and indemnify the auctioneer for losses and attorney's fees for anything that arises from or related to the auction. This is unacceptably over-broad…This provision must be rewritten in a balanced way. Any indemnification obligations from applicants must be limited to the actual conduct of the applicant." DON

Two public comments suggestion clarification to the Auction Manager's responsibility.

"Section 4.1 should be amended to read: "The Auction Manager will administer the Auction in accordance with the Auction Rules." The applicants can only rely on the written agreement and are not aware of the Auction Manager's "good faith" belief about what the rules require or how they should be administered. The Auction's Manager's undisclosed good intent should not be the measure of whether the rules were followed." UNI

"There should be a clause pertaining to the Auction Manager clarifying their obligations under the agreement and their duty to run a working auction platform. As written, there will be no recourse for any Bidder, where the auction site experiences a glitch changing your bid, due to the negligence of the auction provider, as this is explicitly excluded in the agreement." GOOG

Two public comments found unintentional typographical errors.

"Unclear meaning of "defaulting Bid" Clause 60 of the current auction rules specifies that the penalty for defaulting will be "10% of the defaulting Bid". The term "defaulting Bid" is not defined and is not used anywhere else in the document. It is unclear, however, whether the "defaulting Bid" is the "Winning Price" as defined in clauses 46 - 50, or the highest bid placed by the defaulting bidder." DPSA

Section 8: "To be eligible to receive an Intent to Auction notice from ICANN, requirements a-d e below must be met:"   ☐ S
applied-for gTLD in the Contention Set must also meet requirement e f below, except as provided in clause 9:"   ☐ if all members h
of the Contention Set waive requirement e f in clause 8 by submitting a request to proceed to auction…" VAL

The use of Auction proceeds.

Three public comments stressed ICANN has not addressed how Auction proceeds will be allocated. The comments suggest this process/discussion should begin.

"Another issue that is not tackled in the Auction Rules is how auction monies will be used by ICANN and how it negatively affects losers of a gTLD in a contention set. Solution to Address Monies Derived from Auctions: [Suggestion] Losing Applicants in a contention set are given full refunds of their Application fee. The remaining funds can be used by ICANN to 'support directly ICANN's Mission and Core Values and also allow ICANN to maintain its not-for profit status.'" MUS and LAT

"…we call on ICANN to start the community process to determine the allocation of auctions funds received by ICANN. This process should be kicked off no later than the Singapore

meeting." DON

During the reply comment period one commenter asserted:
> "We also note the lack of clarity as regards the destination of the significant funds that ICANN will receive as a result of these auctions; it is therefore highly recommended that ICANN begins a consultation process with the community to determine the allocation of the funds gathered through this process, with a focus on its use for community support, capacity building and engagement of stakeholders in least developed nations." EC

The handling of contention sets with indirect contention relationships.

Five public comments acknowledge that ICANN has not finalized the relevant procedures to process contention sets with indirect relationships. Comments request for ICANN to publish the Rules related to indirect relationships, taking into account that these Rules may impact bidding strategy in direct contention sets.

> "We understand that the AGB outlines the general rules for how ICANN will deal with indirect contention; however, ICANN has still not finalized the relevant procedures. The process is obviously more complicated than was likely initially envisioned. Since only a handful of contention sets are involved, ICANN should simply move all applications in a contention set, whether through direct or indirect contention, into a single grouping for the purposes of the auction procedure." GOOG

> "While ICANN has progressed with regard to the auction of last resort for "direct contention sets," we call on ICANN to complete its work on rules covering the limited number of "indirect contention sets" as well. These TLDs should not be held up due to their status and the auctions of indirect sets should proceed contemporaneously with auctions of direct sets." DON

> "…the current Auction Rules, and draft auction schedule, refer only to direct contention sets. However, as has been pointed out, a number of contention sets will need to be augmented to address indirect contention. In fairness to applicants potentially implicated in indirect contention sets, and to avoid still further delay, we urge ICANN to give appropriate priority to indirect contention rules and auction scheduling prior to issuing the first Intent to Auction notice." VAL

During the reply comment period two commenters acknowledged:

> "ICANN should publish clear rules for how indirect contention relationships will be handled as part of the final Auction Rules…The contents of such an Addendum should be finalized and communicated to applicants involved in an indirect contention set no less than 30 days before such applicants receive their notices of Intent to Auction." FWP

"The NTAG believes that ICANN should publish the rules regarding resolution of indirect contention sets prior to issuance of the first Intent to Auction notice. It is important that parties that are involved in indirect contention know and understand the rules to which they will be subject; moreover, these rules could impact the bidding strategy in direct contention sets. The NTAG wishes to emphasize, however, that the development and publication of these rules should not further delay the timeline proposed for the first ICANN auction, targeted for April 2014. There is ample time for ICANN to formulate indirect contention set rules without impacting the anticipated schedule for auctions." NTAG

Section IV: Analysis of Comments

General Disclaimer: This section is intended to provide an analysis and evaluation of the comments received along with explanations regarding the basis for any recommendations provided within the analysis.

ICANN appreciates the time spent by community members to provide their input on the revised Auction rules to resolve string contention in the New gTLD Program. As noted in the summary of the comments, the topics submitted were grouped by themes previously noted and will be analyzed accordingly.

- The use of Auctions or the Ascending Clock Auction method prescribed in the AGB to resolve string contention.
- Comments relating to timing, scheduling and Auction logistics.
- Suggestions to modify details of the Auction Rules and the Bidder's Agreement.
- The use of Auction proceeds
- The handling of contention sets with indirect contention relationships.

The use of Auctions or the Ascending Clock Auction method prescribed in the AGB to resolve string contention.

The Applicant Guidebook (AGB) version 2012-06-04 provides for use of Auctions as the mechanism of last resort to resolve string contention, and specifically defines the Ascending Clock Auctions method. As stated in the 2008 paper *New gTLD Program Exploratory Memorandum Resolving String Contention; a complete lifecycle including string contention resolution* {http://archive.icann.org/en/topics/new-gtlds/string-contention-22oct08-en.pdf} "ICANN examined a number of potential mechanisms for resolving string contention, including selection by chance, comparative evaluation, selection by best terms and auctions." In the 2008 paper, various methods of Auction were considered, including first price sealed bid, second price sealed bid, reverse auctions, and the Ascending Clock method. The Auction design consultant ultimately recommended the

Ascending Clock method for three distinct advantages over other Auction methods: transparency, preventing the high-value bidder from needing to reveal their ultimate valuation, and the ability to scale.   The use of Auctions and the Ascending Clock Auction method to resolve string contention sets have received the appropriate consideration through the multi-stakeholder model as each of the draft versions one (1) through six (6) of the AGB were put for public comment and revised accordingly prior to the next draft. ICANN has no plans to materially change the AGB and will utilize Ascending Clock Auctions as the method of Mechanism of Last Resort to resolve string contention.   The comments suggesting not to use Auctions or to use an alternative method to the Ascending Clock Auction will be considered out of scope for this public comment which focuses on the Rules and process details of implementing the Auction program.

Five comments suggest the Auction rules do not encourage applicants in contention to negotiate and self-resolve, prior to an Auction. These comments state that the Auction Rules do little to incentivize partnerships and maintain that ICANN's role in encouraging self-resolution is limited only to providing time to applicants to negotiate. As referenced in the AGB, as well as repeated in many webinar and ICANN meeting sessions, the Auction process is the Mechanism of Last Resort. ICANN's role is that of administering the New gTLD program as agreed by the community through the development of the Applicant Guidebook. The time provided to applicants along with the knowledge of a pending Mechanism of Last Resort [including what that process involves], was designed to provide ample incentive for applicants to reach agreement to resolve contention.

Timing , Scheduling, and Auction Logistics
As was stated in the document Draft Auction Schedule, the contention sets did not reflect the objection determinations at the time. ICANN is working to update the contention sets displayed on the New gTLD Microsite to illustrate current status of the contention sets, including those affected by Objection determinations. The exact order of contention sets being sent to Auction will be dependent on the eligibility per the finalized Auction Rules of each set at the time of notification. Intent to Auction Notifications will be issued to the lowest numbered eligible contention sets. The Contention sets have been re-numbered into priority order using the member with the lowest priority number as the basis.

ICANN is aware that the proposed Auction Rules did not specify the timeline to distribute the Intent to Auction notices. At this time, ICANN estimates that the first Intent to Auction notices will be provided to Applicants at least 60 days prior to the first scheduled Auction Date. ICANN will provide basic guidance that includes several actionable timeframes to be considered while participating in the Auction process.

ICANN acknowledges the comment regarding the operational challenges to some regions of

participants by starting all Auctions at 16.00 UTC. ICANN and the Auction Manager will rotate the starting time of round 1 of each Auction among 13.00 UTC, 16.00 UTC and 20.00 UTC. The planned starting time of the Auction will accompany the scheduled date in an upcoming publication of the Auction Schedule.

There were several comments suggesting changes to the round and recess durations. Based on previous feedback, ICANN attempted to reduce participant uncertainty, provide additional time between the rounds, and strive to complete each Auction event in a single day. To accomplish these goals, ICANN made adjustments to four complimentary factors of the rules.

- Establishing a 30 minute first round, followed by subsequent 20 minute breaks and bidding rounds of 20 minute provides for increased duration between the closure of bidding rounds from the previous draft rules.
- Giving the Auction Manager discretion to set the end of round prices
- Providing an allowance for The Auction Manager, with unanimous consent from all remaining participants in the Auction, to adjust the remaining bidding round and/or recess durations.

These three aspects work together to ensure adequate time between bidding deadlines and the ability to adjust the pace or pricing to a particular contention set's needs to reach resolution within single Auction session. An Auction is expected to take less than eight hours to resolve a contention set and most are expected to be resolved much faster.   The Auction Manager has provided guidance that the clause allowing for adjustment of round timing is frequently used to accelerate the pace of Auction at the request of the Auction participants, but can also be used to extend rounds or recesses if the participants unanimously agree.

Comments were received that suggested the end of round prices should be based on a pre-established and published formula. Ascending clock Auctions provide the Bidders real time data regarding the demand for the TLD, which they can use to adjust their bidding strategy. Additionally the format allows Bidders to specify their own exit prices at any time during active bidding. The net affect of these features is that the increments of the end of round prices are relatively less important than the price at which the Bidder values the TLD. Providing the Auction Manager the discretion to set the end of round prices is designed to provide the participants with a customized and optimized Auction experience for each contention set. As previously stated, Auction Manager intends each Auction event to conclude within one day. The pre-announcement of bid increments may hinder this intended timeline. The Auction Manager will maintain the discretion to set the end of round prices.

Three comments stated contention sets should be allowed to advance or postpone an Auction based on mutual consensus of each contention set member. ICANN has included the ability to postpone an Auction if the request stems from full consensus of the participants, as demonstrated by each participant independently notifying ICANN of the request to postpone. This is envisioned as an option

that may be selected by each applicant when responding to the Intent to Auction notification from ICANN via the customer portal. ICANN will consider the possibility of allowing multiple postponements on a case by case basis . As for advancement of a contention set to Auction, this will add complexity to the notification and scheduling process and will not be feasible at the outset of the Auction program; however the request is noted and will continue to be examined as a potential process improvement.

ICANN will not alter the collection timeline of twenty (20) business days, as stated in the AGB. Extending the 20 business days payment deadline increases risk of default, for example it may encourage participants to bid beyond their means and attempt to raise the necessary funds to pay the winning bid after prevailing in the Auction for the gTLD.

Suggestions to modify details of the Auction Rules and the Bidder's Agreement.

In recognition of the comments asserting that ICANN's ability to amend the Auction Rules prior to the Deposit Deadline will not allow Bidders sufficient review time those amendments, ICANN will modify the rules and incorporate the recommendation by the NTAG "ICANN should be required to give at least 15 days advance notice of any change or amendment to each contention set member and post such notice on its website." Once the Auction Rules are finalized, ICANN does not intend to actively adjust the Auction Rules; this clause was designed to allow ICANN the flexibility to make a change to correct a deficiency or address a problem if any were identified.

ICANN appreciates the requests to clarify the Anti-Collusion language of the Auction Rules. As stated in section 4.1.3 of the AGB "Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention." The Anti-Collusion language in the Auction Rules is not intended to discourage self-resolution, but rather to maintain the integrity of the Auctions when self resolution is not reached prior to the Deposit Deadline. The intention of the Anti-Collusion language is to limit discussions and activities between the respective applicants and bidders of a specific contention set during the period beginning at the deposit deadline and ending after winning payment is received for that contention set, but only to the extent such discussions relate to that specific contention set. The Rules and Bidder Agreement have been modified to address these concerns.

The Bidder Agreement gives the Auction Managers the ability, in the event of arbitration, to receive uncapped punitive or exemplary damages, or operational sanctions in the event the arbitrator finds repeated and willful material breach. We acknowledge the comments provided by the community and will address the concerns to limit these remedies.

ICANN, with the community involvement, has determined that 90 days is sufficient to execute a registry agreement, post contention resolution procedure. ICANN maintains the discretion to extend the 90-day period for an applicant who demonstrates that it is working diligently and in good faith towards successful completion of the steps necessary for entry into the registry agreement.

The AGB states 4.4:

> Any winning bidder for whom the full amount of the final price is received within 20 business days of the end of an auction retains the obligation to execute the required registry agreement within 90 days of the end of auction. Such winning bidder who does not execute the agreement within 90 days of the end of the auction is subject to being declared in default. At their sole discretion, ICANN and its auction provider may delay the declaration of default for a brief period, but only if they are convinced that execution of the registry agreement is imminent.

Addressing the comments related to the default penalties, these clauses were based on the rules published in the AGB. "After a winning bidder is declared in default, the remaining bidders will receive an offer to have their applications accepted, one at a time, in descending order of their exit bids." The default penalty is designed to discourage all participants from placing bids that would result in them defaulting. Each Bidder's exit bid should be the true value that Bidder is willing to pay for the gTLD.

ICANN appreciates the two comments that identify an error in the Auction Rules Sections 8 and 9 relating to eligibility for an Auction. Additionally ICANN recognizes the comments from DON and the NTAG regarding eligibility for an Auction and the Name Collision issues. Upon further evaluation of the operational logistics of eligibility and Intent to Auction notifications, several changes will be made to these sections. Applicants will be given the opportunity to "opt-out" of an Auction until the Name Collision framework is finalized, rather than "opt-in". If any applicant in a specified contention set elects the opt-out, the Auction will be postponed until the Name Collision Framework is finalized. This will allow for the Auctions process to begin in parallel with finalization of the Name Collision Framework but not force any application into an Auction until they have had the opportunity to evaluate the impacts of the framework if they so choose. It is envisioned the Intent to Auction notification will allow for the applicant to declare if they wish to postpone the Auction until after the Name Collision Framework is finalized.

The clarification of the use of defaulting Bid in clause 60 of the Auction Rules will be specified. The term is intended to refer to the "Winning Price" as defined in the Auction Rules.

The use of Auction proceeds

ICANN understands the community inquiries regarding use of Auction proceeds. Any proceeds from an Auction will be put into a segregated fund. ICANN's Board of Directors will engage the community to adopt methods on how the segregated funds will be used. The amount of funding resulting from Auctions will not be known until Auctions for all contention sets have been completed. Without knowing the amount of Auction proceeds that will be available, it is challenging to plan for how the funds will be used. Thus several proposed uses of Auction funds might need to be established based on various hypothetical levels of Auction proceeds.

The handling of contention sets with indirect contention relationships.

ICANN recognizes the request for Auction rules for contention sets involving indirect relationships be established before Auctions begin. Contention Sets that involve indirect relationship make up a very small percentage of the total contention sets and the total number of applications of all current unresolved Contention Sets. Due to the level of complexity involved in Contention Sets with indirect relationships, the development of rules will occur in parallel with the launch of preparation activities required to get to the first Auction. The lead-time between the first of these pre-auction activities and, the actual Auction date is anticipated to be sufficient for the rules for contention sets with indirect contention to be in place prior to the first Auction. This will accomplish the request by the NTAG that rules for indirect contention be developed without causing any delays to the first Auction.

Conclusion
As noted previously, ICANN appreciates the time spent by community members to provide their input on the revised Auction rules to resolve string contention in the New gTLD Program.   As detailed in the analysis of the comments, ICANN has made several important modifications to bring the documents put for public comment to a state where they can be implemented for the significant majority of contention sets, and looks forward to the commencement of the Auction process to resolve string contention sets in the near future. The latest versions, including "redlines" from the previous version have been made available on the Auctions page of the New gTLD Microsite at the links below.

New gTLD Auction Rules version 2014-02-26
http://newgtlds.icann.org/en/applicants/auctions/rules-26feb14-en.pdf

Redline of New gTLD Auction Rules from 2013-12-12 to 2014-02-26
http://newgtlds.icann.org/en/applicants/auctions/rules-redline-26feb14-en.pdf

New gTLD Auctions Bidder Agreement version 2014-02-26
http://newgtlds.icann.org/en/applicants/auctions/bidder-agreement-26feb14-en.pdf

Redline of New gTLD Auctions Bidder Agreement from 2013-12-12 to 2014-02-26

http://newgtlds.icann.org/en/applicants/auctions/bidder-agreement-redline-26feb14-en.pdf

The rules for the small population of applications involved in contention sets with indirect contention relationships will continue in parallel with the commencements of the Auction processes, these are anticipated to be in place prior to the first Auction event.

ICANN intends to host a session dedicated to Auctions at the upcoming ICANN 49 Meeting in Singapore, which will focus on implementation details and process of the Auctions.