2012-06-27-NoticenewGTLDMtg

Directors and Liaisons,

Attached below please find the Notice of date and time for two Regular Meetings of the ICANN Board of Directors:

27 June 2012 – Meeting of the New gTLD Program Committee of the ICANN Board of Directors --
at approximately 15:00 UTC – This Committee meeting is estimated to last 1.5 hour.
Some other time zones:
23 June 2012 – 8:00 AM PDT Los Angeles
23 June 2012 – 5:00 PM CEST Brussels
23 June 2012 – 11:00 AM Washington, D.C.
24 June 2012 - 1:00 AM Sydney

http://www.timeanddate.com/worldclock/fixedtime.html?iso=20120627T15&ah=1&am=30

MATERIALS -- All Materials are available on www.boardvantage.com <http://www.boardvantage.com/ <http://www.boardvantage.com/> > , if you have trouble with access, please let us know and we will work with you to assure that you can use the BoardVantage Portal for this meeting.

If call information is required, it will be distributed separately

If you have any questions, or we can be of assistance to you, please let us know.

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2012-06-Resolutions-NewgTLD Meeting

1. **Consent Agenda**

   Resolved, the following resolutions in this Consent Agenda are approved:

   1. Resolved (2012.06.xx.xx), the New gTLD Program Committee approves the minutes of the 10 April 2012 New gTLD Program Committee meeting.

   2. Resolved (2012.06.xx.xx), the New gTLD Program Committee approves the minutes of the 6 May 2012 New gTLD Program Committee meeting.

   3. Resolved (2012.06.xx.xx), the New gTLD Program Committee approves the minutes of the 29 May 2012 New gTLD Program Committee meeting.

2. **Main Agenda**

   1. **Reconsideration Request 12-1**

   Whereas, the BGC has reviewed Reconsideration Request 12-2 submitted by the International Olympic Committee on 10 May 2012 concerning the New gTLD Program Committee's 10 April 2012 decision on the GNSO Recommendation for Protection of Red Cross and International Olympic Committee Names in New gTLDs (http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-10apr12-en.htm).

   Whereas, the BGC has determined that Reconsideration Request 12-1 should be denied.

Whereas, Reconsideration Request 12-1 and the BGC's recommendation have been posted on the ICANN website at http://www.icann.org/en/groups/board/governance/reconsideration.

Resolved (2012.06.xx.xx), the New gTLD Program Committee adopts the recommendation of the BGC that Reconsideration Request 12-1 be denied, as the requestor did not satisfy the requirements to bring a reconsideration request. The request did not identify material information that the New gTLD Program Committee failed to take into consideration when taking its 10 April 2012 decision.

Rationale for Resolution 2012.06.xx.xx

ICANN's Bylaws call for the Board Governance Committee to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, section 3 of the Bylaws. The New gTLD Program Committee, delegated the powers of the Board on this issue, has reviewed and thoroughly discussed the BGC's recommendation with respect to Reconsideration Request 12-1 and finds the analysis sound.

Having a Reconsideration process whereby the BGC reviews and makes a recommendation to the Board for approval positively affects the transparency and accountability of ICANN. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws and Articles of Incorporation. Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

2012-04-10-Minutes-New-gTLD-Committee

Note: On 10 April 2012, the Board established the New gTLD Program Committee, comprised of all voting members of the Board that are not conflicted with respect to the New gTLD Program. The Committee was granted all of the powers of the Board (subject to the limitations set forth by law, the Articles of incorporation, Bylaws or ICANN's Conflicts of Interest Policy) to exercise Board-level authority for any and all issues that may arise relating to the New gTLD Program. The full scope of the Committee's authority is set forth in its charter at http://www.icann.org/en/groups/board/new-gTLD.

A Meeting of the New gTLD Program Committee of the ICANN Board of Directors was held on 10 April 2012 at 5:30 am local time in Los Angeles, California.

Committee Chairman Cherine Chalaby promptly called the meeting to order.

In addition to the Chair the following Directors participated in all or part of the meeting: Rod Beckstrom, Chris Disspain, Bill Graham, Erika Mann, Gonzalo Navarro, Ray Plzak, R. Ramaraj, George Sadowsky, Mike Silber, and Kuo-Wei Wu.

Heather Dryden, GAC Liaison, attended as an observer.

Thomas Roessler, TLG Liaison and non-voting liaison to the committee, sent apologies.

Heather Dryden requested that she be allowed to participate in the call as an observer.

The Chair confirmed that Heather is welcome to participate as an observer, at this and future meetings. He then briefly reviewed the agenda.

1. Defensive Applications for New gTLDs

Kurt Pritz noted that his discussion will be based largely on a paper provided for the Costa Rica, augmented after the public comment period closed on 20 March. Kurt recalled that there was a strong sense that the Board should not change the Applicant Guidebook to add additional protections at the top level, as the comments raised many of the same issues that had been thoroughly discussed earlier in the Program development. Many of the comments instead went to the second level protections. Therefore, the issue for the Committee is whether they want to produce a resolution that states that ICANN is not adding additional top-level protections.

Kurt confirmed that the recommendation from staff is to make a resolution with three items: (1) based on public comment, no additional protections will be introduced at the top-level; (2) the comments made about protections at the second level are being taken seriously, and staff should prepare a briefing paper for GNSO consideration on providing additional protections at the second level; and (3) directing staff to continue targeted communications about the protections at the top level that are available under the New gTLD Program. This could signal that the Board understood all the actions that were taken in an effort to address this issue of perception of the need for defensive applications at the top level, and that after studying it, the Board thinks no changes should be made.

The Chair called for discussion.

George Sadowsky noted that he will vote for the resolution, as he does not believe it is appropriate to change the Applicant Guidebook at this stage. George stated his upset that this issue could have been worked through more thoroughly prior to the approval of the Program.

Chris Disspain stated that if there had had been concerted and clear feedback in the public comment about defensive applications at the top level, he would be in support of doing something about it. But it's pretty clear from the public

comment and the session in Costa Rica on this issue that whilst there is confusion on this issue, it's also clear that the supposed concerns about people having to register a new gTLD in a defensive way do not rise to the level that may have been perceived earlier. ICANN did not received the input or the pushback that some of us might have expected on this topic. What is also clear is that the major concerns are at the second level.

Chris noted his comfort with passing a resolution to say that the Board has listened, and our assessment of the input from the public comment is that there is not an issue warranting changes to the Applicant Guidebook at the top level. The Committee should make some efforts to do something about the concerns at the second level.

Ray Plzak also stated his intention to vote for this resolution. Earlier he'd planned to abstain from this motion because of the potential indication that there are pieces of the Applicant Guidebook that should have been developed as policies inside the GNSO, as these contentious issues reflect that there was not a community consensus around that point. Putting a document out for comment is not the same as achieving consensus.

Mike Silber noted his support for Ray and Chris's comments, and reminded the Committee of his vote in Singapore on this issue.

Bill Graham also noted his support for Ray and Chris's comments.

George elaborated on Ray's comment that public comment does not imply consensus, stating that ICANN needs to figure out how to get more toward consensus in the future than just averaging public comment.

Gonzalo Navarro noted his support for Chris, Ray and Bill's comments.

Kuo-Wei Wu, Rod Beckstrom, R. Ramaraj, Erika Mann and the Chair also indicated that they will support this resolution.

Ray then moved and Kuo-Wei seconded the following resolution:

> Whereas, the Board approved the New gTLD Program with protections for certain interests and rights, and intellectual property rights in particular
> (http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm);

Whereas, the Board provided its rationale for approving the New gTLD Program with these elements (http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm);

Whereas, the availability of the objection process and other aspects of the program have been actively communicated;

Whereas, ICANN received comment describing an apparent need to submit gTLD applications for defensive purposes to protect established legal rights;

Whereas, ICANN responded by establishing a public comment period to seek input on the sources of this perception and how it could be addressed (http://www.icann.org/en/news/public-comment/new-gtlds-defensive-applications-06feb12-en.htm);

Whereas, ICANN held a public workshop during ICANN's public meeting in Costa Rica to hold a community discussion regarding suggestions raised during the comment period, and additional suggestions with participation from the community (http://costarica43.icann.org/node/29711);

Whereas the New gTLD Program goals include the protection of established legal rights,;

Whereas, a summary and analysis of public comment was performed and the discussion in the public workshop was transcribed;

Whereas the sense of the public discussion indicated that trademark protections should continue to be discussed and developed for the registration of second-level domain names and also indicated that cybersquatting was not likely to be a significant issue in the registration of top-level domain names;

Whereas, ICANN is committed to reviewing the effectiveness of the application and evaluation process, and of the safeguards put in place to mitigate issues involved in the introduction of new gTLDs, following the initial application round;

Whereas, the comments indicated that significant concerns about awareness of the protections available and that renewed efforts should be undertaken to broadly communicate those protections to rights holders;

Resolved (2012.04.10.NG1), the New gTLD Program Committee thanks the community for its participation in the discussion of this issue.

Resolved (2012.04.10.NG2), while the New gTLD Program Committee is not directing any changes to the Applicant Guidebook to address defensive gTLD applications at this time, the New gTLD Program Committee directs staff to provide a briefing paper on the topic of defensive registrations at the second level and requests the GNSO to consider whether additional work on defensive registrations at the second level should be undertaken;

Resolved (2012.04.10.NG3), the New gTLD Program Committee directs staff to continue implementing targeted communications about the processes used and protections available in the New gTLD Program.

All voting members of the Committee voted in favor of the Resolutions. The Resolutions carried.

> *Rationale for Resolutions 2012.04.10.NG1-2012.04.10.NG3*
>
> *In furtherance of its commitment to accountability and transparency, ICANN opened a public comment period regarding reported perceptions of the need to file defensive applications that arose as the application window for new gTLDs drew near. While some of the comments were in favor of providing additional protections, such as block lists, "do not sell" lists, or additional refund levels to allow the withdrawal of applications after the reveal of all strings, some commenters noted that the Board should not attempt to introduce new protections at the top level at this stage in the first round of applications without bottom-up policy discussion. The protections that exist within the New gTLD Program were already the result of extensive community discussion and debate. That discussion has included the*

*proposals made during this most recent round of public
comment.*

*Instead of approving any changes at this time, the
Committee directs ICANN to continue emphasizing the
existing protections at the top level within communications
on the New gTLD Program. As many comments referred to
the potential for defensive registrations at the second level,
the Committee is directing further work on this issue, to
allow continued community discussion regarding whether
further policy work should proceed on introducing
additional protections at the second level. Further, ICANN
has committed to conducting a post-first round study on
whether the trademark protections should be adjusted.*

*Not introducing changes to the Applicant Guidebook at this
time will better serve the public interest as those rules are
being relied upon in the ongoing process. This action is not
expected to have an impact on resources, nor is it expected
to have an impact on the security or the stability of the DNS.*

2. GNSO Recommendation for Protection of Red Cross and International Olympic Committee Names in New gTLDs

The Chair and the General Counsel and Secretary had a conversation as to
whether the Committee was required to pass a resolution on this item
given that the Committee was leaning towards not directing any changes at
this time. Staff had provided a written recommendation to the Board to
not take any action on the GNSO Recommendation at this time.

Kurt Pritz noted that whether or not to take a resolution is a choice for the
Committee, and its not clear that the path towards implementing the GNSO
Recommendation is clear at this time, as the application window is soon
closing.

Ray Plzak proposed that the Committee take a resolution to receive the
GNSO Recommendation and then send it back to the GNSO for full
development through the policy development process. It is not clear that
there was consensus on the GNSO Council, as all of the abstentions are

really "no" votes and they are all speaking to the process of how this Recommendation was reached.

Chris Disspain commented on the difference between the defensive applciaiton item and this item. In respect to defensive applications at the top level, there was nothing in the guidebook to address that issue. After the concern was raised, the Board agered there would be a public comment period. The Committee has now listened to that comment and made a decision. On the Red Cross/IOC, there are already changes to the Applicant Guidebook to receiver certain names, and the Board asked the GNSO and the GAC to provide additional input. Now there is a recommendation to make additions to that change, and create a modified reservation status for certain names. The Committee does not have to pass a resolution in respect to the additional recommended changes; the Committee can simply acknowledge the existence of those recommendations. Chris noted that the GAC has not yet weighed in on these specific recommendations. Because the GNSO and the GAC were requested to work on a tight deadline, whether or not a resolution is passed, it is very important for the committee to acknowledge the input from the GNSO in some formal way, as well as acknowledgement of input from the GAC when it is received. However, the Committee could accompany this with a statement tht at this stage there is not a reason to make any changes.

Heather Dryden noted that the GAC is working to provide some sort of reply before 12 April 2012, but that is unlikely a recommendation would be coming through that would require action.

Bill Graham noted that the items raised by Chris and Ray help point a way forward.

The President and CEO noted his interest in Ray's proposed resolution, but wanted to make sure this did not raise any unintended effects.

Bill asked for clarification from Ray as to whether the proposed resolution included a request for this issue to be put through a full GNSO policy development process to attempt to achieve consensus.

Ray noted that his earlier statement didn't take into account that GAC input was still forthcoming. At this point it may be appropriate for the Committee to just receive the GNSO Recommendation, to allow for the

community to understand that the Committee considered the recommendations. If the GAC comes forward with more advice, then the Committee can decide what to do then.

The Chair summarized that the resolution now considered by the Committee is to acknowledge receipt of the GNSO Recommendation. He asked whether the Committee should say that no changes will be made until we hear from the GAC?

Ray suggested that the Committee should not be committing to taking any sort of action, as it could be construed to say that if the GAC input suggests proceeding with the GNSO Recommendations, that the Committee is bound to move forward in that way, and the Committee may have reasons why it does not want to move forward. The resolution should simply be about receipt.

The Chair noted that some people are asking for the Committee to do something before 12 April 2012 and asked if the Committee should be clear that no changes will be made before that date?

Ray noted that the 12th is the close of the public comment period, and not a deadline for action.

Chris commented that the difference between the GNSO Recommendation and the current status is that the names of the IOC and the Red Cross are fully reserved at the top level in the first round. The GNSO Recommendation is for those names to be reserved, but open to the IOC and the Red Cross to apply for those names. It is not known whether the IOC or the Red Cross have reserved a place in the TAS system to apply for any top-level names in the event they were allowed to – but it does show that what the Committee does today could have an affect on the first round, so the Committee needs to have an affirmative statement so the status of this item is understood.

The Chair noted that in his personal opinion, it makes sense for the Committee to provide stability and announce that the Applicant Guidebook will not change before 12 April 2012.

Mike Silber noted his agreement with the Chair and the Applicant Guidebook should be left as is. The Board already put in place a stopgap measure to address the Red Cross/IOC concerns, and it stands now.

The Chair stated that there seem to be two options for a resolution: to acknowledge receipt of the GNSO Recommendation, or to acknowledge receipt and confirm that the Committee is not going to change the Applicant Guidebook.

The President and CEO noted that he is comfortable with either approach, but proposed that the Committee state that it chooses not to make a change to the Applicant Guidebook at this point in time, which could leave the opportunity for the Committee to consider changes on this item at any point in the future.

Ray and George Sadowsky noted their agreement with Rod's proposal.

Chris clarified that he was urging the Committee to be clear, and simply receiving the GNSO input may not be enough. He agreed with the formation of the resolution as provided by the President and CEO.

Heather noted that there is a linkage between the IOC/Red Cross issue and the question of protections for IGOs. The GAC input that is being worked on deals with both issues for the first round. It will be submitted to the Board if approved by the GAC.

Ray noted that he supports the wording used by Rod and does not support the mention of the GAC in a resolution.

The President and the CEO then moved and Ray Plzak seconded the following resolution:

The Committee then took the following action:

> Resolved (2012.04.10.NG4), the New gTLD Program Committee acknowledges receipt of the GNSO's recommendation on extending certain protections to the Red Cross/Red Crescent and the International Olympic Committee names at the top level.

> Resolved (2012.04.10.NG5), the New gTLD Program Committee chooses to not change the Applicant Guidebook at this time.

All voting members of the Committee voted in favor of the Resolutions. The Resolutions carried.

Rationale for Resolutions 2012.04.10.NG4-2012.04.10.NG5

The Committee thanks the GNSO for its work to date on this issue. While the recommendations of the GNSO are well taken, changing the Applicant Guidebook at this time must be balanced against ICANN's commitment to accountability and transparency. The public comment "reply" period remains open on this topic through 14 April 2012, therefore any Committee action at this time – other than maintaining the status quo – could not reflect all of the inputs received on this issue. The comments received to date also demonstrate the existence of opposition to the adoption of the recommendations.

Implementation details have not been worked out to address these recommendations.In addition, a change of this nature to the Applicant Guidebook nearly three months into the application window – and after the date allowed for registration in the system – could change the basis of the application decisions made by entities interested in the New gTLD Program.

Comments received in the public comment forum also raise procedural issues with these recommendations that indicate concerns with the multi-stakeholder process utilized in this instance. While the Committee is not making a determination at this time about these procedural concerns, their existence also weighs towards maintaining the status quo at this time.

The status quo is that the Applicant Guidebook already provides several other protections available to the IOC and Red Cross for the top level, including a moratorium on the delegation of certain names at the top level in the first round of applications; an objection process which allows parties with standing to submit an objection on the grounds that an application infringes its existing legal rights; and the

GAC Early Warning and Advice Processes. As protections already exist, when balanced with the accountability and operational issues posed by changing the Applicant Guidebook at this time, the public interest will be better served by maintaining the status quo. This action is not expected to have an impact on resources, nor is it expected to have an impact on the security or the stability of the DNS.

Nothing in the Committee's action or this rationale is intended to preclude the consideration of the GNSO recommendations for future rounds of applications within the New gTLD Program.

3. Any other business

The Chair reminded the Committee of an email from the Chair of the GAC addressing a variety of issues such as foreign currency control and root scaling, following up item identified in discussions in Costa Rica.

The President and CEO offered for staff to prepare a response to the email.

The Chair agreed with that proposal.

Heather Dryden confirmed that her note did not represent GAC advice, but was seeking information on open action items.

The Chair then called the meeting to close.

2012-05-06-Minutes-New-gTLD-Committee

ICANN

Note: On 10 April 2012, the Board established the New gTLD Program Committee, comprised of all voting members of the Board that are not conflicted with respect to the New gTLD Program. The Committee was granted all of the powers of the Board (subject to the limitations set forth by law, the Articles of incorporation, Bylaws or ICANN's Conflicts of Interest Policy) to exercise Board-level authority for any and all issues that may arise relating to the New gTLD Program. The full scope of the Committee's authority is set forth in its charter at http://www.icann.org/en/groups/board/new-gTLD.

A Meeting of the New gTLD Program Committee of the ICANN Board of Directors was held on 6 May 2012 at 4:00 pm local time in Amsterdam, The Netherlands.

Committee Chairman Cherine Chalaby promptly called the meeting to order.

In addition to the Chair the following Directors participated in all or part of the meeting: Rod Beckstrom, Chris Disspain, Bill Graham, Gonzalo Navarro, Ray Plzak, R. Ramaraj, George Sadowsky, Mike Silber, and Kuo-Wei Wu.

Thomas Roessler, TLG Liaison and non-voting liaison to the committee, and Thomas Narten, IETF Liaison and non-voting liaison to the committee, were also in attendance.

Heather Dryden, GAC Liaison, attended as an observer.

Erika Mann sent apologies.

1. New gTLD Program Application Fee Refund

The President and CEO introduced the proposed resolution. He asked the Committee to consider whether there should be a provision for a small percentage of interest to accompany the refund.

Chris Disspain asked for information as to why the date for the refund was set at the reveal, instead of at the close of the application window.

Kurt Pritz noted that it may take businesses more than just a couple of days to make that decision, so using the reveal date provided a couple of extra weeks.

Chris commented that the close of the window, once the TAS is opened again, is date-certain, while the reveal date will not be date-certain unless ICANN announces in advance what the reveal date will be.

The General Counsel and Secretary confirmed that the intent was to leave a full refund window open as long as was reasonable, to a point where it could not be gamed. Gaming seemed to be a greater possibility upon the reveal of applications. Timing the full refund deadline to the reveal date will give the applicants maximum benefit.

Thomas Narten suggested that the longer the option for the full refund is available, the more potential exists for gaming. Thomas also inquired as to whether the Committee had prior conversation on this topic prior to his joining the Committee.

The Chair confirmed that it had been discussed on an informational call once prior.

The General Counsel and Secretary confirmed that there had been analysis done on the potential impact.

George Sadowsky noted that he is satisfied with the resolution and would recommend including a provision of 1% interest as a rebate.

R. Ramaraj suggested that if interest would be provided, the resolution would have to be very clear in specifying that interest would only be provided for the period of time the money was with ICANN.

Thomas Roessler requested some information on the refund schedule already set out in the Applicant Guidebook.

The General Counsel and Secretary confirmed that through reveal, applicants were currently entitled to a refund of 97% of fees, as opposed to a full 100%.

The Chair suggested that if interest was granted, it should only be for the timeframe within which TAS was offline.

Kurt Pritz noted that if ICANN offered to pay interest, but only at 1% and for a very short period of time, it may not be favorably received by the community, and instead would be viewed as a half-hearted gesture.

Chris agreed with Kurt, and commented that, from a public relations perspective, ICANN would have to be paying something approximating the borrowing rate. Otherwise, ICANN would be seen to be offering a very small amount that did not seem to be worth the bother.

Thomas Roessler commented that any decision on interest would make ICANN look petty, choosing between small percentages. He suggested dropping the interest portion and keeping the refund to the money that ICANN received from the applicants.

Thomas Narten noted that the amount of money at issue, just a couple hundred dollars per application if interest was granted, is likely not worth discussing.

The Chair agreed that though providing interest is a good idea, it seems to just complicate the issue and can be taken out. The Chair then conducted a short straw poll and confirmed that the majority seemed to be in favor of not including a provision for interest.

The President and CEO then moved, and George Sadowsky seconded the following resolution:

> Whereas, the TLD Application System (TAS) has been offline since 12 April 2012 due to a technical glitch and the application window will not be closed until TAS reopens for a period of at least five days.

Whereas, ICANN recognizes that, during the pendency of the glitch, applicants may have re-evaluated decisions to participate in the New gTLD Program.

Whereas, the Applicant Guidebook at Section 1.5.1 sets out a tiered refund schedule in the event that an applicant wishes to withdraw its application.

Resolved (2012.05.06.NG01), the New gTLD Program Committee directs the CEO to offer to applicants a full refund of the New gTLD Application fee actually paid to ICANN if the applicant wishes to withdraw its application prior to the date that ICANN publicly posts the identification of all TLD applications.

All voting members of the Committee in attendance voted in favor of the Resolution. Erika Mann was not available to vote. The Resolution carried.

Rationale for Resolution 2012.05.06.NG01

Out of recognition that some applicants within the first application round of the New gTLD Program may have re-evaluated their decision to participate in the Program during the time when the TLD Application System has been offline, the New gTLD Program Committee has determined to offer full refunds of amounts paid to ICANN if the applicants withdraw prior to the public identification of all TLD applications submitted in the first round. Under the Applicant Guidebook, the applicants would otherwise be entitled to a tiered refund schedule.

This action may have a minor negative impact on ICANN resources, to the extent that ICANN incurred costs in conducting an initial legal check of a withdrawing applicant, or incurs any fees for the return of funds. However, the fiscal impact of these occurrences is expected to be minimal. In line with ICANN's stated process for evaluation of applications, ICANN has not conducted further evaluation of the applications received to date, and therefore no other per-application fee costs have been incurred. On balance with the minimal fiscal impact to ICANN, this action is

expected to have a minor positive impact on the ICANN community as it allows applicants an additional choice in response to their business needs. This action is not expected to impact the security, stability or resiliency of the domain name system.

The President and CEO thanked the Committee for this action.

The Chair called the meeting to a close.

2012-05-29-Minutes-New-gTLD-Committee

Note: On 10 April 2012, the Board established the New gTLD Program Committee, comprised of all voting members of the Board that are not conflicted with respect to the New gTLD Program. The Committee was granted all of the powers of the Board (subject to the limitations set forth by law, the Articles of incorporation, Bylaws or ICANN's Conflicts of Interest Policy) to exercise Board-level authority for any and all issues that may arise relating to the New gTLD Program. The full scope of the Committee's authority is set forth in its charter at http://www.icann.org/en/groups/board/new-gTLD.

A telephonic Meeting of the New gTLD Program Committee of the ICANN Board of Directors was held on 29 May 2012 at 18:00 UTC.

Committee Chairman Cherine Chalaby promptly called the meeting to order.

In addition to the Chair the following Directors participated in all or part of the meeting: Chris Disspain, Bill Graham, R. Ramaraj, George Sadowsky, and Mike Silber.

Thomas Narten, IETF Liaison and non-voting liaison to the committee, was also in attendance.

Rod Beckstrom, Erika Mann, Gonzalo Navarro, Ray Plzak, Kuo-Wei Wu, and Thomas Roessler, TLG Liaison and non-voting liaison to the committee, sent apologies.

Heather Dryden, GAC Liaison, attended as an observer.

1. Batching Process

The Chair introduced the agenda, with a focus on the batching process.

Mike Silber noted that the Risk Committee is discussing risk identification and mitigation work in relation to the batching process.

Kurt Pritz presented background on the consideration of geographic diversity in formation of the batches, including the round robin process. When the round robin model was discussed with the GNSO in Costa Rica, there was concern raised about its fairness, as regions with smaller proportions of numbers in the it would assure that that geographic regions with a smaller percentage of applications overall would have a greater number of applications in the first batch than a strictly proportional system would assure. There was also a suggestion that the process could be susceptible to gaming. For example, if there was a favoring of geographical location or a community TLD, the applicants may go back and adjust applications to take advantage of that. In addition, the issue of fairness in demoting applications that would have otherwise made the first round for those who "won" at digital archery, in favor of those who were promoted in the first round by virtue of round robin, was a community concern.

Kurt continued that the issue of geographic diversity seems to be geared to ensure that, at minimum, if x percent of applications from a particular geographic region, at least x percent of the applications in the first batch should be from that particular region.

George Sadowsky asked Kurt if any statements were made in Costa Rica that would encourage applicants to go back and restructure their applications, such as a change to round robin or moves to proportionality.

Kurt noted that the proportional model had been posted as the method in the "Batching Basics" paper that was posted after Costa Rica, and no statements had been made about changes to that model. Though the proportionality model was posted, if the Board wishes to change the model, it could. There would be risks to adopting a different model, however, particularly with the community comment on fairness and potential demotion if round robin was used.

George commented that all members of the Committee believe that we should be as fair as possibility to applicants. But that depends on whether there is a level playing field to start with. Currently, there are no IDN gTLDs, no gTLDs from certain regions, so even trying to move forward with a proportional representation model perpetuates a nonlevel starting point. George noted

that he voted for the digital archery process because he believed that it was a round robin method that would ameliorate the disadvantage of some of the regions. He is against proportionality.

Bill Graham commented that he does not see why going to the round robin method would be potentially discriminatory, and does not see the basis for claiming unfairness unless all digital archery scores are released. It would actually serve to remove questions about fairness, as it would remove concerns about whether a response from one geographic region could get in as fast as a response from another geographic region. There seems to be a game in defining unfairness within the community.

Chris Disspain commented that the more human interference that is introduced into the process, the more likely it is that a problem will arise. If there's a simple statement at the outset about the rules of the competition, that's fine. But if we start changing the outcome based on the results, there is a risk to that. Chris also inquired about how ICANN determines which geographic region an application is from.

Mike noted that digital archery had been explained as a full concept, not the digital archery and a methodology for manual batching to be applied afterwards. At this time, we cannot just change one portion of the process. The proportional representation is a manual intervention, and the Board would need to vote to approve that change. The round robin method should remain.

Ramaraj agreed with Mike.

Chris asked about the possibility of gaming and whether it is possible for applicants to change their applications now to try to take advantage of any change.

Kurt responded that applicants already submitted their response to a question seeking the place of organization, where there has to be some sort of license to do business there. The ability to change that location would close with the close of the application window.

Chris clarified that this means that an organization would already have to have set up within a specific region in order to be associated with it as part of their application process.

The Chair queried as to whether the country identification selected would apply in either the proportional model or the round robin model, and Kurt confirmed this was the case.

Kurt further responded that there may be a difference in how effective a geographic designation is in getting into the first batch of applications based upon the different method used. For example, if there are 200 applications from one region, and a total of 2000 applications, the proportional model would assure that an applicant for that region would have a 10% chance to get into the first batch. Under round robin, an applicant from that region would have a 50% chance.

Chris asked if allowing proportions to be modified later was more acceptable than a straightforward rule that says that we're taking these applications in regional order.

Kurt repeated that there was a risk associated with demoting applications who achieve a digital archery score among the top 500, who merited position in the first round under a pure digital archery system.

Chris countered that demotion does not occur if the rule is based upon having slots associated to geographic regions. There's little difference between setting that rule, or allowing applicants who achieved a lower digital archery score to move into the first batch by virtue of string contention. There's little difference, whether you are adding to the batch or not including people in the batch. Chris requested that the Committee also discuss the possibility of batches of larger than 500.

Thomas Narten agreed that we have to be clear about defining "fair" and "fairness." One definition of fairness could be very different from another. Second, the place to have the discussion about the issues that may arise with the round robin method is to have the debate within the community. This seems to be change to the batching process as it understood by the community, and making a change of this type without making it clearly understood and assuring it is supported is not good. If a change is made to the process, that is OK, but it has to be done in a way that is clearly communicated.

Kurt noted that the round robin was never published to the community as a method of formulation of batches; there has not been a change.

Thomas Narten countered that it is well-known that the Board was discussing a round robin.

Kurt responded that we've been very careful on what was communicated on the process, as the process had not been approved by the Board. The round robin method is not well-known, and was not really discussed until the days leading up to the Costa Rica meeting.

Thomas Narten noted that it was discussed in Costa Rica and it is the operating assumption of the community. If we change from that model, we are making a change, so even if it is not technically policy in the GNSO sense, this is the kind of thing where you do not make a change unless you have a good reason.

Kurt commented that the Board did not talk about geographical diversity in Costa Rica; the meetings were concentrated on the robustness of the digital archery model and the comparison of digital archery to other models. To reiterate, this is not a change to what has been discussed with the community.

Thomas Narten countered that because the round robin was discussed publicly in Costa Rica, it seems that that is what the community thinks is being implemented.

Kurt noted that there has never been a written document stating that ICANN is implementing the round robin model.

Chris clarified his understanding that the topic was raised in a discussion was raised in a session with the GNSO in Costa Rica and Kurt received significant pushback.

Heather Dryden offered comments to build on what Thomas Narten was saying, regarding the assumptions within some parts of the community. There is not a GAC view that Heather is able to communicate on the round robin versus proportionate model, as the GAC is in the process of compiling questions. There needs to be attention on what the information flows and communications are on this topic and to be sure the community is well informed. If there a decision was made to support digital archery on the basis of certain assumptions, then that is what the community is going to process, including inputs from those at the GNSO session referenced. The main concen is that we seem to building decision upon decision, while not being clear about the assumptions into the first decision. In relation to the GAC, they have a lot

of questions, and sensitivities around making sure that batching works and its timed in a way that makes sense. Hether noted that today's discussion is giving her pause.

The Chair noted that many are being given pause with this discussion, as there is disagreement about the assumptions in the first decision. Thomas Narten stated tha the community has an assumption that batching will be done on the round robin model. Kurt noted that that round robin was only discussed in a GNSO meeting as a potential method, and a lot of people at that meeting raised concerns about it being open to gaming. The Committee needs to ascertain if this is going to be a run on a round robin basis of not. The Chair asked Thomas Roessler and George if the subgroup that looked at batching after Costa Rica discussed the methodology.

George recalled that round robin was presented as the means for assembling the queue for digital archery, however the real focus of discussion was between auctions and digital archery.

Mike and Chris agreed with George's recollection.

Mike continued that the round robin solution was explained to the subgroup and that is what the subgroup agreed to.

Chris continued that in the choice between digital archery and auction, there was a discussion about regionalizing the digital archery and a region-by-region basis. There was not an explicit statement that a regional round robin was going to be used, but there was not discussion of the proportional model at that time.

The Chair commented that it is hard to launch the system and allow submission of digital archery, and then announce later how the batching will work. The announcement of the method has to be done at the same time. We have to provide the rules.

George noted that the sooner we get the rules out, the better everyone will feel, but we could launch the batching system without having provided the notice in advance.

The Chair commented that if he were to call for a vote today among the members of the committee present, the vote would be for round robin, as

some believe that is what was already agreed to, or what the community is expecting.

Chris commented that it may be of help to have staff try to address any issues that may arise if the Committee were to direct staff to proceed with a round robin. The Committee heard that there was pushback that this system could be gamed. Are there are any other consequences to returning to the round-robin model?

The General Counsel and Secretary noted that the "Batching Basics" paper describes the proportionality method, so there are some who believe that the process will be round robin, but we've published that we'll be following proportionality. Of course, we've also stated that we are not providing operational details until later, but we've already published some operational details. The recommendation at this time is go back, determine what has been said where and when on this, and see if that provides further clarity.

Mike stated that it would take a lot of nuance in reading the "Batching Basics" paper to try to argue that round robin is not a proportional system as stated in the paper. Mike noted his opinion that "Batching Basics" could describe either proportional or round robin distribution.

Bill agreed with Mike, that "Batching Basics" does not unequivocally state that only a proportional representation model will be used. Based on the language in the paper, you'd have a hard time insisting that it refers only to one or the other.

Chris and George agreed with Bill. Chris noted that there had been articles written describing the five region approach.

The General Counsel and Secretary confirmed that a number of articles were released that summarized Kurt's discussion to the GNSO; some people in the community took the position that the process was defined, though ICANN was saying operational details were still to come. Kurt clearly said that it was a proposal, though that was not how the media reported it.

The Chair asked again what does the Committee believe is the right system to introduce, including considerations of gaming that have been raised? Does proportional give a fairer result? What about George's comments regarding a level playing field?

The General Counsel and Secretary confirmed that applicants are not able to change their address in the system at this time; the last day to change an address was 29 March 2012, so it is not now possible to change an address as an aspect to gaming.

Mike noted that round robin will produce greater geographic diversity than the proportional method.

George reiterated his point that we do not have a fair situation now, so basing a decision on an assumption of fairness will not hold.

Kurt re-stated Thomas Narten's point that everyone has a different sense of fair. The question now is what should the result be? A lot of the pushback to date come from a perception of relative demotion, from those who scored within the top 500 but did not get into the first round.

Chris queried whether, if you're clear going in about how the batch will be comprised, then there is no real "demotion" – that is only if we are going around and moving slots around.

The General Counsel and Secretary returned to Chris' earlier example of the contention sets being moved into the same batch; there, only on of the applications in contention can be delegated, which allows us to expand the size the batch.

Chris asked if there was any concern in proportionalizing the batch manually, as opposed to using round robin? How will the numbers of strings in contention sets be counted for the purpose of identifying proportion percentages? These are the types of questions that have to be answered for clarity in a proportional system. With a round robin, you just set out the rules.

Kurt agreed that using the proportional model makes it more complicated, as so many of the items within the New gTLD Program have been complicated. Many details have been worked out and are presented in the companion paper. It is complicated, and refinements have to be made.

Chris agreed that round robin may be the easiest and most clear method, though it is not clear that it is the fairest.

The Chair asked if the simplicity of the round robin method was preferred? A decision has to be made soon.

George suggested that the Committee pass a resolution affirming confidence in the first resolution and confirming that round robin would be the method to arrange the final queue.

The Chair asked if round robin was mentioned in the original resolution, and George confirmed that it was not.

Chris asked if a resolution was needed at this time.

The General Counsel and Secretary responded that if the Committee wished to simply advise and guide staff that could suffice, but if they would like to a resolution that is fine too.

George noted that he believes a resolution is necessary given the state of discussion in the community, and providing more information to counter any ambiguous communication that may have taken place.

The Chair polled all persons present on the call to see what each person believes the best system to be. George, Bill, Chris, Mike, Ramaraj, Akram Atallah, Jamie Hedlund and the Chair all supported round robin. Heather stated there was no GAC view at this time.

Kurt noted his preference was for a way to do the round robin while not "demoting" anyone from the batch. The General Counsel and Secretary agreed with Kurt.

Thomas Narten stated that he was undecided and wanted more information about the risks to the round robin system and how they could be mitigated.

Akram noted that simplicity is the most important thing, and if there was an ideal formula as suggested by Kurt, that would be great; however, someone will always be unhappy, so its best to go with the simplest form. Jamie agreed with Akram.

The Chair asked if Kurt had any proposals for the round robin "adjusted" he mentioned previously.

Kurt noted that he has a couple of ideas for models in his head, but they are complex, and could require a great increase to the size of the first batch. Kurt stated that he may not push too hard on further modeling. But the model would essentially be to do the round robin and, on top of that, include those in

the first batch that merited a first batch by scoring in the top 500 across all applications.

George noted that this could make the queues larger for every region, and make the first batch absolutely major.

The General Counsel and Secretary noted that one of the things that we will all know soon is the proportional division of applications, and that may provide an opportunity for change. However, simplicity is probably the best for now, and making a rule that will be re-evaluated later will lead to havoc. The round robin makes sense. If we find a need to change it, or are able to incorporate Kurt's suggested model at a late time, that can be considered.

George asked if the General Counsel and Secretary's comment meant that changes would be introduced later to achieve other objectives?

The General Counsel and Secretary clarified that he is advocating for a simple model, though there always remains a possibility of an anomaly that would allow for a larger batch or to allow a means to address what Kurt has identified as a risk. In that event, that would always be taken back to the Committee for consideration. The rule would be firm, though ICANN should remain open to mitigating risk if there's a means to do so. The intent is to set a clear path that round robin will be used. If something comes up later that changes how the risks have been identified, that would be brought to the Committee.

The Chair summarized that all of the Committee present on the call, other than Thomas Narten and Heather, would prefer to proceed with a round robin as it's simple. The rules can be set before batching launches on 8 June 2012. The decision today is round robin.

The General Counsel and Secretary noted that he and Kurt removed their reservations about finding an adjustment to the system and support the round robin.

The Chair then called for discussion on whether a resolution was needed.

The General Counsel and Secretary advised against a resolution at this time, as it may confuse communications as opposed to improving communications on this topic.

The Chair inquired about what would be communicated when.

Akram noted that a draft communication had been provided to the Committee, including some visibility on the reveal date and the batching schedule. There are not dates in there for the GAC Early Warning process, as more discussions are needed with the GAC on that item. In the announcement, information could be added that a geographical round robin would be used to form the batches.

Chris asked for clarification, as there were previous statements that there would not be operational details released on digital archery until after the application window closes. In that event, should details be released at this time?

Bill suggested that further communication may not be necessary, as this is a decision that the Committee began with and decided not to change.

The Chair noted that clarification seems to be needed, and the communications team will have to decide what to say. The decision is that round robin will be used, and the mechanism for communication will be determined by the staff.

The Chair then turned to the issue of string contention, and asked if the Committee members agreed with the proposal that contention sets go into the highest numbered batch, while no applicants get demoted. No objections were raised.

The Chair turned back to communication of all the rules, and noted that they should be communicated before the launch of the batching system.

Akram noted that the plan is to close the application window on 30 May and shortly after, announce the rules of the digital archery, possibly including a Q&A. Round robin would be included in this information.

The Chair then asked about the work in the Risk Committee on gaming of digital archery, and if there are any communications about that.

Mike noted that the sooner we communicate, the better it will be.

Chris noted that there's a lot of information already available on technical steps that an applicant could take to raise their digital archery score, such as the ability to test. We have to be clear about the protections put into place by

ICANN, such as placing the servers behind a VPN, and the use of a secure platform.

Kurt agreed that this could be included in communications, and he will work with Akram on that point.

Thomas Narten spoke against addressing those types of security measures in a communication. Instead, providing the details of the digital archery system would be better, so that the community can study and understand it.

The Chair noted that there is no negative side including statements about the security placed around the system, as well as an explanation of how digital archery works.

The General Counsel and Secretary noted that, as digital archery is intended to be a game of skill, the baseline is a level platform. Different skill sets will result in different results.

The Chair then asked if the Committee wished to comment on the communications draft before it was released.

George noted that it is the prerogative of staff to implement this, though if there were any doubts about the correctness of the communication as it relates to the Committee discussion, the Committee should review.

The Chair requested that the Committee be given a 24 hour advance preview within which to read and respond.

The Chair then closed the meeting.

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fewer applications overall would have more applications The New gTLD Program Committee had a discussion with staff focusing on the digital archery system, focusing on the issue of batch creation and the considerations of geographical diversity in the proposed system, as well as how string contention sets would be considered within the batching sets. The Program Committee reaffirmed that geographic diversity would be addressed in a "round robin" format among the geographic regions, and that all strings in a contention set would move to the earliest batch among the applications within the set. Staff also discussed a forthcoming communications piece on the batching system.

NEW-G-COMMITTEE-PAPER-RE-RECONSIDERATION-REQUEST-12-1

ICANN BOARD SUBMISSION NO. 2012-06-xxxx

TITLE:	**Reconsideration Request 12-1**
PROPOSED ACTION:	**For New gTLD Program Committee Consideration**

EXECUTIVE SUMMARY:

The International Olympic Committee (IOC) submitted a request for reconsideration of the 10 April 2012 New gTLD Program Committee decision regarding the GNSO Recommendations on additional protections for the IOC and the Red Cross/Red Crescent names in the New gTLD Program. As part of that 10 April decision, the New gTLD Program Committee determined to not make any changes to the Applicant Guidebook "at this time." The IOC Reconsideration Request asks that the GNSO Recommendations and for the additional protections be immediately adopted and incorporated into the Applicant Guidebook.

As detailed in the attached Recommendation, the IOC's Reconsideration Request does not meet the standards for stating a Reconsideration Request. The IOC does not identify any material information that the New gTLD Program Committee failed to take into consideration at the time of its decision. Instead, the IOC identifies items that it wishes the New gTLD Program Committee would re-weigh in taking its decision (such as the scope of opposition within the GNSO and the unique legal status of the IOC) or occurrences after 10 April 2012 (the closing of public comment period and the extension of the application window for the first round of the New gTLD Program), neither of which are proper grounds for reconsideration. The BGC met on 1 June 2012 and recommended that the IOC's request be denied.

The Annex to this paper includes the IOC's request and the BGC Recommendation on Request 12-1 (the Recommendation has also been posted and can be found at http://www.icann.org/en/groups/board/governance/reconsideration. The original Submission on this item for consideration by the New gTLD Program Committee is also attached.

BOARD GOVERNANCE COMMITTEE RECOMMENDATION:

The BGC recommends that no further action be taken on Reconsideration Request 12-1 and the Request be denied. Full detail of the BGC recommendation is discussed in the Annex.

Though reconsideration is not proper in this instance, the BGC notes the use of the phrase "at this time" in the 10 April 2012 decision. As a matter of fairness, the BGC invites the New gTLD Program Committee to evaluate whether its decision on the GNSO Recommendations relating to the IOC is now ripe for determination given that the public comment period on the recommendations has now closed. Of particular import is the scope of public received after 10 April 2012.

PROPOSED RESOLUTION:

Whereas, the BGC has reviewed Reconsideration Request 12-2 submitted by the International Olympic Committee on 10 May 2012 concerning the New gTLD Program Committee's 10 April 2012 decision on the GNSO Recommendation for Protection of Red Cross and International Olympic Committee Names in New gTLDs (http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-10apr12-en.htm).

Whereas, the BGC has determined that Reconsideration Request 12-1 should be denied.

Whereas, Reconsideration Request 12-1 and the BGC's recommendation have been posted on the ICANN website at http://www.icann.org/en/groups/board/governance/reconsideration.

Resolved (2012.06.xx.xx), the New gTLD Program Committee adopts the recommendation of the BGC that Reconsideration Request 12-1 be denied, as the requestor did not satisfy the requirements to bring a reconsideration request. The request did not identify material information that the New gTLD Program Committee failed to take into consideration when taking its 10 April 2012 decision.

PROPOSED RATIONALE:

ICANN's Bylaws call for the Board Governance Committee to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article

IV, section 3 of the Bylaws. The New gTLD Program Committee, delegated the powers of the Board on this issue, has reviewed and thoroughly discussed the BGC's recommendation with respect to Reconsideration Request 12-1 and finds the analysis sound.

Having a Reconsideration process whereby the BGC reviews and makes a recommendation to the Board for approval positively affects the transparency and accountability of ICANN. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws and Articles of Incorporation. Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

Submitted by:	Amy Stathos
Position:	Deputy General Counsel
Date Noted:	18 June 2012
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bgc-recommendation-01jun12-en

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On 10 May 2012, the International Olympic Committee ("IOC"), through its counsel, submitted a reconsideration request ("Request") to the Board Governance Committee ("BGC"). The Request asked the New gTLD Program Committee (the "Committee") to reconsider its 10 April 2012 resolution regarding the GNSO's Recommendation for Protection of Red Cross and International Olympic Committee Names in New gTLDs ("GNSO Recommendations"). Specifically, the IOC asks that the Board, through the New gTLD Program Committee, reconsider its decision and adopt the GNSO Recommendations, thereby providing additional protections to the Red Cross and the IOC in the first application round for the New gTLD Program.

I.   Relevant Bylaws.

Article IV, Section 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

> (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
>
> (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information.

The Bylaws do not provide for reconsideration where "the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act." Bylaws, Art. IV, § 2.2. Similarly, the Bylaws do not provide for reconsideration of an action or inaction of the ICANN Board that was taken after the Board's consideration of material information. Bylaws, Art. IV, § 2.2(b).

When challenging a Board action or inaction, a request must contain, among other things, "a detailed explanation of the material information not considered by the Board and, if the information was not presented to the Board, the reasons the party submitting the request did not submit it to the Board before it acted or failed to act." Bylaws, Art. IV, § 2.6(h).

Dismissal of a request for reconsideration is appropriate if the BGC finds that the requesting party does not have standing because it failed to satisfy the criteria set forth in the Bylaws. Bylaws, Art. IV, § 2.16. These standing requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge a decision with which someone disagrees, but that it is limited to situations where the Board did not have access to information that, if available, may have resulted in a different decision.

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The Request was received on 10 May 2012, making it timely under the Bylaws. Bylaws, Art. IV, § 2.5. The Bylaws require that the BGC publicly announce by 9 June 2012 its intention either to decline to consider or to proceed to consider the Request. Bylaws, Art. IV, § 2.9.

II.   Background.

Throughout the New gTLD Program implementation work, the Red Cross and the IOC have sought heightened protections for their organizations' names, in recognition of, among other things, of the special statutory protections afforded to each organization in countries around the world. This was also the topic of advice from the Governmental Advisory Committee ("GAC"). On 20 June 2011, when ICANN approved the New gTLD Program, the Board approved "incorporation of text [into the Applicant Guidebook] concerning protection for specific requested Red Cross and IOC names for the top level only during the initial application round, until the GNSO and GAC develop policy advice based on the global public interest." See http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm. That decision resulted in a moratorium in the first application round that prohibited any application for certain strings identified by the Red Cross and IOC. 11 January 2012 Applicant Guidebook ("Guidebook"), Section 2.2.1.2.3, available at http://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf. That decision is not being challenged.

Following the 20 June 2011 resolution, the Generic Names Supporting Organization ("GNSO") initiated the GNSO International Olympic Committee/Red Cross Drafting Team ("Drafting Team") to provide policy advice to the Board as requested in the resolution. The Drafting Team's work was informed by a 14 September 2011 letter from the GAC (at https://gacweb.icann.org/download/attachments/1540128/GAC+advice+on+IOC+and+Red+Cross+Sep.+2011.pdf?version=1&modificationDate=1317031625914) recommending that ICANN adopt a new schedule of names to be reserved from registration at the second level that represent the terms most commonly associated with the Red Cross or the IOC. The GAC letter also noted that the top-level protections introduced after the 20 June 2011 resolution should be extended to all future New gTLD Program application rounds, and made recommendations regarding the scope of language protections that should be afforded.

The Drafting Team made three recommendations, herein referred to as the GNSO Recommendations:

1.   Create a category of "Modified Reserved Names" that would be available for application as gTLD strings to the IOC and the Red Cross. These would include strings that are currently restricted from application due to the moratorium. Other applications for strings (i.e., those not from the IOC or Red Cross) would then be subject to a "string similarity" review against the Modified Reserved Names, and confusingly similar strings would not pass this initial review. If the string is an exact match to any of the Modified Reserved Names, the string cannot be registered by any entity other than the Red Cross or IOC. If the string is not an exact match, but did not pass the initial string similarity review, the applicant may seek a letter of non-objection from the Red Cross or IOC (as applicable). If the applicant is unable to obtain a letter of non-objection, the applicant may make a

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demonstration of its legitimate interest in the use of the applied-for string and establish that the use of the string does not refer to IOC or Red Cross activity. A determination in favor of the applicant would not preclude the IOC or Red Cross from invoking the appropriate objection processes under the New gTLD Program to challenge the applied-for string.

2. Protect the IOC and Red Cross terms in as many languages as feasible. The GAC letter stated that the previously provided list of translated terms from the IOC and Red Cross is "illustrative" and recommended expanding the protection to additional languages. The Drafting Team accepted this recommendation, but noted that in order to perform any meaningful string similarity review, a definitive list of translated terms must be provided. If such a list was presented in time, the Drafting Team noted that it would consider recommending the list be substituted for the list currently in the Guidebook.

3. The recommendations on Top Level Protections afforded to the IOC and Red Cross are intended to apply for all future rounds, but are subject to review by the ICANN community as necessary.

The recommendations were posted for public comment on 2 March 2012, at http://www.icann.org/en/news/public-comment/ioc-rcrc-proposal-02mar12-en.htm. The specific recommendations are available at http://gnso.icann.org/issues/ioc-rcrc-proposal-02mar12-en.pdf.

At the GNSO Council Meeting on 26 March 2012, the GNSO Council approved the recommendations, including a recommendation that the Board consider these protections for inclusion in the first application round of the New gTLD Program, then scheduled to close on 12 April 2012. http://gnso.icann.org/meetings/minutes-council-26mar12-en.htm. The motion passed the bicameral GNSO with the following vote count: Contracted Parties House – seven votes in favor (unanimous); Non-Contracted Parties House – seven votes in favor, six abstentions. *Id*.

The Committee, which was formed on 10 April 2012 and is delegated all legal and decision making authority of the Board relating to the New gTLD Program (for the first round of the Program, which commenced in January 2012 and for the related Guidebook that applies to this current round), considered the GNSO Recommendations at its 10 April 2012 meeting. The Committee was provided with a staff recommendation prior to the discussion. After discussion, the Committee followed the staff recommendation, and then passed the following resolution:

> Resolved (2012.04.10.NG4), the New gTLD Program Committee acknowledges receipt of the GNSO's recommendation on extending certain protections to the Red Cross/Red Crescent and the International Olympic Committee names at the top level.

> Resolved (2012.04.10.NG5), the New gTLD Program Committee chooses to not change the Applicant Guidebook at this time.

http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-10apr12-en.htm. The rationale for that decision (the "Rationale"), published in a Preliminary Report on 20 April 2012, states:

> *The Committee thanks the GNSO for its work to date on this issue. While the recommendations of the GNSO are well taken, changing the Applicant Guidebook at this time must be balanced against ICANN's commitment to accountability and transparency. The public comment "reply" period remains open on this topic through 14 April 2012, therefore any Committee action at this time – other than maintaining the status quo – could not reflect all of the inputs received on this issue. The comments received to date also demonstrate the existence of opposition to the adoption of the recommendations.*
>
> *Implementation details have not been worked out to address these recommendations. In addition, a change of this nature to the Applicant Guidebook nearly three months into the application window – and after the date allowed for registration in the system – could change the basis of the application decisions made by entities interested in the New gTLD Program.*
>
> *Comments received in the public comment forum also raise procedural issues with these recommendations that indicate concerns with the multi-stakeholder process utilized in this instance. While the Committee is not making a determination at this time about these procedural concerns, their existence also weighs towards maintaining the status quo at this time.*
>
> *The status quo is that the Applicant Guidebook already provides several other protections available to the IOC and Red Cross for the top level, including a moratorium on the delegation of certain names at the top level in the first round of applications; an objection process which allows parties with standing to submit an objection on the grounds that an application infringes its existing legal rights; and the GAC Early Warning and Advice Processes. As protections already exist, when balanced with the accountability and operational issues posed by changing the Applicant Guidebook at this time, the public interest will be better served by maintaining the status quo. This action is not expected to have an impact on resources, nor is it expected to have an impact on the security or the stability of the DNS.*
>
> *Nothing in the Committee's action or this rationale is intended to preclude the consideration of the GNSO recommendations for future rounds of applications within the New gTLD Program.*

On 10 May 2012, the IOC submitted its Request.

III. Stated Grounds For The Request.

The Request is brought on multiple grounds:

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- Changed circumstances (closure of the public comment period and that the first round application window is "still open")

- Existence of opposition is not sufficient rationale to reject GNSO recommendation

- Time exists to work out implementation details

- Applicants were already on notice that further protections were under consideration and the Applicant Guidebook is subject to change

- Unique status of the legal protections afforded to the IOC and Red Cross supports providing further protections

For each of the grounds, the IOC identifies information that it claims the Committee did not consider in making its decision. The IOC relies upon the Rationale to support each of its grounds for making this Request.

### 1.	Changed Circumstances – Public Comment Closure and TAS Glitch

Public Comment Reply Period. On factor in the Committee's decision not to change the Guidebook at that time was that the public comment period would not be closed for four more days. The Committee noted that any action taken prior to the closing of the comment period could not reflect all inputs on the issue. In its Request, the IOC notes that the reply period of the public comment cycle is now closed, and, further, that "there were no substantive comments in opposition to the proposal that were not fully considered before the GNSO passed the motion." As the reply date has now past, the IOC argues, "this rationale [about the closing date of the public comment reply period] no longer supports the [] Committee's action."

TAS. In addition, following the Committee's decision on 10 April 2012, the first application round was delayed due to a glitch in the TLD Application System ("TAS"). The IOC claims that this unforeseen delay due to the glitch in the TAS "fortuitously provides the Committee with the time and opportunity to reconsider the GNSO Recommendations."

### 2.	Opposition Comments Not Sufficient Rationale

In its Request, the IOC states "there were no substantive comments in opposition to the proposal that were not fully considered before the GNSO Council passed the motion." According to the IOC, all comments were heard and considered by the Drafting Team and GNSO Council, and yet the Council still approved the recommendations by a majority vote. The IOC therefore argues that the "Committee did not consider that recommendations do not have to be universally accepted to be approved by ICANN. The existence of some opposition to the adoption of the GAC and GNSO Recommendation is not a sufficient rationale for rejecting them."

### 3.	Time Exists to Work out Implementation Details

In its Request, the IOC states that the "Committee did not consider that the GNSO Recommendations can be implemented by the string similarity panels" already outlined in the

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Guidebook, and that there is "ample time to work out the implementation details before the evaluation period begins." The IOC notes that items such as the Trademark Clearinghouse and the Uniform Rapid Suspension System are still undergoing implementation work, so not having full implementation details "is not a sufficient rationale for rejecting the GNSO Recommendations." Further, the IOC states that the extension of the application window provides more time to create implementation details.

4.   **Applicants Were Already On Notice That Further Protections Were Under Consideration and The Applicant Guidebook is Subject To Change**

In response to the portion of the Rationale stating *"a change of this nature to the Applicant Guidebook nearly three months into the application window – and after the date allowed for registration in the system – could change the basis of the application decisions made by entities interested in the New gTLD Program,"* the IOC states that the "Committee did not consider that applicants were placed on notice of the contemplated protection of the Olympics words well before the application window opened." In addition, the IOC argues that the 14 September 2011 GAC letter was published and the work of the Drafting Team was initiated prior to the application window opening, and the discussion of the scope of protections was publicly available. The IOC claims that "[n]o diligent applicant could have made good-faith decisions based on the assumption that there would be no string similarity review for the marks protected in Section 2.2.1.2.3 of the Applicant Guidebook." Further, the IOC states that "all applicants' proposed contracts with ICANN are already subject to existing national law, which provides strong protection to the Olympic words…. [A]pplicants could not make decisions based on standards lower than the GNSO Recommendations."

The IOC also states that because the Guidebook is subject to change, the Committee's action to not change the Guidebook at this time cannot be supported. The IOC notes that the GAC requested a change to the Guidebook regarding the provision of GAC advice on sensitive and controversial strings, and it is "incongruous" to allow this change but refuse the GAC-supported GNSO Recommendations at this time.

5.   **Unique Status of the Legal Protections Afforded to the IOC and Red Cross Supports Providing Further Protections**

The IOC states that Committee's decision to rely on the status quo, i.e., the protections already existing within the Guidebook including the moratorium on the delegation of certain IOC and Red Cross names at the top level, (GAC Early Warning and Advice Processes, and other objection mechanisms) did not take into consideration "the unique status of the legal protections afforded to the IOC." That the IOC may have to use the trademark rights protection mechanisms provided for in the Guidebook does "not reflect the spirit and intent of the sui generis national laws that protect Olympic names." According to the IOC, the Board's previous approval of the moratorium "acknowledges that the Olympic names are entitled to special protection, but is not fully aligned" with the protections afforded to the Olympics through national legislation. The IOC claims that the 20 June 2011 request "entrust[ed] to the GAC and GNSO the issue of implementing proper standards for protection" of the Olympic names, and the GNSO Recommendations were formulated accordingly.

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The IOC argues that the GNSO Recommendations would bring the Guidebook more closely in line with national legal standards and avert "improper" applications for Olympic names without requiring the "prolonged and expensive legal proceedings that would otherwise be required." Such proceedings would "divert funding, time and attention from the unique Olympic global humanitarian mission."

IV.   Alleged Harms if Reconsideration Not Granted.

The IOC claims that if the Committee action is not reconsidered, and the GNSO Recommendations are not adopted at this time and incorporated into the Guidebook, the IOC and its National Olympic Committees would be subject to "costly and burdensome legal proceedings that, as a matter of law, they should not have to rely upon. By subjecting the IOC to costly and burdensome Legal Rights Objections, the [] Committee diverts resources away from the fulfillment of this unique, international humanitarian mission."

The IOC also suggests that applicants may attempt to apply for IOC-related strings in ways that may violate national law, and the adoption of the GNSO Recommendations would allow for applicants to avoid "costly legal proceedings." In addition, the IOC states that the Committee's action ignores GAC advice, which "may add fuel to the fire of governments advocating for greater control over internet governance."

V.   Analysis of the Request.

It is the opinion of the BGC[1] that the Request fails to state any grounds that support reconsideration of the Committee's 10 April 2012 decision. Accordingly, the BGC recommends that the Request be denied and that the decision on 10 April 2012 not be reconsidered.

As a preliminary matter, it is important to note that the Committee decision not to adopt the GNSO Recommendations "at this time" allows the Committee to review its decision on this issue as it deems appropriate. Indeed, the Rationale specifically notes that the Committee's decision does not preclude consideration of this issue in future rounds. Based upon the language used by the Committee, this action cannot be cast as a rejection of the GNSO Recommendations, but rather noting that the action was not ripe as of 10 April 2012. The IOC's Request does not controvert this timing issue; in fact, the Request is based in large part on "fortuitous" happenings after the 10 April 2012 decision.

Substantively, the IOC has not identified any material information that was in existence at the time of the Committee's action that the Committee failed to consider. To the extent that the IOC's Request is based upon the fact that the public comment period on the GNSO Recommendations is now closed, or that the application window for the first round of applications in the New gTLD Program was extended, neither of those occurrences was in existence on 10 April 2012 when the Committee made its decision. The IOC's Request acknowledges this to be the case. Information that does not yet exist at the time of the action is not "material information" for the purposes of the Reconsideration process.

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[1] BGC members that have been identified as having a conflict of interest in relation to the New gTLD Program did not take part in the discussion or deliberation on this Recommendation.

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Many of the additional grounds stated in the Request, though phrased as information not "considered" by the Committee, are in fact requests for the Committee to re-weigh the factors it already considered when taking the action.

The IOC's assertion that the existence of opposition is not a sufficient rationale for rejecting the GNSO Recommendations does not identify any material information that the Committee failed to consider in making its decision and thus does not support a request for reconsideration pursuant to ICANN's Bylaws. Instead, the IOC purports to impose a new standard on the ICANN Board, namely that if one of the ICANN Supporting Organizations or Advisory Committees presents a recommendation to the Board based upon majority support, the Board must adopt that recommendation, regardless of whether there is opposition.

Clearly, recommendations do not have to be universally accepted prior to adoption by the Board. However, even where a Supporting Organization's recommendation was universally accepted (which is not the case here), the ICANN Board is duty bound to act in the best interests of ICANN when deciding to implement a recommendation. At times this can mean rejection of recommendations, or, as in this case, a decision to not immediately act on a recommendation. Even when the opposition raised during a public comment period is similar to opposition raised before a Supporting Organization's approval of a recommendation, the Supporting Organization's decision-making process does not replace the Board's obligation to act as it determines, utilizing its judgment, to be in the best interests of ICANN.[2]

The IOC's other stated grounds in support of its Request similarly do not identify material information that was not before the Board, and do not support reconsideration here:

- While the IOC provides specific (and yet incomplete) implementation options that the Committee could have considered, the IOC also notes that there "is ample time to work out the implementation details." This statement by the IOC belies its assertion that implementation details existed and were not considered by the Committee. Instead, it makes clear that the IOC would have liked for the Committee to accept the GNSO Recommendations while directing implementation work to proceed.

- That potential applicants could have been on notice of changes to the Guidebook or the specific protections contemplated in the GNSO Drafting Team discussions does not identify material information not considered by the Committee. The Committee was clearly aware of the ability to modify the Guidebook; without that consideration, the decision to "not change the Applicant Guidebook at this time" is meaningless. Moreover, the IOC ignores the material information considered by the Committee on the effect of a change – *i.e.,* that no new applicants could register to submit an application in the first round, after determining how the proposed protections may inform their business choices. The IOC is instead seeking to have the information re-weighed based on the assertions that potential

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[2] Similarly, the 20 June 2011 request for policy advice that gave rise to the GNSO Recommendations did not comprise a complete "entrust[ment] to the GAC and the GNSO [on] the issue of implementing proper standards for the protection of the Olympic and Red Cross names" as claimed by the IOC.

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applicants should have followed the GNSO Drafting Team discussions to anticipate protections that may be incorporated for the first round, including the creation of a new class of "Modified Reserved Names," seeking non-objection letters, and demonstrating use. The IOC does not put forward material information; it puts forward conjecture. Similarly, the IOC believes that because ICANN will revise Guidebook language on the GAC Advice process based on requested changes by the GAC, that other Guidebook changes – no matter how substantive – are appropriate at this time. This is argument, not identification of material information that the Committee purportedly failed to consider.[3]

- The IOC's assertion that the Committee failed to consider the unique status of the legal protections afforded to the IOC is not accurate. The unique status of the IOC has long been a material factor when considering the availability of heightened protections within the New gTLD Program and there is nothing in the Committee's decision to suggest that the IOC's status was not considered here. The initial GAC advice on this topic provided confirmation of the unique status of the IOC (and the Red Cross), and the Board recognized that unique status in adopting the moratorium for the first round of applications. In its 10 April 2012 Rationale, the Committee acknowledged that the moratorium was in place for the IOC and the Red Cross, as well as the ability to consider the GNSO Recommendations for future application rounds in the New gTLD Program. Though the IOC may not believe that the Committee gave *sufficient* consideration to the IOC's unique status on 10 April 2012, that the IOC wishes for this to be re-weighed by the Committee is not a grounds for reconsideration.[4]

VI.   Recommendation.

Based on the foregoing, it is our opinion that the IOC has not stated proper grounds for reconsideration, and the BGC therefore recommends that the New gTLD Program Committee deny the IOC's Request and not proceed with further consideration of the Request.

Though reconsideration is not proper in this instance, the BGC notes the use of the phrase "at this time" in the 10 April 2012 decision. As a matter of fairness, the BGC invites the New gTLD Program Committee to evaluate whether its decision on the GNSO Recommendations relating to the IOC is now ripe for determination given that the public comment period on the recommendations has now closed.

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[3] The IOC notes that applicants "could not make decision based on standards lower than the GNSO Recommendations" because of the strength of national laws protecting Olympic words. This statement suggests that applicants should already behave in the manner contemplated in the GNSO Recommendations, which negates the need for immediate action by the Committee in any event.

[4] The IOC notes that it may have to resort to "costly, time-consuming legal proceedings" to protect against potential applications that it finds objectionable. However, the GNSO Recommendations would not erase the probability that the IOC may still have to resort to the available objection procedures over applications it finds objectionable.

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