20 January 2023

Re: GNSO Council Review and Input for the SubPro Operational Design Assessment (ODA)

To: Tripti Sinha, Chair, ICANN Board

Dear Tripti,

The GNSO Council appreciates the opportunity to provide its input regarding the SubPro Operational Design Assessment (ODA). While the GNSO Council saw it as a priority to provide feedback on the ODA to support the ICANN Board's workshops taking place from 19-22 January 2023, the Council plans to continue to review the ODA in detail and provide additional input that may arise.

First and foremost, the Council appreciates the thoughtful and detailed work of ICANN org staff in evaluating the operational implications of the Subsequent Procedures (SubPro) PDP Outputs and in developing the resultant ODA. In that respect, the Council very much welcomes the determinations that "a majority of the SubPro Final Report outputs are implementable and can be embodied in the New gTLD Program", that "the SubPro Final Report outputs encompass mechanisms to support diversity, predictability, and innovation" and that "the Global Public Interest (GPI) was central to the discussions involved in this Policy Development Process (PDP)". **It is a Council priority to have the ICANN Board adopt the SubPro PDP outputs and proceed towards implementation in an expeditious manner**; and understanding that the vast majority of the Outputs are implementable is therefore very much welcomed. The Council can be counted on as a willing partner to support efforts as needed to facilitate this priority. Accordingly, the GNSO Council encourages the ICANN Board to adopt the New gTLD Subsequent Procedures Final Report as soon as practicable and that an Implementation Review Team be instituted quickly.

On a principle level, the Council believes that the manner of implementation of the Outputs, whether this should be by "Option 1", "Option 2" or something in between, should primarily be a matter for the Implementation Review Team (IRT), albeit that the Board's direction, having reviewed the ODA, will be extremely important. Assuming that the Board does indeed approve the SubPro Outputs, that IRT should be convened as soon as possible so as to start working through these issues.

Attached is a preliminary issues statement put together by the Council's Small Team which reviewed the ODA. Please note as well that in light of the relatively short turnaround time to provide initial feedback to the ICANN Board, the input provided herein did not receive any formal adoption (i.e., Council vote). We hope that these initial thoughts from the Small Team might prove useful to the Board, but should not be considered a basis to slow the adoption of the SubPro PDP outputs sent to the Board by Council nor cause delay in establishing the IRT which will be in a position to more fully consider the best way forward in light of the various options and variables found in the ODA.

We would again like to share our appreciation for the tremendous amount of careful analysis conducted by the SubPro ODP Team.

Sebastien Ducos
GNSO Chair

Small Team Preliminary Issues Statement

The Small Team was unable to substantially differentiate Options 1 and 2 and their impact on the overall new gTLD program - from an external perspective, Options 1 and 2 are nearly identical. Although, under Option 2, ICANN would only "process" 450 applications in the first cycle, the Small Team believes that the bulk of the applications will come in that first cycle. Thus, if there is a projected demand of 2,000 applications, most, if not all of them will come in the first cycle regardless of what ICANN org internally designs. While Option 2 calls for ICANN to open the second "cycle" a year later, given past history, previous delays, and general lack of confidence that a second cycle will occur when scheduled, together with a general concern not to be at the back of the queue behind all of the unprocessed applications from the first application cycle, those that want new gTLDs will not wait and take a chance. Therefore, the only differences that the Small Team was able to discern are purely internal, in how ICANN org goes about building the systems to support the different options which we understand leads to (or allows for) an overall condensed implementation timeline for Option 2.

While the Small Team identified specific issues with Option 2, it is perhaps more important to note the issues with Option 1, which is the primary output of the ODA. In reviewing the ODA and Option 1, there is an impression that the program design is based on a model of building the "perfect" state-of-the-art system which attempts to automate every single function, relying on in-house resources and seemingly building from scratch. The result, therefore, is a program that appears overly complex, time and resource intensive, and much more expensive than is necessary. The Small Team would presume that while existing systems from 2012 are not usable, at a minimum existing know-how and lessons learned (and the general approach of outsourcing or buying-in and adapting systems) would seem to help avoid the cost and delay of starting from scratch.

Although a number of the risks set forth by ICANN org seem to be the right ones (for example, the risk of not being able to recover system costs since there is a lack of certainty about volume of applications), they have been exacerbated, and to some extent even caused, by the desire to create this state-of-the-art system. **Thus, it is the belief of the Small Team that the need to even have an "Option 2" was brought about as a result of the overly aggressive ODA design.** Because the program design for "Option 1" and its resultant challenges are the reason for exploring alternatives, it is imperative that the adopted build-out, that drives costs, timeline, and risk, holds up to scrutiny (i.e., what is necessary to support the program versus a wish list).

The Small Team recognizes that it does not have all information needed to fully assess the validity of the program design, as details required to do so are not provided in the ODA itself, and the design of which centers around presumptions by the ODP Team as opposed to actual data. Nevertheless, the Small Team's view is that the design can likely be simplified, thus minimizing the risks identified (and which resulted in the exploration of Option 2). For instance, in using customizable existing software and platforms, as opposed to building in-house and from scratch, the result would likely not be as

complex or expensive.

While the Small Team had difficulty in discerning the fundamental differences between Options 1 and 2, it did appreciate the more measured program development approach of Option 2, of limiting systems development and relying on more manual processes/procedures. However, it was unclear why such an approach cannot be utilized for Option 1. Doing so would seem to have the benefit of mitigating the challenges identified for Option 1 without potentially compromising consistency with the SubPro Final Report.

Lastly, while Small Team does not have all the information needed to fully assess the financial assumptions and modeling used, we are aware of substantial community surprise and dissatisfaction at a proposed application fee which is significantly higher than in the previous round, given the efficiencies built into the SubPro Final Report, including the use of an RSP Pre-Evaluation program, allowing for the technical review of each back-end registry once as opposed to the same review being conducted hundreds of times as in the previous round.

It appears that, rather than viewing future rounds as an ongoing process, the ODA bases its financial projections on only a single "round", whether that is a single window with 2000 applications under Option 1 or four annual application windows totaling 2000 applications under Option 2. According to the ODA, all costs of the program implementation and system build are sought to be recovered from those first 2000 applicants, even though applicants in subsequent rounds would also utilize the systems. This puts applicants in the next round at a significant financial disadvantage over those in any later rounds and unfairly discriminates against them. The Small Team would like to point the Board to the *Rationale for Affirmations with Modification 15.3 and 15.4 and Implementation Guidance 15.5 and 15.6* which states, "ICANN org may want to consider how these costs should be applied in calculating cost recovery and whether the costs should be spread over multiple rounds in the cost recovery calculation."[1] The Small Team recognizes similar discussions were held in developing the 2012 round but nevertheless believes that this issue is worth revisiting.

In conclusion, measures such as the proposed RSP pre-evaluation (dealt with in more detail in the Appendix), to be funded by the RSP applicants, were intended to streamline application evaluation and reduce duplication of effort, thereby driving cost-savings. In reviewing the ODA, the Small Team's impression is that the complexity, cost, timeline, and risks appear to be driven at least in part by design choices (e.g., building of bespoke systems, automating as much as possible). And because the program is required to be revenue neutral, the design choices that seemingly result in the high costs to implement and run the program, lead to what the Small Team believes are unfortunately high estimated application fees.

Therefore, the Small Team encourages the ICANN Board and ICANN org to further consider what is

[1] See SubPro Final Report, page 68: https://gnso.icann.org/sites/default/files/file/field-file-attach/final-report-newgtld-subsequent-procedures-pdp-02feb21-en.pdf

necessary to implement and operate the program as opposed to striving for "perfection". The Small Team stands ready to take part in any ensuing dialogue.

While this letter concentrates on the high-level conclusions from reviewing the ODA, the Small Team encourages the ICANN Board to review the topical input captured in the Appendix. SMALL TEAM ON SUBPRO ODA

Respectfully submitted,

GNSO Council Small Team (Anne Aikman-Scalese, Jeff Neuman, Justine Chiu, Susan Payne, Thomas Rickert)

Appendix 1: Topic Related Questions / Comments

General Comments on "Option 2"

In addition to the input noted in the main body of the letter above, the Small Team is concerned about alternative implementation mechanisms for the next round(s) which represent a significant deviation from prior practice, unless those deviations are set forth in the Final SubPro Report or otherwise agreed upon through the appropriate processes within the GNSO.

In the ODA, ICANN org recognizes that its proposal for "Option 2" provide "only an initial overview of areas in relation to the Final Report" and that it would need to "perform a detailed review of all SubPro Final Report outputs to identify any other areas that may not be consistent with the outputs to inform further discussion".

The Small Team is concerned that ICANN Org will unilaterally be determining which policies, recommendations, and implementation guidance need to be sacrificed, through a process outside of the GNSO working group. For example, ICANN's limitation of processing 450 applications per year, the prioritization of applications without string contention and other elements in "Option 2" are concerning to the GNSO and the community, which worked diligently over the past six years to come up with consensus recommendations. Spending additional time on coming up with ways to further "streamline" the process will not only cause its own delay but will put ICANN org in the position of establishing policy outside the Bylaws-mandated policy development processes. In addition, the Final Report represents a complex set of interwoven recommendations and implementation guidance, departure from which could easily lead to unintended consequences, from material changes to the program to discrete elements of the SubPro recommendations.

Topic 6 – RSP Pre-Evaluation

The Small Team is disappointed at the lack of focus by ICANN Org on the RSP pre-evaluation process and the many benefits it could have, including the drastic reduction of evaluation costs for all applicants. There is no discussion for example about how ICANN org already has a team (and external evaluators) in place to perform a similar evaluation when there is a change of back-end registry service provider (RSP). The costs for those evaluations are well known and are significantly less expensive than ICANN org has considered in the ODA. In effect, the basis of the RSP pre-evaluation program already exists and does not need to be re-engineered.

In addition, a number of other considerations were not reflected in the ODA report as indicated in the SubPro Final Report:
- The evaluation would only have to be done once on a particular provider regardless of the number of applications it supports, unless an applicant were to propose a new technical registry service.

- The evaluation costs are to be borne not by the gTLD applicant, but rather by the RSP seeking the pre-evaluation. This will reduce the cost of each application significantly if they have selected a pre-evaluated RSP.
- Thousands of clarifying questions were sent out to applicants during the 2012 round regarding the technical evaluation. If an RSP supported hundreds of applications, the RSP received the same question hundreds of times and had to answer those questions hundreds of times (since each application required its own answer). Not only would RSP pre-evaluation resolve such clarifying questions regarding technical evaluations prior to the application acceptance period, but it would avoid extensive duplication of effort for the evaluators (and applicants), thereby reducing cost.
- Having this program would also reduce a significant amount of risk for ICANN org by leading to more consistent results, as well as overall efficiency.

On page 366 of the ODA, it states that the RSP Pre-evaluation Program was "envisioned to require more than three years to develop and begin operations 18 months before the opening of the application Submission Window". This timeline is not from the SubPro Final Report. In addition, this seems excessive, both because an RSP Pre-Evaluation process is a natural extension of what ICANN does today (see comments above) and because the known universe of RSPs is currently only approximately 40[2]. Even if that number were to double (which seems highly unlikely based on experiences from the 2012 round), this would still only equate to approximately 80 RSPs requiring evaluation.

Topic 17 – Applicant Support -

Given the emphasis on the communications plan to generate more interest and applications for Applicant Support, the estimated USD$2 million seems like too small a sum. The estimated allocation may potentially need to also cover the auction bid credit/multiplier for qualified Applicant Support candidates that participate in ICANN auctions of last resort, furthering concerns about the level of funding.

Topic 18 - Terms and Conditions

ICANN org implies that the PDP WG did not address the Board's concerns in the Recommendation that the Terms and Conditions "must only contain a covenant not to sue if, and only if, the appeals/challenge mechanisms set forth under Topic 32 of this report are introduced into the program…" This is incorrect.

The ICANN Board was concerned that the Recommendation could be interpreted as allowing dissatisfied applicants or objectors to argue that the covenant not to sue was invalid because they did

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[2] ODA Appendix 15 p319

not like the way the appeals/challenge mechanism was built or operated, or that it did not precisely match every element of Implementation Guidance. The PDP WG did in fact discuss these comments and did not agree that this was a reasonable interpretation of the Recommendation. The purpose of the Recommendation was to provide applicants with some sort of redress and accountability for erroneous decisions by evaluators and ICANN org. If there is an Appeals/Challenge process built into the program, then there is no objection to having a covenant not to sue. If there is not an Appeals/Challenge mechanism built into the program, then it would be unfair and unconscionable to also have a covenant not to sue. The PDP WG concluded that the Recommendation is not subjective (as feared by the Board), but rather black and white. The Recommendation intentionally does not include subjective terms such as "an effective appeals process" or "a reasonable appeals process", etc. But rather "Is there an appeals process that covers the situations in Topic 32?" If the answer is "yes", then there is no issue with the covenant not to sue.

Topic 20: Application Change Requests

On page 153 of the ODA, ICANN org suggests allowing all applicants in contention to change their strings, not just .Brand TLDs. ICANN org's stated goal for this proposed change is "to reduce contention sets in a manner that is consistent with the intent of the (SubPro) outputs and that does not disrupt the entire program". The Small Team disagrees with this assertion because:

- The SubPro PDP WG discussed this option specifically and did not endorse such a proposal for all applicants to amend their strings.The agreed policy was limited to just .Brand TLDs for the reasons set up in the SubPro report, and so ICANN Org is proposing new policy which was NOT adopted by a PDP and inconsistent with the intent of the SubPro PDP WG;
- The criteria applied to .Brand TLDs is dependent on trademark registrations and descriptive words used with that registration. Trademark registration forms the starting basis of any justification for a change of string request to a .Brand application, which is absent in applications for non-brand strings. It is hard to envision other non-brand applications that would have valid trademarks matching applied for strings yet applying as an "open non-brand" TLD. It is possible, but such an edge case that would not be worth engineering for.
- Reduction of contention sets is not necessarily a desired goal; contention sets could be regarded as a data point to support competition. Instead, having sufficient contention set resolution mechanisms should be the goal to strive for - evaluations (and challenges), objections (and appeals), self-resolution, CPE, auctions - and these are the mechanisms which we should strive to improve in order to draw litigious applicants away from relying on the Accountability Mechanisms.

Topic 32: Limited Challenges / Appeals Mechanism

ICANN Org states that "Extending a limited challenge / appeal mechanism to cover evaluation decisions made by ICANN or third-party providers may cause unnecessary cost and delay, given the availability and purpose of Extended Evaluation." This concern was discussed during the SubPro PDP. The issue for PDP WG members and the reason for allowing Challenges to evaluation decisions was that it was always unclear as to whether those performing the extended evaluations were the same as those persons that made the initial decision. If that was the case, as we believed it to be, then this would not meet the requirements of the policy recommendation for a challenge process by someone other than the original decision maker.

ICANN org also states: "An additional concern with the scope of a limited challenge/appeal mechanism concerns the breadth of who would have standing to file a challenge/appeal. The broad scope of parties who are recommended in the Final Report to have standing could potentially open the door to gaming/manipulating the process." The PDP WG discussed this as well and believed this could be handled through a Dispute Resolution Service Provider by consolidating all appeals to be heard at once, or through other mechanisms that can be discussed by the IRT.

The PDP WG also discussed the concerns expressed by ICANN Org in Consideration numbers 4 and 5 (pages 173-174 of the OD) and believed these too could be easily addressed through the IRT. The Small Team encourages ICANN org to read the full record to see how those concerns were addressed.

Topic 34. Community Applications

ICANN org writes at page 29: "ICANN org has noted concerns related to CPE in the 2012 round and that the SubPro Final Report outputs do not address these concerns, including concerns related to significant costs, delays and uncertainty related to legal challenges and accountability issues. Then on page 179, ICANN org writes: "As indicated in the Issues section, there are continued concerns that the SubPro Final Report outputs will not sufficiently mitigate the risks of CPE, as experienced in 2012. These include: lack of understanding about the objectives of CPE; avoiding gaming and misuse of CPE; perceptions of inconsistent evaluation results; an evaluation process misaligned with the diversity of communities; and legal liabilities associated with conducting CPE. While the SubPro Final Report offers some improvements, ICANN org proposes exploring additional improvements to mitigate remaining concerns with CPE."

The improvements offered in the SubPro Final Report in respect of CPE were quite significant, the implications of which perhaps can only be appreciated during implementation when the CPE Process is updated for Subsequent Procedures. It is also important to note that the Board's input of 30 September 2020, referenced in the ODA at the bottom of page 178, is in respect of the SubPro Draft Final Report of 21 September 2020 whereas much of the recommendations and implementation guidance related to CPE were formulated after this SubPro Draft Final Report was published for public comment.[3]

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[3] Compare the SubPro Draft Final Report of 21 Sep 2020 at pages 311-312 with the SubPro Final Report of 2 Feb 2021 at pages 294-299

Therefore, while concerns related to costs and delays are matters falling under implementation, the SubPro Outputs for Topic 34 go a long way towards addressing the complaints arising during the 2012 round, which had led to the lengthy Accountability Mechanism proceedings filed by Community-based applicants that opted for CPE.

While ICANN Org is encouraged to explore the additional improvements that have been highlighted in Table A5-5 at page 179 of the ODA, the suggestion of exploring opportunities for string changes as a mechanism for reducing the quantity of evaluations and contentions is not one that is endorsed by the SubPro WG (see comments for Topic 20: Application Change Requests above).