New gTLD Subsequent Procedures PDP Working Group Initial Report
Comments from Jamie Baxter of dotgay LLC

2.3.c.2: ICANN should be more explicit in the Applicant Guidebook on how public comments are to be utilized or taken into account by the relevant evaluators, panels, etc. and to what extent different types of comments will or will not impact scoring. In addition, to the extent that public comments are to be taken into account by the evaluators, panels, etc., applicants must have an opportunity to respond to those comments.

dotgay LLC fully supports this recommendation.

2.3.e.1: The Working Group has noted that while there was a cutoff for application comments to be considered by evaluators, the cutoff for Community Priority Evaluation was far later in the process, allowing for a much longer period of time for comments to be received for this evaluation element. The longer period of time allowed was due to the timing of CPE (i.e., only after program elements like Initial Evaluation, Extended Evaluation, and objections conclude). Is this, or other factors, valid reasoning and/or fair to have the comment period for CPE extend longer than for Initial Evaluation? Do you believe it makes sense to shorten this particular application comment period, perhaps just having it run in parallel to the Initial Evaluation comment period?

We fully support public comment on all applications, but subsequent procedures must ensure fairness and equity among all application types when accepting and considering public comments. There was not equity or fairness in the 2012 round.

We believe there should be a consistent and equal length of time for public comments that open and conclude at the same time, applicable to all applications and application types. The public comment period should in no way, or for any reason, extend beyond the point when the first application in a subsequent procedure has completed Initial Evaluation. This ensures that all applications receive equal time for public comment, without disadvantaging or further scrutinizing any particular application or application type simply because of when their Initial Evaluation is scheduled or because they are required to participate in additional evaluations within the new gTLD program.

This can be accomplished by simply disabling the public comment website so that no further submissions are accepted.

We further believe that "letters of opposition" should be considered a form of public comment and should adhere to the same submission deadlines. It is unclear why in the 2012 round ICANN allowed community organizations additional time to register their comments (in this case opposition) against Community Applications, even accepting

such comments years after the public comment period was closed. This has merely introduced a new gaming opportunity for competitive interests to pursue late in the application review process, providing them additional time to isolate and influence a community organization(s) against a Community Application.

If community opposition exists against a Community Application, and the opposition does not intend to participate in a Community Objection, then it should be required that the expressed opposition be registered during the public comment period in the form of a letter of opposition. This will add to the transparency and legitimacy of the opposition going into Community Priority Evaluations, and lessen the ability and impact of gaming from competitive interests.

2.3.e.2: In the 2012 round, applicants were given the opportunity through Clarifying Questions to respond to comments that might impact scoring. From one perspective, this may have reduced the incentive for applicants to respond to all input received through the public forum, including comments that may be perceived as negative. Do you consider this an issue that needs to be addressed? If so, what measures do you propose in response to this problem?

We disagree with the assertion that applicants were given the chance to respond to comments that might impact scoring, especially in Community Priority Evaluations. In our experience, no Clarifying Questions were issued despite a point in Criteria #4 being withheld because of a single letter of opposition, which we categorically believe fits the definition of a public comment and was logged in the public forum years after the pubic comment period had technically closed.

We believe that without concluding that letters of opposition are a form of public comment, and without setting clear parameters for accepting public comment, it will be impossible for evaluators to understand their requirement to issue Clarifying Questions when scoring could be impacted in CPE. Letters of opposition must be included in the definition of public comments, and they must follow all applicable rules and submission deadlines for public comments as we have previously stated in 2.3.e.1 above.

2.3.e.3: If there is a application comment period prior to evaluations, should applicants be given a certain amount of time to respond to the public comments prior to the consideration of those comments. For example, if there is a 60-day public comment period, should an additional time period of 7-10 days be added solely for the purpose of providing an opportunity for applicants to respond to the comments if they so choose?

We could support this suggestion. I think that many applicants believed some public comments didn't warrant or require a dignified response due to the inaccuracy, irrelevance or misguided nature of the comment, believing that due diligence on behalf of the evaluator would sort through the facts and mistruths. If the standard going forward is that due diligence by the evaluator(s) is not to be assumed, and that it is the applicants responsibility (not the evaluators) to clarify or defend even the most frivolous and/or outrageous of comments to avoid evaluator(s) shortcoming, then the additional time will be necessary for applicants to submit formal responses.

2.4.e.1.3: For the limited ability to change the applied-for string, what do you believe should be the criteria in considering such requests? Are there examples of where a change of an applied-for string should NOT be approved?

We believe that any applied-for string change should not be allowed to create new or further contention within the subsequent procedure, or be exempt from any objection procedure challenge that may result from the change.

All parties in the contention set that participate in the applied-for string change(s) must agree to the string change(s) that help avoid contention, and they must also agree not to file any opposition or objection to the changed strings. Objection filings resulting from the string change from within the original contention set could be perceived as a form of gaming to avoid contention, designed to eliminate potential competition.

The change opportunity within a subsequent procedure should be limited to a single confirmed change, and the newly chosen string must have a connection to the original string or stated mission. Any string change resulting from an attempt to resolve string contention should not be used as an opportunity to secure any available string, or reposition the applicant's stated purpose for the string.