3.1.5 ***Are you aware of any instances where any party or parties attempted to 'game' the Objection procedures in the 2012 round? If so, please provide examples and any evidence you may have available.***

A form of gaming that attempted to take place was an effort to force a community applicant into a Community Objection when achieving "standing" for the objector was a known impossibility due to deceptive representation. The purpose for objecting appears to be related to financially burdening dotgay LLC (dotgay) and projecting fake opposition to a community-based application for .GAY.

Both community objections against dotgay came from the same network of political organizations in the USA, one claiming to represent the national organization and one from an affiliate member organization in Dallas. The contents of each objection were similar and in many cases verbatim in wording. Having two similar objections from two sources knowing of one another is in itself suspect, especially given the potential cost to each to pursue the filings.

Potential impacts to dotgay included paying a non-refundable 5,000 euro administrative fee to the ICC per objection, tying up a deposit of 40,000 plus euros to respond to each objection, as well as creating the false impression that organized community opposition existed against the application. Consolidation of objections was never an ICC guarantee and dotgay is aware of weak excuses that prevented objections from being consolidated, even when near identical.

For community applicants that don't have deep pockets, this form of gaming could knock them out of the new gTLD program. This is especially true given the deposit required for each objection and the fact that all community objections happen simultaneously giving no opportunity to spread out the costs. Some may not be able to front hundreds of thousands of dollars to expose deceptive representation.

This form of gaming went unchecked under the current procedures. No process existed to defend against a spurious objection without first formalizing the objection and making payment to the ICC. To submit a community objection that has no hope of achieving "standing" raises serious questions of gaming, especially given the associated costs the objector (or the party financially supporting them) would be expending on an objection known to be deficient.

Example:

A community objection was filed against dotgay by a person who was fraudulently claiming to represent a community organization called GoProud. By simply writing an organization name on the ICC objection form, the opposing individual fulfilled one of the basic requirements for submitting a community objection (ie. that it come from an organization). There appears to have been no effort made by the ICC to verify truth in this representation at the time of filing.

What did happen however is that the ICC used the info@goproud.org email (noted on the objection) to reach back to the objector to highlight that they had exceeded word count on the objection, asking it be corrected. The objector did not respond in time, later claiming he never received the email. The objector used an AOL email account to file the objection, and in fact never used an @goproud.org email at any point in his attempt to object.

Current procedures call for the objecting organization to be scrutinized for "standing," but only when the panelist is assigned and the evaluation is underway. It is also unclear what actions are taken by the panelist to ensure legitimacy of the person objecting and their link/authority at the organization they claim to represent. The current flaw we identify is that individuals have the ability to use any unknowing organization's name to object and likely have a good chance of at least forcing an applicant into paying a filing fee and deposit in order to respond.

The problem here is that by simply listing an organization on a community objection (whether large, small, significant, insignificant, real, nefarious, legal, fraudulent, etc) it is possible to force a community applicant into responding to an objection. Some standards and criteria should be applied to protect applicants from being gamed in this manner.

Fortunately in our case, the objection was rejected by the ICC because of a rule violation on word length by the objector (or the party that wrote the objection on his behalf). This initiated a series of accountability mechanisms undertaken by the objecting party that provided dotgay ample time to uncover that the GoProud organization had no knowledge their name was being used by the objector. The 5,000 euro filing fee was not paid by GoProud, nor was the individual that paid the filing fee known to the GoProud organization.

Accountability mechanisms were employed by the objector in an attempt to get his objection acknowledged by the ICC. Both the ICANN Ombudsman and ICANN Board separately engaged in efforts to provide opportunity for the objection to be accepted by the ICC, despite the rule violation and despite suspicion of fraud identified by dotgay. The ICC affirmed their prior decision to reject the objection and a Reconsideration Request was filed by the objector.

Requests by dotgay for someone (ICC or ICANN) to simply confirm authenticity of the objection with leadership at GoProud (via phone or email) were ignored by the ICC and by ICANN during the Reconsideration Request proceedings. Knowing if the objection was truly from GoProud could have quickly ended the ongoing fraudulent activity.

In the end, all responsibility was left on the community applicant to convince GoProud leadership to submit a written statement to ICANN to end the objection and highlight that GoProud's name was being used without their authority. Having no prior knowledge or involvement with ICANN or the objection in question, the request was quite odd for dotgay to make of GoProud and required extensive time and money to help them understand what was taking place behind their backs. This is something the ICC or ICANN could have addressed quickly through outreach, but both chose not to.

The GoProud statement provided to ICANN noted that the individual who submitted the objection had no authority to represent their organization or use their name on an objection. Eventually the NGPC rejected the objector's Reconsideration Request, in part because of exposure dotgay brought to the situation during accountability mechanism delays. In rejecting it, the NGPC made no mention about the objection being submitted fraudulently; instead choosing only to note that GoProud had "absolved itself from the community objection" instead of a using a more clear statement that GoProud never actually objected in the first place.

Had there not been a rule violation by the objector, dotgay would have been forced into responding to a fraudulent objection in short order. Only because of unforeseen accountability delays did dotgay get provided time to investigate and reveal the fraudulent actions, but if no rule violation had occurred, dotgay would have been required to pay and respond.

It should also be noted that the "free" public comment period on ICANN's website was not used by this individual in advance of fraudulently using GoProud's name to file an objection.

Conclusion:

More needs to be done to prevent this type of gaming, which includes immeasurable impacts of misrepresented opposition (which in our case received wide media coverage) and unnecessary expenses targeted at community applicants. If unchecked, this type of gaming will likely continue, and perhaps become more pervasive in subsequent rounds.

I am happy to share more of the details involved or point the working group to the background documents discussed in this example. Some documents and correspondences are not public because of ICANN or ICC confidentiality rules, however if needed we presume a request could be made to ICANN or the ICC to have them released for review.

Suggestions:

We believe that some preliminary steps should be implemented to screen the source of community objections so as to ensure that organizations listed on the objections are:

1. Legitimate organizations that meet basic requirements for "standing"
2. Aware & approving of the objection – via multiple contacts at the organization, using published and legitimate contact methods for the organization
3. Actively engaged & educated on the opposition and not simply surrogates for purposes of gaming

Taking these simple steps with the filing fee funds of those who filed the opposition could prevent a lot of unnecessary expense to community applicants. If additional cost to determine standing is required then a portion of the deposit could be paid by the objector to cover the

costs of solidifying standing. If standing is achieved then the funds go back into their objection deposit.

By weeding out frivolous and fraudulent objections that have no chance of meeting standing requirements, before ever forcing community applicants to pay a filing fee and respond, would save everyone a lot of time, energy and money. It would also serve as a line of defense against coordinated efforts aimed at financially drowning out community applicants.

3.1.9 ***Many community members have highlighted the high cost of objections. Do you believe that the costs of objections created a negative impact on their usage? If so, do you have suggestions for improving this issue? Are there issues beyond cost that might impact access, by various parties, to objections?***

As suggested above, perhaps creating a better structure to community objections and associated costs is worth a look.

As noted above, for community objections all money was collected from both parties before anyone ever sat down to examine whether "standing" of the objector was even substantiated. Without "standing" there was ultimately no need to dive into the argument of the objection and engage panelists at a higher level, because panelist findings would be a moot point without standing in the current process for upholding objections.

This is especially important to note given that ICANN has told dotgay on multiple occasions that panel decisions in community objections carry no specific weight or precedent in any other contention resolution proceedings that might follow, such as CPE. Given ICANN's view and our own experiences that followed the community objection proceedings, it seems like any community objection decision is worthless outside of the community objection process itself. If standing of the objector cannot be established then it seems there is no legitimate reason to force a panelist to even examine or rule on a community objection that lacks "standing."

Determining "standing" up front also helps prevent any hint of fake or fraudulent opposition against a community application that could be used in the media or other mediums to negatively impact perception or opinion of the community applicant, either within the community or future evaluation processes.

Suggestion:

Given that standing was a key element in community objections, with discernable boundaries, it is a step in the process that could likely be separated from the other criteria under its own cost

structure and stage in the overall community objection process. Let the objector bear the brunt of the fees until it can be established that they are legitimate and with proper standing to object.

In some cases, having a stage for determination on standing as a first step also provides the community applicant with a reasonable amount of time to try and resolve the issues rooted in the opposition being charged in the formal objection, similar to the Cooperative Engagement Process (CEP) currently used at ICANN.

The current process provides little to no opportunity for community applicants to engage or react in good faith to the opposition, or properly educate the objector about the application details to avoid misunderstandings and misrepresentations contained in the objection.

In our case, outreach to parties objecting to dotgay's application was met with silence, leading us to further concerns about the authenticity of the objections. Requiring a period similar to CEP also helps weed out any fake, frivolous or fraudulent objections, and ultimately helps avoid any unnecessary costs.

3.3.2 ***There is a general sentiment amongst many in the community that the CPE process did not provide consistency and predictability in the 2012 round. Do you believe this was the case and if so, do you have examples or evidence of these issues?***

Consistency:

Examples that dotgay would like to share which clearly illustrate inconsistencies in CPE are contained in the Expert Opinion submitted to ICANN by Yale Law Professor William Eskridge.

The report was submitted to ICANN on September 13, 2016 and is posted on the ICANN Correspondence Page. I specifically draw your attention to Section IV, A & B of the report (pages 10-25) however the entire document has great value in highlighting issues with the 2012 version of CPE.

Predictability:

Issues with predictability in CPE were also plentiful from the very beginning; ranging from the CPE evaluation procedures (EIU created their own CPE guidelines after applications were submitted), timeline (2-3 months for CPE turned into over 8 or more for some) and cost ($10,000 fee was inflated to well over $20,000).

Each one of these issues had immeasurable impacts on community applicants that need to be corrected and solidified before subsequent rounds begin. Leaving any elements of the

community applicant process incomplete or communicated clearly before accepting applications should not be acceptable given the challenges it presented in achieving reasonable predictability for applicants in the 2012 round. In retrospect, leaving so many elements of CPE to be developed while the new gTLD program was already in motion was a huge mistake and should never be repeated.

If cost estimates are published in advance then ICANN should also be willing to assume some reasoned burden of those costs should they inflate beyond a reasonable amount before undertaking. Applicants should not be responsible for poorly vetted cost estimates that ICANN receives from possible vendors, without extreme reason and without transparency or community comment.

3.3.3 ***CPE was the one instance in the New gTLD Program where there was an element of a comparative evaluation and as such, there were inherently winners and losers created. Do you believe there is a need for community priority, or a similar mechanism, in subsequent procedures? Do you believe that it can be designed in such a fashion as to produce results that are predictable, consistent, and acceptable to all parties to CPE? The GNSO policy recommendations left the issue of a method for resolving contention for community claimed names to Board and the implementation. Do you believe that a priority evaluation is the right way to handle name contention with community applicants? Should different options be explored? If so which options should be explored and why?***

We believe there is a need for community priority in subsequent rounds and it must be designed in such a fashion as to be more accessible to communities and produce results that are predictable, consistent, and acceptable to all parties to CPE. Included in the list of "parties to CPE" it is imperative to include the interests of community constituents represented in community applications, which appear to have been largely disregarded and ill-considered in the 2012 round.

The CPE process by default decided whether the interests of community constituents supporting an application would matter in the operation of the gTLD (CPE pass) or if they would not matter at all (CPE fail). Passing CPE legitimized community interests, but failing CPE almost certainly added burden to the exact concerns many community application were designed to address if the community was unable to win at auction. To many communities, the cost of auction is in itself too burdensome and not an option.

Going forward there should perhaps be a process that prevents community constituent interests from being tossed out with the bathwater following a failed CPE. Similar to the governmental interest shown in issuing advice for applicants of gTLDs associated with regulated industries (to build trust and avoid abuse), community interests being represented in community endorsed applications should receive similar attention.

Example:

A community applicant undertakes the effort of applying for a gTLD as a result of expressed community concerns about the future operation of a gTLD and the impact it will have on the community. With a long history of being a targeted community and left without recourse from online activities of existing TLDs, the new gTLD program provided the ideal manner in which to establish a safer online space, and ensure that a gTLD linked to the community didn't cause further detriment or marginalization.

In the case of the gay community, there was a legitimate concern that .GAY domains could lead to abusive behavior and false assumption of trust online; issues at the very root of daily challenges for LGBTQIA individuals in the real world.

Through community participation in the operation and policy of .GAY, more tangible guarantees put the LGBTQIA on the front line of any abuse launched on .GAY. On the other hand, having no community participation in .GAY leaves the LGBTQIA vulnerable at best and lacking empowerment (as on existing TLDs). This is especially concerning if Registry Operator interests are primarily focused on profits.

Not recognizing the unique needs of a community that has engaged in the new gTLD program does not feel like it is living up to ICANN commitments of serving the public interest. Public interest must not always be measured in monetary terms, especially when it comes to people's safety and well-being.

Suggestion:

Whether a mechanism is put in place during CPE (or another phase of the program) public interest commitments (or perhaps better designated as "community interest commitments") should at some point receive review and evaluation. If those interests are deemed to be important or necessary for the community, then it should be a required standard of any operator of the gTLD – similar to how GAC advice rolled out on regulated industries. This would occur regardless of whether the community application prevailed.

Perhaps there should also exist a responsibility of gTLD operators to uphold certain interests of the community to ensure harm or detriment through the operation of the gTLD is avoided,

especially when the community has engaged in the process and expressed interest in being heard. Financial interests must be balanced with the interests of those most likely affected by the operation of the gTLD.