

Consensus Call Response

In accordance with the instructions, I have listed the recommendations and implementation guidance that I cannot support and then briefly described why. Where I cannot support only a portion of a recommendation, I quoted that portion.

I cannot support:

Implementation Guidance 34.11, because:

Lowering the passing threshold without appropriate analysis has a likelihood to result in gaming of the CPE process, resulting in the improper disqualification of bone fide applications. Therefore, a change in the scoring should not be prescribed without an appropriate, in-depth analysis of the inconsistent results in the previous round, analysis that this WG did not undertake. This WG does not have the information necessary to make a recommendation of this specificity.

The rationale for this guidance states, “The Working Group believes that ICANN org and the community should be given more flexibility to implement a new scoring mechanism,” but then proscribes any flexibility by requiring a lower and prescriptive threshold.

Recommendation 34.12, specifically, “... any terms included in the contract between ICANN org and the CPE Provider regarding the CPE process must be subject to public comment,” because:

The negotiation of contracts to execute policy is an operational matter that should be left to ICANN staff. In addition to setting an inappropriate precedent, putting operational agreements out for public comment is likely to: substantially retard progress, cause missed deadlines, result in non-value-added contention among ICANN, contracted parties, other bidders and community members, and discourage potential bidders. Let the policy makers provide requirements and objectives; let operations staff fulfill the policy objectives.

Recommendation 35.4, because:

- (1) The specification of second-price and sealed-bid auctions was made without thorough (or cursory) economic analysis of each. Do the outcomes of these auction types meet or match the policy goals of the new gTLD Program? We do not know. When consideration of second-priced auctions occurred, I read several papers on the development of these auction types and realized that the choice of first or second-priced auctions was somewhat beyond me and could have different effects on program outcomes and the decision should be carefully taken. Sealed-bid versus increasing or decreasing-price auctions have even more complex

implications on outcomes. Will these choices increase or decrease competition and choice, increase DNS participation, or result in the optimum utilization of the domain space? Again, we don't know. At best, this sort of choice *might* be appropriate as implementation advice, but not as a policy.

- (2) The timing of the submission of the sealed bids will serve to reduce participation in the New gTLD Program, discourage participation by newcomers (especially from developing regions), work to the benefit of industry insiders, and dis-serve the goals of fairness and transparency. The primary cause of these negative effects is the difference in time between the submission of sealed bids and the actual auction, which injects unfairness, uncertainty and lack of transparency into the process.
 - a. Discouraging participation: Put yourself in the shoes of a newcomer to TLDs. "Pay \$100,000 now and, by the way, take a guess at the value of the TLD to you some months or years from now – history tells us it could be anywhere from \$500,000 to \$140MM." Being required to make that sort of judgment will discourage all but industry insiders, i.e., those who support this recommendation. The effect of this recommendation on reducing diversity, competition and choice should not be underestimated.
 - b. Fairness: holding an auction months or years from the submission of bids obviates opportunities to value the asset at the time of the bid. The value of the asset and company fortunes change over time and the ability / willingness to bid certain amounts will differ between the time of the bid submission and the auction.

Recommendation 12.9, because:

All translated versions of the Applicant Guidebook should be available for the full four months prior to the commencement of the application submission period. If a translation is *needed*, then it is needed for as long a period of time as the English version. Otherwise, it is not needed. By reducing the availability of the translated versions means that we are only paying lip service to the translation effort.

Recommendation 17.2, specifically, "and a bid credit, multiplier, or other similar mechanism that applies to a bid submitted by an applicant qualified for Applicant Support who participates in an ICANN Auction of Last Resort," and Recommendation 17.15, because:

Determining an appropriate bid credit or multiplier is unworkable, expensive and time consuming. In addition, the application of bid credits is likely to wind up in Reconsideration Requests, IRPs and litigation. Finally, the idea of a bid credit flies in the face of commonly accepted economic theory that states that greater

utility of an asset is realized by the party that places the highest value on it and the ability to invest in it.

Recommendation 17.18, because:

There is not an objective manner for the SARP to determine if gaming was intended. The result of this Recommendation will be a subjective test that is likely to result in Reconsideration Requests, IRPs and litigation.

Recommendation 24.5, because:

Controlling the usage for the life of a TLD (essentially forever) introduces a needless, costly and difficult to implement complexity into the program. I agree that singular-plural combinations (as identified by the string) should be banned. Keep it simple.

Recommendation 24.6, because:

Our recommendation should encourage the development and testing of an algorithmic approach. As Recommendation 31.18 states: "ICANN must reduce the risk of inconsistent outcomes in the String Confusion Objection Process." An algorithmic, objective approach is the only way to prevent the errors and litigation of the last round. Some in the WG claimed the problem was too difficult to solve algorithmically but facial recognition (a significantly harder problem) is effective. Early testing of SWORD demonstrated its effectiveness. Algorithms have grown more powerful since then. Condemning the program to subjective human judgments will impose unneeded costs, time and argument. An algorithmic approach would also eliminate or sharply reduce string similarity objections.

Implementation Guidance 27.18(iii), because:

Merely operating a TLD registry is not adequate proof of financial wherewithal anymore than any number of technical (and non-technical) businesses that are enjoying various degrees of success. This has the whiff of "inside baseball," where existing operators are smoothing their path over newcomers.