

The Intellectual Property Constituency of the GNSO appreciates this opportunity to comment on the paper “Economic Case for Auctions in new gTLDs,” dated 8 August 2008.

The paper (page 1) describes auctions as “the final means of settling any contention cases that have not been resolved at any of the previous stages in the process” of launching new gTLDs. As some commenters have already pointed out (see <http://forum.icann.org/lists/auction-consultation/msg00008.html>), this categorical statement is not consistent with the new TLD procedure as it has been presented to the ICANN community. In fact, when one or more applicants claim support from an identifiable community, such an applicant may choose to have a comparative evaluation procedure, rather than an auction, used to resolve instances of string contention. See <http://www.gnso.icann.org/correspondence/new-gtlds-policy-discussion-11apr08.pdf> at slides 25 et seq. ICANN should clarify that the paper does not accurately reflect its decisions on this point, and at a minimum should reaffirm that the use of auctions in the new TLD process will not be expanded beyond what is currently proposed.

IPC urges ICANN to reject the approach suggested by the paper of resolving all string contention through auctions. In previous comments on the gTLD process, IPC has stated its strong concerns about auctions as a means of allocating new TLDs. See, e.g., <http://www.ipconstituency.org/PDFs/IPC%20Impact%20Statement%20re%20new%20gTLDs.pdf> (page 6) (June 2007); http://www.ipconstituency.org/PDFs/2006-Jan31_IPC%20Response%20to%20New%20gTLD%20Terms%20of%20Reference.pdf (pages 4-5 (January 2006)). The paper under discussion does not explicitly address the concerns raised by IPC in these earlier submissions. This should be done before proceeding any further toward consideration of an auction method for allocating new TLDs.

The paper asserts that auction procedures are “less likely to be legally contested relative to a comparative selection procedure” (page 2), and that awards made through comparative evaluation, rather than through auctions “are unlikely to withstand judicial review” (page 6). Neither assertion is documented, and neither necessarily applies to the new TLD process. As IPC understands it, every applicant for a new TLD will be asked, at the time of application, to accept the pre-established selection procedure, including whatever limited avenues of appeal are offered, and to waive its rights to challenge the selection in court. If so, and if such conditions are fully enforceable, the weight of this consideration would be substantially diminished.

At one point (page 4) the paper observes that “an auction for gTLDs is more likely to be comparable to an auction for houses than to an auction for spectrum.” Unfortunately, the paper does not follow through on some of the implications of this insight. In particular, the paper indulges in the assumption that “bigger is better” with regard to TLDs, and that an application that will “serve many users” is always to be preferred over one that “will serve few users” (see page 1). If this assumption were true, all new TLDs would be competitors to .com, and niche markets would be overlooked. However, a TLD that is better situated to serve a particular community or industry sector, or subset thereof, is often to be preferred over one that seeks to serve a mass market. As with houses, prices are often not dependent on size, but rather on “location, location, and location.”

Similarly, the paper states (page 3) that “an auction process would tend to favor a high-quality, low-cost applicant over a low-quality, high cost applicant.” Regardless of the validity of this statement with respect to spectrum auctions, it raises two unanswered questions as applied to the new TLD process: (1) why is “a low-cost applicant” necessarily to be preferred over a “high-cost applicant” that seeks to fulfill a community need, and (2) what is it that differentiates two applications based on “quality”? The first question seems to proceed from the same unexamined premise – “bigger is better” – discussed above. A community need that can best be fulfilled at a relatively high cost is certainly preferable to a lower-cost solution that does not fulfill the need and perhaps even makes conditions worse. The second question seems to return inescapably to the need for some form of comparative evaluation of “quality.”

Other statements in the paper make it clear that the analogy to spectrum auctions is inapposite. Under the plan now under consideration, “TLD rights” (an ambiguous phrase) would not be “transfer[red] ... to third [sic] parties for little or no compensation,” nor would ICANN be “allocating these resources for free,” (page 4); nor is ICANN proposing to distribute “a valuable but free government license” (page 6). To the contrary, ICANN currently depends, and for the foreseeable future will continue to depend, on periodic fees paid to it by gTLD registries for nearly half of its revenue. All new gTLD registries will be required to contribute.

The unspoken issue hovering over the auctions paper is what ICANN will do with the proceeds of any auctions it holds to allocate new TLDs. ICANN has committed to “undertake a community-based consultation to determine uses of the funds consistent with ICANN’s mission and for the benefit of the DNS and DNS community,” see <https://par.icann.org/files/paris/GNSO-gTLD-Update-Paris22jun08.pdf> (slide 14), but this consultation has not even been initiated. An asterisk on page 3 tells us that ICANN has foresworn one of the “key benefits of a well-designed auction mechanism,” which is revenue maximization. Whether or not revenue maximization is an ICANN “goal,” it will be an ICANN reality to the extent that auctions are employed to allocate new TLDs. The paper asserts on page 6 that these revenues “can be channeled to the good of the internet community.” Yes, they can be; but they can also be wasted or spent counter-productively. It is impossible to evaluate the viability of an auction mechanism without greater clarity about what use will be made of these funds. To assert (page 6) that comparative evaluations can be “invitations to corruption,” without acknowledging that the same can be true of the consumption of auction proceeds, is simply naïve.

Other unaddressed issues regarding auctions include:

- how to ensure complete separation between the organization conducting the auctions and all bidders;
- what auction model will be employed (e.g., English auction, first price sealed bid, Vickrey auction, etc.);
- terms of payment, including how to handle defaults, and whether successful bidders will be allowed to launch new TLDs before full payment has been made.

While IPC agrees with the paper that the comparative evaluation approach to TLD allocation also presents challenges, we believe these can be met through careful advance

planning. In particular, it is important to establish, well in advance of the launch of the new TLD process, “meaningful transparent and objective criteria” for comparative evaluations (page 6). Furthermore, within the existing proposed model for new TLD allocation, greater specificity is needed regarding the definition of a community-based applicant who can choose to trigger a comparative evaluation. (ICANN’s track record on this issue is not encouraging, given the increasingly nebulous definitions of “community” that were accepted during the most recent sponsored TLD round.) Comparative evaluations must also be designed to minimize the risk of a “tie,” which in at least one variant of the proposed new TLD process would also lead to use of an auction as a tie-breaker. See <http://www.gnso.icann.org/correspondence/gtld-process-simplified-10apr08.pdf>. IPC urges that these aspects of the new TLD allocation process be given the attention they deserve, and that further consideration of any proposals to expand the use of auctions as a tie-breaker should be deferred until these more basic questions are resolved.