The ICANN GNSO "Business Constituency"

Reply to Questionnaire from new gTLD Subsequent Procedures PDP

Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

> The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:
>
> 1. promotes end-user confidence because it is a safe place to conduct business
>
> 2. is competitive in the supply of registry and registrar and related services
>
> 3. is technically stable, secure and reliable.

Questionnaire Responses

Below are BC replies to the questionnaire published by the new gTLD Subsequent Procedures PDP on 22-March-2017[1].   Here we include only those questions where the BC had a response, and omit other questions and contextual notes in the questionnaire.

BC responses are shown as indented, *in italics*.

1.1.2 - If an RSP program is established for new gTLDs, do you have any suggestions for some of the details or requirements of the program? For instance, how would the scalability of the RSP be measured across a variable numbers of registries?

> *The BC suggests creating a certification program for entities that would like to participate in the new gTLD program as a Registry Service Provider. This would require that the certification be audited on a regular basis and should include auditable information on security measures and scalability capacity of the RSP.*

1.1.3 - Who should be responsible for evaluating whether an RSP meets the requirements of the program?

> *ICANN should be responsible.*

1.1.4 - Should there be any continuing obligations for approved RSPs, such as high-level requirements for accreditation? Should the requirements be variable based on the types of TLDs the RSP intends to serve or other factors? Please explain. There should definitely be an ongoing obligation for technical compliance for all RSP's.

> *There should be a minimum set of requirements that an RSP must comply with, but ICANN should encourage RSPs to exceed minimum requirements in order to compete in meeting the needs of their customers.*

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[1] Comment page at https://www.icann.org/public-comments/cc2-new-gtld-subsequent-procedures-2017-03-22-en
[2] BC Comment, page 3, at http://www.bizconst.org/assets/docs/positions-

1.1.5 - Should there be an Agreement between an RSP and ICANN? If so, what enforcement mechanisms should be made available to ICANN in the event that such an Agreement is breached?

Yes, there should be an agreement between ICANN and the certified RSP. David Conrad's team would be a likely candidate for managing breaches of this certification.

1.1.7 - Should there be a process to reassess RSPs on a periodic basis? If so, how often should an assessment be conducted and what would the process be for a re-approval?

An annual technical and security audit.

1.1.8 - If there is an RSP Program, how far in advance should such a Program be launched prior to the opening of the next application window?

6 months

1.1.9 - Should there be an RSP application "cut-off" date to allow sufficient time for an RSP seeking approval to receive approval in order for their application to be approved before the opening of an application window?

Yes, but could also envision this as a rolling application window. If an RSP was not ready at the beginning of an application period they could still request certification within the open application period. This would encourage participation by RSP's who were late in becoming aware of the program.

1.1.10 - If there is a list of pre-approved RSPs in any RSP Program, should there be a provision granted to organizations that act as an RSP to an existing delegated TLD? If yes, how would such a provision work? If not, could ICANN use an RSP's existing performance to satisfy any of the technical requirements and/or tests used in the approval process?

All RSP's should be required to request certification and adhere to the requirements of the program.

1.1.11 - If an RSP program is established, how should it be funded? For instance, should registries pay into the program which will reduce related ICANN evaluation fees (and associated application fees)?

Fund the RSP program with application fees for the certification, which should be paid by the RSPs.

1.2 Applicant Support (Wiki page: https://community.icann.org/x/NT2AAw)

1.2.1 - Some have suggested it could be beneficial to expand the scope of the Applicant Support (AS) program by:

Broadening support to IDNs or other criteria:

There is a good argument to be made around the need for additional support for IDNs, but this would need to be wrapped together with two broader areas that are needed: more community technical resources to help applicants get started (IDNs might just need more assistance) and more overall visibility in the marketplace for the program itself.

Allowing the Applicant Support program to include the "middle applicant", defined as struggling regions that are further along in their development compared to underserved or underdeveloped regions. The "middle applicant" is intended to be an expansion and NOT intended to be at the exclusion from applicants in underserved or underdeveloped regions. The "middle applicant" provides a balance between opportunities while considering the economic and developmental realities and priorities for

potential applicants. Do you believe there is value in the above suggestions? Do you feel there are other areas in which the Applicant Support program could be extended to benefit other regions?

In many ways, truly underserved regions may not yet have the appropriate market conditions for participation – they may lack the infrastructure (sales or technical) to provide for sustainable new applicants and may not have the demand. "Middle Applicant" areas could make sense, but we would need to identify which areas to target and which services to offer.

1.2.2 - The Applicant Support Program for the 2012 round was mainly focused on financial support and application submission. Should funding be extended to other areas of the process or for ongoing operational costs? Are there other support mechanisms that should be explored?

Generally, the BC does not agree with subsidizing registry businesses, especially with the behavior we experienced in the last round. However, there may be sound reasons for helping a registry under the right circumstances.

For example, the new gTLD Program could support applicants that are targeting registrants in underserved/underdeveloped regions, particularly for proposed TLDs using the language and script of that region.

In the last round, ICANN set aside $2 million for applicants who needed financial support, yet the criteria was so high that no applicants were accepted into the Applicant Support Program (ASP). Further, applicants that did not receive funding also lost their initial fees. Before we add more funding to the ASP, we should re-assess objectives and criteria for the program.

There are lessons to be learned from the Joint Applicant Support (JAS) program in the last round. The JAS team included just one consistent business representative (Andrew Mack).

> *It needed to tackle more directly the idea of creating a "business model" for potential applicants in order to know which kind of support to provide.*

> *The assumption was that we could/should focus on pricing, but in the end this likely was only one of a number of issues.*

> *Other factors impairing the previous applicant support effort include lack of awareness of the JAS program, the limited information available in most markets about the new gTLD program generally, and the lack of connection to technical information and support.*

> *Underserved/disadvantaged communities need much more technical support in deciding whether and how to go forward as well as some targeted financial support.*

Future support mechanisms for applicants serving qualifying regions should not just be limited to the application process, but should also address the TLD operator's needs in areas such as escrow backup and ICANN annual fee relief—at least for a time period sufficient for market development and adoption.

1.2.3 - Do you have any suggestions for improving publicity and outreach to potential applicants who would benefit from the Applicant Support program? Do you have any suggestions on how to improve the process to apply for support?

Simplify the process, and add these improvements:

1. *If our community is serious about supporting applicants, we need a major effort to help potential applicants learn about the process and understand – early – what kinds of support might be available. Too little was offered too late.*

2. *Provide support not just to committed applicants, but also to groups considering/evaluating whether to apply. Provide the tools to help them evaluate their idea and its potential before looking at applying for support.*

3. *Be present in potential markets. Showing up once or twice won't get it done. This is still a new field in many countries and it takes time/presence to build awareness.*

1.2.4 - The WG has noted that even if the Applicant Support program is well-funded, well-communicated and comprehensively implemented, potential applicants may still choose not to apply for a gTLD. What other metrics could be used to evaluate the success of Applicant Support initiatives beyond the volume of applications? A study conducted by AMGlobal Consulting, 'New gTLDs and the Global South' determined that there was limited awareness of the New gTLD Program and the benefits in applying amongst potential applicants; Would additional metrics on future Applicant Support program(s) and its ability to raise awareness be helpful? Do you have any other metrics that would be helpful measuring the success of the program?

> *There was an informal support ecosystem established by ICANN as part of the process – where firms could offer to support potential applicants and applicants could ask for support – but nobody knew it existed. This was a miss. Agree that there may not be a business case for applying, so I think we should work on that directly by having workshops – regionally, in language, at limited cost – to help potential applicants evaluate their ideas and there see if they might qualify for support. The number of such workshops offered, the number of attendees with ideas, the number of follow-on communications – all of these could be meaningful metrics.*

1.2.5 - Do you have any other general recommendations for improving the Applicant Support program?

> *Simplify, promote, get out there early and more than once. Possibly work with local/regional experts who could provide support for applications. Consider streamlining the application process – for all regions, but especially for the global south – based on the experience of the recent round.*

1.3 Clarity of Application Process (Wiki page: https://community.icann.org/x/JT2AAw)

1.3.1 - How should changes to the Applicant Guidebook and/or the new gTLD Program be handled in subsequent application windows?

> *As this PDP working group is discovering, there was much to learn about the application process –from the perspectives of both the applicant and ICANN staff. For the next round we should expect the applicant Guidebook to be finalized <u>before</u> the application period opens.*

1.4 Application Fees (Wiki page: https://community.icann.org/x/LT2AAw)

1.4.2 - Although the 2012 round is not complete, there is currently a surplus of fees collected relative to costs incurred. As such, do you believe that the principle of breaking even was implemented effectively? Do you believe $185,000 was a reasonable fee? Is it still a reasonable fee? Should the basic structure of the application fee (e.g., approximately one third of the fee was allocated for (i) the cost recovery of historical development costs, (ii) operations and (iii) legal and other contingencies) be reassessed or restructured? Is it too early to make this assessment? With the experience gained from the 2012 round, do you think that a break-even model can be more accurately implemented for future applications? Do you have suggestions on how to minimize any surpluses or shortfalls?

> *In the current application round, ICANN anticipated litigation expenses and set the application fees accordingly. Since we have not seen any litigation there is an argument for refunding some*

of the original application fee to the registry. Another idea may be to allocate part of the application fee to compliance.

1.4.3 - Should the concept of break-even be strictly adhered to or should other aspects be considered? Some WG members have noted concerns about the responsibility required to run a registry which could be negatively impacted by a fee that is "too low." Others have noted that the fee is potentially too high and could create barriers to entry in some underserved regions. As such, should there be a cost floor (minimum) or cost ceiling (maximum) threshold that the application fee should not go below/above despite costs estimates? If so, do you have suggestions in how the cost floor and ceiling amounts should be set?

> *The application fee should at the very least cover all the costs incurred by ICANN to allocate a new extension.*

1.5 Variable Fees (Wiki page: https://community.icann.org/x/Oz2AAw)

1.5.1 - Should the New gTLD application fee vary depending on the type of application? For instance, open versus closed registries, multiple identical applications or other factors? The 2012 round had "one fee fits all," and there seems to be support within the WG for continuing that approach provided that the variance between the different types of applications is not significantly different - do you agree? If not, how much of a variance would be required in order to change your support for a one fee for any type of application approach?

> *The BC supports "one fee fits all" considering that there may be other programs to support applicants with demonstrated needs.*

1.5.3 - Should the application fee be variable based on the volume of applications received from a single applicant? If so, how should the fee be adjusted and what are the potential impacts from doing so?

> *We do not support a fee variable based on the volume of applications, as this would disadvantage smaller businesses seeking to compete with larger business applicants.*

1.6 Application Submission Period (Wiki page: https://community.icann.org/x/Mz2AAw)

1.6.1 - One of the overarching questions in Community Comment 1 focused on whether applications should be accepted during defined windows of time (also known as "rounds"). If the WG determines that a system of rounds is the right approach, is three (3) months an appropriate length of time to accept applications? What considerations should be taken into account when determining the length of the application window? .

> *With enough advance notice, a 3-month application period should be sufficient. We should avoid duplicating the "now or never" situation that occurred with the last round, and schedule rounds closer together. But we also need to balance the impact on ICANN staff in evaluating applications. We have learned much from the latest round and hopefully won't run into as many situations that may cause delay.*

1.10 Applicant Guidebook (Wiki page: https://community.icann.org/x/Iz2AAw)

1.10.1 - The Applicant Guidebook served as the roadmap for applicants, but also all other participants to the program. As such, there is a mixture of historical and practical information, some of which is relevant to only certain parties. Do you think it makes sense to partition the Applicant Guidebook into different audience-driven sections or by type of application?

> *Yes.*

2.1.1 - The question of whether or not a single Registry Agreement is suitable is tied into the subject of different TLD categories. Throughout the working group's discussions, there has been support for a model similar to what is currently in place: a single Registry Agreement with exemptions that allow for TLDs with different operational models (e.g., Specification 13 for Brand TLDs or Specification 12 for Community TLDs). There is also support for different Registry Agreements for different TLD categories, centered around a common, core base set of contractual requirements. Which of these models do you think would be most effective for recognizing the different operational requirements of different TLDs? Which of these models do you think would be most efficient in terms of development, implementation, and operational execution (e.g., contracting, contractual compliance, etc.)? Do you think there are any alternative options that could effectively facilitate TLDs with different operational requirements?

> *We would support a single uniform Registry Agreement (RA), so long as the RA contained certain addendums that may be entered into by specialized Registry Operators, e.g., .Brands, and Community TLDs.*

> *Under such a framework, different operational models would still be taken into account, while the single RA would facilitate efficiency in development, implementation, and compliance. A single RA would also make it easier for a particular Registry Operator or a TLD to move between categories as business needs evolved.*

2.1.3 - Should the entire application be incorporated into the signed Registry Agreement? Should portions of the application, explicitly identified, be incorporated into the signed Registry Agreement? If changes are made between applying and executing the Registry Agreement, how should this be handled? If changes are made after executing the Registry Agreement, how should this be handled? If changes like these are contemplated, how can the needs of the community to properly consider the contents of an application be weighed against an applicant's need to make either minor adjustments or fundamental changes to their registry?

> *Applicants should be more transparent regarding planned pricing of domain names*

> *We believe the current restrictions are working well to protect registrants and Internet users. Regulations pertaining to pricing are generally outside of the scope of ICANN's remit. However, we are concerned about "predatory pricing" schemes by a couple of Registry Operators that have charged significantly higher fees for trademarked terms during Sunrise. Such practices could be potentially dealt with in the future through more explicit fraud provisions in PICs as well as regulations preventing use of TMCH data for purposes other than intended.*

2.2.2 - Do you believe any changes are needed to the list of Reserved Names at the top level as defined in section 2.2.1.2.1 of the Applicant Guidebook?

> *There should be further definition of restricted names.*

> *As the BC comments on the CCWG-Country and Territory Names Interim Report stated, "the BC supports the use of full country and territory names as new gTLDs, including removing any*

moratorium on the ability to apply for such names generally and not requiring any form of governmental pre-approval or non-objection."[2]

2.4.1 - In the 2012 round, the operation of a TLD where the string was considered "generic" could not be closed to only the Registry Operator and/or its Affiliates. Originating from GAC Advice on the subject, this rule was promulgated by ICANN's New gTLD Program Committee of the ICANN Board, but was never adopted as a policy by the GNSO. This rule was subject to public comment and input from the community. Should this rule be enforced for subsequent application windows? Why or why not?

> *There should not be a blanket rule prohibiting closed or restricted business models for TLD strings comprised of "generic" terms, especially given the ambiguities in how such terms are defined. Allowing registry operators to experiment with a variety of business models facilitates innovation and competition, and can result in well-understood communities that benefit users. There is precedent for such a registry model with legacy gTLDs such as .mil, .edu, and .gov, which are all comprised of abbreviated dictionary terms and yet are restricted to specific entities or purposes as a means of developing user trust.*

> *Certain proposed "generic" TLDs may still present legal or public policy issues that are worth addressing, but such concerns may be dealt with on a case-by-case basis and through existing community-developed mechanisms such as the four objection procedures (string confusion, legal rights, community, public interest) which are designed to protect consumers, brands, and the general public. Conversely, a "one-size-fits-all" prohibition unnecessarily stifles opportunity and creativity, and protects a regime designed around a status quo business model that is solely intended to earn revenues from the sale of individual domain names.*

2.4.2 - Do you have suggestions on how to define "generic" in the context of new gTLDs? A "generic string" is currently defined in the Registry Agreement under Specification 11.3.d as meaning, "a string consisting of a word or term that denominates or describes a general class of goods, services, group, organization or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those of others." Are any modifications needed to the definition? If so, what changes? If the exclusion of closed generic TLDs is to be maintained, are there any circumstances in which an exemption to the rule should be granted?

> *If we eliminate the blanket prohibition against "closed generics," defining the term "generic" may not be unnecessary. To the extent that "generic string" is a term still in use, the present definition is workable.*

2.5.3 - According to Section 14 of the Applicant Terms and Conditions, ICANN has the ability to make changes to the Applicant Guidebook. One task of this Working Group is to address the issue of predictability in future rounds, including with respect to the AGB. Do you think that ICANN should be limited in its ability to make changes to the Applicant Guidebook after an application procedure has been initiated? Please explain.

> *ICANN's ability to change the AGB should be very limited. The GNSO community should be asked to clarify its policy recommendations for any implementation decision regarding that policy.*

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[2] BC Comment, page 3, at http://www.bizconst.org/assets/docs/positions-statements/2017/2017_04april_21%20bc%20comment%20on%20using%20names%20of%20countries%20and%20territories%20as%20tlds.pdf

2.6.2 - Specification 13 grants an exception to the Registry Code of Conduct (i.e., Specification 9 in the Registry Agreement) and specifically from the vertical integration restrictions. In addition, Registry Operators may seek an exemption from the Code of Conduct if the TLD string is not a generic term and if it meets three (3) other specified criteria set forth in Specification 9 of the Registry Agreement. Are there any other circumstances where exemptions to the Code of Conduct should be granted?

> *The BC would support granting an exemption to the Code of Conduct in a situation where the Registry Operator can demonstrate that the term comprising the TLD string directly corresponds to a product name of the Registry Operator. The Registry Operator should additionally be able to affirm that all uses of the TLD will be in connection with such product, that all domain name registrations in the TLD will be registered to Registry Operator for its exclusive use, and application of the Registry Operator Code of Conduct to the TLD is not necessary to protect the public interest.*

2.7 TLD Rollout (Wiki page: https://community.icann.org/x/Rz2AAw)

2.7.1 The Applicant Guidebook specified timelines by which applicants had to complete the contracting (9 months) and delegation (12 months) steps of the process. However, this requirement only means that the contract needs to be executed and nic.TLD be delegated. Are these timeframes reasonable? Is there still a need for these requirements? Please explain.

> *Applicants and ICANN both need to adhere to the specified timelines. During the last application round, ICANN often took weeks and even months to respond or send acknowledgement of applications and inquiries. When they did respond, applicants were provided with a very short "response due date" otherwise the issue would be closed. This resulted in a very one-sided process.*

3.1 Objections (Wiki page: https://community.icann.org/x/Vz2AAw)

3.1.2 - Do you believe that those recommendations (which led to the establishment of the String Confusion, Legal Rights, Limited Public Interest, and Community Objections grounds) were implemented effectively and in the spirit of the original policy recommendations? If no, please provide examples. 3.1.3 - Do you believe there were any issues with standing requirements as defined in the Applicant Guidebook (AGB), or as carried out by the providers? Please explain.

> *While the objection process in the first round was generally effective, one notable flaw was the inconsistency in panel decisions for string confusion objections.*

> *In order to address this flaw for the subsequent round we support the publication by ICANN of more detailed and objective criteria for determining string similarity, as well as a broader appeals mechanism for challenging any decisions that are perceived to fall outside of such criteria.*

> *Both losing Objectors and Applicants must have standing to appeal the panel's decision. The language from the 2012 round vests appellate discretion solely with "Losing Applicant[s]," creating a presumption that the rights of gTLD applicants are given more weight than the rights of objectors. Inconsistencies in panel decisions may be further prevented through greater transparency in the process, namely, through publication of any evidence considered by expert panels, arbitration providers, and ICANN staff in its evaluation of objections. Additionally, for the*

subsequent round, we propose that any review or appeals panels be comprised of arbitrators with specific demonstrated experience in new gTLD program objections.

3.1.4 - Do you believe there is evidence of decisions made by objection dispute panels that were inconsistent with other similar objections, the original policy recommendations, and/or the AGB?

Yes. For string confusion objections, despite conditions being effectively the same, one ICDR panel came to the conclusion that .HOTEL and .HOTELS were not confusingly similar, while another determined that .PET and .PETS were confusingly similar. There were multiple other examples of such inconsistencies, e.g., .CAR and .CARS found not similar, and .GAME and .GAMES similar.

To prevent such results in future rounds, we support allowing a single String Confusion Objection to be filed against all applicants for a particular string, rather than requiring a unique objection to be filed against each application. As stated above, we would also support an appeals process with panels comprised of arbitrators with specific demonstrated experience in new gTLD program objections.

3.1.6 - Do you believe that the use of an Independent Objector (IO) is warranted in future application processes?

The Independent Objector is not warranted in future application processes.

The IO was created during implementation of the last expansion, and was not designed or approved in the GNSO policy-making process.

The IO was paid from applicant fees, but did not prove beneficial to applicants. The IO was not independent, was politically or personally motivated, and did not accomplish their stated work.

The IO filed 19 objections, won two decisions, at a million dollars per objection, with a success rate of 2% (https://newgtlds.icann.org/en/program-status/odr/determination). Two cases, .hospital and .charity, were also changed later.

3.1.10 - Do you feel that GAC Early Warnings were helpful in identifying potential concerns with applications? Do you have suggestions on how to mitigate concerns identified in GAC Early Warnings?

In the next "round", the BC would like to see clarification around the GAC objections process and timeline for filing and addressing GAC objections.

3.4 String Similarity (Evaluations) (Wiki page: https://community.icann.org/x/VT2AAw)

3.4.1 - There was a perception that consistency and predictability of the string similarity evaluation needs to be improved. Do you have examples or evidence of issues? If so, do you have suggested changes to the policy recommendations or implementation that may lead to improvement? For instance, should the standard of string confusion that the evaluation panel used be updated or refined in any way?

(Examples are described above, in response to 3.1.4)

The BC has consistently stated that the plural of a TLD term is "confusingly similar" to the singular of that term. The string similarity panels making the decisions did not apply consistent analysis and the mixed results were an embarrassing mistake in the expansion of new gTLDs.

*The default rule should be that the singular and plural of the same term, in the same language and script, should be **presumed** to be sufficiently similar so to be placed in the same contention set. This would be a rebuttable presumption that could be appealed by applicants.*

4.2.1 - Do you see any UA issue that would warrant policy development work, noting that there is extensive coordination work already being done by the Universal Acceptance Steering Group?

Universal acceptance should also be based on how the registry manages their registry. We are seeing a few registries engaging in practices that allow a high percentage of the domain names to be used in scams or fraudulent behavior. Spamhaus reports often show mainly new gTLD registries in the top 10 of most abused tlds.(https://www.spamhaus.org/statistics/tlds)

4.3.1.1 - Do you believe that technical capability should be demonstrated at application time, or could be demonstrated at, or just before, contract-signing time?

Continuing review of technical capability is necessary at regular intervals for the security of the TLD.

4.3.1.2 - Do you believe that technical evaluation should be done per application, per cluster of similar technical infrastructure of a single applicant entity/group, or per cluster of similar infrastructure among all applicants in a procedure (e.g, consolidate as much as possible)?

If the registry is using a third party RSP, then clustering of the evaluations could be workable.

4.3.2.2 - Can financial capability be demonstrated with less detail, in a different manner, or via a different mechanism? Are there details or levels of detail that are unnecessary?

Yes

4.3.2.3 - In the prior round, detailed business plans were provided, but not evaluated; they were however used to provide context to evaluators in scoring applicant responses. Do you believe that this information needs to be collected in order to evaluate an applicant's financial capabilities? Please explain? How should changes in business plans during the application process be handled?

Yes, business plans should still be provided to justify how the applicant intends to run the TLD. The plans should be relevant to the type of TLD (Brand, Geo, Community, etc).

4.3.2.5 - Do you believe that financial capability should be demonstrated at application time, or could it be demonstrated at, or just before, contract-signing time? Or at both times? Please explain.

Continuing evaluation of financial capability should be in place.

Additional Questions

1. The topics above, and the corresponding questions, are all related to the scope of work as determined in this WG's charter. Do you feel that all topics must be fully resolved before any subsequent new gTLD procedures can take place? If not, do you believe that there is a critical path of issues that MUST be considered and addressed? Alternatively, do you believe that there are certain challenging issues where an existing solution may be present (e.g., in the Applicant Guidebook), which can serve as an interim solution, while debate can continue in parallel with the launch of subsequent new gTLD procedures?

   Focus on the critical path and critical issues then allow for the subsequent rounds to proceed.

2. Many in the community have noted the length of time from the close of the application submission period (i.e., June of 2012) to the informal projections for the beginning of subsequent new gTLD procedures (e.g., 2020). Do you have any suggestions on how to shorten that timeline, either now in the event of future rounds or other procedures?

   Focus on the critical path and critical issues then allow for the subsequent rounds to proceed.

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These responses were drafted by Susan Kawaguchi, Cecilia Smith, Andy Abrams, Isabel Rutherfurd, Andrew Mack, and Lawrence OlaWale-Roberts, and were edited by Steve DelBianco.

They were approved in accord with our charter.