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VIA E-MAIL - reconsideration@icann.org

ICANN Board Governance Committee
Dr. Bruce Tonkin, Chairman
Members of the Board Governance Committee
12025 Waterfront Drive, Suite 300
Los Angeles, California 90094

Re: Reconsideration Request No. 14-4
Union of Orthodox Jewish Congregations of America
<.kosher>

Dear Dr. Tonkin and Members of the Board Governance Committee:

We write on behalf of the Union of Orthodox Jewish Congregations of America (“OU Kosher”), STAR-K Kosher Certification, Inc. (“STAR-K”), Kosher Supervision Service, Inc. (“KOF-K”), Chicago Rabbinical Council (“cRc”), and The Kashruth Council of Canada (“COR”). Pursuant to Article IV, Section 2 of ICANN’s Bylaws, the aforementioned organizations (the “Requestors”) submitted Reconsideration Request No. 14-4 regarding a failure by the International Chamber of Commerce (“ICC”) to follow ICANN policies and/or processes in denying OU Kosher’s community objection to the .kosher application. By this letter, Requesters respectfully seek to supplement the record in Reconsideration Request No. 14-4 with two letters that became available after the Requesters filed the reconsideration request and that may be material to the BCG’s consideration.

In particular, we request that the record for Reconsideration Request No. 14-4 be supplemented to include the enclosed letter of 10 February 2014 from the New gTLD Program Committee to the GAC and the enclosed letter of 4 February 2014 from Lawrence E. Stricking, Assistant Secretary for Communications and Information, United States Department of Commerce, to ICANN’s Chairman, Dr. Stephen D. Crocker.

A central issue in Reconsideration Request No. 14-4 concerns the ICC’s improper and illogical interpretation of Specification 11 of the gTLD Registry Agreement as prohibiting any possible discriminatory practices and thereby conclusively preventing the material detriment alleged in the objection. Specifically, the Expert Determination stated that: “[w]hat is . . . ultimately dispositive . . . is that the ICANN mechanism for operating TLDs provides significant safeguards against any

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type of abuse.”¹ The reference in this statement was to Article 3(c) of Specification 11, which states: “Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies.”² The objectors clearly articulated in the objection proceeding that Article 3(c) of Specification 11 merely requires transparency, explaining that: “Section 3(c) will not restrict KMA’s ability to subjectively determine the .kosher registrant eligibility criteria so long as KMA publishes such criteria and even-handedly applies the criteria.” However, the ICC Expert ignored the plain language of Section 3(c), stating that he:

cannot accept the argument that the openness and non-discrimination obligations laid down in [Article 3(c)] would not prevent the Applicant from resorting to restrictive criteria, if it applied them openly and even-handedly. That argument presupposes an interpretation of Article 3(c) that would render it completely meaningless and is therefore untenable. Article 3(c) is a fundamental provision in the overall system, and it must be assumed that it will be interpreted constructively and not in a formalistic manner.³

In the request for reconsideration, the Requesters noted the GAC’s concerns, as expressed in the Buenos Aires Communiqué, that the language of Specification 11 may not satisfy the GAC’s Beijing Communiqué Advice regarding restricted access registries.⁴

On 10 February 2014, ICANN’s New gTLD Program Committee responded to the GAC, confirming the Requesters’ understanding that Specification 11 calls for transparency rather than providing a substantive contractual prohibition against discriminatory and restrictive gTLD operations.⁵

¹ .Kosher Expert Determination ¶ 82 (Reconsideration Request 14-4, Annex A).

² ICANN Registry Agreement, Specification 11 (approved 20 Nov. 2013) (Reconsideration Request 14-4, Annex M).

³ .Kosher Expert Determination ¶ 83.

⁴ See Reconsideration Request 14-4 at 20.

⁵ A copy of the 10 February 2014 letter from ICANN’s Chairman, Stephen D. Crocker to Heather Dryden, Chair, Governmental Advisory Committee, is attached hereto as a proposed Annex S to the Reconsideration Request No. 14-4.

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Specifically, the NGPC expressed its understanding that the GAC Advice upon which Specification 11 is based, was:

a call for transparency, which is fundamental to providing consumers choice in the marketplace, and a goal that ICANN supports. Transparency requires that the community be aware of the restrictions; otherwise, the restrictions may be said to be unjustified or undue.

The NGPC went on to clarify that:

The contractual language focuses on transparency because of the central role transparency plays in ensuring that restrictions do not provide undue preferences or subject parties to undue disadvantages. The text of the PIC Specification was crafted to meet the spirit and intent of the GAC's advice in a way that is appropriate as contract language.

The NGPC clarification confirms that the ICC's expert determination in the .kosher community objection was inconsistent with ICANN policy in that the expert determination expressly relied on an incorrect interpretation of Specification 11 that the NGPC has now directly disavowed (i.e., that Specification 11 would "prevent the Applicant from resorting to restrictive criteria").⁶

A recent letter from Lawrence E. Stricking, Assistant Secretary for Communications and Information, United States Department of Commerce, to ICANN's Chairman, Dr. Stephen D. Crocker, also raised concerns that the .kosher applicant could operate the gTLD in a restrictive and discriminatory manner.⁷ The February 4 letter expressed the United States' "belief that it is important that gTLD registry operators using restricted registrations policies, other than brand and certain other gTLDs, avoid granting undue preference to any particular party or subjecting potential registrants to any undue disadvantage." This letter further demonstrates

⁶ Although the NGPC clarification also references the revisions to the Registry Agreement to address the Category 1 Safeguard advice, the .kosher string is not subject to that Advice.

⁷ A copy of the 4 February 2014 letter from Lawrence E. Stricking, Assistant Secretary for Communications and Information, United States Department of Commerce, to ICANN's Chairman, Dr. Stephen D. Crocker, is attached hereto as a proposed Annex T to the Reconsideration Request No. 14-4.



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the broad concern regarding the limited scope of Article 3(c) and the impropriety of the Expert's interpretation thereof.

The Requestors appreciate this opportunity to supplement the record and look forward to the BGC's response. Please do not hesitate to contact me should you have any questions about the foregoing.

Respectfully Submitted,

/s/ David E. Weslow

David E. Weslow

Enclosures