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## 22 March NGPC Agenda

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- Approval of Disbursements to New gTLD Auction Service Provider – for resolution
  
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- Reconsideration Request 13-13, Christopher Barron/GOProud
  
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- Discussion on how best to handle individual government letters to the NGPC
  
- Update on proposed review mechanism for perceived inconsistent string confusion objection determinations (info paper)
  
- Any Other Business

**ICANN NGPC PAPER NO. 2014.03.22.NG2b**

**TITLE:** **Authorization for contracting with and payment to new gTLD Auction Provider**

**PROPOSED ACTION:** **For Resolution**

**EXECUTIVE SUMMARY:**

The New gTLD budget for processing applications was approved via a board resolution on 25 September 2010 (<http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#1>) and a subsequent Board resolution on 20 June 2011 authorized the President and CEO to implement the New gTLD Program.

As a result of these resolutions and following an extensive selection process (see <http://newgtlds.icann.org/en/applicants/auctions/summary-vendor-selection-10mar14-en.pdf>) ICANN has entered into Master Services Agreements with Power Auctions LLC (the “Auction Provider”) as the entity to provide ICANN facilitated auctions as a last resort for resolving String Contention Sets, as described in the Applicant Guidebook (AGB) section 4.3.

The Auction Provider will receive both a fixed fee and variable fees for its auction management services. The Auction Provider will be paid an upfront fee of \$230,000 intended to cover the development of the auction rules, the auction system and the system user manual.

In addition to the upfront fee, the Auction Provider will be paid an auction management fee per auction. For each auction that is conducted, the Auction Provider will receive 4% of the winning price for winning prices up to \$10 million. Should the winning price exceed \$10 million, the Auction Provider will receive 4% of the winning price up to \$10 million and 2% of the amount of the winning price in excess of \$10 million, with a minimum fee of \$15,000 for each contention set.

Because of the variable component of the fees, it is impossible to predict with certainty the amount of fees that will be payable to the Auction Provider. However, it is possible that the contracting and disbursement limits of the current Disbursement Policy (i.e., no more than

US\$500,000.00 without further Board approval) could be exceeded in one or more months during the period that auctions are conducted.

Accordingly, to ensure that timely obligations are made and satisfied (i.e. processing of new gTLD applications), the NGPC is being asked to authorize the CEO to enter into all required contracts and make all required disbursements to the Auction Provider, subject to budgetary limits and regular reporting requirements on actual spending amounts.

**STAFF RECOMMENDATION:**

Staff recommends that the Board authorize the CEO or his designee, to enter all required contracts with, and make all required disbursements to, the Auction Provider so long as the contracts and disbursements were contemplated in the approved budget for such expenditures.

**PROPOSED RESOLUTION:**

Whereas, on 25 September 2010, the Board approved the New gTLD Application Processing budget (<http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#1>).

Whereas, on 20 June 2011, the Board authorized the President and CEO to implement the New gTLD Program and approved the expenditures related to the New gTLD Program as detailed in section 7 of the Draft FY12 Operating Plan and Budget (<http://www.icann.org/en/minutes/resolutions-20jun11-en.htm>).

Whereas, the Board previously authorized the CEO or his designee to enter all contracts or statements of work with, and make all disbursements to, all gTLD Service Providers so long as the contract and disbursement amounts are contemplated in the approved budget for such expenditures (<http://www.icann.org/en/groups/board/documents/resolutions-2-14mar12-en.htm-1>).

Whereas, on 22 August 2013, the Board formally adopted the FY14 Operating Plan and Budget, which included the details of anticipated expenditures related to the New gTLD Program (<http://www.icann.org/en/about/financials/adopted-opplan-budget-fy14-22aug13-en.pdf>).

Whereas, to date ICANN has entered into a Master Services Agreement with Power Auctions LLC (the “Auction Provider”) to serve as the entity to provide ICANN facilitated auctions as a last resort for resolving String Contention Sets, as described in the Applicant Guidebook (AGB) section 4.3.

Whereas, the Auction Provider could provide in excess of \$500,000 worth of auction services in any given billing cycle and ICANN must be prepared to timely pay for those services.

Resolved (2014.03.22.NGxx), the President and CEO or his designee is authorized to enter all contracts or statements of work with, and make all disbursements to, the Auction Provider so long as the contract and disbursement amounts are contemplated in the approved budget for such expenditures.

**PROPOSED RATIONALE:**

The New gTLD auction process is an essential part of the New gTLD Program to resolve string contention sets. Contention sets are groups of applications containing identical or confusingly similar applied for gTLD strings. Contention sets must be resolved prior to the execution of a Registry Agreement for an applied-for gTLD string. An ICANN facilitated auction is a last resort for resolving string contention sets, as described in the Applicant Guidebook. ICANN’s Disbursement Policy limits ICANN officers from contracting for or disbursing more than US \$500,000.00 per obligation. Fees payable to the Auction Provider could exceed the contracting and disbursement limits of the Disbursement Policy during one or more billing cycles.

Accordingly, to ensure that payment obligations are satisfied with the Auction Provider in a timely manner, the NGPC has determined that it is appropriate to take this action now. The NGPC is therefore authorizing the President and CEO to enter into all required contracts and make all required disbursements, with the Auction Provider, subject to budgetary limits and based on the budget model that the Board approved on 22 August 2013, which included details of anticipated expenditures related to the New gTLD Program

<http://www.icann.org/en/about/financials/adopted-opplan-budget-fy14-22aug13-en.pdf>).

Providing for this additional contracting and disbursement authority will have a positive impact

on the community because it will allow ICANN to timely contract with and pay the Auction Provider that will be conducting the auctions of last resort. There are fiscal impacts on ICANN but all of those impacts have been anticipated in the approved FY 2014 and draft FY 2015 budgets. There will not be any security, stability or resiliency issues relating to the domain names system. This is an Organizational Administrative Function that does not require public comment.

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**ICANN NEW gTLD PROGRAM COMMITTEE SUBMISSION NO. 2014.03.22.2d**

**TO:** ICANN New gTLD Program Committee

**TITLE:** Reconsideration Request 13-13

**PROPOSED ACTIONS:** For Committee Consideration and Approval

**EXECUTIVE SUMMARY:**

In Reconsideration Request 13-13, Christopher Barron (“Barron”) asked the Board (or here the NGPC) to reconsider the International Centre for Expertise of the International Chamber of Commerce’s (“ICC”) decision to dismiss on procedural grounds GOProud, Inc.’s community objection to dotGAY LLC’s (“dotGAY”) application for .GAY. The BCG previously considered Request 13-13 and concluded that Barron has not stated proper grounds for reconsideration. Since the issuance of the BGC Recommendation, ICANN has confirmed that the GOProud Inc. entity that filed the community objection against dotGAY’ application for .GAY has been dissolved, that a new and separate legal entity has been organized in its place, that Barron is not affiliated with the new entity, and that the new entity does not wish to pursue either the community objection against the .GAY gTLD or Request 13-13.<sup>1</sup>

**PROPOSED RESOLUTION:**

Whereas, on 13 March 2013, GOProud Inc. filed a community objection against dotGAY’s LLC’s application for .GAY.

Whereas, 12 April 2013, the International Centre for Expertise of the International Chamber of Commerce’s (“ICC”) dismissed GoProud Inc.’s community objection for failure to timely cure a deficiency in the objection.

Whereas, on 19 October 2013, Christopher Barron (“Barron”) filed a Reconsideration Request (“Request 13-13”) seeking reconsideration of the ICC’s decision to dismiss GOProud, Inc.’s community objection to dotGAY LLC’s application for .GAY.

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<sup>1</sup> Having confirmed these fact, ICANN also reached out to Barron via both email messages and telephone messages to get his views on the issue, but Barron has not responded to any of these messages.

Whereas, on 12 December 2013, the Board of Governance Committee (“BGC”) considered the issues raised in Request 13-13 and recommended that Request 13-13 be denied because Barron has not stated proper grounds for reconsideration and the New gTLD Program Committee agrees.

Whereas, ICANN has since confirmed that the GOProud Inc. entity that filed the community objection against dotGAY LLC’s application for .GAY has been dissolved and that the dissolved GOProud Inc. entity was reorganized and reincorporated as a different legal entity under the name GOProud Inc. 2.0.

Whereas, despite numerous attempts, ICANN has been unable to contact Barron regarding his affiliation with GOProud Inc. 2.0.

Whereas, ICANN has confirmed with GOProud Inc. 2.0 that Barron is not associated with the entity and that GOProud Inc. 2.0 has absolved itself from the community objection against dotGAY LLC’s application for .GAY and Request 13-13.

Resolved (2014.03.22.NGXX), the New gTLD Program Committee (“NGPC”) concludes that Request 13-13 and any potential relief sought thereunder is moot because there does not exist an entity to pursue the community objection brought by the dissolved GOProud Inc. against dotGAY LLC’s application for .GAY, and on that basis the NGPC denies Request 13-13.

**PROPOSED RATIONALE:**

Requester Christopher Barron (“Barron”) asked the Board (or here the NGPC) to reconsider the ICC’s decision to dismiss GOProud, Inc.’s community objection to dotGAY LLC’s application for the .GAY gTLD (the “Objection”). The ICC dismissed GOProud’s Objection because GOProud failed to timely cure a deficiency in its Objection. The Requester contends that he did not receive notification that GOProud needed to cure a deficiency in its Objection until it was too late to cure because the ICC failed to notify at the proper address. The Requester also claims that the ICC failed to conduct its administrative review within 14 days



required under the Applicant Guidebook and the New gTLD Dispute Resolution Procedure. (See Attachment A to Ref. Mat.)

The BGC concluded on 12 December 2013 that the Requestor has not stated proper grounds for reconsideration because there is no indication that the ICC violated any policy or process in deciding to dismiss GOProud's Objection. (See Attachment B to Ref. Mat.)

Since the BGC's Recommendation was issued, ICANN has confirmed the GOProud Inc. entity that filed the community objection to dotGAY LLC's ("dotGAY") application for .GAY has been dissolved. (See Attachment C to Ref. Mat.) ICANN further learned the dissolved GOProud Inc. entity was reorganized and reincorporated as a different legal entity under name GOProud Inc. 2.0. (See Attachment D to Ref. Mat.)

ICANN has confirmed with GOProud Inc. 2.0 that Barron is not associated with the entity. ICANN has also confirmed with GOProud Inc. 2.0 that the entity does not intend to proceed with the Objection or Reconsideration Request 13-13.

ICANN has made numerous attempts to contact via email and telephone Barron regarding Request 13-13 and his affiliation with GOProud Inc. 2.0. However, ICANN has been unable to reach Barron.

## VI. Decision

The NGPC had opportunity to consider all of the materials relevant to Request 13-13, including the materials submitted by or on behalf of the Requestor (see <http://www.icann.org/en/groups/board/governance/reconsideration>), the BGC's Recommendation on Request 13-13, and the materials included as Attachments C – D to the Reference Materials. The NGPC concludes that the Request 13-13 and any potential relief sought thereunder is moot because there does not exist an entity to pursue the community objection brought by the dissolved GOProud Inc. against dotGAY's application for .GAY and on that basis, the NGPC denies Request 13-13.

In terms of timing of the BGC's Recommendation, we note that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request,

unless practical. *See* Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC would have to have acted by 18 November 2013. Due to the volume of Reconsideration Requests received within recent weeks, the first practical opportunity for the BGC to take action on this Request was on 12 December 2013; it was impractical for the BGC to consider the Request sooner. Upon making that determination, staff notified the requestor of the BGC's anticipated timing for the review of Request 13-13. Further, due to the circumstances surrounding Request 13-13 that arose after the BGC issued its Recommendation and other pending issues before the NGPC, the first practical opportunity for the NGPC to consider this Request was on 22 March 2014.

This resolution does not have any financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

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**ICANN NEW gTLD PROGRAM COMMITTEE SUBMISSION NO. 2014.03.22.2e**

**TO:** ICANN New gTLD Program Committee

**TITLE:** Reconsideration Request 14-7

**PROPOSED ACTIONS:** For Committee Consideration and Approval

**EXECUTIVE SUMMARY:**

In Reconsideration Request 14-7, Asia Green IT System Ltd. (“Requester”) asked the Board (or here the NGPC) to reconsider the NGPC’s 5 February 2014 resolution deferring the contracting process for the .ISLAM and .HALAL strings until certain noted conflicts have been resolved. The Requester also seeks reconsideration of an alleged staff action implementing the NGPC’s resolution; namely, the 7 February 2014 letter from Steve Crocker, Chairman of the ICANN Board, to Requester. The Requester claims that the NGPC failed to consider material information in taking its action and also claims that ICANN staff violated an established policy or procedure by failing to inform the Requester how it should resolve the noted conflicts. The BGC concluded that the Requester has not stated proper grounds for reconsideration. The BGC recommended that the Request be denied without further consideration. A summary of the BGC recommendation is provided in the rationale below.

**BOARD GOVERNANCE COMMITTEE RECOMMENDATION:**

The BGC recommends that Request 14-7 be denied and that no further action be taken in response to the Request. As set forth below and detailed in the Recommendation attached to the Reference Materials in support of this paper, the BGC determined that the Requester has not stated proper grounds for reconsideration.

**PROPOSED RESOLUTION:**

Whereas, Asia Green IT System Ltd.’s (“Requester”) Reconsideration Request 14-7, sought reconsideration of the New gTLD Program Committee’s (“NGPC”) 5 February 2014 resolution deferring the contracting process for the .ISLAM and .HALAL strings until certain noted conflicts have been resolved.

Whereas, Request 14-7 also seeks reconsideration of an alleged staff action implementing the NGPC's 5 February 2014 resolution through the 7 February 2014 letter from Steve Crocker, Chairman of the ICANN Board, to the Requester.

Whereas, the Board of Governance Committee ("BGC") considered the issues raised in Request 14-7.

Whereas, the BGC recommended that Request 14-7 be denied because the Requester has not stated proper grounds for reconsideration and the New gTLD Program Committee agrees.

Resolved (2014.03.22.NGXX), the New gTLD Program Committee adopts the BGC Recommendation on Reconsideration Request 14-7, which can be found at <http://www.icann.org/en/groups/board/governance/reconsideration/14-7/determination-agit-13mar14-en.pdf>.

## **PROPOSED RATIONALE:**

### **I. Brief Summary**

The Requester applied for .ISLAM and .HALAL. The applications were the subject of two GAC<sup>1</sup> Early Warning notices, an evaluation by the Independent Objector, an objection filed with the ICC,<sup>2</sup> three issuances of related GAC Advice, and significant objections from a number of other entities and governments. Ultimately, the NGPC resolved to take no further action on the .ISLAM and .HALAL applications until and unless the Requester resolves the conflicts between its applications and the objections raised by the organizations and governments identified by the NGPC. The Requester claims that the NGPC failed to consider material information in taking its action and also claims that ICANN staff violated an established policy or procedure by failing to inform the Requester how it should resolve the noted conflicts.

The BGC concluded that there is no indication that the NGPC failed to consider material information in reaching its 5 February 2014 Resolution. Rather, the record demonstrates that

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<sup>1</sup> Governmental Advisory Committee.

<sup>2</sup> International Centre for Expertise of the International Chamber of Commerce.

the NGPC was well aware of the information Requester claims was material to the 5 February 2014 Resolution. In addition, the Requester has not identified an ICANN staff action that violated an established ICANN policy or procedure. Instead, the action challenged by the Requester was that of the Board, not staff, and, in any event, the Requester has failed to identify any ICANN policy or procedure violated by that action. Given this, the BGC recommends that Request 14-7 be denied. The NGPC agrees.

## II. Facts

### A. Relevant Background Facts

The Requester Asia Green IT System Ltd. (“Requester”) applied for .ISLAM and .HALAL (“Requester’s Applications”).

On 20 November 2012, the Requester’s Applications received GAC Early Warning notices from two GAC members: (i) the United Arab Emirates (“UAE”) (<https://gacweb.icann.org/download/attachments/27131927/Islam-AE-23450.pdf>; <https://gacweb.icann.org/download/attachments/27131927/Halal-AE-60793.pdf>); and (ii) India (<https://gacweb.icann.org/download/attachments/27131927/Islam-IN-23459.pdf>; <https://gacweb.icann.org/download/attachments/27131927/Halal-IN-60793.pdf>.) Both members expressed serious concerns regarding the Requester’s Applications, including a perceived lack of community involvement in, and support for, the Requester’s Applications.

In December 2012, the Independent Objector (“IO”) issued a preliminary assessment on the Requester’s application for .ISLAM, noting that the application received numerous public comments expressing opposition to a private entity, namely the Requester, having control over a gTLD that relates to religion (“IO’s Assessment on .ISLAM”). (<http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/islam-general-comment>.) The Requester submitted responses to the IO’s initial concerns, and the IO ultimately concluded that neither an objection on public interest grounds nor community grounds to the application for .ISLAM string was warranted. (See IO’s Assessment on .ISLAM.)

On 13 March 2013, the Telecommunications Regulatory Authority of the UAE filed

community objections with the ICC to the Requester's Applications ("Community Objections").<sup>3</sup>

On 11 April 2013, the GAC issued its Beijing Communiqué, which included advice to ICANN regarding the Requester's Applications, among others. Specifically, the GAC advised the Board that, pursuant to Section 3.1 of the Applicant Guidebook ("Guidebook"), some GAC members:

[H]ave noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC members that these applications should not proceed.

(Beijing Communiqué, Pg. 3, available at <http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf>.)

On 18 April 2013, ICANN published the GAC Advice thereby notifying the Requester and triggering the 21-day applicant response period. Requester submitted to the Board timely responses to the GAC Advice, which included, among other things, a summary of the support received for the Requester's Applications and a draft of the proposed governance model for the .ISLAM string ("Requester's Responses to GAC Advice").

(<http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-2130-23450-en.pdf>; <http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-2131-60793-en.pdf>; *see also* Summary and Analysis of Applicant Responses to GAC Advice, Briefing Materials 3 ("NGPC Briefing Material") available at <https://www.icann.org/en/groups/board/documents/briefing-materials-3-04jun13-en.pdf>.)

On 4 June 2013, the NGPC adopted the NGPC Scorecard ("4 June 2013 Resolution") setting forth the NGPC's response to the GAC Advice found in the Beijing Communiqué ("NGPC Scorecard"). (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04jun13-en.htm#1.a>; <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-04jun13-en.pdf>.) With respect to the .ISLAM and .HALAL strings, the NGPC Scorecard stated in pertinent part:

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<sup>3</sup> UAE's Community Objections asserted that there is "substantial opposition to [each] gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted." (Guidebook, Section 3.2.1; New gTLD Dispute Resolution Procedure ("Procedure"), Art. 2(e).)

The NGPC accepts [the GAC] advice.... Pursuant to Section 3.1ii of the [Guidebook], the NGPC stands ready to enter into dialogue with the GAC on this matter. We look forward to liaising with the GAC as to how such dialogue should be conducted.

(NGPC Scorecard, Pg. 3.) The NGPC Scorecard further noted the Community Objections filed against the Requester’s Applications and indicated that “these applications cannot move to the contracting phase until the objections are resolved.” (*Id.*)

On 18 July 2013, pursuant to Section 3.1.II of the Guidebook, members of the NGPC entered into a dialogue with the governments concerned about the .ISLAM and .HALAL strings to understand the scope of the concerns expressed in the GAC’s Advice in the Beijing Communiqué.

On 25 July 2013, the Ministry of Communications for the State of Kuwait sent a letter to ICANN expressing its support for UAE’s Community Objections and identifying concerns that the Requester did not receive the support of the community, the Requester’s Applications are not in the best interest of the Islamic community, and the strings “should be managed and operated by the community itself through a neutral body that truly represents the Islamic community such as the Organization of Islamic Cooperation.”

(<http://www.icann.org/en/news/correspondence/al-qattan-to-icann-icc-25jul13-en.pdf> )

On 4 September 2013, in a letter to the NGPC Chairman, the Republic of Lebanon expressed general support for the .ISLAM and .HALAL strings, but stated that it strongly believes “the management and operation of these TLDs must be conducted by a neutral non-governmental multi-stakeholder group representing, at least, the larger Muslim community.”

(<http://www.icann.org/en/news/correspondence/hoballah-to-chalaby-et-al-04sep13-en.pdf>.)

On 24 October 2013, the expert panel (“Panel”) appointed by the ICC to consider UAE’s Community Objections rendered two separate Expert Determinations (“Determinations”) in favor of the Requester.<sup>4</sup> Based on the submissions and evidence provided by the parties, the

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<sup>4</sup> .ISLAM Determination, available at <http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Expertise/ICANN-New-gTLD-Dispute-Resolution/EXP-430-ICANN-47-Expert-Determination/>; .HALAL Determination, available at <http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Expertise/ICANN-New-gTLD-Dispute-Resolution/EXP-427-ICANN-44-Expert-Determination/>.

Panel determined that UAE failed to demonstrate substantial opposition from the community to the Requester's Applications or that the Applications created a likelihood of material detriment to the rights or legitimate interests of a significant portion of the relevant community. (.ISLAM Determination, ¶ 157; .HALAL Determination, ¶ 164.) The Panel dismissed the Community Objections and deemed the Requester the prevailing party. (.ISLAM Determination, ¶ 158; .HALAL Determination, ¶ 165.)

On 4 November 2013, the Secretary General of the Organization of Islamic Cooperation ("OIC") submitted a letter to the GAC Chair, stating that, as the "second largest intergovernmental organization with 57 Member States spread across four continents" and the "sole official representative of 1.6 million Muslims," the Member States of the OIC officially opposed the use of the .ISLAM and .HALAL strings "by any entity not representing the collective voice of the Muslim people" ("4 November 2013 OIC Letter to GAC Chair".) (<http://www.icann.org/en/news/correspondence/crocker-to-dryden-11nov13-en.pdf>.)

On 11 November 2013, having received a copy of the OIC's 4 November 2013 letter, the ICANN Board Chairman sent a letter to the GAC Chair, noting that the NGPC has not taken any final action on the .ISLAM and .HALAL applications while they were subject to formal objections. The letter further stated that since the objection proceedings have concluded, the NGPC will wait for any additional GAC input regarding the strings and stands ready to discuss the applications if additional dialog would be helpful. (Cover Letter to 4 November 2013 OIC Letter to GAC Chair.)

On 21 November 2013, the GAC issued its Buenos Aires Communiqué, which stated the following with respect to the Requester's Applications:

GAC took note of letters sent by the OIC and the ICANN Chairman in relation to the strings .islam and .halal. The GAC has previously provided advice in its Beijing Communiqué, when it concluded its discussions on these strings. The GAC Chair will respond to the OIC correspondence accordingly, noting the OIC's plans to hold a meeting in early December. The GAC chair will also respond to the ICANN Chair's correspondence in similar terms.



(Buenos Aires Communiqué, Pg. 4, available at [https://gacweb.icann.org/download/attachments/27132037/FINAL\\_Buenos\\_Aires\\_GAC\\_Communique\\_20131120.pdf?version=1&modificationDate=1385055905332&api=v2](https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1385055905332&api=v2).)

On 29 November 2013, the GAC Chair responded to the ICANN Board Chairman's 11 November 2013 correspondence, confirming that the GAC has concluded its discussion on the Requester's Applications and stating that "no further GAC input on this matter can be expected." (<http://www.icann.org/en/news/correspondence/dryden-to-crocker-29nov13-en.pdf>.)

On 4 December 2013, the Requester submitted a letter to the ICANN Board Chairman requesting contracts for .ISLAM and .HALAL "as soon as possible." (<http://www.icann.org/en/news/correspondence/abbasnia-to-crocker-04dec13-en.pdf>.)

On 19 December 2013, the Secretary General of the OIC sent a letter to the ICANN Board Chairman, stating that the Foreign Ministers of the 57 Muslim Member States of the OIC have unanimously approved and adopted a resolution officially objecting to the .ISLAM and .HALAL strings and indicating that the resolution "underlines the need for constructive engagement between the ICANN and OIC as well as between ICANN and OIC Member States." (<http://www.icann.org/en/news/correspondence/ihsanoglu-to-crocker-19dec13-en.pdf>.)

On 24 December 2013, the Ministry of Communication and Information Technology on behalf of the government of Indonesia sent a letter to the NGPC Chairman, stating that Indonesia "strongly objects" to the .ISLAM string and, in principle, "approves" the .HALAL string "provided that it is managed properly and responsibly." (<http://www.icann.org/en/news/correspondence/iskandar-to-chalaby-24dec13-en.pdf>.)

On 30 December 2013, the Requester submitted a letter to the ICANN Board Chairman challenging the nature and extent of the OIC's opposition to the Requester's Applications, reiterating its proposed policies and procedures for governance of .ISLAM and .HALAL, and requesting to proceed to the contracting phase. (<http://www.icann.org/en/news/correspondence/abbasnia-to-crocker-30dec13-en.pdf>.)

On 5 February 2014, the NGPC adopted an updated iteration of the NGPC Scorecard (“Actions and Updates Scorecard”). (5 February 2014 Resolution, available at <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-05feb14-en.htm#1.a.rationale>; Actions and Updates Scorecard, available at <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-05feb14-en.pdf>.) With respect to the Requester’s Applications, the NGPC’s Actions and Updates Scorecard stated in pertinent part:

The NGPC takes note of the significant concerns expressed during the dialogue, and additional opposition raised, including by the OIC, which represents 1.6 billion members of the Muslim community.

(Action and Updates Scorecard, Pg. 8.) In addition, the NGPC directed the transmission of a letter from the NGPC, via the Chairman of the Board, to the Requester (“7 February 2013 NGPC Letter to the Requester”). (<http://www.icann.org/en/news/correspondence/crocker-to-abbasnia-07feb14-en.pdf>.) The 7 February 2013 NGPC Letter to the Requester acknowledges the Requester’s stated commitment to a multi-stakeholder governance model, but states:

Despite these commitments, a substantial body of opposition urges ICANN not to delegate the strings .HALAL and .ISLAM...

There seems to be a conflict between the commitments made in your letters and the concerns raised in letters to ICANN urging ICANN not to delegate the strings. Given these circumstances, the NGPC will not address the applications further until such time as the noted conflicts have been resolved.

(7 February 2013 NGPC Letter to the Requester, at Pg. 2.)

On 26 February 2014, the Requester filed Request 14-7.

#### B. Requester’s Claims

The Requester claims that the NGPC failed to consider material information when it approved the 5 February 2014 Resolution. Specifically, the Requester contends that the NGPC ignored, or was not otherwise made aware of, material information including: (1) The ICC’s Determinations dismissing the Community Objections; (2) the Requester’s proposed multi-stakeholder governance model; and (3) the differences between the .ISLAM and .HALAL

Applications. In addition, the Requester claims that the 7 February 2013 NGPC Letter to the Requester was a staff action that violates the policies set forth in the Guidebook and underlying the gTLD program because it fails to provide the Requester with guidance on how to resolve the conflicts identified in the letter.

## II. Issues

The issue for reconsideration is whether the NGPC failed to consider material information in approving the 5 February 2014 Resolution, which deferred the contracting process for the Requester's Application until the identified conflicts have been resolved. Specifically, the issue is whether the NGPC ignored, or was not otherwise made aware of, the information identified in Section I.B, above. An additional issue for reconsideration is whether the 7 February 2013 NGPC Letter to the Requester was a staff action that violated ICANN policies because it failed to provide clear criteria for the Requester to resolve conflicts with the objecting entities and countries.

## IV. The Relevant Standards for Evaluating Reconsideration Requests

ICANN's Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. *See* Article IV, Section 2 of the Bylaws. The NGPC, bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 14-7 and finds the analysis sound.<sup>5</sup>

## V. Analysis and Rationale

### A. The Requester Has Not Demonstrated That The NGPC Failed To Consider Material Information When It Approved The 5 February 2014 Resolution.

The BGC concluded, and the NGPC agrees, that the Requester has not sufficiently stated a request for reconsideration of the 5 February 2014 Resolution. The Requester has identified some information that the NGPC had available to it and purportedly should have considered

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<sup>5</sup> Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval, positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws, and Articles of Incorporation.

before approving the 5 February 2014 Resolution. But the Requester has failed to demonstrate that the NGPC did not consider this information or that the information was material and would have changed the NGPC's decision to defer the contracting process for the Requester's Applications until certain conflicts have been resolved.

First, the BGC determined that the Requester has not demonstrated that the NGPC failed to consider the Determinations dismissing the Community Objections, or that the Determinations were material to the NGPC's Resolution. There is no evidence that the NGPC did not consider the ICC's Determinations on the Community Objections in adopting the challenged Resolution. To the contrary, in the NGPC's Actions and Updates Scorecard that was adopted by the NGPC as part of its 5 February 2014 Resolution, the NGPC specifically referenced the ICC's Determination on the Community Objections. Moreover, in communications with the GAC, ICANN noted that it did not take any final action on the Requester's Applications while the applications were subject to formal objections, but that the "objection proceedings have concluded." (Cover Letter to 4 November 2013 OIC Letter to GAC Chair.) The BGC also concluded that the Requester has also failed to demonstrate that the ICC's Determinations were material to the NGPC's Resolution or otherwise identify how the Determinations would have changed the actions taken by the NGPC. The NGPC agrees.

Second, the BGC concluded and the NGPC agrees that the Requester has not demonstrated that the NGPC failed to consider the Requester's proposed multi-stakeholder governance model, or that the model was material to the NGPC's Resolution. The Requester's assertion that the NGPC failed to consider the Requester's proposed "multi-stakeholder governance model" in reaching its 5 February 2014 Resolution is unsupported. The BGC noted that the Requester's purported multi-stakeholder governance model was a subject of the Beijing Communiqué, the Requester's response to the Beijing Communiqué and the ICC's Determinations. The NGPC's 5 February 2014 Resolution makes clear that the NGPC considered the Beijing Communiqué, the NGPC Briefing Material summarized the Requester's response to the Beijing Communiqué, and, as set forth above, the NGPC was well aware of the ICC's Determinations. Moreover, as the Requester concedes, the 7 February 2013 NGPC Letter to the Requester identifies (and applauds) a 4 December 2013 letter and a 30 December 2013 letter from the Requester to ICANN relating to its proposed multi-

stakeholder governance model. Finally, the Requester does not identify any other materials relating to the Requester's proposed governance model that should have, or could have, been considered by the NGPC before reaching its 5 February 2014 Resolution.

In addition, the BGC noted that the Requester makes no effort to demonstrate that the Requester's proposed governance model was material to the NGPC's resolution or otherwise identify how the proposed model would have changed the action taken by the NGPC. Rather, the 7 February 2013 NGPC Letter to the Requester shows that the NGPC was concerned with conflicts between the Requester's purported model and the claims made about that model in the letters urging ICANN not to proceed with .ISLAM and .HALAL.

Third, the BGC determined and the NGPC agrees that the Requester has not demonstrated that the NGPC failed to consider differences between the .ISLAM and the .HALAL Applications, or that such differences were material to the NGPC's Resolution. The Requester claims that there are differences between the .ISLAM and .HALAL Applications and that the NGPC failed to consider these differences in reaching its 5 February 2014 Resolution. The BGC noted that the Requester's only support for this claim is a letter from Indonesia objecting to .ISLAM, but "endorses[ing]" .HALAL, and a letter from the Islamic Chamber Research and Information Center ("ICRIC") expressing support for .HALAL. The BGC further noted that the record indicates that the NGPC reviewed both of these letters before taking its action. Moreover, the Requester has not explained how consideration of these two letters is material to the NGPC's Resolution or otherwise identify how the letters would have changed the action taken by the NGPC.

**B. The Requester Has Not Demonstrated That The ICANN Staff Took An Action Inconsistent With An Established ICANN Policy Or Process.**

The BGC concluded that the Requester's claim that the 7 February 2013 NGPC Letter to the Requester was a staff action that violates the policies set forth in the Guidebook and underlying the New gTLD Program by failing to provide the Requester with guidance on how it should resolve the conflicts associated with the .ISLAM and .HALAL Applications is not a proper basis for seeking reconsideration.

To challenge a staff action, the Requester would need to demonstrate that it was adversely affected by a staff action that violated an established ICANN policy or process. (Bylaws, Art. IV., Section 2.2.) The 7 February 2013 NGPC Letter to the Requester was not a staff action, it was a Board (or NGPC) action. The letter was sent to the Requester under the signature of the Chair of the ICANN Board, Stephen D. Crocker. More importantly, the NGPC, delegated with all legal and decision making authority of the Board relating to the New gTLD Program, (<http://www.icann.org/en/groups/board/documents/resolutions-10apr12-en.htm>), directed transmission of the letter to explain its reasoning for the 5 February 2014 Resolution. (Actions and Updates Scorecard, Pg. 8.) As such, the BGC concluded that the 7 February 2013 NGPC Letter to the Requester is a Board (or NGPC) action and cannot be challenged as a staff action.

The BGC further noted that even if this were to be considered a staff action, which it is not, there is no established ICANN policy or procedure that requires the ICANN Board or the NGPC to provide gTLD applicants with individualized explanations or direction on what the applicants should do next.

## VI. Decision

The NGPC had the opportunity to consider all of the materials submitted by or on behalf of the Requestor (see <http://www.icann.org/en/groups/board/governance/reconsideration/14-7>) or that otherwise relate to Request 14-7. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 14-7, which shall be deemed a part of this Rationale and the full text of which can be found at <http://www.icann.org/en/groups/board/governance/reconsideration/14-7/determination-agit-13mar14-en.pdf>.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel  
Dated Noted: 16 March 2014  
Email: amy.stathos@icann.org

## ICANN NGPC PAPER NO. 2014.03.22.NG2g

**TITLE:** Update on Public Comments on Review Mechanism for String Confusion Objection Expert Determinations

**PROPOSED ACTION:** For Discussion

### **EXECUTIVE SUMMARY:**

At its 5 February 2014 meeting, the ICANN Board New gTLD Program Committee (NGPC) took action to direct the ICANN President and CEO, or his designee, to initiate a public comment period on framework principles of a potential review mechanism to address the perceived inconsistent String Confusion Objection (SCO) Expert Determinations. If adopted, the review mechanism would constitute a change to the SCO process in the New gTLD Applicant Guidebook.

The initial phase of the public comment period for the proposed review mechanism closed on 12 March 2014, and the reply period is now open until 3 April 2014. Thirty comments were submitted during the comment period. A preliminary summary of the public comments is included in the Reference Materials to this paper, and the complete summary and analysis of the public comments will be prepared at the conclusion of the reply period.

A few themes can be observed in the comments:

- Status Quo. Several commenters urge the NGPC not to create a review mechanism to address perceived inconsistent String Confusion Objection Expert Determinations. These commenters argue that changing the rules after the fact would be unfair, would constitute a breach of contract, and may be creating top-down policy changes outside of the GNSO policy development process.
- Expand the Scope of the Review. Several commenters urge the NGPC to expand the scope of the review mechanism beyond the two identified String Confusion Objections (.CAM/.COM and .CAR/.CARS). The commenters express varying

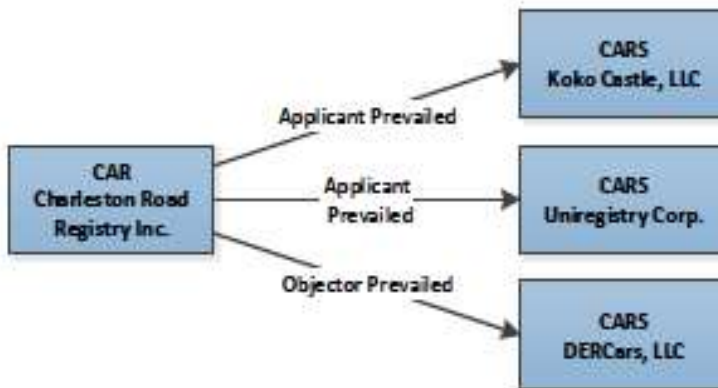


degrees to which the scope should be expanded. While some suggest that the scope be expanded to other String Confusion Objections, such as those related to .shop/.shopping, others recommend an even broader scope that would be widened to include what some continue to call “inconsistencies” in Community and Limited Public Interest Objections.

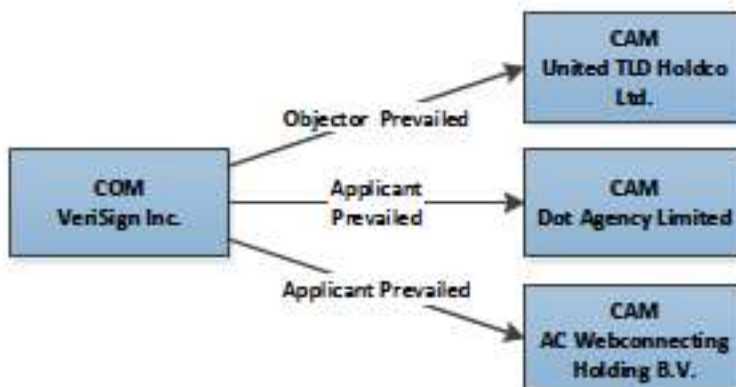
- Status Quo recommended; but if not, revise framework principles. Other commenters recommend maintaining the status quo as the preferred option. However, they go on to state that *if* the NGPC decides to adopt some sort of review mechanism, several of the commenters suggest revisions to the framework principles of the proposed review mechanism. For example, commenters have suggested revisions to the standard of review, the composition of the “Panel of Last Resort,” and the evidence that could be considered by the Panel of Last Resort.

It should also be noted that some of the applicants for strings that would be directly impacted if the review mechanism is adopted as proposed provided comments in the public comment forum. Specifically:

- In the .CAR/.CARS String Confusion Objection set, Google (Charleston Road Registry Inc.), Uniregistry Corp., and DERCars, LLC submitted comments. As highlighted in the Reference Materials, Google asserts that there is no need for an entirely new review process intended “solely to re-litigate two specific instances in which an objection proceeding resulted in a dubious ruling.” If, however, the NGPC adopts the review mechanism, Google suggests some modifications to the framework principles. Uniregistry highlights that the AGB did not provide a mechanism for appeals, and all parties who applied for TLDs relied on the promise that decisions by the dispute resolution service providers would be final. Uniregistry also suggests some revisions to the framework principles, if the NGPC decides to adopt a review mechanism. DERCars expresses general support for the review mechanism, but believes the NGPC should make a few clarifications concerning the framework principles.



- In the .COM/.CAM String Confusion Objection set, United TLD Holdco Ltd. and Dot Agency Limited provided comments. As highlighted in the Reference Materials, United TLD generally supports the proposed review mechanism, but proposes modifications to the framework principles. Dot Agency Limited asserts that amending the New gTLD Program rules now to allow an appeal is a breach of process under ICANN’s own guidelines, and also legally.



**STAFF RECOMMENDATION:**

There is no recommendation at this time. Staff will provide a recommendation after fully analysing all of the comments at the end of the public comment period.

**Signature Block:**

Submitted by: Amy Stathos

Position: Deputy General Counsel

Date Noted: 14 March 2014

Email: amy.stathos@icann.org