

DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 14-3

27 FEBRUARY 2014

The Requester Corn Lake, LLC, a Donuts, Inc. affiliate, seeks reconsideration of the Expert Determination upholding the Independent Objector's community objection to the application for .CHARITY.

I. Brief Summary.

The Requester applied for .CHARITY. The Independent Objector filed a community objection to the Requester's application and won. The Requester claims that the actions of the Expert Panel were inconsistent with ICANN policies, which influenced the Expert Panel's decision to find in the Objector's favor. Specifically, the Requester contends that the Panel failed to adhere to and apply ICANN processes and policies concerning the requirements for identifying a clearly delineated community and for showing the likelihood of material detriment as set forth in Sections 3.5 and 3.5.4 of the Applicant Guidebook.

The Requester asks ICANN to reverse the Expert Determination, follow the standards established by ICANN for purposes of effectuating its policies and procedures respecting community objections as set forth in Section 3.5.4 of the Applicant Guidebook, and confirm that the Requester's .CHARITY application remains active and that the Requester may continue to compete for the string in accordance with applicable ICANN processes.

With respect to each claim asserted by the Requester, there is no evidence that the Panel violated any policy or process in reaching the Panel's determination. The Requester has failed to demonstrate that the Panel applied the wrong standard in evaluating the Independent Objector's Objection. Therefore, the BGC concludes that Request 14-3 should be denied.

II. Facts.

A. Background Facts.

Corn Lake, LLC (“Requester”), a Donuts, Inc. affiliate, applied for .CHARITY.

On 13 March 2013, the Independent Objector (“IO” or “Objector”)¹ filed a Community Objection with the ICC² to the Requester’s application asserting that there is “substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.” (Applicant Guidebook (“Guidebook”), Section 3.2.1; New gTLD Dispute Resolution Procedure (“Procedure”), Art. 2(e)(iv).)

On 7 May 2013, the ICC informed the parties that it was going to consolidate the present proceeding with two other proceedings, namely the IO’s community objections to: (i) Excellent First Limited’s application for .慈善 (translated to “charity”) (EXP/399/ICANN/16); and (ii) Spring Registry Limited’s (“SRL”) application for .CHARITY (EXP/400/ICANN/17).

On 6 June 2013, the Requester responded to the IO’s Objection.

On 4 July 2013, the ICC appointed Tim Portwood as the Expert (“Expert” or “Panel”) to consider the Objection.

On 22 August 2013, the IO filed a supplemental written statement.

On 6 September 2013, the Requester responded to the IO’s supplemental written statement.

On 9 January 2014, the Panel rendered an Expert Determination in favor of the IO, thereby finding the IO the prevailing party. Based on the submissions and evidence, the Panel

¹ The Independent Objector, Professor Alain Pellet, was appointed by ICANN to serve for the duration of the New gTLD Program and object to highly objectionable gTLD applications on limited public interest and community grounds. (See Applicant Guidebook, Section 3.2.5.)

² International Centre for Expertise of the International Chamber of Commerce.

determined that the IO had standing to object and that the IO established each of the requisite four elements to prevail on a community objection. (Determination, ¶ 112, Pg. 27; ¶ 161, Pg. 35.)

On 9 January 2014, the ICC notified the Requester of the Panel's decision.

On 24 January 2014, the Requester filed Request 14-3.

B. The Requester's Claims.

The Requester claims that the Panel's decision to uphold the Objection violates Section 3.5.4 of the Guidebook, in particular the standards for evaluating whether an objector meets the requirements for making a community objection. Specifically, the Requester claims that:

1. The Panel incorrectly applied the standards for evaluating the existence of a clearly delineated community;
2. The Panel incorrectly applied the standards for evaluating the likelihood of material detriment.

(Request, Section 10, Pgs. 12-18; *see also* Request, Section 8, Pg. 7 fn. 18.)

C. Relief Requested.

The Requester asks ICANN to reverse the Expert Determination, follow the standards established by ICANN for purposes of effectuating its policies and procedures respecting community objections as set forth in Section 3.5.4 of the Applicant Guidebook, and confirm that the Requester's .CHARITY application remains active and that the Requester may continue to compete for the string in accordance with applicable ICANN processes. (Request, Section 9, Pg. 11.)

III. Issues.

In view of the claims set forth in Request 14-3, the issues for reconsideration are as follows:

- A. Whether the Panel applied the wrong standard in contravention of established policy or process by:
 1. Failing to apply the proper standard for evaluating the existence of a clearly delineated community; and
 2. Failing to apply the proper standard for evaluating the likelihood of material detriment.

IV. The Relevant Standards for Evaluating Reconsideration Requests and Community Objections.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.³ (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, or if the Board or the NGPC⁴ agrees to the extent that the BGC deems that further consideration is necessary, that the requesting party failed to satisfy the reconsideration criteria set forth in the Bylaws. ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers in the New gTLD Program, such as the ICC, if the claim is that the Panel failed

³ Article IV, Section 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

⁴ New gTLD Program Committee.

to follow established policies or processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.⁵

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC is not to evaluate the Panel's substantive conclusion that there is substantial opposition from a significant portion of the community to which the .CHARITY string may be targeted. Rather, the BGC's review is limited to whether the Panel violated any established policy or process.

The standards for evaluating community objections include a four-part test to help an expert panel determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

(Guidebook, Section 3.5.4.) The Requester's claims are based on the first and fourth elements, namely whether the Panel applied the correct standards in determining the existence of a clearly delineated community and the likelihood of material detriment. The factors relevant to the Requester's claims are discussed in detail below.

⁵ See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

V. Analysis and Rationale.

A. The Requester Failed To Demonstrate That The Panel Applied The Wrong Standards In Contravention Of Established Policy or Process.

1. The Panel Did Not Fail To Apply The Proper Standard For Evaluating The Existence Of A Clearly Delineated Community.

The Requester claims that the Panel failed to apply the standards established by ICANN for evaluating the existence of a clearly delineated community for purposes of a community objection. Specifically, the Requester contends that “[a] ‘clearly delineated’ community means more for the Objection on the merits than it does for standing,” such that, in the Requester’s view, “the <.CHARITY> TLD itself must denote such a community.” (Request, Section 8.3.2, Pg. 7.) The Requester claims that the Panel incorrectly applied this standard because “[t]he sole word ‘charity’ cannot [be a clearly delineated community], since no boundaries surround the multiple millions of persons and organizations involved in philanthropy worldwide.” (*Id.*) To support this assertion, the Requester cites to “comments made during Guidebook drafting,” which the Requester contends require that the term “charity” “uniquely or nearly uniquely identify registered charities, charitable institutions and non-profits, as distinct from the millions of other individuals, organizations and even large, for-profit corporations involved in charitable causes...” (Request, Sections 10.15-10.16, Pg. 18.)⁶

As noted above, to prevail on a community objection, the objector must establish, among other things, that “the community expressing opposition can be regarded as a clearly delineated community.” (Guidebook, Section 3.5.4.) The Guidebook (as the Panel correctly notes) provides that the “community” in question is the one invoked by the objector. (*Id.* (“The

⁶ We note that the comments cited by the Requester are comments submitted by eNOM on 21 July 2009 during the drafting of the Guidebook. There is no indication that these comments were incorporated into the Guidebook. The Requester cites no authority supporting that view.

objector must prove that: The community invoked by the objector is a clearly delineated community”); *see also* Determination, ¶¶ 114, 115, Pg. 27.) Thus, contrary to the Requester’s claim, the issue is not whether the term “charity” defines a clearly delineated community. The issue, as set forth in the Guidebook, is whether the community invoked by the objector is a clearly delineated community. As discussed below, the Panel correctly applied the standards for determining whether the community invoked by the IO was a clearly delineated community.

Here, the community invoked by the IO was “the charity sector” comprising all “charitable institutions.” (Determination, ¶ 116, Pg. 28.) As the Panel noted, and as expressly called for by the Guidebook:

The question for determination, therefore, is whether IO has proven to the Expert Panel that the ‘charity sector’ comprising ‘all charitable institutions’ constitutes a ‘clearly delineated community.’

(Determination, ¶ 117, Pg. 28; Guidebook, Section 3.5.4.)

The Guidebook provides that “a panel could balance a number of factors” to determine whether or not the community expressing opposition can be regarded as a clearly delineated community. (Guidebook, Section 3.5.4; *see also* Determination, ¶ 118, Pg. 28.) The possible factors include but are not limited to the following:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (which may not apply if the community is territorial); and
- The number of people or entities that make up the community.

(Guidebook, Section 3.5.4.)

The Panel adhered to the factors set forth in the Guidebook in determining whether the community invoked by the IO – the charity sector – is a clearly delineated community. Applying the first factor (the level of public recognition), the Panel determined that “[t]he existence in many jurisdictions, such as the UK, of regulators of the charity sector is an indication that that sector is capable of delineation and is considered publicly to be different from others.”

(Determination, ¶ 121, Pg. 28.) The Panel also noted that “[t]he public comments made with respect to the Application indicate that publicly the charity sector is considered to exist separately from other sectors of activity.” (Determination, ¶ 122, Pg. 28.)

Applying the second factor (what persons or entities are considered to form the community), the Panel found it “obvious” that “the common characteristics of the members of the ‘charity sector’ include their charitable aims, often status as not-for-profit institutions, often exemption from regulatory requirements applicable to for-profit entities and funding through donations or public money.” (Determination, ¶ 120, Pg. 28.) Regarding the fourth factor (the global distribution of the community), the Panel noted the existence of regulators of the charity sector “in many jurisdictions.” (Determination, ¶ 121, pg. 28.)

Balancing the factors, the Panel concluded that the charity sector, comprising all charitable institutions, constitutes a clearly delineated community. (Determination, ¶ 124, Pg. 29.)⁷ There is therefore no support for the Requester’s claim that the Panel failed to apply the proper standard for evaluating the existence of a clearly delineated community.

⁷ While the Guidebook identifies other factors the Expert Panel may consider in determining the existence of a clearly delineated community, the Panel is not required to analyze each factor. (Guidebook, Section 3.5.4 (“a panel *could* balance a number of factors”) (emphasis added).) The Requester has not provided any evidence showing that the Panel’s consideration of the foregoing factors was not in accordance with the processes set forth in the Guidebook.

2. The Panel Did Not Fail To Apply The Proper Standard For Evaluating The Likelihood Of Material Detriment.

The Requester claims that the Panel failed to apply the standards established by ICANN for evaluating the likelihood of material detriment. In support, the Requester relies on the Expert Determination in the consolidated objection proceeding concerning Spring Registry Limited's ("SRL") application for .CHARITY, which the Requester characterizes as "the virtually indistinguishable application of SRL in EXP/400/ICANN/17." (Request, Section 10.7, Pg. 13.) Specifically, the Requester contends that "nothing significant distinguishes the application of SRL from that of [the Requester]," such that, in the Requester's view, because the Panel rejected the IO's claim of material detriment in the SRL proceeding, it must necessarily also reject the IO's claim of material detriment in the instant proceeding. (Request, Section 10.8, Pgs. 13-14.) The Requester's claims are unfounded.

As noted above, under the final part of the four-part test for evaluating community objections, the objector must establish that the "application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted." (Guidebook, Section 3.5.4.) The Guidebook includes a list of factors that could be used by a panel in making this determination. The factors include, but are not limited to the following:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;

- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

(Id.)

In evaluating these factors in the context of the Requester's .CHARITY application, the Panel found that the Domain Name System ("DNS") was important to the community's core activities because the DNS is "a means of recognition and fund-raising for the charity sector." (Determination, ¶ 149, Pg. 33.) The Panel then recognized the following rights and interests of the community and the public that could be harmed if the Requester's application was permitted to proceed: (1) the need of the charity sector for public funding to finance its activities; and (2) the trust and confidence of the public in the charity sector that donations will be used for the stated charitable ends. (Determination, ¶ 151, Pg. 33.)

The Panel also accepted the public statements of opposition that "focus on the need clearly to distinguish charitable organizations from for-profit enterprises in particular in public giving and fund-raising activities," stating:

They point out the absence of any limitation in the Application of the ".Charity" string to not-for-profit or charitable organizations ... and emphasize the need for strict registration eligibility criteria limited to persons regulated as charitable bodies or their equivalent depending upon domestic law.

(Determination, ¶¶ 150, 151, Pg. 33.) In the Panel's view, the public statements of opposition evidenced a particular harm that would occur "if access to the '.Charity' string were not restricted to persons (whether incorporated entities, unincorporated associations or entities, foundations or trusts) which can establish that they are a charity or a not-for-profit enterprise

with charitable purposes.” (Determination, ¶¶ 152, 156, Pgs. 33-34.) Because the Requester’s application “expressly avoids such a limitation and therefore the protection that the Expert Panel considers should exist,” the Panel concluded that the IO had satisfied its burden of proving the likelihood of a material detriment. (Determination, ¶ 153, Pg. 33 (citing the statement in the Requester’s application that “we believe attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants”).

The lack of any eligibility policy in the Requester’s application ensuring that registration will be limited to members of the charity sector is precisely what distinguishes the Panel’s determination in the instant proceeding from that in the SRL proceeding. In the SRL proceeding, the Panel articulated the same concerns present here, namely the need to clearly distinguish charitable organizations from for-profit enterprises in particular in public giving and fund-raising activities. (Request, Attachment 9, at ¶¶ 126-128, Pg. 29.) In the SRL proceeding, however, the Panel found that SRL’s proposed eligibility policy adequately assuaged the Panel’s concerns:

The eligibility policy defined by Applicant and inspired by the criteria of the UK Charities Act 2011 which will be included in any registration agreement entered into by Applicant with ICANN together with appropriate safeguards for registry operators respond in the Expert Panel’s view to the Detriment test concerns raised by IO.

(Request, Attachment 9, at ¶ 129, Pg. 29.) Specifically, SRL committed to an eligibility policy that defined the subset of the community to which registration will be limited as “incorporated entities, unincorporated associations or entities, foundations or trusts which can establish that they are a charity or ‘not for profit’ enterprise with charitable purposes.” (Request, Attachment 9, at ¶ 130, Pg. 30.)⁸ As the Panel stated:

⁸ The process for registration further would require each registrant applicant to provide the registrar with evidence of its charitable purposes. (Attachment 9, ¶ 130, Pg. 30.)

In short, registration will be limited to members of the charity sector as narrowly defined by analogy with the definitions of ‘charity’ and ‘charitable purposes for the public benefit’ found in the UK Charities Act 2011.

(Request, Attachment 9, at ¶ 130, Pg. 30.) Because the Requester presented no evidence that it intended to or was otherwise willing to adopt a similar eligibility policy, there is no support for the Requester’s claim that “nothing distinguishes the application of SRL from that of Corn Lake.”

(Request, Section 10.8, Pg. 13.)⁹

The Requester further claims that SRL’s proposed eligibility criteria was submitted “after the close of evidence and without a prior request by SRL,” such that the Panel in the instant proceeding should have afforded Corn Lake “the same opportunity” to submit additional information in defense of its application. (Request, Sections 10.9-10.10, Pg. 14.) The Requester’s claim is unsupported.

In citing SRL’s proposed eligibility policy, the Panel in the SRL proceeding relied on “Annex 2 to Applicant’s Additional Written Statement.” (See Request, Attachment 9, at n. 103-108.) The Applicant’s Additional Written Statement was expressly requested and approved by the Expert Panel in the SRL proceeding before the close of evidence. Indeed, in the Panel’s determination in the SRL proceeding, the Panel stated that “on 9 August 2013, ... the Expert Panel wrote to the Parties informing them of its view that it would be assisted by a second round of written submissions and inviting the Parties each to submit an Additional Written Statement...” (Request, Attachment 9, at ¶ 16, Pg. 7.) In accordance with the Panel’s order, SRL filed its Additional Written Statement on 6 September 2013. (Request, Attachment 9, at

⁹ The Requester periodically asserts that it should have been given the opportunity to “adopt protective measures such as SRL’s.” (See, e.g., Request, Section 10.11, Pg. 16.) But, as noted, the Requester never indicated – and in fact expressly rejected – a willingness to adopt an eligibility policy similar to the one that assuaged the Panel’s concerns in the SRL proceeding.

¶ 23, Pg. 8.) It appears from the Panel’s determination in the SRL proceeding that the proposed eligibility policy upon which the Panel based its determination was annexed to SRL’s 6 September 2013 Additional Written Statement. (*See* Request, Attachment 9, at ¶¶ 129-131, Pgs. 29-30 & Footnotes 103-108.) As such, it was properly before the Panel in the SRL proceeding.¹⁰

By contrast, in the instant proceeding, the evidence closed on 6 September 2013. (Determination, ¶ 25, Pg. 8.) Three months later, on 4 December 2013, the Requester proffered “new information regarding proposed implementation of the GAC’s ‘Category 1’ advice as to which, once adopted by ICANN, Corn Lake would have a duty in its registry agreement to institute protections if awarded the string.” (Request, Section 10.9, Pg. 14; *see also* Request, Attachments 5 and 7.) In response to the Requester’s submission, the ICC noted that “ICANN’s New gTLD Dispute Resolution Procedure does not provide for any specific provision regarding the issue raised by the Applicant. Accordingly, the Centre has referred the decision of whether to take the Applicant’s additional information into account to the Expert Panel.” (*See* Request, Attachment 7.)

For its part, the Panel noted that “further submissions were not contemplated by the procedural timetable (as amended) set out in the Expert Panel’s communication of 9 August 2013 under Article 17(a) of the Procedure,” and that “no application was made by Applicant Corn Lake, LLC to seek leave of the Expert Panel to make further submissions.” (Request, Attachment 7.) Furthermore, the Panel had already submitted its draft Expert Determination to the ICC and at the time the Requester submitted its further submission, the ICC already was in

¹⁰ The Requester also cites a 25 October 2013 submission by SRL. (Request, Section 10.9, Pg. 14.) However, the Requester has not proffered any evidence that the Panel reviewed this email submission, accepted this submission or otherwise relied on it in any way in rendering its determination. The 25 October 2013 submission is not cited anywhere in the Panel’s determination in the SRL proceeding.

the scrutiny procedure provided by Article 21 of the Procedure. (Request, Attachment 7.) Based on these procedural considerations, the Panel dismissed the Requester's further submission. (Request, Attachment 7.) As is evident, the Panel explicitly stated that it followed established procedures and the Requester has not presented any evidence to show that ICANN policy or process was violated by the Panel's refusal to consider the untimely submission.

In all events, the Panel did note that the Requester had agreed to put in place additional measures following the GAC Beijing Advice, but did not deem it sufficient to demonstrate that the Requester would act in accordance with the rights and interests of the clearly delineated community. The Panel found that Requester's offered protections or safeguards "focus on avoiding and eradicating abuse," and "do not therefore respond to the rights and interests of the charity sector community since abuse is not ... defined in the Application in terms of those rights and interests." (Determination, ¶ 154, Pg. 34.)¹¹

VI. Decision.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Reconsideration Request 14-3. Given there is no indication that the Panel violated any policy or process in reaching, or Staff in accepting, the Determination, this Request should not proceed. If the Requester believes that it has somehow

¹¹ The Requester also challenges the Panel's determination that "there is nothing in the Application ... to indicate that Applicant will act in accordance with the rights and interests of the community," claiming that this "formulation[] turn[s] both the substantive objection standard and burden of proof entirely on their heads." (Request, Section 10.13, Pg. 17.) But the Guidebook expressly provides that, in determining whether there is a likelihood of material detriment, the Panel may consider "evidence that the applicant ... does not intend to act in accordance with the interests of the community ..., including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests." (Guidebook, Section 3.5.4.) Thus, contrary to the Requester's claim, the *absence* of assurances in the application to indicate that the applicant will act in accordance with the rights and interests of the community is in fact a relevant consideration.

been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC's determination on Request 14-3 shall be final and does not require Board (or NGPC) consideration. The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-3 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of timing of the BGC's Determination, 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 impractical. (*See* Article IV, Section 2.16 of the Bylaws.) To satisfy the thirty-day deadline, the BGC would have to have acted by 23 February 2014. 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 27 February 2014; 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 14-3.