

## DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

### RECONSIDERATION REQUEST 14-8

22 MARCH 2014

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The Requester DotMusic/CGR E-Commerce Ltd. seeks reconsideration of ICANN staff's alleged failure (inaction): (1) to properly supervise the ICC<sup>1</sup> with respect to appointment and training of experts; (ii) to advise the ICC and appointed expert panelists about GAC<sup>2</sup> advice; and (iii) to provide an appropriate appeal process.

#### **I. Brief Summary.**

The Requester, an applicant for .MUSIC, filed community objections against various .MUSIC and .BAND applications, and lost each of those objections. The Requester claims that: (1) ICANN staff failed to properly supervise the ICC to ensure that an appropriately qualified expert was appointed and trained to decide the Requester's objections; (2) failed to properly supervise the ICC to ensure that experts are free of potential conflicts of interest; (3) failed to advise the ICC and the Panel on GAC advice relating to exclusive access registries; and (4) failed to provide an appropriate appeal process for community objections. In addition, Requester raises a number of other points, without explanation or argument, regarding ICANN's oversight of the New gTLD Program that Requester claims support reconsideration.

With respect to Requester's first claim, there is no support in the Applicant Guidebook or otherwise for the Requester's claim that the Expert should have superior knowledge of the community reflected in the contested applications, or that the Expert lacked the training to address the issues raised in the Requester's objections.

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<sup>1</sup> International Centre for Expertise of the International Chamber of Commerce.

<sup>2</sup> Governmental Advisory Committee.

With respect to Requester's second claim, there is no evidence that ICANN, the ICC, or the Expert failed to comply with all relevant policies regarding conflicts of interest.

With respect to Requester's third and fourth claims, the Requester failed to identify any policy or process violation that supports reconsideration.

Requester's additional points regarding ICANN's oversight of the gTLD program do not support reconsideration because they are not buttressed with any details regarding a violation of ICANN policy or procedure and they appear unrelated to Requester's community objections.

Therefore, the BGC concludes that Request 14-8 should be denied.

## **II. Facts.**

### **A. Background Facts.**

Requester DotMusic/CGR E-Commerce Ltd. ("Requester") applied for .MUSIC ("Requester's Application"). While seven other applicants also applied for .MUSIC, this Request relates to community objections filed against six of the seven applications.<sup>3</sup>

Both Auburn Hollow, LLC, an affiliate of Donuts, Inc., and Red Triangle, LLC, applied for .BAND.

On 13 March 2013, two organizations represented by the Requester, the American Association of Independent Music ("A2IM") and its member the International Federation of Arts Councils and Culture Agencies ("IFACCA") filed community objections to the .MUSIC

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<sup>3</sup> Request 14-8 relates to community objections filed against: (i) Charleston Road Registry, Inc.; (ii) DotMusic, Inc.; (iii) dot Music Limited; (iv) Victor Cross; (v) .music LLC; (vi) and Entertainment Names, Inc. Request 14-8 does not relate to Amazon EU S.a.r.l.'s application for .MUSIC. Requester previously filed a Reconsideration Request (Request 13-22) seeking reconsideration of the expert determination on its community objections against Amazon EU S.a.r.l.'s applications for .MUSIC, .SONG, and .TUNES. <http://www.icann.org/en/groups/board/governance/reconsideration/13-22/determination-dotmusic-05feb14-en.pdf>

applications relevant to this Request.<sup>4</sup> A2IM also filed community objections to both .BAND applications. The .MUSIC and .BAND objections (collectively, “Requester’s Community Objections”) essentially asserted the same claims: That there was “substantial opposition to the gTLD application[s] from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.” (Applicant Guidebook (“Guidebook”), § 3.2.1; New gTLD Dispute Resolution Procedure (“Procedure”), Art. 2(e).)

On 11 April 2013, the GAC issued its Beijing Communiqué. Among other advice, the GAC advised that “[f]or strings representing generic terms, exclusive registry access should serve a public interest goal.” (Beijing Communiqué, Annex I, Pg. 11 available at <http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf>.) The GAC identified .MUSIC and .BAND, among others, as strings that the GAC considered to be generic terms that should be subject to additional safeguards aimed at ensuring that the strings serve a public interest goal.<sup>5</sup> (*See id.*)

In June 2013, the ICC appointed Professor Sir Robin Jacob of the Faculty of Laws as the Expert (“Expert” or “Panel”) to evaluate the Requester’s Community Objections.

On 25 June 2013, the NGPC<sup>6</sup> accepted the advice contained in the GAC’s Beijing Communiqué regarding applicants seeking to impose exclusive registry access for strings the GAC deemed as generic terms, and directed staff to defer contracting with such applicants “pending a dialogue with the GAC” regarding an appropriate definition of “public interest goal”

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<sup>4</sup> IFACC objected to .music LLC’s application. A2IM objected to the applications of: (i) Charleston Road Registry, Inc.; (ii) dot Music Limited; (iii) DotMusic Inc.; (iv) Entertainment Names Inc.; and (v) Victor Cross, LLC. The ICC consolidated A2IM’s .MUSIC Objections into one proceeding.

<sup>5</sup> The ICANN Bylaws require the Board to take into account the GAC’s advice on public policy matters. (Bylaws, Art. XI, § 2.1.j.) In the context of the New gTLD Program, there are also specific procedures pursuant to which the GAC may provide advice to ICANN on new gTLDs. (Guidebook, § 3.1.)

<sup>6</sup> New gTLD Program Committee.

(“25 June 2013 Resolution”). (See

<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm>; see also

ICANN NGPC Paper No. 2013-06-25-2b: GAC Advice in Beijing Communiqué regarding Safeguard Advice Applicable to Category 2 Strings, Briefing Materials 1, Pgs. 25-31, available at <http://www.icann.org/en/groups/board/documents/briefing-materials-1-25jun13-en.pdf>.)

On 2 July 2013, the NGPC approved revisions to the New gTLD Registry Agreement including a provision prohibiting registry operators from limiting registrations in “generic term” registries exclusively to “a single person or entity and/or that person’s or entity’s ‘Affiliates.’” (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-02jul13-en.htm#1.d>; see also <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-item-1d-02jul13-en.pdf>, Annex I, New gTLD Agreement.)

On 12 July 2013, the Requester sent a letter to ICANN seeking clarification of ICANN’s recent resolutions accepting GAC advice and how such resolutions may impact pending community objections. The Requester asked ICANN to instruct the ICC and the Panel not to consider any new policies or changes made to applications as a result of resolutions passed after the date the objections were filed and that each application be judged as it was submitted (“Requester’s 12 July 2013 Letter to ICANN”).

(<http://www.icann.org/en/news/correspondence/roussos-to-crocker-et-al-12jul13-en.pdf>.)<sup>7</sup>

On 12 August 2013, in each of the Requester’s Community Objections, the Requester sought permission from the Panel to file new information relating to the Beijing Communiqué and ICANN’s response thereto.

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<sup>7</sup> ICANN responded to the Requester’s 12 July 2013 correspondence on 14 August 2013, noting that ICANN does not dictate or limit the scope of the documentation that panelists may request or evaluate (“ICANN’s 14 August 2013 Letter to Requester”). (<http://www.icann.org/en/news/correspondence/willett-to-roussos-14aug13-en.pdf>.)

On 21 August 2013, the Panel issued an interim ruling permitting the Requester to make an additional submission relating to the Beijing Communiqué in each of the Requester's Community Objections and giving the applicants an opportunity to respond to the submissions, all of which occurred in due course. (*See A2IM v. Red Triangle LLC*, EXP/460/ICANN/77, Pgs. 3-5.)

On 23 December 2013, the Requester filed Request 13-22, challenging an Expert Determination rejecting the Requester's community objections against Amazon's applications for .MUSIC, .SONG, and .TUNES. Specifically, in Request 13-22, the Requester sought reconsideration of ICANN's alleged failure to: (1) properly supervise the ICC to ensure that appropriately qualified experts are appointed and adequately trained to decide community objections; (2) advise the ICC and appointed expert panelists on GAC advice; and (3) provide an appropriate appeal process for community objections. The claims raised by the Requester in Request 13-22 are again raised by the Requester in connection with the instant Request.

On 5 February 2014, the BGC issued a determination on Request 13-22. With respect to the first claim in Request 13-22 that the Expert was not qualified, the BGC found it was not supported and should be rejected. The BGC noted that there is no support in the Guidebook or otherwise for the Requester's view that the Expert should have superior knowledge of the community reflected in the contested applications, or that the Expert lacked the training to address the issues raised in the Requester's objections." (*See* <http://www.icann.org/en/groups/board/governance/reconsideration/13-22/determination-dotmusic-05feb14-en.pdf>.) With respect to the second claim in Request 13-22 that the Panel should have been advised on the relevance and impact of the GAC's advice relating to exclusive access registries, the BGC determined that the Requester did not demonstrate any policy or

process that supports reconsideration based on ICANN’s alleged failure to advise the ICC and the Panel on GAC advice. (*Id.*)

With respect to the third claim in Request 13-22, the BGC determined that “the Requester has not identified any established policy or process that required ICANN to implement an appeal mechanism (upon request or otherwise).” (*See id.*)

On 18 February 2014, the Panel rendered its Expert Determinations on each of the Requester’s Community Objections in favor of the applicants, thereby dismissing the Requester’s Community Objections and finding applicants to be the prevailing parties. (Request, Annex A.) Based on the submissions and evidence provided by the parties, the Panel determined that the Requester did not have standing to object, and even if the standing requirements had been met, the Requester also failed on the merits. (Determination, Pgs. 9-12.)<sup>8</sup>

On 4 March 2014, the Requester filed Request 14-8.

**B. The Requester’s Claims.**

The Requester seeks reconsideration on the following grounds:

First, the Requester claims that ICANN failed to properly supervise the ICC to ensure that appropriately qualified expert candidates are selected and trained to decide community objections. (Request, Section 3, Pg. 1.)

Second, the Requester claims that ICANN failed to properly supervise the ICC to ensure that experts are free from potential conflicts of interest. (Request, Section 3, Pg. 1.)

Third, the Requester claims that ICANN failed to recognize the relevance and impact that the “exceptional” GAC advice purportedly has on the community objection process and

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<sup>8</sup> The Panel rendered eight nearly identical Determinations on the Requester’s Community Objections. For ease of reference, all citations to “Determination” are made to the Expert Determination on the Requester’s Objection to the .MUSIC application of Charleston Road Registry Inc. (EXP/462/ICANN/79).

community applicants, and failed to advise the ICC and the Panel about GAC advice and subsequent actions (responses to GAC advice, Board resolutions, material changes to “applicant positions,” and revisions to the registry agreement) that addressed GAC advice relating to exclusive access registries. (Request, Section 3, Pgs. 1-2.)

Fourth, the Requester claims that ICANN failed to provide an appropriate appeal process for community objections and denied parties a procedure to protect their fundamental rights and legitimate interests. (Request, Section 3, Pg. 2.)

Finally, the Requester raises additional points regarding alleged ICANN actions and inactions relating the New gTLD Program. (Request, Section 3, Pgs. 2-3.)

### **C. Relief Requested.**

The Requester asks that ICANN: (i) reimburse (or order the ICC to reimburse) all of Requester’s expenses (including attorney fees, administrative expenses and Expert fees associated with its Objections); (ii) allow new community objections to be filed against the challenged applications and appoint an appropriate expert to decide the objections (noted as an expert in music/intellectual property/competition regulation); (iii) determine that public statements concerning an applicant’s intent to substantially amend its application be deemed “material and inconsistent” with positions taken in the applicant’s community objection response and an admission of the applicant’s “harmful policies,” resulting in a ruling in favor of the objector; and (iv) allow for a reconsideration of the Determinations by an appropriate and qualified expert that has been instructed on GAC advice and changes made by the applicants. (Request, Section 9, Pg. 23.)

### **III. Issues.**

In view of the claims set forth in Request 14-8, the issues for reconsideration are:

- A. Whether ICANN staff's alleged failure to properly supervise the ICC to ensure that appropriately qualified experts are selected and trained to decide community objections supports reconsideration;
- B. Whether ICANN staff's alleged failure to properly supervise the ICC to ensure that experts are free of potential conflicts of interest supports reconsideration;
- C. Whether ICANN staff's alleged failure to advise the ICC and the Panel on GAC Advice supports reconsideration;
- D. Whether ICANN staff's alleged failure to provide an appeal mechanism for community objections supports reconsideration; and
- E. Whether Requester's additional points support a claim for reconsideration.

#### **IV. The Relevant Standards for Evaluating Reconsideration Requests.**

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.<sup>9</sup> (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC<sup>10</sup> concludes, or if the Board or the NGPC agrees to the extent that the BGC deems that further consideration is necessary, that the requesting party does not have standing because the 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 to follow established policies or processes in reaching

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<sup>9</sup> Article IV, Section 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration 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.

<sup>10</sup> Board Governance Committee.

the expert determination, or that staff failed to follow its policies or processes in accepting that determination.<sup>11</sup> 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. Rather, the BGC’s review is limited to whether the Panel violated any established policy or process.

**V. Analysis and Rationale.**

**A. The Alleged Failure Of ICANN To Properly Supervise The ICC To Ensure That Appropriately Qualified Experts Are Selected And Trained To Decide Community Objections Does Not Support Reconsideration.**

The Requester claims that the appointed Panel “while a noted and highly respected expert, [] is not an expert on music,” and was therefore not qualified to hear the Requester’s Objections. (Request, Section 6, Pg. 4.) The Requester challenges ICANN’s purported failure to supervise the ICC to ensure appropriately qualified experts are selected and trained to decide community objections. Specifically, the Requester claims that it relied upon § 3.4.4 of the Guidebook, which provides that the “panel will consist of *appropriately qualified* experts appointed to each proceeding by the designated DRSP,”<sup>12</sup> and that ICANN’s failure to appoint and train a music expert constituted a violation of the Guidebook. (Request, Section 6, Pgs. 4-5 (emphasis added).)

ICANN previously addressed this issue with the Requester in connection with Request 13-22. In June 2013, within days of the expert being appointed in connection with the Requester’s community objections to Amazon’s .MUSIC, .SONG, and .TUNES applications, the Requester sent an email to ICANN raising concerns that “the ICC has not identified expert Panelists that have expertise in music – the relevant subject matter of interest for the communities.” (Request, Section 8, Pg. 20.) ICANN responded to the Requester’s email by

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<sup>11</sup> See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

<sup>12</sup> “DRSP” refers to dispute resolution service provider.

referencing § 3.4.4 of the Guidebook and stating that “ICANN has confidence that the ICC has followed the requirements as expressed by the [Guidebook] and has appointed experienced jurists with *appropriate qualifications in mediation/arbitration* to preside over objection proceedings.” (*Id.* (emphasis added).) After the expert rejected the Requester’s community objections to Amazon’s applications, the Requester filed Request 13-22 and again raised this issue. Ultimately, in evaluating Request 13-22, the BGC concluded that “[t]here is no support in the Guidebook or otherwise for the Requester’s view that the Expert should have superior knowledge of the community reflected in the contested applications....” (*See* <http://www.icann.org/en/groups/board/governance/reconsideration/13-22/determination-dotmusic-05feb14-en.pdf>.) Nonetheless, the Requester contends here that “the Expert had limited on [sic] functions of the substantial clearly delineated community invoked and was ill-prepared to understand and address these unique issues by applying correct standards for standing.” (Request, Section 6, Pg. 4.) There is, however, no support for the Requester’s contention.

As the BGC previously found, the Guidebook does not define “expert” as a person with superior knowledge of the community reflected in the application in community objection proceedings, and the Requester’s attempt to impute such a definition into the Guidebook is not supported. (*See* <http://www.icann.org/en/groups/board/governance/reconsideration/13-22/determination-dotmusic-05feb14-en.pdf>; Guidebook, § 3.4.4.) There is likewise no support for the Requester’s claims that the Panelist lacked training or was somehow “ill-equipped to address the unique issues” raised in the Objections. Moreover, the standards for evaluating the merits of a community objection are set out in the Guidebook, and by filing an application for a new gTLD, each applicant agrees to accept the applicability of the gTLD dispute resolution

process. (Guidebook, §§ 3.5.4 & 3.3.2; Procedure, Art. 1(d).)

Finally, the Requester's claim that the Panelist was "unqualified" is just another approach Requester is using to challenge the ultimate outcome of Requester's Community Objections. (See Request, Section 6, Pgs. 4-6 (arguing that the Panelist's findings and rationale regarding standing were incorrect given his alleged lack of experience in the music industry).) Yet, as noted above, the Reconsideration Process does not call for the BGC to perform a substantive review of expert determinations. The BGC is not to evaluate the Panelist's conclusions that the Requester lacked standing to bring its Community Objections. Rather, the BGC's review is limited to whether the Panelist violated any established policy or process. The Requester has not alleged that the Panelist acted in contravention of an established policy or procedure and instead alleges only that the Panelist reached the wrong conclusion because he was somehow unqualified, or lacked the necessary training, to reach this conclusion. For the reasons provided above, ICANN complied with established policies and procedures for supervising the ICC to ensure that appropriately qualified experts are selected and trained to decide community objections against sufficiently transparent and predictable criteria.

**B. The Alleged Failure Of ICANN To Supervise The Panelist To Ensure No Potential Conflicts Of Interest Existed Does Not Support Reconsideration.**

The Requester claims that ICANN failed to properly supervise the Panel to ensure that potential conflicts of interest were not present. (Request, Section 6, Pg. 5.) The Requester further claims that the Expert had a "potential appearance of bias" because he "worked for Samsung," which is a "strategic business partner" of Google, one of the applicants for .MUSIC. (*Id.*) Requester has not provided any support for this contention.

The Guidebook clearly states that all Experts "shall be impartial and independent of the parties." (Guidebook, Attachment to Module 3, Article 13(c).) The Guidebook further requires

that the “applicable DRSP Rules stipulate the manner by which each Expert shall confirm and maintain their impartiality and independence.” (*Id.*)

The DRSP at issue here, the ICC, has impartiality rules in place, as required by the Guidebook. In particular, Article 7 of the ICC’s Rules of Expertise, requires all potential experts to “sign a statement of independence and disclose in writing . . . any facts or circumstances which might be of such a nature as to call into question the expert’s independence in the eyes of the parties.” ([http://www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/icc-rules-for-expertise/#article\\_2](http://www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/icc-rules-for-expertise/#article_2).) From there, the ICC’s rules give the parties an opportunity to comment on, or object to, the selected expert based on potential conflicts of interest. (*Id.*)

Here, as the Requester acknowledges, the Panelist signed a statement of independence in compliance with Article 7 of the ICC’s Rules of Expertise. (Request, Section 8, Pg. 22-23.) The Requester has not provided any evidence that it subsequently commented on or otherwise objected to the appointed Expert based on any alleged potential conflict of interest. Thus, all evidence indicates that ICANN, the ICC and the Expert followed the established policies and procedures regarding selection and impartiality of the Expert.

Additionally, there is no evidence suggesting that the Expert “works” for Samsung, as Requester claims. Rather, Requester’s own documentation indicates that the Expert was retained by Samsung as an expert in an International Trade Commission investigation involving Samsung and Ericsson Inc. relating to electronic devices. (Request, Annex K.) The fact that Samsung and Google may have an agreement relating to the licensing of patents – which was entered into on January 26, 2014, six months after this matter was assigned to the Expert and a mere three-weeks before the Expert Determinations were issued (*see* Request, FN 13) – simply fails to suggest that the Expert had a bias in favor of Google or against Requester. The Requester filed Community

Objections against strings sought by seven applicants, and Google<sup>13</sup> was just one of these seven applicants, yet the result in each of the Community Objections was the same.

**C. The Alleged Failure Of ICANN To Advise The ICC And The Panel On GAC Advice Does Not Support Reconsideration.**

The Requester claims that ICANN failed “to ensure that the ICC and Experts were appropriately advised on the relevancy of GAC Advice/Resolutions and new AGB material changes in contracting,” by not communicating to the Expert information about the GAC’s Beijing Communiqué, which related to exclusive access registries. (Request, Section 6, Pg. 6.) Here, too, Requester has failed to identify a ground for reconsideration.

As an initial matter, the Guidebook provides that the “receipt of GAC advice will not toll the processing of any application (*i.e.*, an application will not be suspended but will continue through the stages of the application process).” (Guidebook, § 3.1.) Thus, ICANN’s receipt of GAC advice in the Beijing Communiqué should not impact or toll the processing of any objections, including Requester’s Community Objections.

In addition, the Requester originally asked ICANN to instruct the ICC to *not* consider these materials:

**We respectfully request that ICANN appropriately instruct the ICC that all applications evaluated by Objection panelists be judged solely on their own merit (within the four-corners of the Applications) without considering new material changes made by ICANN in response to GAC advice (or newly created self-serving statements by Applicants).**

(Requester’s 12 July 2013 Letter to ICANN (emphasis in original).) In response, ICANN advised Requester that ICANN “does not dictate or limit the scope of the documentation that the

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<sup>13</sup> Charleston Road Registry Inc. is a wholly owned subsidiary of Google. (*See* <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/528?t:ac=528>.)

Panel may request or evaluate”; thus, it is up to the Panel whether to consider the impact of recent GAC advice in reaching its determination. (ICANN’s 14 August 2013 Letter to Requester.) ICANN’s response is consistent with the Procedure, which makes clear that, in addition to applying the standards that have been defined by the Guidebook, the Panel “may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.” (Procedure, Art. 20(b).)

More importantly, in each of the Requester’s Community Objections, the Requester was given permission from the Panelist to file new information relating to the GAC’s Beijing Communiqué. (Determination, Pg. 2, ¶¶ 5-6.) And it is clear that the Expert Panel considered the Requester’s supplemental information in reaching its Determination. (*Id.*, Pgs. 6-7, ¶¶ 17-21.) Thus, there is no support for the Requester’s claim that the Panel was not advised about the Beijing Communiqué when the Panel rendered its Determination.

**D. The Alleged Failure To Provide An Appeal Mechanism For Community Objections Does Not Support Reconsideration.**

With respect to Requester’s claims that the lack of an appeal mechanism is grounds for reconsideration of the Expert Determinations in Requester’s Community Objections, there is no support for the Requester’s contentions.<sup>14</sup> Specifically, the Requester contends that the “failure

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<sup>14</sup> In Section 3 of the Request, the Requester complains of a lack of an appeal process for community objections. (Request, Section 3, Pg. 2 (“Point 3”).) But in Section 6 of the Request, where Requester purports to support this claim, the Requester spends almost eleven pages arguing that the Panelist incorrectly determined that the Requester did not have standing. (Request, Section 3, Pgs. 7-18.) But, as set forth above, the Reconsideration Process does not call for the BGC to perform a substantive review of expert determinations. Put another way, it is not for the BGC to evaluate the Panelist’s conclusions that the Requester lacked standing to bring its Community Objections. Rather, the BGC’s review is limited to whether the Panelist violated any established policy or process. The Panelist’s thorough analysis and its reliance of Module 3 of the Guidebook, as set forth in Annex A of the Determination, indicate that the Panelist acted in accordance with established ICANN policy or procedure in reaching its Determination.

of the Board to address a chorus of voices that called for an appeal mechanism to allow appropriate review of cases has prejudiced Objector’s ability to protect their members’ fundamental and legitimate rights.” (Request, Section 8, Pgs. 18-19.) The Guidebook, and its many versions and revisions, is based on years of open and frank discussion, debate and deliberation with the Internet community. The standards for evaluating the merits of a community objection have been debated and have been well known for years. The Guidebook provides that “applicant[s] may utilize any accountability mechanism set forth in ICANN’s Bylaws for purposes of challenging any final decision made by ICANN with respect to that application.” (Guidebook, Module 6, ¶ 6.) These mechanisms include the Reconsideration Process, the Independent Review Process, and the Ombudsman. (Bylaws, Art. IV & V.) The Requester has not identified any established policy or process that required ICANN to implement any additional appeal mechanism (upon request or otherwise) than those mechanisms already provided for under the Guidebook and in ICANN’s Bylaws. The Requester’s belief that the dispute resolution procedures should have included an appeal mechanism does not constitute a policy or process violation that supports reconsideration.

Furthermore, the Requester’s claim in this regard has already been rejected by the BGC in connection with Request 13-22. There, the BGC stated: “The Requester has not identified any established policy or process that required ICANN to implement any additional appeal mechanism (upon request or otherwise) than those mechanisms already provided for under the Guidebook and in ICANN’s Bylaws.”

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(continued...)

<http://www.icann.org/en/groups/board/governance/reconsideration/13-22/determination-dotmusic-05feb14-en.pdf>.)

**E. The Requester’s Additional Points Do Not Support Reconsideration.**

Section 3 of the Request sets out various points that the Requester claims support reconsideration. (Request, Section 3, Pgs. 2-3.) Specifically, Requester states that ICANN is “giving preferential treatment of .brand Applicants and all Applicants without Safeguards in their current Applications,” by permitting these applicants to alter their applications in the form of Public Interest Commitments (“PICs”) and changes to Specification 13. (Request, Section 3, Pg. 2.) In addition, Requester states that ICANN is “giving preferential treatment to the String Confusion Objection process” by introducing a process to address perceived inconsistent string confusion determinations relating to .CAR/.CARS and .COM/.CAM, but not doing the same for perceived inconsistent Community Objections determinations. (*Id.*) Finally, Requester asserts that ICANN “did not verify whether some Applications had exclusive access language” in response to the GAC Category 2 Advice in the Beijing Communiqué. (*Id.* at Pgs. 2-3.) None of these points support reconsideration.

As an initial matter, it is difficult to understand the arguments raised by the Requester because, other than a brief introduction in Section 3, Requester does not substantively address these arguments anywhere else in its Request. In addition, the Requester makes no effort to explain how these points are relevant to the Request or the Requester’s Community Objections, how these alleged inactions materially and adversely affect the Requester or precisely what is being challenged. Most importantly, the Request does not identify any ICANN policy or procedure that has been violated by these alleged actions and inactions. As such, Requester has not stated proper grounds for reconsideration on these the additional points.

## **VI. Decision**

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Reconsideration Request 14-8. If the Requester believes that it has somehow 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 14-8 shall be final and does not require Board consideration. The Bylaws provides that the BGC is authorized to make a final determination on all Reconsideration Requests brought regarding staff action or inaction. (Bylaws, Art. IV, § 2.15.) The BGC has the discretion, but is not required, to recommend the matter to the Board for consideration and action, as the BGC deems necessary. (*See id.*) As discussed above, Request 14-8 seeks reconsideration of an action or inaction taken by staff. After consideration of this particular Request, the BGC concludes that its determination on this matter is sufficient and that no further consideration by the Board is warranted.