

DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 14-1

21 JUNE 2014

The Requester Medistry LLC seeks reconsideration of the Expert Determination, and ICANN's acceptance of that Determination, in favor of the Independent Objector's Community Objection to the Requester's application for .MED.

I. Brief Summary.

The Requester applied for .MED. The Independent Objector ("IO") filed a Community Objection ("Objection") to the Requester's application and won. The Requester contends that the IO and ICANN staff acted contrary to ICANN process that prohibits the IO from filing an objection unless there was a least one public comment opposing the particular application made in the public sphere. In support of its argument, the Requester presented letters from the organizations that had made the public comments upon which the Objection was premised; those letters clarify that the comments were intended to be advisory in nature and not in direct opposition to Requester's application. In addition, the Requester claims that the Expert Panel applied the wrong standards in evaluating the Objection and that ICANN failed to ensure consistent and fair expert determinations.

The BGC¹ concludes that, based on information submitted with this Request, there is substantial and relevant evidence indicating that the Objection was inconsistent with ICANN procedures, despite the diligence and best efforts of the IO and staff. Specifically, the Requester has provided the BGC with uncontroverted information demonstrating that the public comments

¹ Board Governance Committee.

on which the Objection was based were not, in fact, in opposition to the Requester's application. Accordingly, the BGC concludes that ICANN not consider the Expert Determination at issue and that the Requester's Application for .MED is therefore permitted to proceed to the next stage of process in the New gTLD Program.

II. Facts.

A. Background Facts.

Medistry LLC ("Requester"), owned and operated by CC Web Solutions, a wholly owned subsidiary of the Cleveland Clinic and Second Genistry LLC, applied for .MED ("Requester's Application"). (See <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/216?t:ac=216>.) Three other applicants also applied for .MED.

On 9 August 2012, the National Association of Boards of Pharmacy ("NABP") submitted a public comment relating to the Requester's Application. (<https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/5006>.)

On 26 September 2012, the American Hospital Association ("AHA") submitted public comments relating to the .MED applications submitted by other three applicants. (<https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/10936>; <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/10933>; and <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/10931>.) AHA did not submit a public comment regarding Requester's Application.²

² The Requester's Application received another comment, on 25 September 2012, by .JOBS Charter Compliance Coalition. That comment was directed at the Requester's ability to comply with ICANN

On 12 March 2013, the IO³ filed the Objection to 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”), § 3.2.1; New gTLD Dispute Resolution Procedure (“Procedure”), Art. 2(e); [http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/med-cty-medistry/.](http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/med-cty-medistry/))

On 30 December 2013, the Expert Panel (“Panel”) rendered an Expert Determination in favor of the Objection. Based on the submissions and evidence, the Panel determined that the IO had standing to object given his role, and that each of the requisite four elements to prevail on an Objection had been satisfied. (Determination, Pg. 12, ¶ 16; Pg. 42, ¶ 134.)

On 2 January 2014, the ICC⁴ notified the Requester of the Panel’s decision.

On 10 January 2014, ICANN published the Expert Determination.

On 10 January 2014, the NABP addressed a letter to the Cleveland Clinic providing “clarification that NABP’s [9 August 2012] comment [on the Requester’s .MED application] was intended to be advisory in nature” and that the “NABP did not oppose [the Requester’s] application to be the Registry Operator for the .MED TLD.” (Attachment 10 to Request: “10 January 2014 Letter from NABP to the Cleveland Clinic.”)

(continued...)

policies given its relationship to Employ Media LLC, the registry operator for .JOBS, and does not appear to be relevant to the issues raised in the Request or the IO’s Objection.

³ The Independent Objector, Professor Alain Pellet, was appointed by ICANN to serve for the entire New gTLD Program and object to “highly objectionable” gTLD applications on Limited Public Interest and Community Grounds. (Applicant Guidebook, § 3.2.5.)

⁴ International Centre for Expertise of the International Chamber of Commerce.

On 14 January 2014, the AHA addressed a letter to the Cleveland Clinic, confirming that AHA did not “express any comment in opposition (or resistance) to [Requester’s] application for .MED.” (Attachment 11: “14 January 2014 Letter from AHA to Cleveland Clinic.”)

On 17 January 2014, the Requester filed Request 14-1. The 10 January 2014 Letter from NABP to the Cleveland Clinic and 14 January 2014 Letter from AHA to Cleveland Clinic were provided to ICANN for the first time as attachments to Request 14-1.

On 22 March 2014, the BGC granted Request 14-1 for the limited purpose of further evaluating whether the Objection and the Panel’s Expert Determination contravened an established ICANN policy or procedure. Specifically, the BGC found that the Request raised questions as to whether the threshold procedural requirement set forth in Section 3.2.5 of the Guidebook, which requires that at least one comment in opposition to the application must have been made in the public sphere before an IO Objection should be filed, was satisfied with respect to Requester’s Application.

On 29 April 2014, the BGC approved a motion asking staff to confer with the IO in an effort to evaluate the basis for the IO’s decision to file the Objection against Requester’s Application for .MED.

On 30 May 2014, the IO responded to questions posed to him regarding his Objection.⁵

B. The Requester’s Claims.

The Requester seeks reconsideration on the following grounds:

First, the Requester claims that the IO and the Panel ignored ICANN procedure that prohibits the IO from filing an objection unless there was at least one public comment opposing

⁵ The IO’s response to the BGC inquiry regarding the nature and basis for the IO’s decision to file the Objection against the Requester’s application is consistent with the grounds stated in his Objection. Specifically, the IO relied upon the public comment made by NABP in the public sphere at the time.

the relevant application. (Request, Section 10, Pg. 9.) The Requester further claims that staff's inaction by allowing an invalid objection to proceed also violated this procedure.

Second, the Requester claims that staff violated ICANN procedure prohibiting the IO from filing an objection unless there was at least one public comment opposing the relevant application, by accepting the Expert Determination. (Request, Section 3, Pg. 3.)

Third, the Requester claims that the Panel did not impose the correct burden of proof for evaluating the Objection. Specifically, the Requester contends that the Panel "did not require the IO to provide any proof on the four relevant standards, but instead sustained the objection on nothing more than the IO's unsubstantiated assertions and speculations." (*Id.* (emphasis in original).)

Fourth, the Requester claims that the Panel failed to apply the four standards established by ICANN in the Guidebook for evaluating community objections and instead "interposed his own, entirely made up, standards." The Requester focuses on and contends that the Panel incorrectly applied the standards for evaluating substantial opposition and the likelihood of material detriment. (Request, Section 10, Pgs. 9-10; *see also* Request, Section 8, Pg. 7 fn. 18.)

Fifth, the Requester claims that the Panel's failure to follow the policies and procedures established by ICANN demonstrates ICANN's own failure to ensure consistent and fair expert determinations. (Request, Section 10, Pg. 10.)

Sixth, the Requester claims that staff failed to ensure that the New gTLD Dispute Resolution Procedure complied with ICANN policies. (Request, Section 3, Pg. 3.)⁶

⁶ Section 3 of the Request identifies seven purported actions or inactions by ICANN, the IO, and/or the Panel that the Requester seeks to have reconsidered. (Request, Section 3, Pgs. 2-3.) These actions/inactions are incorporated in the grounds for reconsideration summarized above. (Request, Section 10, Pgs. 8-24.)

The Requester claims that the above actions/inactions are contrary to ICANN procedures that require fairness, non-discriminatory treatment, and neutral application of documented policies, including, among others, the following:

- Section 3.2.5 of the Guidebook, which requires the IO to act “solely in the best interests of the public who use the global Internet” and prohibits the IO from filing an objection unless there was at least one public comment opposing the relevant application;
- Section 2.4.4 of the Guidebook, which (according to the Requester) requires the dispute resolution process to operate “in the interests of fairness and equivalent treatment for all applicants”⁷;
- Article 1, Section 2.8 of ICANN’s Bylaws, which requires that documented policies be applied neutrally and objectively, with integrity and fairness;
- Article II, Section 3 of ICANN’s Bylaws, which state that ICANN shall not apply its standards, policies, procedures and practices inequitably or by singling out any particular party for disparate treatment unless justified by substantial and reasonable cause; and
- Article 4 of ICANN’s Articles of Incorporation, which requires ICANN to operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law.

(Request, Section 10, Pgs. 12-13, 15-16, 19, & 21-22.)

C. Relief Requested.

The Requester asks that ICANN overturn, or otherwise refuse to accept, the Expert Determination, conclude that the Objection did not and cannot meet the required criteria and therefore must be rejected, and allow the Requester’s Application for .MED to proceed.

⁷ It should be noted that Section 2.4.4. of the Guidebook refers to the “Communication Channels” and provides that contacting individual ICANN staff members, Board members, or individuals engaged by ICANN to perform an evaluation role in order to lobby for a particular outcome or to obtain confidential information about applications under review is not appropriate; thus, “[i]n the interests of fairness and equivalent treatment for all applicants, such individual contacts will be referred to the appropriate communication channels.”

Alternatively, the Requester asked that ICANN stay any action on the Requester's Application, and do one of the following:

- Refer the Objection back to the ICC for appointment of a new expert panel for *de novo* review and determination; or
- Refer the Objection to an “accountability mechanism” established by ICANN to deal with incorrect, inconsistent, or otherwise improper determinations by DRSPs; or
- Refer the Objection to the NGPC for further evaluation consistent with, among other things, the evidence, ICANN's policies and procedures (including the Guidebook and the Requester's Public Interest Commitments), and the NGPC's response to the GAC's Beijing Communiqué.

(Request, Section 9, Pg. 8.)

III. Issues.

In view of the claims set forth in Request 14-1, the issues for reconsideration are as follows:

- A. Whether ICANN procedure that prohibits the IO from filing an objection unless there was at least one public comment in the public sphere opposing the relevant application was followed?
- B. Whether staff failed to follow ICANN procedure that prohibits the IO from filing an objection unless there was at least one public comment in the public sphere opposing the relevant application by allowing the Objection to proceed and by accepting the Expert Determination?
- C. Whether the Panel applied the wrong standard in contravention of established policy or process by:
 1. Failing to apply the proper burden of proof;
 2. Failing to apply the proper standard for evaluating substantial opposition; and
 3. Failing to apply the proper standard for evaluating the likelihood of material detriment.
- D. Whether ICANN's purported failure to ensure consistent and fair expert determinations supports reconsideration?

Given the BGC's 22 March 2014 finding that further evaluation was required to determine whether the Objection was consistent with the threshold requirements of Section 3.2.5 of the Guidebook, this BGC Determination addresses the issues identified in Paragraphs A and B above, only.

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.⁸ (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 NGPC⁹ 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, such as the ICC, where it can be stated that the Panel failed to follow the established policies or processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.¹⁰

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

⁸ 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.

⁹ New gTLD Program Committee.

¹⁰ See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

to evaluate the Panel's substantive conclusions. Rather, the BGC's review is limited to whether ICANN policies and procedures were followed with respect to the Objection, the Panel's review of the Objection and staff's acceptance of the Expert Determination.

V. Analysis and Rationale.

A. The Requester Has Demonstrated That The Threshold Requirement Of Section 3.2.5 Of The Guidebook Was Not Satisfied With Respect To The Community Objection.

The Requester contends that the policies and procedures of Section 3.2.5 of the Guidebook, which requires that the IO not object to an application unless there is at least one comment in opposition to the application in the public sphere, was not satisfied because there was no comment in opposition to the Requester's Application existing in the public sphere when the Objection was filed. (Request, Section 10, Pg. 10.) The Requester further contends that ICANN staff failed to ensure that the procedures set forth in Section 3.2.5 were followed by allowing the Objection to proceed and by accepting the Expert Determination. (Request, Section 3, Pg. 3.)

The Requester relies on the following statement from Section 3.2.5 of the Guidebook:

In light of the public interest goal noted above, the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.

(Guidebook, Section 3.2.5.) To support its argument, the Requester proffers the 10 January 2014 Letter from NABP to the Cleveland Clinic and the 14 January 2014 Letter from AHA to Cleveland Clinic explaining that the public comments submitted by these entities regarding .MED, which were the comments that caused the IO to file his Objection, were not made in opposition to Requester's Application. (See 10 January 2014 Letter from NABP to the Cleveland Clinic; 14 January 2014 Letter from AHA to Cleveland Clinic; *see also*, IO's Objection, Pgs. 11-12; ¶¶ 25-28.)

Specifically, the 10 January 2014 Letter from NABP to the Cleveland Clinic states:

We wish to clarify that NABP's comment was intended to be advisory in nature, stressing that health-related gTLDs should account for patient safety and implement protections against fraud and abuse. In submitting this comment, NABP did not oppose Medistry's application to be the Registry Operator for the .MED gTLD, nor take any position as to whether Medistry's .MED application contained appropriate safeguards.

NABP acknowledges that the Public Interest Commitments filed by Medistry in response to the Governmental Advisory Committee's Safeguard Advice may satisfactorily address the issues raised in NABP's Public Comment.

(10 January 2014 Letter from NABP to the Cleveland Clinic.)

The 14 January 2014 Letter from AHA to Cleveland Clinic states:

It has come to the attention of the American Hospital Association [] that Public Comments AHA filed against HEXAP SAS, DocCheck AG, and Charleston Road Registry on September 26, 2012 have been mistakenly used by a Panelist in Case NO. EXP/403/ICANN/20 against an unintended party, Medistry LLC....AHA purposefully did not file a similar Public Comment related to Medistry LLC....Again, so there can be no ambiguity: AHA did not then, and does not now, express any comment in opposition (or resistance) to Medistry's application for .MED.

(14 January 2014 Letter from AHA to Cleveland Clinic.)

Given NABP and AHA's statements that their public comments were not in opposition to Requester's Application, it appears that the threshold requirement of Section 3.2.5 was not satisfied in this particular instance. To the contrary, the 10 January 2014 Letter from NABP to the Cleveland Clinic makes clear that NABP's comments were advisory and were not directed at the Requester's Application, and that Requester's commitments addressed any general concerns raised by NABP. Likewise, the 14 January 2014 Letter from AHA to Cleveland Clinic stresses that AHA purposefully did not oppose Requester's Application for .MED

These two letters from NABP and AHA, providing clarity regarding the context and intent of their public comments, were not available when the IO filed the Objection or when staff accepted the Panel’s Determination.¹¹ But the letters explain and provide clear insight into the public comments made by NABP and AHA and are therefore relevant to the BGC’s analysis of whether the threshold requirements of Section 3.2.5 of the Guidebook were satisfied. The letters are also relevant to the BGC’s analysis of whether staff’s actions (or inactions) in accepting the Determination were consistent with Section 3.2.5. Based on these letters, the BGC concludes that the policies and procedures of Section 3.2.5 were not specifically followed with respect to Requester’s Application.

The BGC’s determination is not a finding that the IO or ICANN staff failed to properly discharge their duties. Rather, the BGC’s determination is based on the Requester’s proffer of substantial evidence relevant to the procedures of Section 3.2.5. The public comments from NABP and AHA that were the basis for the Objection were vague and open to a number of interpretations. Given that there is substantial and uncontroverted evidence from the authors of those public comments, indicating what NABP and AHA intended, the BGC cannot ignore this information in assessing the Request or reaching its determination.

VI. Decision.

As noted above, the BGC previously concluded that the Requester had stated proper grounds for reconsideration and granted the Request for the limited purpose of investigation of Requester’s claims. Upon conclusion of that investigation, the BGC further determines that the

¹¹ It is important to note, however, that in the Objection proceedings the Requester referenced “subsequent conversations between [Requester] and the NABP [that] confirmed the NABP’s intent was ‘not to file an opposition specifically against [Requester].’” (Determination, Pg. 26, ¶ 76.) But the Panel determined that such “unsubstantiated and unproven” allegations were “of no avail. As far as it is known to the Panel, NABP has not retracted its public comments.” (*Id.*)

Objection did not satisfy the procedures of Section 3.2.5 of the Guidebook. Accordingly, the BGC has determined that the Requester's Application for .MED is therefore permitted to proceed to the next stage of process in the New gTLD Program.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC concludes that this determination is final and that no further consideration by the Board (or the New gTLD Program Committee) 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 18 February 2014. But given the issues set forth in Request 14-1, the BGC's 22 March 2014 acceptance of the Request, the BGC's instruction to staff to confer with the IO regarding the Request, the IO's responses to staff's inquiries and consideration thereof, additional time was needed to evaluate Request 14-1. As such, the first practical opportunity for the BGC to reach a conclusion on this Request was on 21 June 2014; it was impractical for the BGC to consider the Request sooner. Upon making that determination, Staff notified the Requester of the BGC's anticipated timing for the review of Request 14-1.