

## DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

### RECONSIDERATION REQUEST 14-4

12 June 2014

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The Requester, Union of Orthodox Jewish Congregations of America, seeks reconsideration of the Expert Determination, and ICANN's acceptance of that Determination, dismissing the Requester's community objection to the application for .KOSHER.

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

Kosher Marketing Assets, LLC (KMA) applied for .KOSHER. The Requester objected to KMA's application and lost. The Requester claims that the Panel failed to comply with ICANN policies and processes in reaching the Expert Determination. Specifically, the Requester contends that the Panel applied the wrong standard for evaluating the likelihood of material detriment by: (i) improperly basing its finding of no material detriment on non-binding, non-public statements made by KMA during the course of the objection proceedings that purportedly conflict with KMA's application for .KOSHER; and (ii) improperly relying on an allegedly incorrect interpretation of Specification 11 of the Registry Agreement in finding that Specification 11 would prevent the material detriment alleged by the Requester. This, the Requester claims, caused the Panel to incorrectly conclude that KMA would be prevented from operating the .KOSHER TLD in a disparate manner.

The Requester's claims do not support reconsideration. First, subsequent to the filing of this Request, KMA submitted a Public Interest Commitments Specification which, among other things, specifically prohibits it from "impos[ing] kosher certification standards or methodologies of [its own] or [of] its Affiliates . . . on any registrants" and requires it to "administer registry access in a transparent way that does not give an undue preference to any registrars or registrants, including itself, and shall not subject registrars or registrants to an undue disadvantage."

(<https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1592>.) Those commitments will become binding and enforceable provisions in KMA's Registry Agreement

and thus, contrary to the Requester's claims, will prevent KMA from operating the .KOSHER TLD in a disparate manner. As such, the Requester has not demonstrated that it has been adversely affected by the Panel's alleged failure to comply with ICANN policies and processes.

Second, there is no evidence that the Panel applied the wrong standard in contravention of established policy or procedure in evaluating the likelihood of material detriment. With respect to the first claim, the Panel is permitted to consider KMA's response to the objection on how the proposed string will actually be implemented and operated, and the Panel further rejected the Requester's claims that KMA made statements in the objection proceedings that contradicted statements made in its application. With respect to the second claim, the Requester has failed to establish that the Panel misinterpreted Specification 11 of the Registry Agreement. Therefore, the BGC concludes that Request 14-4 be denied.

## **II. Facts.**

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

Kosher Marketing Assets, LLC (KMA) applied for .KOSHER.

On 13 March 2013, the Requester, Union of Orthodox Jewish Congregations of America ("Requester"), objected to KMA'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."<sup>1</sup> (Applicant Guidebook ("Guidebook"), § 3.2.1; New gTLD Dispute Resolution Procedure ("Procedure"), Art. 2(e).) KMA's Community Objection was properly filed with the ICC.<sup>2</sup>

On 13 May 2013, KMA responded to the Objection.

On 4 June 2013, the ICC appointed Professor Luca G. Radicati di Brozolo as the Expert ("Expert" or "Panel") to consider the Requester's Objection.

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<sup>1</sup> The Objection as well as this Request is supported by Star-K Kosher Certification, Inc., Kosher Supervision Service, Inc., Chicago Rabbinical Council, and the Kashruth Council of Canada. (Request, Pg. 1; *see also* Request, Section 11a., Pg. 24.)

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

On 2 September 2013, the Panel asked KMA to clarify two points. Specifically, the Panel asked KMA: (i) to explain how the limitations on registration set forth in KMA’s new gTLD application are compatible with the arguments KMA made in its written submissions to the Panel concerning “material detriment”; and (ii) to clarify the conditions under which domains in the .KOSHER gTLD “will only be available to companies that have been personally visited, inspected, and are known to be using the domain to promote Kosher Certification” and who will be in charge of personally visiting the companies who seek to register the domains.” (Annex F and G to Request.)

On 4 September 2013, KMA submitted the requested clarifications to the Panel, and the Requester submitted a reply on 9 September 2013.

On 14 January 2014, the Panel rendered an Expert Determination in favor of KMA and dismissed the Requester’s Objection. The Panel determined that the Requester failed to satisfy its burden of proving the likelihood of material detriment. (Determination, Pgs. 21-22, ¶¶ 92 and 94.)

On 16 January 2014, the ICC notified the Requester of the Expert Determination.

On 30 January 2014, the Requester filed Request 14-4.

On 24 April 2014, KMA submitted a Specification 11 Public Interest Commitments (“PICs”). Therein, KMA specifically committed that:

- (1) It would “administer registry access in a transparent way that does not give an undue preference to any registrars or registrants, including itself, and shall not subject registrars or registrants to an undue disadvantage[;]”
- (2) “The TLD will not be restricted to a single person or entity and/or that person’s or entity’s Affiliates;”
- (3) It “will not establish eligibility criteria that exclude[] registrants on the basis that they are competitors to [KMA] or its Affiliates;” and
- (4) It “will not impose kosher certification standards or methodologies of the Registry Operator or its Affiliates . . . on any registrants.”

(KMA's PICs, *available at* <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1592>.)

**B. The Requester's Claims.**

The Requester contends that the Expert Determination reveals two failures by the Panel to comply with ICANN policies and processes. First, the Requester claims that the Panel improperly based its finding of no material detriment on "non-public, non-binding statements" made by KMA during the course of the objection proceedings and not on KMA's application, as the Requester suggests is required by the Guidebook. (Request, § 8, Pg. 11.)

Second, the Requester claims that the Expert improperly relied on a "plainly incorrect interpretation of Specification 11 [of the Registry Agreement] in finding that Specification 11 would prevent the material detriment alleged in the Objection." (*Id.*)

The Requester contends that these improper applications of ICANN policies and procedures were material to the Panel's determination and constitute proper grounds for reconsideration. (Request, § 10, Pgs. 13-14; *see also* Request, § 8, Pgs. 11-12.)

**C. Relief Requested.**

The Requester asks ICANN to reverse or refuse to accept the Expert Determination upholding KMA's Objection. Specifically, the Requester asks that ICANN find that: (i) the Panel's reliance on non-binding statements made by the KMA during the objection proceedings is inconsistent with ICANN policy when such non-binding statements are not reflected in the actual gTLD application at issue; and (ii) the plain language of Specification 11 does not prohibit any and all manner of discriminatory practices by a registry operator and therefore cannot, on its own, eliminate a material detriment that derives from a registry operator favoring itself and/or its own constituents. The Requester asks that KMA's Objection be remanded to the ICC for further consideration in light of the requested clarifications/findings. (Request, Section 9, Pg. 12.)

The Requester further asks for an opportunity to be heard in accordance with Article IV,

Section 2.12 of ICANN's Bylaws. (Request, Pg. 1.)<sup>3</sup>

### **III. Issues.**

In view of the claims set forth in Request 14-4, the issue for reconsideration is whether the Panel applied the wrong standard for evaluating the likelihood of material detriment in contravention of established policy or process by:

1. Basing its finding of no material detriment on allegedly non-binding, non-public statements made during the course of the objection proceedings that purportedly conflict with KMA's application for .KOSHER; or
2. Relying on an allegedly incorrect interpretation of Specification 11 of the Registry Agreement in finding that Specification 11 would prevent the material detriment alleged by the Requester.

### **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.<sup>4</sup> (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 New gTLD Program Committee (NGPC) agrees to the extent that the BGC deems that further consideration is necessary, that the requesting party failed to satisfy the reconsideration

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<sup>3</sup> Hearings are not required in the Reconsideration Process, however requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. *See* Reconsideration Request Form at <http://www.icann.org/en/groups/board/governance/reconsideration/request-form-11apr13-en.doc>; *see also* Bylaws, Art. IV, § 2.12.

<sup>4</sup> 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.

criteria set forth in the Bylaws.<sup>5</sup>

In the context of the New gTLD Program, as the Requester acknowledges in the Request, 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 the Requester failed to establish that KMA's application for .KOSHER creates a likelihood of material detriment to the community or to a substantial portion of the community, as required by the Guidebook. Rather, the BGC's review is limited to whether the Panel violated any established policy or process, which the Requester suggests was accomplished when the Panel incorrectly applied the standard for evaluating the likelihood of material detriment. (Request, § 8, Pg. 5.)

## **V. Analysis and Rationale.**

### **A. The Requester Has Not Demonstrated that It Has Been Adversely Affected by Staff Action or Inaction.**

A party may bring a request for reconsideration of staff action or inaction only to the extent that it has been "adversely affected" by that action or inaction. (Bylaws, Art. IV, § 2.2.)

The Requester argues that it has been adversely affected by the Panel's actions because if KMA is allowed to proceed with contracting for .KOSHER, KMA will be able to

'limit registration of domains . . . for its exclusive use or for use by closely affiliated organizations,' as expressly contemplated in the .kosher Application, or, at the very least, impose the Applicant's subjective kosher certification criteria as a condition of eligibility for .kosher domain name registrations, thereby allowing the .kosher Applicant to utilize its control of the .kosher TLD to change the current state of the marketplace with regard to the designation of products and entities as being 'kosher.'

(Request, § 6, Pgs. 2-3.)

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

However, on 24 April 2014, KMA submitted a PICs Specification that directly addresses the Requester’s claims. In addition to the mandatory PICs imposed on all contract parties, registry operators were also allowed to “specify additional public interest commitments, . . . transforming such commitments into binding contractual obligations” by incorporating them into Specification 11 of the Registry Agreement that the operator executes with ICANN.

(Description of PIC Specification, *available at* <https://www.icann.org/resources/pages/base-agreement-2013-02-05-en>; PIC FAQs, *available at* <http://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-pic-faqs>.)

The enforceability of an applicant’s PIC specifications is further assured by ICANN’s standard contractual compliance processes, as well as, the Public Interest Commitments Dispute Resolution Process (“PICDRP”). (*See* PICDRP Procedure, *available at* <http://newgtlds.icann.org/en/program-status/pddrp>.) The PICDRP provides a recourse for parties who believe they have been harmed by a registry operator’s “act or omission in connection with the operation of its gTLD that is non-compliant with its PICs.” (*Id.* at ¶ B.1.1.) Such parties may submit complaints to ICANN if they believe that a registry operator is not complying with a PIC. (*Id.* at ¶ B.1.2.) ICANN will then review the complaint, facilitate discussions between the registry operator and the allegedly injured parties, and, if necessary, submit the complaint to a standing panel charged with evaluating the registry operator’s compliance with its PICs. (*Id.* at ¶¶ B.2-B.4.) If the standing panel determines that the registry operator is not compliant and the registry operator does not resolve its non-compliance, ICANN has the discretion to enforce appropriate remedial measures. (*Id.* at ¶ B.4.6.) ICANN also has the authority to impose financial sanctions on registry operators who repeatedly fail to comply with their PICs. (*Id.* at ¶ B.5.5.)

KMA’s PICs specifically prohibit it from “impos[ing] kosher certification standards or methodologies of [its own] or [of] its Affiliates . . . on any registrants.” (<https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1592>.) KMA

further commits to “administer registry access in a transparent way that does not give an undue preference to any registrars or registrants, including itself, and shall not subject registrars or registrants to an undue disadvantage.” (*Id.*) KMA further commits that “[t]he TLD will not be restricted to a single person or entity and/or that person’s or entity’s Affiliates (as defined in Section 2.9(c) of the Registry Agreement). The Registry Operator will not establish eligibility criteria that excludes registrants on the basis that they are competitors to Registry Operator or its Affiliates (as defined in Section 2.9(c)).” (*Id.*) These are binding and enforceable commitments—as noted above, they will be incorporated into KMA’s Registry Agreement. Thus, contrary to the Requester’s claims, KMA is prohibited from operating the .KOSHER TLD in a disparate manner. As such, the Requester has not demonstrated that it has been adversely affected by the Panel’s alleged failure to comply with ICANN policies and processes.

**B. Requester Failed To Demonstrate That The Panel Applied The Wrong Standard For Evaluating The Likelihood of Material Detriment In Contravention Of Established Policy or Process.**

**1. The Panel did not Improperly Base its Finding of No Material Detriment on allegedly Non-Binding, Non-Public Statements.**

The Requester claims that the Panel improperly relied on non-public, non-binding statements that KMA made during the objection proceedings that cannot be reconciled with statements that KMA made in its application for .KOSHER. Specifically, the Requester contends that the following statements in KMA’s application expressed KMA’s intent to operate .KOSHER for its own benefit and to the exclusion of other members in the community of kosher certification organizations, thereby causing a material detriment to the legitimate interests of kosher consumers and members of the community of kosher certification organizations:

- The mission of the .KOSHER TLD is to promote Kosher food certification in general, and OK Kosher Certification and its clients in particular. All registration in .KOSHER will be managed by [KMA] on behalf of OK Kosher Certification. Only those clients who pass rigorous certification will be granted use of domain names under this TLD. Given existing data on certification and a conservative forecast for adoption of .KOSHER domains, we forecast having approximately

636 Domains Under Management (DUMs) by the third year of operation.

- [KMA] will promote awareness of the TLD through press releases and direct communications with customers of OK Kosher Certification.
- All domains under this TLD will be managed by [KMA] on behalf of OK Kosher Certification, so they will only be made available to companies that have been personally visited, inspected, and are known to intend to use a domain to promote Kosher Certification.

The mission and purpose of this TLD is to enhance and complement existing brand strategies of [KMA] and present the organization in a consistent manner. As such, [KMA] intends to limit registration of domains either for its exclusive use or for use by closely affiliated organizations in a manner that contributes to the purpose of this TLD. [KMA] also intends to govern the domain names registered to limit confusion and enhance the user experience. To accomplish these objectives, [KMA] may be the sole registrant of domains in the TLD.

(Request, § 10.A, Pgs. 15-16, *see also* § 8, Pg. 6.).

The Requester asserts that, notwithstanding KMA's statements in its application about how it intends to operate .KOSHER, the Panel improperly based its decision on statements made by KMA during the course of the objection proceedings. In support of this contention, the Requester relies on the following statements of the Panel:

While the statement in the Application that [KMA] “*intends to promote OK Kosher certification and its clients in particular*” might give the impression that the Applicant intends to operate the domain in a self-serving manner and as a closed gTLD, the likelihood of that happening is not established . . . .

Indeed, in response to the Expert's request, [KMA] explicitly stated that responsibility for the verification will lie with the “*prospective registrant's own kosher organization.*” This seems evidence enough of the lack of ground to the Objector's claim that only [KMA] will verify eligibility and will be able to determine arbitrarily what registrants will have access to “.kosher” domains. On the other hand, the fact that registration will be subject to some form of third party verification of the conformity of objective standards provides precisely reassurance that the “.kosher” gTLD will only be available to registrants who use the domain for legitimate users, in line with concerns raised by the objector.

(Request, § 10.A, Pg. 17; *see also*, Determination, ¶¶ 78-79.) The Requester contends that the Guidebook limits the Panel's analysis to whether “the application creates a likelihood of material detriment” and therefore the Panel applied the wrong standard by evaluating whether, based on

the statements made during the objection proceedings, KMA is “likely to operate the TLD in a manner that creates a material detriment.” (Request, § 10.A., Pg. 17 (emphasis in original).)

To prevail on a community objection, the objector must, among other things, 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, § 3.5.4.) The Guidebook includes a list of relevant 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.

(Guidebook, § 3.5.4.)

Here, the Panel correctly referenced the above standard in the Expert Determination (Determination, ¶ 75), and specifically rejected the Requester’s contention that KMA “cannot escape” the language of its application. The Panel noted:

In the opinion of the Expert, whether an application for a gTLD may give rise to some form of detriment must be assessed by reference, not to the moment of submission of the application, but by reference to the time when the gTLD will be active, and taking into consideration any intervening circumstances. It is only at that time that any detrimental effect of the application will become concrete and relevant.

(Determination, ¶ 85.) The Panel’s interpretation is not inconsistent with the standard for evaluating material detriment, which (as illustrated by the discretionary factors noted above) is premised on the likelihood that the alleged detriment will result from the applicant’s operation of the applied-for string. The Procedure makes clear that, in addition to applying the standards that have been defined by ICANN, 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).) The standard therefore does not limit the Panel only to a review of the application. Rather, under the standard, the Panel is permitted to consider the applicant’s response to the objection on how the proposed string will actually be implemented and operated.<sup>6</sup>

The Requester had an opportunity to challenge KMA’s statements. In fact, the Requester specifically identified the alleged contradictions for the Panel in its Supplemental Pleading. (Determination, ¶ 70.) The Panel rejected the Requester’s claims and determined there was simply no evidence that the alleged detriment was likely to result from KMA’s operation of .KOSHER. In particular, the Panel disagreed with the Requester that the application indicated that only KMA will verify the eligibility to use .KOSHER. (*Id.* at ¶ 79.) The Panel stated:

The Objector had not explained how the operation of the “.kosher” domain by [KMA] would damage the community oriented nature of kosher certification. There is no evidence that only [KMA] would be able to declare a food manufacture kosher, thereby excluding [kosher certification organizations] from this activity. Likewise, there is no persuasive evidence that the operation of the TLD by [KMA] would lead to significant confusion in consumers or others with a stake in kosher. Equally unsupported is the argument that the word kosher will become “exclusively associated” with [KMA], as is the one that there would be a “single entity” with “unilateral authority” to determine what is kosher. There is also no indication that “.kosher” will be used to provide certification services.

(*Id.* at ¶ 77.) The Panel further determined that KMA’s assurances made during the course of the

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<sup>6</sup> The Requester’s reference to and reliance on determinations rendered by other expert panels is misplaced. (Request, § 10.A., Pg. 18, fn. 35.) As noted by the BGC previously, the fact that another expert panel may have come to a different conclusion (based on different evidence) does not mean that this Panel violated an established policy or process. (*See* <http://www.icann.org/en/groups/board/governance/reconsideration/13-21/determination-european-lotteries-21jan14-en.pdf>, BGC Determination on Reconsideration Request 13-21.)

proceedings as to the accessibility of the registry to other members of the kosher certification organization community were “convincing and made in good faith.”<sup>7</sup> (*Id.* at ¶ 87.) The Panel also determined that, to the extent KMA eventually attempted to operate .KOSHER as a “closed” registry, there is no evidence that there would not be sufficient safeguards in place to protect against the alleged detriment.<sup>8</sup> (*Id.* at ¶ 88.) In balancing the factors for evaluating material detriment, the Panel concluded:

[T]he Expert finds that the Objector has not convincingly proven its claim that the Application will impact negatively on itself, the community of [kosher certification organizations] or the broader community of persons or entities with a stake in kosher. Specifically, it has not demonstrated that the Application could damage the economic or other interests of the [kosher certification organization] community or its reputation or could interfere with the community’s core activities, or that the Applicant does not intend to act in accordance with the interests of the community. Absent such evidence, there can be no finding of material detriment to the community or to a substantial portion of it, as required by the Objection Procedure.

(*Id.* at ¶ 92.) While the Requester may disagree with the Panel’s conclusions, the Requester’s disagreement is not a proper basis for reconsideration.

Based on the above, there is no support for the Requester’s contention that the Panel improperly relied on allegedly non-public, non-binding statements KMA made during the objection proceedings that purportedly conflict with KMA’s application for .KOSHER.

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<sup>7</sup> The Panel also noted that KMA’s assurances will be made public by virtue of the Expert Determination being published in accordance with Article 21(g) of the Procedure. (Determination, ¶ 87.) KMA’s assurances/clarifications are clearly set forth in the Expert Determination (*Id.* at ¶¶ 72-74). KMA’s commitment to operate .KOSHER in a transparent manner consistent with the principles of openness and non-discrimination were also made public in a letter to ICANN. (*See* 27 November 2013 Letter from Rabbi Bernard Levy to Fadi Chehadé, *available at* <http://www.icann.org/en/news/correspondence/levy-to-chehade-27nov13-en>.) There is therefore no support for the Requester’s claim that KMA’s statements regarding the accessibility of .KOSHER were not made public.

<sup>8</sup> The Requester asserts that the Panel incorrectly assumed that statements made by KMA during the objection proceedings would be subject to the public interest commitments dispute resolution procedure (“PICDRP”). (Request, Section 10.A., Pg. 19.) The Requester misstates the Panel’s conclusions in this regard. In evaluating the safeguards available to protect against abuse, the Panel correctly noted that KMA would be required to execute a Registry Agreement (“RA”) and would be subject to the PICs set out in Specification 11 and incorporated into the RA. (Determination, ¶¶ 82-83.) The Panel further noted that the RA and PICs would be binding on KMA and that the Requester can rely on the PICDRP should KMA operate .KOSHER inconsistent with its Specification 11 commitments. (*Id.* at ¶ 84.)

Furthermore, as was discussed above, KMA has subsequently agreed to further PICs regarding the accessibility of the registry to other members of the Kosher certification organization community. Those PICs, which will be incorporated into KMA's Registry Agreement, are binding and enforceable and will protect against the material detriment alleged by the Requester.

**2. The Panel did not Improperly Rely on an Allegedly Incorrect Interpretation of Specification 11 in finding that Specification 11 would Prevent the Material Detriment Alleged by the Requester.**

The Requester claims that the Expert Determination was premised on an interpretation of Specification 11 of the Registry Agreement that is not supported by the plain language of the Specification. Specifically, the Requester contends that Article 3(c) of Specification 11 is about "transparency," and thus will not restrict KMA's ability to subjectively determine eligibility criteria for .KOSHER so long as KMA publishes such criteria and even-handedly applies the criteria. (Request, § 10.B, Pgs. 20-21.)

As the Panel correctly notes in the Expert Determination, after KMA submitted its application for .KOSHER, ICANN approved revisions to the New gTLD Registry Agreement that included certain public interest commitments or PICs. (Determination, ¶ 86; *see also* 2 July 2013 NGPC Resolution *available at*

<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-02jul13-en.htm#1.d>;

Annex 1, New gTLD Agreement *available at*

[http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-item-1d-](http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-item-1d-02jul13-en.pdf)

[02jul13-en.pdf](http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-item-1d-02jul13-en.pdf).) The PICs are contained in Specification 11 of the Registry Agreement, and generally were created in response to GAC Advice.<sup>9</sup> (*See Beijing Communiqué available at*

<http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf>.)

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<sup>9</sup> GAC refers to ICANN's Governmental Advisory Committee. ICANN's Bylaws require ICANN to take into account the GAC's advice on public policy matters in the formulation and adoption of policies. (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, Section 3.1.)

Article 3 of Specification 11 provides:

Registry Operator agrees to perform the following specific public interest commitments, which commitments shall be enforceable by ICANN and through the PICDRP. Registry Operator shall comply with the PICDRP. Registry Operator agrees to implement and adhere to any remedies ICANN imposes (which may include any reasonable remedy, including for the avoidance of doubt, the termination of the Registry Agreement ... ) following a determination by any PICDRP panel and to be bound by any such determination.

(Annex 1, New gTLD Agreement.) Subsection (c) identifies the following PIC:

Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies.

*(Id.)*<sup>10</sup>

The Requester has failed to establish that the Panel misinterpreted Article 3(c) of Specification 11. Contrary to the Requester's assertion, Article 3(c) does impose limitations upon the operation of a restrictive TLD regardless of how transparent a registry's operations may be. As ICANN confirmed in its correspondence to the GAC (in response to requests made by the GAC in the Buenos Aires Communiqué), the "contractual language [of Article 3(c)] focuses on transparency because of the central role transparency plays in ensuring that restrictions do not provide undue preferences or subject parties to undue disadvantages." (*See* Attachment B to Annex S to Request: 10 February 2014 Letter from ICANN to GAC Chair.) In other words, Article 3(c) is intended to prohibit a registry from enforcing exclusive eligibility criteria for generic strings, such as .KOSHER. (*Id.*)

Here, the Panel correctly interpreted the intended purpose and effect of Article 3(c). The Panel concluded that:

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<sup>10</sup> As previously noted, the Procedure makes clear that, in addition to applying the standards that have been defined by ICANN, 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).) Thus, there can be no question (nor does the Requester challenge) that the Panel's consideration of Specification 11 in evaluating the likelihood of material detriment and specifically, whether there are adequate safeguards to protect against the detriment alleged by the Requester, is consistent with the procedure for evaluating objections.

[T]here is no basis for the Objector’s argument that the Applicant would be in a position to apply “*subjective standards to exclude the Objector and its clients or to contradict the Objector’s certification standards, so long as it did so openly and equally.*”

(Determination, ¶ 84 (emphasis in original).) The Panel’s conclusion is consistent with Article 3(c), which would prohibit KMA from granting undue preference to its affiliates, or subjecting potential registrants, such as the Requester and its clients, to undue disadvantages. There is no support for the Requester’s contention that the Panel improperly relied on an incorrect interpretation of Article 3(c) of Specification 11. The Panel evaluated the likelihood of material detriment consistent with the standards set forth in the Guidebook and concluded, among other things, that there are sufficient safeguards to protect against the detriment alleged by the Requester. The BGC will not re-evaluate the Panel’s substantive determination in this regard.

Moreover, as is discussed above, in light of KMA’s PICs, KMA will be explicitly prohibited from applying subjective standards in a manner that gives undue preference to any registrars, unduly disadvantages any registrars, or imposes its kosher certification standards on any registrants.

## **VI. Decision.**

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies the Requester’s Reconsideration Request (including the Requester’s request for a hearing). As there is no indication that the Panel or ICANN violated any policy or process in reaching or accepting the Determination, this Request should not proceed and the BGC does not think that a hearing would offer any additional information that would change this decision. 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 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 1 March 2014. Due to the volume of Reconsideration Requests received within recent weeks, it was impractical for the BGC to issue its Determination prior to 12 June 2014. Upon reaching that conclusion, Staff notified the Requester of the BGC's anticipated timing for the review of Request 14-4.