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## **NGPC Meeting – 30 January 2014**

### **Main Agenda**

- Discussion on Dealing with Inconsistent Panel Determinations
- Reconsideration Request 13-17, GCCIX, W.L.L.
- Reconsideration Request 13-19, HORTEC
- (T) Reconsideration Request 13-13, Christopher Barron/GOProud
- AOB

Cover Note to Report on String Confusion Expert Determinations:

As the NGPC members may recall, on 10 October 2013 the Board Governance Committee (BGC) asked staff to draft a report for New gTLD Program Committee (NGPC) on String Confusion Objections “setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon’s Applied - for String and TLDH’s Applied-for String.” (See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-amazon-10oct13-en.pdf>).

In response to the BGC’s request, staff drafted the attached Report, which was provided to the NGPC for review in Buenos Aires. The NGPC was not able to review the Report in detail due to time constraints in Buenos Aires, and requested a separate meeting to discuss the matter further. The Report lays out some principles for consideration, and potential paths forward to address perceived inconsistencies among a few of the Expert Determinations from String Confusion Objections.

While this Report is also posted on BoardVantage with the other materials for the meeting on 30 January 2014, Chris Disspain has asked that we separately send the Report via email to the NGPC.

Please let us know if you require anything further.

Amy A. Stathos  
Deputy General Counsel  
Internet Corporation for Assigned Names and Numbers  
Contact Information Redacted

Portion of the text superceded by Proposed Review Mechanism to Address the Perceived Inconsistent Expert Determinations of New gTLD Program String Confusion Objections: Framework Principles, which is available at: <http://newgtlds.icann.org/en/program-status/odr/proposed-sco-framework-principles-11feb14-en.pdf>. Remainder of the proposal not considered.

Portion of the text superceded by Proposed Review Mechanism to Address the Perceived Inconsistent Expert Determinations of New gTLD Program String Confusion Objections: Framework Principles, which is available at: <http://newgtlds.icann.org/en/program-status/odr/proposed-sco-framework-principles-11feb14-en.pdf>. Remainder of the proposal not considered.

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**ICANN NEW gTLD PROGRAM COMMITTEE SUBMISSION NO. 2014.01.30.2b**

**TO:** ICANN New gTLD Program Committee

**TITLE:** Reconsideration Request 13-17

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

**EXECUTIVE SUMMARY:**

In Reconsideration Request 13-17, GCCIX, W.L.L. (“GCCIX” or “Requester”) asked the Board (or here the NGPC) to reconsider the NGPC acceptance of the GAC’s<sup>1</sup> consensus advice to reject the Requester’s application for .GCC. The BGC concluded that GCCIX has not stated proper grounds for reconsideration. The BGC recommended that the Request be denied without further consideration. A summary of the BGC recommendation is provided in the rationale below.

**BOARD GOVERNANCE COMMITTEE RECOMMENDATION:**

The BGC recommends that Request 13-17 be denied and that no further action be taken in response to the Request. As set forth below and detailed in the Recommendation attached to the Reference Materials in support of this paper, the BGC determined that GCCIX has not stated proper grounds for reconsideration.

**PROPOSED RESOLUTION:**

Whereas, GCCIX, W.L.L.’s (“GCCIX”) Reconsideration Request 13-17, sought reconsideration of the New gTLD Program Committee’s (“NGPC”) 4 June 2013 resolution accepting the Governmental Advisory Committee’s consensus advice to reject the Requester’s application for the .GCC string.

Whereas, the Board of Governance Committee (“BGC”) considered the issues raised in Request 13-17.

Whereas, the BGC recommended that Request 13-17 be denied because GCCIX has not stated proper grounds for reconsideration and the New gTLD Program Committee agrees.

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<sup>1</sup> Governmental Advisory Committee

Resolved (2014.01.30.NGXX), the New gTLD Program Committee adopts the BGC Recommendation on Reconsideration Request 13-17, which can be found at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-gccix-08jan14-en.pdf>.

## **PROPOSED RATIONALE:**

### **I. Brief Summary**

Requester GCCIX applied for .GCC. GCCIX asked the Board (or here the NGPC) to reconsider its acceptance of the Governmental Advisory Committee's ("GAC") consensus advice to reject the Requester's application for .GCC. The Objector in the underlying proceedings filed a legal rights objection ("LRO") to .GCC. Then, the GAC issued consensus advice that ICANN not approve the .GCC application. The NGPC accepted this advice. As GCCIX's application was not permitted to proceed, the objection proceedings were terminated before an expert determination was rendered. The Requester claims that: (1) the GAC and the NGPC failed to provide rationales for rejecting the .GCC application; (ii) ICANN has not provided rationale for not allowing the LRO proceedings to conclude or for disregarding GNSO input regarding the protection of International Organization identifiers. The BGC concluded that: (i) the Request is untimely and fails on this basis alone; (ii) the claims regarding the alleged failure by the GAC and NGPC to provide rationales relating to their actions regarding .GCC does not support reconsideration; and (iii) neither the NGPC's alleged failure to explain why the LRO proceedings on the .GCC application were terminated nor the NGPC's alleged failure to provide rationale for the alleged disregard of GNSO input constitutes a Board action that is subject to reconsideration. In sum, the BGC concluded that the Request has not stated proper grounds for reconsideration. The NGPC agrees.

### **II. Facts**

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

GCCIX submitted a new gTLD application for .GCC.

The Requester's application received a GAC Early Warning in November 2012 (<https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings>), stating that the

governments of Bahrain, Oman, Qatar and UAE and the Gulf Cooperation Council expressed their serious concerns with respect to (1) The applied for new gTLD exactly matches a name of an Intergovernmental Organization, and (2) Lack of community involvement and support. The rationale for their concerns was set out in the GAC Early Warning notice.

On 13 March 2013, the Cooperation Council for the Arab States of the Gulf (“CCASG”) filed a LRO to the Requester’s application, claiming rights to the GCC acronym.

On 11 April 2013, the GAC issued its Beijing Communiqué, which included consensus advice to ICANN that it not approve the Requester’s application for the .GCC string.

On 18 April 2013, ICANN published the GAC advice thereby notifying the Requester and triggering the 21-day applicant response period. Prior to the 10 May 2013 deadline, the Requester submitted to the Board a response to the GAC consensus advice, which referenced the information provided in the GAC Early Warning notice.

The NGPC developed a scorecard containing the NGPC’s response to the GAC advice found in the Beijing Communiqué (“NGPC Scorecard”). With respect to the .GCC string, the NGPC Scorecard stated in pertinent part:

The NGPC accepts [the GAC] advice. The [Guidebook] provides that if “GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.”

(NGPC Scorecard, Pg. 2.)

On 4 June 2013, the NGPC adopted the NGPC Scorecard (“4 June 2013 Resolution”) adopting the GAC advice on the .GCC application, The Requester was invited to either withdraw the application or “seek relief according to ICANN’s accountability mechanisms.”

Because the Requester’s application was not permitted to proceed, CCASG’s LRO was terminated before a determination could be rendered.

On 19 June 2013, the Requester submitted a letter to the ICANN Board expressing its dissatisfaction with the NGPC’s 4 June 2013 action and the NGPC’s (and GAC’s) purported

failure to provide an explanation for the action. The Requester was seeking a rationale for the NGPC's decision and requesting that CCASG's LRO be allowed to continue.

On 5 September 2013, ICANN responded to the Requester's 19 June 2013 letter.

On 25 September 2013, the Requester's counsel responded to ICANN's 5 September 2013 letter, making similar claims as those asserted in the formal Request and again seeking a rationale for the NGPC's decision and requesting that CCASG's LRO be allowed to continue.

#### B. Requester's Claims

The Requester contends that the GAC failed to explain its consensus advice that the application for .GCC not proceed and that the NGPC failed to explain its acceptance of that advice. The Requester further claims that ICANN has not provided any rationale for failing to allow WIPO to render a decision on CCASG's LRO. Finally, the Requester claims that ICANN has not provided any rationale for disregarding GNSO input regarding the protection of International Organization identifiers, and specifically the GNSO Working Group's "Final Report on the Protection of IGO and INGO Identifiers in All gTLDs Policy Development Process" ("GNSO Working Group's Final Report").

#### II. Issues

The issues for reconsideration are whether the purported failure to provide rationales for the following actions supports reconsideration:

1. The GAC's and the NGPC's rejection of the .GCC application;
2. ICANN's termination of CCASG's LRO before a determination could be rendered; and
3. ICANN's alleged disregard of GNSO input regarding the protection of IGO identifiers, and specifically, the GNSO Working Group's Final Report.

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

ICANN's Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. *See* Article IV, Section 2 of the Bylaws. The NGPC,



bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 13-17 and finds the analysis sound.<sup>2</sup>

V. Analysis and Rationale

A. GCCIX's Request is Untimely.

The challenged NGPC resolution was published on 6 June 2013. The Request was received on 14 November 2013, more than 15 days from the date upon which the challenged resolution was first published, thereby rendering the Request untimely under the Bylaws.

In a 25 September 2013 correspondence, the Requester asked for the “prompt initiation of the Reconsideration Request process described in ICANN’s Bylaws, Art. IV.” (Exhibit A to Request: 25 September 2013 Letter from GCCIX’s counsel to ICANN.) In a 31 October 2013 response, ICANN made it clear to the Requester that the time to file a reconsideration request based on the 4 June 2013 NGPC resolution had “expired.” The Requester claims that it was not until ICANN’s 31 October 2013 correspondence that it “became evident” that ICANN would not be providing the requested rationale for the 4 June 2013 NGPC resolution, and thus, the Request is timely because it was submitted within 15 days of that correspondence.

The Bylaws make clear that reconsideration requests must be submitted within fifteen days after “the date on which information about the challenged Board action is first published in a resolution with an accompanying rationale.” (Bylaws, Art. IV, § 2.5.) Although the Requester appears to be claiming that the Request is timely based on a purported inaction – *i.e.*, the date the Requester concluded that staff would not be providing the requested rationale for the 4 June 2013 NGPC resolution – the Request does not challenge this alleged inaction. Rather, the Request challenges the 4 June 2013 decision of the NGPC. Accordingly, the deadline to file a Reconsideration Request to this decision expired on 21 June 2013, 15 days after the challenged resolution was published. The Request could be denied on this basis

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<sup>2</sup> Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval positively affects ICANN’s transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN’s policies, Bylaws, and Articles of Incorporation.

alone. Notwithstanding the foregoing, even if the Request was timely, the BGC found, and the NGPC agrees, that the stated grounds for the Request do not support reconsideration.

B. The Purported Failure to Provide Rationales Do Not Support Reconsideration of a Board Action or Inaction.

The BGC concluded, and the NGPC agrees, that the GAC's and the NGPC's alleged failure to provide a rationale for their respective decisions is not a proper basis for reconsideration. The BGC noted, and the NGPC agrees, that reconsideration is not the proper mechanism to challenge such action. First, reconsideration is available for challenges to staff or Board actions or inactions, not for challenges to advisory committees or any other constituencies established under ICANN's Bylaws. (Bylaws, Art. IV, § 2.2.) Second, a challenge of a Board action (or inaction) must be based upon Board action (or inaction) without consideration of material information or as a result of the Board's reliance on false or inaccurate material information.<sup>3</sup> (Bylaws, Art. IV, § 2.2.) The Requester has not alleged or provided any evidence demonstrating that the Board took action without considering material information.<sup>4</sup> In fact the Board had access to the GAC Early Warning notice, the GAC Advice, and the applicant's response to the GAC advice which referenced the GAC Early Warning notice. To the extent that the Requester claims that the NGPC acted without considering material information – *i.e.*, the NGPC accepted the GAC's advice to reject Requester's application for the .GCC string without considering WIPO's determination on CCASG's LRO and the GNSO Working Group's Final Report – the claim would still not support reconsideration. The information identified was not available to the NGPC at the time of the 4 June 2013 Resolution. Even if the information was available at the time of the 4 June 2013 Resolution, the Requester has not identified what that information would have provided to the NGPC and how it would have changed the decision taken.

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<sup>3</sup> Requester is not challenging a staff action. (Request, Section 1, Pg. 1.) To challenge a staff action, Requester would need to demonstrate that the staff action violated an established policy or process. (Bylaws, Art. IV, § 2.2.) Requester has made no such claims.

<sup>4</sup> Requester is also not claiming that the 4 June 2013 Resolution was the result of the NGPC's reliance on false or inaccurate material information.

- C. The NGPC's Alleged Failure to Provide a Rationale for Terminating CCASG's LRO Before a Determination Could be Rendered does not Support Reconsideration.

The BGC concluded, and the NGPC agrees, that the Requester's arguments do not support reconsideration in that the NGPC's purported failure to provide an explanation for terminating the LRO process with respect to .GCC's application does not constitute a Board action that is subject to reconsideration. Assuming a Board action could be reconsidered based upon a claim that the Board violated an established policy or process in taking that action (although this is not a proper ground for reconsideration), the Requester has not demonstrated any policy or process violation.

- D. The NGPC's Purported Failure to Provide a Rationale for Allegedly Disregarding the GNSO Working Group's Final Report is not a Proper Basis for Reconsideration.

The BGC concluded, and the NGPC agrees, that for the same reasons stated above, the Requester has not stated a proper basis for reconsideration in that the NGPC's purported failure to provide a rationale for the alleged disregard of GNSO input, including the GNSO Working Group's Final Report, does not constitute a Board action that is subject to reconsideration. Assuming a Board action could be reconsidered based upon a claim that the Board violated an established process in taking that action (although this is not a proper ground for reconsideration), the Requester has not identified any policy or process that the NGPC contradicted. There is nothing in the Guidebook that requires the NGPC to wait for or otherwise seek GNSO input before considering GAC advice on new gTLDs, nor is there anything in the Guidebook that requires the NGPC to provide a rationale for deciding not to wait for or seek GNSO input. The Guidebook makes clear that ICANN is required to consider GAC advice "as soon as practicable." (Guidebook, Section 3.1.)

## VI. Decision

The NGPC had the opportunity to consider all of the materials submitted by or on behalf of the Requestor (see <http://www.icann.org/en/groups/board/governance/reconsideration>) or that otherwise relate to Request 13-17. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 13-

17, which shall be deemed a part of this Rationale and the full text of which can be found at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-gccix-08jan14-en.pdf>.

In terms of timing of the BGC's Recommendation, we note that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request, unless practical. *See* Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC would have to have acted by 14 December 2013. Due to the volume of Reconsideration Requests received within recent weeks and the intervening holidays, the first practical opportunity for the BGC to take action on this Request was on 8 January 2014; it was impractical for the BGC to consider the Request sooner. Upon making that determination, staff notified the requestor of the BGC's anticipated timing for the review of Request 13-17. Further, due to the volume of Reconsideration Requests and other pending issues before the NGPC, as well as scheduling conflicts due to the ICANN public meeting in Buenos Aires in November 2013 and the intervening holidays, the first practical opportunity for the NGPC to consider this Request was on 30 January 2014.

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

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

Submitted By: Amy A. Stathos, Deputy General Counsel  
Dated Noted: 24 January 2014  
Email: amy.stathos@icann.org

**ICANN NEW gTLD PROGRAM COMMITTEE SUBMISSION NO. 2014.01.30.2c**

**TO:** ICANN New gTLD Program Committee

**TITLE:** Reconsideration Request 13-19

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

**EXECUTIVE SUMMARY:**

In Reconsideration Request 13-19, HOTREC (“HOTREC” or “Requester”) asked the Board (or here the NGPC) to reconsider the NGPC’s alleged failure (inaction) to stay the Requester’s community objection to the application for .HOTELS following the NGPC’s 25 June 2013 resolution deferring the contracting process for the .HOTELS string pending a dialogue with the GAC<sup>1</sup>. The BGC concluded that HOTREC has not stated proper grounds for reconsideration. The BGC recommended that the Request be denied without further consideration. A summary of the BGC recommendation is provided in the rationale below.

**BOARD GOVERNANCE COMMITTEE RECOMMENDATION:**

The BGC recommends that Request 13-19 be denied and that no further action be taken in response to the Request. As set forth below and detailed in the Recommendation attached to the Reference Materials in support of this paper, the BGC determined that HOTREC has not stated proper grounds for reconsideration.

**PROPOSED RESOLUTION:**

Whereas, HOTREC’s (“HOTREC”) Reconsideration Request 13-19, sought reconsideration of the New gTLD Program Committee’s (“NGPC”) alleged failure (inaction) to stay HOTREC’s community objection to the application for .HOTELS following the NGPC’s 25 June 2013 resolution deferring the contracting process for .HOTELS pending a dialogue with the Governmental Advisory Committee (“GAC”).

Whereas, the Board of Governance Committee (“BGC”) considered the issues raised in Request 13-19.

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

Whereas, the BGC recommended that Request 13-19 be denied because HOTREC has not stated proper grounds for reconsideration and the New gTLD Program Committee agrees.

Resolved (2014.01.30.NGXX), the New gTLD Program Committee adopts the BGC Recommendation on Reconsideration Request 13-19, which can be found at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-hotrec-21jan14-en.pdf>.

## **PROPOSED RATIONALE:**

### **I. Brief Summary**

Booking.com applied for .HOTELS, indicating that the string will be operated as a “closed” or “exclusive access” registry. The Requester HOTREC filed a Community Objection against Booking.com’s application, and lost. The Requester claims that the New gTLD Program Committee’s (“NGPC”) failure to stay the Requester’s Objection following the NGPC’s resolution deferring the contracting process for “closed generic” TLDs (which includes .HOTELS) violated Article 4 of ICANN’s Articles of Incorporation and Article 1, Sections 2, 7, 8 and 9 of ICANN’s Bylaws, and caused a breach of due process. The BGC concluded that the stated grounds are improper bases for reconsideration under ICANN’s Bylaws because the Board’s purported violations of ICANN policy or procedure is not grounds for reconsideration. The Requester makes no argument and provides no evidence that the NGPC took an action or inaction without considering material information or as a result of reliance on false or inaccurate material information, which are the grounds for challenging Board conduct under the reconsideration process. The BGC further concluded that, even if these were proper bases for reconsideration, the stated grounds do not support reconsideration because there is no policy or process that requires the NGPC to stay objection proceedings while ICANN considers and/or communicates with the GAC regarding advice on new gTLDs. In sum, the BGC concluded that the Request has not stated proper grounds for reconsideration. The NGPC agrees.

### **II. Facts**

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

Booking.com filed an application for .HOTELS, indicating that the string will be operated as a “closed” or “exclusive access” registry.

On 13 March 2013, Requester HOTREC filed a Community Objection with the ICC<sup>2</sup> to Booking.com’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).)

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 .HOTELS, among others, as a string that it considers to be a generic term and for which the applicant is currently proposing to provide exclusive registry access.<sup>3</sup> (*See id.*)

On 25 June 2013, the NGPC accepted the GAC’s advice about 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” (“25 June 2013 Resolution”).

On 1 July 2013, the Requester, citing the 25 June 2013 Resolution, asked the ICC to stay the Community Objection proceedings; Booking.com opposed the request for a stay.

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.’”

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

<sup>3</sup> The ICANN Bylaws require the Board 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.)

On 22 July 2013, the Requester sought leave from the ICC to file an additional submission in reply to Booking.com's Response; Booking.com opposed the request.

On 13 August 2013, the Panel denied the Requester's request for a stay and granted the request to file an additional submission.

On 19 August 2013, ICANN inquired with applicants (including Booking.com) that applied for strings the GAC identified as generic terms, as to whether they still intended to operate the string as an exclusive access registry.

On 20 August 2013, the Requester filed its additional submission with the Panel, noting the 25 June 2013 Resolution; Booking.com responded.

On 4 September 2013, Booking.com informed ICANN that, although its application currently states that .HOTELS will be operated as an exclusive access registry, Booking.com will not operate .HOTELS as an exclusive access registry.

On 28 September 2013, the NGPC adopted a resolution that allows applicants that do not plan to operate as an exclusive access registry, and that are prepared to enter into the Registry Agreement as approved (which prohibits exclusive registry access for generic strings), to move forward with the contracting process ("28 September 2013 Resolution").

On 9 October 2013, ICANN announced that, based on the 28 September 2013 Resolution, applicants that have confirmed they no longer intend to operate the applied-for string as an exclusive access registry (which includes .HOTELS) will be asked to submit a change request to align their applications and intent. Once the application change request has been approved by ICANN and the application becomes eligible, the applicants will be invited to the contracting process in order of priority number.

On 19 November 2013, the Panel rendered an "Expert Determination" in favor of Booking.com.

On 4 December 2013, the Requester filed Request 13-19.

#### B. Requester's Claims



The Requester claims that the NGPC improperly failed to stay the Requester's Objection to Booking.com's application following the 25 June 2013 Resolution. Specifically, the Requester contends that the NGPC violated Article 4 of ICANN's Articles of Incorporation and Article 1, Sections 2, 7, 8 and 9 of ICANN's Bylaws by not complying with the following principles of international law: (i) the right to adversarial proceedings; (ii) the right to equality of arms; and (iii) the right to fairness in the proceedings by way of the administration of evidence.

## II. Issues

The issue for reconsideration is whether the NGPC's purported failure to take appropriate action by not staying the Requester's Objection to Booking.com's application following the 25 June 2013 Resolution supports reconsideration.

## IV. The Relevant Standards for Evaluating Reconsideration Requests

ICANN's Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. *See* Article IV, Section 2 of the Bylaws. The NGPC, bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 13-19 and finds the analysis sound.<sup>4</sup>

## V. Analysis and Rationale

### A. The NGPC's Failure to Stay the Requester's Objection Does Not Support Reconsideration of a Board Action or Inaction.

The BGC concluded, and the NGPC agrees, that NGPC's failure to stay the Requester's Objection following the 25 June 2013 Resolution is not a proper basis for reconsideration under ICANN's Bylaws. The Requester contends the NGPC's alleged inaction violated ICANN's Articles of Incorporation and ICANN's Bylaws. The BGC noted that a challenge of a Board action or inaction must be based upon the Board taking an action or inaction

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<sup>4</sup> Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval, positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws, and Articles of Incorporation.

without consideration of material information or as a result of the Board's reliance on false or inaccurate material information.<sup>5</sup> (Bylaws, Art. IV, § 2.2.) Purported violations of ICANN policy or procedure are not proper grounds for challenging Board action or inaction. The Requester makes no argument and provides no evidence that the NGPC took an action or inaction without considering material information or as a result of reliance on false or inaccurate material information.

Even if the Requester's claims were proper bases for reconsideration, the stated grounds are not well founded in that there is no policy or process that requires the NGPC to stay objection proceedings while ICANN considers and/or communicates with the GAC regarding advice on new gTLDs. 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, Section 3.1.) The NGPC's 25 June 2013 Resolution directed staff to defer moving forward with the contracting process for applicants seeking to operate exclusive access registries with strings representing generic terms (such as .HOTELS) pending further communication with the GAC.

The BGC further concluded, and the NGPC agrees, that there is no support for the Requester's claim that its due process rights were somehow violated by the NGPC's failure to stay the objection proceedings. The Requester claims that it was not given the opportunity to object to Booking.com's application in its final version as a result of the NGPC's purported inaction. The Requester also claims that the NGPC's "actions/inaction related to 'closed-generic' TLD Applications misled the Expert in rendering her determination and led to an unfair determination." The BGC noted that the Requester raised the purported implications of the 25 June 2013 Resolution on the Requester's Objection with the Panel and was granted leave to file an additional submission with the Panel following the Resolution and the NGPC's approval of the revised New gTLD Agreement. The Requester noted that Specification 11 of the revised agreement prohibited strings representing generic terms from imposing eligibility criteria for registering names in the gTLD that limit registrations

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<sup>5</sup> The Requester is not challenging a staff action. (Request, Section 2, Pg. 3.) To challenge a staff action, Requester would need to demonstrate that the staff action violated an established policy or process. (Bylaws, Art. IV, § 2.2.) While the Requester asserts that the Panel improperly considered and relied upon hypothetical or future events in its Determination, the Request is not based on these claims.

exclusively to “a single person or entity and/or that person’s or entity’s ‘Affiliates.’” The Requester suggested to the Panel that the revisions “cast considerable doubt” on whether Booking.com will be able operate .HOTELS as a closed gTLD. Based on the Requester’s assertions, the Panel determined:

It is accordingly far from certain that [Booking.com] would be able to exclude members of the Hotel Community from registering domain names in ‘.HOTELS’ and cause the alleged detriment the Objector foresees.

(Expert Determination, Pgs. 23-24, ¶ 8.48.) The Requester’s contentions are unsupported in that it was Requester’s representations upon which the Panel relied. Thus, the BGC concluded that there is no support for the Requester’s claim that its due process rights were violated by the NGPC’s failure to stay the objection proceedings. Regardless of whether Booking.com’s application for .HOTELS proceeded as a closed gTLD, the Panel determined that the Requester was simply unable to satisfy its burden of proving a likelihood of material detriment to prevail on its Objection.

## VI. Decision

The NGPC had the opportunity to consider all of the materials submitted by or on behalf of the Requestor (see <http://www.icann.org/en/groups/board/governance/reconsideration>) or that otherwise relate to Request 13-19. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC’s Recommendation on Request 13-19, which shall be deemed a part of this Rationale and the full text of which can be found at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-hotrec-21jan14-en.pdf>.

In terms of timing of the BGC’s Recommendation, we note that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request, unless practical. *See* Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC would have to have acted by 3 January 2014. Due to the volume of Reconsideration Requests received within recent weeks and the intervening holidays, the first practical opportunity for the BGC to take action on this Request was on 21 January 2014; it

was impractical for the BGC to consider the Request sooner. Upon making that determination, staff notified the requestor of the BGC's anticipated timing for the review of Request 13-19.

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

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

Submitted By: Amy A. Stathos, Deputy General Counsel  
Dated Noted: 24 January 2014  
Email: amy.stathos@icann.org

**New gTLD Program Committee Members,**

**Attached below please find Notice of the following New gTLD Program Committee Meeting:**

**30 January 2014 – NGPC Meeting at 21:00:00 UTC. This Committee meeting is estimated to last 2 hours.**

<http://www.timeanddate.com/worldclock/fixetime.html?msg=NGPC+Meeting&iso=20140130T21>

**Some other helpful time zones:**

**30 January 2014 – 1:00 p.m. PST Los Angeles, CA**

**30 January 2014 – 4:00 p.m. EST Washington, D.C.**

**30 January 2014 – 10:00 p.m. CEST Brussels**

**Main Agenda**

- Discussion on Dealing with Inconsistent Panel Determinations
- Reconsideration Request 13-17, GCCIX, W.L.L.
- Reconsideration Request 13-19, HORTEC
- (T) Reconsideration Request 13-13, Christopher Barron/GOProud
- AOB

Note: Materials for Reconsideration Request 13-13 are being finalized. If ready prior to the 30 Jan NGPC meeting, those materials will be distributed on 27 January.

**MATERIALS for this meeting will be posted at:**

Contact Information Redacted

**If you have trouble with access, please let us know and we will work with you to assure that you can use the BoardVantage Portal for this meeting.**

**If call information is required, it will be distributed separately**

If you have any questions, or we can be of assistance to you, please let us know.

**John Jeffrey**

**General Counsel & Secretary, ICANN**

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