

**DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)**

**RECONSIDERATION REQUEST 13-23**

**5 FEBRUARY 2014**

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The Requester Ruby Pike, LLC seeks reconsideration of the Expert Determination upholding the Independent Objector's limited public interest objection to the application for .HOSPITAL.

**I. Brief Summary.**

The Requester applied for .HOSPITAL. The Independent Objector filed a Limited Public Interest Objection to the Requester's application, and his Objection was upheld. The Requester claims that the actions of the Panel were inconsistent with ICANN policies, which influenced the Panel's decision to uphold the IO's Objection. Specifically, the Requester contends that the Panel failed to adhere to and apply ICANN processes and policies concerning Limited Public Interest Objections as expressed in Sections 3.5 and 3.5.3 of the Applicant Guidebook.

The Requester asks ICANN to reverse the Expert Determination and follow the example the Requester argues to be set forth in the decisions of other panels that have adhered to the standards established by ICANN for purposes of effectuating its policies and procedures respecting limited public interest objections set forth in Sections 3.5 and 3.5.3 of the Applicant Guidebook.

With respect to each claim asserted by the Requester, there is no evidence that the Panel deviated from the standards set forth in Sections 3.5 or 3.5.3 of the Applicant Guidebook. The

Requester has failed to demonstrate that the Panel applied the wrong standard in contravention of established policy or procedure. Therefore, the BGC<sup>1</sup> concludes that Request 13-23 be denied.

## **II. Facts.**

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

Ruby Pike, LLC (the “Requester”), an affiliate of Donuts, Inc., applied for the gTLD string .HOSPITAL.

On 12 March 2013, the Independent Objector (“IO”)<sup>2</sup> filed a Limited Public Interest (“LPI”) Objection (the “Objection”) with the ICC<sup>3</sup> to the Requester’s application. The IO asserted that “the applied-for gTLD string is contrary to general principles of international law for morality and public order.” (Applicant Guidebook (“Guidebook”), § 3.5.3.)

On 15 May 2013, the Requester responded to the IO’s Objection.

On 19 June 2013, the ICC appointed Mr. Piotr Nowaczyk as the Chairman of the Expert Panel (“Expert” or “Panel”), and Professor August Reinisch and Mr. Ike Ehiribe as Co-Experts, to consider the IO’s Objection.

On 2 August 2013, the IO sought leave from the Panel to file an additional round of written submissions, which the Panel granted.

On 12 August 2013, the IO filed a supplemental written statement.

On 20 August 2013, the Requester responded to the IO’s supplemental written statement.

On 28 August 2013, the Panel determined that the Objection was not subject to dismissal pursuant to the Quick Look Procedure, which is aimed at eliminating frivolous and/or abusive

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<sup>1</sup> Board Governance Committee.

<sup>2</sup> The Independent Objector, Professor Alain Pellet, was appointed by ICANN to serve for the duration of the New gTLD Program and object to highly objectionable gTLD applications on limited public interest and community grounds. *See* Applicant Guidebook, § 3.2.5.

<sup>3</sup> International Centre for Expertise of the International Chamber of Commerce.

objections.

On 11 December 2013, the Panel issued an Expert Determination in favor of the IO. One member of the three member Panel dissented. Based on the submissions and evidence provided by the parties, the Panel Majority determined that “there is no doubt that human health and its safety tips the scale in finding the Objection to be justified.” (Determination, ¶ 89, Pg. 18.) The Panel upheld the Objection and deemed the IO the prevailing party. (Determination, Pg. 18, ¶ 91.)

On 12 December 2013, the ICC notified the parties of its Determination.

On 27 December 2013, the Requester filed Request 13-23. On the same day, the Requester filed Revised Request 13-23.<sup>4</sup>

#### **B. The Requester’s Claims.**

The Requester claims that the Panel’s decision to uphold the IO’s Objection violates the following ICANN policies:

- Section 3.5.3 of the Guidebook, in particular the standards for evaluating whether or not “the applied-for gTLD string is contrary to general principles of international law for morality and public order”; and
- Section 3.5 of the Guidebook and Article 20(c) of the New gTLD Dispute Resolution Procedure, which together place the burden on the objector to prove “that its Objection should be sustained in accordance with applicable standards.”

(Request, Section 10.b, Pgs. 13-19.) Specifically, the Requester claims that the Panel:

1. Adopted definitions of ‘morality’ and ‘public order’ based upon common understanding and respective scientific sources instead of “specific principles of international law as reflected in relevant international instruments of law”;

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<sup>4</sup> There do not appear to be any substantive differences between the Requester’s original Request 13-23 and its Revised Requested 13-23. The Request considered by the BGC is the Requester’s Revised Request 13-23.

2. Failed to conduct its analysis on the basis of the applied-for gTLD string itself or the intended purpose of the TLD as stated in the application; and
3. Ignored the Guidebook's burden of proof requirement and failed to recognize the "presumption" in favor of awarding new gTLD strings to otherwise qualified applicants.

(Request, Sections 10.8-10.13, pgs. 15-19.)

**C. Relief Requested.**

The Requester asks that ICANN reverse the Expert Determination upholding the Objection (including, specifically, the Panel's finding that .HOSPITAL would be contrary to general principles of international law for morality and public order). The Requester also asks that ICANN "[f]ollow the decisions of the other panels that have reviewed this same issue, as well as the reasoning of the Dissent, all of which adhere to the standards established by ICANN for purposes of effectuating its policies and procedures respecting [LPI] objections set forth in the [Applicant Guidebook] §§ 3.5, 3.5.3." (Request, Section 9, Pg. 12.)

**III. Issues.**

In view of the claims set forth in Request 13-23, the issues for reconsideration are whether the Panel incorrectly applied the standards for evaluating whether an applied-for gTLD string would be contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law in violation of an established policy or process. Specifically, the issues are:

- A. Whether the Panel improperly adopted definitions of 'morality' and 'public order' based upon common understanding and respective scientific sources instead of "specific principles of international law as reflected in relevant international instruments of law";
- B. Whether the Panel improperly conducted its analysis on the basis of matters beyond the applied-for gTLD string itself or the intended purpose of the TLD as stated in the application; and

- C. Whether the Panel ignored the Guidebook's burden of proof requirement and improperly failed to apply a presumption in favor of awarding new gTLD strings to otherwise qualified applicants.

#### **IV. The Relevant Standards for Evaluating Reconsideration Requests and Independent Objector LPI Objections.**

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.<sup>5</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 NGPC<sup>6</sup> 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.<sup>7</sup>

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC is not to evaluate the Panel's substantive conclusion that the Requester's application for .HOSPITAL is

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<sup>5</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.

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

<sup>7</sup> See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

contrary to general principles of international law for morality and public order. Rather, the BGC’s review is limited to whether the Panel violated any established policy or process.

The standards for evaluating LPI objections are set forth in Section 3.5.3 of the Applicant Guidebook (the “Guidebook”). Pursuant to Section 3.5.3 of the Guidebook, the expert panel hearing an LPI objection will “consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order.” These principles are contained in a number of human rights instruments, which are listed in a demonstrative fashion in paragraph 3.5.3 of the Guidebook.

That same provision also contains a list of four “grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law.” (Guidebook, § 3.5.3.)

These grounds are:

- Incitement to or promotion of violent lawless action;
- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law;
- Incitement to or promotion of child pornography or other sexual abuse of children;  
or
- A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

(*Id.*) Section 3.5.3 also states that the panel will conduct its analysis “on the basis of the applied-for gTLD string itself,” but that the “panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application.” (*See id.*) The factors relevant to the Requester’s claims are discussed in detail below.

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

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

The Requester contends that the Panel failed to follow the Guidebook's substantive objection standards for evaluating whether the applied-for gTLD string is contrary to generally accepted principles of international law for morality and public order. Specifically, the Requester claims that the Panel erroneously "adopted, on its own initiative, definitions of 'morality' and 'public order' ... based upon common understanding and respective scientific sources, rather than upon any specific provision of international law that the String itself, as Applicant would use it as described in the Application, would contravene." (Request, Section 10.8, p. 15.) The Requester also claims that the Panel failed to apply the proper burden of proof. (*Id.* at Section 10.11, pgs. 17-18.)

As noted above, there are four grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law. (Guidebook, § 3.5.3.) The IO's objection was based on the fourth ground: "A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law." (*Id.*; Determination, ¶ 21, pg. 7.) As the Requester correctly notes, in determining whether an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant instruments of law, the Panel "will conduct its analysis on the basis of the applied-for gTLD string itself," but "may, if needed, use as additional context the intended purposes of the TLD as stated in the application." (Guidebook, § 3.5.3.) As discussed in detail below, there is no support for Requester's contention that the Panel incorrectly applied any of these standards in contravention of established policy or process.

**1. The Panel Did Not Fail To Apply Specific Principles Of International Law As Reflected In Relevant International Instruments Of Law.**

The Requester claims that the Panel failed to apply “specific principles of international law as reflected in relevant international instruments of law” when it determined that .HOSPITAL would be contrary to general principles of international law for morality and public order. (Request, Section 10.8, Pg. 15.) To support this assertion, the Requester relies solely on the following Panel statement:

In order to review the case under consideration, the Expert Panel has adopted, on its own initiative, definitions of ‘morality’ and ‘public order’ that are based upon common understanding and respective scientific sources.

(Determination, ¶ 76, pg. 15.)

The Panel’s statement, however, cannot be viewed in isolation. The Panel went on to explain that the principles of morality and public order that require all members of society to be “extremely cautious on issues of human life and health” (Determination, ¶ 79, pg. 16), are “reflected in the right to health *which is broadly recognized in many international law instruments.*” (*Id.* at Section H, pg. 17 (emphasis added).) In other words, the principles of morality and public order relied on by the Panel were derived from the fundamental right to health, which, the Panel found, was reflected in relevant international instruments of law. Specifically, the Panel cited the following international law instruments in support of its determination that “the right to health is an important principle of international law” (*Id.* at ¶ 86):

- Article 25 of the Universal Declaration of Human Rights (“Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”);
- Article 12(1) of the International Covenant on economic, Social and Cultural Rights (“The States Parties to the present Covenant recognize the right of



everyone to the enjoyment of the highest attainable standard of physical and mental health.”); and

- The 1998 European Court of Human Rights decision in the case of *Guerra v. Italy*, [1998] ECHR 7, 26 EHRR 357 (holding that a failure by the state to provide timely information on environmental pollution issues so that the citizens of that state could assess the health risks to themselves and their families was tantamount to a violation of their right to respect for their right to private and family life in breach of Article 8 of the European Convention on Human Rights).

Based on the foregoing international law instruments, as well as others submitted by the IO, the Panel concluded that “having access to reliable and trustworthy health related information is part of the fundamental right to health.” (Determination, ¶ 87, pg. 17.) The Expert Determination thus reveals that, in concluding that the right to health is a fundamental principle of international law for morality and public order, the Panel applied specific principles of international law as reflected in relevant international instruments of law, which is precisely what the Guidebook calls for. (Guidebook, § 3.5.3.) Accordingly, there is no evidence that the Panel’s action contradicted any established policy or process in this regard.

**2. The Panel Did Not Improperly Conduct Its Analysis On The Basis Of Matters Beyond The Applied-For gTLD String Itself Or The Intended Purpose Of The TLD As Stated In The Application.**

Having concluded that the right to health is a specific principle of international law for morality and public order as reflected in relevant international instruments of law, the Guidebook next called for the Panel to determine whether the applied-for gTLD string – .HOSPITAL – would be contrary to the relevant principle of international law (here, the right to health). The Requester claims that the Panel failed to follow the standards set forth in Section 3.5.3 of the Guidebook when it determined that .HOSPITAL would in fact contravene the fundamental right to health. (Request, Section 10.8, Pgs. 15-16.) Specifically, the Requester claims that the

Panel’s determination “finds no support in the only sources to which the Panel may look – the String itself and its intended use as stated in the Application.” (Request, Section 10.8.2, Pg. 16.)

According to the Expert Determination, and as recognized by the Requester, “Paragraph 3.5.3 ... authorizes the Expert Panel to use as additional context the intended purpose of the gTLD as stated in the Application to conduct its analysis on the basis of the applied-for gTLD string itself.” (Determination, ¶ 71, pg. 14; *see also* Guidebook § 3.5.3.) Adhering to Paragraph 3.5.3 of the Guidebook, the Panel thereafter analyzed the Requester’s intended purpose for .HOSPITAL, as stated in the Requester’s application.

Specifically, the Panel found that the application “clearly states in answer to question 18 of the Application that the Applicant: ‘intends to increase competition and consumer choice at the top level (...) In doing so, the TLD will introduce significant consumer choice and competition to the Internet namespace – the very purpose of ICANN’s new TLD program.’” (Determination, ¶ 71, pgs. 15-14.) The Panel also considered the Requester’s answer to question 18(c) in the .HOSPITAL application, which asked: “What operating rules will you adopt to eliminate or minimize social costs?” (Determination, ¶ 73, pg. 15.) In response to question 18(c), the Requester discussed its intended pricing policies for registering second level domains, but did not otherwise address any social costs associated with operating .HOSPITAL. (*Id.*) The Panel found the Requester’s “disregard for [the] social cost of operating .HOSPITAL provides a very clear indication of the commercial purpose and mission of the Application.” (*Id.*)

Based on the Requester’s statements in its .HOSPITAL application, it was “the Expert Panel’s opinion [that] the Applicant’s sole purpose for the Application as expressed in the Application documents is simply for commercial purposes.” (Determination, ¶ 71, pg. 15.) As stated by the Panel:

[The .HOSPITAL application] presents simply a ‘market approach’ whereas morality and public order require a ‘social approach’ as is stated in the following sections.

(Determination, ¶72, pg. 15.)

According to the Panel, it was the focus on .HOSPITAL’s commercial purpose as stated in the Requester’s .HOSPITAL application that supported its conclusion that .HOSPITAL would be contrary to the fundamental right to health. Specifically, the Panel stated that “[t]he term ‘Hospital’ is a generic term that is commonly associated with healthcare and emergency. This original meaning and health related connotation cannot be replaced or obscured by the commercial use of this name.” (Determination, ¶ 80, pg. 16.) The Panel thus concluded that the commercial, market approach presented by the Requester in its .HOSPITAL application, “greatly increases” the risk that misuse of the word “hospital” may cause significant harm to society in contravention of the fundamental right to health. (Determination, ¶ 81, pg. 16.) In this regard, the Panel’s determination that .HOSPITAL would contravene the right to health was based on the intended purpose of the .HOSPITAL gTLD as stated in the Requester’s application, which the Guidebook expressly provides for in Section 3.5.3.<sup>8</sup>

The Requester also claims that it is inappropriate for the IO or a Panel to consider GAC recommendations in the context of an LPI objection. (Request, ¶ 10.10, pg. 17.) As an initial matter, while the Requester notes that the IO in his Objection cited the GAC Beijing advice, the Requester does not cite any language in the Expert Determination that relies on GAC

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<sup>8</sup> The Requester repeatedly cites the Expert Panel’s dissenting opinion as support for the Requester’s disagreement with the substance of the majority determination. (*See, e.g.*, Request, Section 10.10, pg. 16 (stating that the dissent “got it right” substantively). In the context of the New gTLD Program, however, 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’s application for .HOSPITAL is contrary to general principles of international law for morality and public order.

recommendations in a manner allegedly contrary to ICANN policy or process. On this basis alone, the Requester has not established that the Panel’s action contradicted any established policy or process.<sup>9</sup>

Even had the Requester appropriately raised this issue, the Expert Determination only references the GAC’s comments in the context of evaluating the commercial purpose stated in the Requester’s .HOSPITAL application, which, as set forth above, the Guidebook expressly condones. (Guidebook, § 3.5.3.) Specifically, the Panel notes that the .HOSPITAL application “does not include the specific protection safeguards listed on page 8 of the GAC’s comments.” (Determination, ¶ 83, pg. 16.) Instead, the .HOSPITAL application only provides the same level of protection as the applications for .CREDITCARD, .LEGAL, or .INVESTMENTS. (*Id.*) According to the Panel: “[t]he sensitivity of .HOSPITAL has a different dimension than gTLDs connected with banking or legal services since human life and health require greater care than pure commercial activity.” (*Id.*) Given the Requester’s market approach as stated in the .HOSPITAL application, it was clear to the Panel that the Requester had not considered how to include safeguard mechanisms that would strengthen, rather than hinder, the fundamental right to health, including the right to reliable health related information. (*Id.* at ¶ 87 (citing the eleventh principle of the “Guiding Principles” that were endorsed by the United Nations Human Rights Council in its Resolution 17/4 of 16 June 2011 and finding that “where such mechanisms for ensuring safety and reliable health related information ... are non-existent or inadequate, then the Application breaches the right to health”).)

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<sup>9</sup> The Requester also cites the decisions of different panels that addressed different, unrelated gTLD applications. (Request, Section 10.10, pg. 17.)

In summary, the Expert Determination reveals that the Panel considered the GAC's comments as a means to further provide context to the intended purpose of the .HOSPITAL TLD as stated in the application, which is consistent with the standards set forth in Section 3.5.3 of the Guidebook. Moreover, 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).)

### **3. The Panel Did Not Ignore The Burden Of Proof Requirement.**

The Requester claims that the Panel contravened ICANN process by ignoring the Guidebook's burden of proof requirement. (Request, Section 10.11, Pgs. 17-18.) The Expert Determination correctly states, however, that the IO, as the objector, bears the burden of proof. The Panel noted:

Article 20(c) of the Procedure requires the IO to prove that the Objection should be sustained in accordance with applicable standards. In this case the standard, provided by paragraph 3.5.3, is the following: 'an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law (...) as reflected in relevant international instruments of law.' Therefore, the IO has to provide the necessary evidence that the Application is indeed contrary to those norms.

It appears that the Requester is actually claiming that the Panel applied the wrong "standard of proof." The Requester claims that the Panel ignored "ICANN's own express presumption in favor of awarding new gTLD strings to otherwise qualified applicants," a presumption which, in the Requester's view, "requires the IO to prove the Application 'more likely than not' to cause a violation of specific provisions of international law for morality or public order." (Request, Section 10.12-10.13, pg. 18; *see id.* (calling for a "preponderance of the evidence" standard).)

The relevant standard for evaluating an LPI objection is set out in Section 3.5 of the Guidebook – The objector bears the burden of proof in each case. Article 20(b) of the Procedure further provides that:

The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.

(Procedure, Art. 20(b).) Contrary to the Requester’s assertion, nothing in the above quoted language, or any other applicable provision of the Guidebook or the Procedure, supports the Requester’s claim that a clear presumption exists in favor of the Application or that the IO must meet a preponderance of the evidence standard. It appears that the Requester’s position is based on archival notes purportedly summarizing public comments made in 2010 to the draft Applicant Guidebook. As noted by the Panel, however, the archive cited by the Requester no longer exists and therefore was not available for the Panel to evaluate.<sup>10</sup> As such, there is no support for the Requester’s claim that the Panel’s application of the burden of proof standard was in any way inconsistent with the Guidebook or the Procedure.

In all events, even assuming that the Panel was required to apply a “more likely than not” standard, it appears that the Panel has in fact done so. As stated by the Panel:

For the majority of the Panel, there is no doubt that human health and its safety *tips the scale in finding the Objection is justified*.

(Determination, ¶89, pg. 18.)

## **VI. Decision**

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Ruby Pike, LLC’s Reconsideration Request.

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<sup>10</sup> In support of its claim that the Panel failed to apply the proper standard of proof, the Requester cites the Panel’s statement that it was “not obligated to follow all ICANN bylaws or its analysis.” (Request, Section 10.12, pg. 18.) Taken in context, however, it is clear that the Panel was responding to the fact that the archival notes advanced by the Requester simply do not exist.

As there is no indication that the Panel violated any policy or process in reaching the Determination, this Request should not proceed. If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC's determination on Request 13-23 shall be final and does not require Board (or NGPC) consideration. The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 13-23 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of timing of the BGC's Determination, we note that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. *See* Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC would have to have acted by 26 January 2014. Due to the volume of Reconsideration Requests received within recent weeks and the intervening holiday schedule, the first practical opportunity for the BGC to take action on this Request was on 5 February 2014; it was impractical for the BGC to consider the Request sooner. Upon making that determination, staff notified the requestor of the BGC's anticipated timing for the review of Request 13-23.