DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 15-11

3 SEPTEMBER 2015

The Requester, Motion Picture Domain Registry Pty Ltd. ("MPDR"), the registry operator for the .FILM gTLD, seeks reconsideration of ICANN's response to MPDR's Request For Release Of Letter/Letter Two-Character ASCII Labels.

I. Brief Summary.

The Process for Requesting Authorization for Release of Letter/Letter Two-Character Labels (the "Process") describes how new gTLD registry operators may ask ICANN to authorize the release of letter/letter two-character ASCII second level domain names ("two-letter labels") for their registry, as well as the procedure that ICANN follows in responding to such requests. On 1 April 2015, MPDR requested that ICANN authorize the release of all two-letter labels for the .FILM gTLD ("Release Authorization Request"). Pursuant to the Process, MPDR's Release Authorization Request was subject to a 60-day public comment period, which ended on 2 June 2015. In accordance with the Process,[1] on 12 June 2015, ICANN authorized the release for registration of many (but not all) of the two-letter labels that the Release Authorization Request had sought ("Authorization"). The two-letter labels that were withheld were subject to objections, most of which were comprised of governmental entities' concerns that those two-letter labels could interfere with certain two-letter country code TLDs.

MPDR now seeks reconsideration of the Authorization because it did not authorize for release those two-letter labels that were subject to objections. The Process, however, explicitly states that *only* the "non-objected" two-letter labels will be released within 7-10 days of the close

[1] *See* Authorization Process for Release of Two-Character ASCII Labels, *available at* https://www.icann.org/resources/two-character-labels.

of the comment period, which is exactly what ICANN did. Neither the Process nor any other established ICANN policy or procedure currently prescribes whether, or how, objected-to two-letter labels are to be further evaluated. Accordingly, MPDR has not demonstrated any conduct inconsistent with any established policy or procedure.

To the extent that MPDR is arguing that ICANN staff did not properly evaluate the objections applicable to the withheld two-letter labels, MPDR is implicating a process or procedure that is not yet in place. As ICANN has publicly stated, ICANN is currently developing a process pursuant to which it can determine whether, and under what circumstances, ICANN might authorize release of objected-to two-letter labels.[2] Nevertheless, MPDR claims reconsideration is warranted because a 12 February 2015 ICANN Board resolution instructed ICANN staff to "fully consider[]" governmental objections to two-letter labels,[3] yet ICANN withheld all objected-to labels, and did not consider the merits of each objection. To be sure, ICANN has not yet evaluated or fully considered the merits of the governmental objections. ICANN's lack of action to date in that regard, however, is not inconsistent with any established policy or procedure. Rather, pursuant to the 12 February 2015 Board resolution, ICANN currently is developing a process pursuant to which it will determine whether, and under what

[2] On 21 August 2015, MPDR provided a Supplemental Submission to Request 15-11 that purports to address a recently released draft of this new process, which has not yet been implemented. *See* Supplemental Submission, *available at* https://www.icann.org/resources/pages/reconsideration-15-11-motion-picture-domain-registry-2015-06-30-en; *see also* Resolving the Release of Two-Character ASCII Labels with Comments, *available at* https://www.icann.org/news/blog/resolving-the-release-of-two-character-ascii-labels-with-comments. Nothing in the Supplemental Submission supports reconsideration. MPDR first requests that its reconsideration request "be considered in accordance with the Authorization Process that was in place at the time we submitted our request." However, there is no other standard by which Request 15-11 might be considered, given that no new Authorization Process has been finalized. MPDR then complains of certain disparities regarding the release of two-letter labels as amongst the registries. To the extent any such disparities exist, the new process will seek to address them, as MPDR appears to recognize, and MPDR identifies no policy or procedure violation that supports reconsideration in connection with the new proposed process or the implementation of the Authorization Process currently in place.

[3] Resolution 2015.02.12.16, *available at* https://www.icann.org/resources/board-material/resolutions-2015-02-12-en#1.e.

circumstances, the release of objected-to two-letter labels is appropriate.[4] The formulation of the criteria by which ICANN will evaluate objections to two-letter labels necessarily involves the weighing of competing priorities and the solicitation of input from various governmental entities, as well as community stakeholders, and this will take time.[5] Nonetheless, the BGC will continue to monitor the development of the criteria and process for evaluating objections to the release of certain two-letter labels, and will continue to urge staff to proceed as expeditiously as practicable.

In short, MPDR does not identify any ICANN staff action or inaction that is inconsistent with established ICANN policy or procedure. The BGC therefore concludes that Request 15-11 should be denied.

II. Facts.

A. Background Facts.

1. Background on Two-Character ASCII Labels At The Second Level.

Specification 5 of the January 2014 base form of new gTLD Registry Agreement (as well as MPDR's Registry Agreement with ICANN) requires registry operators to withhold *all* two-character ASCII labels from second-level registration including digit/digit, digit/letter, letter/digit, and letter/letter labels.[6] Pursuant to Specification 5, a registry operator may request written authorization from ICANN for the release certain of these labels "based on [the registry's] implementation of measures to avoid confusion with the corresponding country codes."[7]

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[4] *See* Resolving the Release of Two-Character ASCII Labels with Comments, *available at* https://www.icann.org/news/blog/resolving-the-release-of-two-character-ascii-labels-with-comments.
[5] *Id*. ("Within the next few months, ICANN will reach out to all governments that have submitted comments to better understand their concerns, including why a government may believe a specific *label.TLD* combination causes confusion with the corresponding country code.").
[6] *See* Registry Agreements, *available at* https://www.icann.org/resources/pages/registries/registries-agreements-en; .film Registry Agreement, *available at* https://www.icann.org/resources/agreement/film-2015-01-08-en.
[7] *Id*. Further, Section 6 of Specification 5 provides that certain two character ASCII labels may never be released for the second-level registration, because they are included in a list of reserved names not eligible for activation in the DNS. *See* http://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.htm. The reserved names include those withheld to ensure the protection of intergovernmental organizations. *See* Reserved Names for New gTLDs, *available at* https://www.icann.org/resources/pages/reserved-2013-07-08-en. MPDR has

On 16 October 2014, the Board approved Resolution 2014.10.16.14 ("2014 Resolution"), whereby it authorized the President and CEO to develop and implement an efficient procedure for the release of two-character domains currently required to be reserved in Specification 5 of the new gTLD Registry Agreement.[8]

On 1 December 2014, ICANN published a general authorization for the release of all non two-letter labels for all new gTLD registry operators—meaning that registry operators were no longer required to seek authorization to register and activate digit/digit, digit/letter, and letter/digit labels.[9]

Similarly, on 1 December 2014, ICANN published the first iteration of the Process,[10] which explicitly set forth the process for a registry operator to request the release of certain two-letter labels as well as the procedure for ICANN to respond to such requests:

- The registry operator must "complete the Authorization for Release of Letter/Letter Two-Character Request Form[.]"[11]
- "Once the request is received, ICANN will validate the completeness of the request and post it to [the ICANN webpage] for comments."[12]
- "The comment period for each request is 30 days, and the GAC will be notified of each request posted to [ICANN's webpage]."[13]

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conceded that none of the two-character labels on that list may be released, and does not challenge ICANN's determination to withhold them. As such, this Determination assumes that any two-character labels on the Section 6, Specification 5 listing fall outside the purview of this Reconsideration Request.

[8] Resolution 2014.10.16.14, *available at* https://www.icann.org/resources/board-material/resolutions-2014-10-16-en#2.b. On 15 October 2014, the GAC noted in its Los Angeles Communiqué that it was "not in a position to offer consensus advice on the use of two-character second level domain names in new gTLD operations," but that "the GAC considers that the public comment period is an important transparency mechanism, and in addition asks that relevant governments be alerted by ICANN about these requests as they arise." GAC Los Angeles Communiqué, *available at* https://www.icann.org/en/system/files/correspondence/gac-to-board-15oct14-en.pdf.

[9] *See* Authorization Process for Release of Two-Character ASCII Labels, *available at* https://www.icann.org/resources/pages/two-character-labels-2015-02-20-en.

[10] *Id*.

[11] *Id*.

[12] *Id*.

- "Following the comment period, the *non-objected* Letter/Letter two-character ASCII labels will be released via an Authorization that will be provided by ICANN to the Registry Operator."[14]

On 11 February 2015, the GAC issued its Singapore Communiqué, which contained advice regarding the release of two-letter codes at the second level in gTLDs, including the extension of the comment period to sixty days (from thirty), and the "establish[ment of] an effective notification mechanism, so that relevant governments can be alerted as requests are initiated."[15]

On 12 February 2015, the ICANN Board approved Resolution 2015.02.12.16 ("2015 Resolution").[16] The 2015 Resolution accepted the GAC Singapore Advice[17] and directed staff to revise the Process so as to: (1) extend the comment period so that all requests undergo 60 days of comment; (2) implement improvements to the Process to alert relevant governments when requests are initiated; and (3) ensure comments from relevant governments will be fully considered.[18] These revisions were incorporated into the Process effective 23 February 2015.[19]

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[13] *Id*.
[14] *Id*. (emphasis added).
[15] *See* GAC Advice, GAC Singapore 52 Communiqué, *available at* https://newgtlds.icann.org/en/applicants/gac-advice.
[16] Resolution 2015.02.12.16 , *available at* https://www.icann.org/resources/board-material/resolutions-2015-02-12-en#1.e.
[17] Article XI, Section 2.1 of the ICANN Bylaws permits the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.
[18] Resolution 2015.02.12.16, *available at* https://www.icann.org/resources/board-material/resolutions-2015-02-12-en#1.e.
[19] Authorization Process for Release of Two-Character ASCII Labels, *available at* https://www.icann.org/resources/pages/two-character-labels-2015-03-24-en.

The current Process, effective 24 March 2015[20] and applicable to MPDR's Release Authorization Request, provides as follows:

- The registry operator must "complete the Authorization for Release of Letter/Letter Two-Character Request Form."[21]
- "Once the request is received, ICANN will validate the completeness of the request and post it to [the ICANN webpage] for comments."[22]
- "The comment period for each request is 60 days, and the GAC will be notified of each request posted to [ICANN's webpage]."[23]
- "Within 7-10 days of the close of the comment period, the *non-objected* Letter/Letter two-character ASCII labels will be released via an Authorization that will be provided by ICANN to the Registry Operator."[24]

On 23 June 2015, during the ICANN 53 meeting in Buenos Aires, at the gTLD Registry Stakeholder Group ("RySG") meeting, ICANN informed the community that ICANN was in the process of preparing a procedure intended to address the objections submitted in response to requests for the release of certain two-letter labels, and solicited feedback from RySG volunteers. The next day, at the GAC meeting with the ICANN Board, ICANN reiterated that it was developing a process for addressing objections to two-letter labels.[25] Also on 24 June 2015, ICANN presented to over twenty registry representatives a draft flow chart encapsulating the

[20] The Process underwent minor revisions between 23 February 2015 and 24 March 2015, but none of the revisions are relevant to this Request. *See* Archive Index, *available at* https://www.icann.org/resources/pages/two-character-labels-archive-2015-03-24-en.
[21] Authorization Process for Release of Two-Character ASCII Labels, *available at* https://www.icann.org/resources/two-character-labels.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] Audio from that meeting is available at http://audio.icann.org/meetings/buenosaires2015/gac-board-24jun15-en.mp3.

proposed standards that, if approved, would govern the evaluation of the objections and potential release of certain two-letter labels.[26]

Simply put, pursuant to the Board's 12 February 2015 resolution, ICANN is in the midst of seeking community input and developing a process to evaluate the objections submitted regarding certain two-letter labels, and establishing a procedure to potentially release certain of those objected-to two-letter labels.[27] This proposed process, however, has neither been finalized nor implemented to date.

2. Background on MPDR's Release Authorization Request.

MPDR is the registry operator for the .FILM gTLD.

On 1 April 2015, MPDR submitted its Release Authorization Request, which sought the release of all two-letter labels for the .FILM gTLD.

ICANN received objections from various third parties with respect to a number of two-letter labels. While most of the objections were not specific to the .FILM gTLD, they nonetheless included governmental objections to the use of certain two-letter labels within any gTLD and therefore were applicable to the labels requested in MPDR's Release Authorization Request.[28]

Within 10 days after the 60-day public comment period regarding the Release Authorization Request expired, ICANN rendered the Authorization on 12 June 2015. The Authorization permitted MPDR to release most (but not all) of the requested two-letter labels in the .FILM gTLD.

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[26] *See* 15 June 2015 Letter, *available at* https://www.icann.org/en/system/files/correspondence/atallah-to-sutton-et-al-15jun15-en.pdf.
[27] *See* Resolving the Release of Two-Character ASCII Labels with Comments, *available at* https://www.icann.org/news/blog/resolving-the-release-of-two-character-ascii-labels-with-comments.
[28] *See, e.g.,* Authorization Process for Release of Two-Character ASCII Labels and the word Bahrain, *available at* http://mm.icann.org/pipermail/twochar_comments/2015/000086.html.

MPDR now seeks reconsideration of the Authorization, contending that authorization to release certain (unspecified) two-letter labels should not have been withheld.[29]

B. Relief Requested.

MPDR asks ICANN to release all two-letter labels to which MPDR contends "no reasoned or relevant comment has been submitted" along with "a detailed justification for withholding authorization on the basis of confusion with an existing ccTLD only."[30] MPDR also requests that if ICANN has withheld a string "based on a comment received by an individual government" that ICANN "provide justification for that continued reservation."[31] MPDR further states that in responding to release authorization requests, as a "matter of best practices," ICANN should "advise of the letter/letter labels that are to remain reserved along with an explanation for the continued reservation."[32]

III. Issues.

In view of the claims set forth in the Reconsideration Request, the issues for reconsideration are whether ICANN staff acted inconsistently with an established policy or procedure by withholding some of the two-letter labels MPDR sought to be released for registration, and by failing to provide a detailed justification for the labels that it withheld.

IV. The Relevant Standards for Evaluating Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.[33] Dismissal of a request for reconsideration of staff action or

[29] Request, § 9, Pg. 8.
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] Bylaws, Art. IV, § 2. Article IV, § 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

inaction is appropriate if the BGC concludes, and the Board or the NGPC[34] agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

V. Analysis and Rationale.

A. MPDR Has Not Demonstrated Any ICANN Staff Conduct That Was Inconsistent With Established Policy Or Procedure.

1. ICANN Followed All Applicable Policies And Procedures In Evaluating The Release Authorization Request.

MPDR argues that ICANN did not follow policy or procedure in withholding certain of the requested two-letter labels because, according to MPDR, the "mere existence of an objection does not warrant withholding a particular letter/letter two character label."[35] MPDR identifies certain objections it contends are "without justification or substantiating evidence," and argues that ICANN failed to follow policies and procedures by purportedly paying "little consideration" to the merits of those objections. The Process, however, is clear—ICANN is to authorize the release of *only* the "non-objected" two-letter labels in response to a release authorization request.[36] The Process has twice been revised since its initial implementation in January 2014, yet this provision has remained the same in all three versions.[37] ICANN strictly adhered to the Process, and MPDR has not and cannot identify any provision of that Process that was not followed by ICANN staff in responding to the Release Authorization Request. Indeed, the

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(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.

[34] New gTLD Program Committee.

[35] Request, § 8, Pg. 7.

[36] Authorization Process for Release of Two-Character ASCII Labels, *available at* https://www.icann.org/resources/two-character-labels.

[37] Archive Index, *available at* https://www.icann.org/resources/pages/two-character-labels-archive-2015-03-24-en.

release authorization request form itself states: "All requests for release are subject to ICANN's review and approval."[38] Specification 5 of the Registry Agreement also makes clear that ICANN may withhold authorization for the release of labels based on a submitted objection, as two-letter labels are only available for registration with ICANN's prior written authorization.[39] ICANN's decision to withhold all objected-to two-letter labels pending the development of the evaluation process does not violate any policy or procedure, because ICANN adhered to the Process in evaluating the Authorization Request and no other procedure has been finalized.

In sum, MPDR was on notice that ICANN maintained the discretion to withhold authorization for the release of objected-to labels, and cannot argue that ICANN acted inconsistently with any established policy or procedure when it did withhold authorization for objected-to labels in response to MPDR's Release Authorization Request.

2. The Request Is Impermissibly Vague Insofar As MPDR Does Not Identify Which Labels It Contends Should Not Have Been Withheld.

In its Reconsideration Request, MPDR never identifies which two-letter labels it contends that ICANN should have, but did not, authorize for release. Indeed, MPDR admits as much—stating that it has "not identified in this letter those labels which the Applicant finds should have been released[.]"[40] Instead, MPDR merely lists as exemplars certain governmental objections it deems irrelevant, "blanket objections," or "absent of detailed reasoning or evidence[.]"[41] These vague objection characterizations, however, provide no insight into what two-letter labels are actually at issue in this Reconsideration Request. This lack of specificity constitutes another deficiency in Reconsideration Request 15-11, insofar as MPDR has not

[38] *See* Request for Release of Letter/Letter Two-Character ASCII Labels, *available at* https://www.icann.org/en/system/files/files/two-char-auth-form-01dec14-en.pdf.
[39] *See* Registry Agreements, *available at* https://www.icann.org/resources/pages/registries/registries-agreements-en.
[40] Request, § 8, Pg. 7.
[41] *Id*., § 8, Pgs. 6-7.

concretely defined the relief it seeks.

3. No Established Policy Or Procedure Requires ICANN To Provide A "Detailed Justification" For Withholding A Two-Letter Label.

MPDR asks that ICANN provide a "detailed justification" for each two-letter label it does not authorize for the release for registration.[42] MPDR further requests that when ICANN responds to release authorization requests as a "matter of best practices," it include a list of the withheld labels.[43] However, neither the Process nor any other established ICANN policy or procedure requires such a detailed response to a release authorization request. ICANN has processed over 60 requests to release two-letter labels for over 200 new gTLDs.[44] As such, to the extent reconsideration is sought based on the fact that ICANN's did not provide a detailed justification for each withheld label, Reconsideration Request 15-11 is denied because ICANN's conduct is not inconsistent with an established policy or procedure.

B. No Reconsideration Is Warranted Based On The Withholding Of Authorization For Release Of Objected-To Two-Letter Labels.

To the extent that MPDR is arguing that ICANN staff did not properly evaluate the objections applicable to the withheld two-letter labels, MPDR seeks reconsideration of a review process that has not yet been finalized, much less implemented.

MPDR contends that ICANN's decision to withhold authorization for the release of certain two-letter labels was improper because, in MPDR's view, ICANN did not adequately assess the merits of the objections submitted in connection with the two-letter labels it withheld in the Authorization.[45]

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[42] *Id*,, § 9, Pg. 8.
[43] *Id*.
[44] Authorization Process for Release of Two-Character ASCII Labels, *available at* https://www.icann.org/resources/two-character-labels/background-authorization-process.
[45] Request, § 8, Pgs. 5-6.

To that end, MPDR proposes its own "understanding" of what "considerations are taken into account when ICANN makes a determination of whether to authorize or withhold" a two-letter label, with absolutely no authority or citation for this claim.[46] Specifically, MPDR contends that those "considerations" are twofold. First, MPDR asserts that the "overarching purpose of the [Process] is to balance the Registry Operator interests in releasing all letter/letter two-character labels with public and governmental objectives to maintain a secure and stable internet."[47] Second, MPDR asserts that "ICANN will consider the comments and only withhold the release of two-character letter/letter labels in respect of which a reasoned and relevant objection has been lodged by an individual government."[48] Despite MPDR's attempts to create its own standards for the analysis of two-letter label objections, the Process is the only applicable policy or procedure currently governing ICANN's consideration of release authorization requests and it contains no such provisions.[49]

As described above, ICANN is currently engaging in an open and transparent process to develop a procedure by which ICANN can determine whether, and under what circumstances, ICANN might authorize the release of certain objected-to two-letter labels for all gTLDs.[50] No such policy or procedure has been finalized or implemented; moreover, some of the two-letter labels sought in the Release Authorization Request may ultimately be released based upon the criteria ICANN is in the process of formulating. In other words, withholding the release of objected-to two-letter labels cannot constitute a violation of established policy or procedure

[46] *Id*., § 8, Pg. 5.
[47] *Id*.
[48] *Id*. It appears that MPDR pulled certain language from an ICANN press announcement and now asserts that this constitutes an additional requirement under the Process. However, the Process is the only procedure governing ICANN's evaluation of the Release Authorization Request and it was followed in all respects.
[49] *Id*., § 8, Pg. 7.
[50] *See* 15 June 2015 Letter https://www.icann.org/en/system/files/correspondence/atallah-to-sutton-et-al-15jun15-en.pdf; Resolving the Release of Two-Character ASCII Labels with Comments, *available at* https://www.icann.org/news/blog/resolving-the-release-of-two-character-ascii-labels-with-comments.

because the criteria by which objected-to two-letter labels might be released is in the process of being drafted. Therefore, to the extent that MPDR argues that reconsideration is warranted because the objections were not properly evaluated, the BGC concludes that Reconsideration Request 15-11 is denied.

VI. Determination.

Based upon the foregoing, the BGC concludes that MPDR has not stated proper grounds for reconsideration, and therefore denies Request 15-11. ICANN's decision to withhold all objected-to two-letter labels pending the development of this evaluation process does not violate any established policy or procedure, because ICANN adhered to the Process in evaluating the Authorization Request and no other procedure has been finalized yet. As such, Request 15-11 is denied. The BGC will, however, monitor the development of the criteria and process for evaluating objections to the release of certain two-letter labels, and urge staff to proceed as expeditiously as practicable. If MPDR believes that it has somehow been treated unfairly in the process, MPDR is free to ask the Ombudsman to review this matter.

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 no Board (or NGPC) consideration is required.[51] As discussed above, Request 15-11 seeks reconsideration of a staff action or inaction. As such, after consideration of Request 15-11, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of the timing of this decision, 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.[52]

[51] Bylaws, Art. IV, § 2.15.
[52] *Id*.

To satisfy the thirty-day deadline, the BGC would have to have acted by 27 July 2015. Due to timing of the Request, it was impractical for the BGC to make a final Determination on Request 15-11 prior to 3 September 2015.