

DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-20

21 JANUARY 2014

The Requester seeks reconsideration of ICANN’s alleged failure: (1) to properly prepare the ICC¹ to decide community objections and to ensure compliance with the established procedures concerning sensitive strings; and (ii) to provide a mechanism to appeal expert determinations based on grounds outside the Applicant Guidebook (“Guidebook”).

I. Brief Summary.

The Requester applied for .BANK. The Objector IBF filed a Community Objection against Requester’s application, and won. The Requester claims that ICANN staff failed to assure the preparedness of the ICC and the ICC panelists to apply the established policies in determining community objections concerning sensitive strings, such as .BANK. The Requester further claims that ICANN staff failed to provide an appeal mechanism if the decision was based on grounds outside the Guidebook.

With respect to the claim that the ICC or the Panel were not adequately trained, this claim is not supported and should be rejected. The Requester does not cite any established policy or process that was allegedly violated by ICANN’s purported inaction or that required ICANN to take action beyond the action that ICANN took. Moreover, there is no support for the Requester’s claim that the Panel applied the wrong standard of review.

With respect to the second claim, the Requester has not identified any established policy or process that required ICANN to implement an appeal mechanism (upon request or otherwise).

¹ International Centre for Expertise of the International Chamber of Commerce.

The Requester's belief that the dispute resolution procedures should have included certain quality controls does not constitute a policy or process violation that supports reconsideration. And, as noted many times before, the procedures were developed over years of public input and discussion.

Therefore, the BGC concludes that Request 13-20 be denied.

II. Facts.

A. Background Facts.

DotSecure Inc. ("Requester") applied for .BANK.

On 13 March 2013, the International Banking Federation ("IBF") objected to the Requester's application asserting that there is "substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted." (Guidebook, § 3.2.1; New gTLD Dispute Resolution Procedure ("Procedure"), Art. 2(e).)

On 14 May 2013, the Requester responded to IBF's Objection ("Response").

On 12 June 2013, the ICC appointed Mark Kantor as the Expert ("Expert" or "Panel").

On 3 July 2013, IBF filed a reply to the Response ("IBF's Reply").

On 9 July 2013, the Requester responded to IBF's Reply.

On 26 November 2013, the Panel rendered an Expert Determination in favor of the IBF, thereby finding IBF the prevailing party. Based on the submissions and evidence, the Panel determined that the Requester's application for .BANK "would create a likelihood of material detriment to the rights and legitimate interests of a significant portion of the global banking community, the community to which [the Requester] expressly and implicitly targets string '.bank.'" (Determination, Pg. 35, ¶ 185.)

On 28 November 2013, the ICC notified the Requester of its Decision.

On 12 December 2013, the Requester filed Request 13-20.²

B. The Requester's Claims.

The Requester seeks reconsideration on the following grounds:

First, the Requester claims that ICANN staff failed to assure the preparedness of the ICC and the ICC panelists to apply the established procedures in determining community objections. (Request, Pg. 9, ¶ 8.3.) The Requester contends that the Panel's purported application of the wrong standard for evaluating IBF's Objection and ICANN staff's alleged failure to provide the ICC with status reports on changes to the Guidebook evidence the ICC's improper training and staff's failure to ensure compliance. (Request, Pg. 2, ¶ 3.3 and Pgs. 5-6, ¶¶ 3.10-3.12.)

Second, the Requester claims that ICANN staff failed to provide an appeal mechanism if the decision was based on grounds outside the Guidebook. (Request, Pg. 9, ¶ 8.3.)

C. Relief Requested.

The Requester asks that ICANN reject the Expert Determination in favor of IBF. The Requester also asks that ICANN cancel its appointment of the ICC to determine either all community objections, or at least community objections involving sensitive strings such as .BANK, and void all such expert determinations rendered by the ICC, including the one at issue here. The Requester further asks that the ICC refund all fees collected in connection with community objections that are overruled as a result of this Request, and provide "another, fair, open, efficient and expeditious method of providing binding resolution of Community Objections involving sensitive strings," or alternatively, a procedure for applicants to review

² In addition to the three annexes submitted in support of its Request (all of which are posted), the Requester included a link to a dropbox with additional materials. Those materials include IBF's Objection and supporting documentation. The Requester informed ICANN that it has not obtained IBF's permission to publicly disclose these materials. Pursuant to Article IV, Section 2.14, the BGC cannot consider any materials that are not in the public record when evaluating a reconsideration request. Requester has since withdrawn all materials submitted without the other parties' permission.

determinations. Finally, the Requester asks that ICANN provide an appeal mechanism for applicants to appeal an ICC determination “on legitimate grounds if the decision rendered against them was based on grounds outside the [Guidebook].” (Request, Pgs. 10-11, ¶ 9.1.)

III. Issues.

In view of the claims set forth in Request 13-20, the issues for reconsideration are as follows:

- A. Whether ICANN staff’s alleged failure to: (i) properly prepare the ICC and the Panel; and (ii) to ensure compliance with the established procedures concerning sensitive strings supports reconsideration; and
- B. Whether ICANN staff’s alleged failure to provide an appeal mechanism in the dispute resolution process supports reconsideration.

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.³ (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC⁴ concludes, or if the Board or the NGPC⁵ agrees to the extent that the BGC deems that further consideration 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.

³ Article IV, Section 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration 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.

⁴ Board Governance Committee.

⁵ New gTLD Program Committee.

A. The Alleged Failure of ICANN To Properly Prepare The ICC And The Panel, And To Ensure Compliance With The Established Procedures Concerning Sensitive Strings Does Not Support Reconsideration.

The Requester claims that by providing “inadequate or no training” to the ICC, ICANN has improperly prepared the ICC to make decisions on community objections involving sensitive strings. (Request, Pg. 11, ¶ 10.2; Pgs. 3-4, ¶ 3.4; Pgs. 4-5, ¶ 3.7.)⁶ In asserting this claim, the Requester also points to correspondence from the Requester’s parent company, Radix Registry (“Radix”), and other applicants, to ICANN about the ICC’s purported inadequate training and the concern that ICC expert panels are “2 degrees removed from the ICANN staff.” (Request, Pgs. 6-7, ¶ 3.13; Annex 3 to Request.)

Notably, the Requester is challenging an alleged inaction – *i.e.*, ICANN’s purported failure to “assur[e] the preparedness of the ICC and the ICC panelists to properly apply [the] policies in determination of Community Objections concerning sensitive strings.” (Request, Pg. 9, ¶ 8.3.) The Requester, however, does not cite any established policy or process that was allegedly violated by ICANN or that required ICANN to take action beyond the action that ICANN took – “ICANN selected DRSPs on the basis of their relevant experience and expertise, as well as their willingness and ability to administer dispute proceedings in the new gTLD Program.”⁷ (Guidebook, Section 3.2.3.) The Requester’s claim that the ICC or the Panel were not adequately trained on the procedures set forth in the Applicant Guidebook is simply not supported and should be rejected.

⁶ By way of example, the Requester claims that the Panel found “substantial opposition” to the Requester’s application for .BANK without considering the “truth or validity” of the submissions filed in opposition. The Requester does not contend here that the Panel applied the wrong standard in assessing the amount of opposition filed and the substantiality of the opponents, but instead, asserts that ICANN should have trained the ICC to ensure that only opposition based on accurate statements is included in the calculus of the substantiality of the opposition. (Request, Pg. 4, ¶ 3.5.)

⁷ “DRSPs” refers to dispute resolution service providers.

The current Guidebook is posted on ICANN's new gTLD microsite.⁸ The standards for evaluating the merits of a community objection are set out in the Guidebook, and by filing an application for a new gTLD, each applicant agrees to accept the applicability of the gTLD dispute resolution process. (Guidebook, Section 3.5.4 & Section 3.3.2; Procedure, Art. 1(d).) Applicants are evaluated against transparent and predictable criteria, and the procedures are designed to ensure fairness.

In its correspondence to ICANN, Radix acknowledged that the Guidebook “does a remarkable job of providing clear guidance to the Applicants, Objectors and Panels on the criteria that need to be met in order for an Objection to prevail” and that the definitions in the Guidebook are “unambiguous” and “were available well in advance of the application deadline.” (Annex 3 to Request: 22 July 2013 Correspondence from Radix to ICANN.) Radix further conceded that ICANN “spent significant amounts of time working with the personnel at the DRSPs, particularly the [ICC], to make them thorough with the [Guidebook],” but asserted that the “requisite knowledge and understanding of the [Guidebook] has not percolated down to the actual Expert Panels appointed by the ICC.” (*Id.*) In its correspondence, Radix claimed that the expert panels have not “adhered” to the admittedly clear standards set out in the Guidebook in making their determinations. (*Id.*) Radix therefore claimed that expert panels allegedly applying the wrong standard is evidence of ICANN's purported failure to train the expert panels.

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by DRSPs, such as the ICC, where it can be stated that the Panel failed to follow the established policies or processes in reaching the

⁸ See <http://newgtlds.icann.org/en/applicants/agb>.

expert determination.⁹ Thus, to the extent an expert panel applied an incorrect standard in evaluating and determining a community objection (as Radix suggests), the reconsideration process is a proper mechanism for challenging such a decision. But a blanket claim by the Requester that ICANN failed to properly prepare the ICC and/or the Panel based on broad allegations that expert panels are applying the wrong standard does not support reconsideration for the reasons stated above.

1. The Requester Has Failed to Demonstrate that the Panel Applied the Wrong Standard In Contravention of Established Policy or Procedure.

The Requester claims that the Panel's purported failure to apply the correct standard in evaluating IBF's Objection evidences the Panel's improper training and ICANN's failure to ensure compliance with the established procedures concerning sensitive strings. (Request, Pgs. 3-5, ¶¶ 3.3-3.9.) Specifically, the Requester contends that although early advice from the GAC¹⁰ and others providing that sensitive strings (such as .BANK) should be operated only by members of the relevant community to which such strings are targeted was not adopted by ICANN, the Panel determined that the Requester's application for .BANK will cause material detriment to the global banking community simply because the Requester is not a member of the alleged global banking community. (Request, Pg. 3, ¶ 3.3). The Requester's conclusions in this respect are not supported.

To prevail on a community objection, the objector must establish, among other things, that the "application creates a likelihood of material detriment to the rights or legitimate interests

⁹ See BGC Recommendation on Reconsideration Request 13-5 at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>.

¹⁰ Governmental Advisory Committee.

of a significant portion of the community to which the string may be explicitly or implicitly targeted.” (Guidebook, Section 3.5.4.) The Guidebook includes a list of factors that could be used by a panel in making this determination. The factors include but are not limited to the following:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

(Guidebook, Section 3.5.4.)

Here, the Panel correctly referenced the above standard in the Determination. (Determination, Pg. 30, ¶¶ 149 & 151). The Panel also noted the Requester’s position regarding the early GAC advice relating to sensitive strings, principally the Requester’s contention that IBF’s Objection misconstrues the role of the GAC and fails to note the responses by ICANN to the GAC’s comments. (Determination, Pg. 31, ¶ 157.) The Panel concluded that IBF accurately characterized the GAC’s concerns regarding sensitive strings and that ICANN’s responses to the GAC’s comments did not reject the GAC’s concerns, but instead, directed interested parties to utilize the dispute resolution process to address such concerns. (*Id.*)

The Panel further concluded that, even though the Requester may not have broken any rules or requirements in applying for .BANK while not being a member of the global banking community, there are a number of reasons why the Requester's:

[A]dmitted lack of an existing relationship with the banking industry is sufficient by itself to create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the global banking community and users of banking services worldwide.

(Determination, Pg. 31, ¶ 159.) In a detailed analysis, the Panel addressed, among other things, how the Requester's lack of experience and lack of existing relationships in this highly complex regulatory environment is:

[H]ighly likely to result in inadvertent non-compliance with bank regulatory measures, in delays in obtaining regulatory consents, in difficulties resolving overlapping requirements imposed by a multiplicity of regulators and policymakers, and in significant concerns on the part of regulatory authorities over the possibility of fraud, consumer abuse, tax evasion and money laundering, other financial crimes and improper avoidance of regulatory measures by means of the Internet.

(Determination, Pg. 32, ¶ 163.) The Panel noted that such concerns were highlighted by bank regulatory authorities in their comments to ICANN with respect to sensitive financial services strings such as .BANK. (*Id.*) The Panel also expressed its views that the prospects for delay, non-compliance and confusion are likely to directly and adversely affect the reputation and the core activities of the global banking community, and that the Requester's admitted lack of relationships and familiarity with banking "raises the level of certainty with respect to the likelihood of these injuries materializing to a high level, far too high to sustain the Application."

(Determination, Pg. 32, ¶¶ 164-166.) Thus, contrary to the Requester's assertion, the Panel did not determine that the Requester's application for .BANK was likely to cause material detriment to the global banking community simply because the Requester is not a member of the global banking community. Rather, the Panel determined that the Requester's lack of existing

relationships and familiarly with the global banking community was highly likely to create a number of material detriments to the targeted community. There is therefore no support for the Requester's claim that the Panel's purported lack of training resulted in the Panel applying the wrong standard in evaluating IBF's Objection.

2. ICANN's Purported Failure to Provide the ICC with Status Reports Does not Demonstrate a Policy or Process Violation.

The Requester claims that ICANN's alleged failure to provide the ICC with status reports on changes to the Guidebook further evidences the ICC's improper training and ICANN's failure to ensure compliance with the established procedures concerning sensitive strings. (Request, Pgs. 5-6, ¶¶ 3.10-3.12.) Specifically, the Requester contends that the GAC issued advice relating to sensitive strings (identifying .BANK, among others), that ICANN has since indicated to the GAC its intent to accept that advice by revising the draft New gTLD Registry Agreement, and that ICANN has made no attempts to update the ICC regarding these changes. (Request, Pg. 6, ¶ 3.11.)

As an initial matter, 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.) Thus, ICANN's receipt of GAC advice relating to sensitive strings will not have an impact on the processing of any objections involving sensitive strings, including IBF's Objection to the Requester's application for .BANK.

The Requester suggests that the referenced GAC advice includes changes to the Guidebook and the objection procedures therein. The Requester's suggestion here is misplaced. The GAC's advice relating to sensitive strings has no bearing on the current objection procedures outlined in the Guidebook. The GAC's advice relates to certain safeguards in the contracting

process for new gTLD applicants, which includes proposed changes to the New gTLD Registry Agreement. To date, the NGPC has only approved the proposal for how to implement the GAC's advice; nothing has been approved/finalized.

(<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm#2.b>, *see also* Annex I: NGPC Proposal for Implementation of GAC Safeguards Applicable to All New gTLDs available at <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-i-agenda-2b-25jun13-en.pdf>.) Accordingly, there is no support for the Requester's claim that ICANN's alleged failure to provide the ICC with status reports is evidence of the ICC's improper training or ICANN's failure to ensure compliance with the established procedures concerning sensitive strings.

B. The Alleged Failure To Provide An Appeal Mechanism In The Dispute Resolution Process Does Not Support Reconsideration.

The Requester claims it has (through its parent company, Radix) requested that ICANN provide an appeal mechanism to enable applicants to defend their rights under the Guidebook against exactly the type of outcome the Requester obtained by the Panel here – a decision rendered against them based on grounds allegedly outside the Guidebook. The Requester contends that ICANN's failure to provide such a mechanism is an inaction that should be reconsidered. (Request, Pg. 7, ¶ 3.14 and Pg. 9, ¶ 8.3.)

The Guidebook, and its many versions and revisions, is based on years of open and frank discussion, debate and deliberation with the Internet community. The standards for evaluating the merits of a community objection have been debated and have been well known for years. The Guidebook provides that “applicant[s] may utilize any accountability mechanism set forth in ICANN's Bylaws for purposes of challenging any final decision made by ICANN with respect to that application.” (Guidebook, Module 6, ¶ 6.) These mechanisms include the Reconsideration

Process, the Independent Review Process, and the Ombudsman. (Bylaws, Art. IV & V.) The Requester has not identified any established policy or process that required ICANN to implement any additional appeal mechanism (upon request or otherwise) than those mechanisms already provided for under the Guidebook and in ICANN's Bylaws. The Requester's belief that the dispute resolution procedures should have included certain quality controls does not constitute a policy or process violation that supports reconsideration.

VI. Decision

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Requester's Reconsideration Request (Request 13-20). There is no indication that ICANN violated any policy or process in accepting the determination sustaining IBF's Objection to the Requester's application for .BANK. 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 13-20 shall be final and does not require Board consideration. The Bylaws provides that the BGC is authorized to make a final determination on all Reconsideration Requests brought regarding staff action or inaction. (Bylaws, Art. IV, § 2.15.) The BGC has the discretion, but is not required, to recommend the matter to the Board for consideration and action, as the BGC deems necessary. (*See id.*) As discussed above, Request 13-20 seeks reconsideration of action or inaction taken by staff. After consideration of this particular Reconsideration Request, the BGC concludes that its determination on this matter is sufficient 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 11 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 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 13-20.