

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

**RECONSIDERATION REQUEST 13-22**

**5 FEBRUARY 2014**

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The Requester DotMusic seeks reconsideration of ICANN's alleged failure (inaction): (1) to properly supervise the ICC<sup>1</sup> to ensure that appropriately qualified experts are appointed and adequately trained to decide community objections; (ii) to advise the ICC and appointed expert panelists on GAC<sup>2</sup> advice; and (iii) to provide an appropriate appeal process for community objections.

**I. Brief Summary.**

Amazon applied for .MUSIC, .SONG and .TUNES. The Requester, also an applicant for .MUSIC, filed community objections against Amazon's applications, and lost. The Requester claims that ICANN staff failed to properly supervise the ICC to ensure that an appropriately qualified expert was appointed and trained to decide the Requester's objections, failed to advise the ICC and the Panel on GAC advice relating to exclusive access registries, and failed to provide an appropriate appeal process for community objections.

With respect to the first claim that the Expert appointed to decide the objections was not qualified, this claim is not supported and should be rejected. There is no support in the Guidebook or otherwise for the Requester's view that the Expert should have superior knowledge of the community reflected in the contested applications, or that the Expert lacked the training to address the issues raised in the Requester's objections.

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<sup>1</sup> International Centre for Expertise of the International Chamber of Commerce.

<sup>2</sup> Governmental Advisory Committee.

With respect to the second claim that the Panel should have been advised on the relevance and impact of the GAC's advice relating to exclusive access registries, the Requester did not demonstrate any policy or process that supports reconsideration based on ICANN's alleged failure to advise the ICC and the Panel on GAC advice. The NGPC's decision with respect to how it treats GAC advice is independent of the dispute resolution process.

With respect to the third claim, the Requester has not identified any established policy or process that required ICANN to implement an appeal mechanism (upon request or otherwise). 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 13-22 be denied.

## **II. Facts.**

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

Requester DOTMUSIC ("Requester") applied for .MUSIC.

Amazon EU .S.Á R.L. ("Amazon") applied for .MUSIC, .SONG, and .TUNES ("Amazon's Applications").

On 13 March 2013, the American Association of Independent Music ("A2IM"), represented by Requester<sup>3</sup>, filed community objections to Amazon's Applications ("Objections") asserting that there is "substantial opposition to the gTLD application[s] from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted."

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<sup>3</sup> The Request was filed by Constantinos Roussos on behalf of DOTMUSIC.

(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 .MUSIC, .SONG, AND .TUNES, among others, as strings that it considers to be a generic term and for which the applicant is currently proposing to provide exclusive registry access.<sup>4</sup> (*See id.*)

On 24 April 2013, the ICC consolidated the Objections.

On 16 May 2013, Amazon responded to the Objections (“Responses”).

On 12 June 2013, the ICC appointed Professor Francisco Orrego Vicuña as the Expert (“Expert” or “Panel”) to evaluate the Objections.

On 19 June 2013, the Requester sent an email to ICANN raising concerns that the ICC had not identified an expert with an expertise in music. (Request, Section 8, Pg. 12.)

On 24 June 2013, ICANN responded to the Requester’s 19 June 2013 email by expressing its confidence that the ICC acted consistent with the Guidebook and appointed an expert with appropriate qualifications in mediation and arbitration to preside over the objection proceedings. (Request, Section 8, Pg. 12.)

On 25 June 2013, the New gTLD Program Committee (NGPC) accepted the GAC’s advice about applicants seeking to impose exclusive registry access for strings the GAC deemed

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<sup>4</sup> The ICANN Bylaws require the Board to take into account the GAC’s advice on public policy matters. (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.)

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”). (See <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm>; see also ICANN NGPC Paper No. 2013-06-25-2b: GAC Advice in Beijing Communiqué regarding Safeguard Advice Applicable to Category 2 Strings, Briefing Materials 1, Pgs. 25-31, available at <http://www.icann.org/en/groups/board/documents/briefing-materials-1-25jun13-en.pdf>.)

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.’” (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-02jul13-en.htm#1.d>; see also <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-item-1d-02jul13-en.pdf>, Annex I, New gTLD Agreement.)

On 12 July 2013, the Requester sent a letter to ICANN seeking clarification on ICANN’s recent resolutions accepting GAC advice and how such resolutions may impact pending community objections. The Requester asked ICANN to instruct the ICC and the Panel not to consider any new policies or changes made to applications as a result of resolutions passed after the date the objections were filed and that each application be judged as it was submitted (“Requester’s 12 July 2013 Letter to ICANN”).

(<http://www.icann.org/en/news/correspondence/roussos-to-crocker-et-al-12jul13-en.pdf>.)<sup>5</sup>

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<sup>5</sup> ICANN responded to the Requester’s 12 July 2013 correspondence on 14 August 2013, noting that ICANN does not dictate or limit the scope of the documentation that panelists may request or evaluate (“ICANN’s 14 August 2013 Letter to Requester”). (<http://www.icann.org/en/news/correspondence/willett-to-roussos-14aug13-en.pdf>.)

On 29 July 2013, Requester sought leave from the Panel to file a reply to the Responses, which the Panel denied on 2 August 2013.

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

On 22 August 2013, the Panel rendered its Expert Determinations in favor of Amazon, thereby dismissing the Objections and finding Amazon the prevailing party. Based on the submissions and evidence provided by the parties, the Panel determined that the Requester did not have standing to object, and even if the standing requirements had been met, the Requester also failed on the merits.<sup>6</sup> (Determination, Pg. 25, ¶ 73.)

On or before 4 September 2013, Amazon informed ICANN that, although its applications for .MUSIC, .SONG, and .TUNES currently state that the gTLDs will be operated as exclusive access registries, Amazon will not operate the gTLDs as exclusive access registries.

(<http://newgtlds.icann.org/sites/default/files/applicants/09oct13/gac-advice-response-1-1317-53837-en.pdf>.)<sup>7</sup>

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”).

(<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-28sep13->

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<sup>6</sup> The Panel rendered three nearly identical Determinations on the consolidated objections. For ease of reference, all citations to “Determination” are made to the Expert Determination on the Requester’s Objection to .MUSIC (EXP/461/ICANN/78).

<sup>7</sup> Amazon’s responses to ICANN were published on 9 October 2013. (<http://newgtlds.icann.org/en/announcements-and-media/announcement-4-09oct13-en.>)

en.htm#2.a.rationale; see also Annex 1 to Resolution available at <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-28sep13-en.pdf>.)

On 8 October 2013, Requester sent a follow-up letter to its 12 July 2013 Letter to ICANN asking ICANN to verify with the ICC and the Panel that any changes made to applications as a result of resolutions taken after the date the objections were filed are not being considered and that each application is being judged as it was submitted (“Requester’s 8 October 2013 Letter to ICANN”). (<http://www.icann.org/en/news/correspondence/roussos-to-crocker-et-al-08oct13-en.pdf>.)

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 .MUSIC, .SONG, and .TUNES) 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.

(<http://newgtlds.icann.org/en/announcements-and-media/announcement-4-09oct13-en>.)

On 10 October 2013, the Requester sent an email to ICANN asking ICANN to notify the Panel that Amazon’s applications for the music-themed TLDs (.MUSIC, .SONG, and .TUNES) will no longer operate as exclusive access registries, and asked that both ICANN and the ICC issue clarification statements about how such changes will be addressed and handled

(“Requester’s 10 October 2013 Email to ICANN”).<sup>8</sup> (Request, Section 8, Pg. 14.) On the same

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<sup>8</sup> On 22 October 2013, ICANN responded to the Requester’s 8 October 2013 letter and 10 October 2013 email, noting that ICANN does not have a process pursuant to which it can provide information to expert panelists. ICANN suggested that the Requester contact the ICC to determine how and whether, as an objector, additional materials may be submitted to the Panel (“ICANN’s 8 October 2013 Letter to Requester”). (<http://www.icann.org/en/news/correspondence/willett-to-roussos-22oct13-en.pdf>.)

day, in an email to the ICC and the Panel, the Requester separately asked the Panel to consider Amazon's recent statements regarding its intent not to operate the music-themed TLDs as exclusive access registries. (Request, Section 8, Pg. 15.)

On 11 October 2013, the Panel denied Requester's request to consider additional/new information, noting that it has already submitted its decisions on the Objections within the 45-day period provided under the Procedure. (Request, Section 8, Pg. 16.)

On 26 November 2013, the ICC separately responded to Requester's 10 October 2013 email, stating that it is up to the Panel to decide whether to re-open an objection. (Request, Section 8, Pg. 17.) The Requester responded to the ICC that same day, asserting that the Panel should take into consideration "any relevant new statements by the Applicant as well as new, pertinent ICANN NGPC Resolutions with respect to 'exclusive access' or lack of 'enhanced safeguards.'" (Request, Section 8, Pg. 18.)

On 3 December 2013, the ICC responded to the Requester's 26 November 2013 correspondence, noting that the current version of the Procedure does not provide for the possibility of an amendment to an objection, and reiterated that it is within the Panel's discretion whether to take into account additional submissions. (Request, Section 8, Pg. 19.)

On 9 December 2013, the Requester received the Panel's Determinations.

On 23 December 2013, the Requester filed Request 13-22.

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

The Requester seeks reconsideration on the following grounds:

First, the Requester claims that ICANN failed to properly supervise the ICC to ensure that appropriately qualified expert candidates are selected and trained to decide community objections. (Request, Section 3, Pg. 1.)

Second, the Requester claims that ICANN failed to recognize the relevance and impact of the "exceptional" GAC advice on the community objection process and community applicants, and failed to advise the ICC and the Panel on the GAC's Beijing Communiqué and subsequent actions (including responses to GAC advice, Board resolutions, material changes to "applicant positions," and revisions to the registry agreement) addressing GAC advice relating to exclusive access registries. (Request, Section 3, Pgs. 1-2.)

Third, the Requester claims that ICANN failed to provide an appropriate appeal process for community objections and denied parties a procedure to protect their fundamental rights and legitimate interests. (Request, Section 3, Pg. 2.)

**C. Relief Requested.**

The Requester asks that ICANN: (i) reimburse (or order the ICC to reimburse) all of Requester's expenses (including attorney fees, administrative expenses and Expert fees associated with its Objections); (ii) allow new community objections to be filed against Amazon's Applications and appoint an appropriate expert to decide the objections (noted as an expert in music/intellectual property/competition regulation); (iii) determine that public statements concerning an applicant's intent to substantially amend its application be deemed "material and inconsistent" with positions taken in the applicant's community objection response and an admission of the applicant's "harmful policies," resulting in a ruling in favor of the objector; and (iv) allow for a reconsideration of the Determinations by an appropriate and



qualified expert that has been instructed on GAC advice and changes made by the applicants.  
(Request, Section 9, Pg. 21.)

### **III. Issues.**

In view of the claims set forth in Request 13-22, the issues for reconsideration are:

- A. Whether ICANN staff's alleged failure to properly supervise the ICC to ensure that appropriately qualified experts are selected and trained to decide community objections supports reconsideration;
- B. Whether ICANN staff's alleged failure to advise the ICC and the Panel on GAC advice supports reconsideration; and
- C. Whether ICANN staff's alleged failure to provide an appeal mechanism for community objections 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.<sup>9</sup> (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC<sup>10</sup> concludes, or if the Board or the NGPC 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.**

#### **A. The Alleged Failure of ICANN To Properly Supervise The ICC To Ensure That Appropriately Qualified Experts Are Selected And Trained To Decide**

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<sup>9</sup> 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.

<sup>10</sup> Board Governance Committee.

### **Community Objections Does Not Support Reconsideration.**

The Requester claims that the appointed Expert was not appropriately qualified in that he was not “versed in the unique music, intellectual property competition and cultural issues that strongly relate to the music community,” and as such, had limited knowledge on the functions of the music community and was ill-prepared to understand and address the “unique music community matters” raised in the Objections. (Request, Section 6, Pg. 3) To support this assertion, the Requester contends that: (i) where any reasonable qualified expert should have taken “judicial knowledge of the indisputable fact that the music community is heavily dependent on the DNS for the core of its activities,” the Expert agreed with Amazon’s allegedly misleading statement that the music industry does not rely on the DNS/Internet (Request, Section 6, Pg. 4); (ii) where an appropriately-qualified expert with experience working with competition regulators would have been equipped to render a decision concerning the anticompetitive effects of Amazon’s proposed exclusive access registries, the Expert allegedly admitted he was unqualified to render an opinion on whether Amazon’s applications would be anticompetitive (Request, Section 6, Pgs. 4-5); and (iii) the Expert incorrectly determined the Requester lacked standing by ignoring purported realities of the music community (Request, Section 6, Pgs. 5-8).<sup>11</sup>

The Requester is challenging an alleged inaction – *i.e.*, ICANN’s purported failure to supervise and ensure appropriately qualified experts are selected and trained to decide community objections. Specifically, the Requester claims that it relied upon Section 3.4.4 of the Guidebook, which provides that the “panel will consist of appropriately qualified experts

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<sup>11</sup> The Requester does not appear here to be claiming that the Expert applied the wrong standard in evaluating the Requester’s Objections, but instead asserts that the Expert was “ill-equipped to address the unique issues” raised by the Requester’s Objections. (Request, Section 6, Pg. 3.)

appointed to each proceeding by the designated DRSP,”<sup>12</sup> and that ICANN’s failure to appoint and train a competition regulation, intellectual property, or music expert constituted a violation of the Guidebook. (Request, Section 6, Pgs. 3-4 (emphasis added).)

ICANN previously addressed this issue with the Requester in June 2013. Within days of the Expert being appointed, the Requester sent an email to ICANN raising concerns that “the ICC has not identified expert Panelists that have expertise in music – the relevant subject matter of interest for the communities.” (Request, Section 8, Pg. 12.) ICANN responded to the Requester’s email by referencing Section 3.4.4. of the Guidebook and stating that “ICANN has confidence that the ICC has followed the requirements as expressed by the [Guidebook] and has appointed experienced jurists with appropriate qualifications in mediation/arbitration to preside over objection proceedings.” (*Id.* (emphasis added).) The Requester now contends that the use of the phrase “appropriately qualified” in the Guidebook refers to more than expertise in mediation or arbitration; Requester contends that “[o]bjectors reasonably relied on the fact that experts would be ‘appropriately qualified experts’ pertaining to the Applications determined and have ‘comprehensive and authoritative knowledge’ in that ‘particular area.’” (*Id.*) There is no support for the Requester’s contention.

The Guidebook does not define “expert” as a person with superior knowledge of the community reflected in the application in community objection proceedings, and the Requester’s attempt to impute such a definition into the Guidebook is not supported. (Guidebook, § 3.4.4.) The Requester points out the Community Priority Evaluation (“CPE”) Guidelines specifically provide that the Economist Intelligence Unit (“EIU”) evaluators will be “selected based on their knowledge of specific countries, regions and/or industries, as they pertain to Applications.”

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<sup>12</sup> “DRSP” refers to dispute resolution service providers.

(Request, Section 8, Pg. <http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>.)

There is no similar requirement in the Guidebook or the Procedure for appointing experts to evaluate community objections. (Guidebook, § 3.4.4.) The Requester's reliance on the appointment process of an entirely different evaluation procedure is misplaced and should be rejected.

There is likewise no support for the Requester's claims that the Expert lacked training or was somehow "ill-equipped to address the unique issues" raised in the Objections. 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).) 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 conclusions that: (i) the Requester failed to establish that music community depends on the DNS for its core activities; (ii) the anticompetitive behavior alleged by the Requester is too speculative to establish a likelihood of material detriment; or (iii) the Requester lacked standing. Rather, the BGC's review is limited to whether the Panel violated any established policy or process. The Requester has not alleged that the Panel acted in contravention of an established policy or procedure and instead alleged only that the Panel was somehow unqualified or lacked the training to reach these conclusions. For the reasons provided above, ICANN complied with established policies and procedures for supervising the ICC to ensure that appropriately qualified experts are selected and trained to decide community objections against sufficiently transparent and predictable criteria.

**B. The Alleged Failure of ICANN To Advise the ICC and the Panel on GAC Advice Does Not Support Reconsideration.**

The Requester claims that ICANN failed to consider the relevance and impact of the GAC’s advice on the community objection process and failed to advise the ICC and the Panel on such advice. (Request, Section 6, Pg. 8.) Specifically, the Requester contends that its Objections pre-dated the GAC’s Beijing Communiqué, which called into question applications that proposed to operate exclusive access registries. The Requester characterized the GAC’s advice as a “material change” and asserts that ICANN should have either advised the ICC and the Panel on the GAC’s advice or required the ICC and the Panel to review and evaluate the impact and relevance of the GAC’s advice and subsequent Board Resolutions, applicant responses, and revisions to the registry agreement in response to the GAC advice on the community objection process. (*Id.*)

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 exclusive access registries will not have an impact on the processing of any objections involving exclusive access registries, including Requester’s Objections to Amazon’s Applications.

In the Request, the Requester claims that on 2 August 2013 the Panel “completely ignored material changes to the Program by GAC Advice, NGPC Resolutions and Applicant misleading statements” and rejected the Requester’s request to file an additional written submission. (Request, Section 8, Pg. 13.) Notably, before and after the Panel decided not to accept a reply from the Requester, the Requester sent letters to ICANN specifically requesting ICANN to advise the ICC and the Panel to do just that – *i.e.*, ignore the purported material

changes in order to avoid potential prejudice in the community objection process. In its 12 July 2013 correspondence to ICANN, Requester asked ICANN to do the following:

**We respectfully request that ICANN appropriately instruct the ICC that all applications evaluated by Objection panelists be judged solely on their own merit (within the four-corners of the Applications) without considering new material changes made by ICANN in response to GAC advice (or newly created self-serving statements by Applicants).**

(Requester's 12 July 2013 Letter to ICANN (emphasis in original).) In its 8 October 2013 correspondence to ICANN, the Requester asked:

To avoid such issues from materializing we request ICANN verify with the ICC and the Community Objection Panelists that **any new policies and changes made to Applications by virtue of ICANN resolutions or action after the date that Objections were filed not to be considered as loophole for the objected-to Applicants to circumvent a fair Objection process. As required by the Applicant Guidebook each Application should be judged as it was submitted (in April, 2012) without any material changes affecting contention sets.**

(Requester's 8 October 2013 Letter to ICANN (emphasis in original).) In response, ICANN advised Requester that ICANN "does not dictate or limit the scope of the documentation that the Panel may request or evaluate"; thus, it is up to the Panel whether to consider the impact of recent GAC advice in reaching its determination. (ICANN's 14 August 2013 Letter to Requester.) Indeed, the NGPC's determination with respect to how it treats GAC Advice is independent of any dispute resolution proceedings of any objections, including Requester's Objections. ICANN's response was consistent with the Procedure, which makes clear that, in addition to applying the standards that have been defined by the Guidebook, 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).)

It was not until 10 October 2013 that the Requester changed course and asked ICANN to notify the Panel of recent activity, namely, Amazon's statements regarding its intent not to operate the music-themed TLDs as exclusive access registries. (Request, Section 8, Pg. 15.) Because the Panel, not ICANN, has complete discretion on whether to allow the parties to submit additional written submissions (Procedure, Art. 17(a)), ICANN appropriately responded that ICANN does not have a process pursuant to which it provides information to expert panelists and that the Requester should contact the ICC to "determine how and whether, as an objector, you may submit additional materials to the Panel(s) assigned to the objection proceedings that you have referenced." (ICANN's 22 October 2013 Letter to Requester.) The Panel thereafter declined to consider any additional information on the Requester's Objection, noting that it has already rendered its Determination, and the ICC confirmed that the Panel had ultimate discretion on whether to take into account additional submissions. (Request, Section 8, Pgs. 16-17 & 19.)

Moreover, any claim by the Requester that it was prejudiced or that its due process rights were somehow violated as a result of the Panel's failure to consider the impact of GAC advice is also unsupported. The Requester argued to the ICC and the Panel that Amazon's statements concerning its intent not to operate the music-themed TLDs as exclusive access registries should be considered by the Panel because it is evidence that exclusive access registries are "improper and harmful." (Request, Section 8, Pg. 16.) However, if Amazon has confirmed that it no longer intends to operate .MUSIC, .SONG, and .TUNES as exclusive access registries, the purported harm has been eliminated. Thus, Amazon's intent to change its registries from exclusive access

to non-exclusive access would not alter the Panel’s determination on the likelihood of material detriment – nor, would it have any impact on the Panel’s findings on standing.<sup>13</sup>

**C. The Alleged Failure To Provide An Appeal Mechanism For Community Objections Does Not Support Reconsideration.**

The Requester claims that the lack of an appeal process for community objection denies parties a procedure to protect their fundamental rights. (Request, Section 6, Pg. 8.) Specifically, the Requester contends that the “failure of the Board to address a chorus of voices that called for an appeal mechanism to allow appropriate review of cases has prejudiced Objector’s ability to protect their members’ fundamental and legitimate rights.” (*Id.*)

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

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<sup>13</sup> The Requester’s claim that the changes to Amazon’s Applications have not yet been approved or finalized, and therefore the harm still exists, also lacks merit. The Requester cannot have it both ways and expect the Panel to use Amazon’s statements concerning its intent to change as evidence of harm, while at the same time ignore the fact that Amazon has confirmed its intent to change, which eliminates the harm.



dispute resolution procedures should have included a review mechanism 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 13-22). 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 13-22 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 13-22 seeks reconsideration of an 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 22 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 13-22.