

## **Reconsideration Request by Ruby Pike, LLC**

*Regarding Action Contrary to Established ICANN Policies Pertaining to  
Limited Public Interest Objections to New gTLD Applications*

Independent Objector v. Ruby Pike, LLC,  
ICC No. EXP/412/ICANN/29, re <.HOSPITAL>

### **Introductory Summary**

Ruby Pike, LLC, as a party “adversely affected by” an “ICANN action ... that contradict[s] established ICANN policy,” respectfully submits this request for reconsideration (“Request”) to the Board Governance Committee (“BGC”) under ICANN Bylaws Art. IV § 2.2(a). Specifically, Ruby Pike, also referred to as “Applicant,” requests the BGC to reconsider conduct by the International Chamber of Commerce (“ICC”) as the dispute resolution services provider (“DRSP”) for Limited Public Interest (“LPI”) objections and, more particularly, the determination (“Ruling”) of the expert panel (“Panel”) convened by the ICC for the above-referenced matter (the “Proceeding”). The Ruling of only two members of the Panel (“Majority”) sustained the objection (“Objection”), brought on LPI grounds by Independent Objector Alain Pellet (“Objector” or the “IO”), to the <.HOSPITAL> gTLD (the “String”) sought by Ruby Pike’s application no. 1-1505-15195 (“Application”). The third member of the Panel, Prof. August Reinisch, dissented from the Ruling (“Dissent”).

The Ruling fails to adhere to and carry out ICANN processes and policies concerning LPI objections as expressed in Sections 3.5 and 3.5.3 of the gTLD Applicant Guidebook (“Guidebook” or “AGB”). As such, Ruby Pike has the right to have it reconsidered by the BGC:

ICANN has determined that the reconsideration process can properly be invoked for challenges of the third party DRSPs’ decisions as challenges of the staff action where it can be

stated that ... the DRSP failed to follow the established policies or processes in reaching the decision ....

<http://newgtlds.icann.org/en/announcements-and-media/webinars> (MP3 at 27:40). ICANN has directed that “the Panel *shall* apply the standards ... defined by ICANN” in the Guidebook for LPI objections. New gTLD Dispute Resolution Procedure (“Procedure,” cited as “Proc.”), AGB Mod. 3 Attmt., Art. 20(a) (emphasis added). However, despite having taken months – well in excess of the 45-day Guidebook time limits – to arrive at and review the Ruling, the ICC failed to correct the Majority’s conscious decision *not* to apply these standards.

The Majority took it upon itself to replace ICANN’s governing standards with its own. The Majority defiantly proclaims that it “is not obligated to follow all ICANN Bylaws or its analysis.” Instead, it “adopted, on its own initiative, definitions of ‘morality’ and ‘public order’” that come not from any specific provision of international law, but rather from what the Majority alone deemed as more appropriate “common understanding.” Ruling (**Attmt 5**) ¶¶ 75-76.<sup>1</sup> Professor Reinisch commented that, by so doing, the Majority “exceed[ed] the powers” given it by ICANN, and improperly undertook “to rewrite the application standards for gTLD strings ... with higher standards” that ICANN did not impose. Dissent (**Attmt 6**) ¶¶ 16, 17.

Five other LPI cases have reached decision to date. All apply the actual standards and *all* come out *unanimous* in *rejecting* the objections. By reviewing these other opinions, the BGC will find it clear that the Panel Majority failed to adhere to ICANN process and policy as articulated in the Guidebook criteria and followed by the other LPI panels. Although those cases involve different strings, their reasoning and proper employment of Guidebook principles pertain directly,

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<sup>1</sup> This Request refers to supporting materials as “Attachments,” to distinguish them from the “Annexes” and “Exhibits” that appear in some of them.

and can lead to no other conclusion than that the Majority in this Proceeding simply strayed from its obligation to uphold ICANN policy and process.<sup>2</sup>

ICANN did not contract for the ICC to allow its arbiters to rewrite new gTLD standards, or to substitute their own policy views for those formulated by ICANN's multiple stakeholders. The ICC failed in this case to meet its contractual duty solely to consider existing ICANN policy to determine simply whether or not "the applied-for gTLD string is contrary to general principles of international law for morality and public order." AGB § 3.5.3. Accordingly, Ruby Pike respectfully requests that the BCG reverse the Ruling and adopt the Dissent and the decisions of all the other panels that have reviewed this issue and have followed actual ICANN policy and process, so that this and all similar matters benefit from a consistent and policy-compliant approach.

#### **1. Requestor Information**

**Name:** Ruby Pike, LLC

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**Email:**

**Counsel:** John M. Genga, Don C. Moody  
The IP and Technology Legal Group, P.C.  
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<sup>2</sup> The five other LPI decisions to date involve three different applications for <.HEALTH> challenged by the IO, one for <.HEALTHCARE> also objected to by the IO, and one against the string <.BROKER>, brought by a private party. See ICC list of expert determinations at <http://iccwbo.org/products-and-services/arbitration-and-adr/expertise/icann-new-gtld-dispute-resolution/expert-determination/>. Along with the Dissent in this case, these five unanimous three-member panels bring to 16 the number of experts who have rejected the rewriting of ICANN policies by the two isolated Majority panelists in this case.

**2. Request for Reconsideration of:**

Board action/inaction

Staff action/inaction

**3. Description of specific action you are seeking to have reconsidered.**

Applicant seeks reconsideration of the failure of the ICC and the Panel Majority, as appointees of ICANN and agents subject to and responsible for carrying out ICANN's policies and processes as expressed in the Guidebook and Procedure, to apply fully, and *only*, the standards for LPI objections, and the burden of proof requirements for *all* objections, as set forth in AGB §§ 3.5 and 3.5.3, in issuing the questioned Ruling of 12 December 2013. Applicant urges the BGC, as a result of such reconsideration, to reverse the Ruling and reject the Objection based on the proper policy determinations made by the Dissent and by all other panels who have ruled on LPI objections.

**4. Date of action/inaction:**

12 December 2013.

**5. On what date did you become aware of the action or that action would not be taken?**

12 December 2013.

**6. Describe how you believe you are materially affected by the action or inaction:**

6.1. "The findings of the panel will be considered an expert determination and advice that ICANN *will accept* within the dispute resolution process." AGB § 3.4.6 (emphasis added). While ICANN has not yet, to Applicant's knowledge, formally "accepted" the Ruling, it represents the first instance by which Applicant has become aware of the ICC as a third party DRSP vendor, leading to a violation of ICANN policies and processes. Rather than wait

for action by ICANN in response to the Ruling – *i.e.*, that its Application “will proceed no further” as contemplated by AGB § 1.1.2.9, at which point it also could rightly seek reconsideration – Applicant makes this Request now.

6.2. The failure of the ICC and the Majority to follow such policies and processes embodied in AGB §§ 3.5 and 3.5.3 has deprived Applicant of the benefit of the “presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD,” by neglecting to impose a “corresponding burden upon a party that objects to the gTLD to show why that gTLD should *not* be granted to the applicant.” Comment Summary and Analysis to AGB v.3 at 67 (15 Feb. 2010), <http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf>. In reliance on that presumption, the strength of its Application, the rules and objection standards published in the AGB, and the years of experience of its principals in the domain name industry, Applicant has invested the \$185,000 application fee, tens of thousands of dollars more in attorneys’ fees opposing the Objection, ICC filing fees of nearly 150,000 euros and countless additional financial and other resources toward technical and administrative preparations to operate a <.HOSPITAL> gTLD, all of which would be lost should the Ruling stand and ultimately get accepted by ICANN.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

7.1. If not reversed, the Ruling likely will impact other applicants subjected to LPI objections. The inconsistency of the ICC’s application of the standards that ICANN has directed it to employ creates a danger of additional expert determinations that contravene ICANN policy and process, including as to burden of proof, as expressed in AGB §§ 3.5 and 3.5.3.

7.2. The Ruling would deprive registrants entirely of any ability to register a <.HOSPITAL> domain name. Indeed, because no one but Applicant

has applied for the TLD, users would have no opportunity whatsoever to see, make use of or benefit from <.HOSPITAL> names on the Internet.

7.3. The time taken by the ICC to render decisions on objections within its jurisdiction, as compared to other DRSPs, provides a unique opportunity for the BGC to make a reconsideration determination that could correct apparent misapprehensions on the part of the ICC and some of its appointed experts. This would allow the ICC and its panels to dispose of remaining LPI objections in a manner consistent with ICANN process and policy as embodied in the burden of proof and substantive standards for LPI objections in AGB §§ 3.5 and 3.5.3.

## **8. Detail of Board or Staff Action – Required Information**

**Staff Action:** Applicant has summarized the staff action subject to this Request *supra* in Section 3 hereof. Factual and procedural history appears *infra* at ¶¶ 8.1 *et seq.* The Ruling constitutes ICANN action contrary to (i) ICANN process as to the burden of proof applicable to all new gTLD objections, and (ii) ICANN policy regarding the presumptive right of qualified applicants to operate new gTLDs absent a showing that meets the substantive standards applicable to the objection under consideration – here, the LPI Objection brought against the String by the IO. Such policy and process violations appear in the above Introductory Summary and are discussed at greater length in Section 10, *infra*.

**Board action:** Not applicable; Ruby Pike does not seek reconsideration of any Board action of which it is aware.

### **Provide the Required Detailed Explanation here:**

8.1. The factual and procedural history set forth below reflects the failure of the ICC to follow ICANN policy and process.

8.2. Ruby Pike timely submitted the subject Application to ICANN by 13 June 2012. A true and correct copy of the Application appears in **Attachment 2** hereto, Annex B, Ex. 1.

8.3. The IO timely filed his LPI Objection to the Application on or about 12 March 2013, a true and correct copy of which appears in **Attachment 1** hereto. Among other things:

8.3.1. The IO makes clear that his “Objection is exclusively based on the fourth” ground of AGB § 3.5.3, namely, that the applied-for String would be “contrary to generally accepted legal norms related to morality and public order” based on “specific principles of international law as reflected in relevant international instruments of law.” **Attmt. 1 ¶ 6.**

8.3.2. The Objection takes the position that “[h]ospitals are inextricably linked to health,” and that “[h]ealth is not just another commodity,” but rather “a fundamental human right” as indicated in a number of international law sources cited in the Objection. *Id.* ¶¶ 10-14, 16. Applicant has not disputed these concepts.

8.3.3. The IO cites the importance of hospitals and other healthcare facilities as deliverers of health services, again referencing various international proclamations on the subject. *Id.* ¶¶ 9, 18, 19.

8.3.4. “The Independent Objector is of the view that any Applicant applying for a .Hospital TLD should demonstrate awareness of its duty to see to it that this TLD is organized, set up and managed in such a way that the right to health with all of the implications discussed above, including the necessity of reliability and trustworthiness, is fully respected and, consequently, should demonstrate that this duty will be effectively and continuously implemented. In addition, the Applicant should demonstrate how, given the public interest at stake, the policies and

decision-making of the Applicant will be properly connected to the public authorities, national as well as international, that are under a legal obligation to respect, protect and fulfill the right to health. These are requirements that are fully justified given the specific principles of international law as reflected in relevant international instruments of law discussed” earlier in the Objection. *Id.* ¶ 27.

8.3.5. The Objection characterizes the Application as nowhere reflecting that Applicant “is aware of the fact that health is not just another commodity” or “demonstrates awareness of the fact that health, including ‘hospitals’ as one of its essential elements, is not only a ‘term’ but that it also represents a fundamental right.” *Id.* ¶ 31.

8.3.6. The IO concludes that the Application “does not meet the standards that have to be applied,” in the IO's view, to a “highly sensitive TLD” such as <.HOSPITAL>. That Applicant falls short of the bar that the IO has chosen to set – but which appears nowhere in the Guidebook – renders the Application, in his view, “contrary to specific principles of international law as reflected in relevant international instruments of law.” *Id.* ¶ 35.

8.4. Applicant timely opposed the Objection on or about 15 May 2013 (the “Opposition”). A true and correct copy of the Opposition appears in **Attachment 2** hereto. The Opposition speaks for itself, but points from it pertinent to this Request include the following:

8.4.1. Applicant is a subsidiary of Donuts Inc., which applied for a total of 307 new gTLDs through subsidiaries such as Applicant, for the purpose of increasing choice, competition and free speech in the namespace, consistent with ICANN's stated goals for its new gTLD program. See **Attmt 2** at 5 and Annex B ¶¶ 4-6, 8.



8.4.2. A gTLD string can violate international law norms for morality and public order under the fourth branch of the LPI test only if it incites or promotes conduct of a character similar to that proscribed by the first three prongs of the standard – *i.e.*, (i) violent lawless action, (ii) discrimination based on race or other inborn characteristics, and (iii) child pornography and sexual abuse – under the principle of *ejusdem generis*. *Id.* at 9-10. (As shown below, both the Panel Majority and Dissent agree with this construction of the LPI objection grounds spelled out in AGB § 3.5.3.)

8.4.3. Applicant has no intention of operating a registry denoted by the String in any manner contrary to such international law norms for morality and public order. Rather, its Application states merely that a <.HOSPITAL> gTLD would be:

attractive to registrants with affinity or professional interest in promotion or treatment of human health, and the methods of delivery and payment for health care services, as well as other uses of the generic term. This includes, but is not limited to, those engaged in the treatment and prevention of disease and illness, the provision of primary and secondary care, the dissemination of health care information, and the advancement of public health. The term is also highly topical in the global discussion of healthcare policy and administration, and is a useful forum for debate and the exchange of ideas. We would operate this TLD in the best interests of all registrants, and in a stable and secure manner.

See *id.* 10 and Annex B, Ex. 1, ¶ 18A at 7-8. Nothing in this excerpt or any other portion of the Application suggests any intent on the part of Applicant to violate international law norms for morality or public order.

8.4.4. To the extent the IO contends that the Application lacks sufficient safeguards for a “sensitive” string such as <.HOSPITAL>, the Opposition notes that this policy point lies within the purview of ICANN, and thus has no relevance to an objection brought on LPI grounds. In any event, the Application includes: (i) 14 protection mechanisms imposed by ICANN beyond what it ever required of any other gTLD; (ii) eight extra measures voluntarily adopted by Donuts for all strings for which it applied; and (iii) four additional safeguards in recognition of <.HOSPITAL> as a “sensitive” string. *Id.* at 12 and Annex B ¶¶ 9-12.

8.5. The IO requested and was granted leave to make a supplemental submission (“Reply”), which he timely did on or about 12 August 2013. A true and correct copy of the Reply appears as **Attachment 3** hereto. Among other things, the Reply contends that the April 2013 “Beijing communiqué” from the Government Advisory Council (“GAC”), which suggested a need for additional safeguards for “sensitive” strings (<.HOSPITAL> included), somehow bolsters the IO’s position that the intended *operation* of the String would run contrary to international law norms for morality and public order. See **Attmt 3** ¶¶ 11, 21.

8.6. Applicant timely submitted its response (“Sur-Reply”) to the Reply on or about 20 August 2013, a true and correct copy of which appears as **Attachment 4** hereto. The Sur-Reply questions the relevance of the GAC advice and notes that, whether or not Applicant agrees with the policy recommendations

therein, it would have the obligation to implement them if ultimately adopted by ICANN. This in fact has occurred, as the BGC no doubt knows.<sup>3</sup>

8.7. On 12 December 2013, the Panel Majority issued its Ruling, from which one member dissented. True and correct copies of the Ruling and the Dissent appear as **Attachments 5 and 6** hereto, respectively. We discuss each further in Section 10, *infra*, but note briefly as follows:

8.7.1. The Ruling acknowledges that “[t]he scope of the Limited Public Interest Objection is expressly limited to the four grounds enumerated in Section 3.5.3 of the Guidebook.” **Attmt 5 ¶ 62**. “[T]he wording of this paragraph clearly indicates that this catalogue has an exhaustive character.” *Id.* ¶ 63. The Dissent concurs that ICANN has expressly so constrained the scope of the LPI objection. **Attmt 6 ¶¶ 5-7**.

8.7.2. The Panel Majority further “shares the Applicant’s view that according to the *ejusdem generis* doctrine the fourth ground should be interpreted in order to establish a relatively homogeneous set of grounds. In this case, it is a class of various violations of human rights.” **Attmt 5 ¶ 64**. Again, the Dissent takes the same view, and further notes that the IO himself agrees. **Attmt 6 ¶¶ 18-21**.

8.7.3. The Majority begins to diverge when it notes that it “cannot agree with the conclusion that violation of the right to health under the fourth ground is less serious than” the previous three pertaining to “violent lawless action,” “discrimination” and “child pornography.” **Attmt 5 ¶ 65**.

However, the Majority misses, as the Dissent notes and as detailed more

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<sup>3</sup> Recently, Applicant sought to bring the Panel’s attention to the fact that the ICANN Board had adopted the GAC recommendations, rendering moot the IO’s argument concerning that advice, since Applicant would now have the obligation to follow it. The IO opposed Applicant’s effort to so notify the Panel, and the Panel rejected Applicant’s proffered submission in any event. See **Attachments 7-9**.

fully below, that nothing about the String or its intended use as stated in the Application portends that the *Applicant* will *violate* the “right to health” proclaimed by the IO and accepted by the Majority. This does not result from a mere difference of interpretation that the Majority may have concerning the applicable standards, but rather from creation of “norms” that simply do not exist in the objection criteria designed by ICANN to effectuate its policies and processes.

**9. What are you asking ICANN to do now?**

Applicant respectfully requests that the BGC act as follows:

9.1. Reverse the Ruling sustaining the Objection and having the effect of disqualifying the Application; and

9.2. Follow 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 AGB §§ 3.5, 3.5.3.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

10.1. Ruby Pike has been adversely affected by the actions and/or inactions of ICANN staff and its agents and appointees, the ICC and its experts, and thus has both procedural standing to make this Request and the substantive right to have it granted.

**a. Applicant has standing to make this Request.**

10.1. Applicant has been “adversely affected by ... one or more staff actions or inactions that contradict established ICANN policy ...” This fact gives it standing within the meaning of Bylaws Art. IV sec. 2.2(a).

10.2. According to the form reconsideration request that Applicant uses here, a requestor must “demonstrate material harm and adverse impact” by the following measures:

10.2.1. *A loss or injury, financial or non-financial.* Ruby Pike has described its injuries and losses in Section 6, *supra*, and thus satisfies this element of standing.

10.2.2. *A direct and causal connection between the loss or injury and the staff action or inaction that is the basis of the Request.* Absent the apparent inability of the ICC and the Panel Majority to follow ICANN process and policy as expressed in the Guidebook’s burden of proof and LPI objection standards, the aberrant Ruling should not have occurred.

10.2.3. *The relief requested must be capable of reversing the harm alleged.* Ruby Pike seeks exactly that here, asking that the BGC reverse the existing Ruling and follow ICANN policy with regard to LPI objections as determined by as many as sixteen other panelists who have reviewed these issues. This will assure that the ICC and its experts carry out ICANN policy and processes correctly and fully, both as to the instant Proceeding as well as other LPI objections that remain pending.

10.3. Based on the foregoing, Ruby Pike unquestionably has standing to make its current Request.

**b. The Ruling violates ICANN policy and process by failing to apply the sole substantive LPI objection standards and burden of proof requirements established by ICANN to effectuate such policy and process.**

10.4. “ICANN has determined that the Reconsideration process can properly be invoked for challenges [to] third party’s decisions where ... the vendor failed to follow its process in reaching the decision.” BGC Rec. on Recon. Req. 13-5 (1 Aug. 2013) at 4. The BGC has explicitly endorsed the use of the

reconsideration process to “review ... whether the Panel violated any established policy or process” in reaching its Ruling. BGC Rec. on Recon. Req. 13-9 (10 Oct. 2013) at 8.

10.5. ICANN expressly designed its new gTLD program to increase choice and competition in domain names and promote free expression on the Internet. See, e.g., AGB Preamble; *id.* § 1.1.2.3; *id.* Mod. 2 Attmt. at A-1; and *id.* at 3-21. The Guidebook resulted from years of input from the multi-stakeholder model – governments, business and intellectual property interest, technologists and others – regarding how best to accomplish these goals by creating rigorous application criteria, adequate protections for IP owners and Internet users, and accessible mechanisms and clear standards for parties to object to proposed <.ANYTHING> domains to the extent affected in ways that ICANN’s multiple stakeholders by consensus deemed worthy of redress. The Guidebook represents the ultimate expression of ICANN policy and process designed to promote and implement its new gTLD program goals.

10.6. Via the Guidebook, ICANN has established objection processes to effectuate new gTLD policy by four now well-familiar methods – string confusion, legal rights, community and LPI. Each type of objection has its own substantive standards by which DRSP panelists must evaluate challenged applications, but *all* share the *same* burden of proof. In the words of the Guidebook:

The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

*The objector bears the burden of proof in each case.*

AGB § 3.5 (emphasis added). The “paragraphs that follow” include those that set out the standards for LPI objections. ICANN directs that “the Panel shall apply

the standards that have been defined by ICANN.” Proc. Art. 20(a). Both the Majority and the Dissent acknowledge this. See **Attmt 5 ¶ 49**, **Attmt 6 ¶ 5**. However, the Ruling by the Majority fails to follow this mandate.

**1) The Majority violates ICANN policy by refusing to follow the Guidebook’s substantive objection standards.**

10.7. According to the Majority, “an application that is contrary to the right to health, a fundamental human right as is incorporated in international law instruments falls within the scope” of a LPI objection. **Attmt 5 ¶ 66**. Ruby Pike does not quarrel with this notion, but rather with the Majority’s unsupported conclusion that the Application here contravenes any such rights.

10.8. The Panel was required to determine that “the applied-for string is contrary to generally accepted principles of international law for morality and public order” by reason of: (a) inciting or promoting (i) “violent lawless action,” (ii) “discrimination based on race, color, gender, ethnicity or national origin,” or (iii) “child pornography or sexual abuse of children;” or (b) a “determination that an applied-for *string* would be contrary to *specific* principles of international law as reflected in relevant international instruments of law.” AGB § 3.5.3 (emphases added). The Majority did not do this. Instead, it “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. Compare **Attmt 5 ¶ 76** with AGB § 3.5.3.

10.8.1. In this regard, the Majority exceeded its powers and attempted unilaterally “to rewrite the application standards for gTLD strings and to supplement them with higher standards” of its own choosing. Dissent, **Attmt 6 ¶¶ 16, 17**.

10.8.2. Moreover, the means by which the Majority arrived at its conclusion 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*. AGB § 3.5.3 at 3-22. The Majority simply takes issue with what appears to it from the Application as solely a commercial enterprise. According to the Majority, “morality and public order” require a “social approach” more than a “market approach,” and finds that the commercial nature of the TLD as Applicant would operate it exhibits a “disregard for social cost of operating .Hospital ....” **Attmt 5 ¶¶** 72, 73. The Majority then leaps to the conclusion that “[t]he market approach presented by the Applicant greatly increases th[e] risk” of “[m]isuse of the word ‘hospital,’” which “may cause significant harm to society.” *Id.* ¶ 81.

10.9. The Dissent correctly points out that nothing in the Application suggests that Ruby Pike intends to operate a <.HOSPITAL> registry in any way that would violate proscriptions of specific instruments of international law against the type of reprehensible behavior akin to child pornography or violent lawless action, and that this is the *only* inquiry the Panel has the power to make under the limited scheme of the Guidebook. Indeed, the Dissent finds from the commercial nature of Applicant’s activities as a domain name provider, and the lack of any indication in the Application that Ruby Pike “intends to engage in ... the sale of medicine, the offering of medical treatment or ... hospital services, let alone in the sale of counterfeit medicine or other reprehensible behavior” such that its Application “could be considered contrary to ‘fundamental norms of public order and morality that are recognized under international law’” as required by AGB § 3.5.3. **Attmt 6 ¶¶** 23-26.

10.10. The Dissent “got it right,” as has every other LPI determination to date. The IO has taken the position in the instant Proceeding as well as in other



cases that a violation of international law norms for morality and public order occurs simply by the absence of certain operational assurances for the TLD that the IO deems necessary to protect the public. In that regard, he has cited the GAC Beijing advice. ICANN has mooted that point, since it has adopted the GAC's recommendations and will require the Applicant to follow them. Even apart from this, however, the details of how one must run a registry represent a policy determination that does not rest with the IO or any panel. The Dissent aptly finds it "inappropriate to demand compliance with [GAC] recommendations" in the context of a LPI objection. **Attmt 6 ¶¶ 33-34**. And, according to another panel, the IO "fails to connect the alleged right to health-related information to his key assertion that [an applicant] could only validly operate a [health-related] gTLD string under the conditions envisaged by the IO." See Opinion ¶ 102 in IO v. DotHealth, LLC, ICC No. EXP/416/ICANN/33. This certainly cannot be the case in the context of a LPI objection where some violation of international law must, but cannot, be shown simply from an open, commercial health-related string. See *id.* ¶¶ 102-104.

**2) The Majority contravenes ICANN process by ignoring the Guidebook's burden of proof requirement.**

10.11. The Ruling further runs afoul of the ICANN *process* that squarely places upon the Objector the burden of *proving* that the String itself, including its "intended purpose *as stated in the Application*," violates such international law norms for morality and public order. AGB § 3.5.3 at 3-22 (emphasis added). "The objector bears the burden of proof in each" type of objection -- that is, "the burden of proving that its Objection should be sustained in accordance with the applicable standards." AGB § 3.5; Proc. Art. 20(c). The Majority, however, looked beyond the String and its intended use as stated in the Application.

10.12. Again as the Dissent correctly notes, the Majority's bald conclusion that "Applicant has failed to appreciate the sensitive nature of the applied-for string" does not satisfy the IO's burden to prove that the String or its intended use as stated in the Application would run counter to international law norms for morality and public order. Dissent (Attmt 6) ¶¶ 14, 37. Instead, the Majority affirmatively *refused* to hold the Objector to the burden of proof that ICANN had established in order to overcome ICANN's own express presumption in favor of awarding new gTLD strings to otherwise qualified applicants, and declared itself "not obligated to follow all ICANN bylaws or its analysis." Ruling (Attmt 5) ¶ 75.

10.13. The burden of proof represents a fundamental process guarantee arrived at among ICANN's multiple stakeholders. The Majority pays virtually no heed to that important protection established by ICANN. At minimum, the burden 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. Indeed, ICANN has created a presumption in favor of awarding the String to the Applicant that would suggest an even greater burden. However, the Majority would simply have the IO identify some international norms with which the Application is contrary, with no indication that it requires a *preponderance of evidence*. Attmt 5 ¶ 74. The Dissent, by contrast, would hold the IO to the proper burden, and has correctly concluded that he fell well short of meeting it. Attmt 6 ¶ 37.

**3) The Ruling demands reconsideration to correct the policy and process transgressions by the ICC and Panel Majority, and thereby ensure consistency regarding this Proceeding and other pending LPI matters for the benefit of objectors and applicants alike.**

10.14. The Ruling admits to flouting ICANN policy and calls out for the BGC to agree to Applicant's reconsideration request. The Ruling results from the omission or refusal of the ICC and the Panel Majority to act as directed by ICANN to carry out its processes and policies in a fair and consistent manner.

The Bylaws, Art. IV sec. 2.2(a), expressly call for such reconsideration. The BGC should do exactly that, and recommend that the Board reverse the Ruling for its failure to follow ICANN-instructed processes and policies imposing upon the Objector the burden to prove that the subject String or its intended use as stated in the Application violates "accepted principles of international law for morality and public order" as "specific[ally] ... reflected in relevant international instruments of law," as required by AGB §§ 3.5 and 3.5.3.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

Yes

No

**11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.**

Not applicable.

**Do you have any documents you want to provide to ICANN?**

Yes, the following attachments are submitted with this Request:

**Attachment 1:** IO Objection

**Attachment 2:** Ruby Pike Opposition

**Attachment 3:** IO Reply

**Attachment 4:** Ruby Pike Sur-Reply

**Attachment 5:** Majority Ruling

**Attachment 6:** Dissent

**Attachment 7:** Ruby Pike Request for Addl Submission re GAC Advice

**Attachment 8:** IO Response to Ruby Pike Request for Addl Submission

**Attachment 9:** Panel Denial of Ruby Pike Request for Addl Submission

## **Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

DATED: December 27, 2013

Respectfully submitted,

THE IP and TECHNOLOGY LEGAL GROUP  
dba New gTLD Disputes

By: \_\_\_\_\_/dcm/\_\_\_\_\_

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