

Recommendation Of The Board Governance Committee
Reconsideration Request 10-3
4 December 2010

On 25 October 2010, Michael Palage submitted a request to the Board Governance Committee (“BGC”) to reconsider the Board’s 25 September 2010 resolution regarding the High Security Top Level Domain program (“HSTLD”). By invitation of the BGC, Mr. Palage filed an amended request on 18 November 2010. (See Amended Reconsideration Request 10-3, <http://www.icann.org/en/committees/reconsideration/reconsideration-request-amended-18nov10-en.pdf>, hereinafter the “Request”.) In his Request, Mr. Palage asks that the Board revoke or rescind the text from the 25 September 2010 Resolution relating to the HSTLD program.

I. Relevant Bylaws.

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

The Bylaws do not provide for reconsideration 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.” Bylaws, Art. IV, § 2.2. Similarly, the Bylaws do not provide for reconsideration of material information that was considered by the Board. Bylaws, Art. IV, § 2.2(b).

If an entity is requesting reconsideration of ICANN staff action or inaction, a request must contain, among other things, “a detailed explanation of the facts as presented to the staff and the reasons why the staff’s action or inaction was inconsistent with established ICANN policy(ies).” Bylaws, Art. IV, § 2.6(g). When challenging a Board action or inaction, a request must contain, among other things, “a detailed explanation of the material information not considered by the Board and, if the information was not presented to the Board, the reasons the party submitting the request did not submit it to the Board before it acted or failed to act. Bylaws, Art. IV, § 2.6(h).

Dismissal of a request for reconsideration is mandatory if the BGC finds that the requesting party does not have standing because it failed to satisfy the criteria set forth in the Bylaws. Bylaws, Art. IV, § 2.16. These standing and application requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge a decision with which someone disagrees, but that it is limited to situations where the Board did not have access to information that, if available, may have resulted in a different decision.

The Request was received on 25 October 2010, making it timely under the Bylaws. Bylaws, Art. IV, § 2.5. An amended Request was received on 18 November 2010. As such, the Bylaws require that the BGC publicly announce by 18 December 2010 its intention either to decline to consider or to proceed to consider the Request. Bylaws, Art. IV, § 2.9.

II. Background.

As part of ICANN's work on the New gTLD Program, efforts began on a High Security Top Level Domain Verification Program, or HSTLD, to provide a structured approach to improve Internet community trust and to improve overall security of domains registered within a Top Level Domain that wish to participate in the HSTLD program. To facilitate the discussion on the HSTLD program, in late 2009, ICANN convened an Advisory Group. Information on the work of the Advisory Group can be found at <http://www.icann.org/en/topics/new-gtlds/hstld-program-en.htm>. The work of the HSTLD Advisory Group continues, and no final report has been issued.

On 24 and 25 September 2010, the ICANN Board convened a retreat dedicated to the topic of the New gTLD Program. In preparation for the retreat, ICANN staff provided substantial documentation to the Board on many aspects of the New gTLD program, including a paper addressing the HSTLD concept ("HSTLD Paper"). Staff's HSTLD Paper, along with others presented to the Board, are available on the Board Meeting Minutes page at <http://www.icann.org/en/minutes/>. At the September retreat, the Board held a meeting during which it gave Staff substantial direction on the preparation of the next version of the Applicant Guidebook draft. One of the items discussed was the HSTLD Program. Specifically as it relates to the HSTLD concept, the Board resolved as follows:

High Security Zone (HSTLD) concept: The HSTLD concept is a voluntary concept being developed by a cross-stakeholder group including the financial services industry for use in TLDs wishing to provide services on a high-security basis. Thus, the development of the concept does not impact the launch of the gTLD application process. Any publication of this concept will be shared freely with other organizations that might be interested in development of such a concept. (<http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.8>)

III. Mr. Palage's Request.

Mr. Palage seeks reconsideration of the portion of the Board's 25 September 2010 Resolution stated above (the "HSTLD Resolution"). Mr. Palage requests that the HSTLD Resolution be revoked or rescinded to allow for the Board to review the final report of the Advisory Group, and to issue a new Resolution at that time. Alternatively, Mr. Palage requests that the Board provide detailed analysis supporting its Resolution.

A. Stated Grounds For The Request.

The stated ground for the reconsideration is that the Board failed to consider material information in reaching the HSTLD Resolution because the Board acted without the benefit of the final report of the Advisory Group. Mr. Palage raises questions about the accuracy of a

statement within the briefing materials referring to the HSTLD program as a third-party operated initiative, though the materials also noted that ICANN would have some level of oversight over the criteria applied.

Mr. Palage also questions why ICANN Staff did not consult the Advisory Group before presenting the Board with the HSTLD Paper. Finally, Mr. Palage questions the Board's commitment to meeting the Affirmation of Commitments because of its failure to provide a detailed analysis of the impact of its decision along with the HSTLD Resolution.

B. Alleged Harms if Reconsideration Not Granted.

Mr. Palage claims that the community will be harmed by allowing the Board's action to stand because: (1) the Board did not wait for the work of the group charged with reviewing this item, affecting the members of that group; (2) the community will never know when the Board will take unilateral action such as the HSTLD Resolution, even when community work is underway; and (3) the financial community – a main proponent of the HSTLD program – has identified harms to the community if such a program is not made available.

IV. Analysis of the Request and Recommendation.

It is the recommendation of the BGC that the Request be denied as unsupported, and the BGC will not proceed with further consideration of this Request. Mr. Palage has failed to identify material information that was in existence at the time of the Board action that the Board failed to consider. The Board briefing materials identify that the work of the Advisory Group is ongoing, and is expected to elicit valuable guidance on the future formation of the program. Therefore, the Board had material information on the future work of the Advisory Group available when making the HSTLD Resolution. Information that is not yet in existence cannot be considered "material information" for the purposes of the Reconsideration process.

The two additional grounds for reconsideration cited in the Request – failing to consult the Advisory Group on the HSTLD Paper and a question as to the Board's commitment to meeting the Affirmation of Commitments – are not proper bases for reconsideration of the HSTLD Resolution. Neither involve Staff actions or inactions that contradict established ICANN policy or Board actions that have been taken or not taken without consideration of material information. *See* Bylaws, Art. IV, Section 2.2.

The BGC applauds the efforts of the HSTLD Advisory Group, and looks forward to the continued positive inputs that the Advisory Group is anticipated to produce.