

## RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

### RECONSIDERATION REQUEST 13-13

12 DECEMBER 2013

---

On 19 October 2013, Christopher Barron submitted a reconsideration request (“Request”). The Request asked the Board to reconsider the ICC’s<sup>1</sup> decision to dismiss GOProud’s<sup>2</sup> community objection to the .GAY gTLD.

#### I. Relevant Bylaws

In pertinent part, Article IV, Section 2.2 of ICANN’s Bylaws states that any entity may submit a request for reconsideration or review of an ICANN staff 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).”<sup>3</sup> (Bylaws, Art. IV, § 2.2)

The Board Governance Committee (“BGC”) has previously stated that the action of an Expert Panel issuing a Determination on a New gTLD Program objection proceeding can be challenged as a staff action. (*See* BGC Recommendation on Reconsideration Request 13-5 at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>.) Dismissal of a Request for Reconsideration is appropriate if the BGC recommends, and in this case the New gTLD Program Committee (“NGPC”) agrees, that the

---

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

<sup>2</sup> GOProud, Inc.

<sup>3</sup> The grounds for challenging Board action or inaction include whether “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 “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.”

requesting party failed to satisfy the standing criteria set forth in the Bylaws. These standing requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees. The reconsideration process is for situations where the staff acted in contravention of established policies (when the Request is based on staff action or inaction).

The Request was received on 19 October 2013. The ICC confirmed its dismissal of GOProud's objection on 2 October 2013, which renders the Request untimely under the Bylaws. Barron claims that the Request is timely because it was submitted within fifteen days after the date on which Barron became aware of the reconsideration process, which was on 15 October 2013. (Request, Pg. 4.) Barron's unfamiliarity with the reconsideration process, however, does not afford him additional time to submit a reconsideration request. Barron also claims that, if calculated in business days, his Request is timely based on his 2 October 2013 receipt of notification from the ICC. The Bylaws make clear that for reconsideration requests that challenge staff actions, requests must be submitted within fifteen days – which are calendar days – after the date on which the party submitting the request became aware of (or reasonably should have become aware of) the challenged action. Bylaws, Art. IV, § 2.5. For this reason alone, the BGC could refuse to consider the Request.

Notwithstanding whether the Request is timely, the BGC also finds that the stated grounds for the Request do not support reconsideration.

## **II. Background**

### **A. Filing An Objection To A New gTLD Application**

The New gTLD Program includes an objection procedure pursuant to which objections to applications for new gTLDs are submitted to an independent DRSP. The objection procedures are set out in Module 3 of the Applicant Guidebook

(<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>) and the New gTLD Dispute Resolution Procedure (the “Procedure”) attached thereto.

To initiate a dispute resolution proceeding, an objection must comply with the procedures set out in Articles 5-8 of the Procedure. This includes the requirement that objections be filed with the appropriate DRSP, using a model form made available by that DRSP. (Guidebook, Section 3.2.3; Procedure, Art. 7(a).) Before an objection will be registered for processing, the DRSP will conduct an administrative review to verify compliance with Articles 5-8 of the Procedures and the applicable DRSP Rules. (Procedure, Art. 9(a).)

**B. Facts**

**1. GOProud’s Objection to the .GAY String**

dotGay LLC (“dotGay”) applied for.GAY. GOProud objected to dotGay’s application, asserting that there is a substantial opposition to the proposed string from a significant portion of the community to which the string may be explicitly or implicitly targeted (“Objection”). The following is a timeline of the relevant events, beginning with the submission of GOProud’s Objection.

<b>Date</b>	<b>Event</b>
13 March 2013	GOProud submits two nearly identical objections to ICC from email address cbarron@capsouthdc.com. (13 March 2013 emails from Barron to ICC; 19 July 2013 Letter from ICC to Willett.)
15 March 2013	Before commencing proceedings, ICC contacts Barron via email to the address from which the objections were submitted (cbarron@capsouthdc.com) asking which of the two objections the ICC should use to commence proceedings; Barron advises that the ICC should use the second Objection sent. The ICC confirmed that it would only take the second Objection into account. Per applicable rules, the Objection was filed on an ICC Model Form, which requires the Objector to specify the Objector’s Contact Address that “shall be used for all communications and notifications in the present proceedings.” GOProud designated the email address info@goproud.org as the contact address for Objector’s Contact Address. (See 19 July 2013 Letter from ICC to Willett.)
16 March 2013	The ICC sends a letter to Barron via email to his designated Objector’s Contact Address (info@goproud.org) informing Barron of the receipt of

Date	Event
	the Objection and reminding Barron that the Filing Fee had to be paid. Later that day, the Filing Fee was credited to the ICC's bank account. ( <i>Id.</i> )
19 March 2013	ICC sends Barron a letter via email to the Objector's Contact Address to confirm receipt of the Filing Fee and to inform GOProud that the ICC would now begin administrative review. ( <i>See Id.</i> )
28 March 2013	ICC notifies Barron via email to the Objector's Contact Address that the objection is over the word limit and invites GOProud to cure the deficiency within five days from the date of the notification. The email also stated that if the deficiency was not cured within the five days the ICC would dismiss the Objection and close the proceedings. There was no indication that this email bounced back or was not otherwise received by the destination server. ( <i>See id.</i> )
2 April 2013	The 5-day deadline for the correction of the Objection expired. ( <i>See id.</i> )
5 April 2013	Eight days later, Barron sends an email to ICC inquiring about the status of the GOProud Objection. ( <i>See id.</i> )
9 April 2013	Barron sends another email to ICC inquiring about the status of the GOProud Objection. ( <i>See id.</i> )
9 April 2013	The ICC advises Barron via email to the Objector's Contact Address at info@goproud.org that GOProud missed the deadline to correct the word limitation issue. For courtesy, the ICC also sent a copy of the letter to Barron's private email address. ( <i>See id.</i> )
10 April 2013	Barron sends a letter to the ICC explaining that he never received the ICC's email of 28 March 2013. ( <i>See id.</i> )
10 April 2013	The ICC re-sends to Barron the original email from 28 March 2013 as well as the delivery confirmation that the ICC received when sending that email. The original email from 28 March 2013 was sent to the Objector's Contact Address and Barron's personal email as a courtesy. ( <i>See id.</i> )
11 April 2013	The ICC receives an email from Barron enclosing the corrected Objection.
12 April 2013	ICC notifies Barron that GOProud's Objection has been dismissed for failure to correct the word limitation issue within the time limit granted and that the proceedings on GOProud's Objection are closed (the "12 April 2013 Decision"). ( <i>See 12 April 2013 Letter from ICC to GOProud.</i> )
17 May 2013	Barron sends letter to Ombudsman.
12 June 2013	Barron sends Ombudsman more details requested by Ombudsman.
1 July 2013	Ombudsman issues report ("Report") to ICANN Board indicating that, based on the facts available to him, he had concerns about the possible fairness of the ICC's decision to reject GOProud's objection and recommended to the Board (or the NGPC in this case) that the ICC be asked to revisit its decision. ( <i>See Meeting of the NGPC, Briefing Materials 2 available at</i>

Date	Event
	<a href="http://www.icann.org/en/groups/board/documents/briefing-materials-2-13jul13-en.pdf">http://www.icann.org/en/groups/board/documents/briefing-materials-2-13jul13-en.pdf.</a> )
13 July 2013	NGPC approves Resolution 2013.07.13.NG03 directing the President of the Global Domains Division to forward to the ICC the Report and ask the ICC to revisit its decision in light of the Report. ( <a href="http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-13jul13-en.htm">http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-13jul13-en.htm.</a> )
2 October 2013	ICC advised that the Standing Committee did reconsider the matter and decided not to revise the Centre’s decision not to register GOProud’s objection (the “2 October 2013 Decision”). The ICC further advises that the matter is terminated and the proceedings closed. (2 October 2013 Letter from ICC to Objector and Applicant.)

**III. Rationale/Analysis of The Request – The ICC’s Dismissal of GOProud’s Objection Does Not Demonstrate A Process Violation**

Barron seeks reconsideration of the ICC’s 2 October 2013 Decision to not reinstate GOProud’s Objection. More specifically, Barron requests that ICANN direct the ICC to “let the objection stand,” or to otherwise “facilitate the full consideration” of the Objection. (Request, Section 9.) In the Request, Barron contends that he did not receive notification that GOProud needed to cure a deficiency in its Objection until it was too late to cure and the ICC had already reached its 12 April 2013 Decision to dismiss the Objection. Barron claims that because he did not receive the notification in a timely fashion, the ICC has unfairly dismissed GOProud’s Objection. According to Barron, the 28 March 2013 notification of the deficiency in the Objection was sent to a different email address than the one that was listed in the Objection for GOProud’s “representative,” and to a different email address than the one previously used by the ICC to communicate with Barron. (Request, Pgs. 3-4.) Barron also claims that the ICC failed to conduct its administrative review within the 14 days required under the Applicant Guidebook and the Procedure. (Request, Pg. 3.)

As part of the ICC's Objection Form, in addition to identifying the "Objector" and the "Objector's Representative(s)," the objecting party is required to provide the "Objector's Contact Address." (ICC New gTLD Dispute Resolution Procedure Objection Form To Be Completed By The Objector ("Objection Form"), available at <http://www.iccwbo.org/WorkArea/DownloadAsset.aspx?id=19327354293>.) The Objection Form specifies that:

This address shall be used for all communication and notifications in the present proceedings. Accordingly, notification to this address shall be deemed notification to the Objector. The Contact Address can be the Objector's address, the Objector's Representative's address or any other address used for correspondence in these proceedings.

(Objection Form, Pg. 2.)

As noted above, the "Objector's Contact Address" is the address that the ICC would use "for all communication and notifications in the present proceedings." In the Objection Form, Barron (identified as the Objector's Representative) specifically provided an email address as the official Objector's Contact Address that was not his personal email address. (GOProud's Objection, Pg. 2.) Although Barron could have provided his personal email address as the Objector's Contact Address, he did not do so. Barron was therefore obligated to check the email address that he provided as GOProud's official Objector's Contact Address and the ICC had no obligation to send notifications to any other email address.

Based on the Request and supporting exhibits, it appears that every communication from the ICC to Barron relating to GOProud's Objection, after the proceedings were initiated, was sent to GOProud's Objector's Contact Address, including the ICC's 28 March 2013 correspondence notifying GOProud that the Objection did not comply with the Procedure, and

giving GOProud five days to cure the deficiency. (28 March 2013 Letter from the ICC to GOProud.)

The only exceptions to this practice of communicating through the Objector's Contact Address involved a communication sent to Barron's personal email before the proceedings were initiated, and two courtesy emails the ICC sent to Barron at his personal email *in addition* to the primary Objector's Contact Address after Barron notified the ICC that he had not received the ICC's prior correspondences. For courtesy reasons only, the first email sent to Barron's personal email address sought clarification from Barron as to which of the two nearly identical objections that Barron submitted should be considered by the ICC as initiating the proceedings. (19 July 2013 Letter from ICC to Willett.) The ICC also attempted to contact Barron by telephone. The fact that one initial clarifying email to figure out which objection should be used to initiate the proceedings was submitted to Barron's personal email address does not create any reasonable expectation that GOProud would not be held to the designation of the Objector's Contact Address. Barron had no justification to believe that a single email attempting to sort out which objection was to be considered would change the official Objector's Contact Address, particularly when Barron had specifically designated a different email address as the Objector's Contact Address. Barron was obligated to check the Objector's Contact Address and his failure to do so does not demonstrate a process violation by the ICC. Rather, the ICC followed process and sent the notifications to the Objector's Contact Address as provided in the Objector Form.

Barron further claims that he did not receive the 28 March 2013 communication providing GOProud notification of the deficiency in the Objection and the only "proof" provided that the email was actually sent is a delivery receipt from the ICC that states "no delivery notification was sent by the destination server." (Request, Pgs. 3 & 6.) Barron's contention is

misplaced. The delivery receipt confirms that the ICC sent the communication to GOProud's official Objector's Contact Address. (Exhibit C to undated letter from Barron to Spela Kosak.) The fact that no delivery notification was sent by GOProud's email server does not in any way mean that the email was not sent. When Barron provided an official Objector's Contact Address for GOProud's Objection, the ICC specifically followed its procedures by using that email address to communicate regarding the proceedings. If Barron failed to ensure that the email address he provided as the Objector's Contact Address was operating properly, that is his burden to bear; it has no bearing on whether the ICC followed its policies or procedures. The documentation provided by Barron supports that the 28 March 2013 email was sent to Barron by the ICC, and there is no documentation to support that the email was not received.

Finally, Barron claims that the ICC did not follow its own procedural rules by failing to inform him of any compliance issues within fourteen days. (Request, Pg. 6.) Article 9(a) of the Procedure provides:

The DRSP shall conduct an administrative review of the Objection for purposes of verifying compliance with Articles 5-8 of this Procedure and the applicable DRSP Rules, and inform the Objector, the Applicant and ICANN of the result of its review within fourteen (14) days of its receipt of the Objection. The DRSP may extend this time limit for reasons explained in the notification of such extension.

(Procedure, Art. 9(a).) Here, the ICC received two nearly identical objections from GOProud on 13 March 2013. It was not until 15 March 2013 that Barron confirmed that only the second objection should be considered by the ICC, and it was not until 16 March 2013 that the filing fees for the Objection were credited/received by the ICC. Accordingly, on 19 March 2013, the ICC sent a letter to GOProud (via the official Objector's Contact Address) to "confirm receipt of the Filing Fee and to inform the Objector that the Centre would now conduct the administrative review." (19 July 2013 Letter from the ICC to ICANN, Pgs. 3-4 (emphasis added).) Nine days



later, on 28 March 2013, the ICC advised GOProud of the compliance issue associated with its Objection and, pursuant to Article 9(c) of the Procedure, invited GOProud to correct the issue within five days from the day following the communication. (28 March 2013 Letter from the ICC to GOProud.)

Based on the above, the ICC conducted the administrative review of GOProud's Objection in a timely manner in accordance with the Procedure and the applicable DRSP Rules. The identified deficiency was not cured within the time provided, and pursuant to Article 9(d) of the Procedure, the ICC dismissed the Objection and closed the proceedings.

After the NGPC's 13 July 2013 resolution, the ICC followed the directive issued and reviewed the dismissal of GoProud's Objection. Following that review, on 2 October 2013 the ICC notified GoProud that the Objection would not be reinstated. As the ICC's earlier actions do not demonstrate any policy or process violation, and the ICC then acted in accord with the NGPC's resolution, there are no policy or process violations identified by GoProud that support reconsideration of this matter.

#### **IV. Recommendation and Conclusion**

Based on the foregoing, the BGC concludes that the Request has not stated proper grounds for reconsideration. While it appears that the Request was not submitted in a timely fashion and could be dismissed on that ground alone, the lack of substantive grounds for reconsideration also supports our recommendation that Barron's Request be denied without further consideration.

As there is no indication that the ICC violated any policy or process in deciding to dismiss GOProud's Objection, this Request should not proceed. To avoid the timing confusion raised in the Request, the BGC recommends that staff more clearly specify on the timing

diagram for Reconsideration that the 15-day deadline for invoking the Reconsideration Process for submitting requests are calendar days.

The BGC recommends that it would be appropriate for the NGPC to consider this Request and the BGC's Recommendation given that the NGPC had previously considered and took action on the Ombudsman's report and recommendations.