REFERENCE MATERIALS – NGPC RESOLUTIONS ON RECONSIDERATION REQUESTS – 13-6 through 13-10

Reconsideration Request 13-6

Attachment A is Reconsideration Request 13-6, submitted on 23 August 2013.

Attachment B is the Attachment to Request 13-6, submitted on 23 August 2013.

Attachment C is the Letter from Flip Petillion to Bruce Tonkin, submitted on 30 August 2013.

Attachment D is the Letter from Christopher Klenner, ETTSA, to the BGC, submitted on 19 September 2013.

Attachment E is the Letter from Flip Petillion to Bruce Tonkin, submitted on 23 September 2013.

Attachment F is the BGC's Recommendation on Reconsideration Request 13-6, issued on 25 September 2013.

Attachment G is a Letter from Johannes Lenz-Hawliczek to the BGC, submitted on 26 September 2013.

Reconsideration Request 13-7

Attachment A is Reconsideration Request 13-7, submitted on 23 August 2013.

Attachment B is Attachments 1-2 to Request 13-7, submitted on 23 August 2013. Attachment 3 to Request 13-7 was the complete New gTLD Applicant Guidebook, available at http://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf.

Attachment C is Attachments 4-11 to Request 13-7, submitted on 23 August 2013.

Attachment D is the Letter from Jim Davis to the BGC, submitted on 6 September 2013.

Attachment E is the BGC's Recommendation on Reconsideration Request 13-7, issued on 25 September 2013.

Reconsideration Request 13-8

Attachment A is Reconsideration Request 13-8, submitted on 30 August 2013.

Attachment B is the Attachments to Request 13-8, submitted on 30 August 2013.

Attachment C is the Letter from Judith Harris to the BGC, submitted on 13 September 2013.

Attachment D is the BGC's Recommendation on Reconsideration Request 13-8, issued on 10 October 2013.

Reconsideration Request 13-9

Agenda Item Not Considered - No Briefing Materials Posted

Reconsideration Request 13-10

Agenda Item Not Considered - No Briefing Materials Posted

Proposed New gTLD Program Committee Resolutions
5 November 2013
Meeting of the New gTLD Program Committee

1. Main Agenda:

a. Reconsideration Request 13-6

Whereas, Hotel Top-Level-Domain S.a.r.l's ("dotHotel") Reconsideration Request, Request 13-6, sought reconsideration of the 8 August 2013 Expert Determination from a dispute resolution panel established by the International Centre for Dispute Resolution dismissing dotHotel's objection to the new gTLD application for .HOTELS.

Whereas, the Board Governance Committee ("BGC") considered the issues raised in Request 13-6.

Whereas, the BGC recommended that Request 13-6 be denied because dotHotel has not stated proper grounds for reconsideration and the New gTLD Program Committee agrees.

Whereas, the NGPC reviewed and considered the material that was submitted by dotHotel after the BGC issued its recommendation on Request 13-6 and concluded that said material does not change the recommendation of the BGC.

Resolved (2013.11.05.NGxx), the New gTLD Program Committee adopts the BGC Recommendation on Reconsideration Request 13-6, which can be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-hotel-25sep13-en.pdf.

Rationale for Resolution 2013.11.05.NGxx

ICANN's Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, Section 2 of the Bylaws. The New gTLD Program Committee ("NGPC"), bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 13-6 and finds the analysis sound.

Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, procedures, Bylaws, and Articles of Incorporation.

Request 13-6 asks that ICANN disregard the Panel's expert determination of dotHotel's string confusion objection to Booking.com's new gTLD application for .HOTELS and requests that a different panel be appointed to "rehear" dotHotel's objection on a de novo basis. DotHotel also requests that ICANN institute "appropriate Quality Control provisions within the String Similarity Objection process to ensure the consistency of decisions of panelists." (Request, Section 9.)

The Request calls into consideration: (1) whether the Panel violated any policy or process in conducting its visual similarity review of dotHotel's objection; and (2) whether ICANN's alleged failure to incorporate suitable "quality control" mechanisms in the New gTLD dispute objection and dispute resolution process constitutes a material failure of process. (Request, Sections 6-8 & 10.)

In consideration of the first issue, the BGC reviewed the grounds stated in the Request, including the attachment, and concluded that dotHotel failed to adequately state a Request for Reconsideration of Staff action because they failed to identify any policy or process that was violated by Staff. Contrary to dotHotel's suggestion that the Panel improperly relied on result of the String Similarity Review finding that the .HOTEL and .HOTELS strings were not similar, there does not appear to be anything in the Applicant Guidebook or the New gTLD Dispute Resolution Procedure (the "Procedure") that restricts the Panel's ability to refer to or rely upon previously conducted reviews or evaluations of the strings at issue. DotHotel does not cite to or otherwise reference any such provision to support

its assertions. The BGC noted that the Procedure makes clear that, in addition to applying the standards that have been defined by ICANN, 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).) Moreover, the BGC noted that Panel indicated that the String Similarity score was put before the Panel for review by Booking.com in its Response to dotHotel's Objection as evidence that the two strings are not visually similar. The BGC determined that there is nothing in the Applicant Guidebook or the Procedure that would preclude a panel from referencing or relying upon evidence presented, even when that evidence may have also been supportive of the results of the earlier String Similarity Review. There is no requirement that the earlier outcomes of the String Similarity Review should be disregarded when determining a subsequent string confusion objection.

In the context of the New gTLD Program, the Reconsideration process is not intended for the BGC, or the NGPC, to perform a substantive review of DRSP panel decisions, but it is for the consideration of failure of process- or policy-related complaints. No policy or process has been violated. Therefore, while dotHotel may disagree with the Panel's findings, Reconsideration is not available as a mechanism to re-try the determinations of DRSP panels.

The BGC further concluded that dotHotel's contention that the dispute resolution proceedings are designed to "take a second look at" the results of the String Similarity Review is unsupportable. Rather, the String Similarity Review that occurs at the outset of the evaluation process "is intended to augment the objection and dispute resolution process . . . that addresses all types of similarity." (Applicant Guidebook, Section 2.2.1.1.1.)

In consideration of the second issue, the BGC concluded, and the NGPC agrees, that dotHotel does not identify any established policy or process that required ICANN to take action. While dotHotel suggests that ICANN's failure to incorporate suitable "quality control"

provisions into the objection and dispute resolution process constitutes a material failure of process and that such failures have led to flawed Dispute Resolution Service Provider ("DRSP") panel decisions and "inherently inconsistent results", dotHotel does not appear to be suggesting that the dispute resolution procedures set out in Module 3 of the Applicant Guidebook, or the Procedure, were not followed. Rather, DotHotel appears to be seeking reconsideration of an alleged inaction – i.e., ICANN's purported failure to act to implement appropriate quality controls. DotHotel suggests only that because other aspects of the New gTLD Program include quality control mechanisms, the objection and dispute resolution process should also include such mechanisms. (Request, Section 8.)

The NGPC notes that dotHotel submitted a survey regarding dis-similar String Confusion Objections results after the BGC issued its Recommendation. (See Attachment G to Reference Materials.) Due to the timing of this submission, the BGC did not have the opportunity to consider the survey before issuing its Recommendation. The survey has since been reviewed and considered. The NGPC has determined that the survey does not alter the BGC's Recommendation or the rationale contained in that Recommendation.

In addition to the above, the NGPC had opportunity to consider all of the materials submitted by the requestor, as well as all of the letters summited that relate to Request 13-6. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on 13-6, the full text of which can be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-hotel-25sep13-en.pdf and is attached to the Reference Materials to the NGPC Submission on this matter. The BGC's Recommendation on Reconsideration Request 13-6 shall also be deemed a part of this Rationale.

In terms of timing of the BGC's Recommendation, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation to the Board [or NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless practical. See Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC would have to have acted on Request 13-6 by 22 September 2013. When Request 13-6 was submitted, the BGC's next meeting was already expected to take place during ICANN's Board workshop, scheduled for 26-28 September 2013. Because the preparations for this meeting had already taken place, and given the travel necessary prior to the workshop, the first practical opportunity for the BGC to take action on this Request was during the workshop; it was impractical for the BGC to consider Request 13-6 sooner. Upon making that determination, staff notified the requestor of the BGC's anticipated timing for review of Request 13-6.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

b. Reconsideration Request 13-7

Whereas, Dish DBS Corporation's ("Dish") Reconsideration Request, Request 13-7, sought reconsideration the 29 July 2013 Expert Determination from a dispute resolution panel established by the Arbitration and Mediation Center of the World Intellectual Property Organization sustaining The DirecTV Group, Inc.'s objection to Dish's application for .DIRECT.

Whereas, the Board Governance Committee ("BGC") considered the issues raised in Request 13-7.

Whereas, the BGC recommended that Request 13-7 be denied because Dish has not stated proper grounds for reconsideration and the New gTLD Program Committee agrees.

Resolved (2013.11.05.NGxx), the New gTLD Program Committee adopts the BGC Recommendation on Reconsideration Request 13-7, which can be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-dish-dbs-25sep13-en.pdf.

Rationale for Resolution 2013.11.05.NGxx

ICANN's Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, Section 2 of the Bylaws. The New gTLD Program Committee ("NGPC"), bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 13-7 and finds the analysis sound.

Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, procedures, Bylaws, and Articles of Incorporation.

Request 13-7 is about trademark rights. The requestor asks ICANN to disregard the Panel's decision to sustain DirecTV's objection to Dish's application for the .DIRECT new gTLD and requests that the decision be reviewed by a new expert panel. Dish also requests that ICANN provide applicants of "inconsistent or erroneous DRSP panel determinations with an avenue of redress that is consistent with ICANN's mandate to act with fairness." In the event that ICANN will not immediately reverse the decision, Dish requests that it be provided an opportunity to respond to the BGC, before the BGC makes a final recommendation. (Request, Section 9.) Dish also requests a hearing. (Request, Page 11.)

The Request calls into consideration: (1) whether the Panel's alleged influence by media accounts constitutes a process violation; and (2) whether ICANN's automatic accept of Dispute Resolution Service Provider ("DRSP") panel decision is contrary to ICANN's mandate to act transparently and fairly.

In consideration of the first issue, the BGC reviewed the grounds stated in the Request, including the attachment, and concluded that Dish failed to adequately state a Request for Reconsideration of staff action because they failed to identify any policy or process that was violated by staff. (BGC Recommendation, Pgs. 8-9, 13-13.) The NGPC agrees. Dish claims that the Panel, in reaching its conclusion that Dish's application for .DIRECT was not a "bona fide application," failed to accord proper weight to a declaration presented, and instead, was improperly influenced by Dish advertisements that were not part of the record. (Request, Section 10.) The BGC determined that, contrary to Dish's contention, there is no provision in the New gTLD Dispute Resolution Procedures (the "Procedure") that restricts a panel's ability to refer to or rely upon media advertisements. (BGC Recommendation, Pg. 7.)

The BGC noted that the relevant standard for evaluating a Legal Rights Objection is set out in Section 3.5.2 of the Applicant Guidebook ("Guidebook"). Section 3.5.2. sets forth eight non-exclusive factors that a panel will need to consider in cases where the objection is based on trademark rights. (Guidebook, Section 3.5.2.) The Procedure also makes clear that, in addition to applying the standards that have been defined by ICANN, 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).) The BGC found that the Panel applied the eight non-exclusive factors to Dish's LRO as required by the Guidebook and determined that the balance of factors favored DirecTV. (Determination, Pages 5-8.)

The BGC found that Dish misstated the alleged influence of media "accounts" on the Panel in rendering its determination. The Panel referenced television advertisements to illustrate the fact that Dish and DirecTV are direct competitors in the satellite television industry. (Recommendation, Pg. 7; Determination, Pgs. 4-5.) The BGC noted that Dish does not dispute the fact that the two are competitors, and both parties acknowledge that they provide satellite television services. (Recommendation, Pg. 7; Determination, Pgs. 2-3.) Thus, even if the Panel's reference to television advertisements was somehow improper, there does not appear to be any prejudice to Dish. The BGC also noted that the "media accounts" at issue are advertisements produced by the parties to the objection proceedings, and not statements of journalists, so Dish's opposition to the decision because of these "media accounts" seems misplaced in any event. (BGC Recommendation, Pg. 7.)

In consideration of the second issue, the BGC concluded, and the NGPC agrees, that Dish's attempt to claim that the procedures set forth in the Guidebook, which followed years of inclusive policy development and implementation planning, are inconsistent with ICANN's Articles of Incorporation and Bylaws (or the recommendations of the GNSO) is not supported. The Guidebook sets out the standards used to evaluate and resolve objections. The Expert Determination shows that the Panel followed the evaluation standards. ICANN's acceptance of that Expert Determination as advice to ICANN is also in accordance with the established process. (Guidebook, Section 3.4.6.) Dish's disagreement as to whether the standards should have resulted in a finding in favor of DirecTV's objection does not mean that ICANN (or the Panel) violated any policy or process in reaching the decision (nor does it support a conclusion that the decision was actually wrong).

Moreover, the BGC found that Dish does not suggest that that the dispute resolution procedures set out in Module 3 of the Applicant Guidebook, or under the Procedure, were not followed. In its Request, Dish contends that ICANN's automatic acceptance of DRSP

panel decisions, including those that are "erroneous or inconsistent," is contrary to ICANN's mandate to act transparently and fairly. (Request, Section 8, Page 4.) The BGC concluded that Dish's assertions are not accurate and do not support Reconsideration.

For the same reasons, the BGC found that ICANN's purported inaction in implementing new controls does not demonstrate a violation of any ICANN policy or process.

While parties to a dispute resolution proceeding may not always be satisfied with the determinations of the DRSP panels – and there may be divergence in the conclusions reached between the various panels – the Reconsideration process is not intended to reexamine the established dispute resolution process. Dish's belief that the objection and dispute resolution procedures should be changed does not constitute a policy or process violation that supports reconsideration. Rather, the Request challenges the Panel's substantive determination. In the context of the New gTLD Program, Reconsideration is not a mechanism for direct, de novo appeal of panel decisions with which the requester disagrees, and seeking such relief is, in fact, in contravention of the established processes within ICANN.

The NGPC had the opportunity to consider all of the materials submitted by the requestor, and all letters submitted that relate to Request 13-7. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 13-7, the full text of which can be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-dish-dbs-25sep13-en.pdf and that is attached to the Reference Materials to the NGPC Submission on this matter. The BGC's Recommendation on Reconsideration Request 13-7 shall also be deemed a part of this Rationale.

In terms of timing of the BGC's Recommendation, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation to the Board [or NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless practical. See Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC needed to act by 22 September 2013. When Request 13-7 was submitted, the BGC's next meeting was already expected to take place during ICANN's Board workshop, scheduled for 26-28 September 2013. Because the preparations for this meeting had already taken place, and given the travel necessary prior to the workshop, the first practical opportunity for the BGC to take action on this Request was during the workshop; it was impractical for the BGC to consider Request 13-7 sooner. Upon making that determination, staff notified the requestor of the BGC's anticipated timing for review of Request 13-7.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

c. Reconsideration Request 13-8

Whereas, Merck KGaA's Reconsideration Request, Request 13-8, sought reconsideration the 13 July 2013 resolution of the New gTLD Program Committee ("NGPC") that permitted and encouraged dispute resolution panels to use discretion in enforcing the deadlines set forth in the New gTLD Applicant Guidebook.

Whereas, Request 13-8 challenges the NGPC resolution as it relates to Merck & Co. Inc.'s community objection to Merck KGaA's application for .MERCK, which was rejected by the Dispute Resolution Service Provider for being filed after the published closing deadline set forth in the Applicant Guidebook.

Whereas, the Board Governance Committee ("BGC") considered the issues raised in Request 13-8.

Whereas, the BGC recommended that Request 13-8 be denied because Merck KGaA has not stated proper grounds for reconsideration.

Resolved (2013.11.05.NGxx), the New gTLD Program Committee adopts the BGC Recommendation on Reconsideration Request 13-8, which can be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-merck-10oct13-en.pdf.

Rationale for Resolution 2013.11.05.NGxx

ICANN's Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, Section 2 of the Bylaws. The New gTLD Program Committee ("NGPC"), bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 13-8 and finds the analysis sound.

Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws, and Articles of Incorporation.

Request 13-8 seeks reconsideration of the Resolution that permitted and encouraged dispute resolution panels to use discretion in enforcing the deadlines set forth in the New gTLD Applicant Guidebook. Specifically, the Request challenges the NGPC resolution as it relates to the Objector's community objection to Merck KGaA's application for .MERCK, which was rejected by the Dispute Resolution Service Provider (DRSP) for being filed after the published closing deadline.

The Request calls into consideration: (1) whether the NGPC failed to consider material information in adopting the challenged Resolution; (2) whether the NGPC lacks the jurisdiction to "oversee, appeal or challenge" the procedural decisions of the DRSPs; and (3) whether the NGPC's actions constitute breaches of ICANN's Core Values, including the requirement to make "decisions by applying documented policies neutrally and objectively, with integrity and fairness," and the requirement to employ "open and transparent policy development mechanisms that … ensure that those entities most affected can assist in the policy development process".

In consideration of the first issue, the BGC reviewed the grounds stated in the Request, including the attachment, and concluded that Merck KGaA's failed to adequately state a Request for Reconsideration. Specifically, the BGC found that there is no support for Merck KGaA's claim that the NGPC failed to consider material information because the Resolution was based on "incomplete, and improperly compiled, reports by the ICANN Ombudsman." (Request, Pg. 16.) Contrary to Merck KGaA's claims that the Ombudsman denied Merck KGaA's right to be heard and issued its recommendations to the NGPC on the basis of unilateral communications with only the Objector's position being presented (Request, Pg. 5), the BGC noted that the reports from the Ombudsman that were considered by the NGPC did not address, nor were they intended to address, the Objector's complaint to the Ombudsman regarding the ICC's rejection of the objection to .MERCK. (NPGC Briefing Material.)

The Ombudsman issued only two reports to the Board relating to purportedly missed deadlines. The first report addressed an objection from Axis Communication AB to the Saudi Telecom Company's application for .AXIS (the ".AXIS Report"). (NGPC Briefing Materials 2, http://www.icann.org/en/groups/board/documents/briefing-materials-2-13jul13-en.pdf.)The second report addressed an objection to .GAY by GOProud (the ".GAY Report"). (NPGC Briefing

Material, Pg. 10-11.) The BGC noted that based on the .AXIS Report and the .GAY Report, the NGPC adopted two very specific resolutions asking the respective DRSPs to reconsider/revisit their decisions relating to the relevant filings. In addition to the two specific resolutions, the NGPC adopted a resolution that generally permits and encourages DRSPs to exercise discretion in enforcing the deadlines set forth in the Applicant Guidebook. This more general resolution is not directed towards any one specific DRSP or any one specific dispute resolution proceeding or Ombudsman's complaint, including the complaint relating to the .MERCK objection.

The BGC found that because neither report addressed the Objector's complaint to the Ombudsman – or, otherwise reflected a recommendation to the NGPC on how to resolve the Objector's complaint – there is no support for Merck KGaA's assertion that the NGPC failed to consider material information relating to the Objector's complaint. The NGPC agrees.

Moreover, the BGC noted that, in its published rationale for the Resolution, the NGPC acknowledged that, beyond the two Ombudsman reports, ICANN received several other inquiries from objectors, applicants, and the DRSPs about issues related to late filings and whether the DRSPs have the discretion to deviate from the specific deadlines set forth in the Applicant Guidebook. The NGPC concluded, in the interests of fairness and reasonableness, that it is appropriate for the DRSPs to exercise discretion, given the circumstances of each situation, in enforcing dispute resolution deadlines. (13 July 2013 Resolutions.) This grant of discretion is just that, it does not direct any DRSP to reverse any specific decision to accept or reject a late filing. Rather, the Resolution is intended to provide further guidance to the DRSPs on the issue of late submissions.

In consideration of the second issue, the BGC concluded, and the NGPC agrees, that the stated grounds do not constitute a proper basis for Reconsideration under ICANN's Bylaws. However, even if

these were proper bases for Reconsideration, the above-stated grounds do not support reconsideration. The BGC noted that Article 23(a) of the New gTLD Dispute Resolution Procedure (the "Procedures") clearly provides ICANN with the jurisdiction to modify the procedures governing the dispute resolution process. (Procedures, Art. 23(a).) Thus, even if the challenged Resolution was considered a modification to the Procedures, the NGPC has the authority to make such modifications, provided the modifications are in accordance with ICANN's Bylaws.

In consideration of the third issue, the BGC determined, and the NGPC agrees, that Merck KGaA's assertions are unsupported and do not constitute a proper basis for Reconsideration under ICANN's Bylaws. As discussed above, the .MERCK complaint to the Ombudsman was not before the NGPC. The NGPC adopted two resolutions specifically addressing issues surrounding objections to the applied-for .AXIS and .GAY strings, and adopted a third resolution generally permitting and encouraging DRSPs to exercise discretion in enforcing dispute resolution procedure deadlines. (13 July 2013 Resolutions.) This general grant of discretion is to be applied neutrally and objectively. Both the .AXIS Report and .GAY Report are publicly posted, and the NGPC clearly stated and published its rationale for the Resolutions (13 July 2013 Resolutions). The NGPC's actions – both the evaluation of the issues and its ultimate resolutions – were at all times open, transparent, and in good faith. Accordingly, there is no support for Merck KGaA's claim that the NGPC's actions were somehow inconsistent with ICANN's Core Values.

In addition to the above, the NGPC had opportunity to consider all of the materials submitted by the requestor, as well as all of the letters summited that relate to Request 13-8. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 13-8, the full text of which can be found at http://www.icann.org/en/groups/board/governance/reconsideration

/recommendation-dish-dbs-25sep13-en.pdf and is attached to the Reference Materials to the NGPC Submission on this matter. The BGC's Recommendation on Reconsideration Request 13-8 shall also be deemed a part of this Rationale.

In terms of timing of the BGC's Recommendation, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation to the Board [or NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless practical. See Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC needed to act by 29 September 2013. Due to the volume of Reconsideration Requests received within recent weeks, the first practical opportunity for the BGC to take action on this Request was on 10 October 2013; 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 13-8.

Adopting the BGC's Recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

d. Reconsideration Request 13-9

Resolution Not Considered

Resolution Not Considered

Rationale for Resolution 2013.11.05.NGxx

Rationale Not Considered

Rationale Not Considered

Rationale Not Considered

Rationale Not Considered

Rationale Not Considered

Rationale Not Considered

e. Reconsideration Request 13-10

Resolution Not Considered

Rationale for Resolution 2013.11.05.NGxx

Rationale Not Considered

Rationale Not Considered

Rationale Not Considered

Rationale Not Considered

Rationale Not Considered

ICANN NEW gTLD PROGRAM COMMITTEE SUBMISSION NO. 2013-10-XX-XX

TO:	**ICANN New gTLD Program Committee**
TITLE:	**Reconsideration Request 13-6**
PROPOSED ACTIONS:	**For Committee Consideration and Approval**

EXECUTIVE SUMMARY:

On 23 August 2013, Hotel Top-Level-Domain S.a.r.l ("dotHotel") submitted a reconsideration request ("Request 13-6" or the "Request") seeking reconsideration of the 8 August 2013 Expert Determination from a dispute resolution panel (the "Panel") established by the International Centre for Dispute Resolution dismissing dotHotel's objection to the new gTLD application for .HOTELS. The BGC considered Request 13-6 at its 25 September 2013 meeting and concluded that dotHotel has not stated proper grounds for reconsideration. The BGC recommended to the NGPC that the Request be denied and that no further action be taken in response to the Request.

BOARD GOVERNANCE COMMITTEE (BGC) RECOMMENDATION:

The BGC recommends that Request 13-6 be denied and that no further action be taken in response to the Request. As detailed in the Recommendation attached to the Reference Materials in support of this paper, the BGC determined that Request 13-6 fails to state any grounds that support reconsideration.

PROPOSED RESOLUTION:

Whereas, Hotel Top-Level-Domain S.a.r.l's ("dotHotel") Reconsideration Request, Request 13-6, sought reconsideration of the 8 August 2013 Expert Determination from a dispute resolution panel established by the International Centre for Dispute Resolution dismissing dotHotel's objection to the new gTLD application for .HOTELS.

Whereas, the Board Governance Committee ("BGC") considered the issues raised in Request 13-6.

Whereas, the BGC recommended that Request 13-6 be denied because dotHotel has not stated proper grounds for reconsideration and the New gTLD Program Committee agrees.

Whereas, the NGPC reviewed and considered the material that was submitted by dotHotel after the BGC issued its recommendation on Request 13-6 and concluded that said material does not change the recommendation of the BGC.

Resolved (2013.10.XX.XX), the New gTLD Program Committee adopts the BGC Recommendation on Reconsideration Request 13-6, which can be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-hotel-25sep13-en.pdf.

PROPOSED RATIONALE:

ICANN's Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. *See* Article IV, Section 2 of the Bylaws. The New gTLD Program Committee ("NGPC"), bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 13-6 and finds the analysis sound.

Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, procedures, Bylaws, and Articles of Incorporation.

Request 13-6 asks that ICANN disregard the Panel's expert determination of dotHotel's string confusion objection to Booking.com's new gTLD application for .HOTELS and requests that a different panel be appointed to "rehear" dotHotel's objection on a *de novo* basis. DotHotel also requests that ICANN institute "appropriate Quality Control provisions within the String Similarity Objection process to ensure the consistency of decisions of panelists." (Request, Section 9.)

The Request calls into consideration: (1) whether the Panel violated any policy or process in conducting its visual similarity review of dotHotel's objection; and (2) whether ICANN's

alleged failure to incorporate suitable "quality control" mechanisms in the New gTLD dispute objection and dispute resolution process constitutes a material failure of process. (Request, Sections 6-8 & 10.)

In consideration of the first issue, the BGC reviewed the grounds stated in the Request, including the attachment, and concluded that dotHotel failed to adequately state a Request for Reconsideration of Staff action because they failed to identify any policy or process that was violated by Staff. Contrary to dotHotel's suggestion that the Panel improperly relied on result of the String Similarity Review finding that the .HOTEL and .HOTELS strings were not similar, there does not appear to be anything in the Applicant Guidebook or the New gTLD Dispute Resolution Procedure (the "Procedure") that restricts the Panel's ability to refer to or rely upon previously conducted reviews or evaluations of the strings at issue. DotHotel does not cite to or otherwise reference any such provision to support its assertions. The BGC noted that the Procedure makes clear that, in addition to applying the standards that have been defined by ICANN, 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).) Moreover, the BGC noted that Panel indicated that the String Similarity score was put before the Panel for review by Booking.com in its Response to dotHotel's Objection as evidence that the two strings are not visually similar. The BGC determined that there is nothing in the Applicant Guidebook or the Procedure that would preclude a panel from referencing or relying upon evidence presented, even when that evidence may have also been supportive of the results of the earlier String Similarity Review. There is no requirement that the earlier outcomes of the String Similarity Review should be disregarded when determining a subsequent string confusion objection.

In the context of the New gTLD Program, the Reconsideration process is not intended for the BGC, or the NGPC, to perform a substantive review of DRSP panel decisions, but it is for the consideration of failure of process- or policy-related complaints. No policy or process has been violated. Therefore, while dotHotel may disagree with the Panel's findings, Reconsideration is not available as a mechanism to re-try the determinations of DRSP panels.

The BGC further concluded that dotHotel's contention that the dispute resolution proceedings are designed to "take a second look at" the results of the String Similarity Review is unsupportable. Rather, the String Similarity Review that occurs at the outset of the evaluation process "is intended to augment the objection and dispute resolution process . . . that addresses all types of similarity." (Applicant Guidebook, Section 2.2.1.1.1.)

In consideration of the second issue, the BGC concluded, and the NGPC agrees, that dotHotel does not identify any established policy or process that required ICANN to take action. While dotHotel suggests that ICANN's failure to incorporate suitable "quality control" provisions into the objection and dispute resolution process constitutes a material failure of process and that such failures have led to flawed Dispute Resolution Service Provider ("DRSP") panel decisions and "inherently inconsistent results", dotHotel does not appear to be suggesting that the dispute resolution procedures set out in Module 3 of the Applicant Guidebook, or the Procedure, were not followed. Rather, DotHotel appears to be seeking reconsideration of an alleged inaction – *i.e.,* ICANN's purported failure to act to implement appropriate quality controls. DotHotel suggests only that because other aspects of the New gTLD Program include quality control mechanisms, the objection and dispute resolution process should also include such mechanisms. (Request, Section 8.)

The NGPC notes that dotHotel submitted a survey regarding dis-similar String Confusion Objections results after the BGC issued its Recommendation. (*See* Attachment G to Reference Materials.) Due to the timing of this submission, the BGC did not have the opportunity to consider the survey before issuing its Recommendation. The survey has since been reviewed and considered. The NGPC has determined that the survey does not alter the BGC's Recommendation or the rationale contained in that Recommendation.

In addition to the above, the NGPC had opportunity to consider all of the materials submitted by the requestor, as well as all of the letters summited that relate to Request 13-6. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on 13-6, the full text of which can be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-hotel-25sep13-en.pdf and is attached to the Reference Materials to the NGPC Submission on this

matter. The BGC's Recommendation on Reconsideration Request 13-6 shall also be deemed a part of this Rationale.

In terms of timing of the BGC's Recommendation, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation to the Board [or NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless practical. *See* Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC would have to have acted on Request 13-6 by 22 September 2013. When Request 13-6 was submitted, the BGC's next meeting was already expected to take place during ICANN's Board workshop, scheduled for 26-28 September 2013. Because the preparations for this meeting had already taken place, and given the travel necessary prior to the workshop, the first practical opportunity for the BGC to take action on this Request was during the workshop; it was impractical for the BGC to consider Request 13-6 sooner. Upon making that determination, staff notified the requestor of the BGC's anticipated timing for review of Request 13-6.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel
Dated Noted: 21 November 2013
Email: amy.stathos@icann.org

ICANN NEW gTLD PROGRAM COMMITTEE SUBMISSION NO. 2013-10-XX-XX

TO:	**ICANN New gTLD Program Committee**
TITLE:	**Reconsideration Request 13-7**
PROPOSED ACTIONS:	**For Committee Consideration and Approval**

EXECUTIVE SUMMARY:

On 23 August 2013, Dish DBS Corporation ("Dish") submitted a reconsideration request ("Request 13-7" or the "Request") seeking reconsideration of the 29 July 2013 Expert Determination from a dispute resolution panel ("Panel") established by the Arbitration and Mediation Center of the World Intellectual Property Organization regarding The DirecTV Group, Inc.'s ("DirecTV") objection to the application for .DIRECT. Specifically, the Request seeks reconsideration of the Panel's determination sustaining DirecTV's objection to Dish's application for .DIRECT. The BGC considered Request 13-7 at its 25 September 2013 meeting and concluded that Dish has not stated proper grounds for reconsideration. The BGC recommended to the NGPC that the Request be denied and that no further action be taken in response to the Request.

BOARD GOVERNANCE COMMITTEE (BGC) RECOMMENDATION:

The BGC recommends that Request 13-7 be denied and that no further action be taken in response to the Request. As detailed in the Recommendation attached to the Reference Materials in support of this paper, the BGC determined that Request 13-7 fails to state any grounds that support reconsideration. The BGC further recommends that Dish's request for a hearing be denied.

PROPOSED RESOLUTION:

Whereas, Dish DBS Corporation's ("Dish") Reconsideration Request, Request 13-7, sought reconsideration the 29 July 2013 Expert Determination from a dispute resolution panel established by the Arbitration and Mediation Center of the World Intellectual Property Organization sustaining The DirecTV Group, Inc.'s objection to Dish's application for .DIRECT.

Whereas, the Board Governance Committee ("BGC") considered the issues raised in Request 13-7.

Whereas, the BGC recommended that Request 13-7 be denied because Dish has not stated proper grounds for reconsideration and the New gTLD Program Committee agrees.

Resolved (2013.10.XX.XX), the New gTLD Program Committee adopts the BGC Recommendation on Reconsideration Request 13-7, which can be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-dish-dbs-25sep13-en.pdf.

PROPOSED RATIONALE:

ICANN's Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. *See* Article IV, Section 2 of the Bylaws. The New gTLD Program Committee ("NGPC"), bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 13-7 and finds the analysis sound.

Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, procedures, Bylaws, and Articles of Incorporation.

Request 13-7 is about trademark rights. The requestor asks ICANN to disregard the Panel's decision to sustain DirecTV's objection to Dish's application for the .DIRECT new gTLD and requests that the decision be reviewed by a new expert panel. Dish also requests that ICANN provide applicants of "inconsistent or erroneous DRSP panel determinations with an avenue of redress that is consistent with ICANN's mandate to act with fairness." In the event that ICANN will not immediately reverse the decision, Dish requests that it be provided an opportunity to respond to the BGC, before the BGC makes a final recommendation. (Request, Section 9.) Dish also requests a hearing. (Request, Page 11.)

The Request calls into consideration: (1) whether the Panel's alleged influence by media accounts constitutes a process violation; and (2) whether ICANN's automatic accept of Dispute Resolution Service Provider ("DRSP") panel decision is contrary to ICANN's mandate to act transparently and fairly.

In consideration of the first issue, the BGC reviewed the grounds stated in the Request, including the attachment, and concluded that Dish failed to adequately state a Request for Reconsideration of staff action because they failed to identify any policy or process that was violated by staff. (BGC Recommendation, Pgs. 8-9, 13-13.) The NGPC agrees. Dish claims that the Panel, in reaching its conclusion that Dish's application for .DIRECT was not a "bona fide application," failed to accord proper weight to a declaration presented, and instead, was improperly influenced by Dish advertisements that were not part of the record. (Request, Section 10.) The BGC determined that, contrary to Dish's contention, there is no provision in the New gTLD Dispute Resolution Procedures (the "Procedure") that restricts a panel's ability to refer to or rely upon media advertisements. (BGC Recommendation, Pg. 7.)

The BGC noted that the relevant standard for evaluating a Legal Rights Objection is set out in Section 3.5.2 of the Applicant Guidebook ("Guidebook"). Section 3.5.2. sets forth eight non-exclusive factors that a panel will need to consider in cases where the objection is based on trademark rights. (Guidebook, Section 3.5.2.) The Procedure also makes clear that, in addition to applying the standards that have been defined by ICANN, 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).) The BGC found that the Panel applied the eight non-exclusive factors to Dish's LRO as required by the Guidebook and determined that the balance of factors favored DirecTV. (Determination, Pages 5-8.)

The BGC found that Dish misstated the alleged influence of media "accounts" on the Panel in rendering its determination. The Panel referenced television advertisements to illustrate the fact that Dish and DirecTV are direct competitors in the satellite television industry. (Recommendation, Pg. 7; Determination, Pgs. 4-5.) The BGC noted that Dish does not dispute the fact that the two are competitors, and both parties acknowledge that they provide satellite television services. (Recommendation, Pg. 7; Determination, Pgs. 2-3.) Thus, even

if the Panel's reference to television advertisements was somehow improper, there does not appear to be any prejudice to Dish. The BGC also noted that the "media accounts" at issue are advertisements produced by the parties to the objection proceedings, and not statements of journalists, so Dish's opposition to the decision because of these "media accounts" seems misplaced in any event. (BGC Recommendation, Pg. 7.)

In consideration of the second issue, the BGC concluded, and the NGPC agrees, that Dish's attempt to claim that the procedures set forth in the Guidebook, which followed years of inclusive policy development and implementation planning, are inconsistent with ICANN's Articles of Incorporation and Bylaws (or the recommendations of the GNSO) is not supported. The Guidebook sets out the standards used to evaluate and resolve objections. The Expert Determination shows that the Panel followed the evaluation standards. ICANN's acceptance of that Expert Determination as advice to ICANN is also in accordance with the established process. (Guidebook, Section 3.4.6.) Dish's disagreement as to whether the standards should have resulted in a finding in favor of DirecTV's objection does not mean that ICANN (or the Panel) violated any policy or process in reaching the decision (nor does it support a conclusion that the decision was actually wrong).

Moreover, the BGC found that Dish does not suggest that that the dispute resolution procedures set out in Module 3 of the Applicant Guidebook, or under the Procedure, were not followed. In its Request, Dish contends that ICANN's automatic acceptance of DRSP panel decisions, including those that are "erroneous or inconsistent," is contrary to ICANN's mandate to act transparently and fairly. (Request, Section 8, Page 4.) The BGC concluded that Dish's assertions are not accurate and do not support Reconsideration.

For the same reasons, the BGC found that ICANN's purported inaction in implementing new controls does not demonstrate a violation of any ICANN policy or process.

While parties to a dispute resolution proceeding may not always be satisfied with the determinations of the DRSP panels – and there may be divergence in the conclusions reached between the various panels – the Reconsideration process is not intended to reexamine the established dispute resolution process. Dish's belief that the objection and dispute resolution procedures should be changed does not constitute a policy or process violation that supports

reconsideration. Rather, the Request challenges the Panel's substantive determination. In the context of the New gTLD Program, Reconsideration is not a mechanism for direct, de novo appeal of panel decisions with which the requester disagrees, and seeking such relief is, in fact, in contravention of the established processes within ICANN.

The NGPC had the opportunity to consider all of the materials submitted by the requestor, and all letters submitted that relate to Request 13-7. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 13-7, the full text of which can be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-dish-dbs-25sep13-en.pdf and that is attached to the Reference Materials to the NGPC Submission on this matter. The BGC's Recommendation on Reconsideration Request 13-7 shall also be deemed a part of this Rationale.

In terms of timing of the BGC's Recommendation, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation to the Board [or NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless practical. *See* Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC needed to act by 22 September 2013. When Request 13-7 was submitted, the BGC's next meeting was already expected to take place during ICANN's Board workshop, scheduled for 26-28 September 2013. Because the preparations for this meeting had already taken place, and given the travel necessary prior to the workshop, the first practical opportunity for the BGC to take action on this Request was during the workshop; it was impractical for the BGC to consider Request 13-7 sooner. Upon making that determination, staff notified the requestor of the BGC's anticipated timing for review of Request 13-7.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel
Dated Noted: 21 November 2013
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ICANN NEW gTLD PROGRAM COMMITTEE SUBMISSION NO. 2013-10-XX-XX

TO:	**ICANN New gTLD Program Committee**
TITLE:	**Reconsideration Request 13-8**
PROPOSED ACTIONS:	**For Committee Consideration and Approval**

EXECUTIVE SUMMARY:

On 30 August 2013, Merck KGaA submitted a reconsideration request ("Request 13-8" or the "Request") seeking reconsideration of the 13 July 2013 resolution (the "Resolution") of the New gTLD Program Committee ("NGPC") that permitted and encouraged dispute resolution panels to use discretion in enforcing the deadlines set forth in the New gTLD Applicant Guidebook. Specifically, the Request challenges the NGPC resolution as it relates to Merck & Co. Inc.'s ("Objector") community objection to Merck KGaA's application for .MERCK, which was rejected by the International Chamber of Commerce ("ICC") for being filed after the published closing deadline. The BGC considered Request 13-8 at its 10 October 2013 meeting and concluded that Merck KGaA has not stated proper grounds for reconsideration. The BGC recommended to the NGPC that the Request be denied and that no further action be taken in response to the Request.

BOARD GOVERNANCE COMMITTEE (BGC) RECOMMENDATION:

The BGC recommends that Request 13-8 be denied and that no further action be taken in response to the Request. As detailed in the Recommendation attached to the Reference Materials in support of this submission, the BGC determined that Request 13-8 fails to state any grounds that support reconsideration.

PROPOSED RESOLUTION:

Whereas, Merck KGaA's Reconsideration Request, Request 13-8, sought reconsideration the 13 July 2013 resolution of the New gTLD Program Committee ("NGPC") that permitted and encouraged dispute resolution panels to use discretion in enforcing the deadlines set forth in the New gTLD Applicant Guidebook.

Whereas, Request 13-8 challenges the NGPC resolution as it relates to Merck & Co. Inc.'s community objection to Merck KGaA's application for .MERCK, which was rejected by the Dispute Resolution Service Provider for being filed after the published closing deadline set forth in the Applicant Guidebook.

Whereas, the Board Governance Committee ("BGC") considered the issues raised in Request 13-8.

Whereas, the BGC recommended that Request 13-8 be denied because Merck KGaA has not stated proper grounds for reconsideration.

Resolved (2013.10.XX.XX), the New gTLD Program Committee adopts the BGC Recommendation on Reconsideration Request 13-8, which can be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-merck-10oct13-en.pdf.

PROPOSED RATIONALE:

ICANN's Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. *See* Article IV, Section 2 of the Bylaws. The New gTLD Program Committee ("NGPC"), bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 13-8 and finds the analysis sound.

Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws, and Articles of Incorporation.

Request 13-8 seeks reconsideration of the Resolution that permitted and encouraged dispute resolution panels to use discretion in enforcing the deadlines set forth in the New gTLD Applicant Guidebook. Specifically, the Request challenges the NGPC resolution as it relates to the Objector's community objection to Merck KGaA's application for .MERCK, which was rejected by the Dispute Resolution Service Provider (DRSP) for being filed after the published closing deadline.

The Request calls into consideration: (1) whether the NGPC failed to consider material information in adopting the challenged Resolution; (2) whether the NGPC lacks the jurisdiction to "oversee, appeal or challenge" the procedural decisions of the DRSPs; and (3) whether the NGPC's actions constitute breaches of ICANN's Core Values, including the requirement to make "decisions by applying documented policies neutrally and objectively, with integrity and fairness," and the requirement to employ "open and transparent policy development mechanisms that … ensure that those entities most affected can assist in the policy development process".

In consideration of the first issue, the BGC reviewed the grounds stated in the Request, including the attachment, and concluded that Merck KGaA's failed to adequately state a Request for Reconsideration. Specifically, the BGC found that there is no support for Merck KGaA's claim that the NGPC failed to consider material information because the Resolution was based on "incomplete, and improperly compiled, reports by the ICANN Ombudsman." (Request, Pg. 16.) Contrary to Merck KGaA's claims that the Ombudsman denied Merck KGaA's right to be heard and issued its recommendations to the NGPC on the basis of unilateral communications with only the Objector's position being presented (Request, Pg. 5), the BGC noted that the reports from the Ombudsman that were considered by the NGPC did not address, nor were they intended to address, the Objector's complaint to the Ombudsman regarding the ICC's rejection of the objection to .MERCK. (NPGC Briefing Material.)

The Ombudsman issued only two reports to the Board relating to purportedly missed deadlines. The first report addressed an objection from Axis Communication AB to the Saudi Telecom Company's application for .AXIS (the ".AXIS Report"). (NGPC Briefing Materials 2, http://www.icann.org/en/groups/board/documents/briefing-materials-2-13jul13-en.pdf.) The second report addressed an objection to .GAY by GOProud (the ".GAY Report"). (NPGC Briefing Material, Pg. 10-11.) The BGC noted that based on the .AXIS Report and the .GAY Report, the NGPC adopted two very specific resolutions asking the respective DRSPs to reconsider/revisit their decisions relating to the relevant filings. In addition to the two specific resolutions, the NGPC adopted a resolution that generally permits and encourages DRSPs to exercise discretion in enforcing the deadlines set forth in the Applicant Guidebook. This more general resolution is <u>not</u> directed towards any one specific DRSP or

any one specific dispute resolution proceeding or Ombudsman's complaint, including the complaint relating to the .MERCK objection.

The BGC found that because neither report addressed the Objector's complaint to the Ombudsman – or, otherwise reflected a recommendation to the NGPC on how to resolve the Objector's complaint – there is no support for Merck KGaA's assertion that the NGPC failed to consider material information relating to the Objector's complaint. The NGPC agrees.

Moreover, the BGC noted that, in its published rationale for the Resolution, the NGPC acknowledged that, beyond the two Ombudsman reports, ICANN received several other inquiries from objectors, applicants, and the DRSPs about issues related to late filings and whether the DRSPs have the discretion to deviate from the specific deadlines set forth in the Applicant Guidebook. The NGPC concluded, in the interests of fairness and reasonableness, that it is appropriate for the DRSPs to exercise discretion, given the circumstances of each situation, in enforcing dispute resolution deadlines. (13 July 2013 Resolutions.) This grant of discretion is just that, it does not direct any DRSP to reverse any specific decision to accept or reject a late filing. Rather, the Resolution is intended to provide further guidance to the DRSPs on the issue of late submissions.

In consideration of the second issue, the BGC concluded, and the NGPC agrees, that the stated grounds do not constitute a proper basis for Reconsideration under ICANN's Bylaws. However, even if these were proper bases for Reconsideration, the above-stated grounds do not support reconsideration. The BGC noted that Article 23(a) of the New gTLD Dispute Resolution Procedure (the "Procedures") clearly provides ICANN with the jurisdiction to modify the procedures governing the dispute resolution process. (Procedures, Art. 23(a).) Thus, even if the challenged Resolution was considered a modification to the Procedures, the NGPC has the authority to make such modifications, provided the modifications are in accordance with ICANN's Bylaws.

In consideration of the third issue, the BGC determined, and the NGPC agrees, that Merck KGaA's assertions are unsupported and do not constitute a proper basis for Reconsideration under ICANN's Bylaws. As discussed above, the .MERCK complaint to the Ombudsman was not before the NGPC. The NGPC adopted two resolutions specifically addressing issues

surrounding objections to the applied-for .AXIS and .GAY strings, and adopted a third resolution generally permitting and encouraging DRSPs to exercise discretion in enforcing dispute resolution procedure deadlines. (13 July 2013 Resolutions.) This general grant of discretion is to be applied neutrally and objectively. Both the .AXIS Report and.GAY Report are publicly posted, and the NGPC clearly stated and published its rationale for the Resolutions (13 July 2013 Resolutions). The NGPC's actions – both the evaluation of the issues and its ultimate resolutions – were at all times open, transparent, and in good faith. Accordingly, there is no support for Merck KGaA's claim that the NGPC's actions were somehow inconsistent with ICANN's Core Values.

In addition to the above, the NGPC had opportunity to consider all of the materials submitted by the requestor, as well as all of the letters summited that relate to Request 13-8. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 13-8, the full text of which can be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-dish-dbs-25sep13-en.pdf and is attached to the Reference Materials to the NGPC Submission on this matter. The BGC's Recommendation on Reconsideration Request 13-8 shall also be deemed a part of this Rationale.

In terms of timing of the BGC's Recommendation, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation to the Board [or NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless practical. *See* Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC needed to act by 29 September 2013. Due to the volume of Reconsideration Requests received within recent weeks, the first practical opportunity for the BGC to take action on this Request was on 10 October 2013; 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 13-8.

Adopting the BGC's Recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

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