

ACCEPTANCE BY THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 14-1

22 MARCH 2014

The Requester, Medistry LLC, seeks reconsideration of the Expert Determination, and ICANN's acceptance of that Determination, upholding the Independent Objector's Community Objection to the application for .MED.

I. Summary And Analysis.

The Requester applied for .MED ("Requester's Application"). Three other applicants also applied for .MED. The Independent Objector ("IO") filed a Community Objection to the Requester's Application and won. The Requester contends that, among other things, the IO failed to follow Section 3.2.5 of the Applicant Guidebook ("Guidebook") by objecting to the Requester's Application when there was no public statement opposing the Requester's Application, and the Expert Panel "perpetuated that failure by allowing the IO's invalid objection to proceed to a determination on the merits." (Request, Section 10, Pg. 10.) The Requester further contends that staff also violated Section 3.2.5 by allowing the Community Objection to proceed and by accepting the Expert Determination.

Section 3.2.5 of the Guidebook states that in "light of the public interest goal noted above, the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere." (Guidebook, Section 3.2.5.)

To support its claim that there were no publicly made comments in opposition to the Requester's Application, with its Reconsideration Request 14-1, the Requester submitted letters from the National Association of Boards of Pharmacy ("NABP") and the American Hospital Association ("AHA"). Both of these letters explain that public statements made by these entities

regarding .MED, which appear to be the comments that caused the IO to file his objection,¹ were not made in opposition to the Requester's Application.

Specifically, the letter from NABP to the Cleveland Clinic,² dated 10 January 2014, states:

We wish to clarify that NABP's comment was intended to be advisory in nature, stressing that health-related gTLDs should account for patient safety and implement protections against fraud and abuse. In submitting this comment, NABP did not oppose Medistry's application to be the Registry Operator for the .MED gTLD, nor take any position as to whether Medistry's .MED application contained appropriate safeguards.

NABP acknowledges that the Public Interest Commitments filed by Medistry in response to the Governmental Advisory Committee's Safeguard Advice may satisfactorily address the issues raised in NABP's Public Comment.

(10 January 2014 Letter from NABP to the Cleveland Clinic.) The letter from AHA to Cleveland Clinic, dated 14 January 2014, states:

It has come to the attention of the American Hospital Association [] that Public Comments AHA filed against HEXAP SAS, DocCheck AG, and Charleston Road Registry on September 26, 2012 have been mistakenly used by a Panelist in Case NO. EXP/403/ICANN/20 against an unintended party, Medistry LLC....AHA purposefully did not file a similar Public Comment related to Medistry LLC....Again, so there can be no ambiguity: AHA did not then, and does not now, express any comment in opposition (or resistance) to Medistry's application for .MED.

(14 January 2014 Letter from AHA to Cleveland Clinic.)

¹ On 9 August 2012, the National Association of Boards of Pharmacy ("NABP") submitted a public comment on the Requester's Application. (<https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/5006>.) On 26 September 2012, the American Hospital Association ("AHA") submitted public comments relating to .MED applications submitted by other three applicants. (<https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/10936>; <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/10933>; and <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/10931>.) But AHA did not submit a public comment regarding Requester's Application.

² Requester is owned and operated by CC Web Solutions, a wholly owned subsidiary of the Cleveland Clinic and Second Genistry LLC. (See <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/216?t:ac=216>.)

These letters do raise some questions as to whether a threshold procedural requirement set out in the Guidebook was satisfied. The relevant threshold requirement is that at least one comment in opposition to the application must have been made in the public sphere before an IO Objection can be filed. Although NABP and AHA did not send the January 2014 letters to the Requester until after the Expert Panel issued its Determination,³ now that they are available to the BGC, the letters are relevant to the BGC's analysis of whether the IO's Objection satisfied the procedures found in Section 3.2.5 of the Guidebook. Accordingly, the BGC finds that Request 14-1 should be granted to provide sufficient time to further evaluate whether any actions were taken in contravention of established policy or procedure, such as whether the threshold requirement set forth in Section 3.2.5 of the Guidebook was satisfied. The BGC will ensure that ICANN further evaluates this issue and provides a report to the BGC for consideration.

It is important to note that the BGC's acceptance of this Reconsideration Request should in no way reflect poorly on the IO or be seen as a finding that the IO failed to properly discharge his duties. Rather, this determination is a recognition that the Requester has submitted substantial information indicating that the IO's assessment of what could be described as vague comments (particularly those of NABP), may not have been consistent with what the commenters intended. Now that this evidence is available to the BGC, and relevant to the BGC's assessment of the Request, this evidence must be further evaluated.

³ The Panel noted in its Determination that Requester referenced "subsequent conversations between [Requester] and the NABP [that] confirmed the NABP's intent was 'not to file an opposition specifically against [Requester].'" The Panel determined that such "unsubstantiated and unproven" allegation is "of no avail. As far as it is known to the Panel, NABP has not retracted its public comments." (Determination, Pg. 26, ¶ 76.)

II. Accepting the Reconsideration Request.

Based on the foregoing, the BGC concludes that the Requester has stated proper grounds for reconsideration in that the Requester has identified a Guidebook requirement that may not have been satisfied. The BGC will ensure that a further evaluation be conducted as to whether the IO's Community Objection (and by extension the resulting Expert Determination) was consistent with Section 3.2.5 of the Guidebook.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC concludes that this decision to accept Reconsideration Request 14-1 is final and that no further consideration of whether to accept this Request by the Board (or the New gTLD Program Committee) is warranted.

The BGC wants to make clear that merely accepting a Reconsideration Request does not necessarily mean that the BGC will overturn, reverse, or otherwise alter the decision (or in this case the Objection and Expert Determination) that serves as the basis of Reconsideration Request 14-1. Accepting the Request gives the BGC the time to gather and evaluate additional information to determine if any changes should be made. Once the BGC has completed its evaluation of the additional information, the BGC will issue a supplemental determination to address all the claims asserted in the Request.⁴

In terms of timing of the BGC's Determination, we note that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. (*See* Article IV, Section 2.16 of the Bylaws.) To satisfy the thirty-day deadline, the

⁴ The BGC acknowledges the Requester's request for an in-person presentation to the BGC. At present, and based on the BGC's acceptance of the Request, such a presentation is not necessary. But as this matter progresses, the BGC will notify the Requester, and other relevant parties, of a desire for in-person presentations if the BGC determines that such presentations will be helpful in completing the BGC's analysis.

BGC would have to have acted on Reconsideration Request 14-1 by 18 February 2014. Due to the issues raised by Reconsideration Request 14-1 and the number of Reconsideration Requests received in recent weeks, additional time was needed to evaluate this Request. As such, the first practical opportunity for the BGC to take action on this Request was on 22 March 2014; it was impractical for the BGC to consider the Request sooner. Upon making this determination, Staff notified the Requester of the BGC's anticipated timing for the review of Reconsideration Request 14-1, and no objections were raised.