

DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 14-11

29 APRIL 2014

The Requester, Commercial Connect, LLC, seeks reconsideration of the decision by ICANN staff to change the application status of the Requester's .SHOP application to "On Hold" to reflect that the application is involved in multiple ICANN Accountability Mechanisms.

I. Brief Summary.

The Requester applied for .SHOP. The Requester subsequently filed string confusion objections to two other applied-for strings: (i) Amazon EU S.a.r.l.'s application for the Japanese translation of "online shopping"; and (ii) Top Level Domain Holdings Limited's Application for the Chinese Translation of "shop." The Requester's objection to Amazon's application was sustained; its objection to Top Level Domain Holdings Limited's application was denied. Following the issuance of the expert determinations on these objections, several accountability mechanisms were invoked relating to Requester's .SHOP application. Specifically, Amazon submitted Reconsideration Request 13-9 seeking reconsideration of the expert determination on Requester's objection. The Requester submitted Reconsideration Request 13-10 seeking reconsideration of the expert determination on its objection to Top Level Domain Holdings Limited's application. Requests 13-9 and 13-10 are pending consideration by the New gTLD Program Committee (NGPC), which will follow the NGPC's consideration of matters surrounding certain string confusion expert determinations. Additionally, the Requester also invoked a Cooperative Engagement Process (CEP) as part of the Independent Review Process for .SHOP.

Under the New gTLD Program process, applications that are subject to pending activities that may impact the status of the applications, such as accountability mechanisms, are regularly reviewed and may be placed on hold until the pending activities have been resolved. Because of the various accountability mechanisms that have been invoked relating in some way to Requester's .SHOP application, the Requester received an email informing it that its "application status will be changed to 'On Hold' to reflect that the application is involved in an ICANN Accountability Mechanism." The Requester then filed Reconsideration Request 14-11, requesting reconsideration of the ICANN staff's action in placing the Requester's Application on hold.

With respect to the claims submitted by the Requester, there is no evidence that ICANN staff acted in contravention of established policy or procedure in placing Requester's application on hold. Therefore, the BGC concludes that Request 14-11 should be denied.

II. Facts.

A. Background Facts.

The Requester Commercial Connect LLC ("Requester") applied for .SHOP. The Requester subsequently filed string confusion objections to: (i) Amazon EU S.a.r.l.'s ("Amazon") application for a Japanese string that translates to mean "online shopping," ("Amazon's Applied-For String"); and (ii) Top Level Domain Holdings Limited's ("TLDH") Application for a Chinese string that translates to mean "shop" ("TLDH's Applied-For String"), contending that the two applied-for strings were "confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications." (New gTLD Applicant Guidebook, § 3.3.2.1; New gTLD Dispute Resolution Procedure, Art. 2(e).)

The Objections were referred to the ICDR,¹ which appointed two separate panels, one to render an expert determination on each of the Requester's objections. The panel appointed to hear the Requester's objection to TLDH's Applied-for String rendered its determination on 8 August 2013 ("TLDH Expert Determination"), dismissing the Requester's objection. The panel appointed to hear the Requester's objection to Amazon's Applied-for String rendered its determination on 21 August 2013 ("Amazon Expert Determination"), finding in favor of the Requester.

On 4 September 2013, Amazon submitted Reconsideration Request 13-9 seeking reconsideration of the Amazon Expert Determination.

On 5 September 2013, the Requester submitted Reconsideration Request 13-10, seeking reconsideration of the TLDH Expert Determination.

On 10 October 2013, the BGC² recommended that Reconsideration Requests 13-9 and 13-10 be denied on the basis that neither Amazon nor the Requester had stated proper grounds for reconsideration. The BGC further recommended that "staff provide a report to the NGPC . . . setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute process in similar disputes involving Amazon's Applied-for String and TLDH's Applied-for String." (Determination on Reconsideration Request 13-9, p. 14; Determination on Reconsideration Request 13-10, p. 11.) The BGC further recommended that "the strings not proceed to contracting prior to staff's report being produced and considered by the NGPC." (*Id.*) Requests 13-19 and 13-10 are pending

¹ International Centre for Dispute Resolution.

² Board Governance Committee.

consideration by the NGPC, which will follow the NGPC's consideration of matters surrounding certain string confusion expert determinations relating to the issues raised within these Requests.

On 12 February 2014, the Requester invoked a Cooperative Engagement Process ("CEP") in an effort to resolve or narrow the issues that are contemplated to be brought to an Independent Review Process. (Bylaws, Art. IV, § 3.14.) The CEP is currently ongoing.

On 14 March 2014, the Requester received an email from ICANN stating that the Requester's "application status will be changed to 'On Hold' to reflect that the application is involved in an ICANN Accountability Mechanism." (Request, § 3, p.1.)

On 2 April 2014, the Requester filed Reconsideration Request 14-11, requesting reconsideration of the ICANN staff's decision to change the application status of the Requester's Application to "On Hold."

B. The Requester's Claims.

Reconsideration Request 14-11 seeks reconsideration of ICANN staff's alleged violation of established policies and procedures by placing the Requester's application on hold. (*Id.*, § 3, Pg. 2) Specifically, the Requester contends that "unfairly placing our application on hold violates our rights and the commitments of neutrality, objectivity, integrity and fairness made by ICANN." (*Id.* § 3, Pg.8.) While Requester references its efforts to introduce .SHOP over the course of fourteen years and makes a number of varied assertions concerning ICANN's alleged failings, Requester does not state that it is seeking reconsideration of these matters in this Request and has provided no basis supporting reconsideration of such matters.³ For purposes of responding to Request 14-11, the BGC addresses only the Requester's claim that ICANN policy

³ Many of the events chronicled by the Requester occurred years – and even decades – ago. Any challenge to an alleged Board action or inaction concerning such long past conduct would be time-barred in all events. (Bylaws, Art. IV, § 2.5.).

or process was violated by virtue of the Requester's .SHOP application being placed on hold.

C. Relief Requested.

The Requester asks that ICANN lift the hold status on Requester's Application or, in the event the Requester's Application cannot be released from hold, that ICANN place "the complete new TLD process . . . on hold until such time where ICANN can made correct and proper determinations and allow these decisions to be applied to all applicants equally and fairly."

(Request, § 9, p. 13.)

III. Issues.

In view of the claims set forth in Request 14-11, the issue is whether ICANN staff acted in contravention of established policy or process by placing the Requester's gTLD application on hold to reflect that the .SHOP application is involved in an ICANN Accountability Mechanism.

IV. The Relevant Standards for Evaluating Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.⁴ (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or the NGPC agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

⁴ Article IV, § 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN 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); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, 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
- (c) 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.

Requests challenging staff actions or requests must be submitted within 15 days of “the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action.” (Bylaws, Art. IV, § 2.5.)

V. Analysis and Rationale.

1. The Request is Untimely.

The Request is untimely. The Requester seeks reconsideration of ICANN staff’s decision to place the Requester’s Application on hold. As acknowledged by the Requester, the Requester “received an email” from ICANN on 14 March 2014, stating, among other things, that “[y]our application status will be changed to ‘On Hold’ to reflect that the application is involved in an ICANN Accountability Mechanism.” (Request, § 3, Pgs.1-2.) Requester states elsewhere that it only became aware of the staff’s action on 18 March 2014, but this is inconsistent with the Requester’s concession that it received the hold notification email from ICANN on 14 March 2014. (*Compare* Request, § 3, Pg. 1 *with* Request, § 5, Pg. 10.) Absent an explanation of this contradiction, the Requester will be deemed to have first become aware of the contested staff action on 14 March 2014. Request 14-11 was not filed until 2 April, more than 15 days from the date on which the Requester became aware of the challenged staff action. Request 14-11 is therefore untimely under ICANN’s Bylaws. (Bylaws, Art. IV, § 2.5.)

Notwithstanding the foregoing, even if the Request were timely, the BGC finds that the stated grounds for the Request do not support reconsideration.

2. ICANN Staff Did Not Violate Established Policy or Procedure in Placing the Requester’s Application on Hold.

The Requester claims that ICANN staff acted in violation of established policy or procedure in placing its .SHOP application on hold. (Request, § 3, p. 8.) The Requester’s claim is unsupported. In the context of the New gTLD Program, ICANN has publicly stated that an

“On Hold” designation “may be applied if there are pending activities (*i.e.* ICANN Accountability Mechanisms ...) that may impact the status of the application.” (<http://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en>.) ICANN’s accountability mechanisms are identified in ICANN’s Bylaws and include: (i) Ombudsman; (ii) Reconsideration Request process; and (iii) the Independent Review process (“IRP”), including Cooperative Engagement in advance of the filing of an IRP.⁵ (Bylaws, Art. IV, §§ 2, 3; *see also*, <http://www.icann.org/en/news/in-focus/accountability/mechanisms>.) Here, the Requester’s Application was placed on hold because the Application is subject to two pending Reconsideration Requests (one filed by the Requester) and because the Requester has also initiated a CEP in anticipation of an IRP concerning its application.

Specifically, the Requester filed Reconsideration Request 13-10 seeking reconsideration of the TLDH Expert Determination. Similarly, Amazon filed Reconsideration Request 13-9 seeking reconsideration of the Amazon Expert Determination.⁶ Both Requests are still pending before the NGPC. Furthermore, as the Requester notes in Request 14-11, the Requester is currently in an active CEP with ICANN concerning its .SHOP application. (Request, § 3, Pg. 3.)

Application status updates are part of the New gTLD Program process “to provide a more complete picture of the current status of applications...[a]s applications complete evaluation and proceed to the next phases of the New gTLD Program.”

⁵ An “on hold” designation is considered for and typically assigned to applications on which status may be impacted by a Reconsideration Request or known Ombudsman complaint. Neither of these Accountability Mechanisms has a process step that allows a party to seek a stay of activity related to one or more impacted applications. In contrast, the “on hold” designation is not typically assigned to an application whose status may be impacted by an Independent Review Process (“IRP”) because the IRP has a built in mechanism within the IRP procedures that allows parties to seek an emergency stay of activity related to impacted applications.

⁶ The Requester contends that those two objections did not involve applications in its contention set, however, the Amazon Applied-for String is in the Requester’s contention set. <https://gtdresult.icann.org/application-result/applicationstatus/contentionsetdiagram/229>

(<http://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en>.) The current application status page reflects the New gTLD Program process in which an application is currently engaged. According to the process for updating application status:

An application engaged in one of the New gTLD Program processes as defined in section 1.1.2 of the AGB is considered an active application and may have one of the following statuses: In IE, In EE, Evaluation Complete, In Contracting, In PDT, or Transition to Delegation. Alternatively, the application status page may reflect one of the following statuses for an application:

- Withdrawn – The applicant has withdrawn the application and will not continue in the New gTLD Program. This is a final status.
- Not Approved – The application is not approved and shall not continue in the New gTLD Program as a result of a resolution passed by the ICANN Board of Directors or a Committee of the ICANN Board, such as the New gTLD Program Committee.
- Will Not Proceed – The application has completed a Program process, and based on the outcome will not continue, as defined in the AGB. This could include process outcomes including but not limited to not passing evaluation, a dispute resolution proceeding, not prevailing in a contention resolution auction.
- On-Hold – May be applied if there are pending activities (i.e. ICANN Accountability Mechanisms, ICANN Public Comment periods on proposed implementation plans for Program-related activities) that may impact the status of the application. The application stays in the current process step and will not proceed to the next step in the Program until the On-Hold status is cleared.
- Delegated – Indicates the gTLD for this application has been delegated in the Root Zone of the DNS. This is a final status.

(<http://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en>.)

In light of the pending Reconsideration Requests 13-9 and 13-10, and the active CEP, the decision by ICANN staff to change the status of the Requester's .SHOP application to “on hold” was in accordance ICANN transparency and with stated procedures for application status updates and of placing applications on hold pending the final outcome of accountability mechanisms.

The Requester also claims that its Application should not have been placed on hold because “strings that[] should be in contention with .shop [] have not been placed on hold”

(Request, § 3, p. 2.) The Requester does not, however, identify any ICANN process or policy that was violated in this regard. On the contrary, as set forth in the contention set status update procedure below, ICANN's stated policy is to place all applications in a contention set on hold if at least one application in the set is on hold.

Explanation of Contention Set Status:

The following will be used to indicate the status of Contention Sets:

- **Active** – The set contains at least two active applications in direct contention with each other and no applications are identified as On-Hold.
- **On Hold** – The set contains at least one application with a status of On-Hold. Applications in the set cannot proceed to New gTLD Program Auctions until the set is no longer on hold.
- **Resolved** – No direct contention remains amongst the active applications and no applications are identified as On-Hold.

(<http://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en>.) As the Requester acknowledges, ICANN staff complied with its policy, placing all the applications in the Requester's contention set on hold.⁷ The Requester cites to no policy or procedure that would require ICANN to put an undefined number of gTLD applications on hold simply because one contention set is on hold.

VI. Decision.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Reconsideration Request 14-11. Given that there is no indication that staff violated any policy or process in placing the Requester's Application on hold, this Request should not proceed. If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

⁷ <https://gtdresult.icann.org/application-result/applicationstatus/contentionsetdiagram/229>

In accordance with Article IV, § 2.15 of the Bylaws, the BGC's determination on Request 14-11 shall be final and does not require Board consideration. The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-11 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board (or the New gTLD Program Committee) is warranted.