

## **Reconsideration Request by Corn Lake, LLC**

*Regarding Action Contrary to Established ICANN Policies  
Pertaining to Community Objections to New gTLD Applications*

Independent Objector v. Corn Lake, LLC  
ICC Case No. EXP/395/ICANN/12, re <.CHARITY>

### **Introductory Summary**

i. Corn Lake, LLC, “adversely affected by” an “ICANN action ... that contradict[s] established ICANN policy,” respectfully submits this request for reconsideration (“Request”) to the Board Governance Committee (“BGC”). Bylaws Art. IV § 2.2(a). Corn Lake, also referred to as “Applicant,” requests the BGC to reconsider action by the International Chamber of Commerce (“ICC”) as the dispute resolution services provider (“DRSP”) for community objections and, more particularly, the 9 January 2014 determination (“Ruling”) of the ICC’s expert panel (“Panel”) in the above-captioned matter (the “Proceeding”). The Ruling sustained the objection (“Objection”), brought on community grounds by the Independent Objector (“IO”), to the <.CHARITY> gTLD (the “String”) sought by Corn Lake’s application ID 1-1384-49318 (“Application”).

ii. The Ruling fails to follow ICANN processes and policies concerning community objections as expressed in Sections 3.5 and 3.5.4 of the gTLD Applicant Guidebook (“Guidebook” or “AGB”). “ICANN has determined that the reconsideration process can properly be invoked for challenges of the third party DRSPs’ decisions as challenges of the staff action where it can be stated that ... the DRSP failed to follow the established policies or processes in reaching the decision ....”

<http://newgtlds.icann.org/en/announcements-and-media/webinars> (MP3 at 27:40).

iii. “[T]he Panel *shall* apply the standards ... defined by ICANN” in the Guidebook for *all* objections. New gTLD Dispute Resolution Procedure (“Procedure,” cited as “Proc.”), AGB Mod. 3 Attmt., Art. 20(a) (emphasis added). This includes the community objection elements, all four of which the IO had the burden to prove. AGB at 3-25. However, despite the lack of evidence of a “clearly delineated” charity

“community,” or of “material detriment” to that alleged community, the Panel upheld the Objection and divested Applicant of its presumptive right to compete for the TLD.

iv. The Panel’s contravention of ICANN policy and process becomes more glaring in light of the opposite result reached by the same Panel in the consolidated case brought by the IO against Spring Registry Limited (“SRL”). In the SRL case, EXP/400/ICANN/17, the Panel held that the alleged community would not likely incur material detriment because of obligations that SRL had indicated in a supplemental filing it would assume in its registry agreement with ICANN.<sup>1</sup> The Panel in that case accepted SRL’s additional evidence negating the IO’s claim of material detriment, and denied the objection. Here, by contrast, the Panel refused to consider a proffered further submission showing that, by its proposed adoption of Government Advisory Council (“GAC”) advice regarding the String, ICANN would require Corn Lake to employ stringent protection mechanisms of the type the Panel found sufficient in SRL.

v. Reconsideration properly lies to remedy the Ruling as inconsistent with ICANN policy and process and with the Panel’s own decision in the consolidated case. “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment.” Bylaws Art. II § 3. Corn Lake urges the BCG to correct this anomaly, enforce uniform application of ICANN’s policies and procedures, reverse the Ruling and allow the Application to proceed to compete for the String with the similar application that withstood the IO’s indistinguishable objection.

## 1. Requestor Information

**Name:** Corn Lake, LLC

**Address:**

Contact Information Redacted

**Email:**

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<sup>1</sup> The consolidated case also included the IO’s community objection against Excellent First Limited (“EFL”), EXP/399/ICANN/16. That matter, however, involves the Chinese IDN for <CHARITY>, as well as other facts sufficiently distinct from this Proceeding, that Corn Lake does not rely on that case even though it, like the SRL decision, rejected the IO’s objection.

**Counsel:** John M. Genga, Don C. Moody  
The IP and Technology Legal Group, P.C.  
dba New gTLD Disputes

Contact Information Redacted

**Address:**

**Email:**

**2. Request for Reconsideration of:**

Board action/inaction

Staff action/inaction

**3. Description of specific action you are seeking to have reconsidered.**

Applicant seeks reconsideration of the failure of the ICC and the Panel, as appointees of ICANN and agents subject to and responsible for carrying out ICANN policy and process, to require proof of the community objection elements established by the Guidebook and Procedure. Applicant urges the BGC to apply the proper policies and processes established by ICANN in reconsidering the Ruling and, as a result, to reverse the Ruling, reject the Objection and maintain the Application as active.

**4. Date of action:**

9 January 2014

**5. On what date did you become aware of the action?**

9 January 2014

**6. Describe how you believe you are materially affected by the action:**

6.1. "The findings of the panel will be considered an expert determination and advice that ICANN *will accept* within the dispute resolution process." AGB § 3.4.6 (emphasis added). While ICANN has yet to "accept" the Ruling formally, it represents the first instance by which Applicant has become aware in this case of conduct by the DRSP vendor in excess of and in conflict with ICANN policy and process. Rather than wait for action by ICANN in response to the Ruling – *i.e.*, that the Application "will proceed no further" as contemplated by AGB § 1.1.2.9, at which point Applicant also could rightly seek reconsideration – Applicant permissibly makes this Request now.

6.2. The failure of the Panel to follow the standards of AGB §§ 3.5 and 3.5.4 has deprived Applicant of the benefit of the “presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD ...” See <http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf>. In reliance on that presumption, the strength of its Application, the rules and objection standards published in the Guidebook and the years of experience of its principals in the domain name industry, Applicant has invested the \$185,000 application fee, tens of thousands more in attorneys’ fees responding to the Objection and further submissions to the Panel, ICC and Panel fees of over €30,000, and substantial additional financial and other resources preparing to operate a <.CHARITY> gTLD (demonstrable by an accounting that Applicant currently has in the works), all of which would be lost should the Ruling stand and ultimately get accepted by ICANN.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

If not reversed, the Ruling may impact other applicants subjected to community objections. The inconsistency of the ICC and its same Panel in applying the standards that ICANN has directed them to employ creates danger of more expert determinations that contravene ICANN substantive policy and burden of proof process as expressed in AGB §§ 3.5 and 3.5.4.

**8. Detail of Board or Staff Action – Required Information**

**Staff Action:** The Ruling constitutes ICANN action contrary to (i) the ICANN Bylaws prohibiting action that singles out an actor for disparate treatment, and (ii) ICANN policy regarding the burden of proof and the presumptive right of qualified applicants to operate new gTLDs absent proof meeting substantive objection standards. Such policy and process violations are discussed at greater length in Section 10, *infra*.

**Board action:** Not applicable.

**Provide the Required Detailed Explanation here:**

8.1. Corn Lake timely submitted the Application to ICANN by 13 June 2012. A true and correct copy of the Application appears as Annex B, Exhibit 1 to Corn Lake's Response to the Objection ("Response" or "Resp."), **Attachment 2** hereto.<sup>2</sup>

8.2. The IO timely filed his Objection on or about 12 March 2013, a true and correct copy of which appears in **Attachment 1** hereto. Among other things:

8.2.1. The Objection sets forth the four tests that all must be met for a community objection to prevail: (i) a clearly delineated community; (ii) substantial opposition by that community to the application; (iii) strong association between the community and the String; and (iv) likelihood of material detriment to the rights or legitimate interests of the community targeted by the String. AGB § 3.5.4 and 3-25.

8.2.2. As to the first element of "clearly delineated community," the IO recognizes that those with potential interest in a <.CHARITY> TLD comprise "a broader group than charities *per se*," but argues that the term itself *includes* "charities and charitable organizations." Objn (**Attmt 1**) ¶ 19. The IO concedes that "CHARITY" has wide meaning that itself does not "clearly delineate" a "community," and that any such "community" does not have "clear[ ] formal boundaries ... in terms of membership or registration;" however, "that in no sense means that there is no community consistent with the Guidebook." *Id.* ¶ 21. The IO states that he invokes a "community" of "charities and charitable institutions," which are "delineated from Internet users in general, and are rightly seen as constituting a community." *Id.* ¶¶ 19-20.

8.2.3. Regarding the fourth, "material detriment" factor, the IO contends that the Guidebook "puts particular attention to the issue whether the Applicant is not acting or does not intend to act in accordance with the interests of the community," and that, "[i]n such a case, it is more than likely that the rights and interests of the

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<sup>2</sup> We refer to the items submitted herewith as "Attachments" (citation "Attmt") to distinguish them from the "Annexes" and "Exhibits" included within some of the "Attachments."

community will be detrimentally affected by operation of the gTLD as projected by the applicant." Objn (**Attmt 1**) ¶ 36. Applicant vehemently disputes this.

8.2.4. "Applicant ... has not addressed the specific needs of the charity community in its proposed management of the gTLD." Objn ¶ 41. "[T]hree key factors ... demonstrate ... likelihood of detriment," *id.*:

8.2.4.1. First, the IO finds it "striking that the Application has not been framed ... as a community based gTLD." Objn (**Attmt 1**) ¶ 42. "In so doing, the Applicant avoids certain consequences in terms of the evaluation of the Application and the terms under which it will be operated. In particular, the Applicant will not be committed to establish requirements for registration by members of the TLD community and use of registered domain names in conformity with the stated purpose of the community-based TLD." *Id.* In other words, the IO contends that <.CHARITY> *must* operate as a community in order to protect the community's interests.

8.2.4.2. Second, the IO takes issue that "the Application does not propose any eligibility criteria for the string." Objn (**Attmt 1**) ¶ 43. He contends that Applicant's "safety and security measures which are only directed at remedying problems and abuses if and when they occur do not meet the specific needs and requirements of the charity community ...." *Id.* ¶ 44.

8.2.4.3. Third, notwithstanding that Applicant undertakes to implement an "Anti-Abuse Policy," the IO quarrels that the Application does not "suggest[ ] that the charity community ... will be associated in the elaboration of this policy or its implementation." Objn (**Attmt 1**) ¶ 45.

8.2.5. From its own foregoing opinions, the IO concludes – and the Panel accepts – that the "absence of preventative security measures assuring the charitable nature, the integrity and also the trustworthiness of the entities represented and the information provided ... through stringent eligibility criteria established in advance in

collaboration with the community and its stakeholders, creates a likelihood of detriment to the rights or legitimate interests of the charity community ...” Objn (**Attmt 1**) ¶ 46.

8.3. After the ICC consolidated the cases on 7 May 2013, Applicant timely submitted on 6 June 2013 its Response, a true and correct copy of which appears in **Attachment 2**. Points from the Response pertinent to this Request include:

8.3.1. “There is a presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD,” and a “corresponding burden upon a party that objects to the gTLD to show why that gTLD should not be granted to the applicant.” Resp. (**Attmt 2**) at 6, citing <http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf>. “The objector bears the burden of proof in each case.” AGB at 3-18.

8.3.2. A “clearly delineated” community means more for the Objection on the merits than it does for standing, or else the substantive objection elements would add nothing. Resp. (**Attmt 2**) § C.1. As such, the <.CHARITY> TLD itself must denote such a community. The sole word “charity” cannot do so, since *no boundaries* surround the multiple millions of persons and organizations involved in philanthropy worldwide. The IO itself has recognized that such a generic term with many meanings cannot designate a “community” under the Guidebook:

A specific community should distinguish itself from others, precisely by its characteristics or specificities. It cannot be the case for a “generic term” which, by definition, goes beyond specificities as it is used by very different persons ... [and] *cannot be considered as a clearly delineated community*.

See **Attmt 2** Annex C, “Community Objections” ¶ 4 (emphasis added).

8.3.3. Applicant sets forth the six Guidebook elements for the Panel to consider in determining whether the Objector has discharged its burden to prove “material detriment.” **Attmt 2** at 11-12, citing AGB at 3-24. The Objection fails to do

more than mention most of these factors. Specifically, it does not attempt to establish that the String would interfere with “core” activities of a purported “charity” community, that any such “community” in any way “depends” upon the DNS for any such “core” activities, or any level of certainty that detrimental outcomes will occur. *Id.* at 13.

8.3.4. The Objection contends merely that some unspecified harm might occur to a “charity community” because insufficient mechanisms exist to preserve the “trust” users might place in a <.CHARITY> domain. AGB at 3-24. Thus, the Objection would have Applicant operate the gTLD as a community. Yet, the Guidebook nowhere requires this. “The ultimate goal of the community-objection process” is not simply “to prevent the misappropriation of a community label by delegation of a TLD,” but also “to ensure that an objector cannot keep an applicant with a legitimate interest in the TLD from succeeding.” <http://www.icann.org/en/topics/new-gtlds/summary-analysis-proposed-final-guidebook-21feb11-en.pdf>. In any event, the Application – the source examined for “material detriment” – does include 14 protective mechanisms required by ICANN for new gTLDs, eight further steps for Corn Lake (as a Donuts Inc. affiliate) to take with all of the over 300 strings for which Donuts has applied through its gTLD applicant affiliates, and four additional measures Donuts specifically provides for <.CHARITY> and other “sensitive” strings. **Attmt 2** at 12-13, Ann. B ¶¶ 9-12, Ex. 1 at 8.

8.3.5. Given that ICANN does not require operating any string as a community – or, by extension, imposing advance eligibility criteria to confirm the status of registrants as legitimate “members” of any such “community” – a finding of “material detriment” simply cannot follow from the absence of such eligibility verification. Such a finding would improperly supplant an ICANN policy with the Panel’s own belief.

8.4. The IO requested and was granted leave to make a further submission (“Reply”), which he timely did on or about 22 August 2013, a true and correct copy of which appears as **Attachment 3** hereto. Among other things, the Reply reiterates the Objection’s position that the interests of a charity “community” require “stringent



eligibility criteria established in advance in collaboration with the community and its stakeholders.” **Attmt 3** ¶ 25, *citing* Objn ¶ 48. The Reply goes on to claim evidence of detriment from Applicant’s “continu[ing] to challenge the safeguard measures advised by” the GAC April 2013 “Beijing communiqué.” **Attmt 3** ¶ 27. That document proposes eight specific protective mechanisms for so-called “Category 1” or “sensitive” strings, including <CHARITY>. **Attmt 3** Annex 1 § IV.1.b. and Annex I thereto.

8.5. Applicant timely submitted its response (“Sur-Reply”) to the Reply on or about 6 September 2013, a true and correct copy of which appears as **Attachment 4** hereto. The Sur-Reply notes that, whether or not Applicant agrees with the GAC recommendations, it would have to implement them if ultimately adopted by ICANN.

8.6. ICANN now proposes eight protections for .CHARITY that address the GAC’s “Category 1” Beijing recommendations. Corn Lake attempted to bring this to the Panel’s attention by an email of 3 December 2013, a true and correct copy of which, with annexes, appears as **Attachment 5** hereto. That submission sought to make the Panel aware that the position taken by the IO in support of its “material detriment” argument has become moot, since Applicant, if awarded the String, must agree in its registry agreement to implement the measures based on the GAC advice relied upon by the IO. Once approved by the Board, the safeguards must be “implemented as public interest commitments [PICs] in ... the New gTLD Registry Agreement” for each “Category 1” registry operator. Such steps – which Applicant must take if awarded the String and in order to maintain the right to operate it – directly address the specific concerns raised by the IO and echoed in the Ruling, as shown in Section 10 *infra*.

8.7. By an email of 5 December 2013, a true and correct copy of which appears as **Attachment 6** hereto, the IO opposed Applicant’s effort to notify the Panel of the foregoing. By a letter dated 13 December 2013, a true and correct copy of which appears as **Attachment 7** hereto, the Panel rejected Applicant’s proffered submission.

8.8. On 9 January 2014, the Panel issued its Ruling, a true and correct copy of which appears as **Attachment 8** hereto. We note briefly the Panel's following points:

8.8.1. The "material detriment" test "requires evidence of a likelihood" of such detriment "and not evidence of actual detriment – which would be impossible given the prospective nature of the objection process." **Attmt 8 ¶ 147**.

8.8.2. Statements of opposition to the Application suggest that the String "should be treated only as a community-based TLD." **Attmt 8 ¶ 150**. Such statements and the IO "emphasize the need for strict registration eligibility criteria limited to persons regulated as charitable bodies ...." *Id.* ¶ 151. The Panel feels "these public statements of opposition ... cannot be ignored as they point to an important characteristic of the targeted community ... that would be harmed if access to the '.Charity' string were not restricted to persons ... which can establish that they are a charity or a not-for-profit enterprise with charitable purposes." *Id.* ¶ 152.

8.8.3. The Panel believes Corn Lake's safeguards merely "focus on avoiding and eradicating abuse," and "do not therefore respond to the rights and interests of the charity sector community since abuse is not ... defined in the Application in terms of those rights and interests." **Attmt 8 ¶ 154**. From there, the Ruling states:

There is nothing in the Application ... to indicate that the Applicant will act in accordance with the rights and interests of the community.

*Id.* "In view of the foregoing, the Expert Panel is satisfied that there is a likelihood of material detriment to the charity sector community were the Application to proceed ...."

**Attmt 8 ¶ 156**. By upholding the Objection, *id.* ¶ 157, the Ruling means that the Application "will proceed no further." AGB § 1.1.2.9.

8.9. Concurrently with the Ruling, the Panel issued its decision rejecting the IO's community objection to SRL's application for the String, a true and correct copy of which appears as **Attachment 9** hereto. In that case, the Panel found, *id.* ¶¶ 129-132, that the non-community application at issue did not create a likelihood of material

detriment to a charity “community” due to additional safeguards that the applicant would become contractually obligated to employ. Specifically, although not in its original application, SRL made public interest commitments in its registry agreement with ICANN. A true and correct copy of SRL’s undertakings, in the form submitted to the Panel well after the close of evidence in its case, appears as **Attachment 10** hereto. Notwithstanding these eleventh-hour additions from SRL accepted by the Panel, the SRL application, a true and correct copy of which appears as **Attachment 11** hereto, does not differ meaningfully from Corn Lake’s Application.

**9. What are you asking ICANN to do now?**

Applicant respectfully requests that the BGC:

9.1. Reverse the Ruling sustaining the Objection and having the effect of disqualifying the Application, and thereby effectuate ICANN policy of not “apply[ing] its standards, policies, procedures, or practices inequitably or singl[ing] out any particular party for disparate treatment,” Bylaws Art. II § 3;

9.2. Follow the standards established by ICANN for purposes of effectuating its policies and procedures respecting community objections set forth in AGB § 3.5.4; and

9.3. Confirm that the Application remains active and that Applicant may continue to compete for the String in accordance with the ICANN processes that apply upon rejection of an Objection.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

10.1. Corn Lake has been adversely affected by the actions of ICANN staff in the form of its agents and appointees, the ICC and the Panel, and thus has both procedural standing to make this Request and the substantive right to have it granted.

**a) Applicant has standing to make this Request.**

10.2. Applicant has been “adversely affected by ... one or more staff actions or inactions that contradict established ICANN policy ....” This fact gives it standing within the meaning of Bylaws Art. IV § 2.2(a).

10.3. According to the form reconsideration request used here, a requestor must “demonstrate material harm and adverse impact” by the following measures:

10.3.1. *A loss or injury, financial or non-financial.* Corn Lake has described this in Section 6, *supra*, thus satisfying this element of standing.

10.3.2. *A direct and causal connection between the loss or injury and the staff action or inaction that is the basis of the Request.* Absent the failure of the Panel to follow ICANN process and policy expressed in the Guidebook’s community objection standards, the aberrant Ruling should not have occurred.

10.3.3. *The relief requested must be capable of reversing the harm alleged.* Corn Lake seeks exactly that here, asking that the BGC reverse the existing Ruling and follow ICANN policy with regard to community objections.

**b) The Ruling violates ICANN policy by refusing to follow the Guidebook’s community objection standards regarding proof of material detriment to a “clearly delineated community,” and by treating Corn Lake differently than a similarly situated applicant.**

10.4. “ICANN has determined that the Reconsideration process can properly be invoked for challenges [to] third party’s decisions where ... the vendor failed to follow its process in reaching the decision.” BGC Rec. on Recon. Req. 13-5 (1 Aug. 2013) at 4. The BGC may properly “review ... whether the Panel violated any established policy or process” in reaching its Ruling. BGC Rec. on Recon. Req. 13-9 (10 Oct. 2013) at 8.

10.5. ICANN expressly designed its new gTLD program to increase choice and competition in domain names and promote free expression on the Internet. See, e.g., AGB Preamble; *id.* § 1.1.2.3; *id.* Mod. 2 Attmt. at A-1; and *id.* at 3-21. The Guidebook resulted from years of input from the multi-stakeholder model – governments, business

and intellectual property interest, technologists and others – regarding how best to accomplish these goals by creating rigorous application criteria, adequate protections for IP owners and Internet users, and accessible mechanisms and clear standards for parties to object to proposed <.ANYTHING> domains to the extent affected in ways that ICANN's multiple stakeholders by consensus deemed worthy of redress.

10.6. Through the Guidebook, ICANN has established objections on four now well-familiar grounds to effectuate new gTLD policy. Each type of objection has its own substantive standards by which DRSP panelists must evaluate challenged applications, but *all* share the *same* burden of proof. In the words of the Guidebook:

The principles for adjudication on each type of objection are specified in the paragraphs that follow....

*The objector bears the burden of proof in each case.*

AGB § 3.5. The “paragraphs that follow” include those that set out the standards for community objections. ICANN directs that “the Panel shall apply the standards that have been defined by ICANN.” Proc. Art. 20(a). The Ruling ignores this mandate.

10.7. Furthermore, ICANN – including its agents and DRSP vendors and Panels – “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment.” Bylaws Art. II § 3. The Ruling likewise fails to observe this nondiscrimination policy, diverging from the Panel's own decision regarding the virtually indistinguishable application of SRL in EXP/400/ICANN/17.

10.8. “Material detriment” must appear from the Application itself:

The objector must prove that the *application* creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be ... targeted.

AGB § 3.5.4 at 3-24. Nothing significant distinguishes the application of SRL from that of Corn Lake. Neither applies as a community, and both eschew establishing guidelines to verify registrants as “eligible” participants in or “members” of any “community” that the

String may connote. Compare Corn Lake App. §§ 18(a)-(c) (**Attmt 2**, Annex B, Ex. 1 at 7-13) and SRL App. §§ 18(a)-(c) (**Attmt 11** at 7-21).

10.9. Moreover, in the SRL case, the Panel accepted a submission from SRL, after the close of evidence and without a prior request by SRL, setting forth new proposed eligibility criteria that SRL will contractually obligate itself to implement if awarded the String. See 25 Oct. 2013 SRL Supp. Filing, **Attmt 10**; SRL Ruling (**Attmt 9**) ¶¶ 67, 129-132 (considering SRL's additional submission and rejecting the objection based on it). Corn Lake also proffered new information regarding proposed implementation of the GAC's "Category 1" advice as to which, once adopted by ICANN, Corn Lake would have a duty in its registry agreement to institute protections if awarded the String. See **Attmt 5**. The Panel, however, *refused* even to *consider* this new information, on the stated basis that Applicant had not sought prior leave to file it (even though SRL similarly had sought no such prior leave in its case). See **Attmts 7, 10**.

10.10. The Panel in the SRL case denied the IO's objection "[p]rovided that Applicant's undertaking is honoured." **Attmt 9** ¶¶ 132, 134. It did not give Corn Lake the same opportunity to honor the provisions by which ICANN proposes to effectuate the GAC advice; nor did it give Corn Lake a chance to adopt the same protections proposed by SRL. The Panel allowed last-minute corrections by SRL but ignored the GAC safeguard protections that all <.CHARITY> applicants would have to implement once adopted as ICANN proposes, bringing all applicants to essentially the same level. Consistent with ICANN non-discrimination policy, the Panel should have placed Corn Lake in the same stratum and denied the Objection on the comparable condition that it institute such protective measures as ICANN adopts based on the GAC Beijing advice.

10.11. Had it acted as required by ICANN's non-discrimination policy and considered Corn Lake's requested supplemental filing on its merit, the Panel would have seen that, if awarded the String, Corn Lake must perform contractual obligations similar to those that the Panel found sufficient for SRL to prevent "material detriment":

<b><u>ICANN-Proposed GAC Implementation</u></b>	<b><u>SRL Undertakings</u></b>
Requiring registrants “who collect and maintain sensitive ... data” to “implement reasonable and appropriate security measures commensurate with the offering of those services” per “applicable law.”	Prohibiting registrants “from distributing malware, ... phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law ....”
Registry “will proactively create a clear pathway for the creation of a working relationship with the relevant regulatory or industry self-regulatory bodies by publicizing a point of contact and inviting such bodies to establish a channel of communication, including for the purpose of facilitating the development of a strategy to mitigate the risks of fraudulent and other illegal activities.”	Providing for a “seal” reflecting the Registry’s Abuse Prevention and Mitigation (“APM”) plan, by use of which countries may participate in the APM program directly with the registry, and allowing a user to visit an APM information page specific to his or her country by means of geo-location technology.
Requiring registrants to “provide administrative contact information ... for the notification of complaints or reports of registration abuse,” and “contact details of the relevant regulatory, or industry self-regulatory, bodies in their main place of business.”	Registry will implement an Abuse Prevention and Mitigation (“APM”) plan that “will facilitate reporting of breaches of and enforcement of the Eligibility Policy, a breach of which will also be reportable and actionable by the Registry in the same manner as a breach of the Acceptable Use Policy.”
Requiring registrants claiming to act as regulated bodies to represent that they “possesses any necessary authorisations, charters, licenses and/or other related credentials for participation in the sector associated with the Registry TLD string.”	Requiring “evidence acceptable to the Registry,” including but not limited to “organizational documents, statutory restrictions, binding agreements, binding resolutions or commitments enforceable by third parties,” that a registrant is registered as a charity or equivalent with a government body or taxing authority.
Registry operator to provide for investigating “complaint[s] expressing doubt with regard to the authenticity of licenses or credentials ... with relevant national supervisory authorities, or their equivalents” regarding such authenticity.	“Registry reserves the right to deny or cancel the registration, renewal, or transfer of any Registered Name, or to place any Registered Name on registry lock, hold, or similar status, with respect to any such Registered Name that the Registry, upon reasonable belief formed after reasonable investigation, deems to be registered to a registrant that is not in compliance with the Eligibility Policy.”

<u>ICANN-Proposed GAC Implementation</u>	<u>SRL Undertakings</u>
Requiring registrants “to report any material changes to the validity of the Registrants' authorisations, charters, licenses and/or other related credentials for participation in the sector associated with the Registry TLD string.”	“[A]llowing for updated regulatory or legislative developments” on APM information pages

Compare **Attmt 5**, Annex A ¶¶ 3, 5-8 with **Attmt 10** at 3-6. The Panel's refusal to consider Applicant's proposed supplemental filing reflecting the foregoing protective mechanisms, and to give Applicant the opportunity to adopt protective measures such as SLR's, constitutes impermissibly disparate treatment of similarly situated applicants. It also led to a discriminatory *result* in which the Panel denied the objection conditionally against SLR but did not do similarly as to Corn Lake. One can hardly imagine a clearer instance of violation of ICANN policy. Bylaws Art. II § 3, Art. IV § 2.2(a).

10.12. The Panel also purported to hold Corn Lake to standards contrary to those established by the Guidebook. For example, the Guidebook does *not* require an applicant to operate *any* registry as community-based; it has made the opposite clear:

The ultimate goal of the community-objection process is to prevent the misappropriation of a community label by delegation of a TLD *and to ensure that an objector cannot keep an applicant with a legitimate interest in the TLD from succeeding.*

See <http://www.icann.org/en/topics/new-gtlds/summary-analysis-proposed-final-guidebook-21feb11-en.pdf> (emphasis added). Yet, the Panel essentially holds Corn Lake to an affirmative community obligation by accepting opposition statements suggesting that the String “should be treated only as a community-based TLD.” See Ruling (**Attmt 8**) ¶¶ 150-152. The Ruling would thus impose requirements that ICANN consciously eschewed as a matter of new gTLD policy in the Guidebook.<sup>3</sup>

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<sup>3</sup> To the extent ICANN policy changes with adoption of the GAC advice, Corn Lake must, as shown in ¶ 10.9, comply with new policy, and the feared “material detriment” would not exist.



10.13. The Ruling goes further, however, and reaches a conclusion of “material detriment” because “nothing in the Application ... indicate[s] that the Applicant *will act* in accordance with the rights and interests of the community.” **Attmt 8** ¶ 154 (emphasis added). See *also id.* ¶ 148, in which the Panel states that the several factors it must evaluate include “the importance of the rights and interests exposed for the community and the public, and whether the Applicant intends acting in accordance with those rights and interests.” These formulations turn both the substantive objection standard and burden of proof entirely on their heads. The Guidebook does not obligate an applicant to act *affirmatively* in the interest of *any* community; rather, it delegates to an objector the burden to *prove, by evidence*, that the Applicant does *not* intend to implement protections for user interests. AGB at 3-24.

10.14. The IO has *not* demonstrated – and the Ruling certainly cites no *evidence* from the Application *itself*, as ICANN policy and process demand – that Applicant does *not* intend to “institute effective security protections for user interests.” To the contrary, the *only* evidence reveals that Applicant will employ an abundance of protective mechanisms – nearly twice as many as ICANN initially required. The Panel, however, rejects these as simply “avoiding and eradicating abuse,” and deems that adequate protection mandates rigorous pre-registration eligibility criteria to verify community status. **Attmt 8** ¶ 154. Again, however, this is tantamount to compelling Corn Lake to operate the TLD as a community, which ICANN has refused to require as a matter of policy. The Ruling’s contravention of that policy necessitates reconsideration.

10.15. Finally, the notion of a “clearly delineated” charity “community” is itself fanciful and in excess of the policy bounds established by ICANN in the Guidebook. While the Panel views the term “charity” as *including* “charities and charitable institutions” susceptible *themselves* to “delineation” as a “community,” such construction misapplies the community standard and the policy underlying it. Virtually any term with a number of definitions could include some that lend themselves to community-like

treatment. However, comments made during Guidebook drafting confirm that the “community” test is “to prevent the misappropriation of a string that *uniquely or nearly uniquely* identifies a well-established and *closely connected* group of people or organizations.” See <http://archive.icann.org/en/topics/new-gtlds/agve-analysis-public-comments-04oct09-en.pdf> at 19 (emphases added).

10.16. The term “CHARITY” certainly does not “uniquely or nearly uniquely” identify registered charities, charitable institutions and non-profits, as distinct from the millions of other individuals, organizations and even large, for-profit corporations involved in charitable causes, promoting secular or religious charitable values, making policy to alleviate poverty, disease or other social ills, or commentating on or simply exchanging ideas about the numerous topics coming within the umbrella of the word’s broad meaning. As a matter of ICANN policy of allowing qualified applicants to compete for domains and preventing “misappropriation” of TLD designations that do not “uniquely or nearly uniquely” identify a true “community,” the BGC should reverse the Ruling and reinstate the Application on this independent basis. Such a result would both comport with the overarching goals of the new gTLD program as well as clarify the scope of the “community” concept for the remainder of this and in future rounds.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

Yes

No

**11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.**

Not applicable.



## **Documents Submitted**

- Attachment 1:** IO Objection
- Attachment 2:** Corn Lake Response
- Attachment 3:** IO Reply
- Attachment 4:** Corn Lake Sur-Reply
- Attachment 5:** Corn Lake Request for Addl Submission re GAC Advice
- Attachment 6:** IO Response to Corn Lake Request for Addl Submission
- Attachment 7:** Panel Denial of Corn Lake Request for Addl Submission
- Attachment 8:** Ruling
- Attachment 9:** Ruling in consolidated SRL case
- Attachment 10:** SRL 25 Oct. 2013 supplemental filing and linked evidence
- Attachment 11:** SRL Application No. 1-1241-87032 for <.CHARITY>