

## United TLD Reply Comment on the Proposed Review Mechanism to Address Inconsistent Expert Determinations on String Confusion Objections

United TLD Holdco Ltd. (“United TLD”), trading as Rightside Registry, a registry operator and applicant for new generic top level domain names (gTLDs) submitted its initial comment on ICANN’s Proposed Review Mechanism to Address the Inconsistent Expert Determinations for .CAM/.COM and .CAR/.CARS. <http://forum.icann.org/lists/comments-sco-framework-principles-11feb14/msg00013.html>.

United TLD wishes to submit this Reply Comment in response to comments submitted by others during the initial Comment Period.

### 1. A “Clearly Erroneous” Standard of Review Is Not the Proper Standard

Members of the Intellectual Property Constituency (IPC) suggested that ICANN’s proposed standard of review be changed and a “clearly erroneous” standard be adopted for the review by the Panel of Last Resort. <http://forum.icann.org/lists/comments-sco-framework-principles-11feb14/msg00029.html>. Applying such a standard is wholly misplaced given that review is not an appeal process but ultimately, a review of ICANN’s compliance with its bylaws and the Applicant Guidebook.

The “clearly erroneous” standard is a relatively common legal standard of review for cases brought on appeal in U.S. courts and in courts in certain other foreign jurisdictions. However, the review mechanism is not an appeal of a decision issued for the facts in just one case. Rather, it is a review of the effect of multiple decisions that, when taken together, reveal an unfairness and prejudice to one applicant. Adoption of a “clearly erroneous” standard would be inappropriate, as it would not address this prejudicial effect on the losing applicant.

The Panel of Last Resort is reviewing the decisions to determine whether they may stand without prejudice to one applicant. If the decisions were prejudicial, however, the outcome would place ICANN in jeopardy of violating its own Bylaws. Article II, Section 3 of ICANN’s Bylaws state that:

*ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out any party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.*

This principle is also reflected in Section 5.2.7 of the AGB which declares that:

*ICANN’s Bylaws require ICANN to act in an open and transparent manner, and to provide equitable treatment among registry operators.*

Finally, the GNSO stated that one of the key principles of the new gTLD program, is that “*the evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency, and non-discrimination.*” (Principle A; Policy 1).

As United TLD stated in its initial Comment, the standard of review must include a review of the reasonableness of the outcome in light of the other outcomes and the end result.

## **2. Winning Objectors Should Not Get a “Second Bite at the Apple”**

United TLD supports the recommendation made by Donuts that only losing applicants be allowed to seek redress under the review mechanism. To allow objectors to file for review would amount to allowing a second round of objections and effectively change the AGB in a way that materially harms the applicants. As stated by Donuts:

*Such harm would invoke the protections afforded to applicants under AGB Module 6, Section 14. Objectors – those filing objections – are not party to the AGB contract for purposes of their objections (even if they might be applicants as well). As such, they are not subject to Section 14 of the AGB and the AGB offers no protection from changes to the process that may not be in an objector’s favor.*

<http://forum.icann.org/lists/comments-sco-framework-principles-11feb14/msg00025.html>.

## **3. Domain Venture Partners Is Not Prejudiced by a Reversal of a .CAM/.COM Decision**

Domain Venture Partners, an investor in dotAgency Ltd’s application for .CAM argues that a review of United TLD’s .CAM/.COM decision would “prejudice our investment.” <http://forum.icann.org/lists/comments-sco-framework-principles-11feb14/msg00007.html>. A reversal of our objection however, would not prejudice the other applicants in any substantial way – and would only result in the allowance of another party into a contention set. If ICANN considers what is happening to the two strings, it must recognize that there WILL be a .CAM and a .CARS and that these strings WILL BE in a contention set which MUST be resolved via ICANN auction if not resolved privately by another means. Allowing United TLD and DERCars, LLC to participate in the contention set does not change what MUST already occur and so therefore cannot materially prejudice the other applicants. The only prejudicial and unfair outcome, and the only one that would place ICANN directly in violation of its bylaws and the AGB is to let the two SCO Expert Determinations against United TLD and DERCars, LLC stand.

## **CONCLUSION**

The review of the .CAM/.COM and the .CAR/.CAR SCO determinations and their reversal will insure that the principles of fairness and equal treatment are upheld by ICANN.

Once again, United TLD urges ICANN to implement the proposed review mechanism IMMEDIATELY so that the applicants for the exact same string can resolve contention and move forward in the program.

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