

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 16-13
2 NOVEMBER 2016**

The Requester, Merck KGaA, seeks reconsideration of the ICANN Contractual Compliance department's decision to conduct an internal review of the Requester's Public Interest Commitment Dispute Resolution Procedure complaint (PICDRP Complaint) regarding a dispute between the Requester and the National Association of Boards of Pharmacy (NABP), the latter being the domain name registry operator for the .PHARMACY gTLD (Registry). The Requester argues that ICANN staff should have appointed an independent standing panel of experts to review the PICDRP Complaint.

I. Brief Summary.

The Requester filed the PICDRP Complaint with ICANN's Contractual Compliance department challenging the Registry's denial of its sunrise application for MERCK.PHARMACY (Sunrise Application). "The PICDRP addresses complaints that a Registry may not be complying with the Public Interest Commitment(s) in Specification 11 of their Registry Agreement."¹ Pursuant to the PICDRP, ICANN staff conducted an internal investigation of the PICDRP Complaint. Through that investigation, ICANN determined that the Registry had not violated any contractual obligation, and informed the Requester that ICANN would therefore not take any further action regarding the Requester's dispute with the Registry. The Requester claims that ICANN's determination to proceed by internal investigation with respect to the PICDRP Complaint, rather than by referral to an independent panel of experts, warrants reconsideration.

¹ Public Interest Commitments Dispute Resolution Procedure (PICDRP), *available at* <https://www.icann.org/resources/pages/picdrp-2014-01-09-en>.

The Requester does not present any evidence that shows any misapplication of any policy or procedure by ICANN staff when it considered and evaluated the PICDRP Complaint, because there was no such misapplication. Indeed, the applicable policy, i.e., the PICDRP, expressly permits ICANN to proceed by way of internal investigation under the circumstances presented here. While the Requester apparently disagrees with that decision and, moreover, appears dissatisfied with ICANN's determination that the Registry had complied with all applicable contractual commitments, such disagreement is not a basis for reconsideration. Moreover, as demonstrated below, ICANN's internal investigation of the PICDRP Complaint thoroughly and comprehensively investigated the claims raised therein and found no evidence suggesting that the Registry violated its contractual obligations. As such, the Requester has failed to show that ICANN staff acted in contravention of any established policy or procedure, and the BGC concludes that Reconsideration Request 16-13 (Request 16-13) be denied.

II. Facts.

A. Background Facts.²

1. The Requester's Sunrise Complaint.

Both the Requester and Merck Sharp and Dohme Corp. (MSD) hold legitimate trademark rights involving the word "Merck."³

The Requester submitted its Sunrise Application for MERCK.PHARMACY to the Registry on 3 March 2015; the Registry confirmed receipt on 10 March 2015.⁴ MSD also submitted a sunrise application for MERCK.PHARMACY (MSD Sunrise Application) to the

² Certain of the background facts cited herein are drawn from the Contractual Compliance department's files. As such, certain dates referenced may not exactly align with those noted by the Requester, due to the fact that ICANN and the relevant parties are located in different time zones.

³ See Request, § 8.3, Pg. 13.

⁴ Request, Ex. 1.

Registry.⁵

On 22 April 2015, the Registry informed the Requester that its Sunrise Application would “be closed,” because “[i]n accordance with the requirements of [ICANN], in the case of contention between two or more eligible applicants for the same .pharmacy domain name during the Trademark Clearinghouse Sunrise Period, NABP employs objective criteria, which ICANN requires to be nondiscriminatory, to determine which applicant acquires the domain. Applicant information was reviewed and it was determined that the Merck KGaA application met fewer criteria than another applicant seeking merck.pharmacy.”⁶

On 29 April 2015, the Requester wrote to the Registry (29 April 2015 Letter) to state its concerns that the Registry was in violation of “paragraph 2.1.2 of ICANN’s Trademark Clearinghouse Rights Protection Mechanism Requirements” (TMCH RPM).⁷ The 29 April 2015 Letter asserted that the Registry violated the TMCH RPM because it had not published the criteria by which it had assessed the Requester’s Sunrise Application and the MSD Sunrise Application, had not submitted those criteria to ICANN, and had not provided any assurance that the criteria were objective and non-discriminatory.⁸ The Requester also mentioned that an entity related to MSD had contributed \$100,000 to the Registry, and suggested that MSD’s financial support had played a role in the Registry approving the MSD Sunrise Application (and therefore denying the Requester’s Sunrise Application).⁹ In the 29 April 2015 Letter, the Requester asked the Registry to publish and submit to ICANN its “decision process and criteria” for denying the Requester’s Sunrise Application.¹⁰

⁵ See Request, § 8.2, Pg. 10.

⁶ Request, Ex. 2.

⁷ Request, Ex. 3 (29 April 2015 Letter).

⁸ *Id.*

⁹ *Id.* at 2.

¹⁰ *Id.*

On 12 May 2015, the Registry responded by email, stating that it had complied with all ICANN requirements related to the Requester's Sunrise Application.¹¹

On 15 May 2015, the Requester submitted a sunrise complaint (Sunrise Complaint) to ICANN regarding its dispute with the Registry.¹²

The Contractual Compliance department processed the Sunrise Complaint by requesting information from the Registry multiple times, beginning 2 June 2016, and also from the Requester on 21 July 2015.

The Registry responded to the first request for information on 11 June 2015, and ICANN requested additional information on 12 June 2015. The Registry responded on 19 June 2015. ICANN requested further information from the Registry on 3 July 2015, received incomplete information on 6 July 2015, and requested the remaining information on 20 July 2015.

On 21 July 2015, ICANN asked the Requester to submit a copy of the Requester's Sunrise Application as well as the Requester's relevant communications with the Registry, which the Requester provided on 27 July 2015.¹³ ICANN requested further information from the Registry on 28 July 2015, which the Registry provided on 31 July 2015.

On 5 August 2015, ICANN posed questions to the Registry regarding the Sunrise Complaint, which the Registry answered on 11 August 2015.

On 13 August 2015, ICANN informed the Requester that it had assessed the Sunrise Complaint and determined that the Registry had not violated the TMCH RPM. By the same email, ICANN noted that aspects of the Sunrise Complaint related to the Registry's compliance with Specification 11 of the Registry Agreement (Spec 11), and that the Requester could submit

¹¹ Request, Ex. 4.

¹² Request, Ex. 5.

¹³ Request, Exs. 9-10.

a PICDRP complaint if it had concerns in that regard.¹⁴ The Requester does not seek reconsideration of ICANN's assessment of the Requester's Sunrise Complaint.

2. The Requester's PICDRP Complaint.

On 29 June 2016, the Requester filed the PICDRP Complaint.¹⁵

On 3 August 2016, the Requester and the Registry held an email conference concerning the PICDRP Complaint, pursuant to the PICDRP.¹⁶

During that email conference, the Registry disclosed the criteria it had used to assess the Sunrise Application (Sunrise Dispute Criteria):

1. Number of accurate consumer resources (web pages, sections, articles, tools) that applicant website provides addressing:
 - a. Patient health care
 - b. Disease state management
 - c. Medication safety in general (e.g. safe disposal, misuse and abuse)
 - d. buying prescription medications safely online
2. Applicant holds voluntary accreditations or certifications demonstrating public health compliance
3. Applicant has demonstrated support of the .pharmacy initiative and its mission to protect the public health.¹⁷

On 17 August 2016, the Requester notified ICANN that the email conference had not resolved the issues between the parties, and ICANN promptly informed the Registry that ICANN had received this notification. On 17 August 2016 and then again on 22 August 2016, ICANN sent requests for information to the Registry related to the claims raised in the PICDRP Complaint, to which the Registry responded on 1 September 2016.

On 1 September 2016, ICANN notified both parties that it determined a compliance investigation was appropriate, and that ICANN was continuing its review of the PICDRP

¹⁴ Request, Ex. 11.

¹⁵ Request, Ex. 12.

¹⁶ Request, Ex. 13; PICDRP §§ 2.2-2.4, *available at* <https://www.icann.org/resources/pages/picdrp-2013-10-31-en>.

¹⁷ *Id.*

Complaint and the Registry's responses.

On 8 September 2016, ICANN informed the Requester by email (Closure Notice) that ICANN had completed "its compliance investigation," "decided to take no further action," and considered the PICDRP "now closed."¹⁸ The Closure Notice noted that the Registry had published its Sunrise Dispute Resolution Policy (SDRP), which addressed trademark disputes, and had also published its instructions for domain name applications, which indicated that the Registry would "evaluate[]" a sunrise applicant's website "to be approved for .pharmacy domain names."¹⁹ The Closure Notice concluded that the Registry's "operational procedure" did not conflict with any ICANN agreement or policy.²⁰

B. Relief Requested.

The Requester asks that ICANN "refer [the Requester's PICDRP Complaint] to an independent panel for review and decision."²¹

III. The Relevant Standards For Reconsideration Requests and Contractual Compliance Review.

A. Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.²² The Requester challenges staff action. Dismissal of a

¹⁸ Request, Ex. 14.

¹⁹ *Id.*; .PHARMACY Application Instructions, *available at* <http://www.safe.pharmacy/apply/application-instructions>.

²⁰ Request, Ex. 14.

²¹ Request, § 9, Pg. 14.

²² Bylaws, Art. IV, § 2. All references to ICANN's Bylaws refer to the Bylaws which took effect on 11 February 2016. While ICANN's amended Bylaws became effective on 1 October 2016, *see* <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>, the former version applies here because Request 16-13 was filed before 1 October 2016.

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

request for reconsideration of staff action or inaction filed before 1 October 2016 is appropriate if the BGC concludes, and the Board agrees to the extent that the BGC deems that further consideration by the Board is necessary, that the requesting party failed to satisfy the reconsideration criteria set forth in the Bylaws.

B. The PICDRP.

The mission of ICANN’s Contractual Compliance department is to “preserve the security, stability and resiliency of the Domain Name System and to promote consumer trust.”²³ The scope of the review conducted by the Contractual Compliance department is limited to “ensur[ing] that ICANN’s contracted parties fulfill the requirements set forth in their agreements with ICANN.”²⁴ In this instance, those requirements are found in Spec 11.²⁵

Once a PICDRP complaint is submitted, ICANN adheres to the PICDRP, which details, among other things, the steps the Contractual Compliance department follows in responding to a PICDRP complaint. This process entails the following steps: (1) an online PICDRP complaint is submitted to ICANN; (2) ICANN undertakes a “preliminary review” of the PICDRP complaint to assess whether the claimant has “completed all of the reporting requirements”; (3) the parties engage in a conference; (4) if the issues are not resolved in the parties’ conference, the Registry may provide ICANN with a response to the PICDRP complaint; (5) “[b]ased on the PIC complaint received by ICANN and Registry Operator’s response(s) to ICANN’s request for explanation, ICANN will determine whether a compliance investigation is appropriate”; (6) if a compliance investigation is determined to be appropriate, “[a]t ICANN’s sole discretion, ICANN may elect to “invoke the [independent] Standing Panel or undertake a[n internal] compliance

(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.

²³ Contractual Compliance – About, <https://www.icann.org/resources/pages/about-2014-10-10-en>.

²⁴ Contractual Compliance, <https://www.icann.org/resources/pages/compliance-2012-02-25-en>

²⁵ See 2013 RA, <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>.

investigation”; (7) if the results of the investigation show that the Registry is not in compliance with its obligations in connection with Spec 11, ICANN may institute an enforcement action; and (8) ICANN will notify the Registry and the reporter of the results of the investigation.²⁶

IV. Analysis and Rationale.

The Requester does not present any evidence to show a misapplication of any policy or procedure by ICANN staff when it elected to review the Requester’s PICDRP Complaint by way of internal investigation. Nor could it, because ICANN adhered to all applicable policies and procedures in conducting its investigation and making its determination, insofar as the PICDRP expressly permits ICANN to proceed by way of internal investigation. While the Requester may have preferred that ICANN refer the Requester’s PICDRP Complaint to an independent standing panel, no policy or procedure required ICANN to do so, and thus reconsideration is not warranted on those grounds. In addition, the Requester’s substantive disagreement with ICANN’s determination that the Registry complied with Spec 11 when it denied the Requester’s Sunrise Application is not a basis for reconsideration.

A. No Reconsideration Is Warranted With Respect To ICANN’s Decision To Conduct An Internal Investigation In Response To The Requester’s PICDRP Complaint.

The Requester seeks reconsideration of ICANN’s decision to address the PICDRP Complaint by way of an internal investigation, as opposed to using an independent standing panel. However, ICANN’s decision to do so was in full compliance with all applicable policies and procedures for responding to a PICDRP complaint.

Specifically, ICANN adhered to the PICDRP. First, ICANN undertook a “preliminary review” of the PICDRP Complaint.²⁷ Then, an email conference between the parties was

²⁶ See generally PICDRP.

²⁷ Request, § 8.1, Pg. 7 (acknowledging ICANN’s “preliminary review” of the PICDRP Complaint).

conducted, which took place on 3 August 2015.²⁸ The issues were not resolved in the parties' conference, so ICANN requested information from the Registry on 17 and 22 August 2016, which the Registry provided on 1 September 2016. Next, ICANN determined and notified the parties on 1 September 2016 that a compliance investigation was warranted, and that it should proceed by way of an internal Contractual Compliance department investigation.²⁹ The results of the investigation showed that the Registry was in compliance with its obligations in connection with Spec 11 (as discussed below).³⁰ Finally, ICANN notified the Requester of the results of the investigation.³¹ In sum, ICANN adhered to the PICDRP to the letter, and informed both the Requester and the Registry of its progress at each stage.

The Requester claims that reconsideration is nonetheless warranted, arguing that ICANN staff should have appointed an independent standing panel of experts to investigate the PICDRP Complaint. This argument fails because the PICDRP grants ICANN the "sole discretion"³² to determine whether to utilize an internal or an independent standing panel investigation—which the Requester explicitly acknowledges in Request 16-13.³³ ICANN exercises that discretion based on its careful review of the facts and issues presented in the relevant PICDRP Complaint. Here, ICANN determined that an internal investigation was prudent because the subject matter was within the scope of the Contractual Compliance department's ability to review and make a determination of compliance (or not) with Spec 11, and the issues raised by the Requester's PICDRP Complaint had already been fully investigated and reviewed by ICANN during its processing of the Sunrise Complaint.

²⁸ Request, § 8.1, Pg. 7 & Ex. 13.

²⁹ See Request, Ex. 14 (noting that ICANN undertook a compliance investigation).

³⁰ *Id.*

³¹ *Id.*

³² PICDRP § 3.3.

³³ Request, § 8.3, Pg. 12.

Ultimately, ICANN’s decision not to refer the matter to an independent standing panel to review the PICDRP Complaint fully complied with applicable established policies and procedures, and reconsideration is not warranted.

B. ICANN Adhered To The PICDRP In Finding, After Conducting A Thorough Investigation, That The Registry Did Not Violate Spec 11.

The Requester implicitly challenges the results of ICANN’s internal investigation, namely ICANN’s determination that the Registry did not violate Spec 11 and ICANN’s corresponding decision not to take any enforcement (or other further) action with respect to the Registry.³⁴ However, substantive disagreement with the results of ICANN’s investigation is not a ground for reconsideration. As such, the Requester’s claims do not support reconsideration.

1. Spec 11 Does Not Require The Registry To Publish Its Sunrise Dispute Criteria Or Submit Them To ICANN.

Section 3(c) of Spec 11 requires the Registry to “operate the TLD in a transparent manner” and to “publish[] . . . clear registration policies.”³⁵ The Requester argues that the Registry violated this obligation when it “failed to publish criteria for resolving sunrise conflicts” before such conflicts are resolved.³⁶ While the Registry disclosed the Sunrise Dispute Criteria during the parties’ conference regarding the PICDRP Complaint, the thrust of both the PICDRP Complaint and Request 16-13 is that the Registry should have published the Sunrise Dispute Criteria prior to applicants’ submissions of sunrise applications for .PHARMACY domain names. ICANN investigated this claim, and concluded that the Requester did not present any grounds for finding the Registry not in compliance with Spec 11.

First, ICANN determined that Spec 11 does not obligate the Registry to publish its Sunrise Dispute Criteria. Rather, pursuant to the express terms of Spec 11, only “registration

³⁴ Request, § 8.2, Pgs. 8-12.

³⁵ Request, Ex. 23 (RA, Spec 11 ¶ 3(c)).

³⁶ Request, § 8.2, Pg. 9.

policies” must be published,³⁷ and the Sunrise Dispute Criteria do not constitute a registration policy. Instead, as ICANN stated in the Closure Notice, the “detailed review criteria used to resolve the contention for the registration of the domain name <merck.pharmacy> was part of an *operational procedure*” that “does not conflict with ICANN’s agreements and policies[.]”³⁸ As such, the Requester has not shown that Spec 11 required the Registry to publish its Sunrise Dispute Criteria, and therefore has not shown reconsideration is warranted with respect to ICANN’s determination that the Registry did not violate Spec 11 in declining to publish them.

Similarly, the Requester claims Section 2.1.2 of the TMCH RPM required the Registry to submit the Sunrise Dispute Criteria to ICANN.³⁹ However, that provision of the TMCH RPM only requires registry operators to submit “TLD Startup Information” to ICANN, and the TMCH RPM defines “TLD Startup Information” in a way that does not encompass the Sunrise Dispute Criteria.⁴⁰ Instead, it defines TLD Startup Information to include only: (1) “[c]onfirmation that Registry Operator has completed Integration Testing”; (2) the start and end dates for the sunrise period; (3) sunrise “registration policies” (which, as discussed above, do not include the Sunrise Dispute Criteria); (4) start and end dates for any limited registration periods (defined as “additional periods during which it will accept domain name registrations following the Sunrise Period but prior to General Registration”); (5) start and end dates for any “claims period” related to a limited registration period; and (6) whether the registry operator will implement a start-date (first come first serve) or end-date sunrise period (where the registry operator may not use any

³⁷ Request, Ex. 23 (RA, Spec 11 ¶ 3(c)).

³⁸ Request, Ex. 14 (emphasis added).

³⁹ Request, § 8.2, Pg., 9; *see* TMCH RPM, *available at* Rights Protection Mechanism Requirements Published, <https://newgtlds.icann.org/en/announcements-and-media/announcement-30sep13-en>

⁴⁰ *See* TMCH RPM § 2.1.2.

“time-based . . . registration process”).⁴¹ None of those items could be interpreted to encompass the Sunrise Dispute Criteria.

Second, while the Registry was not required to publish the Sunrise Dispute Criteria, ICANN determined that the Registry had published two policies effectively disclosing the nature and substance of the Sunrise Dispute Criteria: the Registry’s SDRP and its domain name application instructions. As stated in the Closure Notice, ICANN determined that the SDRP “transparently addressed resolution of trademark disputes for Sunrise registrations.”⁴² The Requester correctly notes that the SDRP “does not address the resolution of a contention between two Sunrise applicants *both* having effective prior trademark rights[.]”⁴³ As such, the SDRP therefore signals that the Registry may determine those criteria in its discretion. In other words, because the SDRP does not specify any criteria to resolve a dispute between two legitimate trademark holder sunrise applicants, even though it addresses the resolution of other trademark issues, the Requester was on notice that the Registry would be the sole arbiter of disputes between multiple valid trademark holders, and would adjudicate such disputes at its discretion.

Further, as ICANN also explained in the Closure Notice, the Registry’s published application instructions “indicated openly and clearly that all applicants’ proposed website content would be subject to review.”⁴⁴ This is consistent with the Sunrise Dispute Criteria, which provides for a review of the “applicant website” to assess the extent to which it promotes “medication safety” and related health concerns.⁴⁵ The Requester complains that the application instructions only “indicated that applicants’ proposed website content would be subject to review referred to the eligibility requirements for the *registration* of a second level domain under

⁴¹ See TMCH RPM § 2.1, 3.2.4.

⁴² Request, Ex. 14.

⁴³ Request, § 8.2, Pg. 13 (emphasis added).

⁴⁴ Request, Ex. 14.

⁴⁵ Request, § 8.1, Pg. 8.

<.pharmacy> but not to the *dispute resolution criteria for multiple Sunrise applications for the same string*.”⁴⁶ In fact, the application instructions provide that: “[t]o be *approved* for .pharmacy domain names, you must submit the content of the website to NABP for review.”⁴⁷ Therefore, the application instructions also put the Requester on notice that the content of its website would be assessed in the process of applying for approval of the Sunrise Application.

In sum, the Registry has no contractual obligation to publish the Sunrise Dispute Criteria, and here, the Registry published all of the registration policies it was required to publish, which complied with ICANN’s requirements.

2. The Registry Did Not Discriminate Against The Requester In Denying The Sunrise Application.

The Requester notes that Section 3(c) of Spec 11 requires the Registry to operate the TLD according to the principle of “non-discrimination” and argues that the Registry failed to do so when it denied the Requester’s Sunrise Application. The Requester claims that: (1) the denial of its Sunrise Application was “arbitrary” and that the Sunrise Dispute Criteria exhibit “obvious defects”; and (2) the Registry wrongly took into account the financial support an entity related to MSD had provided to the Registry.⁴⁸ Neither serves as a basis for reconsideration.

To start, the Requester claims that the Registry discriminated against the Requester by applying what the Requester deems to be “irrelevant” Sunrise Dispute Criteria to the Requester’s Sunrise Application in a “subjective and arbitrary” way, in violation of Spec 11’s requirement that the TLD be operated “with general principles of openness and non-discrimination[.]”⁴⁹ The Sunrise Dispute Criteria, on their face, are not “irrelevant” “subjective” or “arbitrary” because

⁴⁶ Request, § 8.3, Pg. 14 (emphasis added).

⁴⁷ .PHARMACY Application Instructions, *available at* <https://www.safe.pharmacy/apply/application-instructions>.

⁴⁸ Request, § 8.2, Pgs. 9-10 & Ex. 25.

⁴⁹ Request, § 8.2, Pg. 11.

they collectively consider whether a sunrise application aligns with the mission and purpose of the Registry; each Sunrise Dispute Criterion considers the degree to which the applicant's conduct (including on its website) advances the Registry's stated "mission to protect the public health."⁵⁰

The Requester also suggests that the Sunrise Dispute Criteria are "defective" for lacking any tie to trademark rights or laws but, in so arguing, the Requester conflates the purposes of the SDRP and the Sunrise Dispute Criteria.⁵¹ The SDRP outlines the process to be followed in the event of a trademark infringement claim.⁵² The Sunrise Dispute Criteria apply in the scenario where two legitimate trademark holders both applied for the same domain name.⁵³ Nothing in Spec 11 requires that the Sunrise Dispute Criteria must relate to trademark rights. Moreover, it is undisputed that both the Requester and MSD assert legitimate trademark rights in connection with the word "Merck."⁵⁴ As such, no reconsideration is warranted in connection with ICANN's finding that the Registry's Sunrise Dispute Criteria does not violate Spec 11.

Next, the Requester claims that the Registry acted in a discriminatory manner because it purportedly considered the fact that an entity related to MSD made a payment of \$100,000 to the .PHARMACY "initiative."⁵⁵ Yet the Requester does not explain why or how Spec 11 would prohibit the Registry from favoring applicants that have demonstrated their commitment to the Registry's mission of protecting public health by way of a financial contribution to the .PHARMACY initiative. Indeed, it seems reasonable for the Registry to consider such a contribution, given that "support of the .pharmacy initiative" is one of the Sunrise Dispute

⁵⁰ Request, § 8.1, Pg. 8.

⁵¹ See Request, § 8.2, Pgs. 9-10.

⁵² Request, Ex. 21.

⁵³ Request, Ex. 13.

⁵⁴ See Request, § 8.3, Pg. 13.

⁵⁵ Request, § 8.2, Pg. 10 & Ex. 25.

Criteria.⁵⁶ ICANN's investigation did not disclose any reason why the consideration of financial support would violate Spec 11, or why it would otherwise be unfair.

In sum, ICANN correctly determined that the Registry had complied with Spec 11. As ICANN informed the Requester, registry operators may set their own criteria for resolving disputes in the circumstance where two legitimate trademark holders apply for the same second level domain. Here, the Registry denied the Requester's Sunrise Application, and approved the MSD Sunrise Application, according to the Registry's own objective criteria. ICANN followed the PICDRP to investigate the Requester's claims that the Registry had violated Spec 11, and found them to be unsupported. No reconsideration is warranted in connection with that determination.

V. Determination.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Request 16-13. If the Requester believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter.

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 no Board consideration is required. As discussed above, Request 16-13 seeks reconsideration of a staff action or inaction. As such, after consideration of Request 16-13, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of the timing of this decision, 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, unless impractical. To satisfy the thirty-day deadline, the BGC would have to have acted by 23 October 2016. In order to thoroughly investigate and

⁵⁶ Request, § 8.1, Pg. 8.

evaluate the claims and exhibits set forth in Request 16-13, including understanding the relevant facts with ICANN's Contractual Compliance department, the BGC considered Request 16-13 at the first practical opportunity, namely 2 November 2016.