**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE**

**INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/488/ICANN/105

CLOUD INDUSTRY FORUM LIMITED

(UK)

vs/

CHARLESTON ROAD REGISTRY INC.

(USA)

# INTERNATIONAL CENTRE FOR EXPERTISE
# INTERNATIONAL CHAMBER OF COMMERCE

Case No. EXP/488/ICANN/105

In the matter of an objection under the ICANN *New Generic Top-Level Domain Dispute Resolution Procedure*

Between:

**CLOUD INDUSTRY FORUM LIMITED**

**(UNITED KINGDOM)**

Objector

and

**CHARLESTON ROAD REGISTRY INC.**

**(UNITED STATES OF AMERICA)**

Applicant

---

## EXPERT DETERMINATION

---

Expert Panel: Stephen L. Drymer

5 December 2013

## TABLE OF CONTENTS

## INTRODUCTION

1. This Expert Determination concerns a so-called community objection ("**Objection**") by CLOUD INDUSTRY FORUM LIMITED ("**CIF**" or "**Objector**") to an application ("**Application**") submitted to the Internet Corporation for Assigned Named and Numbers ("**ICANN**") by CHARLESTON ROAD REGISTRY INC. ("**CRR**" or "**Applicant**") in respect of the new generic top-level domain ("**gTLD**") string ".CLOUD".

2. The dispute arises under and is governed by the terms of ICANN's *gTLD Applicant Guidebook* v. 2012-04-06 ("**Guidebook**") and related documents as well as the *Expertise Rules* ("**Rules**") of the International Centre for Expertise ("**Centre**") of the International Chamber of Commerce ("**ICC**") and related documents. These documents, which set out the substantive and procedural rules applicable to objections to applications for new gTLD strings, are discussed at Part IV of the present Expert Determination.

3. It is important to note that the dispute in question here concerns only the Objection filed by the Objector in this case. It does not concern the merits of the Application for the .CLOUD string submitted to ICANN by the Applicant.

4. To be clear, in accordance with the applicable procedure and rules, the nature and purpose of these proceedings is strictly limited to determining the "success or dismissal of the Objection" (Article 21(d) of the New gTLD Dispute Resolution Procedure) The Application itself, including the decision whether or not to delegate the applied-for gTLD string as requested by the Applicant, will be considered and determined by ICANN in due course, in accordance with its procedures, and is not in issue here.

5. It is also important to note that the entire procedure spelled out in the Guidebook – which establishes, among other things, the very procedure at issue here and the standards by which community objections are to be determined – is relatively new and largely untested. As at the moment of drafting this Expert Determination, few other expert determinations in respect of a community objection have been published.

6. It is in this context that the present Expert Determination focuses on and decides only those questions – as it turns, *the* question – which must be resolved in order to determine the outcome of this particular case.

## I - THE PARTIES AND THEIR REPRESENTATIVES

### A. The Objector

7. The Objector, CLOUD INDUSTRY FORUM LIMITED, describes itself as follows in its Objection:

> *Objector is not-for-profit industry body that represents the business and public affairs needs of the cloud industry at large, including but not limited to companies and organisations that build, implement, provide, sell and support cloud computing solutions and services, or seek to consume them as end-user organisations.*

8. The Objector is located at

Sword House
Totteridge Road
High Wycombe, HP13 6DG
United Kingdom

Tel: +44 7802 264 588
www.cloudindustryforum.org

9. The Objector's representative in these proceedings is its founder, Mr. Andrew Burton. For purposes of these proceedings Mr. Burton's coordinates are as indicated above. His email is andy@cloudindustryforum.org.

### B. The Applicant

10. Applicant, CHARLESTON ROAD REGISTRY INC. describes itself as follows in its Application:

> *Charleston Road Registry is an American company, wholly owned by Google, which was established to provide registry services to the Internet public. Google is an American multinational public corporation and global technology leader focused on improving the ways its hundreds of millions of users connect with information. [...]*
>
> *In line with Google's general mission, Charleston Road Registry's mission is to help make information universally accessible and useful by extending the utility of the DNS while enhancing the performance, security and stability of the Internet for users worldwide. Charleston Road Registry aspires to create unique web spaces where users can learn about Google products, services and information in a targeted manner and in ways never before seen on the Internet. Its business objective is to manage Google's gTLD portfolio and Google's registry operator business. [...]*

11. Applicant's principal place of business is located at

1600 Amphitheatre Parkway
Mountain View, CA 94043
USA

Tel: +1 202 346 1230

12. Applicant's representatives in these proceedings are

Ms. Sarah Falvey
1011 New York Ave., 2nd Floor
Washington, DC 20005
USA

Tel: +1 202 346 1230
sarahfalvey@google.com; tas-contact@google.com

and

Brian J. Winterfeldt, Esq.
Katten Muchin Rosenman LLP
2900 K Street NW, North Tower - Suite 200
Washington, DC 20007-5118
USA

Tel: +1 202 625 3562
brian.winterfeldt@kattenlaw.com

## II - THE EXPERT PANEL

13. On 15 June 2013, the Chairman of the Standing Committee of the Centre appointed Mr. Stephen L. Drymer as sole expert ("**Expert**") of the Expert Panel ("**Panel**") in this matter.

14. The Expert's address is

Mr. Stephen L. Drymer
WOODS LLP
2000 McGill College Ave., Suite 1700
Montréal, QC H3A 3H3
Canada

Tel: +1 514 370 8745
sdrymer@woods.qc.ca

15. By letter dated 20 June 2013, the Centre notified the parties of the Expert's appointment.

## III - PROCEDURAL BACKGROUND

### A. Nature of Objection

16. As indicated above, the specific ground upon which the Objector has filed its Objection is a "community objection".

### B. Key Procedural Steps

17. The proceedings were commenced by the filing of CIF's Objection on 13 March 2013.

18. By letter dated 18 March 2013 the Centre acknowledged receipt of the Objection. On 5 April 2013 the Centre advised the Objector that the Objection had been registered for processing.

19. CRR's Response to the Objection was dated and filed on 18 May 2013.

20. By letter dated 28 May 2013 the Centre advised the Applicant that its Response was not in compliance with the applicable procedure given that the substantive part of the document exceeded the strict word count set out in the Guidebook. The Centre invited Applicant to submit a revised Response.

21. Applicant accordingly submitted a revised Response, also dated 18 May 2013, on 30 May 2013 ("**Response**"). This is the Response that is before the Panel.

22. By letter dated 30 May 2013 the Centre acknowledged receipt of the Response, informed the parties that the Response was in compliance with the applicable procedure and rules, and advised the parties of its intention to proceed with the appointment of the Panel.

23. As indicated above, the Panel was appointed on 15 June 2013.

24. On 18 July 2013 the Objector filed an unsolicited additional submission with the Centre ("**Objector's Additional Submission**"). That Additional Submission was filed further to a Change Request dated 18 May 2013 submitted to ICANN by Applicant ("**Change Request**"), by which CRR proposed to amend its Application by providing that it intended to operate the applied-for gTLD string .CLOUD as a registry open to third parties rather than as a closed registry as originally proposed.

25. On 20 June 2013 the parties were notified of the appointment of the Expert. On 23 July 2013, following the parties' advance payment of the Estimated Costs of the proceedings, the constitution of the Panel was confirmed by the Centre and the file was transferred to the Panel.

26. On 30 July 2013 the Panel wrote the parties to invite them to provide their views as to whether a hearing would be required. The Panel also invited the parties to provide their views as to whether the Objector's Additional Submission should be accepted for purposes of these proceedings and, if so, whether Applicant would wish to file its own additional submission in reply.

27. Each party subsequently submitted their arguments on the question and, on 13 August 2013, the Panel issued a reasoned decision allowing Objector to file its Additional Submission and inviting Applicant to file a reply within one week. In response to a request from Applicant, this deadline was subsequently extended by several days.

28. Applicant's Additional Submission was duly filed on 23 August 2013 ("**Applicant's Additional Submission**").

29. Neither party requested that a hearing be held.

30. The present dispute was therefore considered, and this Expert Determination is rendered, on the basis of the Objection, the Response, the parties' respective Additional Submissions and the supporting evidence and materials accompanying those documents.

31. In accordance with Articles 21(a) and (b) of the Procedure, and within the extended time limit established pursuant to those provisions, the Expert Determination was submitted in draft form to the Centre for scrutiny on 11 September 2013.

## C. Communications

32. All communications between the parties, the Panel and the Centre were submitted electronically, in accordance with Article 6(a) of the Procedure.

## D. Language

33. The language of submissions and proceedings in this matter is English. All of the materials submitted by the parties, including all of their written submissions and supporting evidence, were submitted in English, in accordance with Article 5(a) of the Procedure.

## E. Place of the Proceedings

34. The place of the proceedings is Paris, France, where the Centre is located (Article 4(d) of the Procedure).

### F. Related Cases

35. By letter dated 12 April 2013 the Centre notified the parties that it was considering consolidating the present case with two other cases, involving two other applicants that had applied for the new gTLD string .CLOUD and in which CIF had filed a community objection substantially similar to its Objection in the present case.

36. On 19 April 2013 the Centre informed the parties that it had decided not to proceed with the consolidation of the three cases on its own initiative, but invited the parties themselves to propose a consolidation should they wish to do so. No such proposal was made, and the three cases proceeded separately.

37. The Panels in the two other cases referred to above were constituted on 15 June 2013 – the same date on which the Panel in the present case was constituted. The same Expert was appointed in all three cases.

38. Although the three cases remain distinct and have been or will be decided separately – each on its own merits and on the basis of the submissions and evidence presented by the parties in each case – given that the community objection filed by CIF in all three cases is substantially the same, important elements of the Expert Determination in each case will necessarily be similar.

## IV - APPLICABLE PROCEDURE AND RULES

39. The procedure and rules governing the determination of objections to new gTLD applications are set out in two sets of documents: documents forming part of the ICANN Guidebook; and documents associated with the ICC Expertise Rules. As indicated, these documents provide for both the substantive and procedural basis on which objections to news gTLD applications are assessed and determined.

### A. ICANN New gTLD Applicant Guidebook

40. The Guidebook provides for substantive and procedural criteria, standards and rules related to virtually every aspect of the gTLD application, evaluation, objection and dispute resolution process.

41. Two elements of the Guidebook are of particular relevance to the objection process: Module 3, entitled *"Objection Procedures"* ("**Module 3**"); and the Attachment to Module 3, entitled *"New gTLD Dispute Resolution Procedure"* ("**Procedure**").

**(i) Module 3**

42. As stated in the introduction to Module 3:

> *II. [...] This module describes the purpose of the objection and dispute resolution mechanisms, the grounds for lodging a formal objection to a gTLD application, the general procedures for filing or responding to an objection, and the manner in which dispute resolution proceedings are conducted.*
>
> *This module also discusses the guiding principles, or standards, that each dispute resolution panel will apply in reaching its expert determination.*

43. Module 3 in fact describes two types of mechanisms that may affect an application for a new gTLD: the procedure by which ICANN's Governmental Advisory Committee may provide advice to the ICANN Board of Directors concerning a specific application; and the dispute resolution procedure commenced by a formal objection to an application by a third party. It is the second of these mechanisms that concerns us here.

44. Relevant extracts of Module 3 are reproduced below (underlining added):

> ***3.2 PUBLIC OBJECTION AND DISPUTE RESOLUTION PROCESS***
>
> *The independent dispute resolution process is designed to protect certain interests and rights. The process provides a path for formal objections during evaluation of the applications. It allows a party with standing to have its objection considered before a panel of qualified experts.*
>
> *A formal objection can be filed only on four enumerated grounds, as described in this module.*
>
> *[...]*
>
> ***3.2.1 Grounds for Objection***
>
> *A formal objection may be filed on any one of the following four grounds:*
>
> ***String Confusion Objection** – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied for gTLD string in the same round of applications.*
>
> ***Legal Rights Objection** – The applied-for gTLD string infringes the existing legal rights of the objector.*
>
> ***Limited Public Interest Objection** – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.*

***Community Objection*** – *There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.*

*[…]*

***3.2.2 Standing to Object***

*Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:*

| ***Objection ground*** | ***Who may object*** |
|---|---|
| *String confusion* | *Existing TLD operator or gTLD applicant in current round. In the case where an IDN ccTLD Fast Track request has been submitted before the public posting of gTLD applications received, and the Fast Track requestor wishes to file a string confusion objection to a gTLD application, the Fast Track requestor will be granted standing.* |
| *Legal rights* | *Rightsholders* |
| *Limited public interest* | *No limitations on who may file – however, subject to a "quick look" designed for early conclusion of frivolous and/or abusive objections* |
| *Community* | *Established institution associated with a clearly delineated Community* |

*[…]*

***3.2.2.4 Community Objection***

*Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:*

***It is an established institution*** *– Factors that may be considered in making this determination include, but are not limited to:*

- *Level of global recognition of the institution;*
- *Length of time the institution has been in existence; and*
- *Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.*

***It has an ongoing relationship with a clearly delineated community*** *– Factors that may be considered in making this determination include, but are not limited to:*

- *The presence of mechanisms for participation in activities, membership, and leadership;*
- *Institutional purpose related to the benefit of the associated community;*
- *Performance of regular activities that benefit the associated community; and*
- *The level of formal boundaries around the community.*

*The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.*

***3.2.3 Dispute Resolution Service Providers***

*[…]*

- *The International Center of Expertise of the International Chamber of Commerce has agreed to administer disputes brought pursuant to Limited Public Interest and Community Objections.*

*[…]*

## *3.5 DISPUTE RESOLUTION PRINCIPLES (STANDARDS)*

*Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.*

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

*The principles outlined below are subject to evolution based on ongoing consultation with DRSPs, legal experts, and the public.*

*[…]*

***3.5.4 Community Objection***

*The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:*

- *The community invoked by the objector is a clearly delineated community; and*
- *Community opposition to the application is substantial; and*
- *There is a strong association between the community invoked and the applied-for gTLD string; and*
- *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 explicitly or implicitly targeted. Each of these tests is described in further detail below.*

***Community*** *– The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:*

- *The level of public recognition of the group as a community at a local and/or global level;*
- *The level of formal boundaries around the community and what persons or entities are considered to form the community;*
- *The length of time the community has been in existence;*
- *The global distribution of the community (this may not apply if the community is territorial); and*
- *The number of people or entities that make up the community.*

*If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.*

***Substantial Opposition*** *– The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:*

- *Number of expressions of opposition relative to the composition of the community;*
- *The representative nature of entities expressing opposition;*

- *Level of recognized stature or weight among sources of opposition;*
- *Distribution or diversity among sources of expressions of opposition, including:*
  - *Regional*
  - *Subsectors of community*
  - *Leadership of community*
  - *Membership of community*
- *Historical defense of the community in other contexts; and*
- *Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.*

*If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.*

***Targeting** – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:*

- *Statements contained in application;*
- *Other public statements by the applicant;*
- *Associations by the public.*

*If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.*

***Detriment** – 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 explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.*

*Factors that could be used by a panel in making this determination include but are not limited to:*

- *Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;*
- *Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;*

- *Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;*

- *Dependence of the community represented by the objector on the DNS for its core activities;*

- *Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and*

- *Level of certainty that alleged detrimental outcomes would occur.*

*If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.*

*The objector must meet all four tests in the standard for the objection to prevail.*

### (ii) New gTLD Dispute Resolution Procedure

45. The Procedure is especially germane to these proceedings. As stated in its Preamble:

> *These Procedures were designed with an eye toward timely and efficient dispute resolution. As part of the New gTLD Program, these Procedures apply to all proceedings administered by each of the dispute resolution service providers (DRSP). Each of the DRSPs has a specific set of rules that will also apply to such proceedings.*

46. The Procedure provides, in relevant part (underlining added):

> ***Article 1. ICANN's New gTLD Program***
>
> *[…]*
>
> *(c) Dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider ("DRSP") in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b).*
>
> ***Article 2. Definitions***
>
> *[…]*
>
> *(c) The "Panel" is the panel of Experts, comprising one or three "Experts," that has been constituted by a DRSP in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b).*
>
> *[…]*
>
> *(e) The grounds upon which an objection to a new gTLD may be filed are set out in full in Module 3 of the Applicant Guidebook. Such grounds are identified in this*

*Procedure, and are based upon the Final Report on the Introduction of New Generic Top-Level Domains, dated 7 August 2007, issued by the ICANN Generic Names Supporting Organization (GNSO), as follows:*

*[...]*

*(iv) "Community Objection" refers to the objection that there is substantial opposition to the application from a significant portion of the community to which the string may be explicitly or implicitly targeted.*

*(f) "DRSP Rules" are the rules of procedure of a particular DRSP that have been identified as being applicable to objection proceedings under this Procedure.*

***Article 3. Dispute Resolution Service Providers***

*The various categories of disputes shall be administered by the following DRSPs:*

*[...]*

*(d) Community Objections shall be administered by the International Centre for Expertise of the International Chamber of Commerce.*

***Article 4. Applicable Rules***

*(a) All proceedings before the Panel shall be governed by this Procedure and by the DRSP Rules that apply to a particular category of objection. The outcome of the proceedings shall be deemed an Expert Determination, and the members of the Panel shall act as experts.*

*(b) The applicable DRSP Rules are the following:*

*[...]*

*(iv) For a Community Objection, the applicable DRSP Rules are the Rules for Expertise of the International Chamber of Commerce (ICC), as supplemented by the ICC as needed.*

*(c) In the event of any discrepancy between this Procedure and the applicable DRSP Rules, this Procedure shall prevail.*

*(d) The place of the proceedings, if relevant, shall be the location of the DRSP that is administering the proceedings.*

*(e) In all cases, the Panel shall ensure that the parties are treated with equality, and that each party is given a reasonable opportunity to present its position.*

*[...]*

***Article 13. The Panel***

*[...]*

*(b) Number and specific qualifications of Expert(s):*

*[…]*

*(iv) There shall be one Expert in proceedings involving a Community Objection.*

*(c) All Experts acting under this Procedure shall be impartial and independent of the parties. The applicable DRSP Rules stipulate the manner by which each Expert shall confirm and maintain their impartiality and independence.*

***Article 14. Costs***

*[…]*

*(e) Upon the termination of the proceedings, after the Panel has rendered its Expert Determination, the DRSP shall refund to the prevailing party, as determined by the Panel, its advance payment(s) of Costs.*

***Article 17. Additional Written Submissions***

*(a) The Panel may decide whether the parties shall submit any written statements in addition to the Objection and the Response, and it shall fix time limits for such submissions.*

*[…]*

***Article 18. Evidence***

*In order to achieve the goal of resolving disputes over new gTLDs rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the Panel may require a party to provide additional evidence.*

***Article 19. Hearings***

*(a) Disputes under this Procedure and the applicable DRSP Rules will usually be resolved without a hearing.*

*(b) The Panel may decide, on its own initiative or at the request of a party, to hold a hearing only in extraordinary circumstances.*

*[…]*

***Article 20. Standards***

*(a) For each category of Objection identified in Article 2(e), the Panel shall apply the standards that have been defined by ICANN.*

*(b) In addition, the Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.*

> *(c) The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.*
>
> ***Article 21. The Expert Determination***
>
> *[…]*
>
> *(d) The Expert Determination shall be in writing, shall identify the prevailing party and shall state the reasons upon which it is based. The remedies available to an Applicant or an Objector pursuant to any proceeding before a Panel shall be limited to the success or dismissal of an Objection and to the refund by the DRSP to the prevailing party, as determined by the Panel in its Expert Determination, of its advance payment(s) of Costs pursuant to Article 14(e) of this Procedure and any relevant provisions of the applicable DRSP Rules.*

## B. The Rules of Expertise of the ICC International Centre for Expertise

### (i) The Rules

47. As indicated in Article 4 of the Procedure, all proceedings before a Panel such as the present are governed by – in addition to the Procedure itself – the rules of the relevant dispute resolution service provider. In the case of a community objection, Article 4 provides that those rules are "the Rules for Expertise of the International Chamber of Commerce (ICC), as supplemented by the ICC as needed".

### (ii) Appendix III to the Rules

48. The Rules include an Appendix III, entitled "Schedule of Expertise Costs for Proceedings under the New gTLD Dispute Resolution Procedure" ("**Appendix III**").

### (iii) ICC Practice Note

49. The Rules have also been supplemented by a document entitled "ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure" ("**ICC Practice Note**").

50. The Rules and related documents (Appendix III, ICC Practice Note) are exclusively *procedural* in nature. They do not address or in any way affect the substantive principles and standards according to which objections are assessed and determined, all of which are laid down in the ICANN Guidebook.

## V - SUMMARY OF THE PARTIES' POSITIONS

51. The following summary of the parties' positions is based on the parties' submissions and statements, and the supporting documents and evidence presented by them, during these proceedings. Regardless of whether they are expressly referred to here, all of the parties' allegations, evidence and arguments have been carefully considered by the Panel.

### A. Objector's Submissions

52. As declared at the outset of its Objection, the Objector

> *[B]rings this Community Objection on behalf of the members of the cloud community. [...] Unless the Expert Panel denies the Application, Applicant will gain an unfair competitive advantage against the rest of the cloud community through the improper grant of a perpetual monopoly on a generic industry term in contravention of established international legal norms and to material detriment to the community.*

53. Objector's submissions are presented in its Objection and Additional Submission. Objector submits that it has standing to file a community objection, and that its Objection must prevail on the merits. Its submissions in respect of these questions explicitly refer to and rely on the various principles, standards, rules and, in particular, "factors" explicitly identified in the Guidebook. It invokes no other relevant principles, standards, rules or factors by which, it submits, the Objection is to be evaluated and determined.

#### (i) Standing

54. The Objector submits as follows with respect to the question of its standing to bring a community Objection:

- Objector is an established, not-for-profit institution registered with the England and Wales Registrar of Companies.
- Objector has existed almost as long as the cloud industry itself.
- Objector enjoys widespread, global recognition through representation of industry members, its Certification Program, government consulting and participation in industry events.
- Objector is widely considered one of the leading independent voices, if not the leading independent ("vendor agnostic") voice, when it comes to cloud service provider matters, independent research and best practice advice.

- Objector has an ongoing relationship with a clearly delineated community.
- According to the ICANN Independent Objector ("**Independent Objector**" or "**IO**"), "the notion of 'community' is wide and broad" and can be defined as a group of individuals or entities who "have something in common and/or share common values, interests or goals".
- The community in question here is the "*cloud computing industry*".
- Cloud computing is "a means of delivering software and information technology (e.g., infrastructure, platform, communications, network) as a service, through the cloud (i.e., the internet), as opposed to on-site … The 'cloud' is built on infrastructure that is operated to host IT services that are provided as a service and accessed over the internet".
- The cloud computing community, "while constantly evolving with new types of cloud services", is defined by certain "key characteristics and actors". More specifically, the community is defined by five "essential characteristics" of cloud computing, and consists of three "distinct actors … [that] encompass the participants in the cloud computing industry".
- The five essential characteristics of cloud computing, according to the US Department of Commerce National Institute of Science and Technology ("**NIST**") "Definition of Cloud Computing", are: on-demand service; broad network access; resource pooling; rapid elasticity or expansion; and measured service.
- The actors/participants in the cloud computing industry community – i.e., *the members of the community* – are "cloud service *users*", "cloud service *providers*", and "cloud service *partners*". These include "retailers of cloud-based software and IT services, cloud infrastructure providers, cloud service providers, cloud resellers, cloud systems integrators, and cloud standard organisations" as well as "those that operate in the cloud services market", "entities that represent the interests of end-users", and "advisory entities such as law firms specializing in the field".
- The community is bound by shared interests and goals: its members are "all driven by the enhancement, adoption and use of this new technology [cloud computing]".
- Although concentrated in Western Europe and North America, the community is recognised at a global level.
- The Objector's association with the community is "self-evident". CIF's "every activity relates to cloud computing, so to say that the Objector has an 'ongoing relationship' with the

Community is an understatement ... the Community is the very reason for the Objector's existence".

**(ii) Merits of the Objection**

55. As regards the merits of its Objection, and whether the Objection meets the standards and satisfies the "four tests" established in the Guidebook, the Objector submits:

- Community – The Objector's argument in respect of standing (summarised above) "establishes that the cloud computing industry is a clearly delineated community with global recognition, formal boundaries, and many members with shared interest expertise and goals, namely the provision, enhancement, adoption and use of cloud computing services".

- Substantial opposition – The community's substantial opposition to the Application is demonstrated by: (i) the breadth of Objector's membership, comprised of "33 vendor entities and 13 legal practices", all "leading members of the cloud computing and services industry"; (ii) the global coalition of 11 organisations and user groups that support the Objection and that cover "a huge swath of the community, in virtually all geographic regions, representing 1000s of CSPs, CSUs, and CSNs, cloud standards organisations, and independent cloud commentators"; and (iii) the response from the community generally, including from the Government of Australia, to the notion of "closed generics".

- Targeting – The issue is "open and shut". Applicant defines itself as a leading provider of cloud-based storage solutions. Its Application states that the applied-for gTLD .CLOUD plays an integral part in Applicant's business goals and demonstrates that .CLOUD explicitly targets the community. Evidence shows that .CLOUD also targets the community implicitly: the term "cloud" is a common generic term for the community; and the public is likely to associate .CLOUD with the community.

- Detriment – (This part of the summary of Objector's position is taken from the Objection. Objector's Additional Submission, which modifies and expands on the Objection in relation to the changes to CRR's Application outlined in the Change Request, is summarised below.) Applicant's stated goal of excluding others from this generic industry term fundamentally contradicts the interests of the community as a whole. The Application will result in other members of the community being "prevented from pursuing their independent business and policy interests within this TLD". "No rational argument can be made that this benefits the community." Applicant seeks to "sidestep international legal norms that prohibit the exclusive ownership of common generic terms". Ownership and control of .CLOUD will "disrupt the core activities of the community", result in "industry-wide

confusion" and "barriers to entry", and allow Applicant to "gain an unfair competitive advantage over other members of the community". It is widely recognised that the detriment to the community will be manifested in "industry-wide ***material damage, disruption, and economic harm***" (emphasis in the original). That detriment is "real", tangible and very likely to occur if the Disputed TLD [.CLOUD] is delegated"; in fact, the likelihood of material detriment is "near-certain".

56. Objector's Additional Submission, as mentioned, was filed in reaction to Applicant's Change Request. Objector states as follows in its Additional Submission:

- CRR's argument in its Response (see below) that that the Objection is rendered moot by the Change Request, "is nothing more than a veiled attempt to divert this Panel's attention from the issues highlighted in CIF's Objection".

- The Change Request cannot render the Objection moot because it constitutes merely a request that ICANN approve changes to the Application. The proposed changes were preliminarily approved for public comment on 5 July 2013, "but this is only the first step in the change request process". There is "no guarantee" that ICANN will accept the requested changes.

- In any event, the Objection is relevant and valid regardless of whether Applicant proposes to operate the applied-for gTLD string as an open, restricted or closed registry. In fact, the proposed changes "amplify" the anti-competitive risks of the Application, such that the Application is even more objectionable in its modified version.

- The proposed changes do not address or alleviate the principal concern articulated in the Objection, namely, that Objector opposes the operation of the .CLOUD registry by "an industry player" who will thereby gain an "unfair competitive advantage against the rest of the cloud community through the improper grant of a perpetual monopoly on a generic industry term …".

**B. Applicant's Response**

57. Applicant contends, as indicated above, that the Objection is rendered moot by its Change Request:

> *CIF's concern is almost entirely related to CRR's application for .CLOUD being applied for as a closed registry. However, on March 7, 2013, Google issued public comments … to ICANN and on April 6, 2013, CRR sent a more detailed letter to ICANN's gTLD Program General Manager … outlining its plan to operate .CLOUD as a registry open*

> *to third parties. On May 18, 2013, CRR filed a change request with ICANN … to modify the application to allow registration by third party providers of cloud services. Therefore, this entire argument is now moot.*

58. It goes on to argue that, irrespective of the Change Request, CIF's objection still fails "as it does not satisfy the four-pronged community objection standard" set out in Section 3.5.4 of Module 3 of the Guidebook. Nor does the Objector "meet the standing requirements" set out in Section 3.2.2.4 of the Guidebook. Similar to Objector, Applicant's submissions as regards the twin questions of Objector's standing and the Objection's merits refer directly and exclusively to the principles, standards, rules and especially the "factors" set out in the Guidebook – Sections 3.2.2.4 and 3.5.4 of Module 3, as well as certain provisions of Section 4.2.3 of Module 4. No other relevant standards or factors are invoked.

**(i) Objector's Standing**

59. Applicant submits:

- Although Objector does have members that provide cloud-based services, CIF is not "an established institution with widespread, global recognition", as Objector contends.

- Several globally-relevant cloud service providers are "missing from its ranks"; "only 3 (or 3.6%) of the top 82 Cloud Software-as-a-Service (SaaS) Vendors are members of CIF"; and Objector's activities and membership are restricted primarily to the UK and to a lesser extent Europe.

- Objector has not been existence for an adequate length of time. Article 4.2.3 of the Guidebook provides that for a *community-based organisation to have standing to apply for a gTLD*, it must have existed prior to September 2007, when the gTLD guidelines were finalized. "The same standard should be applied to organizations *objecting on behalf of a community*, as the criteria and language set forth in Sections 3.5.4 and 4.2.3 are essentially the same."

- A major problem is the definition of "cloud computing" proposed by Objector:

> *The definition of cloud computing that CIF provides is decidedly narrow and should not only include SaaS providers and services. In recent years, there has been exponential growth in the use of the Internet by billions of people, millions of businesses, and more than a hundred governments. This trend has driven unforeseen technological innovations and advancements in computing and has led to new generations of interconnected web services, applications, consumer devices, and infrastructure, as the Internet contributes more than $2.3 trillion annually to the global economy … Moreover, many concepts have been used to describe computing over the Internet,*

*including "terminal computing," "network computing," "distributed computing," "cloud computing," etc., but they are all one and the same. Almost every form of computing device, ranging from a smartphone to a data center, can now utilize computing resources on the Internet to manage increasingly complex tasks - from sending an email to modeling treatments for genetic illnesses. As such, limiting the "cloud community" to only a handful of companies does not actually represent the full scope of the industry. (Underlining added)*

- Applicant does not disagree with "the definition of the cloud or its characteristics" proposed by Objector. The problem is that the *cloud computing industry* is not "clearly defined", and the *community of participants in the industry* is not "clearly delineated by formal boundaries and common interests".

- As reported in the Wall Street Journal, "over 80% of Fortune 500 companies use or produce cloud services in some way, hardly making cloud services a group that can claim exclusivity with a clear delineation of membership, recognized leadership or cohesive common goals."[1]

- Objector does not have "an ongoing relationship" with the community it purports to represent. Objector is comprised of a few large-scale cloud service providers, operates exclusively in Europe "and claims an association and representation of a much broader coalition of companies than is practical." Objector is "hardly in a position to speak on behalf of millions of cloud users (who are mostly unaware of their status)" or of "major cloud service providers when an overwhelming majority are missing from its membership rolls".

- Objector has a "unique relationship" with some of its founding members, namely VMWare, Dell, Citrix and Microsoft, that "likely drives many of its activities, targeting some applicants over others." Objector has "only filed objections against CRR, Symantec and Amazon, key competitors to its largest sponsors, yet seems unconcerned by applications submitted by Donuts, Cloudnames or Aruba.it ...".

[1] It is noted that the article in question, Annex 9 to Applicant's Response, in fact refers to a "recent survey of 500 IT decision-makers" conducted by CompTIA, which found that "more than eight in ten companies use some form of cloud computing technology ...". There is no reference in the article to whether these "500 IT decision-makers" are related to "Fortune 500 companies" as indicated by Applicant. The survey is available online only to CompTIA members (of which the Expert is not one). However, in what appears to be a summary of the survey in question on the CompTIA website, one reads – and the Panel understands that this is the essential point that Applicant wishes to make: "CompTIA's latest study on cloud computing finds that ... [o]ver 80% of companies now claim to use some form of cloud solution, whether that be virtual machines that can be spun up on demand or applications that can be easily procured and put into use" (http://www.comptia.org/research/cloud.aspx).

**(ii) Merits of the Objection**

60. Insofar as the merits of the Objection are concerned, and in addition to its argument that the Objection is moot by virtue of the Change Request, Applicant declares that "[t]he rationale cited by CIF for filing the objection is concern over the use of 'closed generics' … there is no reason presented that specifically applies to CRR …".

61. Applicant further submits that the Objection fails to satisfy the four-part test for a community objection under Section 3.5.4 of Module 3 of the Guidebook:

- Community – As noted above, membership in a community of cloud service users, providers and partners cannot be clearly delineated. The cloud community is in fact too "nebulous" to define or delineate. Moreover, "[m]any of the people and corporations placed into these groups by CIF are largely unaware of their status and likely do not share common goals, critical thresholds for defining membership in a community as described in [Section 4.2.3 of] the Guidebook …". As noted by the Independent Observer, terms such as "cloud" are so generic that they are employed universally thus making it difficult, if not impossible, to formally delineate a community around them. In any event, Cloud services are "a tool among many on the Internet, with ubiquitous presence and myriads of implementations … *[T]o disambiguate the 'cloud community' from the general public using the Internet is not possible*". Moreover, the community identified may not be lasting, "as prior technologies introduced into the Internet are often folded into more complex tools over time". Words such as "microchip", or even "computer", "no longer pose specific enough boundaries around them to have industry associations anymore". Even the concept of "the cloud" is "hardly new, as distributed computing was developed in the 1960's and 1970's",[2] and there is no reason to assume that "the focus around .CLOUD as a term or community will continue to persist as an 'organized' community … In all likelihood, cloud services will become as commonplace and ubiquitous as email, browsers or the DNS …".

- Substantial Opposition – Objector fails to prove that there exists "substantial opposition" to CRR's Application. As indicated, Objector's membership comprises but a "small segment" of the cloud industry that "omits significant participants and providers from its ranks". The

[2] Applicant's support for this argument is an article published in the Journal of Internet Law. The article is found at Annex 11 of Applicant's Response. It is noted that Ms. Falvey, one of Applicant's representatives in these proceedings, is one of the three authors of the article, as is Patrick S. Ryan, Adjunct Professor at the University of Colorado at Boulder and Policy Counsel, Open Internet at Google Inc.

list (annexed to the Objection) of organizations that have "self-certified" or adopted Objector's code of practice is not compelling evidence of strong objection to the Application, since "this seems to conflate the purpose of certification with a very specific policy aim that a majority of these organizations have no awareness of". On the same basis, "13,400 signups for CIF's general newsletter should not be considered an indication of strong objection". Public discourse concerning the gTLD .CLOUD is actually sparse. Only four public comments have been filed against CRR's Application, "fewer than any other applicant". Moreover, no objections have been filed regarding Applicant as the operator of .CLOUD as an *open* registry. Even the 10 letters of support for the Objection that Objector has filed all address the issue of "closed registries". The Objection does not demonstrate substantial opposition from a community, but is rather "a last ditch attempt to create roadblocks for applicants during the gTLD process, likely for the gain of [Objector's] strongest sponsors, Microsoft, Dell, VMWare and Citrix/Cisco".

- Targeting – The applied-for TLD does not explicitly target the community invoked by Objector. Citrix, a leading CIF member, registered the domain name "Cloud.com" in 2000 (renewable in 2017), and Objector "has never indicated any opposition" to that registration. This "calls into question the neutrality of CIF serving the interests of the community at-large and not simply its own membership", as well as Objector's purported concerns about "an industry player" being granted an unfair competitive advantage "through the improper grant of a perpetual monopoly on a generic industry term …". It is also unlikely that the meaning of the term "cloud" would pass the criteria of "uniqueness" set out in Section 4.2.3 of the Guidebook, "as there are several other meteorological definitions (e.g. 'cumulus cloud'), zoological definitions (e.g. 'a cloud of grasshoppers'), as well as common usages in English (e.g. 'a clouded sense of judgment')" that carry other significant meaning that do not pertain to the community proposed by Objector.

- Detriment – CRR's clear and publicly declared intent to operate .CLOUD as a registry open to third party providers of cloud services "precludes any discussion of exclusive use or using the TLD for anticompetitive purposes …". The Application will not result in confusion or barriers to entry. "[W]hether CRR manages a TLD has no bearing on the ability of companies to deliver their services, otherwise there would be no cloud industry at all since still to this date no .CLOUD TLD exists." Objector fails to provide any estimate of – let alone prove –economic damages that would result from the delegation of .CLOUD to Applicant. "Furthermore, CIF's largest sponsors, Microsoft, VMWare, Dell and Citrix/Cisco have not disclosed any inherent risk or materially detrimental concerns to their shareholders in their most recent annual reports, signaling that the risk presented by CIF is nonexistent." In any event, top-level domains do not convey a competitive advantage to

applicants. "If [generic] TLDs are successful, it will not necessarily be due to the inherent value of a generic term, but rather because users are persuaded to make use of these domains." To claim, as does Objector, that a particular TLD will provide a competitive advantage to its operator "overlooks the matter of possible substitutes." Finally, Objector's claim that the level of certainty of alleged material detriment (if CRR's Application is successful) is high, is belied by the facts. Objector provides no evidence "that CRR or Google have ever acted against the interest of users or the cloud community in general." On the contrary, the evidence proves otherwise. CRR has no intention of foreclosing competition, as this "runs counter to our business model". And Google "has developed a privacy policy that governs the use of information on its servers and has gone to great lengths to minimize detrimental activity from occurring on the Internet".

## VI - DISCUSSION AND FINDINGS

### A. Nature of these Proceedings; Remedies Available

62. As a preliminary comment, the Panel recalls the limited nature and purpose of these proceedings. As stated in the Introduction to this Expert Determination, the issue to be determined here is the success or dismissal of the Objection. The merits of the Application itself, and the Application's ultimate success or failure, are not for this Panel to decide. Article 21 of the Procedure is unequivocal: "The remedies available to an Applicant or an Objector pursuant to any proceeding before a Panel shall be limited to the success or dismissal of an Objection ...".

63. The Procedure is equally plain as regards the basis for determining the "success or dismissal" of an objection: "The grounds upon which an objection to a new gTLD may be filed are set out in full in Module 3 of the ... Guidebook" (Procedure, Article 2(e)). And: "For each category of Objection ... the Panel shall apply the standards that have been defined by ICANN" (Procedure, Article 20(a)).

64. The role of the Panel, therefore, is to determine whether the Objection satisfies the requirements for success set out in the ICANN Guidebook and Procedure. Those requirements involve a determination by the Panel of the Objector's "standing" to bring an objection; and, if the Objector is able to demonstrate that it does have such standing, a determination of the merits of the Objection itself, specifically, whether the Objection meets the substantive "standards" – embodied in the "four tests" – established by ICANN.

## B. Burden and Standard of Proof

65. A second preliminary comment relates to the notion of "burden of proof". This is no mere legal abstraction. Nor is it a concept imported into these proceedings by an "Expert Panel" whose sole member/expert is a lawyer. On the contrary, the question of the burden of proof is of the essence of the procedure and rules laid down by ICANN and reiterated throughout the Guidebook.

66. Section 3.5 of Module 3, for example, provides that in the process of evaluating the merits of each type of objection (not only a community objection), "[t]he objector bears the burden of proof in each case". The Procedure similarly states at Article 20(c): "The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards." The same applies to a determination of a would-be objector's standing to file a community objection. As set out in Section 3.2.2.4 of the Guidebook: "To qualify for standing to a community objection, the objector must prove …".

67. What this means, in concrete terms, is that it is the Objector in these proceedings, not the Applicant, that must prove its case. The Objector must prove that it has standing; and, if it is successful on that score, the Objector must prove that its Objection meets the tests required by the Guidebook. It can only do so on the basis of compelling evidence which it adduces and musters in support of its arguments.

68. It also means that in determining these questions, in particular under a procedure and rules that provide for an expert determination to be rendered on the basis of limited written submissions, the Panel is fairly strictly bound to consider the case *as put by the parties* – that is, as set out in the parties' submissions and supporting documents. A panel certainly enjoys an important degree discretion in its appreciation and weighing of the statements and evidence submitted, and in its interpretation and (in appropriate cases) selection of the "rules or principles that it determines to be applicable" (Procedure, Article 20(b)). A panel obviously also exercises a certain discretion when it comes to the "balancing of the factors" listed in Sections 3.2.2.4 and 3.5 of Module 3. But it is not for a panel in these proceedings to "investigate" on its own the facts and issues at stake or independently to compile evidence on the basis of which it then grounds its decision. It is, as noted, limited to an important degree to a consideration of the evidence and submissions put before it by the parties.

69. Finally, it is useful to address very briefly the applicable "standard" of proof, that is, the standard by which an alleged fact will be considered to be proven. The standard of proof is not addressed in either Module 3 or the Procedure. Nonetheless, the Panel has no hesitation in stating that the appropriate standard of proof is a "balance of probabilities" or a "preponderance of evidence".

Stated simply, the standard is met if the evidence demonstrates that it is more likely than not that an alleged fact is true.

70. With the forgoing considerations in mind, the Panel turns to the essential issues to be determined.

## C. Standing – Who May File an Objection?

71. The Guidebook provides that a party must satisfy certain "standing requirements" to be considered an objector entitled to file an objection to a gTLD application. Only a party that demonstrates that it has standing is eligible to file an objection to a gTLD application and to have that objection considered.

72. Section 3.2.2 of Module 3 provides that for a community objection, only an "established institution associated with a clearly delineated community" has standing and is eligible to object to a gTLD application.

73. Section 3.2.2.4 of Module 3 reiterates that to qualify for standing for a community objection, the objector must prove among other things that "it has an ongoing relationship with a clearly delineated community".

74. Three facts must therefore be proven for an objector to have standing: that it is an "*established institution*"; that it is "*associated*" with or has an "*ongoing relationship*" with a community; and that that community is a "*clearly delineated community*".

75. As indicated above, Section 3.2.2.4 identifies four particular factors, among others, on which an objector may rely to make such proof; four factors that a panel may consider and on which it may rely to determine whether or not a would-be objector meets the Guidebook's requirements for standing. Section 3.2.2.4 goes on to state that "[t]he panel will perform a balancing of the factors … as well as other relevant information, in making its determination." And it provides: "It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements."

76. As noted, in their submissions to the Panel in these proceedings, both parties expressly rely on the factors listed in Section 3.2.2.4 in support of their respective arguments for and against the Objector's standing. Additionally, Applicant relies on certain provisions of Section 4.2.3 of the Guidebook that concern the meaning and usage of the terms "community" and "delineated. Neither party invokes any further factor or rule to be taken into account in the "balancing of the factors" to be performed by the Panel. Nor does the Panel consider that other factors, rules or principles are necessary to decide the question of the Objector's standing.

77. As indicated above, of the four factors related to standing that are listed in Module 3, three are concerned with the *institution* that wishes to object and the nature of its *relationship* or *association* with the community in question. Only one of the listed factors concerns the *community* in question. More specifically, only one of the listed factors concerns the means by which an objector may prove that is has an ongoing relationship with *a clearly delineated community*: "The level of formal boundaries around the community".

78. The importance of this concept of a "clearly delineated community" as a group defined in part by some type and level of "boundaries" that delineate (or distinguish) it from other groups and communities is reiterated over and over again in the Guidebook.

## D. Substantive Standards

79. Section 3.5 of Module 3 sets out the substantive principles and standards for adjudication of the merits for each type of objection to a gTLD application (as opposed to adjudication of the objector's standing, or eligibility, to file an objection under Section 3.2.2). It also articulates, as mentioned, the fundamental rule that "[t]he objector bears the burden of proof in each case".

### (i) "Four Tests" for the Success of a Community Objection

80. The principles and standards according to which community objections are evaluated are found in Section 3.5.4 of Module 3. "Four tests" must be met for a community objection to be successful: the so-called "*community*" test; the "*substantial opposition*" test, the "*targeting*" test, and the "*detriment*" test.

81. Lest there be any doubt in this regard, article 2(e) states clearly that "[t]he grounds upon which an objection to a new gTLD may be filed are set out in full in Module 3 of the Applicant Guidebook". Article 20(a) reiterates that "the Panel shall apply the standards that have been defined by ICANN" for each type of objection set out in the Guidebook, while article 20(c) reiterates the principle repeated throughout the Guidebook that "[t]he Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards".

### (ii) The Community Test – a "Clearly Delineated Community"

82. The first of these tests – the community test – is described in two ways in Section 3.5.4: "For an objection to be successful, the objector must prove that ... the community invoked by the objector is a clearly delineated community"; and "The objector must prove that the community expressing opposition can be regarded as a clearly delineated community". To the extent that

there could be said to be a distinction between these two expressions of the test, it is a distinction without a difference.

83. Section 3.5.4 goes on to state that, just as in the matter of standing, "a panel could balance a number of factors to determine this [whether the community invoked by the objector can be regarded as a clearly delineated community]". It lists a number of such illustrative factors: the level of public recognition of the group as a community at a local and/or global level; the level of formal boundaries around the community; what persons or entities are considered to form the community; the length of time the community has been in existence; the global distribution of the community; and the number of people or entities that make up the community.

84. As with respect to the question of standing, apart from Applicant's reliance on certain provisions of Section 4.2.3 related to the definition of "community" (and "uniqueness", in relation to the "targeting" test), neither party invokes factors others than those listed in Section 3.5.4 in support of its submissions regarding the merits of the Objection. Here too, the Panel does not consider that other factors, rules or principles are necessary to decide the question at hand.

85. Section 3.5.4 then states: "*If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.*" This, boiled down to its practical essence, is the community test.

86. For the reasons discussed more fully below, it is unnecessary to consider the other three "tests" – substantial opposition; targeting; detriment – for evaluating the merits of an objection.

## E. Applying the Community Test – a Matter of Both Standing *and* Substance

87. From the foregoing it is clear that, although they constitute separate steps, the test for standing and the test(s) for determining the merits of a community objection share an important commonality. Both require the objector to prove the existence of a "*clearly delineated community*" on whose behalf it purports to object to a particular gTLD application.

88. The Objector has failed to make such proof in this case.

89. The problem lies in the definition of the community invoked by the Objector.

90. The Objector refers to the community in question as the "*cloud computing industry*". It submits that this industry/community can be defined, among other things, by its membership, which Objector claims encompasses all "actors" or "participants" in the cloud computing industry, including (as identified at various places in the Objection):

- "cloud service users"
- "cloud service providers"
- "cloud service partners"
- "retailers of cloud-based software and IT services"
- "cloud infrastructure providers"
- "cloud resellers"
- "cloud systems integrators"
- "cloud standards organisations"
- "those that provide infrastructure technology and applications to build cloud solutions"
- "those that operate in the cloud services market"
- "entities that represent the interests of end-users"
- "advisory entities such as law firms specializing in the field"
- "including but not limited to companies and organizations that build, implement, provide, sell and support cloud computing solutions and services, or seek to consume them as end-user organisations"

91. With respect, what Objector is proposing here is effectively a community of *virtually anyone and everyone – individuals; businesses; private and public groups; professional, academic and government entities – having anything to do with or any interest in cloud computing.*

92. It is recalled that Objector also describes the cloud computing industry as "a means of delivering software and information technology as a service, through 'the cloud' (i.e., the internet)". It describes the industry and its community as "constantly evolving" (and presumably expanding) as new types of cloud services are developed. And it relies for its definition of this community, in part, on the NIST's "five essential characteristics" of cloud computing.

93. None of this is contentious on its own. But what it means is that the community proposed by Objector may just as well be defined as *an evolving community of people and entities having anything to do with or any interest in using or delivering software and information technology as a service, through the Internet,*[3] *according to a model that is currently characterised by on-demand service; broad network access; resource pooling; rapid elasticity or expansion; and measured service.*

94. Such a community is not a "clearly delineated community" within the meaning of the Guidebook.

95. Section 3.5.4 of the Guidebook lists five factors that may be taken into account to determine whether or not a community can be regarded as "clearly delineated". Other factors may also be taken into account. In any case, the question is not whether a community may be characterised by one or other of the factors listed in Section 3.5.4, but whether a community is a "clearly delineated community". At the risk of stating the obvious, the Guidebook requires that such a community must not only be capable of being "delineated"; it must be "clearly delineated".

96. Delineation connotes differentiation, distinction, specification. As pointed out by Applicant, the ICANN Independent Objector writes that "[a] specific community should distinguish itself from others, precisely by its characteristics or specificities" (see below).

97. This is borne out by the Guidebook.

98. Certain of the factors listed in Section 3.5.4 appear to be concerned with features of a community that distinguish it from other groups or communities. The most obvious example is "the level of formal boundaries around the community". Certain of the factors could be said to relate more to features of a community that emphasise what its members share in common – what might be termed the "glue" that binds members of a group together.

99. What is evident is that the Guidebook envisages a "clearly delineated community" as a group whose members clearly share a significant degree of both commonality and cohesion – of interest, values, characteristics – and as a group whose characteristics are such that it can be clearly distinguished from other groups or communities.

---

[3] While recognising and respecting the divergence of convention regarding spelling of the term "Internet" – some capitalise the word, some do not – the Panel chooses to adopt the spelling used by ICANN in reference to the global Internet. For a summary of the issue see: http://en.wikipedia.org/wiki/Capitalization_of_%22Internet%22.

100. Because both parties quote and purport to rely on certain of the published views of the Independent Objector concerning the notion of "community" in the context of a generic term or TLD string, it is useful to pause here to consider the relevant sections of the IO's published statement on the issue of gTLDs, in full and in their proper context.

101. The Independent Objector – the eminent international jurist and legal scholar Professor Alain Pellet – was appointed by ICANN in May 2012. The IO serves as an independent decision maker, impartial and unaffiliated with any particular Internet community. With a mandate to act "in the best interests of the public who use the global Internet", the IO is authorised to file objections – on limited public interest and community grounds – to highly objectionable gTLD applications that he considers are contrary to the public's interests. If the IO determines that a limited public interest or community objection should be filed, he may initiate the objection on his own authority. His activities are only subject to reporting requirements to ICANN as well as the public. (http://www.independent-objector-newgtlds.org/english-version/home)

102. In the context of his mandate, the IO also publishes his views on relevant topics. His statements are in no way binding on other decision makers, but they are learned, thoughtful and compelling. Of particular interest for purposes of these proceedings are the IO's published views on the issue of closed generic TLD applications. These are set out below (underlining added):

> **THE ISSUE OF "CLOSED GENERIC" gTLD APPLICATIONS - THE VIEWS OF THE INDEPENDENT OBJECTOR**
>
> • ***Description of the issue***
>
> *1. ICANN has recently opened a 30-day public comments period to address the issue of "closed generic" gTLDs. ICANN seeks comments from interested stakeholders in order to explore potential new alternatives and provisions addressing the issue.*
>
> *2. As the Independent Objector, I have faced the issue of "closed generic" gTLDs from the very beginning of my review of applications. Notably, several persons and entities reported directly to me their concerns on this issue and urged me to file objections against the concerned applications. I have decided not to do so on this sole ground. As I am acting on behalf of the public who use the global Internet and committed to full transparency, I deem it necessary to briefly explain my position in this respect.*
>
> *3. In my view, a "generic term" is a word associated to goods, service, activities or market sectors, which is widely used by people and commonly understood as referring to the good, service, activity or market sector in question. It is supposedly not directly associated to a brand or trademark. However, sometimes trademarks or brands become generic terms, such as "Aspirin".*

*4. I note that the core question is whether applicants, generally being companies and corporate entities, can have the benefit of a new gTLD string for their own use, notwithstanding the general use of the term by the public.*

*5. According to the new gTLDs Program Committee of the ICANN Board of Directors and its resolution of February 2, 2013, it is understood that "members of the community term a 'closed generic' TLD as a TLD string that is a generic term and is proposed to be operated by a participant exclusively for its own benefit". Where the new gTLDs "program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs", opponents to applications for "closed generic" gTLDs argue that it would have a negative impact on competition and consumer choice.*

- ***The Independent Objector's Mission***

*1. On this issue, it is important to insist on the core essence of the IO's functions and his "limited powers" as described in the Applicant Guidebook, which constitutes the basis for his mandate under the new gTLDs Dispute Resolution Process.*

*2. The IO is only entitled to lodge objections on the limited public interest and community grounds. For both grounds for objection, he acts in complete independence, and solely in the best interests of the public who use the global Internet.*

*3. In line with this public interest mission, the IO is only allowed to file objections when applications have been commented in the public sphere. He can only lodge an objection if no one else files previously an objection on the same ground, which implies that he is acting as a "safety net".*

*4. When reviewing the applications, I have paid great attention to the related public comments, some of which addressed the issue of "closed generic" gTLDs.*

*5. While the present comment aims at explaining the reasons why I consider that the issue of "closed generic" gTLDs does not fall within the scope of my limited functions, it should be noted that the hereunder remarks are general; each application is reviewed separately and has specificities which could justify an objection from the IO for other reasons. It is also not the mission of the IO to express his personal position on the substance of the issue, nor to make suggestions and proposals to ICANN.*

*6. However, I acknowledge the importance of the problem. The question of the openness of new gTLDs is crucial, particularly when it comes to terms that could be profitable to a large part of the public, and this is undoubtedly the case concerning gTLDs strings such as ".search", ".book", ".beauty", ".insurance", ".blog", ".shop", ".music", ".jewerly", ".app" or ".cloud", to mention the most commented ones.*

*[...]*

- ***Community Objections***

*1. For every application I review, I also assess whether a community objection could be warranted. I examine whether there is a substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted. The communities in question must be strongly associated with the applied-for gTLD string in the application that is the subject of the objection.*

*2. I base my evaluation on four eliminatory tests, which are set out in the Applicant Guidebook in order to guide the Expert panels for the evaluation of community objections. The gTLD string must explicitly or implicitly target a specific community. The targeted community must be clearly delineated. I verify if there is a substantial opposition to the gTLD application from a significant portion of the community. Finally, I assess whether the application for the gTLD string 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 explicitly or implicitly targeted.*

*3. As for the community test, (the IO determines if the community invoked is a clearly delineated community), the notion of "community" is wide and broad, and is not precisely defined by ICANN's Applicant Guidebook for the new gTLDs program. It can include a community of interests, as well as a particular ethnical, religious, linguistic or similar community. Moreover, communities can also be classified in sub-communities (i.e. the Jewish community in New York or the Italian community on Facebook). However, beyond the diversity of communities, there are common definitional elements and a community can be defined as a group of individuals who have something in common (which can include their nationality or place of residence – i.e. the French, South-East Asian or Brazilian community – or a common characteristic – i.e. the disability community), or share common values, interests or goals (i.e. the health or legal community). For the purpose of the IO evaluation, it is clear that what matters is that the community invoked can be clearly delineated, enjoys a certain level of public recognition and encompasses a certain number of people and/or entities.*

*4. In view of the broad elements of definition mentioned above, and more pertinently in view of the very nature of a "generic term", it is unlikely that these applications will pass this community test. Of course for a community objection, each application has to be reviewed separately. However, as a general remark and because I have reviewed all applications, it is difficult in these cases to prove the existence of a clearly delineated community. By definition, a "generic term" is a term which is used by a significant number of people, who do not necessarily share similar goals, values or interests. 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. Therefore, while I fully understand the concerns expressed on behalf of the public who use the Internet, the latter cannot be considered as a clearly delineated community. When criteria for this test are not met on this basis, a community objection is not warranted.*

> *5. I have however reviewed all the applications in order to make sure that in each case, no clearly delineated community, generally referring to a particular industry, was substantially opposed to the string and that their interests were not threatened. As a general observation, I have to note that in most cases, such a delineated community does not exist.*
>
> *6. Taking ".book" as an example, the "book industry" and a hypothetical "book community" would encompass a large variety of stakeholders, who do not always share similar primary interests. Thus, it would include authors, publishers, libraries, retailers, readers, etc... In a more inclusive way, we could also include international organizations working, inter alia, for the promotion of culture such as the UNESCO. Therefore, these different stakeholders are difficult to be delineated as a single community since they are of very different nature. Some have the promotion of literature as their primary aim but for many others it is one objective among many others. It is therefore quite doubtful that they represent a clearly delineated community within the meaning of the Applicant Guidebook.*
>
> *7. Therefore, I note that, in general, for the issue of "closed generic" gTLDs and my possibility to object as the IO on the community ground, it is unlikely that the applications concerned meet the four tests. However, it is important to note that for an assessment on the community ground, each application has to be reviewed separately. The present comment only affirms that a community objection cannot be lodged on behalf of the public who uses the Internet as a whole, which cannot be considered as a clearly delineated community.*
>
> *8. Moreover, as for my possibility to object on the community ground, it is my clearly explained public policy not to make an objection when a single established institution representing and associated with the community having an interest in an objection can lodge such an objection directly. This does not exclude that I could deem it nevertheless appropriate to file a community objection in exceptional circumstances, in particular if the established institution representing and associated with the community has compelling reasons not to do so, or if several institutions could represent a single community and are in the same interest so that an application could raise issues of priority, or in respect to the modalities of the objection. The objections I have just filed are based on such assessments.*
>
> (http://www.independent-objector-newgtlds.org/english-version/the-issue-of-closed-generic-gtlds/)

103. The Panel expresses no comment regarding the IO's views. The IO's cogent statement speaks for itself. And as the IO properly notes, each case must be considered separately, on its own merits.

104. The focus here, as it must be in any given case, is not merely on the applied-for gTLD string in the abstract, but on the nature of the particular "community" that is invoked by the Objector, and more particularly, whether that community can be regarded as "clearly delineated".

105. In this light, it is not so much the generic nature of the word "cloud" or of the TLD string ".CLOUD" that is problematic, but rather the generic nature – the ubiquitousness – of the definitional elements of the so-called cloud (or cloud computing, or cloud computing industry) "community" invoked by Objector. The ubiquity of cloud computing itself, as well as its rapidly evolving nature, as identified by Objector and as emphasised by Applicant, is also a problem. As Applicant states, most computing devices, from smartphones to data centers, can now utilize computing resources on the Internet.

106. "Ubiquitous" is defined as "existing or being everywhere at the same time : constantly encountered : WIDESPREAD" (Merriam-Webster's Collegiate Dictionary, 11th Edition, 2012). "Ubiquity" is defined more succinctly as "OMNIPRESENCE" (Id.).

107. CIF does not demonstrate that the vast and varied membership of the "cloud computing industry", as defined by Objector (or described in any of the sources on which the parties rely for evidence), can be defined by reference to common characteristics, values, interests or goals to any important degree. Certainly the members of such a group share "something in common", as the Objector suggests. But what exactly that "something" is – the actual characteristics or values that these participants in the so-called cloud community can be said to share – beyond their merely having something to do with or some interest in cloud computing, is not clearly or adequately identified or proven by Objector. To the extent that the "provision, enhancement, adoption and use of cloud computing services" could even be said to comprise "shared interests, expertise and goals", or some sort of essential, defining characteristic of the proposed community, as argued by Objector, it is certainly insufficient to demonstrate that all those involved in such activities comprise a clearly delineated community. There is, moreover, no evidence that the members of such a vast and rapidly evolving group demonstrate any sort of "cohesion", or that they even consider themselves part of a community as defined by Objector. Indeed, it might more easily be assumed that a group of people and entities defined as broadly as it is defined by Objector is more diverse than homogeneous, and that its members' values, interests and goals are at least as conflicting as they are common.

108. Still less does Objector prove how the community that it invokes is surrounded by any sort of barriers, formal or other, or is effectively differentiated from other individuals, entities, groups or communities associated with computing or information services, or with what the IO refers to as "the public who use the global Internet". A community of all users, providers, partners, integrators, retailers, regulators, representatives, advisors, etc. of cloud computing, as defined,

can hardly be delineated or differentiated from the universe of users, providers, partners, etc. of the Internet generally or, in the not-too-distant future (some, including the Applicant, might say that that future is upon us), of any computing or information services.

109. As noted above, Objector describes cloud computing as "a means of delivering software and information technology (e.g., infrastructure, platform, communications, network) as a service, through the cloud (i.e., the internet)". This sounds very much like Applicant's description of the cloud as "a tool among many on the Internet, with ubiquitous presence and myriads of implementations …". Either way, it appears that both parties understand and acknowledge – and indeed the evidence submitted by them bears this out – that to "disambiguate" (to borrow a phrase from Applicant) the cloud from the Internet is not possible. In which case, as indicated above (to quote Applicant), "to disambiguate the 'cloud community' from the general public using the Internet is not possible."

110. The Objector *asserts* that the cloud computing industry comprises a clearly delineated community. It asserts that this community enjoys "global recognition", "formal boundaries", and a membership with "shared interest, expertise and goals" (i.e., "the provision, enhancement, adoption and use of cloud computing services") around which the community might be said to cohere. But it does not *prove* these assertions. Its evidence in this respect is as inadequate as the definition of its proposed community is over-vast.

111. A review of the six documents ("**Annexes**" to the Objection) adduced as evidence by Objector in support of its assertions concerning the "clearly delineated" nature of its proposed community is telling.

- Annex H contains the statement of the IO further to his review of an application for the new gTLD ".VODKA" (one of what the IO refers to as "controversial applications" as indicated by the level and nature of public comment generated by the application). The statement reiterates certain of the IO's views regarding the notion of "community" expressed in the IO's publication concerning closed generic gTLDs generally, which is reproduced above.

- Annex I contains a definition of "cloud computing" from the University of Michigan Office of the Vice President for Research. It is interesting to note that the definition commences as follows (underlining added): "Cloud computing is the <u>next stage in the Internet's evolution</u>, providing the means through which <u>everything – from computing power to computing infrastructure, applications, business processes to personal collaboration</u> – can be delivered to you …".

- Annex J is the NIST Definition of Cloud Computing. It is noted, among other things, that the NIST itself declares that "[c]loud computing is an evolving paradigm". The NIST describes the "intended audience for the document" – which is as close to a description of a "community" as found in the NIST publication – as "system planners, program managers, technologists, and others adopting cloud computing as consumers or providers of cloud services" (underlining added). The NIST actually defines cloud computing as "a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources ...". The descriptor "*ubiquitous*" is noteworthy. The document goes on to state that this "cloud model" is composed of, among other things, the five "essential characteristics" to which Objector refers. It is further noted that the NIST defines one of the many cloud computing "deployment models" – the so-called "public cloud" – as follows: "The cloud infrastructure is provisioned for open use by the general public. It may be owned, managed, and operated by a business, academic, or government organization, or some combination of them" (underlining added).

- Annex K comprises an excerpt from a study on cloud computing undertaken by the International Telecommunication Union. Similar to the NIST, it too defines cloud computing as "a model for enabling service users to have ubiquitous, convenient and on-demand network access to a shared pool of configurable computing resources ...". It goes on to describe the various "actors" in the "cloud ecosystem", which include the cloud service users, providers and partners referred to by Objector. In a prominent note to its definition of cloud service users, it states that such users include "intermediate users [i.e., the "resellers" identified by Objector] that will deliver cloud services provided by a cloud service provider ... to actual users of the cloud service, i.e., end-users". It continues: End users can be persons, machines or applications" (underlining added). The idea of a community whose membership (cloud service users, providers and partners, among others) is comprised not only of people and entities, but of machines and applications, is intriguing. But it is presumably not what the Objector has mind, and it is clearly not what the Guidebook envisages.

- Annex L, a press release by the consulting firm Gartner, Inc., attests to the phenomenal growth of the public cloud services market.

- Annex M is an interview with Amazon's Chief Technology Officer, Mr. Werner Vogels, in which Mr. Vogels proposes that cloud computing is better conceived of as an "ecosystem" (a term also used by the ITU in the study mentioned above) than as a service – what the journalist/interviewer refers to as an "everything-as-a-cloud-service ecosystem". Here too,

the recognition of the widespread if not omnipresent nature of cloud computing, and of any purported community of cloud computing users, providers and partners, etc., is noteworthy.

112. This evidence does not prove the validity of Objector's assertions. It does not prove the existence of a community that is bound by (or even considers that it is bound by) shared interests and goals, still less one that can be regarded as "clearly delineated", as Objector claims.

113. On the contrary, the evidence presented by Objector is largely consistent with Applicant's own evidence, all of which serves rather to demonstrate, as argued by Applicant, that that the so-called "community" of participants in the cloud computing industry is more nebulous – vague, or indistinct – than clearly delineated. The evidence presented by the parties demonstrates that cloud computing remains an evolving paradigm or concept; one that may be defined, if at all, by the fact that as currently envisaged (whatever terms are actually used to describe it), it potentially encompasses almost "everything" having to do with the delivery or use of computing and information services over the Internet, and – on the basis of Objector's definition – anyone who uses, provides or enables such services, or has an interest in the concept.

114. The last sentence of the community test set out at Section 3.5.4 of Module 3 is instructive – and crucial. It reads: "If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail."

115. This sentence makes plain that for purposes of a community objection the notion of a "community" is not merely a function of the number of people or entities that comprise its membership. The size of a group's membership matters; so too may its geographical distribution, the length of time it has been in existence, the level of public recognition it enjoys and the level of formal boundaries around it.

116. But these are merely indicators of what matters most of all. For purposes of being considered a "community", the test is whether the group can be regarded as "clearly delineated". As explained above, the community proposed by Objector fails this test.

117. In the circumstances, it is unnecessary for the Panel to consider the other elements of Module 3, or to enquire further into the merits of the Objection.

## F. Costs

118. Article 14(e) of the Procedure provides that the Centre will refund to the prevailing party the amount of the advance payment(s) of costs related to these proceedings made by that party.

The Procedure allows for no further or other decision by the Panel with respect to costs. As stated in Article 21(d), the remedies that the Panel may order are "limited to the success or dismissal of an Objection and to the refund by the DRSP to the prevailing party ... of its advance payment(s) of Costs pursuant to Article 14(e) ...".

119. The Applicant is the prevailing party in this case. It is therefore entitled to have the amount of its advance payment(s) refunded to it by the Centre.

### G. Conclusion

120. For the reasons discussed above, the Panel finds that the Objector has failed to prove that the community that it invokes in its Objection can be regarded as a "clearly delineated community".

121. On this basis, Objector has failed to demonstrate that it has standing to bring a community objection in accordance with Section 3.2.2 of the Guidebook or that its Objection meets the community test as set out in Section 3.5.4 of the Guidebook. The Objection must be dismissed.

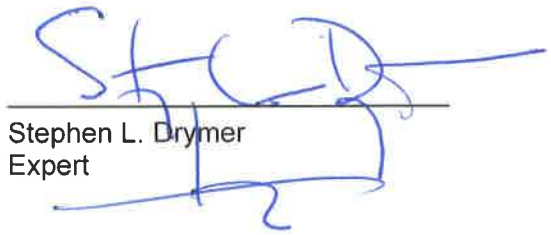
## VII - DECISION

122. On these grounds, and for all of the foregoing reasons, I hereby render the following Expert Determination in accordance with Article 21(d) of the Procedure:

(1) CLOUD INDUSTRY FORUM LIMITED's Objection is dismissed;

(2) The Applicant, CHARLESTON ROAD REGISTRY INC. prevails and shall be refunded by the Centre the amount of the advance payment on costs made by it to the Centre.

5 December 2013



Stephen L. Drymer
Expert