

**THE INTERNATIONAL CENTRE FOR ADR OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/498/ICANN/115

CTIA – THE WIRELESS ASSOCIATION® (USA)

vs/

DISH DBS CORPORATION (USA)

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

THE INTERNATIONAL CENTRE FOR ADR OF THE
INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/498/ICANN/115

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

Between

CTIA – The Wireless Association ® (USA)

OBJECTOR

and

DISH DBS CORPORATION

APPLICANT

Expert Determination

Expert Panel:

Kap-You (Kevin) Kim

TABLE OF CONTENTS

1. Introduction	1
2. Preliminaries	1
2.1. THE PARTIES	1
2.2. THE EXPERT PANEL	2
2.3. THE NEW GTLD STRING OBJECTED TO	2
2.4. APPLICABLE RULES	2
2.5. NATURE OF THE OBJECTION	2
2.6. STANDARD AND BURDEN OF PROOF	3
2.7. MISCELLANEOUS	4
3. Procedural Background	4
4. Criteria for an Objection	10
4.1. STANDING REQUIREMENTS	11
4.2. MERITS REQUIREMENTS FOR A COMMUNITY OBJECTION	11
5. Analysis	11
5.1. STANDING ANALYSIS	12
5.1.1. Established Institution	12
5.1.2. Ongoing Relationship with a Clearly Delineated Community	14
5.1.3. Sub-conclusion	24
5.2. MERITS ANALYSIS	24
5.2.1. Clearly Delineated Community	25
5.2.2. Substantial Opposition by the Community	25
5.2.3. Strong Association (“Targeting”)	27
5.2.4. Likelihood of Material Detriment	27
5.2.5. Sub-conclusion	33
6. Expert Determination	33

1. INTRODUCTION

1. Under the Internet Corporation for Assigned Names and Numbers ("*ICANN*") new generic Top-Level Domain ("*gTLD*") name program ("*Program*"), the Applicant has applied for the string <.MOBILE>. The Objector has objected to the application (both originally and as subsequently amended) pursuant to the applicable rules.
2. This Expert Determination is a decision upon the merits of the objection (as supplemented and amended). For the reasons explained below, I have determined that the Objector has failed to satisfy the requirements for a Community Objection. The Objection is therefore rejected.
3. In this Expert Determination, I have referred only to those submissions and evidence that were in my view relevant and material to the outcome of the Expert Determination. I have not considered it necessary to address explicitly each and every one of the submissions and arguments in these proceedings. To the extent that any of the parties' arguments or evidence is not addressed expressly, it should not be assumed that these have not been considered, but rather must be understood to have been subsumed in the analysis. In arriving at the final determination, I have carefully considered all evidence and arguments from the parties, even if they are not expressly referenced in this Expert Determination.

2. PRELIMINARIES

2.1. The Parties

4. The Objector is CTIA – The Wireless Association®, located at 1400 16th Street, NW, Suite 600 Washington, DC 20036 USA.
5. The Objector is represented by Ms. Kathryn A. Kleiman and Mr. Robert J. Butler, FLETCHER, HEALD & HILDRETH, PLC, located at 1300 North 17th Street, 11th Floor, Arlington, VA 22209 USA; kleiman@fhhlaw.com and butler@fhhlaw.com.
6. The Applicant is DISH DBS Corporation, located at 9601 S. Meridian Boulevard, Englewood, CO 80112 USA).
7. The Applicant is represented by Ms. Deborah M. Lodge and Mr. Christopher W. Adams,

SQUIRE PATTON BOGGS, located at 2550 M Street NW, Washington, DC 20037 USA; deborah.lodge@squirepb.com and christopher.adams@squirepb.com.

2.2. The Expert Panel

8. The Expert Panel comprises a sole Expert, Mr. Kap-you (Kevin) Kim, BAE, KIM & LEE LLC, located at 133 Teheran-ro, Gangnam, Seoul 135-723, Korea; kevin.kim@bkl.co.kr.

2.3. The New gTLD String Objected To

9. The new gTLD string applied for and objected to is: ***“.MOBILE”***.

2.4. Applicable Rules

10. The Program provides a process for the introduction of new gTLDs in the internet, such as the .MOBILE string at issue in this proceeding. The procedures of the Program are detailed in the gTLD Applicant Guidebook (***“Guidebook”***).¹ The Guidebook provides substantive and procedural criteria, standards and rules related to the gTLD application process.
11. Module 3 of the Guidebook, entitled *“Objection Procedures”*, and the Attachment to Module 3, entitled *“New gTLD Dispute Resolution Procedure”* (***“Procedure”***), are particularly relevant to these proceedings. Module 3 describes *“the guiding principles, or standards, that each dispute resolution panel will apply in reaching its expert determination.”*² The Procedure details procedures for resolving new gTLD disputes.
12. In addition, the ICC Expertise Rules (***“ICC Rules”***) of the International Centre for ADR (***“Centre”***) of the International Chamber of Commerce (***“ICC”***) supplemented by the ICC Practice Note on the Administration of Cases under the Procedure also apply to these proceedings.
13. Collectively, the above are ***“the Rules.”***

2.5. Nature of the Objection

14. Section 2(e) of the Procedure provides for four categories of permissible objections:

¹ I refer to and rely on version 2012-06-04 of the Guidebook, dated 4 June 2012.

² Guidebook (Module 3), Introduction.

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:

(i) "String Confusion Objection" refers to the objection that the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications.

(ii) "Existing Legal Rights Objection" refers to the objection that the string comprising the potential new gTLD infringes the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law.

(iii) "Limited Public Interest Objection" refers to the objection that the string comprising the potential new gTLD is contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law.

(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.

15. In this case, the Objection is a "Community Objection".

2.6. Standard and Burden of Proof

16. In deciding on an objection, the expert shall apply the standards that have been defined by ICANN.³ Section 3.5 of Module 3 of the Guidebook on "*Dispute Resolution Principles (Standards)*" lays down the procedure for each of the four types of objections under the Rules. Section 3.5.4 of Module 3 of the Guidebook contains the standards applicable to Community Objections. In addition, the expert may rely upon the statements and documents submitted by the parties and any rules or principles that he finds to be applicable.⁴
17. As per the Rules, the burden of establishing that the Objection should be sustained lies upon the Objector.⁵

³ Procedure, Article 20(a).

⁴ Id., Article 20(b).

⁵ Id., Article 20(c).

2.7. Miscellaneous

18. The language of these proceedings is English.⁶ All written materials and communications among the parties and the Expert Panel have been in English.⁷
19. All submissions and communications were exchanged between the parties and the Panel electronically, copying the Centre (the appointed Dispute Resolution Service Provider or "*DSRP*").⁸
20. Given that the Applicant amended its application after these proceedings had been initiated, the parties were allowed to file additional submissions.⁹ In addition, neither of the parties requested a hearing in these proceedings. Therefore, in light of the preference against hearings in the Procedure,¹⁰ I did not consider it necessary to convene a hearing.
21. The place of the proceedings is Paris, France, where the DRSP (i.e., the Centre) is located.¹¹

3. PROCEDURAL BACKGROUND

22. The "*Original Application*" was submitted on 13 June 2012.
23. The Objector submitted its "*Objection*" to the Original Application on 13 March 2013.
24. The Centre conducted an administrative review of the Objection and issued a notice dated 5 April 2013 indicating that the Objection was in compliance with the Procedure and the ICC Rules.
25. On 12 April 2013, ICANN published a list of all Objections which passed the DRSPs' Administrative reviews (ICANN's Dispute Resolution Announcement).

⁶ Procedure, Article 5(a).

⁷ Procedure, Article 6(a).

⁸ Procedure, Article 6(b).

⁹ See ¶¶ 41-48 below.

¹⁰ Procedure, Article 19.

¹¹ Procedure, Article 4(d).

26. On 12 April 2013, the Centre notified the parties that it was considering consolidating this case with another case involving an objection submitted by the Objector related to the .MOBILE string application by Amazon EU S.à r.l. (EXP/499/ICANN/116) and invited the parties to comment on the potential consolidation;
 - (1) After having received relevant comments from all parties involved, the Centre issued its decision not to consolidate the two cases on 19 April 2013;
 - (2) The Centre invited the Applicant to submit a Response in its letter dated 19 April 2013;
 - (3) The Applicant again requested that the cases be consolidated on 24 April 2013;
 - (4) Centre asked for comments from the parties on 26 April 2013;
 - (5) After having received comments from all parties involved, the Centre issued another decision not to consolidate the two cases on 3 May 2013.
27. On 19 May 2013 the Centre received the Applicant's response to the Objection. Upon an administrative review, the Centre informed the Applicant on 27 May 2013 that the Original Application exceeded the maximum allowed length in words, and asked the Applicant to file a revised response.
28. The Applicant filed its revised "*Response*" to the Objection on 1 June 2013 and the Centre informed the Applicant on 12 June 2013 that the Response was now in compliance with the Procedure and the ICC Rules.
29. The parties were informed on 21 June 2013 that the Chairman of the Standing Committee of the Centre had appointed an expert in the matter on 14 June 2013.
30. The parties then jointly requested a series of procedural stays on the reported ground that the .MOBILE New gTLD application that is the subject of this proceeding might be determined to fall within the ICANN Board's definition of a "*Generic String*" application with exclusive registry access, and that this might impact the nature and outcome of these proceedings. The stay requests were received and granted as follows:

- (1) On or around 22 July 2013, the parties jointly requested a stay of the proceedings until 19 August 2013, which was granted by the Centre on 24 July 2013.
- (2) On or around 9 August 2013, the parties jointly requested a second stay of 60 days, which was granted by the Centre on 13 August 2013.
- (3) On or around 2 October 2013, the parties jointly requested a third stay of 60 days. On 3 October 2013, the Centre granted a stay of the proceedings until 10 November 2013.
- (4) On or around 6 November 2013, the parties jointly requested a fourth stay of 60 days. On 7 November 2013, the Centre granted a stay of the proceedings until 7 December 2013.
- (5) On or around 6 December 2013, the parties jointly requested a fifth stay of 60 days. On 6 December 2013, the Centre granted a stay of the proceedings until 6 January 2014.
- (6) On or around 3 January 2014, the parties jointly requested a sixth stay of 60 days. On 6 January 2014, the Centre granted a stay of the proceedings until 5 February 2014.
- (7) On or around 5 February 2014, the parties jointly requested a seventh stay of 60 days. On 5 February 2014, the Centre granted a stay of the proceedings until 7 March 2014.
- (8) On or around 5 March 2014, the parties jointly requested an eighth stay of 60 days. On 6 March 2014, the Centre granted a stay of the proceedings until 4 April 2014.
- (9) On or around 1 April 2014, the parties jointly requested a ninth stay of 60 days. On 4 April 2014, the Centre granted a stay of the proceedings until 5 May 2014.
- (10) On or around 21 April 2014, the parties jointly requested a tenth stay of 60 days. On 23 April 2014, the Centre granted a stay of the proceedings until 4 June 2014.

- (11) On or around 23 May 2014, the parties jointly requested an eleventh stay of 30 days. On 27 May 2014, the Centre granted a stay of the proceedings until 4 July 2014.
 - (12) On or around 2 July 2014, the parties jointly requested a twelfth stay of 30 days. On 3 July 2014, the Centre granted a stay of the proceedings until 4 August 2014.
 - (13) On or around 31 July 2014, the parties jointly requested a thirteenth stay of 30 days. On 1 August 2014, the Centre granted a stay of the proceedings until 3 September 2014.
 - (14) On or around 29 August 2014, the parties jointly requested a fourteenth stay of 30 days. On 1 September 2014, the Centre granted a stay of the proceedings until 3 October 2014.
 - (15) On or around 30 September 2014, the parties jointly requested a fifteenth stay of 15 days. On 1 October 2014, the Centre granted a stay of the proceedings until 20 October 2014.
 - (16) On or around 20 October 2014, the parties jointly requested a sixteenth stay. On 22 October 2014, the Centre granted a stay of the proceedings until 20 November 2014.
 - (17) On or around 20 November 2014, the parties jointly requested a seventeenth stay of 21 days. On 20 November 2014, the Centre granted a stay of the proceedings until 22 December 2014.
 - (18) On or around 23 December 2014, the parties jointly requested an eighteenth stay of 16 days. On 23 December 2014, the Centre granted a stay of the proceedings until 8 January 2015.
31. During this period of repeated stay requests, ICANN and various interested parties discussed the issue of closed generic gTLDs. On 11 April 2013, the ICANN Governmental Advisory Committee ("**GAC**") issued advice to the ICANN Board of Directors regarding New gTLD applications in a so-called "*Beijing Communiqué*." Among other things, the GAC addressed strings that represent "*generic terms*" and the issue of exclusive access. The GAC stated (in Annex 1 "*Safeguards on New gTLDs*," under "*Category 2*") that "[f]or strings representing generic terms, exclusive registry

access should serve a public interest goal.” It then identified a “non-exhaustive list of strings that it considers to be generic terms, where the applicant is currently proposing to provide exclusive registry access.” Among them was the .MOBILE string.

32. On 9 January 2015, the Applicant wrote to the Expert stating that it had submitted an amended application for the .Mobile gTLD (“**Amended Application**”) which, according to the Applicant, addressed all of the concerns raised in the Objection. The Applicant requested that the proceedings be stayed until ICANN had reviewed and approved the Amended Application, or alternatively that the Expert confirm that the Expert Determination will be based on the Amended Application. The Applicant also requested that it be allowed to file a supplementary submission informing the Expert of developments that had occurred since the filing of the Response.
33. The Objector wrote to the Expert on 11 January 2015 stating that the parties’ negotiations had failed and that the proceedings should not be further stayed. The Objector also requested that it be given an opportunity to respond to the Applicant’s letter of 9 January 2015.
34. On 14 January 2015, the Centre invited the Objector to respond to the additional information provided by the Applicant. The Centre also noted that in the absence of a joint request for a stay, the Centre would proceed to transfer the file for the matter to the Expert.
35. The Objector wrote to the Centre and the Expert on 21 January 2015, objecting to the Applicant’s contention that the Amended Application addressed the Objector’s concerns, and stating that it should only be asked to respond substantively to the Amended Application once it had been reviewed and, possibly, approved by ICANN. Importantly, in this letter the Objector proposed that the proceedings be stayed until ICANN had made its decision on the Amended Application, and that thereafter, the Applicant be allowed to make submissions followed by submissions by the Objector. The Objector also stated that the Expert Determination made after this process should be based on the new record.
36. On 23 January 2015, the Centre proceeded to transfer the file to the Expert.
37. On or around 26 January 2015, the Objector wrote to the Expert supporting the Applicant’s earlier request for a stay of the proceedings until the review of the

Amended Application by ICANN, as well as the request for supplementary submissions.

38. On 28 January 2015, the Expert wrote to the parties inviting the Applicant to comment on the Objector's request.
39. On 30 January 2015, the Applicant wrote to the Expert denying the Objector's comments regarding the contents of the Amended Application. In this correspondence, the Applicant agreed to a further stay of the proceedings and proposed several revisions to the Objector's proposal for further procedural steps.
40. The Objector responded on 31 January 2015 requesting that the Applicant's proposed changes to the procedure be denied, as the changes would be unfair to the Objector.
41. On 5 February 2015, the Expert wrote to the parties staying the proceedings in light of the parties' agreement on this point and advising the parties that the Expert Determination would be based on the Amended Application. The letter further indicated that the Expert was inclined to provide both parties further opportunity to plead their case on the Amended Application, but that the exact procedure would be decided after the Amended Application had been reviewed and, possibly, approved by ICANN.
42. On 23 June 2015, the Expert again wrote to the parties, stating that he understood the Amended Application to have been approved by ICANN and to have been objected to by the Objector. The Expert invited the parties to provide him an update of the proceedings and their views on how matters should move forward.
43. The Applicant responded on 29 June 2015 stating that the proceedings should move forward based on the procedure suggested in the Expert's earlier correspondence.
44. Also on 29 June 2015, the Objector responded updating the Expert on some of the details of its objections to the Amended Application, which it had filed with ICANN, and informing the Expert that ICANN had directed the Objector to raise certain concerns that the Objector had with the Amended Application in these proceedings. The Objector further requested that the Expert allow the Objector to address the issue of a lack of Public Interest Commitments (PICs) in the Amended Application in a summary judgment motion. The Objector requested that if the summary judgment motion was unsuccessful, the Objector should be allowed a reasonable opportunity to establish that the Amended Application failed to remove the likelihood of material

harm to the “*Mobile Wireless Community*.” The Objector requested that it be allowed 60 days to submit these arguments.

45. On 16 July 2015, the Expert wrote to the parties denying the Objector’s request for a summary judgment motion and inviting the parties to file supplementary submissions, with the Objector filing additional submissions by 14 August 2015 and the Applicant filing additional submissions by 11 September 2015.
46. The Objector filed the “*Objector’s Supplemental Pleading*” on 14 August 2015 and the Applicant filed the “*Applicant’s Rejoinder*” on 11 September 2015.
47. On 16 October 2015 the Expert received additional, unsolicited, information/evidence from the Objector. On the same day, the Applicant requested that this unsolicited submission should be rejected, or alternatively, the Applicant should be given an opportunity to respond.
48. On 21 October 2015, the Expert invited the Applicant to provide its comments on the unsolicited submission of 16 October 2015, and reserved a decision on the relevance or admissibility of the unsolicited submissions for later. The Applicant filed its response on 26 October 2015. These unsolicited submissions and the response thereto have been considered by the Expert, where relevant, in arriving at this Expert Determination.
49. In light of the additional submissions that were filed in these proceedings, the Centre extended the time limit for rendering the Expert Determination. The draft Expert Determination was sent to the Centre on 20 November 2015, with the time limit as extended by the Centre.
50. As stated later in this Expert Determination, in considering whether the Amended Application is likely to cause material detriment, I have considered the Objector’s arguments as they were initially made against the Original Application prior to being amended, to the extent that they remain applicable, and have also considered the arguments made in subsequent pleadings following the Amended Application.

4. CRITERIA FOR AN OBJECTION

51. A party objecting to a New gTLD application must meet certain criteria in order to be successful: first, it should have standing to raise the objection under Section 3.2.2.4 of

the Guidebook, and second, it should establish the objection on the merits, meeting the various elements of a community objection stated in Section 3.5.4 of the Guidebook.

4.1. Standing Requirements

52. Section 3.2.2.4 of the Guidebook explains who has standing to submit a Community Objection. According to this section, for an objector to have standing, it must show that it is (1) an *“established institution”*, (2) with an *“ongoing relationship with a clearly delineated community”* that is *“strongly associated with the applied-for gTLD string.”*
53. Section 3.2.2.4 of the Guidebook provides a list of factors that can be considered in determining whether the requirements in the preceding paragraph are met. The factors listed are meant to serve as guidance in determining whether an objector has standing, and *“[i]t is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.”*

4.2. Merits Requirements for a Community Objection

54. In addition to standing, an objector must also meet the substantive requirements for a Community Objection set out in Section 3.5.4 of Module 3 of the Guidebook:
- *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.*
55. An objection will only succeed if all these requirements are met.

5. ANALYSIS

56. The following subsections examine the Objection for each of the required elements stated in section 4 above, dealing first with the Objector’s standing and then the merits of the Objection.

5.1. Standing Analysis

57. In order for an Objector to have standing, it must show that:¹²

- (1) it is an “*established institution*”;
- (2) it has an “*ongoing relationship with a clearly delineated community*” that is “*strongly associated with the applied-for gTLD string.*”

5.1.1. Established Institution

58. For the reasons stated in this section, I find that the Objector is an “*established institution*” for the purposes of the standing requirements under the Guidebook.

59. Section 3.2.2.4 indicates that a panel may consider the following non-mandatory and non-exclusive factors as relevant to its determination on this issue:

- (1) *Level of global recognition of the institution;*
- (2) *Length of time the institution has been in existence; and*
- (3) *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.*

60. The Objector has asserted as follows:¹³

There is no question that CTIA is an “established institution” with an “ongoing relationship” with the clearly delineated Mobile Wireless Community. CTIA was founded in 1984, shortly after the first commercial cellular systems began operating, and has represented the interests of the mobile industry since that time. An international organization, with its primary regulatory focus in North America, it has nonetheless been globally recognized and active throughout its history.

CTIA is a voluntary association composed of 256 companies, falling into three categories: Carrier members are those companies that hold a license or construction permit from the FCC or other North American regulatory body to offer commercial mobile services. Supplier members are those companies that

¹² Guidebook (Module 3), Section 3.2.2.4.

¹³ Objection, pp. 4-5.

provide services or equipment to the commercial mobile radio services or wireless Internet industries or engage in wireless Internet business activities. Associate members are those companies or organizations that provide mobile wireless service beyond North America or are consultants, resellers, academia, law firms, engineers, etc., working with the industry. Almost a quarter of all of CTIA's members have some foreign ownership and more than half operate globally, providing products and services to governments, companies, and individual users in more than 170 countries worldwide. A list of current CTIA members is attached. Attachment A.

CTIA's Board of Directors draws upon the mobile network operators (aka "carriers") and suppliers who are members of CTIA. The list of CTIA's current Board is attached. A leadership team comprised of the President/CEO and eleven vice presidents head up the various CTIA departments and other operations, as discussed in more detail below. The CTIA Office of General Counsel provides legal counsel to all CTIA Departments and also manages outside counsel when necessary. A professional staff runs the Association and sees to the needs of its members.

61. Based on the factors stated in Section 3.2.2.4 of the Guidebook, the following facts are pertinent to determining whether the Objector meets the requirement of being an "established institution" :
- (1) Objector appears to have been founded in 1984 and has developed a substantial membership roster and purview of activity.
 - (2) Objector has submitted into evidence a list of its 256 purported members as "Attachment A" to the Objection. Objector lists AT&T, Verizon Wireless, Sprint Nextel Corporation, T-Mobile USA among others as its "Carrier Members," and such names as Apple, Inc., LG Electronics, HTC America, Intuit, Nokia, Qualcomm, Research in Motion, and other household names among its "Supplier Members." The membership list alone is strongly supportive of the conclusion that Objector is an "established institution."
 - (3) Objector holds major trade shows annually with tens of thousands of attendees. The capability and recognition required to hold such trade shows is highly indicative of the Objector's status as an "established institution".
62. Objector also asserts that its most important activities are in policy-setting for the industry. The Applicant itself admits that "the CTIA provides limited representation before the U.S. Government on issues of importance to some, but not all, of its Carrier

*Members.*¹⁴ I do not believe that such representation before the U.S. Government can be carried out by an institution that is anything but established.

63. In fact, it is also of some relevance that the Applicant seems not to have taken issue with the fact that the Objector is an established institution, and seems only to have contested the Objector's status as a representative for the "*greater mobile wireless community.*"¹⁵ The Applicant's Response states:¹⁶

Therefore, while CTIA is an organization, its reach is limited, its relevant membership is limited, and its global representation of entities in the wireless community is limited. CTIA does not represent the entire – or even a substantial portion of – the diverse worldwide Mobile Wireless Community on any issue, let alone issues of international reach and importance. Because CTIA lacks the requisite standing to bring this Objection, CTIA's objection must fail.

64. While I consider these arguments in the relevant parts of this Expert Determination, I do not think they raise any points that would prevent me from concluding that the Objector is indeed an "*established institution.*"

5.1.2. Ongoing Relationship with a Clearly Delineated Community

65. The second element required to establish standing is whether the Objector has an "*ongoing relationship with a clearly delineated community*" that is "*strongly associated with the applied-for gTLD string.*" The Objector contends that it has an ongoing relationship with what it calls the "*Mobile Wireless Community,*" in satisfaction of the second required element for standing.¹⁷
66. For the reasons stated below, I find that the Objector does have an "*ongoing relationship with a clearly delineated community*" that is "*strongly associated with the applied-for gTLD string.*"

5.1.2.1. Clearly Delineated Community

67. I first consider whether the "*Mobile Wireless Community*" referred to by the Objector is a clearly delineated community. It is important to bear in mind that whether a

¹⁴ Response, p. 5.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Objection, p. 7.

community is clearly delineated is a question separate from whether the Objector has an ongoing relationship with that community.

68. The Guidebook lists the following non-exclusive and non-mandatory factors that may be considered in determining whether the objector has an “*ongoing relationship with a clearly delineated community*” for purposes of standing:¹⁸

- *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.*

69. Among the listed factors, the last one appears to be the most logically connected to the “*clearly delineated community*” aspect of the requirements.

70. This same factor is also folded into the more extensive list suggested for consideration under the merits tests, for which the Guidebook suggests that the Expert Panel “*could balance a number of factors ... including but not limited to the following*”:¹⁹

- *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.*

71. Although the merits test provides a more elaborate analytical framework and perhaps a stricter standard for evaluating whether the subject community meets the intended standard in this regard, there is nothing in the standing test that would preclude consideration of similar factors.

72. Further, although not raised by the parties, in my consideration of the issues, I have reviewed the comments of the Independent Objector (“*IO*”) with regard to this issue

¹⁸ Guidebook (Module 3), Section 3.2.2.4.

¹⁹ Guidebook (Module 3), Section 3.5.4.

in general. The role of the Independent Objector in the Program is to act *“in the best interests of global Internet users”* by *“lodg[ing] objections in cases where no other objection has been filed.”*²⁰ The IO’s comments and widely known and publicly available for review by the parties. However, they are by no means binding. To the extent that the IO’s comments reflect my own views concerning the concept of *“community”* in the context of the new gTLD Program dispute resolutions procedures, I comment on them here.

73. In commenting on Community Objections generally,²¹ the IO has asserted that the *“notion of ‘community’ is wide and broad”* and may be generically described as *“a group of individuals who have something in common,”* whether that be *“common values, interests or goals (i.e. the health or legal community).”* He further states: *“[W]hat 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.”*
74. I also note that the ICANN Generic Names Supporting Organisation’s Final Report on the Introduction of New Generic Top-Level Domains issued on 8 August 2007 (*“ICANN Final Report”*) supports the IO’s view of the notion of a community. It states that the term *“community” “should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted.”*²² While the parties have not referred to the ICANN Final Report in their submissions, it is publicly available, and as one of the main documents related to the Program, is widely known and available for the parties’ review.
75. In this case, Objector has asserted that the *“Mobile Wireless Community”* is *“a global community comprised of the carriers, network providers, and others involved in the delivery of mobile wireless and wireless-enabled services to governments, enterprises, and consumers worldwide.”*²³ According to Objector, this community consists of

²⁰ See <http://newgtlds.icann.org/en/program-status/odr/independent>.

²¹ See <http://www.independent-objector-newgtlds.org/home/the-issue-of-closed-generic-gtlds>.

²² ICANN Final Report, Part A, Implementation Guideline P, available at: <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

²³ Objection, p. 5.

Objector's members *"and others like them."*²⁴ And what binds or links this community is a *"common interest in the provision, enhancement and use of commercial mobile services, devices and applications."*²⁵

76. Based on Objector's description of the *"Mobile Wireless Community"* and its other arguments, it considers the scope of the community to include parties as diverse as: wireless service providers such as AT&T, T-Mobile and Verizon, mobile device manufacturers and mobile app developers, among others.
77. I must also note that while the Applicant's Response does take issue with the Objector being representative of the *"Greater Mobile Wireless Community"*,²⁶ it has not stated any compelling arguments as to whether the community in question is a clearly delineated community or not.
78. It seems to me very clear that the *"Mobile Wireless Community"* is indeed an economic sector that can be classified as a community. The question that remains, however, is whether it could be said to be a clearly delineated community.
79. It may be instructive to consider the Objector's membership in this regard, which is categorized as follows:
 - (1) Carrier members *"are those companies that hold a license or construction permit from the FCC or other North American regulatory body to offer commercial mobile services."*²⁷
 - (2) Supplier members *"are those companies that provide services or equipment to the commercial mobile radio services or wireless Internet industries or engage in wireless Internet business activities."*²⁸

²⁴ *Id.*

²⁵ Objection, p. 5.

²⁶ Response, p. 5.

²⁷ Objection, p. 5.

²⁸ *Id.*

- (3) Associate members “are those companies or organizations that provide mobile wireless service beyond North America or are consultants, resellers, academia, law firms, engineers, etc., working with the industry.”²⁹
80. It must be acknowledged that the mobile wireless industry is not as precisely circumscribed as certain other industries such as the insurance, banking or hotel industries, each of which is highly regulated and therefore very strictly delineated. While Objector’s “Carrier Members,” like a bank or insurance company, are easily identifiable because they must “hold a license or construction permit from the FCC or other North American regulatory body to offer commercial mobile services,” the “Supplier Members” and “Associate Members” are more broadly inclusive.
81. Nonetheless, Objector asserts that there is a common thread through all of its member groups, and that is that their activities are based in, or relate to, or depend on, the provision of wireless communications.
82. While a community will necessarily have some diversity—sometimes wide diversity—in its ranks, it may still be “clearly delineated.” By being capable of circumscription, it is delineated. It should be possible in most cases to determine whether an entity is a carrier, network provider, or otherwise “involved in the delivery of mobile wireless and wireless-enabled services.” I find that this is a clear delineation.
83. One may say there is a bright line test: either one does provide mobile wireless services (or is involved in the provision of those services), or one does not. It is apparent to me that there is a community here that is substantially identifiable and, I think, recognizable to most, even though the exact boundaries may not be as precisely apparent as in certain highly regulated industries.
84. Moreover, while the membership of the alleged “Mobile Wireless Community” would be wider than just the members of Objector and other similar organizations, the very process of joining and maintaining membership in trade associations or other groups certainly provides a formal process for those who choose it. Indeed, I consider the formality of organization of the community overall to be a relevant factor. In this case, the existence and scale of organizations such as Objector and the Groupe Speciale

²⁹ *Id.*

Mobile Association (“*GSMA*”) (whose letters the Objector attached as Attachment D to the Objection and Attachment H to the Objector’s Supplemental Pleading, indicating opposition to the Original Application and the Amended Application respectively³⁰) reflect a strong shared group interest in pursuing activities and policy goals that benefit the group as a whole. Such organizations only arise where there is a common interest in a community, and active participation.

85. For all these reasons, I find that there is a clearly delineated community, which is the “*Mobile Wireless Community*” as described by the Objector, consisting of “*carriers, network providers, and others involved in the delivery of mobile wireless and wireless-enabled services to governments, enterprises, and consumers worldwide.*”³¹

5.1.2.2. Ongoing relationship

86. Having concluded there is a clearly delineated community, I next turn to the question of whether Objector has shown that it has an ongoing relationship with that community. I find that it has.
87. Objector describes its major activities on behalf of the Mobile Wireless Community thusly:³²

CTIA’s activities since 1984 have included internationally-attended major trade shows and conferences. The most recent MobileCON™ and CTIA WIRELESS® shows (held in 2012) attracted more than 30,000 attendees including 4,170 foreign/international attendees.

In addition to the two annual CTIA conferences, CTIA’s departments and operations include:

—The External and State Affairs Department is CTIA’s liaison with state legislatures, regulatory entities and advocacy organizations on wireless communications issues.

—The CTIA Government Affairs Department is the voice of the wireless industry on Capitol Hill and at various Executive branch departments and agencies.

—The CTIA Operations Department consists of the CTIA Membership division, CTIA Technology Programs, and the CTIA Certification Program. In addition it produces the CTIA MobileCON™ and WIRELESS® conventions.

³⁰ See ¶ 113 below.

³¹ Objection, p. 5.

³² Objection, pp. 5-6.

—The CTIA Public Affairs Department serves as the voice of the wireless industry as the primary contact for members of the media, and functions as a communications resource to member companies, analysts, and national, local, and trade media.

—The Regulatory Affairs Department is the chief representative of the wireless industry before the Federal Communications Commission and other federal government organizations that seek to regulate the wireless industry.

—The Wireless Internet Development Department focuses on accelerating the growth of the wireless data segment of the industry, in large part by supporting the Wireless Internet Caucus (WIC).

See <http://www.ctia.org/aboutCTIA/structure/>.

88. Objector further refers to its alleged development of international “certification programs” and “voluntary guidelines to protect mobile users.”³³
89. Finally, Objector describes its lobbying activities on behalf of the Mobile Wireless Community as follows:³⁴

Perhaps most importantly, representatives of CTIA and its senior leadership meet regularly with key policymakers, government representatives, and trade representatives from the U.S. and around the world. In addition to regular contacts with the U.S. Administration, Congress, the Federal Communications Commission, and other federal agencies, members of CTIA's leadership team and senior staff have briefed representatives of the governments of the Federal Republic of Germany, Islamic Republic of Pakistan, Japan, People's Republic of China, Republic of Chile, Republic of Korea, the Russian Federation, the Socialist Republic of Vietnam, State of Israel, and the United Kingdom, among others, on the mobile industry.

90. The Applicant has argued that the CTIA does not speak for the “Greater Mobile Wireless Community.” The Applicant states that the Objector’s reach, as a representative for the community in question, is limited, both in the U.S. and globally.
91. I find that although the Objector may not serve the entire community, it is the trade association for a very significant component of the community, as reflected in its extensive membership, and as admitted to some extent by the Applicant. For the purpose of determining an ongoing relationship, the Guidebook does not require that an objector should be the premiere organization representing a community, or even that its reach should permeate the entire community, regionally and functionally. It is

³³ Objection, p. 6.

³⁴ *Id.*

sufficient to establish an ongoing relationship between the Objector and the “*Mobile Wireless Community*” that the Objector does serve, and indeed represents in certain cases, a sizeable portion of the community.

92. It should be borne in mind that the question of whether the Objector is representative enough that its opposition would constitute, in and of itself, substantial opposition by the community, is a different issue that relates to the merits of the Objection.
93. For all the reasons above, I find that Objector has demonstrated an ongoing relationship with the Mobile Wireless Community by virtue of its prominent role as the U.S. trade association of that community. In addition, as the U.S. trade association for the Mobile Wireless Community, its membership also includes several international mobile companies, which further supports the existence of such a relationship.

5.1.2.3. Strong Association

94. The next element required for establishing standing is that the community in question should be strongly associated with the applied-for gTLD string objected to.
95. Section 3.2.2.4 of the Guidebook (setting out the standing requirements) states: “*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.*” [Emphasis added.]
96. Test number three of the four mandatory tests in Section 3.5.4 of the Guidebook also requires that there be “*a **strong association between the community invoked and the applied-for gTLD string.***” [Emphasis added.]
97. The merits test suggests that the factors that could be balanced by a panel to determine this test include but are not limited to:³⁵
 - *Statements contained in application;*
 - *Other public statements by the applicant;*
 - *Associations by the public.*

³⁵ Guidebook (Module 3), Section 3.5.4.

98. While the standing test does not elaborate what factors might be considered in the analysis, it does not preclude consideration of the above, or any other relevant factors.
99. In my reading of the language of the test, an Objector does not need to prove that the applied-for new gTLD string is exclusively or even primarily targeted at the relevant community. Rather, the words of the rule require a “*strong association*” between the new gTLD string and the relevant community. Reading the rule according to its plain language, I believe this to be the more reasonable interpretation.
100. In this regard, Objector has asserted:³⁶

There is a "strong association" between the Mobile Wireless Community and the .MOBILE gTLD string because the term "MOBILE" is plainly descriptive of the key defining characteristic of the products and services which the Community provides. CTIA's member companies, both carrier and non-carrier, are significantly engaged in the mobile industry in the United States and globally. This engagement involves the provision of mobile offerings to end users in the form of mobile services, mobile equipment, and other mobile-enabled and mobile-related products (i.e., mobile commerce).

These products include the production and sale of mobile applications to end-users and, as previously noted, more than one billion mobile devices including mobile handsets, mobile data modems, and other mobile devices used worldwide. MobileCON™, as discussed above, is a key CTIA conference. Further, the number one Google search result for "mobile" is the homepage of T-Mobile, which profiles its mobile devices and services. Attachment E.

Additional, CTIA's Mobile Application Rating System, is "a rating system specifically designed for mobile applications." See <http://www.growingwireless.com/learn-engage/ctia-mobileapplication-rating-system-with-esrb>. CTIA also has endorsed the U.S. Federal Trade Commission's 'Marketing Your Mobile App' Guidelines (Sept. 2012) at <http://www.ctia.org/media/press/body.cfm/prid/2206>.

Indeed, despite the fact that there are "fixed" wireless services as well, "mobile" and "wireless" are often used interchangeably both within the industry and by the public at large. For example, Bing searches for "mobile" produce numerous ads for cellular telephone services. Thus, it is fair to say that telecommunications mobility represents the common interest and link among all of the members of the Community. The GSMA "strongly agree[s] with US Trade body CTIA-The Wireless Association® that the new gTLD will be closely identified with our Mobile Wireless Community and .MOBILE must not be reserved for the exclusive use of a single market participant." Attachment D.

101. The Applicant has denied that the Objector has shown a strong association between

³⁶ Objection, p. 8.

the string and the targeted community, stating:³⁷

The Objector has the burden of establishing “a strong association between the applied-for gTLD and the community represented by the Objector.” Guidebook § 3.5.4. In determining whether a strong association exists, the panel may balance DISH’s representations in its application for the <.mobile> gTLD (Application ID #1-2012-89566) (the “Application”), DISH’s public statements, associations by the public, and other factors the panel deems relevant. Because all factors weigh—heavily—against a strong association between the <.mobile> gTLD and CTIA’s purported community, the Objection must fail.

*First, CTIA’s community has no specific or exclusive association with the word ‘mobile.’ Not even CTIA focuses on the word “mobile” in describing the “wireless communications industry” it claims to represent. See CTIA, About Us, <http://www.ctia.org/aboutCTIA/>. Although used interchangeably in common parlance, “wireless” and “mobile” have different meanings within the telecom industry. ‘Wireless’ refers to the method of transferring information between computing devices without a physical connection, whereas ‘mobile’ refers to devices that are portable. See Attachment C. While mobile devices may have wired or wireless communications connections, mobile devices do not require such capabilities. *Id.* Thus, from a technology perspective, wireless capability may be a feature of any given mobile device, but it is improper to define devices by reference to only one of many features.*

Second, ‘mobile’ is currently used on multiple second level domains (SLDs) by individual, corporate members of the community. For example, Mobile.com is owned by AT&T, Mobile.net is for sale, and Mobile.org is owned by a company named Mobile Bay. None of these ‘mobile’ domains were reserved by CTIA or its members for community use. The public will not associate www.xyz.mobile with CTIA or any member thereof (other than DISH) any more so than Mobile.com is associated with CTIA or any entity other than AT&T.

*Third, and as set forth in the accompanying Declaration of DISH Vice President Vivek Khemka (Attachment P hereto), DISH has as compelling an association with the <.mobile> gTLD as any other member of CTIA’s purported community. Since the early 21st century, with the advent of the POCKETDISH mobile device, through today, DISH has provided and continues to provide technologies which enable content to be viewed on mobile devices. *Id.*, ¶3. DISH’s recent bid for Sprint Nextel (Attachment D) reinforces DISH’s association with mobile devices and the <.mobile> gTLD. Dish intends, over the coming decade, to provide Internet, video and telephone products and services to consumers for both home and mobile applications. *Id.*, ¶¶ 6-7. Thus, DISH’s current and future products and services give it as strong an affiliation with “mobile” as any CTIA member.*

102. First, I am not convinced by the Applicant’s argument that a strong association does not exist between the community in question and the .MOBILE string because,

³⁷ Response, p. 6.

according to the Applicant, the CTIA itself associates itself with the wireless communications industry, and the words “mobile” and “wireless” technically have different meanings. The Applicant has itself admitted in making this argument that the terms wireless and mobile are “used interchangeably in common parlance” even though they have different meanings. It is therefore not relevant whether the community in question is primarily associated with the word “mobile” or whether it is better associated with the word “wireless”. It remains the case that there is a “strong association” between the two, whether or not other, more strongly associated terms may exist.

103. I am also not convinced by the Applicant’s second argument that “[t]he public will not associate *www.xyz.mobile* with CTIA or any member thereof (other than DISH) any more so than *Mobile.com* is associated with CTIA or any entity other than AT&T.”³⁸

104. Last, I do not believe that the Applicant’s third argument, that “DISH’s current and future products and services give it as strong an affiliation with ‘mobile’ as any CTIA member,” has any relevance to the question of whether the gTLD string .MOBILE is strongly associated with the “Mobile Wireless Community.”

105. In conclusion, I find that the word “mobile” is strongly associated with the Mobile Wireless Community as it has been defined by Objector, thus satisfying this test.

5.1.3. Sub-conclusion

106. In conclusion, Objector has satisfied all the criteria for standing to submit its Community Objection.

5.2. Merits Analysis

107. I now turn to considering the Objector’s case on the merits in the following subsections. According to Section 3.5.4 of the Guidebook, in order to be successful in its Objection, the Objector has to establish that:

- The community invoked by the objector is a clearly delineated community;³⁹ and

³⁸ Response, p. 6.

³⁹ See § 5.2.1 below.

- Community opposition to the Amended Application is substantial;⁴⁰ and
- There is a strong association between the community invoked and the applied-for gTLD string;⁴¹ and
- The Amended 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.⁴²

108. I consider each of these elements below.

5.2.1. Clearly Delineated Community

109. This requirement is present both in the standing and merits tests. I have already conducted the necessary analysis for standing,⁴³ which is sufficient for merits purposes as well. Therefore, I shall not repeat it here, but simply restate that Objector has demonstrated satisfactorily that the Mobile Wireless Community is a clearly delineated community as required by the Rules.

5.2.2. Substantial Opposition by the Community

110. Objector asserts that there is substantial opposition from the target community, in satisfaction of this test. I agree.

111. Under this test, the Objector *“must prove substantial opposition within the community it has identified itself as representing.”*⁴⁴ The expert may 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;*

⁴⁰ See § 5.2.2 below.

⁴¹ See § 5.2.3 below.

⁴² See § 5.2.4 below.

⁴³ See § 5.1.2.1 above.

⁴⁴ Guidebook (Module 3), Section 3.5.4.

- *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.*⁴⁵

112. If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the Objection will fail.⁴⁶

113. In support of its assertion that there is substantial opposition in the Mobile Wireless Community, Objector has asserted that its own opposition, together with the opposition expressed in the letters of 4 and 5 June 2015, respectively, from USTelecom and GSMA,⁴⁷ indicate that substantial opposition to the Amended Application exists.

114. I find that this test is satisfied in the present case. In particular, as I have discussed above, it is apparent to me that Objector serves an important representative function in the Mobile Wireless Community as a US trade association that acts as the policy-guiding and lobbying arm of the industry. Accordingly, in light of the criteria stated at paragraph 111 above, the Objector's representative nature and its recognized stature and weight are, in itself, sufficient to meet the substantial opposition test.

115. Moreover, in addition to the Objector, the GSMA and USTelecom have both expressed objections to the Amended Application for the .MOBILE gTLD. I note that the letters from both these organizations⁴⁸ respectively state that these organizations are trade associations of considerable standing, with the GSMA in particular being major global trade association for the Mobile Wireless Community. The opposition expressed by both these trade associations furthers adds to the "*representative nature of entities*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Attachment H to Objector's Supplemental Pleading, GSMA's letter of 5 June 2015; Attachment G to Objector's Supplemental Pleading, USTelecom's letter of 4 June 2015.

⁴⁸ See ¶¶ 113 above.

expressing opposition”, the “[l]evel of recognized stature or weight among sources of opposition”, and the “[d]istribution or diversity among sources of expressions of opposition” in terms of the leadership of the community and regional coverage.⁴⁹ Thus, between the Objector, the GSMA, and USTelecom there is plainly “*substantial opposition*” to the Amended Application for the .MOBILE gTLD.

5.2.3. Strong Association (“Targeting”)

116. This test requires the Objector to “*prove a strong association between the applied-for gTLD string and the community represented by the objector.*”⁵⁰ The tests for standing and merits both contain almost identical phraseology and I find that the same analysis can be applied to both with the same result. Rather than repeat the analysis here, I refer to my analysis on this requirement in the standing section above,⁵¹ and confirm that I find that Objector has proven a “*strong association between the applied-for gTLD string and the community represented by the objector*” in satisfaction of this test on the merits.

5.2.4. Likelihood of Material Detriment

117. To satisfy this test, 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.*”⁵² It is further clarified that “[a]n 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.”⁵³ Under the circumstances, for the reasons stated below, I am not persuaded by the Objector’s arguments that the Amended Application creates a likelihood of such material detriment.

118. The Guidebook provides the following factors that could be used by a panel in making this determination:

⁴⁹ See ¶ 111 above.

⁵⁰ Guidebook (Module 3), Section 3.5.4.

⁵¹ See § 5.1.2.3 above.

⁵² Guidebook (Module 3), Section 3.5.4.

⁵³ *Id.*

- *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.*⁵⁴

119. The list of factors above is non-mandatory and non-exclusive. It includes actual economic harm, reputational harm, the potential for the Applicant to act inconsistently with the community's interests "*or of users more widely*", actual interference with the community's activities, a forced dependency relationship, etc.

120. In considering whether the Amended Application is likely to cause material detriment, I have considered the Objector's arguments as they were initially made against the Original Application prior to being amended, to the extent that they remain applicable, and have also considered the arguments made in subsequent pleadings following the Amended Application.

121. At this stage, the Objector's primary argument is that the Amended Application does not cure the deficiencies of the Original Application, and so creates a likelihood of the same material detriment that the Original Application would have caused. A substantial part of this argument is that while the Applicant may have amended the Original Application from one for a closed gTLD to an open one, the Applicant still intends to operate the gTLD in a manner detrimental to the interests of the Mobile Wireless Community. The Objector further asserts that the Amended Application fails to provide mechanisms to enforce the Applicant's purported commitment to operating the gTLD in an open and non-discriminatory manner, and even if

⁵⁴ *Id.*

enforceable, the Amended Application fails to provide effective and useful commitments in terms of operating the gTLD in a non-discriminatory manner.

122. Before discussing the arguments on this issue in detail, it is important to consider the Objector's contention that "[a] *complete analysis of Dish's amendment requires that it be considered in the context of its original intended use.*"⁵⁵ However, the Objector has not provided any compelling reasons that would justify this approach. The Applicant's Original Application was filed in accordance with the then-applicable regulations, and has thereafter been amended. There is nothing on the record to suggest that the Applicant intends to exploit the gTLD or the rules applicable to the use of the gTLD. It would therefore be inapposite to consider the Amended Application on the assumption that it is only a means to achieve the effect of the Original Application.

5.2.4.1. Are the Applicant's proposed commitments enforceable?

123. The Objector first suggests that the Amended Application is "*worthless because its proposed commitments are unenforceable.*"⁵⁶ The Objector suggests that in the absence of specific enumerated Public Interest Commitments (PICs) by the Applicant, all its promises of commitment to openness or transparent operation are rendered unenforceable.
124. At this stage, it is worth mentioning that while the Objector has referred to several examples to suggest that the Amended Application should include specific enumerated PICs, it has not provided me with anything that would suggest that specific and enumerated PICs are a mandatory requirement for the Amended Application to be successful. It is therefore clear that the only question that has to be decided in relation to lack of specific PICs in the Amended Application is whether their absence would mean that the Amended Application will result in a likelihood of material detriment to the Mobile Wireless Community.
125. In this regard, the Applicant has drawn my attention to Specification 11 of the Registry Agreement. The Registry Agreement is the essential, binding contract that is concluded between a successful Applicant for a gTLD string and ICANN. The Applicant has also referred to the commitment in its Amended Application which provides that

⁵⁵ Objector's Supplemental Pleading, p. 5.

⁵⁶ Objector's Supplemental Pleading, p. 6.

it shall operate the .MOBILE gTLD in an open and non-discriminatory manner. The Applicant's Rejoinder states as follows:

[...] CTIA littered its Supplement with speculations about potential harms to the mobile community, but failed to provide any evidentiary support for these speculations. However, speculations are not facts. In contrast, Specification 11, sections 3(c) and 3(d) of the Registry Agreement (which must be executed prior to delegation of the <Mobile>gTLD) requires adoption of non-discriminatory policies, which eviscerates the heart of CTIA's objections. Moreover, on execution of the Registry Agreement, DISH must warrant and represent that all material information in the Amended Application is true and correct as of the time made and effective date of the Registry Agreement. See ICANN Registry Agreement, Provision 1.3. Again, this is directly contrary to CTIA's rank speculation about DISH's alleged ulterior motives.⁵⁷

126. The Applicant has stated that Sections 3(c) and 3(d) of Specification 11 of the Registry Agreement, as referred to by the Applicant, contain standard PICs which are enforceable through the PIC dispute resolution procedure. The Applicant's Rejoinder states:

Since CTIA filed its Objection, ICANN revised its Standard PICs under Specification 11 of the Registration. Specifically, paragraphs 3(c) and 3(d) of that Specification now provide in pertinent part:

(c) Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies. (Emphasis added).

(d) Registry Operator of a "Generic String" TLD may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person's or entity's "Affiliates" [. . .]. "Generic String" means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those others.

The above Standard PICs, which are enforceable by the ICANN PIC dispute resolution procedure (PICDRP), ensure that DISH's <Mobile> registry will be available to registrants other than the Applicant, including the Mobile Community, and all registrants will be "treated equally" —to quote a goal voiced by CTIA. (CTIA Supplement at p. 7).

As detailed above, ICANN has recommended the adoption of "Standard PICs" for Category 2 strings, such as <Mobile>. CTIA attempts to poke holes in DISH's commitment to "Open and Non-Discriminatory" registrations lacks any basis. DISH's Amended Application provides that:

⁵⁷ Applicant's Rejoinder, p. 2

*As used herein, the term "Open and Non-discriminatory" means Applicant shall operate and provide the <Mobile> string in a **transparent way** that does not give an undue preference to any registrars or Member registrants, including Applicant, Affiliates and/or commonly controlled entities of Applicant and Affiliates, and shall not subject registrars and Member registrants to an undue (Emphasis added.) (CTIA Supplement Attachment J at Annex 1). [Emphasis in the original text.]*

127. Based on the Applicant's submissions, I am convinced that the standard PICs included in Specification 11 of the Registry Agreement, read together with the Applicant's stated commitment in the Amended Application to operate the .MOBILE gTLD in a transparent manner are enforceable through ICANN's PIC dispute resolution procedure and provide sufficient protection to members of the Mobile Wireless Community against material detriment.

5.2.4.2. Are the Applicant's commitments adequate?

128. The Objector further contends that the commitment to operate the .MOBILE gTLD in a transparent and non-discriminatory manner is "*ill-defined and porous*" and will leave the Mobile Wireless Community vulnerable to anti-competitive behavior by the Applicant. Principally, the Objector contends that the use of the word "*undue*" in the commitment, stating that the Applicant will not give "*undue preference*" to any registrars or Member registrants, or that it shall not subject the same to "*undue disadvantage*," leaves room for detrimental conduct. It argues that the use of the word "*undue*" means that the Applicant is prevented only from unwarranted or excessive acts of discrimination.⁵⁸
129. In this regard, I remain convinced that read with the entirety of the Amended Application and the standard PICs referred to above, the prohibition on giving undue preference or against causing undue disadvantage to registrars and Member registrants provides sufficient protection to prevent material detriment to the Mobile Wireless Community. Read in its context, the commitment clearly prevents the Applicant from operating the .MOBILE gTLD in a closed, non-transparent or discriminatory manner.

⁵⁸ Objector's Supplemental Pleading, p. 8.

5.2.4.3. Does the Amended Application lack mechanisms for monitoring?

130. The Objector further asserts that the Amended Application provides no mechanisms to allow oversight and monitoring of the Applicant's conduct and operation of the string to ensure compliance. And while it may be that the Applicant does not provide the mechanisms listed by the Objector,⁵⁹ it is still required to follow ICANN rules which require it to provide the following information:⁶⁰

- *<.Mobile> registration policies must be published publicly;*
- *WHOIS information for all <.Mobile> domain names must be publicly available;*
- *Centralized Zone Data Service ("CZDS") information for <.Mobile> must be publicly available;*
- *<.Mobile> launch schedule will be (and must be) published publicly;*
- *the registry (DISH) must use an ICANN-accredited registrar for any domains they register (they can't register "in the dark"); and*
- *DISH must provide all accredited registrars with equal and open access to the <.Mobile> TLD. [Emphasis in the original text]*

131. Thus, it would not be correct to say that there will be no way to monitor the Applicant's operation of the string. The absence of any additional mechanisms is therefore not sufficient to suggest that the Applicant's conduct will not be subject to scrutiny.

5.2.4.4. Does the Amended Application retain preferential rights for the Applicant?

132. The Objector has further argued that the Applicant has intentionally retained preferential rights and the ability to self-deal.⁶¹ This argument stems from the Objector's assertion that the Applicant is ill-placed to serve as the registry operator because it is also a competitor in the Mobile Wireless Industry.

133. There is no dispute that the preferential rights being referred to by the Objector, the activation or reservation of domain names, are provided by ICANN and are rights which remain with the registry operator under the standard scheme of the ICANN Registry Agreement. However, the question is whether the Applicant is ill-suited to

⁵⁹ Objector's Supplemental Pleading, p. 9.

⁶⁰ Applicant's Rejoinder, p. 13.

⁶¹ Objector's Supplemental Pleading, p. 9.

retain those rights because it is also an industry competitor in the Mobile Wireless Community, and may abuse those rights.

134. As the Applicant points out, this argument ignores the Amended Application's commitment to operate the .MOBILE string in an open and non-discriminatory way. The Objector has provided little in the way of a basis for arguing that the Applicant will abuse these rights and will breach its commitment to operate the string in a transparent and non-discriminatory manner. As such, I am not convinced that these preferential rights in and of themselves result in the likelihood of material detriment to the Mobile Wireless Community.

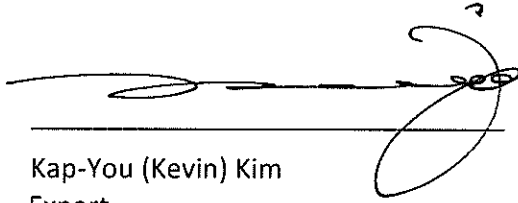
5.2.5. Sub-conclusion

135. I find that the Amended Application will not allow the Applicant to "*engage in anticompetitive and discriminatory abuses*" and is not deficient. As I have found that no deficiencies exist, I do not need to consider further whether the alleged deficiencies would affect the Mobile Wireless Community.
136. In light of all the above reasons, the Objector has failed to "*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.*"
137. In conclusion, I find that Objector has satisfied only three of the four tests on the merits of the Objection. Accordingly, the Objection is not successful.

6. EXPERT DETERMINATION

138. Based on the foregoing, I decide that the Objector has not satisfied all of the tests required for a successful Community Objection, because it has failed to prove that the Amended Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the Mobile Wireless Community.
139. Therefore, the Objection is rejected. As the Applicant is the prevailing party, the Centre shall refund the Applicant's advance payment of costs in accordance with Article 14(e) of the Procedure.

Date of Signature: 28 December 2015



Kap-You (Kevin) Kim
Expert