

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

CASE No. EXP/499/ICANN/116

CTIA – THE WIRELESS ASSOCIATION® (USA)

vs/

AMAZON EU S.À R.L. (LUXEMBOURG)

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 EXPERTISE OF THE  
INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/499/ICANN/116

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

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*Between*

**CTIA – The Wireless Association<sup>®</sup> (USA)**

**OBJECTOR**

*and*

**Amazon EU S.à r.l. (Luxembourg)**

**APPLICANT / RESPONDENT**

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**Expert Determination**

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**Expert Panel:**

Kap-You (Kevin) Kim

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## 1. INTRODUCTION

1. Under the Internet Corporation for Assigned Names and Numbers ("**ICANN**") new generic Top-Level Domain ("**gTLD**") name program ("**Program**"), the Applicant (Amazon EU S.à r.l.) has submitted an application ("**Application**") for the string <.MOBILE>.<sup>1</sup> The Objector (CTIA – The Wireless Association) has filed an objection ("**Objection**") pursuant to the applicable rules, and the Applicant has filed a response ("**Response**").
2. This Expert Determination is a decision upon the merits of the Objection. For the reasons explained below, I have determined that Objector has satisfied all the requirements for a Community Objection. The Objection is upheld.

## 2. PRELIMINARIES

### 2.1. The Parties

3. The Objector is CTIA – The Wireless Association® (1400 16th Street, NW, Suite 600 Washington, DC 20036 USA).
4. The Objector is represented by Ms. Kathryn A. Kleiman and Mr. Robert J. Butler, FLETCHER, HEALD & HILDRETH, PLC (1300 North 17th Street, 11th Floor, Arlington, VA 22209 USA; kleiman@fhhlaw.com and butler@fhhlaw.com).
5. The Applicant is Amazon EU S.à r.l. (5 rue Plaetis, Luxembourg 2338, Luxembourg).
6. The Applicant is represented by Mr. Douglas M. Isenberg, THE GIGALAW FIRM (5555 Glenridge Connector, Suite 200, Atlanta, Georgia 30342, USA; disenberg@GigaLawFirm.com).

### 2.2. The Expert Panel

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

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<sup>1</sup> The Application can be found online at: <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/969>.

### 2.3. The New gTLD String Objected To

8. The new gTLD string applied for and objected to is: **.MOBILE**

### 2.4. Nature of the Objection

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

*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.*

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

### 2.5. Applicable Rules

11. 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**").<sup>2</sup> The Guidebook provides substantive and procedural criteria, standards and rules related to virtually every aspect of the gTLD application, evaluation, objection and dispute resolution process.
12. Module 3 of the Guidebook, entitled "Objection Procedures", and the Attachment to

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<sup>2</sup> I refer to and rely on version 2012-06-04 of the Guidebook, dated 4 June 2012.

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.*”<sup>3</sup> The Procedure details procedures for resolving new gTLD disputes.

13. In addition, the ICC Expertise Rules (“*ICC Rules*”) of the International Centre for Expertise (“*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.
14. Collectively, the above are “*the Rules.*”

## 2.6. Standard and Burden of Proof

15. In deciding on an objection, the expert shall apply the standards that have been defined by ICANN.<sup>4</sup> 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.<sup>5</sup>
16. As per the Rules, the burden of establishing that the Objection should be sustained lies upon the Objector.<sup>6</sup>

## 2.7. Miscellaneous

17. The language of these proceedings is English.<sup>7</sup> All written materials and communications among the parties and the Expert Panel have been in English.<sup>8</sup>
18. All submissions and communications were exchanged between the parties and the

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<sup>3</sup> Guidebook (Module 3), introduction.

<sup>4</sup> Procedure, Article 20(a).

<sup>5</sup> Id., Article 20(b).

<sup>6</sup> Id., Article 20(c).

<sup>7</sup> Procedure, Article 5(a).

<sup>8</sup> Procedure, Article 6(a).

Panel electronically, copying the Centre (the appointed Dispute Resolution Service Provider or “*DSRP*”).<sup>9</sup>

19. The place of the proceedings is Paris, France, where the DRSP (i.e., the Centre) is located.<sup>10</sup>

### **3. PROCEDURAL BACKGROUND**

20. The Application was submitted on 13 June 2012.
21. The Objection was submitted on 13 March 2013.
22. 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.
23. On 12 April 2013, ICANN published a list of all Objections which passed the DRSP’s Administrative reviews (ICANN Dispute Resolution Announcement). And in a letter dated 19 April 2013, the Centre invited the Applicant to submit a Response under Article 11(b) of the Procedure.
24. In a letter dated 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 Dish DBS Corporation (EXP/498/ICANN/115) and invited the parties to comment on this. After receipt of the parties’ comments, the Centre issued its decision not to consolidate the two cases on 19 April 2013. The question of consolidation was revived at the request of the applicant in EXP/498/ICANN/115. On 3 May 2013, after receipt of parties’ comments, the Centre again decided against consolidation.
25. The Centre conducted an administrative review of the Response and issued a notice dated 27 May 2013 indicating that the Response was in compliance with the Procedure and the ICC Rules.

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<sup>9</sup> Procedure, Article 6(b).

<sup>10</sup> Procedure, Article 4(d).

26. The Chair of the Standing Committee of the Centre appointed the Expert on 14 June 2013, and the parties were informed of this by letter from the Centre dated 21 June 2013.
27. On 24 July 2013, the Centre confirmed that the parties had paid the estimated costs, confirmed the full constitution of the Expert Panel and transferred the file to me.
28. 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 as follows:
  - (1) On or around 29 July 2013, the parties jointly requested a 30-day stay of the proceedings, which I granted on the same day.
  - (2) On or around 28 August 2013, the parties jointly requested a second stay, of 40 days, which I granted on 30 August 2013.
  - (3) On or around 9 October 2013, the parties jointly requested a third stay, of 15 days, which I granted on 10 October 2013 and confirmed on 15 October 2013.
  - (4) On or around 23 October 2013, the parties jointly requested a fourth stay, of 60 days, which I granted on 24 October 2013.
  - (5) Then, on or around 23 December 2013, the Objector submitted a document purporting to be a joint request for an additional stay of 60 days. However, Applicant objected to the additional stay. As the Rules do not provide for the Expert to unilaterally stay the proceedings without the agreement of all parties, no stay was granted.
29. During this period of repeated stay requests, ICANN and various interested parties discussed the issue of closed generic gTLDs. As noted in the Objector's latest stay request in late December 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.”<sup>11</sup> 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.

30. In response, ICANN invited Applicants who had applied for the gTLDs so identified by the GAC to respond and clarify whether they still intended to operate the new gTLD as an “exclusive access registry.”
31. In an official “Response Form for Applicants” in connection with “GAC Advice Category 2: Exclusive Access,” which has been publicly posted, Amazon responded:
  - (1) **“No”** to the question **“Will the TLD be operated as an exclusive access registry?”**;
  - (2) **“Yes”** to the question **“Does your current application state that the TLD will be operated as an exclusive registry?”**; and
  - (3) **“No”** to the question **“Do you have a pending change request regarding exclusive access?”**<sup>12</sup>
32. In response to Applicant’s objection to a further stay, Objector complained in an email dated 23 December 2013 that given the above development relating to whether .MOBILE would be a closed or open registry, the matter should be stayed pending amendment of the Application. Applicant responded in an email dated 24 December 2013 that Objector’s email dated 23 December 2013 had addressed “substantive issues” and should be ignored or, absent that, Applicant should be given an opportunity to respond. Objector then responded by email dated 25 December 2013 that it “fully support[ed] Applicant’s request to file an additional submission.”

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<sup>11</sup> The GAC’s “Beijing Communiqué” can be found online here: <http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf>.

<sup>12</sup> Amazon’s response can be found online here: <http://newgtlds.icann.org/sites/default/files/applicants/09oct13/gac-advice-response-1-1316-6133-en.pdf>.

Applicant in turn (by email dated 26 December 2013) clarified that it was not making such a request. I then solicited clarification from the Applicant in an email dated 4 January 2014:

*I understand that the Objector has requested a further stay and that the Applicant does not concur. Before proceeding, the Tribunal invites the Applicant to clarify its position by no later than Friday, 10 January regarding to whether .MOBILE will be operated as a closed or exclusive access registry and whether Amazon has or intends to amend its Closed Generic application relating to this question.*

33. Applicant responded in an email dated 8 January 2014:

*Amazon will not operate .MOBILE as an "exclusive access registry," and Amazon intends to amend its application to reflect this prior to entering into a Registry Agreement, as required by ICANN. For reference, please see ICANN's notice dated October 9, 2013, regarding recent GAC advice and ICANN's new limitations on "exclusive access registries" (available at <http://newgtlds.icann.org/en/announcements-and-media/announcement-4-09oct13-en>) as well as Amazon's public response to ICANN (PDF attached, also available at <http://newgtlds.icann.org/en/applicants/gac-advice/cat2-safeguards>).*

34. Objector responded in an email dated 11 January 2014:

*In view of Applicant's confirmation below that its application as currently on file and before this Tribunal is not a true and accurate representation of Applicant's business plans with respect to the .MOBILE gTLD, Objector CTIA maintains its request for a stay of this proceeding until such time as Applicant amends its application to correct the inaccuracies and describes in reviewable detail its plans for operation of .MOBILE as a non-exclusive access registry. A stay is warranted in order to preserve Objector's rights to review, object to, and receive a Panel decision on the actual application and to preserve the integrity of the Panel's and Tribunal's decision-making processes.*

35. Following this, I requested further clarification from Applicant in an email dated 24 January 2014:

*I understand that Applicant (1) acknowledges that its current application on file states that it intends to operate the .MOBILE as an "exclusive access registry," (2) has expressed the intention to amend its application to reflect an intention not to operate the .MOBILE as an "exclusive access registry" prior to entering into a Registry Agreement, but (3) has not yet amended its application to reflect this intention. [...]*

*I have no reason to question Applicant's intentions. However, I am not certain that independent assurances by Applicant are a proper foundation on which to render a decision. Therefore, before deciding whether or not to stay this matter, I would ask Applicant whether it accepts to have a decision rendered based on its*

*application which currently expresses an intention to operate the .MOBILE as an “exclusive access registry”; or, if not, to provide reasons why it believes that a decision may be rendered based on the declaration of intentions reflected in the response form found at the url link above, without amending the application itself.*

36. Applicant then responded in an email dated 27 January 2014, stating, *inter alia*:

*Applicant believes that the decision in this proceeding should be based on the Objection filed by the Objector on March 13, 2013, and the Response filed by the Applicant on May 16, 2013 – each of which relates to Application ID 1-1316-6133, a copy of which was posted by ICANN on June 13, 2012 [...].*

I inferred from this that Applicant did not consider that a further stay, further briefing or a hearing was required, but rather held the view that a decision should be rendered forthwith based on the contents of the Objection and Response.

37. On 29 January 2014, Objector responded, stating, *inter alia*:

*[A]n application for a New gTLD must be “true and accurate and complete in all material respects.” See Module 6, Section 1, Applicant Guidebook. Applicant admits that its Application does not satisfy these fundamental criteria for proceeding with its evaluation. A mere statement of intent to amend does not render the Application true or complete, nor does it permit a substantive review of the actual application as it will ultimately exist. Accordingly, the Panel cannot accept Applicant’s representation of non-exclusivity and simply proceed to decision at this time. Rather, the Panel and Objector need to see the details of the promised amendment, and Objector must be given an opportunity to review and comment to preserve our rights as representatives of the Mobile Wireless Community.*

*[...]*

*Importantly, it is not acceptable under any concept of ICANN principles, due process or public equity and fairness to allow Applicant to proceed on its fictional application and then, even if the Objection is sustained, argue that it can still amend and proceed with an amended application while wholly circumventing the necessary and authorized community review of that actual amended application through the Objection Process. Any such attempt to “game the system” should be summarily rejected.*

38. In sum, although Applicant has stated an intention to revise the Application to provide for an open registry, it insists that I issue my Expert Determination without any further stay to allow it to revise its Application accordingly. Given that the Program is intended to allow objections to be lodged in response to submitted applications, it would be inappropriate to make a determination based on a hypothetical application. Therefore, in light of the Rules and the foregoing exchange, I issue this Expert Determination based on the contents of the Objection and the Response, which

address the unrevised Application, and without regard to any hypothetical revision of the Application which might provide for an open registry for the .MOBILE gTLD string.

39. On 3 March 2014, having considered the parties' respective comments and the relevant provisions of the Rules, I informed the parties by email of my decision not to stay the proceedings and that I would endeavor to issue the Expert Determination expeditiously.
40. I have decided that there is no need for additional written submissions from the parties beyond the Objection, the Response and the submissions I had solicited from the parties in the communications set out above between late December and the end of January.<sup>13</sup>
41. In addition, I note that neither party has requested a hearing. Bearing in mind the parties' stated positions above and the overall circumstances, and in light of the preference against hearings in the Procedure,<sup>14</sup> I have decided there is no need to convene a hearing.
42. I sent the draft Expert Determination to the Centre for its review on 18 March 2013. Although Article 21(1) of the Procedure stipulates that "the DRSP and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel," this was not possible in view of the parties' joint stays and dispute regarding an additional stay requested by the Objector. Nonetheless, the Expert Determination has been issued within 45 days of my decision not to further stay the proceedings issued on 3 March 2014.

#### **4. REQUIREMENTS**

##### **4.1. Standing Requirements**

43. Section 3.2.2.4 of the Guidebook explains who has standing to submit a Community

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<sup>13</sup> See Procedure, Article 17.

<sup>14</sup> See Procedure, Article 19(a)-(b):

*(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.*

Objection, stating:

*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.*

44. The article concludes by stating that the expert’s task is to “perform a balancing of the factors listed above, as well as other relevant information, in making its determination” 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.”
45. Although the rule seems to present two mandatory tests for standing, in fact there are three, since the first paragraph also dictates that “[t]he 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.”
46. In sum, the standing tests require the would-be objector to demonstrate that it is (1) an “established institution”, (2) with an “ongoing relationship with a clearly delineated community”, and further, (3) that the named community is “strongly associated with the applied-for gTLD string.”

## 4.2. Merits Requirements for a Community Objection

47. Should the Objector meet the requirements for standing, to be successful on its Objection, it must then meet the substantive requirements for a Community Objection set out in section 3.5.4 of Module 3 of the Guidebook, which reads:

*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.*

48. The four tests are eliminatory; that is, if any one of them is not satisfied, the Objection must be denied. Each element is further broken down according to factors that may be considered by the Expert in deciding whether that particular element has been satisfied. These factors will be considered in the context of the relevant analysis below.

## 4.3. Issues Common to Both Standing and Merits: the “Community Test”

49. Both the standing and merits tests require proof of a “clearly delineated community” and a “strong association” between the invoked community and the applied-for gTLD string. I consider these common connections in the following subsections.

### 4.3.1. “Clearly Delineated Community”

50. As mentioned above, 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:

- *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.*<sup>15</sup>

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

51. 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”:

- *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.*<sup>16</sup>

52. The rule emphasizes the mandatory nature of this community requirement: “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.”<sup>17</sup> In other words, irrespective of the number involved or the strength of their opposition, only a clearly delineated community’s objections will be recognized.

53. 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.

#### **4.3.2. “Strong Association” between the Community and the gTLD String**

54. Both the standing test and the merits tests also require the Objector to demonstrate that there be a “strong association” between the subject community and the gTLD string. Specifically:

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<sup>15</sup> Guidebook (Module 3), Section 3.2.2.4.

<sup>16</sup> Guidebook (Module 3), Section 3.5.4.

<sup>17</sup> Guidebook (Module 3), Section 3.5.4.

- (1) Section 3.2.2.4 (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”; and
- (2) Test number three of the four mandatory tests in section 3.5.4 requires that there be “a strong association between the community invoked and the applied-for gTLD string.”

55. The merits test suggests that the factors that could be balanced by a panel to determine this test include but are not limited to:

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

It also indicates that “if opposition by the relevant community is determined, but there is no ‘strong association’ [or targeting relationship] between the community and the applied-for gTLD string, the objection must be dismissed.”

56. 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.
57. 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.

## 5. ANALYSIS

### 5.1. Standing Analysis

#### 5.1.1. *Established Institution*

58. The Objector must first demonstrate that it is “an established institution.” The Objector asserts that it is, and I agree.
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. In arguing that it is an "established institution," Objector has asserted:

*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 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.<sup>18</sup>*

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<sup>18</sup> Objection, pp. 4-5.

61. Applicant has responded that Objector has failed to prove that it is an “established institution” as required by subsection 3.2.2.4 of the Guidebook.<sup>19</sup> In particular, Applicant points out:

*With respect to the Guidebook’s requirement that an objector be “an established institution,” the Objector here has failed to provide any evidence for at least two of the three factors to consider in making this determination. Specifically:*

*1. Guidebook Factor: “Level of global recognition of the institution.” The Objection contains no evidence of global recognition of the Objector.*

*2. Guidebook Factor: “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.” Other than an unsupported statement that it is “an international nonprofit membership organization,” Objector has provided no historical evidence of its existence, that is, no formal charter or national or international registration and no validation by a government, inter-governmental organization, or treaty. Although Objector states that it has existed “since 1984” (Objection, p. 4), Objector provides no evidence of this or when its activities began in earnest.<sup>20</sup>*

62. However, I find that the evidence seems clear that Objector is an established, fully functioning, active and well-regarded entity with a robust and impressive membership and lineup of business activities. For instance, among other things:

- (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.” 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 Applicant has not challenged the veracity of this member roster and I am not aware of any other challenges from any quarter despite the fact that this membership list is presented daily to the public on Objector’s website as well as in connection with this new gTLD Program. Were it fraudulent in any material respect, one would expect that some interested party would have mentioned it.

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<sup>19</sup> Response, p. 4.

<sup>20</sup> Response, p. 5.

Therefore, I take it to be accurate. 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. Although Objector has not indicated “when its activities began in earnest”, as Applicant would have it do, these trade shows are objectively verifiable events and, again, one does not build such well-attended trade shows overnight. Nor does one operate and maintain such major trade shows without an established organization and experienced staff. Again, this suggests that Objector is an “established institution.”

63. I also find that Objector is globally recognized within its trade area. Its member roster contains numerous companies which are global brands, as mentioned above. Indeed, its Associate Members include “companies or organizations that provide mobile wireless service beyond North America.” Such members include China Telecommunication Technology Labs , Hyper Taiwan Technology Inc., Lenovo Inc., TUV Rheinland Group and others, all of whom plainly have an international or global connection. Objector represents that these “Associate members include companies which provide, either directly or through their affiliates, mobile wireless service to more than 1 billion people in Asia, Africa, Europe, Central and South America” and that “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.”<sup>21</sup> While these statistics are not supported by specific evidence, there is sufficient evidence in the member list alone to make them at least plausible.

64. Objector also asserts that its most important activities are in policy-setting for the industry. It states that:

*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,*

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<sup>21</sup> Objection, p. 5.

*the Socialist Republic of Vietnam, State of Israel, and the United Kingdom, among others, on the mobile industry.*<sup>22</sup>

65. Overall, given that the bulk of the representations and evidence provided by Objector in support of its standing arguments consists of website content and other content generated by Objector, one might take a skeptical view of it, as the Applicant has. However, I have noted that Objector has also cited and attached a letter to the ICC International Centre for Expertise from Group Speciale Mobile Association (“GSMA”), dated 13 March 2013,<sup>23</sup> which indirectly serves to corroborate Objector’s representations.
66. The GSMA is a premier global trade association that is widely known and well regarded in connection with mobile wireless technology and industry. The Director General of the GSMA writes to lend the GSMA’s support to the Objection, stating:

*On behalf of the GSMA, I write to affirm our opposition to the applications of Amazon EU S.a r.l. (“Amazon”) and Dish DBS Corporation (“Dish”) for the new gTLD string .MOBILE on the grounds that both Amazon and Dish have proposed to operate that TLD on a completely “closed” basis, making it unavailable to the vast majority of participants in the mobile services industry and members of the Mobile Wireless Community. As the major trade association for mobile operators around the globe, GSMA submits that granting exclusive rights in .MOBILE will harm competition in the mobile services marketplace and expose mobile subscribers to the likelihood of confusion and deception in their choice of mobile services and providers. As a result, consumers, our members, and other members of the Mobile Wireless Community will be harmed.*

*The GSMA represents the interests of mobile operators worldwide. Spanning more than 220 countries, the GSMA unites nearly 800 of the world’s mobile operators with more than 230 companies in the broader mobile ecosystem, including handset makers, software companies, equipment providers and Internet companies, as well as organisations in industry sectors such as financial services, healthcare, media, transport and utilities.*

*We strongly agree 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. Accordingly, we fully support CTIA’s objection to the Amazon and Dish Applications. [Emphasis added.]*

67. There is an implicit recognition in the GSMA’s letter of the Objector’s status in the

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<sup>22</sup> Objection, p. 6.

<sup>23</sup> Objection, Attachment D.

trade. That the GSMA letter takes no pains to introduce the Objector except as “US trade body” would seem to suggest that no more introduction than this is required, thus giving credence to Objector’s own representations about its status. GSMA agrees with the Objector that the .MOBILE string “will be closely identified with our Mobile Wireless Community.” The reference to “our Mobile Wireless Community” lends further atmospheric support to this view. In short, the GSMA here has recognized the Objector as a U.S. trade body representing the so-called “Mobile Wireless Community” and lends its more explicitly global support.

68. In view of the above, along with other considerations reflected in the record, I find that Objector has shown that it is an “established institution” in satisfaction of the first standing requirement.

#### ***5.1.2. Ongoing Relationship with a Clearly Delineated Community***

69. The second prong of the standing test requires Objector to prove that it has an ongoing relationship with a clearly delineated community.<sup>24</sup> 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. I concur.
70. First, I consider the nature of the community (that is, whether the community is a clearly delineated one) and then the relationship of the Objector to that community (that is, whether it is an ongoing one).

##### **5.1.2.1. Clearly Delineated Community**

71. I turn first to the community component of the test. “Community” is not defined in the Rules. It thus must be considered according to common usage and understanding of that term.
72. Although not raised by the parties, in my consideration of the issues, I have reviewed the comments of the Independent Objector (“IO”), whose role 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.”<sup>25</sup> The IO’s comments are by no means binding or authoritative and I do not rely on them as such. But they are well-considered, widely

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<sup>24</sup> Guidebook (Module 3), Section 3.2.2.4.

<sup>25</sup> See <http://newgtlds.icann.org/en/program-status/odr/independent>.

known, and publicly available for review by the parties. 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,<sup>26</sup> 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. In the same comments, however, the IO also noted the difficulty of establishing a "clearly delineated community" that is associated with generic string terms. With regard to "generic terms" (such as the .MOBILE string), the IO takes the position that "it is unlikely that these applications will pass this community test" because "[b]y 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." Thus, the IO concludes, "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."
75. I share the view that a community may take a broad range of forms, and that an economic sector may be a form of community.<sup>27</sup> One may ask, though, what constitutes a "sector" of the economy that may be deemed a 'community'? To what extent must such an economic sector share common interests and activities? At what point is the linkage too tenuous to meet the "clearly delineated" threshold? And does the alleged "Mobile Wireless Community" as described by the Objector qualify?

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<sup>26</sup> See <http://www.independent-objector-newgtlds.org/home/the-issue-of-closed-generic-gtlds>.

<sup>27</sup> I note that this same view was reflected in 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*") which it indicates 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." (Emphases added.)

76. 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.” According to Objector, this community consists of Objector’s members “and others like them.” And what binds or links this community is a “common interest in the provision, enhancement and use of commercial mobile services, devices and applications.”
77. I accept that there is a widely recognized sector of the global economy that is devoted to mobile wireless technologies. And, as I noted, an economic sector is a form of community. In this regard, Objector also declares that “[t]he community is well-defined and extensively studied as a critically important engine of the world economy.” Had Objector included examples of the literature on this economic sector, it would make the task of evaluating the question of clear delineation simpler. But it has not, and so I undertake that analysis by other means.
78. 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. Objector states that “their common interest is the provision, enhancement and use of commercial mobile services, devices and applications.”
79. It may be instructive to consider the diversity of Objector’s membership, 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.”
  - (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.”
  - (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.”

80. 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.
81. 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.” This seems to me clearly delineated.
82. Indeed, it would appear that the GSMA has the same or similar conception of a “Mobile Wireless Community,” since it makes a reference to “our Mobile Wireless Community” in its letter supporting the Objection.
83. However, 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 industry, 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. Applicant makes much of the wide breadth and diversity of the “Associate” category in particular as being “essentially unrestricted and open to anyone regardless of any affiliation with the wireless industry.”
84. However, in my view it is not necessary that all of Objector’s members must be considered as members of the Community in question. Under the Rules, it is sufficient that the objector be “associated with [a] clearly delineated”<sup>28</sup> community. The Rules do not suggest that such an association should be exclusive—i.e., that the objector may *only* be associated with members of the community at issue. It is therefore possible for an organization to be associated with a certain community even though certain members of the organization are not members of the community in question.
85. For instance, an academic interest alone does not make one a member of a

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<sup>28</sup> Guidebook (Module 3), Section 3.2.2.4.



community; one can, for instance, study Judaism without being Jewish. But having said that, it is perfectly logical for a trade association representing an economic sector to invite and facilitate the involvement of academics and others who support and serve the community in various ways. Indeed, in my view it would not be fatal to the idea of a clearly delineated community if Objector did accept members who, as Applicant alleges, may have no “affiliation with the wireless industry” at all. (That said, as a practical matter it seems unlikely that anyone would make the investment to become a member of a trade association for an industry sector in which they have no interest.) Accordingly, I do not find the internal diversity of Objector’s member categories to undermine the clarity of delineation of the community at issue. One can simply go back to the definition offered by the Objector: “carriers, network providers, and others involved in the delivery of mobile wireless and wireless-enabled services to governments, enterprises, and consumers worldwide.” Does the entity or individual in question fall into that description or not?

86. 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.
87. To further aid in my analysis of this issue, I evaluate each of the factors listed in section 3.5.4 relating to whether a community is “clearly delineated.” Although section 3.5.4 sets out a set of factors to be considered for the merits test, for reasons asserted above, I find it appropriate to use them as a guide in the standing analysis on this point as well.
88. **First**, is there public recognition of the mobile wireless industry as a community at a local and/or global level? In my view, and based on the materials presented by the parties, there is unquestionably global recognition of the mobile or wireless economic sector generally.
89. **Second**, to what extent are there formal boundaries around the community, and what persons or entities are considered to form the community? Objector takes the position that its members “and others like them” form the community. In my view these “others” would include many of the members of the GSMA as well.

90. While the membership of the alleged “Mobile Wireless Community” would be wider than just the members of Objector and GSMA, 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 GSMA 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.
91. Thus, while membership in the alleged “Mobile Wireless Community” does not *require* membership in Objector or any other organization, such organizational bodies do exist and, as noted above, the fee requirement and self-selection of the membership results in a natural exclusionary function such that the membership of such organizations will inevitably be substantially composed of community members.
92. **Third**, how long has the community been in existence? The “Mobile Wireless Community,” as described by Objector, has been in existence for several decades, since mobile or wireless communications services and devices were made commercially available. According to Objector, this was in 1984. I accept this.
93. **Fourth**, what is the global distribution of the community (this may not apply if the community is territorial)? Objector has defined the community at issue as “global” and noted that it consists of its own members “and others like them.” It further states:

*CTIA's carrier members (mobile network operators and mobile virtual network operators) alone serve more than 304 million mobile wireless subscribers in the U.S., including customers using more than 300 million data-capable and more than 243 million web-capable devices. ... CTIA's non-carrier members provide mobile-related products and services worldwide, including mobile network infrastructure, mobile devices (handsets, tablets, mobile data modems), chipsets, software and content, and a wide variety of accessories and enabling technologies and components. In addition, CTIA's Associate members include companies which provide, either directly or through their affiliates, mobile wireless service to more than 1 billion people in Asia, Africa, Europe, Central and South America. In combination with CTIA's General members, CTIA's members provide mobile wireless service to more than 1.3 billion people worldwide.<sup>29</sup>*

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<sup>29</sup> Objection, p. 5.

94. In addition, Objector has acknowledged that the alleged global “Mobile Wireless Community” consists of its members “and others like them,” which would clearly also include the members of GSMA, which has also lent its support to the Objection. Therefore, I find that the invoked community is both substantial and globally distributed.
95. **Fifth**, what number of people or entities makes up the community? It is sufficient to say that, plainly, the number of people or entities that make up the community is large and is substantially reflected in the membership of the Objector and the GSMA.
96. 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.”

#### **5.1.2.2. Ongoing relationship**

97. 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. Although it may not serve the entire community, it is the trade association for a very significant component of the community (i.e., the US/North American sub-community), as reflected in its extensive membership list and the many important companies that populate them.
98. Objector describes its major activities on behalf of the Mobile Wireless Community:

*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.*

—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/>.<sup>30</sup>

99. Objector further refers to its alleged development of international “certification programs” and “voluntary guidelines to protect mobile users”.<sup>31</sup>
100. Finally, Objector describes its lobbying activities on behalf of the Mobile Wireless Community as follows:

*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.*<sup>32</sup>

101. I note here, too, the contents of the GSMA letter dated 13 March 2013, quoted above, which lends support to the Objection.<sup>33</sup>
102. Applicant counters by arguing that Objector has failed to prove that it has an “ongoing relationship with a clearly delineated community” as required by subsection 3.2.2.4 of the Guidebook.<sup>34</sup> In particular, Applicant points out that Objector has “failed to provide evidence for at least three of the four factors to consider in making this

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<sup>30</sup> *Id.* at 5-6.

<sup>31</sup> *Id.* at 6.

<sup>32</sup> *Id.*

<sup>33</sup> See Objection, Attachment D, third paragraph.

<sup>34</sup> Response, p. 4.

determination,” and states:

Guidebook Factor: “The presence of mechanisms for participation in activities, membership, and leadership.” Objector claims that it “is a voluntary association composed of 256 companies.” (Objection, p. 5.) However, the Objection contains no information as to how (or even whether) any of these companies participate in activities, membership and leadership of the Objector, or what criteria exist for a company to become a member. Indeed, according to Objector’s own website, membership is open to a tremendously broad range of individuals and companies, as diverse as “consultants, resellers, academia, law firms, engineers, etc.” that are merely “working with the wireless industry” – and the “CTIA Associate Membership Application” does not even require that a member show how (or whether) it satisfies this broad criteria. Accordingly, it appears that membership in Objector’s association is essentially unrestricted and open to anyone regardless of any affiliation with the wireless industry.

Guidebook Factor: “Institutional purpose related to the benefit of the associated community.” The Objection contains no information about the institutional purpose of the Objector or its alleged community, other than the fact that Objector “represent[s]” the wireless communications industry (Objection, p. 4) and the fact that its representatives “meet regularly with key policymakers, government representatives, and trade representatives from the U.S. and around the world.” (Objection, p. 6.) These vague, broad and unsupported statements offer no information about the institutional purpose of the Objector or how it benefits any community.

Guidebook Factor: “The level of formal boundaries around the community.” Although the Objection refers to “the Mobile Wireless Community” (Objection, p. 4), the Objector fails to define this community. Further, as shown above and as set forth in the “CTIA Associate Membership Application,” there are no formal boundaries around the community given that any person or company can become a member of Objector’s association. The only eligibility criteria appear to be an ability pay Objector’s annual dues of \$6,000.

In addition, as ICANN’s Independent Objector has made clear, it is unlikely that a “clearly delineated” community exists around any generic term (such as “mobile”) because “[b]y 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.”<sup>35</sup>

103. Applicant concludes: “In light of the above, it is apparent that Objector is ineligible to file the Objection in this proceeding and, for that reason alone, the Panel should deny

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<sup>35</sup> Response, pp. 5-6.

the Objection.”<sup>36</sup>

104. However, I am not persuaded by these arguments. I have directly addressed the objection in the first and third “Guidebook factors” above already. As to the second, while I agree that it would have served Objector’s goals better for it to provide for extensive and concrete evidence of its activities and purposes, the simple fact of its robust membership lists is indicative of the fact that it is serving its role as trade association in the US successfully. Furthermore, that it is a “US Trade body” for the Mobile Wireless Community, as independently asserted by the GSMA, and is supported in its objection by the GSMA is sufficiently demonstrative of its role on behalf of the Mobile Wireless Community. The function of a trade association is generally understood,<sup>37</sup> though its specific activities may be diverse and varied. And the prominence and importance of the US in wireless and mobile communications worldwide is beyond dispute. From this, it can be inferred that it does serve an institutional purpose relevant to the designated community, and that for purposes of its Objection, it represents that community.
105. 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 US trade association of that community, as also reflected in the support lent to its Objection by the GSMA.

#### **5.1.1. Strong Association**

106. The third element required for standing is the existence of “a community strongly associated with the applied-for gTLD string” objected to. As noted above, the merits tests likewise include a component requiring a “strong association” between the specified community and the gTLD string at issue.
107. I would add one note of clarification regarding this requirement, and that is that the threshold is a relatively high one—“strong” association—but it by no means requires that the gTLD string must be an identifier that is unique to the community at issue.
108. The word “mobile” of course has various meanings. Applicant has cited Merriam-

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<sup>36</sup> *Id.*, at 6.

<sup>37</sup> See, e.g., <http://www.wisageek.com/what-is-a-trade-association.htm>.

Webster's online dictionary in which the first six adjectival definitions of "mobile" and the single noun definition make no reference to wireless communications or devices. But these kinds of results can be cherry-picked. By contrast, Objector has noted that the first search result in Google is T-Mobile. Different sources produce different results. The Wikipedia entry for "mobile," for instance, begins as follows:

**Mobile** often refers to:

- Mobile phone, a portable communications device
- Mobile, Alabama, a U.S. port city
- Mobile (sculpture), a hanging artwork (or toy)
- Mobility, the ability to move or be moved
- Mobility of single cell animals (motility)
- Mobile forces, especially Motorized infantry or Mounted infantry

**Mobile** may also refer to:

#### **Technology**

- Mobile computing, a generic term describing one's ability to use technology in mobile environments
- Mobile device, a computer designed for mobile computing
- Mobile game, a video game played on a mobile phone, smartphone, PDA or handheld computer
- Mobile Magazine, a publication on portable electronics
- Mobile network operator, a company which provides mobile phone network access and services
- Mobile radio, wireless communications systems and devices which are based on radio frequencies
- Mobile rig
- Mobile station, user equipment and software needed for communication with a wireless telephone network
- Mobile Web, the World Wide Web as accessed from mobile devices using Mobile Web Browser
- Mobile TV, TV services viewed via a mobile device.<sup>38</sup>

109. Indeed, in the internet world within which the new gTLDs will operate, the association of the term "mobile" with wireless technologies may predominate over more traditional or historical meanings of the word. It is not uncommon for people in

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<sup>38</sup> Following the above are additional usage categories "places" and "entertainment." See <http://en.wikipedia.org/wiki/Mobile>.

countries where such technologies are common to use the word "mobile" as a synonym for a cellular phone on business cards or in conversation, and "mobile device" is commonly used to capture the category of technological devices which operate via wireless communications signals, such as cellular phones, smart phones, tablets, and the like. Such contemporary usage is heavily reflected in the Wikipedia page excerpt above.

110. In this regard, Objector has asserted:

*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.<sup>39</sup>*

111. Respondent has denied that Objector has shown a strong association between the string and the targeted community, stating:

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<sup>39</sup> Objection, p. 8.



Objector has failed to prove “a strong association between the applied-for gTLD string and the community represented by the objector,” as required by the Guidebook, subsection 3.5.4.

Objector indicates that it “represent[s] the wireless communications industry” (Objection, p. 4) and that its “carrier and non-carrier” members “are significantly engaged in the mobile industry” (Objection, p. 8); however, the Objector does not provide any evidence that the .mobile gTLD is strongly associated with this community. Indeed, although the Guidebook provides three factors to consider when evaluating such targeting, the Objector has not provided any information relevant to any of these three factors – because all three factors weigh against the Objector. Specifically:

1. Guidebook Factor: “Statements contained in the application.” The Application states that the mission of the .MOBILE registry is as follows:

To provide a unique and dedicated platform for Amazon while simultaneously protecting the integrity of its brand and reputation.

A .MOBILE registry will:

- Provide Amazon with additional controls over its technical architecture, offering a stable and secure foundation for online communication and interaction.
- Provide Amazon a further platform for innovation.
- Enable Amazon to protect its intellectual property rights.

Application, para. 18(a).

Nowhere in the Application does the Applicant make reference to the words or phrases “wireless,” “carrier,” “communications industry” or “mobile industry.”

Accordingly, there are no statements in the Application indicating an association (let alone a “strong association”) between the applied-for gTLD and the community represented by the Objector.

2. Guidebook Factor: “Other public statements by the applicant.” The Objection does not refer to any public statements made by the Applicant regarding the Application, because Applicant has made no such public statements.

3. Guidebook Factor: “Associations by the public.” The Objection does not contain evidence of any associations by the public that the applied-for gTLD targets the community represented by the Objector. In any event, the word “mobile” has many definitions that do not bear any association with the wireless communications industry, as shown in the printout attached hereto as Annex 8, from the website of the Merriam-Webster dictionary. Indeed, the first six definitions of “mobile” as an adjective are unrelated to the wireless communications industry, as is the only definition of “mobile” as a noun[.]<sup>40</sup>

112. I am not aware of any statements by Applicant in its Application or otherwise linking the Application with the Mobile Wireless Community. Rather, the Application

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<sup>40</sup> Response, pp. 8-9.

specifically indicates that it is not a “community-based” application. Therefore, there is no need to even consider the first two objections raised by Applicant above. As to the associations of the public, for reasons I have asserted above and with the arguments of Objector also in mind, I find that there is a strong association in the public mind between the word “mobile” and the Mobile Wireless Community as defined by Objector.

113. 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.

**5.1.2. Sub-conclusion**

114. In conclusion, Objector has satisfied all three criteria to have standing to submit its Community Objection.

**5.2. Merits Analysis**

**5.2.1. Clearly Delineated Community**

115. As noted above, this requirement is present both in the standing and merits tests. I have already conducted the necessary analysis for standing, 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**

116. Objector asserts that there is substantial opposition from the target community, in satisfaction of this test—the second of four mandatory tests. I agree.

117. Under this test, the Objector “must prove substantial opposition within the community it has identified itself as representing.”<sup>41</sup> 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;*

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<sup>41</sup> Guidebook (Module 3), Section 3.5.4.

- *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.*<sup>42</sup>

118. If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.<sup>43</sup>

119. In support of its assertion that there is substantial opposition in the Mobile Wireless Community, Objector asserts:

*CTIA's opposition alone constitutes substantial opposition to the Amazon application from the Mobile Wireless Community because of the breadth of its membership and its leading stature in that Community. CTIA's opposition is entitled to substantial weight as the Association represents companies across the mobile ecosystem, including mobile network operators and mobile virtual network operators serving more than 304 million subscribers in the United States and its territories, and suppliers of mobile network infrastructure and devices responsible for the production of more than 1.1 billion mobile devices that were sold to end users worldwide in 2012. See Gartner Press Release, Gartner Says Worldwide Mobile Phone Sales Declined 1.7 Percent in 2012, Feb. 13, 2013. Attachment C. Including members' owners and affiliates, CTIA-related providers serve more than 1.3 billion subscribers worldwide. Together with the GSMA, there are more than 3.2 billion mobile wireless users worldwide. See <http://gsmamobileeconomy.com/>.*

*CTIA's members also include non-traditional platform providers who offer more than 1.5 million mobile applications to end users worldwide, and suppliers of chipsets, software and other content, and a wide variety of accessories and enabling technologies and components essential to the provision to and enjoyment of mobile service by users worldwide. Accordingly, in no way can the opposition of these significant global industry elements/community members to the Amazon application for a "closed" .MOBILE gTLD be deemed insubstantial.*

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

Notably, the world's largest mobile services trade association fully supports CTIA's objection and opposes Amazon's application. The Groupe Speciale Mobile Association ("GSMA") "represents the interests of mobile operators worldwide. Spanning more than 220 countries, the GSMA unites nearly 800 of the world's mobile operators with more than 230 companies in the broader mobile ecosystem, including handset makers, software companies, equipment providers and Internet companies, as well as organisations in industry sectors such as financial services, healthcare, media, transport and utilities." The GSMA affirms its "opposition to the Application[] of Amazon EU S.a r.l. ... for the New gTLD string .MOBILE on the grounds that ... Amazon ... [has] proposed to operate that TLD on a completely 'closed' basis, making it unavailable to the vast majority of participants in the mobile services industry and members of the Mobile Wireless Community. As the major trade association for mobile services operators around the globe, GSMA submits that granting exclusive rights in .MOBILE will harm competition in the mobile services marketplace and expose mobile subscribers to the likelihood of confusion and deception in their choice of mobile services and providers. As a result, consumers, our members, and other members of the Mobile Wireless Community will be harmed." Attachment D.<sup>44</sup>

120. Applicant disagrees, asserting:

Objector has failed to prove that there is "substantial opposition within the community it has identified itself as representing," as required by the Guidebook, subsection 3.5.4. Specifically, Objector has failed to prove or even provide adequate evidence of any of the six factors to determine whether there is substantial opposition, namely:

1. Guidebook Factor: "Number of expressions of opposition relative to the composition of the community." Other than a single letter from a European-based trade association, Objector has provided **no evidence of any expressions of opposition from the community**. Furthermore, it cannot be assumed that all of Objector's members support the Objection. For example, while Objector's online membership list identifies "Google Inc" as a member, Google has been conspicuously omitted from the list of members included by the Objector as Attachment A to the Objection, raising the question as to whether Google and/or other members specifically oppose the Objection.

2. Guidebook Factor: "The representative nature of entities expressing opposition." Because, as stated above, Objector has failed to identify any entities other than a European-based trade association that supports its Objection, it is impossible to evaluate the "representative nature" of any such entities. Further, as also stated above, the worldwide base of mobile phone subscribers is about six billion, so it is far from likely that the Objector adequately represents the interests of such a diverse group.

3. Guidebook Factor: "Level of recognized stature or weight among sources of opposition." Objector has not provided any information as to this factor.

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<sup>44</sup> Objection, p. 8.

*4. Guidebook Factor: "Historical defense of the community in other contexts." The Objection contains no information whatsoever as to how or even whether it has defended the wireless community in any context. Indeed, the activities described by the Objector – conferences, lobbying and public relations (Objection, p. 5-6) – are general and proactive in nature and not in any way defensive.*

*5. Guidebook Factor: "Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition." Not only has Objector failed to include any information about costs it may have incurred in expressing opposition to Applicant's Application for the .mobile gTLD, but the Objection contains no references to any other channels that Objector has used to convey opposition. Indeed, despite a three-month window during which the public was invited to submit comments on all of the gTLD applications (a process that resulted in 12,160 comments), Objector did not submit any comments on the Applicant's .mobile Application.<sup>45</sup>*

121. I find that this test is satisfied in the overall circumstances. 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, the central organizer of two of the largest trade shows in the industry in North America, and in certain other capacities. Accordingly, the opposition of Objector alone may be sufficient to meet the "substantial opposition" test.
122. Moreover, in addition to the Objector, the GSMA (the largest, global trade association in the Mobile Wireless Community) and others have expressed objections to the Application for the .MOBILE gTLD on the grounds that it should not be operated as a so-called "closed generic gTLD." Between the Objector and the GSMA, there is plainly "substantial opposition" to the Application for the .MOBILE gTLD.

### **5.2.3. Strong Association ("Targeting")**

123. This test requires the Objector to "prove a strong association between the applied-for gTLD string and the community represented by the objector."<sup>46</sup> As I explained above, 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, and confirm that I find that Objector has proven a "strong association between

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<sup>45</sup> Response, pp. 7-8.

<sup>46</sup> Guidebook (Module 3), Section 3.5.4.

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**

124. 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.”<sup>47</sup> 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.”

125. 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.*<sup>48</sup>

126. The list of factors above is, again, non-mandatory and non-exclusionary. It includes actual economic harm, reputational harm, the potential for 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.

127. In support of its argument that the Mobile Wireless Community will likely suffer

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<sup>47</sup> Guidebook (Module 3), Section 3.5.4.

<sup>48</sup> Guidebook (Module 3), Section 3.5.4.

material detriment, Objector asserts that “exclusive access of one company to all domain names within the .MOBILE TLD will have a substantial impact in the marketplace and lead to real and significant harm and material detriment for the Mobile Wireless Community.” Objector presents its arguments in support of this contention in several sub-sections, as follows. Rather than recite Objector’s extensive arguments in each case, I insert my views and findings under each heading, reflecting my pertinent views and findings in response to Applicant’s arguments as well. While I do not address each and every argument asserted, I have reviewed and considered them all in reaching my conclusions.

**5.2.4.1. Amazon Has Expressly Acknowledged That It Has No Intention of Operating The .MOBILE gTLD In Accordance With The Interests Of The Mobile Wireless Community.**

128. It is not disputed that under the Application, Applicant has declared an intention to operate the registry on a closed basis for its own use. As noted above, there is some indication that Applicant will not—or will be precluded from—doing this. But the actual outcome is far from clear and, in any event, is beyond the purview of my mandate as Expert. Therefore, I find that the evidence suggests that Applicant will not act in accordance with the interests of the Mobile Wireless Community to the extent that the community has an interest in exploiting .MOBILE domain names.
129. Given the fact that, as discussed above, there is a “strong association” between the string and the Mobile Wireless Community, this would inherently have some effect on the community. Among other things, it would be indefinitely precluded from making use of the very gTLD that is strongly associated—perhaps most strongly associated—with it.
130. While it is at present easy to argue that the Mobile Wireless Community would not be harmed because they can simply conduct their business under .COM or other gTLDs as they do now, that argument is circular. .MOBILE domain names have no present quantifiable value because they do not yet exist. The same could be said universally of any market entrant today, which could simply select a domain name using presently available gTLDs. However, the very fact that market forces have pressed for additional gTLDs strongly suggests that new gTLDs are wanted and, by virtue of being wanted, will have market value. In light of the present Program, it is not difficult to reach the conclusion that once the geography of the domain name landscape changes with the

addition of new gTLDs through the current program (of which this is only the first round), industries and market participants will begin to use these as identifiers rather than sticking with the one-size-fits-all .COM or equivalents. In the expanded-gTLD internet world, in light of the Mobile Wireless Community's strong association with the term "mobile," it is very likely to want access to the .MOBILE gTLD. This is indicated, among other reasons, by the fact that the community's advocates say so now, and object to the Applicant having exclusive access to it. In my view, if Applicant is permitted to lay exclusive claim to all .MOBILE domain names it would constitute a likely material detriment to the Mobile Wireless Community.

**5.2.4.2. Access to the .MOBILE Domain Names, in the Highly Competitive Mobile Marketplace Is Critical to the Core Activities of the Mobile Wireless Community – a Community Heavily Vested in and Dependent on the DNS**

131. I am not certain that having access to the .MOBILE gTLD is "critical to the core activities of the Mobile Wireless Community"—at least at this point in time. If it was, one would expect that community to swiftly move to submit its own application to act as the register itself. However, as the domain name landscape adjusts to the expanded gTLD options, this may well become the case. In any case, as explained above, in my view it is likely to have value to the Mobile Wireless Community. The gTLD .MOBILE is not a generic descriptor like ".com" (short for "company"), but an identifying descriptor that is a widely used to refer to the community. (Indeed, while not determinative in any way, it is noteworthy that the .MOBILE string has a far weaker association with Amazon than it does with the Mobile Wireless Community.) Within the bounds of the Mobile Wireless Community, .MOBILE could easily function in a manner similar to the way .COM functions in the broader internet economy.
132. Top-level domain names are not co-equal with the second-level name market. There, excepting certain limitations and preclusions, one need only find a unique name and pay to register it. However, a TLD is something else entirely. A market participant cannot simply "register" a TLD like .MOBILE or .WIRELESS or .APP, as it can register a second-level domain name like "app.com." Rather, one must become the registrant, which is an expensive, time-consuming, complex process. And after a registrant is selected, it cannot simply sell its rights as a registrant to another market participant. It is a highly regulated position, subject to the oversight of ICANN and to numerous regulations.



133. Hence, it is incorrect to say that Amazon’s securing the .MOBILE gTLD is no different than the AT&T’s registering the MOBILE.COM domain name. It is for this reason, it seems to me that ICANN has provided affected communities the opportunity to object where the community fulfills the requirements contained in the Guidebook.
134. As stated in the list of factors above, material detriment may be shown, among other things, where there is “[e]vidence 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.” In this case, Applicant has proposed no effective security protections for the simple reason that its Application proposes not to allow the Mobile Wireless Community—or other users—access to the .MOBILE gTLD at all.
135. The establishment of unrestricted, exclusive rights to a gTLD that is strongly associated with a certain community or communities, particularly where those communities are, or are likely to be, active in the internet sphere, seems to me inherently detrimental to those communities’ interests. And it is unquestionably the case that the Mobile Wireless Community is a community for which domain name “real estate” is of high value.

**5.2.4.3. The Mobile Wireless Community Will Suffer Significant and Extensive Economic Harm Should .MOBILE Be Delegated to Amazon Under the Terms Set Out in the New gTLD Application**

136. While I do not necessarily agree with all of the potential harms foreseen by Objector, I am persuaded that .MOBILE is a highly descriptive term which, if Applicant alone has access, it will have the power to exploit to its advantage while denying the opportunity to the Mobile Wireless Community which has a strong interest in it.
137. In this regard, I feel compelled to clarify that I am not taking the position that there should or can be no closed registry of generic terms at all. That is a policy question for others to determine. I only take the view that in a case such as this where a party has shown that it is a community strongly associated with a particular gTLD and there is substantial opposition in that community to a particular party having a closed registry on that gTLD, there is a strong likelihood that there is a material detriment.

**5.2.4.4. The Level of Certainty That the Alleged Harms Will Occur Is Very High**

138. Based on the Application and Response of Applicant, it is clear that Applicant will, if granted the .MOBILE registry, operate it for its own exclusive benefit, and the Mobile Wireless Community will be precluded indefinitely from using this gTLD. In my view, given the strong association between .MOBILE and the Mobile Wireless Community in the mind of the internet public, there is a high likelihood that this will result in the detriment discussed above.

**5.2.5. Sub-conclusion**

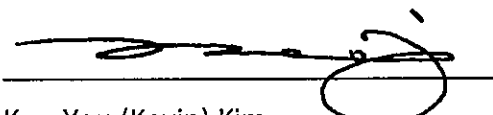
139. In conclusion, I find that Objector has satisfied each of the four tests on the merits of the Objection. Accordingly, its Objection is successful.

**6. EXPERT DETERMINATION**

140. Based on the foregoing, I decide that the Objector has standing and has satisfied the four tests required for a successful Community Objection.

141. Therefore, Objector has prevailed and the Objection is upheld. As the Objector is the prevailing party, the Centre shall refund the Objector's advance payment of costs to the Objector in accordance with Article 14(e) of the Procedure.

Date of Signature: 10 April 2014

  
Kap-You (Kevin) Kim  
Expert