THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE

INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/508/ICANN/125

AMERICAN INSURANCE ASSOCIATION

(USA)

vs/

PIONEER WILLOW, LLC

(USA)

This document is an original 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.

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List of Abbreviations

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Add.Sub.	Additional Submission
Appendix III	Appendix III to the Rules, Schedule of expertise costs for proceedings under the Procedure
Applicant	Pioneer Willow LLC
Application	Appl. I.D. 1-1516-617, <.insure>
Attachment	Attachment to Module 3 of the gTLD Applicant Guidebook
Beijing GAC Advice	GAC Communiqué - Beijing
Centre	International Centre for Expertise
Donuts	Parent company of Applicant, Donuts Inc.
DPML	Donuts Protected Marks List
Expert Determination	Expert Determination
GAC	ICANN's Government Advisory Committee
gTLD	generic Top Level Domain
Guidebook	gTLD Applicant Guidebook
ICANN	Internet Corporation for Assigned Names and Numbers
ICANN Final Report	Final Report - ICANN Generic Names Supporting Organization - August 8, 2007
Note	ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure
Objection	Community Objection filed by American Insurance Association
Objector	American Insurance Association
P&C Insurance Providers	Community of companies that are licensed and authorised to sell property-casualty insurance products
PIC	Donuts Public Interest Commitment
Procedure	Module 3 of gTLD Applicant Guidebook
Proceedings	Exp. 508/ICANN/125
Requirements	Requirements to be met for an Objection to prevail as detailed in paragraph 28
Rules	Rules for Expertise of the ICC

1. **INTRODUCTION**

1. This expert determination ["**Expert Determination**"] is issued pursuant to the proceedings being held before the International Centre for Expertise ["**Centre**"] of the International Chamber of Commerce Centre designated as EXP/508/ICANN/125 ["**Proceedings**"][1].

2. The Proceedings deal with the Community Objection ["**Objection**"] filed by the American Insurance Association ["**Objector**"] to the application registered by Pioneer Willow LLC ["**Applicant**"] before the Internet Corporation for Assigned Names and Numbers ["**ICANN**"] for the new generic top level domain ["**gTLD**"] <.insure> (Appl. I.D. 1-1516-617) ["**Application**"].

3. Objector – American Insurance Association – is an insurance trade organisation, the purpose of which is to represent and advocate on behalf of its approximately 300 insurers members. Objector's address is:

   Ms. Angel Gleason
   Associate Counsel
   American Insurance Association, Suite 400
   2101 L Street, NW
   Washington D.C. 20037, USA
   Ph: (+ 1) 202.828.7181
   agleason@aiadc.org

4. Objector is represented by:

   David E. Weslow, Esq.
   Wiley Rein LLP
   1776 K Street, NW
   Washington D.C. 20006, USA
   Ph: (+1) 202.719.7000
   dweslow@wileyrein.com

5. Applicant – Pioneer Willow LLC – is a company formed to acquire and operate generic top level domains under ICANN's new gTLD program[2]. Applicant's address:

   Mr. Daniel Schindler
   Pioneer Willow, LLC
   155 108th Avenue NE, Suite 510
   Bellevue, WA 98004, USA
   Ph: (+ 1) 424.254.8537
   pionerwillow@donuts.co

   The parent company of Applicant is Donuts Inc. ["**Donuts**"].

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[1] Though originally consolidated with EXP/431/ICANN/48, an objection filed by The Financial Services Roundtable, such objection was withdrawn.
[2] Declaration of J. Nevett, Annex B to Response, at 3.

6. Applicant is represented by:

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2. **PROCEDURAL BACKGROUND**

8. On 13 June 2012 Applicant filed with ICANN an application requesting the gTLD <.insure.

Community Objection

9. On 13 March 2013 Objector filed an Objection before ICANN, which gave rise to the present proceedings.

Beijing GAC Advice

10. On 11 April 2013 the ICANN's Government Advisory Committee ["**GAC**"] issued the GAC Communiqué – Beijing ["**Beijing GAC Advice**"], where it stated that "to reinforce existing processes for raising and addressing concerns the GAC is providing safeguard advice to apply to broad categories of strings (see Annex I)".

11. In Annex I to the Beijing GAC Advice the GAC advised the ICANN Board that:

> "Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm… [I]n the current round the GAC has identified the following non-exhaustive list of strings that the above safeguards should apply to: …….
>
> • Financial: ……insure".

Applicant's response

12. Applicant filed its Response on 22 May 2013.

Appointment of Expert

13. The Expert was appointed on 1 July 2013 by the Chairman of the Standing Committee of the International Centre for Expertise of the ICC.

14. The file was transferred to the Expert on 15 July 2013 following payment in full of the estimated Costs by the parties and the confirmation of the constitution of the Panel by the Centre.

Approval of the Application

15. On 26 July 2013 ICANN declared that the Application had passed the Initial Evaluation.

Main procedural steps of the Proceeding

16. By letter of 17 July 2013 the Expert inquired whether the parties required further submissions[3] and on 24 July 2013 the Expert authorised additional submissions, establishing 18 October 2013 as the date to deliver the Expert Determination[4]. It is noted that the request to authorize a period after delivery of the last additional submission to request a hearing was denied.

17. On 9 August 2013, after consultation with parties, the Expert delivered to the parties a Mission Statement, reflecting the basic aspects of the Proceeding.

18. Objector delivered its additional submissions on 13 August 2013.

19. Applicant filed its additional submissions on 3 September 2013.

20. I note that the language of the Proceeding has been English[5], this being the language of all documentation submitted, and that all communications have been delivered by email[6].

Delivery date

21. This Expert Determination is submitted for scrutiny to the Centre pursuant to article 21(a) and (b) of the Procedure.

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[3] Objector required further submissions and requested the possibility of requesting a hearing after the last of the additional submissions had been delivered.
[4] The parties agreed to have the 45-day period to provide the expert determination start from the delivery of the last additional submission.
[5] As required by article 5 (a) of the Procedure.
[6] As required by article 6 (a) of the Procedure.

3.   REQUIREMENTS APPLICABLE TO THE OBJECTION

22.   A community objection permits an application to be rejected if a significant part of the community to which the string is explicitly or implicitly targeted presents substantial opposition. The determination is to be made by an expert panel[7].

A.   Applicable rules

23.   In its review of a community objection, the panel will apply primarily:

-    Module 3 (Objection Procedures) [the "**Procedure**"] and its attachment [the "**Attachment**"] of the gTLD Applicant Guidebook ["**Guidebook**"] (other parts of the Guidebook will also be helpful as reference, including specifically Module 4 (String Contention Procedures)[8]).
-    Rules for Expertise of the ICC ["**Rules**"].
-    Appendix III to the Rules, Schedule of expertise costs for proceedings under the Procedure ["**Appendix III**"].
-    ICC Practice Note on the Administration of Cases under the new gTLD Dispute Resolution Procedure ["**Note**"].

24.   Finally, the Procedure refers to the 8 August 2007 Final Report by the ICANN Generic Names Supporting Organization ["**ICANN Final Report**"][9], which includes the rationales of the different objections[10]. Thus, the panel can draw additional guidance from the ICANN Final Report.

25.   I now detail below certain relevant aspects of each of these rules.

B.   Requirements and standards

26.   Pursuant to the Procedure, an Objection must satisfy the following requirements to be successful:

27.   First: Objector must prove that it has standing to object[11] (a).

28.   Second: Having proven standing, objector must that the following four tests regarding the merits are complied with [12] (b):

-    The community invoked by the objector is a clearly delineated community;
-    The community opposition to the application is substantial;

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[7] Recommendation 20 – ICANN Final Report: "An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted".
[8] On the reference value of Module 4, see paragraph 43 for further analysis.
[9] Procedure at p. 3-5.
[10] Recommendation 20.
[11] Procedure at 3-8.
[12] Procedure at 3-22.

- There is a strong association between the community invoked and the applied-for string; and
- The application creates a likelihood of material detriment to the rights of legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

The standing and the four tests described below will be referred to as the "**Requirements**".

29. To assist the panel in its task, the Procedure identifies for each of the Requirements a non-exhaustive list of factors which the panel may consider. The panel is authorised to balance the relevant factors (though not all factors must be established) and to take other factors into consideration[13].

30. In making its determination, the panel may refer to and base its findings upon the statements and documents submitted by the parties and/or any rules or principles that it determines applicable[14].

31. The panel must bear in mind that it is the Objector who bears the burden of proofing that the requirements and standards applicable to the Objection are met[15].

a.   Standing to object

32. The first step is to qualify for standing to file a community objection. In order to have standing, Objector must prove that it is an established institution and that it has an ongoing relationship with a clearly delineated community.

33. To evaluate whether Objector is an established institution, the panel may consider, among others, the following factors[16]:

- 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 organisation, or treaty; the institution must not have been established solely in conjunction with the gTLD application process.

34. To evaluate whether there is an on-going relationship with a clearly delineated community, the panel may consider, among others, the following factors[17]:

- The presence of mechanisms for participation in activities, membership and leadership;
- Institutional purpose related to the benefit of the associated community;

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[13] Procedure at 3-22/3-25.
[14] Attachment, article 20 (b).
[15] Attachment, article 20 (c).
[16] Procedure at 3-8.
[17] Procedure at 3-8.

- Performance of regular activities that benefit the associated community and
- The level of formal boundaries around the community.

b.   Requirements on the merits

35.   If the Objector is found to have standing, then it must pass the following four tests on the merits.

(i)   <u>First test: Objector must prove that the community is clearly delineated</u>

36.   To evaluate whether the community is clearly delineated[18], the Procedure allows the panel to consider, among others, the following factors:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community 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.

(ii)   <u>Second test: Objector must prove that the community opposition is substantial</u>

37.   This second Requirement will only be analysed if the first test is passed, i.e. if a clearly delineated community is found.

38.   In considering whether the second test[19] is met, the Procedure provides that the panel may consider, among others, the following factors[20]:

- The number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- The level of recognised stature or weight among sources of opposition;
- The distribution or diversity among sources of expressions of opposition, including:
  - · Regional
  - · Subsectors of community
  - · Leadership of community
  - · Membership of community
- The historical defence of the community in other contexts; and
- The costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

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[18] Procedure 3-23.
[19] Procedure 3-23.
[20] Procedure at 3-8.

(iii) Third test: Objector must prove the existence of a strong association

39. If substantial opposition to the application is evidenced, the objector must then prove that there is a strong association between the community invoked and the applied-for string[21].

40. To evaluate the existence of a strong association between the string and the community, the panel may consider, among others, the following factors[22]:

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

(iv) Fourth test: Objector must prove likelihood of detriment to rights

41. Finally, if a strong association between community and string has been established, the objector must prove that the application creates the 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[23].

42. To evaluate the existence of material detriment to the members of the community, the Procedure advises the panel to use, among others, the following factors[24]:

- 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.

* * *

43. Module 4 of the Guidebook (String contention procedure) also provides criteria to review and score a community-based application. It shares some common concepts with the community objection procedure (such as community establishment and nexus

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[21] Procedure 3-24.
[22] Procedure 3-23.
[23] Procedure 3-24.
[24] Procedure 3-23.

between the string and the community), though its standards are stricter, and thus can only be taken as a general reference[25].

44.   ICANN provides the following guidelines in relation to Recommendation 20 of its Final Report:

> "Guidelines
> a) Substantial – in determining substantial the panel will assess the following: signification portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment.
> b) Significant portion – in determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting.
> c) Community – 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.
> d) Explicitly targeting – explicitly targeting means there is a description of the intended use of the TLD in the application.
> e) Implicitly targeting – implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use.
> f) Established institution – an institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years.
> Exceptional circumstances include but are not limited to a re-organization, merger or an inherently younger community.
> The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO.
> g) Formal existence – formal existence may be demonstrated by appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organization or similar.
> h) Detriment – the objector must provide sufficient evidence to allow the panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely".

4.   SUMMARY OF THE OBJECTION

45.   Objector claims that the granting of the string "<.insure" to the Applicant will result in material harm to the insurance industry generally, the community of companies that are licensed and authorised to sell property-casualty insurance products ["**P&C Insurance Providers**"], and the consumers[26] and considers that the Application should be rejected.

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[25] Thus, Module 4 states that "*It should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application, as embodied in the criteria below. Accordingly, a finding by the panel that an application does not meet the scoring threshold to prevail in a community priority evaluation is not necessarily an indication the community itself is in some way inadequate or invalid.*" – Mod. 4 at p. 4-9.
[26] Objection p. 5.

46.   Objector claims that it has standing to object (A), and meets the four tests on the merits required by the Procedure (B).

A.   Standing to object

47.   Objector must prove that it is an established institution (a) and that is has an on-going relationship (b) with a clearly delineated community (c).

a.   An established institution

48.   The Objector states that it was born out of the merger in 1964 of the old American Insurance Association with the National Board and the Association of Casualty and Surety Companies[27]. It has a membership of approximately 300 P&C Insurance Providers that represent around 20% of total P&C insurance market in the United States[28].

b.   On-going relationship with the community

49.   Objector claims it is recognised as a leading voice on behalf of the P&C Insurance Providers[29]. In that role it has provided on-going defence of the community of P&C Insurance Providers through litigation, lobbying and other forms of advocacy. It has, additionally, defended the community in a variety of contexts, including filing amicus briefs in support of the property-casualty industries in hundreds of cases over the years. Objector's president is an acknowledged advocate for the property-casualty insurance industry[30].

c.   The community is clearly delineated

50.   From the above it follows that the Objector is an institution with an on-going relationship with the community of P&C Insurance Providers. The insurance industry is one of the most highly regulated industries in the world. This regulatory structure has resulted in a clearly delineated community of P&C Insurance Providers, that is, companies that are licensed and authorized to sell property-casualty insurance products[31].

B.   Requirements on the merits

51.   The Requirements consist of four tests, the first of which (the existence of a clearly delineated community) has already been addressed in the previous section. The Objector's position with respect to the remaining three tests is as follows.

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[27] Objection p. 5.
[28] Objection p. 11.
[29] Objection p. 7.
[30] Objection p. 7.
[31] Objection p. 9.

a. There is substantial opposition to the Application

52. The Objector claims that there is substantial opposition to the Application from the P&C Insurance Providers community. The opposition is represented essentially by the Objector, whose members represent approximately 20% of the total property-casualty insurance market in the United States. The Objector is widely recognised as a leading voice of the P&C Insurance Providers community as a consequence of many years providing ongoing defence for the community through litigation, lobbying and other forms of advocacy. Importantly, its members are among the leaders in both the personal and commercial property-casualty insurance markets (at least two members are within the top ten writers of private passenger coverage and five among the top ten commercial carriers)[32].

53. Additionally, the Objector presented several letters supporting the Objection[33].

b. There is a strong association between the string and the community

54. The Objector claims that there is a strong association between the P&C Insurance Providers community and the string. Automobile and homeowners insurance products are ubiquitous. This is evident on the basis that all U.S. states (except New Hampshire) require automobile insurance, and most lenders require homeowners to carry insurance on their homes. Moreover, the members of the P&C Insurance Providers community spend substantial amounts in advertising their products. As a result, Objector states, consumers understand they can obtain insurance from many members of the community of P&C Insurance Providers[34].

55. Objector considers[35] that another element that evidences association between the <.insure and the community P&C Insurance Providers is evident from the face of the Application, which states that:

> ".insure will be … particularly attractive to registrants providing insurance products and services (one of the world's largest and most attractive industries)".

> "Registrants may include insurance companies, brokerages, adjusters, service providers, reinsurance organizations, agents and others who can use the TLD to more intuitively reach end-users".

56. Many of these groups are members of the community of P&C Insurance Providers.

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[32] Objection p. 11.
[33] From Insurance Bureau of Canada, Canadian Life and Health Insurance Association, Reinsurance Association of America, The Financial Services Roundtable, Allstate Insurance Company ["**Allstate**"], Progressive Casualty Insurance Company ["**Progressive**"], State Farm Mutual Automobile Insurance Company ["**State Farm**"] and Namic (National Association of Mutual Insurance).
[34] Objection p. 13.
[35] Objection p. 13.

c. The application is likely to cause material detriment

57. Objector claims that the operation of the Application will be detrimental to the insurance community. The Objector highlights that the Application lacks any registration criteria (i.e. no restrictions on who can own second-level domains), and thus there is a strong likelihood that there will be serious abuse within the gTLDs and that consumers will be misled[36].

58. Objector also claims that persons with no connection to the insurance industry could potentially hold out as brokers or carriers, using legitimate- appearing sites for phishing or other malicious data collecting purposes relying on the trust consumers impart to insurers in providing personal information[37]. This is further exacerbated by the fact that proxy registrations will be permitted. The Objector alleges that proxy registration have historically encouraged fraud and spam[38].

59. Objector contends that the Beijing GAC Advice provides additional evidence of the material detriment that Donuts[39] proposed operation of the <.insure will cause[40]. The injury to insurance consumers, argues the Objector, will arise when a consumer encounters a <.insure domain name (and associated website), at which point it will be too late to avoid the damage by subsequently conducting research to identify the domain registrant information held on file by Donuts[41].

60. Objector contends that, taking into account the above, Applicant's approach would be particularly disruptive given the increasing use of technology by members of the community of P&C Insurance providers to sell and service policies. The Objector points out that direct writers-companies that sell their own products and rely heavily on Internet sales channels, accounted for 51.1% of all property-casualty net premiums written in 2011[42].

61. In addition to the above, Objector contends that the Application does not include sufficient protections for variations of the trademarks and trade names of members of the P&C Insurance Providers community. This could lead to significant consumer confusion, consumer fraud and misleading advertisements of insurance products and services[43].

62. Objector submits that the likelihood of material detriment posed to the members of the insurance community by the .insurance gTLD application is made further certain by examination of the background of the Donuts group. In this respect, Objector suggests that it appears likely that the Donuts group should not survive the background screening standards set forth in sections 1.1 and 2.1 of the Guidebook[44].

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[36] Objection p. 14.
[37] Objection p. 14.
[38] Objection p. 15.
[39] Refers to Donuts, ultimate parent of Applicant's group.
[40] Additional Submission ["**Add. Sub.**"] p. 8.
[41] Add. Sub. p. 9.
[42] Objection p. 15.
[43] Objection p. 15.
[44] Objection p. 16.

5.   SUMMARY OF APPLICANT'S RESPONSE

63.   Responding to the Objection, Applicant claims that Objector has failed to prove standing (A), and has not proven any of the four tests on the merits (B).

A.   Lack of standing

64.   The Applicant alleges that the Objector contests the application for the generic term <.insure and not for a term strongly associated with the clearly delineated community. Furthermore, the Applicant quotes section 3.2.2.4 of the Guidebook stating that the "community named by the objector must be … strongly associated with the applied-for gTLD string"[45].

B.   Requirements on the merits

65.   On the merits Applicant submits that Objector has not been able to meet any of the four tests for several reasons, namely:

a.   No clearly delineated community

66.   Applicant contends that the Objector has not identified a clearly delineated community for the following reasons[46]:

67.   (i) The word insure has several meanings, it is impossible to show that this generic term describes a clearly delineated community.

68.   (ii) Even if insure refers only to "regulated insurance", which it does not, the Objector occupies but a fraction of the universe by that term. Objector represents only P&C Insurance Providers, and by its own admission, its members represent only 20% of the P&C U.S. market.

69.   (iii) There are many types of insurance (e.g. health, life, automobile, liability, home, professional liability, long-term disability, etc. to name a few). Such variations make even the narrow product aspect of insurance impossible to delineate.

70.   (iv) Applicant argues that an infinitely greater universe of users beyond P&C insurance with conceivable interest in the various meanings and implications of "insure" exists. Objector attempts to identify a narrow community more susceptible of "delineation" than the vast population associated with the generic "insurance" designation[47].

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[45] Response p. 7.
[46] All detailed in Response p. 7/9.
[47] In Response p. 9 Applicant refers to the term "insurance".

b. No substantial opposition

71. Applicant alleges that Objector has not presented evidence of substantial opposition. Of the thousands (if not more) insurance companies globally, the Objector represents only 20% of P&C providers in the U.S., excluding insurers that provide other types of insurance, other P&C insurers outside the U.S. and others otherwise associated with the term insure but who do not write policies[48].

72. Applicant points out that no evidence of the substantial opposition within the Objector's community has been provided: no letters from any of its members have been provided. Moreover, even assuming that all members of the Objector have implicitly expressed opposition, this represents 20% of the invoked community. Such a percentage cannot be considered as substantial opposition from the P&C Insurance Providers community[49].

73. Applicant alleges that the Objector not only fails to demonstrate substantial opposition within the restricted U.S. based community it invokes, it also fails to offer evidence of the opposition on the global scale of the Internet, where the Applicant will make the string domain available. With the exception of one letter from the Insurance Bureau of Canada, no P&C community outside of North America has written a letter in support of the Objection. Regarding the second letter from Canada, Applicant notes that it is sent by Canadian Life & Health Insurance Association, which is not a member of the Objector nor even part of the P&C community[50]. The additional support letters delivered by Reinsurance Association of America, The Financial Services Roundtable, Allstate, Progressive, State Farm, and Namic are all from U.S. based entities.

c. Lack of strong association

74. Applicant claims that Objector has not proven the existence of a strong association between the community and the string, for the following reasons:

75. First, the text of the Application reveals that Applicant intends to offer this gTLD to a wide variety of internet users, and not just those providing insurance products and services[51].

76. Applicant's second argument states that Objector does not demonstrate any public association between the string and the P&C insurance community Objector represents. Objector does little more than link "insure" with "insurance". Additionally, the P&C coverage represents but one form of insurance, while many others exist. Objector presents no evidence that the public strongly associates the term insure with Objector's community as opposed to the wider meaning of the verb and noun[52].

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[48] Response p. 9.
[49] Response p. 9.
[50] Response p. 10.
[51] Response p. 11.
[52] Add. Sub. p. 4.

77. Even more, the invoked community exists solely in the U.S. while the <.insure string has a global reach. The English term "insure" goes well beyond Objector's own limited geographic region[53].

d. No material detriment

78. Applicant considers that Objector has failed to demonstrate the likelihood of material detriment to the community for the following reasons.

- The Application provides effective security protections that are sufficient to safeguard the best interests of all users.
- There is no evidence that Applicant's string poses a likelihood of damage to the purported "community" or its "reputation". While it claims that it will invite an increasing cybersquatting and phishing threat, it tenders no evidence that it would create any greater or different harm to the industry than exists today.
- The Donuts Protected Marks List ["**DPML**"] provided in the Donuts Public Interest Commitment ["**PIC**"] establishes an adequate trademark protection safeguard, allowing concerned members to register in advance to get notification of cybersquatting and other internet schemes[54].
- There is no relevant evidence regarding interference with the community's core activities.
- No evidence is shown demonstrating any level of certainty regarding the detriment its constituents may suffer[55].
- The Beijing GAC Advice adds nothing to the Objection. Current policy as established in the Guidebook does not require the onerous registration constraints for which the Objector advocates. If the GAC ultimately requires such measures, and ICANN's Board accepts the advice, Applicant would abide by the decision. It is a policy decision, however, to be made by the ICANN Board and not by Objector or this Panel[56].

79. Finally, the Applicant rejects the suggestion that it should not survive the background screening standards set forth by the Guidebook, and refutes any allegations as to impropriety[57].

6. FINDINGS OF THE EXPERT

80. In order to be successful, the Objector must prove that it has standing to object (A) and that the four Requirements are met: the community it invokes is clearly delineated (B), there is substantial opposition from the community to the Application (C), there is a strong association between the community and the string (D), and the Application creates the likelihood of material detriment to the rights or legitimate interests of a

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[53] Add. Sub. p. 4 – Applicant provides examples of the use "insure" at second domain level by various entities offering insurance products in Belgium, Spain, Germany and India, among others.
[54] Response p. 11.
[55] Response p. 13.
[56] Add. Sub. p. 6.
[57] Objection p. 12.

significant portion of the community to which the string may be explicitly or implicitly targeted (E).

81. The Objector claims it has met all the above Requirements, while the Applicant avers that the Objector has failed to prove any of the above Requirements.

82. I turn now to review the Requirements.

A. Objector's standing to object

83. To have standing, Objector must prove that it is an established institution (a) with an on-going relationship with a clearly delineated community (b).

a. Objector as an established institution

84. The Objector has submitted evidence that it is an organization comprising approximately 300 members of the community (representing around 20% of the P&C Insurance Providers market in the U.S. by premium[58]), engaged in the promotion and protection of its members and the P&C insurance industry generally[59]. Its proactive activities and public recognition are referred to in paragraph 94.

85. As for its historical existence, the Objector has been in existence since 1964.

86. On the basis of the above, I am satisfied that the Objector has shown it is an established institution for the purposes of this Proceeding.

b. Ongoing relationship with a clearly delineated community

87. Having shown that it is an established institution, the Objector must then prove that it has an ongoing relationship with a clearly delineated community invoked by the Objector.

88. The first question to be addressed is the definition of the community the Objector is invoking. The Objector has not expressly identified such community. Although most of the references regarding delineation are made to the U.S. insurance regulations[60], the Objection also mentions a global P&C Insurance Providers community[61].

89. In my opinion, the community being invoked by the Objector is that of the U.S. P&C Insurance Providers. I reach this conclusion based on the fact that the Objector, when referring to the opposition to the Application "by the community", mentions that its

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[58] Objection p.11.
[59] I note that one of the factors I am suggested by the Procedure to consider is the global level of recognition of the institution (Procedure 3-8). Since I have found (see paragraph 89) that the invoked community is the U.S. P&C Insurance Community (i.e. a territorial community), I have taken into consideration the level recognition of the institution within the community invoked (Procedure 3-23 addresses an analogous situation in relation to global distribution and a territorial community).
[60] Add. Sub., p. 7.
[61] Objection p. 10.

members represent 20% of the "community"[62]; since the Objector represents 20% of the U.S. P&C Insurance Providers[63], the Objector must be equating "community" to "U.S. P&C Insurance Providers". Additionally, when providing evidence of the support to the Objection by the invoked community, Objector lists only the support letters from U.S. based P&C Insurance Providers, excluding the letter from the Insurance Bureau of Canada (which, in fact, supports the Objection), thus evidencing that Canadian P&C Insurance Providers would be outside the invoked community. All these factors lend weight to the idea that the community represented is the U.S. community[64].

90.   On the basis of the above, I will assume that the community invoked by the Objector is the U.S. P&C Insurance Providers comprised by entities licenced to sell P&C insurance products in the U.S. I will nevertheless make some further remarks in the course of my analysis.

91.   The U.S. P&C Insurance Providers community (thus defined) comprises 2,660 entities in 2011, representing 42% of the total net insurance premiums in all the U.S. [65].

92.   Is the U.S. Property & Casualty Providers insurance community <u>clearly delineated</u>?

93.   In this regard, I note that Module 4, criterion 1, dealing with the determination of Community Establishment defines delineation as relating

> "to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low"[66].

94.   The Objector has stated that the U.S. P&C Insurance Providers are subject to a strong set of regulations covering registration and solvency requirements, among other aspects of the insurance legal protection regime. The high regulatory barriers constitute a clear formal boundary around the alleged community[67]. The ongoing relationship between the Objector and the community invoked is also clear. The Objector has been in existence since 1964 and its members are all entities belonging to the community. Its objective is to advocate on behalf of the interests of the industry, and in that role it has developed activities like filing *amicus curiae*. Its proactive role is recognised by the public[68].

95.   On the basis of the above, I consider that the U.S. P&C Insurance Providers community invoked is clearly delineated for the purposes of standing.

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[62] Add. Sub. p. 7.
[63] Objection p. 11.
[64] Add. Sub. p. 6/7.
[65] Objection p. 11/13.
[66] Module 4 at 4-11.
[67] Objection p. 8.
[68] "The savvy chief of the leading property-casualty insurance trade group is skilled at building coalitions on Capital Hill", "Pusey is a strong advocate for the property-casualty insurance industry". Objection p. 7.

96.   I must now turn to the Applicant's counter-arguments on the matter of clear delineation. Applicant alleges that:

-       since the word insure has several meanings, it is impossible for Objector to show that this generic term describes a clearly delineated community, but rather a large universe of users with conceivable interest in the various meanings and implications of "insurance" (i) and
-       even if insure referred only to "regulated insurance", the Objector occupies but a fraction of the universe covered by that term (ii);
-       finally, the Objector contests the application for the generic term <.insure and not for a term strongly associated with the clearly delineated community (iii).

97.   I am unconvinced by the arguments put forward by the Applicant and persuaded by the Objector.

98.   (i) The issue at hand is whether the invoked community is a clearly delineated community itself. In this regard, Objector is invoking the U.S. P&C Insurance Providers community. Although I agree with Applicant that this definition of community is narrower than a broader definition of, say, an insurance community, as such, I see no requirement in the Guidebook that a string should solely identify one community. The strong association required to exist between a clearly delineated community and the string, does not imply that the string term has no meaning other than identification of the community[69].

99.   This notwithstanding, I agree that a narrow definition of the invoked community entails a series of difficulties, which may become an issue when deciding whether a strong association exists between string and community, because it makes evidence of such association more difficult. This is, however, a question to be discussed in section D. Test 3 *infra*[70].

100.   (ii) Applicant also states that even if <.insure refers only to "regulated insurance", an assumption which Applicant rejects, the Objector occupies but a fraction of the universe covered by that term. In fact, Objector only represents U.S. P&C Insurance Providers, and of those, only 20% of the market. This argument must fail since the Procedure requires no relationship between the representational size of the Objector and the community invoked. In other words, there is no requirement that the Objector should represent any minimum part of the community invoked.

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[69] Module 4 provides the criteria to evaluate the existence of a community in the case of a Community Priority Evaluation. Criterion 2 thereof provides guidance on the valuation of the nexus between the proposed string and the community. The criteria to apply are nexus (matching of string and name of community) and uniqueness (string term has no other significant meaning beyond identifying the community). The nexus criteria could score up to three points, while the uniqueness criteria could score a maximum of one (Guidebook at 4-13). Additionally, when dealing with the definition of relevance in criterion 4, the Guidebook clearly states that there may be more than one community associated to a string (Guidebook, at 4-18).
[70] See paragraphs 118 et seq.

101. (iii) Applicant finally alleges that the Objector contests the application for the generic term <.insure and not for a term strongly associated with the clearly delineated community, a requirement established in section 3.2.2.4 of the Procedure (the "community named by the objector must be … strongly associated with the applied-for gTLD string")[71].

102. I understand Applicant's argument but am unconvinced that it has any bearing on the issue of Objector's standing: section 3.2.2.4 of the Procedure states that "to qualify for standing for a community objection, the objector must prove both of the following: it is an established institution … It has an ongoing relationship with a clearly delineated community…"[72]. Having proved these requirements, the Objector must be pronounced as having standing.

* * *

103. The conclusion reached *supra* is thus not altered: standing requires the Objector to prove that it is an established community with an ongoing relationship with a clearly delineated community. I find that Objector has satisfied all these elements, and declare that the Objector has standing to file the Objection.

* * *

104. Having established standing, the next task is to review whether the four tests on the merits have been satisfied.

B.   Test 1: Clearly delineated community

105. The first test requires proving that a clearly delineated community exists, a concept which has already been considered for the purposes of standing. The analysis made in section 6.A is valid for these purposes: in my opinion the community invoked is the U.S. P&C Insurance Providers and this community meets the requirements of being clearly delineated.

C.   Test 2: Substantial opposition by the community

106. Having considered that the community invoked by the Objector is clearly delineated, the next test is to determine whether there is substantial opposition from the community.

107. To evaluate whether the opposition is substantial, the Procedure invites the Expert to consider several factors, including, among others, the number of expressions of opposition relative to the composition of the community, the representative nature of

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[71] Response p. 7.

[72] The reference to the strong association between the community and the string made in section 3.2.2.4 of the Procedure must be understood as a general background statement preceding the actual requirements for evaluation of standing. A string may explicitly or implicitly target a community (see test 4, Procedure at p 3-23), and such review is to be made under such test on the merits and not at the standing phase. In any event, the question is probably moot since failure to prove the strong association will, regardless of where it is made, result in the failure of the Objection.

entities expressing opposition, the level of recognised stature or weight among sources of opposition and the distribution or diversity among sources of expressions of opposition.

108. Having said that, the Objector is an association representing over 300 entities, with a market share of 20%. I accept the representative nature of the Objector, and that its opposition should be considered as the opposition of the members. Thus, the fact that no members have issued specific letters of opposition is irrelevant.

109. In addition, the Objector has delivered letters from:

- Allstate Insurance Company (with approximately 16 million households as clients),
- Progressive Casualty Insurance Company (with more than 13 million policies in the U.S. and Australia),
- State Farm Mutual Automobile Insurance Company (which with its affiliates serves over 81 million policies and accounts), and
- The National Association of Mutual Insurance companies – Namic – a P&C trade organisation in the U.S. with more than 1,400 member companies,

  to demonstrate substantial opposition among the community of U.S. P&C Insurance Providers[73].

- And also from the Insurance Bureau of Canada, a national industry association representing 90% of Canada's P&C insurance market and from Canadian Life and Health Insurance Association – I note that, whilst the letter from the Insurance Bureau of Canada is issued by an institution belonging to the P&C insurance market, it is outside the invoked community (U.S. P&C Insurance Providers); and as regards the letter from the Canadian Life and Health Insurance Association, this association is not even part of the P&C Insurance Providers; thus, none of the two Canadian support letters will be taken into consideration when ascertaining whether substantial support from the community exists. Because they do not represent members of the invoked community, their consideration would not, in any event, affect my final decision.

110. The first issue is whether 20% of the community invoked can be counted as substantial opposition, as the Objector contends[74]. By itself, I would probably conclude that such limited representation cannot be counted as substantial. However, it is not an insignificant proportion, and its weight may be supplemented by other factors.

111. The second issue is whether there are other factors to supplement the Objector's opposition. In this context, I note that several of the members of the Objector are among the top ten companies in the U.S. in two subsectors (two in private passenger coverage and five are among the top ten commercial carriers). I believe that a group including major companies of the community is a sign of leadership and representation of the larger group.

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[73] Add. Sub. p. 7.
[74] Add. Sub. p. 7.

112. The historical existence of the U.S. P&C Insurance Providers community evidenced by the Objector is another factor to be taken into consideration. Moreover, I find the quotes cited by Objector on the lobbying capabilities of the Objector's president relevant[75].

113. In addition, the support letters mentioned above also increase the scope of the opposition.

114. These considerations taken together indicate a perception of the Objector as one of the leaders of the P&C insurance industry in the U.S.

115. The significant stature of some of Objector's members, the historical existence of the Objector, the lobbying capabilities developed at present by Objector's president and the additional support from other U.S. P&C Insurance Providers lend weight to the opposition the Objector itself represents, and leads me to accept that there is substantial opposition from the community to the Application[76].

116. Applicant has submitted that because the use of the string is intended to be world-wide, that opposition should be measured on the same scale, and that Objector has failed to provide evidence of such global opposition to the Application. I do not concur: Objector must evidence substantial opposition from the invoked community. In this case, such community is the U.S. P&C Insurance Providers. And consequently, the opposition proven must be substantial from within this specific community.

117. <u>In conclusion</u>, the Objector has evidenced substantial opposition from the U.S. P&C Insurance Providers community.

D. Test 3: Strong association between community and string

118. Having established substantial opposition to the Application, the next test to consider is whether there is a strong association between the community invoked and the string.

119. To determine the issue, the Expert may balance factors including: the statements contained in the Application (a) and the association by the public between community and the string (b)[77].

a. Statements contained in the Application

120. Both parties have drawn my attention to the answer provided by Applicant to question 18 (a) of the Application, though inferring different conclusions: the Objector claims that the Application evidences association between the string <.insure and the community of U.S. P&C Insurance Providers[78]. The Applicant, however, submits that the Application reveals its intent to offer this gTLD to a wide variety of internet users,

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[75] Objection p. 14.
[76] This conclusion is based on the decision that the invoked community is not the global P&C insurance market, but only the U.S. P&C Insurance Providers; however, if *arguendo* I were to assume that the invoked community was the global P&C insurance providers market, Test 2, substantial opposition, would not have been met.
[77] Procedure at 3.24.
[78] Objection p. 13.

and not just those providing insurance products, and thus denies the association between string and the invoked community[79].

121. The relevant paragraph in the Application states as follows[80]:

> "This international term, as a TLD, will be attractive for registrants interested in leveraging the intuitively positive nature of the term INSURE, which means to make certain or protect from risks. Registrants in .INSURE will be attracted to the confident and supportive connotation of the term. The TLD will be utilized by a broad and diverse group including, but not limited to, insurance agents, adjusters and brokers, financial advisors, bankers, and others who make insurance products and services available to consumers and businesses around the world. This inclusive TLD would operate in a secure, stable and legitimate manner".

122. I concur with Applicant that the statements made in the paragraph do not lead to an association between community and string. The Application highlights that this TLD "will be attractive for registrants … [who are interested in] the intuitively positive nature of the term insure"; registrants will include a very wide range of potential users. The Application further states that the TLD will be utilised by a "broad and diverse group". This means that the string is aimed at registrants inside <u>and outside</u> the insurance industry. I note that the Application does not make any reference at all to the P&C insurance sector. It follows that an analysis of the paragraph does not lead to the conclusion that the U.S. P&C Insurance Providers community, delineated as such, is the target.

123. I thus cannot find that the wording of the Application evidences a strong association between the string and the U.S. P&C Insurance Providers community invoked by the Objector.

b. Level of association by the public

124. Another relevant factor that the Procedure establishes for consideration is the level of association by the public between the string and the community; i.e. the level of association by the public between <.insure and the U.S. P&C Insurance Providers.

125. The Objector alleges that, due to the extended use of the P&C insurance products, plus the high degree of advertising, there is strong association among consumers between the string and the community[81]. The Applicant is of the contrary opinion, and submits that the Objector offers no evidence that the public strongly associates the string <.insure with its community of U.S. P&C insurers[82]. Further, the community invoked exists solely in the U.S., while the term insure goes well beyond this geographic region[83].

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[79] Response p. 10.
[80] Application answer 18 (a). Please note that Objector mentions in Objection p. 13/14 that Applicant's answer in 18 (a) contains the following language: "[.insure will be] particularly attractive to registrants providing insurance products and services". I have been unable to locate the language which the Objector quotes from the Application.
[81] Objection p. 13.
[82] Response p. 11.
[83] Add. Sub. p. 4.

126. Before entering into and in-depth analysis of the Objector's arguments, I first have to clarify: (i) what is to be understood as 'level of association' and (ii) who is the 'public'.

127. (i) <u>Level of association</u>: association must be measured as the degree in which the string term brings to mind the community invoked. The association can be strong (for example, the term "navajo" would be strongly associated with the Navajo Indian community since it uniquely identifies the community[84]) or it can be weak (for example the string .indian would have in my opinion a low association with the Navajo tribe: in this case, the string does not describe uniquely the community, nor does it even identify it).

128. (ii) <u>The public</u>: since I have concluded *supra* that the invoked community is the U.S. P&C Insurance Providers, a natural question arises – should the public perception be measured on the U.S. public, as the Objection seems to imply[85], or rather, as Applicant suggests, on the whole world, for it is Applicant's intention to use the string world-wide?

129. I side with Applicant. The scope of the public perception goes beyond the geographical scope of the invoked community and should be extended to the area where the string is to be used. In this case, the use of the string is the English speaking population (since 'insure' is an English word), and the public perception must be measured against this standard.

130. On the basis of the above clarifications I side with the Applicant and find that Objector has not evidenced that a risk exists that the English speaking population will strongly associate the string <.insure with the U.S. P&C Insurance Providers. My decision is based on the following reasons:

   - No risk of association between the terms '<u>insure</u>' and '<u>insurance</u>': although Objector claims that the term "insure" is inextricably linked (and thus associated to) the term "insurance", and that the business of insurance is associated with the term insure[86], purely semantic reasons convince me of the contrary. First of all, there is no identity between 'insure' and 'insurance'. Insurance is a noun and insure is a verb. There is a second and stronger argument, because 'insure' has a double meaning – it can be understood as 'to buy or provide insurance for', which would have clear connotations to the insurance market, but it can also have the more generic sense 'to make something sure, certain or safe'[87]. The existence of this latter generic sense, unrelated to the insurance industry, substantially weakens the link between the term insure and insurance, and minimises the risks of association between the string and the community.

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[84] I note, however, that uniqueness is not necessary to prove a strong association.
[85] Objection p. 12/13.
[86] Add. Sub. p. 8.
[87] The Cambridge Dictionary defines insure as: "to make something certain, or to be certain about something: Because of the importance of the game, we wanted to insure (that) it would be televised. We had reporters check to insure the accuracy of the story". © Cambridge University Press.

But, even if the term 'insure' were to be equated to 'insurance', then there still would be:

- No risk of association between the <u>insurance market</u> and the <u>P&C Insurance Providers</u>: the Objector has not persuaded me that there is a distinct and strong association between the term insure/insurance and the P&C Insurance Providers in particular. The term insurance clearly overreaches the concept of P&C insurance, because it includes all types of insurance. Thus, the public in general – be on a global or national scale – may associate the term insurance to the wider insurance community, but not necessarily to the narrower P&C insurance community[88].

And, even if a (minimum) risk of association existed between the term 'insure' and the P&C Insurance Providers community, there would be:

- No risk of association between the term '<u>insure</u>' and the specific <u>U.S. P&C Insurance Providers community</u>: no evidence has been produced, which proves that the English speaking population, when reading the string <.insure, would strongly associate this term with a separate, narrow and confined community, such as that of the U.S. P&C Insurance Providers.

131. <u>In conclusion</u>, I find that the Objector has not evidenced that the English speaking populations strongly associates the string <.insure with the U.S. P&C Insurance Providers community invoked, and therefore has failed to meet one of the four tests established in section 3.5.4 of the Procedure. This failure leads to the dismissal of the Objection.

7. CONCLUSION

132. I find that while the Objector has established its standing to file the Objection against the granting of the string <.insure to the Applicant, Objector has not met the burden of establishing a strong association between the string <.insure and the U.S. P&C Insurance Providers community (Test 3).

133. Since Objector has not met Test 3 successfully, considering whether Test 4 (Material Harm) has been complied with becomes moot.

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8. COSTS

134. The Applicant has requested payment of the costs reasonably incurred in opposing the Objection. However, pursuant to article 14 (e) of the Attachment to the Procedure, upon termination of the proceedings, the Dispute Resolution Service Provider shall refund to

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[88] Even if the community invoked were to be the global P&C Insurance Providers, I would still have serious doubts as to the existence of a strong association by the public between the generic string insurance and the specific community of P&C insurers.

the prevailing party, as determined by the panel, its advance payment in costs. Thus, the panel has no mandate on costs other than the advance costs referred.

135. The Applicant has prevailed, and thus shall have its advance costs refunded.
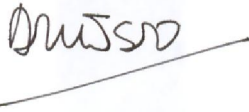
DECISION

For the reasons given above, and in relation to the Objection filed by American Insurance Association as Objector, against the application filed by Pioneer Willow, LLC, as Applicant, for the gTLD <.insure, I find and declare that:

I.   The Applicant has prevailed and the Objection is dismissed;

II.   The Applicant is entitled to have its advance payment of costs refunded by the Centre.

Date: 14 January 2014

Signature:

Mr. Juan Fernández-Armesto
Expert