

Exhibit A



gTLD Applicant Guidebook

(v. 2012-06-04)

Module 4

4 June 2012

Module 4

String Contention Procedures

This module describes situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.

4.1 String Contention

String contention occurs when either:

1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or
2. Two or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation and dispute resolution processes, and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called contending strings. If either situation above occurs, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction. Both processes are described in this module. A group of applications for contending strings is referred to as a contention set.

(In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.)

4.1.1 Identification of Contention Sets

Contention sets are groups of applications containing identical or similar applied-for gTLD strings. Contention sets are identified during Initial Evaluation, following review of all applied-for gTLD strings. ICANN will publish preliminary contention sets once the String Similarity review is completed, and will update the contention sets as necessary during the evaluation and dispute resolution stages.

Applications for identical gTLD strings will be automatically assigned to a contention set. For example, if Applicant A and Applicant B both apply for .TLDSTRING, they will be identified as being in a contention set. Such testing for identical strings also takes into consideration the code point variants listed in any relevant IDN table. That is, two or more applicants whose applied-for strings or designated variants are variant strings according to an IDN table submitted to ICANN would be considered in direct contention with one another. For example, if one applicant applies for string A and another applies for string B, and strings A and B are variant TLD strings as defined in Module 1, then the two applications are in direct contention.

The String Similarity Panel will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS. The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Similarity review described in Module 2 is the identification of contention sets among applications that have direct or indirect contention relationships with one another.

Two strings are in **direct contention** if they are identical or similar to one another. More than two applicants might be represented in a direct contention situation: if four different applicants applied for the same gTLD string, they would all be in direct contention with one another.

Two strings are in **indirect contention** if they are both in direct contention with a third string, but not with one another. The example that follows explains direct and indirect contention in greater detail.

In Figure 4-1, Strings A and B are an example of direct contention. Strings C and G are an example of indirect contention. C and G both contend with B, but not with one another. The figure as a whole is one contention set. A contention set consists of all applications that are linked by string contention to one another, directly or indirectly.

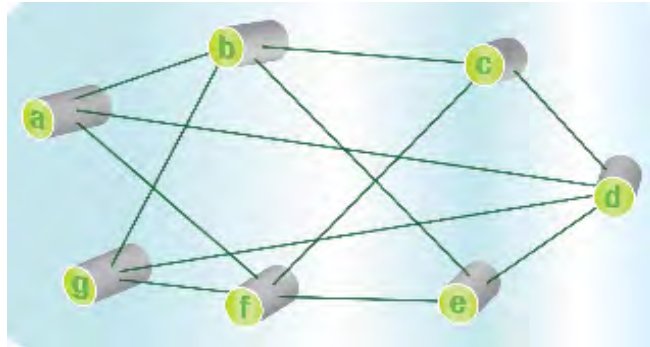


Figure 4-1 – This diagram represents one contention set, featuring both directly and indirectly contending strings.

While preliminary contention sets are determined during Initial Evaluation, the final configuration of the contention sets can only be established once the evaluation and dispute resolution process stages have concluded. This is because any application excluded through those processes might modify a contention set identified earlier.

A contention set may be augmented, split into two sets, or eliminated altogether as a result of an Extended Evaluation or dispute resolution proceeding. The composition of a contention set may also be modified as some applications may be voluntarily withdrawn throughout the process.

Refer to Figure 4-2: In contention set 1, applications D and G are eliminated. Application A is the only remaining application, so there is no contention left to resolve.

In contention set 2, all applications successfully complete Extended Evaluation and Dispute Resolution, so the original contention set remains to be resolved.

In contention set 3, application F is eliminated. Since application F was in direct contention with E and J, but E and J are not in contention with one other, the original contention set splits into two sets: one containing E and K in direct contention, and one containing I and J.

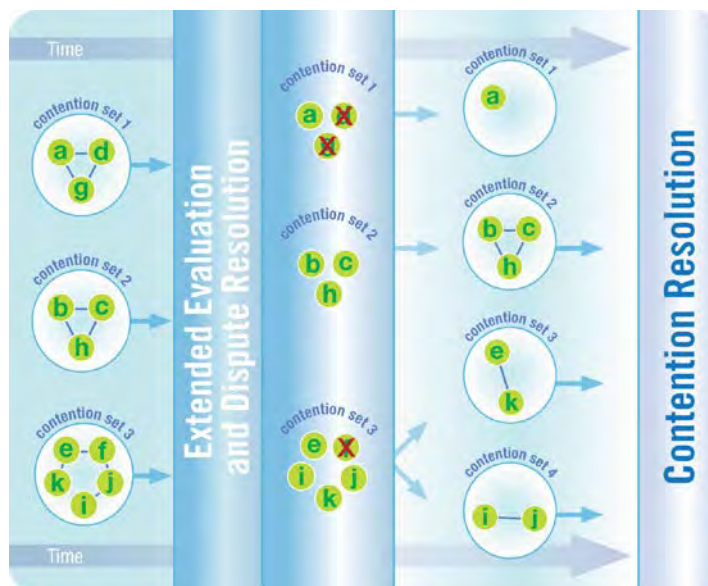


Figure 4-2 – Resolution of string contention cannot begin until all applicants within a contention set have completed all applicable previous stages.

The remaining contention cases must then be resolved through community priority evaluation or by other means, depending on the circumstances. In the string contention resolution stage, ICANN addresses each contention set to achieve an unambiguous resolution.

As described elsewhere in this guidebook, cases of contention might be resolved by community priority evaluation or an agreement among the parties. Absent that, the last-resort contention resolution mechanism will be an auction.

4.1.2 *Impact of String Confusion Dispute Resolution Proceedings on Contention Sets*

If an applicant files a string confusion objection against another application (refer to Module 3), and the panel finds that user confusion is probable (that is, finds in favor of the objector), the two applications will be placed in direct contention with each other. Thus, the outcome of a dispute resolution proceeding based on a string confusion objection would be a new contention set structure for the relevant applications, augmenting the original contention set.

If an applicant files a string confusion objection against another application, and the panel finds that string

confusion does not exist (that is, finds in favor of the responding applicant), the two applications will not be considered in direct contention with one another.

A dispute resolution outcome in the case of a string confusion objection filed by another applicant will not result in removal of an application from a previously established contention set.

4.1.3 Self-Resolution of String Contention

Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.

Applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications. An applicant may not resolve string contention by selecting a new string or by replacing itself with a joint venture. It is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention. However, material changes in applications (for example, combinations of applicants to resolve contention) will require re-evaluation. This might require additional fees or evaluation in a subsequent application round. Applicants are encouraged to resolve contention by combining in a way that does not materially affect the remaining application. Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation.

4.1.4 Possible Contention Resolution Outcomes

An application that has successfully completed all previous stages and is no longer part of a contention set due to changes in the composition of the contention set (as described in subsection 4.1.1) or self-resolution by applicants in the contention set (as described in subsection 4.1.3) may proceed to the next stage.

An application that prevails in a contention resolution procedure, either community priority evaluation or auction, may proceed to the next stage.

In some cases, an applicant who is not the outright winner of a string contention resolution process can still proceed. This situation is explained in the following paragraphs.

If the strings within a given contention set are all identical, the applications are in direct contention with each other and there can only be one winner that proceeds to the next step.

However, where there are both direct and indirect contention situations within a set, more than one string may survive the resolution.

For example, consider a case where string A is in contention with B, and B is in contention with C, but C is not in contention with A. If A wins the contention resolution procedure, B is eliminated but C can proceed since C is not in direct contention with the winner and both strings can coexist in the DNS without risk for confusion.

4.2 Community Priority Evaluation

Community priority evaluation will only occur if a community-based applicant selects this option. Community priority evaluation can begin once all applications in the contention set have completed all previous stages of the process.

The community priority evaluation is an independent analysis. Scores received in the applicant reviews are not carried forward to the community priority evaluation. Each application participating in the community priority evaluation begins with a score of zero.

4.2.1 Eligibility for Community Priority Evaluation

As described in subsection 1.2.3 of Module 1, all applicants are required to identify whether their application type is:

- Community-based; or
- Standard.

Applicants designating their applications as community-based are also asked to respond to a set of questions in the application form to provide relevant information if a community priority evaluation occurs.

Only community-based applicants are eligible to participate in a community priority evaluation.

At the start of the contention resolution stage, all community-based applicants within remaining contention sets will be notified of the opportunity to opt for a community priority evaluation via submission of a deposit by a specified date. Only those applications for which a deposit has been received by the deadline will be scored in the community priority evaluation. Following the evaluation, the deposit will be refunded to applicants that score 14 or higher.

Before the community priority evaluation begins, the applicants who have elected to participate may be asked to provide additional information relevant to the community priority evaluation.

4.2.2 Community Priority Evaluation Procedure

Community priority evaluations for each eligible contention set will be performed by a community priority panel appointed by ICANN to review these applications. The panel's role is to determine whether any of the community-based applications fulfills the community priority criteria. Standard applicants within the contention set, if any, will not participate in the community priority evaluation.

If a single community-based application is found to meet the community priority criteria (see subsection 4.2.3 below), that applicant will be declared to prevail in the community priority evaluation and may proceed. If more than one community-based application is found to meet the criteria, the remaining contention between them will be resolved as follows:

- In the case where the applications are in indirect contention with one another (see subsection 4.1.1), they will both be allowed to proceed to the next stage. In this case, applications that are in direct contention with any of these community-based applications will be eliminated.
- In the case where the applications are in direct contention with one another, these applicants will proceed to an auction. If all parties agree and present a joint request, ICANN may postpone the auction for a three-month period while the parties attempt to reach a settlement before proceeding to auction. This is a one-time option; ICANN will grant no more than one such request for each set of contending applications.

If none of the community-based applications are found to meet the criteria, then all of the parties in the contention set (both standard and community-based applicants) will proceed to an auction.

Results of each community priority evaluation will be posted when completed.

Applicants who are eliminated as a result of a community priority evaluation are eligible for a partial refund of the gTLD evaluation fee (see Module 1).

4.2.3 Community Priority Evaluation Criteria

The Community Priority Panel will review and score the one or more community-based applications having elected the community priority evaluation against four criteria as listed below.

The scoring process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). This calls for a holistic approach, taking multiple criteria into account, as reflected in the process. The scoring will be performed by a panel and be based on information provided in the application plus other relevant information available (such as public information regarding the community represented). The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.

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.

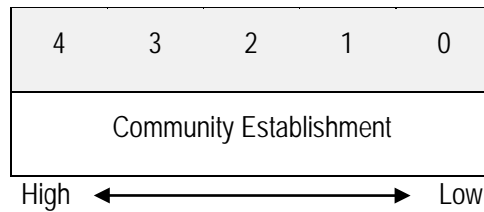
The sequence of the criteria reflects the order in which they will be assessed by the panel. The utmost care has been taken to avoid any “double-counting” - any negative aspect found in assessing an application for one criterion

should only be counted there and should not affect the assessment for other criteria.

An application must score at least 14 points to prevail in a community priority evaluation. The outcome will be determined according to the procedure described in subsection 4.2.2.

Criterion #1: Community Establishment (0-4 points)

A maximum of 4 points is possible on the Community Establishment criterion:



As measured by:

A. Delineation (2)

2	1	0
Clearly delineated, organized, and pre-existing community.	Clearly delineated and pre-existing community, but not fulfilling the requirements for a score of 2.	Insufficient delineation and pre-existence for a score of 1.

B. Extension (2)

2	1	0
Community of considerable size and longevity.	Community of either considerable size or longevity, but not fulfilling the requirements for a score of 2.	Community of neither considerable size nor longevity.

This section relates to the community as explicitly identified and defined according to statements in the application. (The implicit reach of the applied-for string is not

considered here, but taken into account when scoring Criterion #2, "Nexus between Proposed String and Community.")

Criterion 1 Definitions

- "Community" - Usage of the expression "community" has evolved considerably from its Latin origin – "communitas" meaning "fellowship" – while still implying more of cohesion than a mere commonality of interest. Notably, as "community" is used throughout the application, there should be:
(a) an awareness and recognition of a community among its members; (b) some understanding of the community's existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.
- "Delineation" relates 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.
- "Pre-existing" means that a community has been active as such since before the new gTLD policy recommendations were completed in September 2007.
- "Organized" implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.
- "Extension" relates to the dimensions of the community, regarding its number of members, geographical reach, and foreseeable activity lifetime, as further explained in the following.
- "Size" relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers - a geographic location community may count millions of members in a limited location, a language community may have a million members with some spread over the globe, a community of service providers may have "only" some hundred members although well spread over the globe, just to mention some examples - all these can be regarded as of "considerable size."

- "Longevity" means that the pursuits of a community are of a lasting, non-transient nature.

Criterion 1 Guidelines

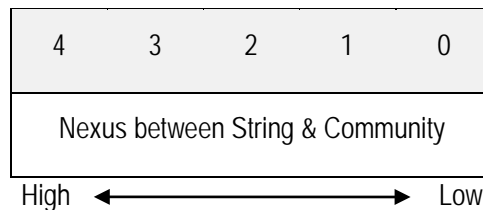
With respect to "Delineation" and "Extension," it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both "Delineation" and "Extension."

With respect to "Delineation," if an application satisfactorily demonstrates all three relevant parameters (delineation, pre-existing and organized), then it scores a 2.

With respect to "Extension," if an application satisfactorily demonstrates both community size and longevity, it scores a 2.

Criterion #2: Nexus between Proposed String and Community (0-4 points)

A maximum of 4 points is possible on the Nexus criterion:



As measured by:

A. Nexus (3)

3	2	0
The string matches the name of the community or is a well-known short-form or abbreviation of the community	String identifies the community, but does not qualify for a score of 3.	String nexus does not fulfill the requirements for a score of 2.

3	2	0
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name.

B. Uniqueness (1)

1	0
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String has no other significant meaning beyond identifying the community described in the application.

String does not fulfill the requirement for a score of 1.

This section evaluates the relevance of the string to the specific community that it claims to represent.

Criterion 2 Definitions

- "Name" of the community means the established name by which the community is commonly known by others. It may be, but does not need to be, the name of an organization dedicated to the community.
- "Identify" means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.

Criterion 2 Guidelines

With respect to "Nexus," for a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification / name of the community.

With respect to "Nexus," for a score of 2, the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community. As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for ".TENNIS") then it would not qualify for a 2.

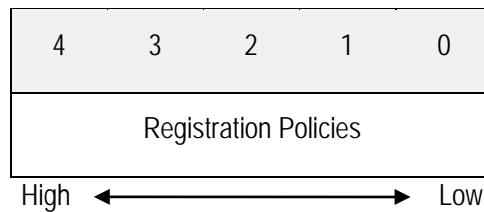
With respect to "Uniqueness," "significant meaning" relates to the public in general, with consideration of the community language context added.

"Uniqueness" will be scored both with regard to the community context and from a general point of view. For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for uniqueness if it carries another significant meaning in the common language used in the relevant community location. The phrasing "...beyond identifying the community" in the score of 1 for "uniqueness" implies a requirement that the string does identify the community, i.e. scores 2 or 3 for "Nexus," in order to be eligible for a score of 1 for "Uniqueness."

It should be noted that "Uniqueness" is only about the *meaning* of the string - since the evaluation takes place to resolve contention there will obviously be other applications, community-based and/or standard, with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone."

Criterion #3: Registration Policies (0-4 points)

A maximum of 4 points is possible on the Registration Policies criterion:



As measured by:

A. Eligibility (1)

1	0
Eligibility restricted to community members.	Largely unrestricted approach to eligibility.

B. Name selection (1)

1	0
Policies include name selection rules consistent with the articulated community-based purpose of the applied-for gTLD.	Policies do not fulfill the requirements for a score of 1.

C. Content and use (1)

1	0
Policies include rules for content and use consistent with the articulated community-based purpose of the applied-for gTLD.	Policies do not fulfill the requirements for a score of 1.

D. Enforcement (1)

1	0
Policies include specific enforcement measures (e.g. investigation practices, penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms.	Policies do not fulfill the requirements for a score of 1.

This section evaluates the applicant's registration policies as indicated in the application. Registration policies are the conditions that the future registry will set for prospective registrants, i.e. those desiring to register second-level domain names under the registry.

Criterion 3 Definitions

- "Eligibility" means the qualifications that entities or individuals must have in order to be allowed as registrants by the registry.
- "Name selection" means the conditions that must be fulfilled for any second-level domain name to be deemed acceptable by the registry.
- "Content and use" means the restrictions stipulated by the registry as to the content provided in and the use of any second-level domain name in the registry.
- "Enforcement" means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.

Criterion 3 Guidelines

With respect to "Eligibility," the limitation to community "members" can invoke a formal membership but can also be satisfied in other ways, depending on the structure and orientation of the community at hand. For example, for a geographic location community TLD, a limitation to members of the community can be achieved by requiring that the registrant's physical address is within the boundaries of the location.

With respect to "Name selection," "Content and use," and "Enforcement," scoring of applications against these sub-criteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.

Criterion #4: Community Endorsement (0-4 points)

4	3	2	1	0	
Community Endorsement					
High		←————→			Low

As measured by:

A. Support (2)

2	1	0
Applicant is, or has documented support from, the recognized community institution(s)/ member organization(s) or has otherwise documented authority to represent the community.	Documented support from at least one group with relevance, but insufficient support for a score of 2.	Insufficient proof of support for a score of 1.

B. Opposition (2)

2	1	0
No opposition of relevance.	Relevant opposition from one group of non-negligible size.	Relevant opposition from two or more groups of non-negligible size.

This section evaluates community support and/or opposition to the application. Support and opposition will be scored in relation to the communities explicitly addressed as stated in the application, with due regard for the communities implicitly addressed by the string.

Criterion 4 Definitions

- "Recognized" means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by

the community members as representative of the community.

- "Relevance" and "relevant" refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied-for string would be considered relevant.

Criterion 4 Guidelines

With respect to "Support," it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations.

Also with respect to "Support," the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.

The applicant will score a 1 for "Support" if it does not have support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent the community with its application. A 0 will be scored on "Support" if the applicant fails to provide documentation showing support from recognized community institutions/community member organizations, or does not provide documentation showing that it has the authority to represent the community. It should be noted, however, that documented support from groups or communities that may be seen as implicitly addressed but have completely different orientations compared to the applicant community will not be required for a score of 2 regarding support.

To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.

When scoring "Opposition," previous objections to the application as well as public comments during the same application round will be taken into account and assessed

in this context. There will be no presumption that such objections or comments would prevent a score of 2 or lead to any particular score for “Opposition.” To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.

4.3 Auction: Mechanism of Last Resort

It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.

An auction will not take place to resolve contention in the case where the contending applications are for geographic names (as defined in Module 2). In this case, the applications will be suspended pending resolution by the applicants.

An auction will take place, where contention has not already been resolved, in the case where an application for a geographic name is in a contention set with applications for similar strings that have not been identified as geographic names.

In practice, ICANN expects that most contention cases will be resolved through other means before reaching the auction stage. However, there is a possibility that significant funding will accrue to ICANN as a result of one or more auctions.¹

¹ The purpose of an auction is to resolve contention in a clear, objective manner. It is planned that costs of the new gTLD program will offset by fees, so any funds coming from a last resort contention resolution mechanism such as auctions would result (after paying for the auction process) in additional funding. Any proceeds from auctions will be reserved and earmarked until the uses of funds are determined. Funds must be used in a manner that supports directly ICANN’s Mission and Core Values and also allows ICANN to maintain its not for profit status.

Possible uses of auction funds include formation of a foundation with a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community, such as grants to support new gTLD applications or registry operators from communities in subsequent gTLD rounds, the creation of an ICANN-administered/community-based fund for specific projects for the benefit of the Internet community, the creation of a registry continuity fund for the protection of registrants (ensuring that funds would be in place to support the operation of a gTLD registry until a successor could be found), or establishment of a security fund to expand use of secure protocols, conduct research, and support standards development organizations in accordance with ICANN’s security and stability mission.

4.3.1 Auction Procedures

An auction of two or more applications within a contention set is conducted as follows. The auctioneer successively increases the prices associated with applications within the contention set, and the respective applicants indicate their willingness to pay these prices. As the prices rise, applicants will successively choose to exit from the auction. When a sufficient number of applications have been eliminated so that no direct contentions remain (i.e., the remaining applications are no longer in contention with one another and all the relevant strings can be delegated as TLDs), the auction will be deemed to conclude. At the auction's conclusion, the applicants with remaining applications will pay the resulting prices and proceed toward delegation. This procedure is referred to as an "ascending-clock auction."

This section provides applicants an informal introduction to the practicalities of participation in an ascending-clock auction. It is intended only as a general introduction and is only preliminary. The detailed set of Auction Rules will be available prior to the commencement of any auction proceedings. If any conflict arises between this module and the auction rules, the auction rules will prevail.

For simplicity, this section will describe the situation where a contention set consists of two or more applications for identical strings.

All auctions will be conducted over the Internet, with participants placing their bids remotely using a web-based software system designed especially for auction. The auction software system will be compatible with current versions of most prevalent browsers, and will not require the local installation of any additional software.

Auction participants ("bidders") will receive instructions for access to the online auction site. Access to the site will be password-protected and bids will be encrypted through SSL. If a bidder temporarily loses connection to the Internet, that bidder may be permitted to submit its bids in a given auction round by fax, according to procedures described

The amount of funding resulting from auctions, if any, will not be known until all relevant applications have completed this step. Thus, a detailed mechanism for allocation of these funds is not being created at present. However, a process can be pre-established to enable community consultation in the event that such funds are collected. This process will include, at a minimum, publication of data on any funds collected, and public comment on any proposed models.

in the auction rules. The auctions will generally be conducted to conclude quickly, ideally in a single day.

The auction will be carried out in a series of auction rounds, as illustrated in Figure 4-3. The sequence of events is as follows:

1. For each auction round, the auctioneer will announce in advance: (1) the start-of-round price, (2) the end-of-round price, and (3) the starting and ending times of the auction round. In the first auction round, the start-of-round price for all bidders in the auction will be USD 0. In later auction rounds, the start-of-round price will be its end-of-round price from the previous auction round.

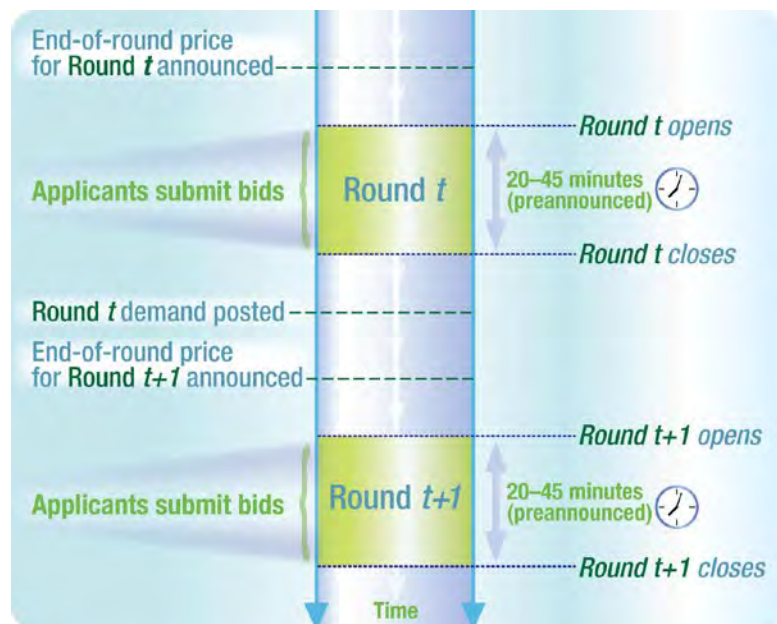


Figure 4-3 – Sequence of events during an ascending-clock auction.

2. During each auction round, bidders will be required to submit a bid or bids representing their willingness to pay within the range of intermediate prices between the start-of-round and end-of-round prices. In this way a bidder indicates its willingness to stay in the auction at all prices through and including the end-of-auction round price, or its wish to exit the auction at a price less than the end-of-auction round price, called the exit bid.
3. Exit is irrevocable. If a bidder exited the auction in a previous auction round, the bidder is not permitted to re-enter in the current auction round.

4. Bidders may submit their bid or bids at any time during the auction round.
5. Only bids that comply with all aspects of the auction rules will be considered valid. If more than one valid bid is submitted by a given bidder within the time limit of the auction round, the auctioneer will treat the last valid submitted bid as the actual bid.
6. At the end of each auction round, bids become the bidders' legally-binding offers to secure the relevant gTLD strings at prices up to the respective bid amounts, subject to closure of the auction in accordance with the auction rules. In later auction rounds, bids may be used to exit from the auction at subsequent higher prices.
7. After each auction round, the auctioneer will disclose the aggregate number of bidders remaining in the auction at the end-of-round prices for the auction round, and will announce the prices and times for the next auction round.
 - Each bid should consist of a single price associated with the application, and such price must be greater than or equal to the start-of-round price.
 - If the bid amount is strictly less than the end-of-round price, then the bid is treated as an exit bid at the specified amount, and it signifies the bidder's binding commitment to pay up to the bid amount if its application is approved.
 - If the bid amount is greater than or equal to the end-of-round price, then the bid signifies that the bidder wishes to remain in the auction at all prices in the current auction round, and it signifies the bidder's binding commitment to pay up to the end-of-round price if its application is approved. Following such bid, the application cannot be eliminated within the current auction round.
 - To the extent that the bid amount exceeds the end-of-round price, then the bid is also treated as a proxy bid to be carried forward to the next auction round. The bidder will be permitted to change the proxy bid amount in the next auction round, and the amount of the proxy bid will not constrain the bidder's ability to submit any valid bid amount in the next auction round.

- No bidder is permitted to submit a bid for any application for which an exit bid was received in a prior auction round. That is, once an application has exited the auction, it may not return.
 - If no valid bid is submitted within a given auction round for an application that remains in the auction, then the bid amount is taken to be the amount of the proxy bid, if any, carried forward from the previous auction round or, if none, the bid is taken to be an exit bid at the start-of-round price for the current auction round.
8. This process continues, with the auctioneer increasing the price range for each given TLD string in each auction round, until there is one remaining bidder at the end-of-round price. After an auction round in which this condition is satisfied, the auction concludes and the auctioneer determines the clearing price. The last remaining application is deemed the successful application, and the associated bidder is obligated to pay the clearing price.

Figure 4-4 illustrates how an auction for five contending applications might progress.

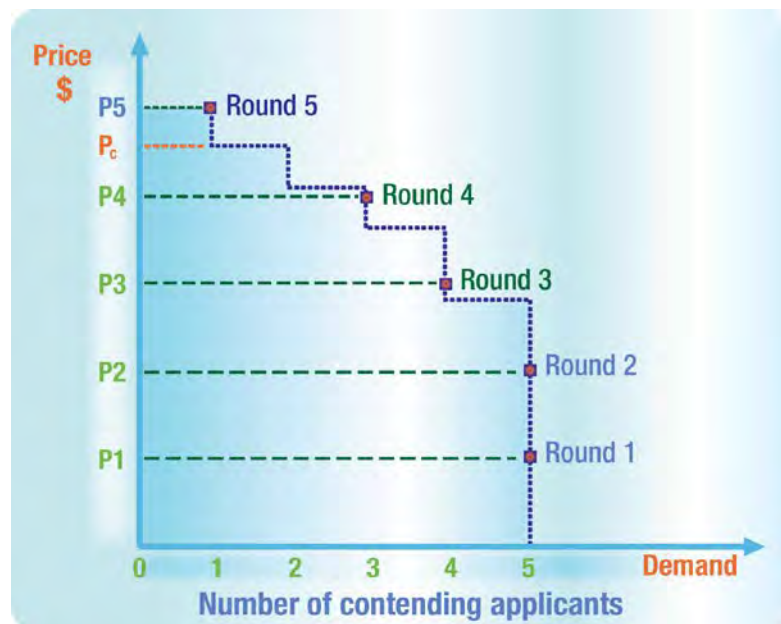


Figure 4-4 – Example of an auction for five mutually-contending applications.

- Before the first auction round, the auctioneer announces the end-of-round price P_1 .
- During Auction round 1, a bid is submitted for each application. In Figure 4-4, all five bidders submit bids of at least P_1 . Since the aggregate demand exceeds one, the auction proceeds to Auction round 2. The auctioneer discloses that five contending applications remained at P_1 and announces the end-of-round price P_2 .
- During Auction round 2, a bid is submitted for each application. In Figure 4-4, all five bidders submit bids of at least P_2 . The auctioneer discloses that five contending applications remained at P_2 and announces the end-of-round price P_3 .
- During Auction round 3, one of the bidders submits an exit bid at slightly below P_3 , while the other four bidders submit bids of at least P_3 . The auctioneer discloses that four contending applications remained at P_3 and announces the end-of-round price P_4 .
- During Auction round 4, one of the bidders submits an exit bid midway between P_3 and P_4 , while the other three remaining bidders submit bids of at least P_4 . The auctioneer discloses that three contending applications remained at P_4 and announces the end-of-auction round price P_5 .
- During Auction round 5, one of the bidders submits an exit bid at slightly above P_4 , and one of the bidders submits an exit bid at P_c midway between P_4 and P_5 . The final bidder submits a bid greater than P_c . Since the aggregate demand at P_5 does not exceed one, the auction concludes in Auction round 5. The application associated with the highest bid in Auction round 5 is deemed the successful application. The clearing price is P_c , as this is the lowest price at which aggregate demand can be met.

To the extent possible, auctions to resolve multiple string contention situations will be conducted simultaneously.

4.3.1.1 Currency

For bids to be comparable, all bids in the auction will be submitted in any integer (whole) number of US dollars.

4.3.1.2 Fees

A bidding deposit will be required of applicants participating in the auction, in an amount to be determined. The bidding deposit must be transmitted by wire transfer to a specified bank account specified by ICANN or its auction provider at a major international bank, to be received in advance of the auction date. The amount of the deposit will determine a bidding limit for each bidder: the bidding deposit will equal 10% of the bidding limit; and the bidder will not be permitted to submit any bid in excess of its bidding limit.

In order to avoid the need for bidders to pre-commit to a particular bidding limit, bidders may be given the option of making a specified deposit that will provide them with unlimited bidding authority for a given application. The amount of the deposit required for unlimited bidding authority will depend on the particular contention set and will be based on an assessment of the possible final prices within the auction.

All deposits from non-defaulting losing bidders will be returned following the close of the auction.

4.3.2 Winning Bid Payments

Any applicant that participates in an auction will be required to sign a bidder agreement that acknowledges its rights and responsibilities in the auction, including that its bids are legally binding commitments to pay the amount bid if it wins (i.e., if its application is approved), and to enter into the prescribed registry agreement with ICANN— together with a specified penalty for defaulting on payment of its winning bid or failing to enter into the required registry agreement.

The winning bidder in any auction will be required to pay the full amount of the final price within 20 business days of the end of the auction. Payment is to be made by wire transfer to the same international bank account as the bidding deposit, and the applicant's bidding deposit will be credited toward the final price.

In the event that a bidder anticipates that it would require a longer payment period than 20 business days due to verifiable government-imposed currency restrictions, the bidder may advise ICANN well in advance of the auction and ICANN will consider applying a longer payment period to all bidders within the same contention set.

Any winning bidder for whom the full amount of the final price is not received within 20 business days of the end of an auction is subject to being declared in default. At their sole discretion, ICANN and its auction provider may delay the declaration of default for a brief period, but only if they are convinced that receipt of full payment is imminent.

Any winning bidder for whom the full amount of the final price is received within 20 business days of the end of an auction retains the obligation to execute the required registry agreement within 90 days of the end of auction. Such winning bidder who does not execute the agreement within 90 days of the end of the auction is subject to being declared in default. At their sole discretion, ICANN and its auction provider may delay the declaration of default for a brief period, but only if they are convinced that execution of the registry agreement is imminent.

4.3.3 Post-Default Procedures

Once declared in default, any winning bidder is subject to immediate forfeiture of its position in the auction and assessment of default penalties. After a winning bidder is declared in default, the remaining bidders will receive an offer to have their applications accepted, one at a time, in descending order of their exit bids. In this way, the next bidder would be declared the winner subject to payment of its last bid price. The same default procedures and penalties are in place for any runner-up bidder receiving such an offer.

Each bidder that is offered the relevant gTLD will be given a specified period—typically, four business days—to respond as to whether it wants the gTLD. A bidder who responds in the affirmative will have 20 business days to submit its full payment. A bidder who declines such an offer cannot revert on that statement, has no further obligations in this context and will not be considered in default.

The penalty for defaulting on a winning bid will equal 10% of the defaulting bid.² Default penalties will be charged against any defaulting applicant's bidding deposit before the associated bidding deposit is returned.

² If bidders were given the option of making a specified deposit that provided them with unlimited bidding authority for a given application and if the winning bidder utilized this option, then the penalty for defaulting on a winning bid will be the lesser of the following: (1) 10% of the defaulting bid, or (2) the specified deposit amount that provided the bidder with unlimited bidding authority.

4.4 Contention Resolution and Contract Execution

An applicant that has been declared the winner of a contention resolution process will proceed by entering into the contract execution step. (Refer to section 5.1 of Module 5.)

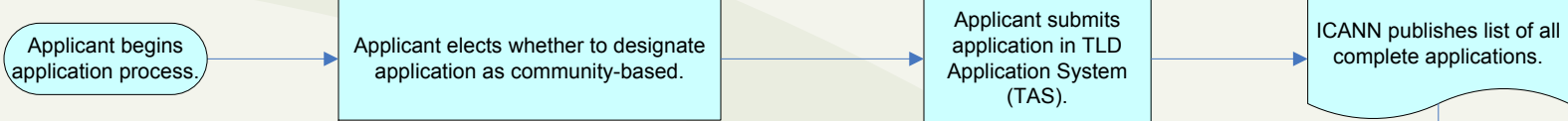
If a winner of the contention resolution procedure has not executed a contract within 90 calendar days of the decision, ICANN has the right to deny that application and extend an offer to the runner-up applicant, if any, to proceed with its application. For example, in an auction, another applicant who would be considered the runner-up applicant might proceed toward delegation. This offer is at ICANN's option only. The runner-up applicant in a contention resolution process has no automatic right to an applied-for gTLD string if the first place winner does not execute a contract within a specified time. If the winning applicant can demonstrate that it is working diligently and in good faith toward successful completion of the steps necessary for entry into the registry agreement, ICANN may extend the 90-day period at its discretion. Runner-up applicants have no claim of priority over the winning application, even after what might be an extended period of negotiation.

DRAFT - New gTLD Program - String Contention

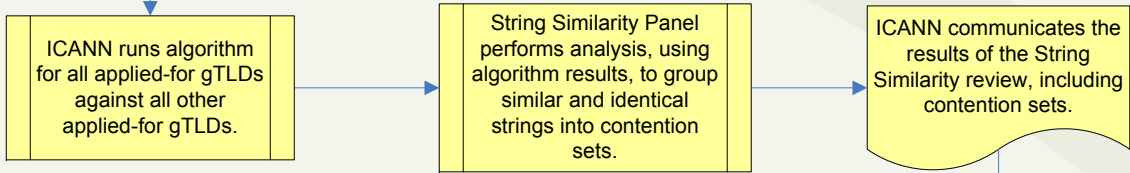


ICANN

Application/
Admin Check



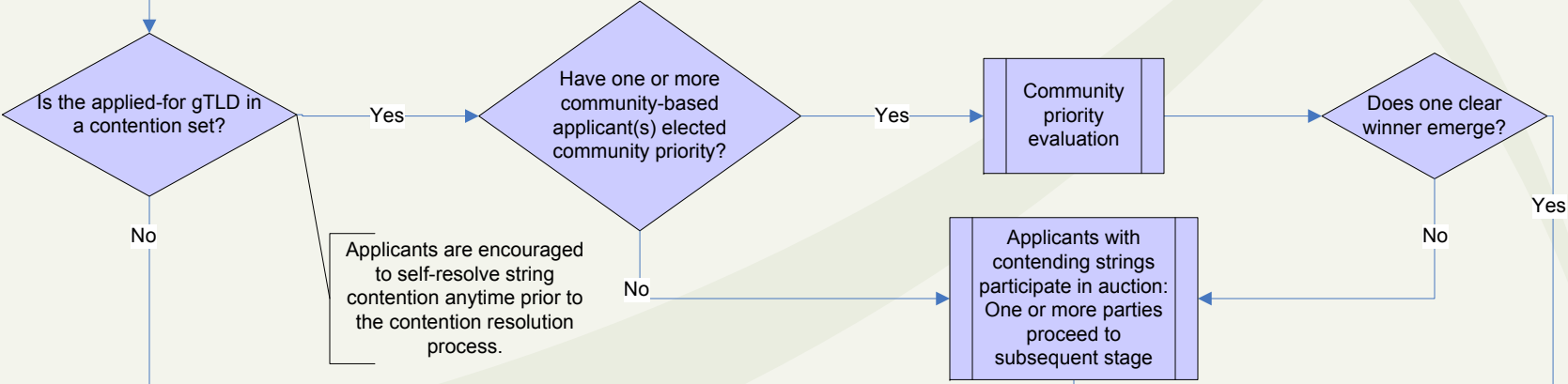
Initial Evaluation (IE)
String Review



IE + EE
+ Dispute Res

IE, Extended Evaluation (EE), and Dispute Resolution continue. Some applications may not pass certain elements of the review process, **which may alter the contention sets.**

String Contention



Transition to
Delegation

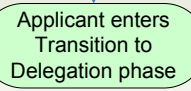


Exhibit B



1201 New York Avenue, NW • # 600 • Washington, DC 20005-3931

Tel. 202-289-3111 • Fax 202-289-3106 • ahla.com

E-mail: joe@ahla.com

Joseph A. McInerney, CHA
President & CEO

March 20, 2012

ICANN
Suite 330, 4676 Admiralty Way
Marina del Rey, CA 90292

Attention: New gTLD Evaluation Process

Subject: Letter of support for HOTEL Top-Level-Domain's application for ".hotel"

Dear Sir/Madam,

The American Hotel & Lodging Association has worked with HOTEL Top-Level-Domain Sarl (dotHOTEL) for more than three years. We have reviewed and contributed to the concepts and policies of dotHOTEL concerning its .hotel top-level domain application at ICANN, playing an active role in the company's Advisory Board.

Therefore, we have the pleasure to announce that AH&LA fully and exclusively supports this initiative. While online distribution is getting more and more important for the hospitality industry in the US, .hotel domains are likely to be more relevant for search engines than any of the existing Top-Level Domains such as .com or .eu.

We believe that the .hotel top-level domain will contribute due to its verified domain names and security measures to more reliability, trust and credibility in e-business for customers and hotel guests. We are also very content with regard to the well thought out brand protection measures dotHOTEL has installed in its policies after constructive dialogues with members of the Hotel industry worldwide.

We strongly encourage ICANN to grant the .hotel top-level domain to HOTEL Top-Level-Domain Sarl since this is the only application that gives a voice to the interests of the global Hotel community. This will not only enable an innovative concept to be proven but may also have positive implications for other sectors of the economy.

Sincerely

A handwritten signature in black ink, appearing to read "Joe McInerney", is written over the typed name "Joseph A. McInerney CHA".

Joseph A. McInerney CHA

JAM/mj

中国饭店协会

To
ICANN
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292
USA

.hotel Top-level Domain Supporting Statement

To whom it may concern,

We support HOTEL Top-Level-Domain S.á.r.l. application to establish a .hotel top-level domain for the benefit of the global hotel business on the Internet.

We believe that .hotel will enhance the efficiency and convenience of e-commerce for hotels and that the new namespace will create more security, trust and credibility for the hotel business and its customers.

A hotel top-level domain will make hotels more intuitively accessible and will give consumers greater confidence. It also provides the hotel business with a voice and improved visibility on the Internet.

We are convinced that the creation of a .hotel namespace will be a significant step for our industry.

Therefore we encourage the licensing organization ICANN (www.icann.org) to grant the .hotel application to Hotel Top-Level-Domain S.á.r.l.. This will not only enable the merits of this innovative concept to be proven but may also have direct effects on the global hotel industry.

Organization: China Hotel Association
Address: 25 Yuetan North Street., Beijing, China, 100834
Name: Han Ming
Function: President



June 20, 2011

Date / Signature



ICANN
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292
USA

March 14, 2012

Endorsement of the Global Hotel Alliance for HOTEL Top-Level-Domain Sarl's application for .hotel

Based on the airline alliance model, Global Hotel Alliance is the world largest alliance of independent hotel brands. It uses a common technology platform to drive incremental revenues and create cost savings for its members, while offering enhanced recognition and service to customers across all brands. GHA currently comprises of Anantara, Doyle Collection, First, Kempinski, Leela, Lungarno Collection, Marco Polo, Mirvac, Mokara, Omni, Pan Pacific, PARKROYAL, Shaza and Tivoli Hotels & Resorts encompassing nearly 300 upscale and luxury hotels with 65'000 rooms across 51 different countries.

GHA has reviewed the concepts and policies of HOTEL Top-Level-Domain Sarl (dotHOTEL) concerning its .hotel top-level domain application at ICANN. We are confident by the approach chosen by dotHOTEL to focus on the individual needs of the global Hotel Community and to actively consult and cooperate with eminent representatives of this Community. Therefore, we have the pleasure to announce that GHA fully and exclusively supports this initiative. While online distribution is getting more and more important for the hospitality industry in the US, hotels all over the union are concerned to lose more and more control over their rates, distribution channels and the hotel product itself to the so-called Other Travel Agencies or OTAs.

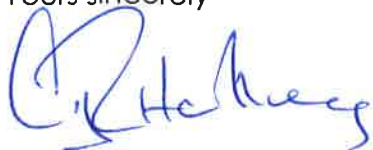
With dotHOTEL's Eligibility Criteria for a verified and secure domain name space exclusively for the hotel industry as defined in ISO 18513, .hotel domain names will help to increase direct bookings by which profit margins of hotels rise and to reduce dependency from OTAs. It will also help enhance search engine rankings and visibility for hotel websites since .hotel domains are likely to be more relevant for search engines than any of the existing Top-Level Domains such as .com or .eu.

We are convinced that many consumers are reluctant to purchase hotel rooms over the Internet because of uncertainty about the reputation and reliability of websites under .com or other TLDs which may be geographically remote and whose qualifications and capabilities have not been verified by any independent party.

We believe that the .hotel top-level domain will contribute due to its verified domain names and security measures to more reliability, trust and credibility in e-business for customers and hotel guests. We are also very content with regard to the well thought out brand protection measures dotHOTEL has installed in its policies after constructive dialogues with members of the Hotel industry worldwide.

We strongly encourage ICANN to grant the .hotel top-level domain to HOTEL Top-Level-Domain Sarl since this is the only application that gives a voice to the interests of the global Hotel community. This will not only enable an innovative concept to be proven but may also have positive implications for other sectors of the economy.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'C. Hartley', written in a cursive style.

Christopher Hartley
CEO



INTERNATIONAL
HOTEL & RESTAURANT
ASSOCIATION

ICANN
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292

USA

Lausanne, March 2012

Endorsement of the International Hotel & Restaurant Association IH&RA
for HOTEL Top-Level-Domain S.à.r.l.'s application for .hotel

The International Hotel & Restaurant Association (IH&RA) is the only global business organization representing the hospitality industry worldwide. It is a global network of independent and chain operators, national associations, hospitality suppliers and educational centres in the hotel and restaurant industry, representing over 750.000 establishments in more than 150 countries.

The IH&RA is the only representative of the global hotel and restaurant industries that is officially recognized by the United Nations. The IH&RA monitors and lobbies all international agencies on behalf of these industries, estimated to comprise 300.000 hotels and 8 million restaurants, employ 70 million people and contribute 950 billion USD annually to the global economy.

The IH&RA has cooperated closely in the development of the concepts and policies of HOTEL Top-Level-Domain S.à.r.l. (dotHOTEL) concerning its application for the .hotel top-level domain at ICANN since 2009. The undersigned, President of the IH&RA, is an active member of dotHOTEL's Advisory Board; at the same time, one of the CEOs of the company, Mr. Lenz-Hawliczek, serves on the Board of Directors of the IH&RA. We are very confident by the approach chosen by dotHOTEL to focus on the individual needs of the global Hotel Community and to actively consult and cooperate with eminent representatives of this Community.

Therefore, we have the pleasure to announce that the IH&RA fully and exclusively supports dotHOTEL's initiative to apply for and operate the top-level domain .hotel. While online distribution is getting more and more important for the hospitality industry worldwide, hotels are concerned to lose more and more control over their rates, distribution channels and the hotel product itself to the so-called Other Travel Agencies or OTAs.

We fully support dotHOTEL's Eligibility Criteria as defined in ISO 18513 to establish a verified and secure domain name space exclusively for the hotel industry. Thus, .hotel domain names will help to increase direct bookings by which profit margins of hotels rise and to reduce dependency from OTAs. It will also help enhance search engine rankings and visibility for hotel websites since .hotel domains are likely to be more relevant for search engines than any of the existing Top-Level Domains such as .com or .eu.

International Hotel & Restaurant Association

42, Avenue General Guisan| Lausanne|1009 PULLY| Switzerland
Tel : +41 21 711 4283 – Fax : +41 21 711 4285 email : ihra@live.com - www.ih-ra.com

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INTERNATIONAL
HOTEL & RESTAURANT
ASSOCIATION

We are convinced that many consumers are reluctant to purchase hotel rooms over the Internet because of uncertainty about the reputation and reliability of websites under .com or other TLDs which may be geographically remote and whose qualifications and capabilities have not been verified by any independent party.

We believe that the .hotel top-level domain will contribute due to its verified domain names and security measures to more reliability, trust and credibility in e-business for customers and hotel guests. We are also very content with regard to the well thought out brand protection measures dotHOTEL has installed in its policies after constructive dialogues with members of the Hotel industry worldwide.

We strongly encourage ICANN to grant the .hotel top-level domain to HOTEL Top-Level-Domain S.à.r.l. since this is the only application that gives a voice to the interests of the global Hotel community. This will not only enable an innovative concept to be proven but may also have positive implications for other sectors of the economy.

A handwritten signature in blue ink, appearing to read 'Ghassan Aidi'.

Dr. Ghassan AIDI
IH&RA President



ICANN

4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292
USA

Endorsement of HOTREC – Hotels, Restaurants and Cafés in Europe for HOTEL Top-Level-Domain Sarl’s application for .hotel

Dear Sir/Madam,

HOTREC represents the hotel, restaurant and café industry at European level. It counts 1.7 million businesses, with 92% of them being micro enterprises employing less than 10 people. The micro and small enterprises (having less than 50 employees) in the hospitality industry representing 99% of businesses make up some 64% of value added. The industry provides some 9.5 million jobs in the EU alone. HOTREC brings together 43 National Associations representing the interest of the industry in 26 different European countries. Europe is the largest tourism destination in the world with a market share of more than 50, representing some 503 million international arrivals. People are spending over 1.5 billion nights in hotels and similar establishments in the EU27.

HOTREC has liaised with HOTEL Top-Level-Domain Sarl (dotHOTEL) for more than two years. We have reviewed and contributed to the concepts and policies of dotHOTEL concerning its .hotel top-level domain application at ICANN. Therefore, we have the pleasure to announce that HOTREC fully and exclusively supports this initiative. While online distribution is getting increasingly important for the hospitality industry in Europe, hotels all over Europe are concerned to lose more and more control over their rates, distribution channels and the hotel product itself to the so-called Online Travel Agencies or OTAs.

With dotHOTEL’s Eligibility Criteria for a verified and secure domain name space exclusively for the hotel industry as defined in ISO 18513, .hotel domain names will help to increase direct bookings by which profit margins of hotels rise and to reduce dependency from OTAs. It will also help enhance search engine rankings and visibility for hotel websites since .hotel domains are likely to be more relevant for search engines than any of the existing Top-Level Domains such as .com or .eu.

We believe that the .hotel top-level domain will contribute due to its verified domain names and security measures to more reliability, trust and credibility in e-business for customers and hotel guests. We are also very content with regard to the well thought out brand protection measures dotHOTEL has installed in its policies after constructive dialogues with members of the Hotel industry worldwide.

We strongly encourage ICANN to grant the .hotel top-level domain to HOTEL Top-Level-Domain Sarl since this is the only application that gives a voice to the interests of the global Hotel community. This will not only enable an innovative concept to be proven but may also have positive implications for other sectors of the economy.

We are convinced that many consumers are reluctant to purchase hotel rooms over the Internet because of uncertainty about the reputation and reliability of websites under .com or other TLDs which may be geographically remote and whose qualifications and capabilities have not been verified by any independent party.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Kent Nyström', with a horizontal line underneath.

Kent Nyström
President of HOTREC

Brussels, 11 April 2012

Exhibit C



COMMUNITY PRIORITY EVALUATION (CPE)

CPE Page Menu

- [News & Views](#)
- [CPE Process Review](#)
- [Understanding CPE](#)
- [CPE Eligibility](#)
- [CPE Resources](#)
- [CPE Status](#)
- [News & Views Archive](#)
- [CPE Resources Archive](#)

News & Views

13 December 2017 – ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process
(<https://www.icann.org/news/announcement-2017-12-13-en>)

ICANN today published three reports on the review of the Community Priority Evaluation (CPE) process. The CPE Process Review was initiated at the request of the ICANN Board as part of the Board's due diligence in the administration of the CPE process. The reports can be found at the link below.

- [CPE Process Review Reports](#)

CPE Process Review

The CPE Process Review was initiated at the request of the ICANN Board as part of the Board's due diligence in the administration of the CPE process. The CPE Process Review was conducted by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice, and consisted of three parts: (i) reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1); (ii) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (iii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the eight evaluations which are the subject of pending Reconsideration Requests that were pending at the time that ICANN initiated the CPE Process Review (Scope 3).

The corresponding reports for each of the Scopes described above can be found below:

- [Scope 1 Report \(https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf\)](https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf) [PDF, 159 KB]
- [Scope 2 Report \(https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf\)](https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf) [PDF, 312 KB]
- [Scope 3 Report \(https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf\)](https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf) [PDF, 309 KB]

Understanding CPE

Overview

Community Priority Evaluation (CPE) is a method to resolve string contention, described in full detail in section 4.2 of the [Applicant Guidebook \(AGB\) \(/en/applicants/agb\)](#). It will only occur if a community application is both in contention and elects to pursue CPE. The evaluation itself is an independent analysis conducted by a panel from the Economist Intelligence Unit (EIU). The EIU was selected for this role because it offers premier business intelligence services, providing political, economic, and public policy analysis to businesses, governments, and organizations across the globe.

As part of its process, the EIU reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and Community; Registration Policies, and Community Endorsement. An application must score at least 14 points to prevail in a community priority evaluation, a high bar because awarding priority eliminates all non-community applicants in the contention set

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as well as any other non-prevailing community applicants. For details regarding the EIU's work with ICANN as well as its evaluation process, please see the resources below:

- [CPE Panel Process Document \(http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf\)](http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf) [PDF, 314 KB] (also available along with additional information under [CPE Resources](#) below)
- [EIU Contract and SOW Information \(http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip\)](http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip)

CPE Eligibility

Fulfillment of the CPE Eligibility criteria explained below permits an applicant to begin the CPE process and ensures that applications as well as contention sets are in stable, viable states, i.e., are not at risk of an open matter affecting whether they will proceed.

Eligibility Requirements for Standard CPE Invitation

Once an application is eligible for CPE, it will be invited to CPE and have up to 21 days to accept the invitation and pay the CPE fees. The invitations will be posted to this page in the CPE Status section. The evaluation will begin no sooner than 14 days after the invitation to allow for final submission of application comments and correspondence to ICANN regarding the application.

To be eligible to begin Standard CPE Processing, an application must:

- be a self-designated Community Application per section 1.2.3 of the AGB
- have an application status of "Active"
- be in an unresolved contention set (contention set status is either "Active" or "On-Hold" and at least one other application in the set has a status of either "Active or On-Hold"
- not have a pending change request
- not be in an active comment window for a recently approved changed request

Additionally, as per section 4.2 of the AGB, all remaining members of the contention set must have completed all previous stages of the process. All remaining applications in the contention set must:

- have completed evaluation
- have no pending objections
- have addressed all applicable GAC Advice
- not be classified in the "High Risk" category of the Name Collision Occurrence Management Framework

Eligibility Requirements for Accelerated Invitation to CPE

Once a community application has met the requirements listed below, ICANN will notify them of the option to request an Accelerated Invitation to CPE. An applicant is able to request an Accelerated Invitation to CPE when outstanding eligibility criteria do not have the potential to impact the community applicant's membership in a contention set and/or when the contention set as a whole may not have met all eligibility requirements for the standard CPE Invitation process.

After an Applicant has requested the Accelerated Invitation, the standard CPE Invitation process will commence, including posting on this web page.

To be eligible for an Accelerated Invitation to CPE, an application must:

- be a self-designated Community Application per section 1.2.3 of the AGB
- have a status of "Active" or "On-Hold"
- be in an unresolved contention set (contention set status is either "Active" or "On-Hold" and at least one other application in the set has a status of either "Active or On-Hold")
- not have a pending change request
- not be in an active application comment window for an approved changed request
- have addressed all applicable GAC Advice

Additionally, as per section 4.2 of the AGB, all remaining members of the contention set must have completed all previous stages of the process. All remaining applications in the contention set must:

- have completed evaluation
- have no pending objections
- not be classified in the "High Risk" category of the Name Collision Occurrence Management Framework

CPE Resources

- [CPE Panel Process Document \(/en/applicants/cpe/panel-process-07aug14-en.pdf\)](/en/applicants/cpe/panel-process-07aug14-en.pdf) [PDF, 314 KB] {06 August 2014}

The Economist Intelligence Unit's Process documentation for Community Priority Evaluation is posted for informational purposes to provide transparency of the panel's evaluation process. On 14 March 2016, in an effort to provide greater transparency on the CPE process, the Panel submitted [correspondence \(https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf\)](https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf) [PDF, 52 KB] with additional information regarding the process for verifying letters of support and opposition.

- [CPE Guidelines \(/en/applicants/cpe/guidelines-27sep13-en.pdf\)](/en/applicants/cpe/guidelines-27sep13-en.pdf) [PDF 1.85 MB] {27 September 2013}

ICANN has published the CPE Guidelines produced by the Economist Intelligence Unit after considering ICANN community feedback on the first draft. The Guidelines are an accompanying document to the AGB, and are meant to provide additional clarity around the scoring principles outlined in the AGB. The Guidelines are intended to increase transparency, fairness and consistency in the evaluation process.

- [Updated CPE Frequently Asked Questions \(FAQs\) \(/en/applicants/cpe/faqs-10sep14-en.pdf\)](/en/applicants/cpe/faqs-10sep14-en.pdf) [PDF, 377 KB] (10 SEPT 2014)

This document contains answers to common questions about CPE from applicants and other interested community members. The update from 19 September 2014 includes revisions to existing answers based on changes put forth in the ["Update on Application Status and Contention Sets" Advisory \(/en/applicants/advisories/application-contention-set-14mar14-en\)](/en/applicants/advisories/application-contention-set-14mar14-en).

- [CPE Processing Timeline \(/en/applicants/cpe/timeline-10sep14-en.pdf\)](/en/applicants/cpe/timeline-10sep14-en.pdf) [PDF, 54 KB] {10 SEPT 2014}

The timeline has been updated to reflect changes made in the FAQ revision from 13 Aug 2014.

CPE Status

ICANN began inviting [eligible](#) applicants to elect the CPE process on 9 October 2013. The invitation date and evaluation results are represented in the table below. **Important:** application comments and letters of support or opposition must be submitted within 14 days of the CPE Invitation Date in order to be considered by the CPE Panel. [Access the Application Comments page \(https://gtldcomment.icann.org/applicationcomment/viewcomments\)](https://gtldcomment.icann.org/applicationcomment/viewcomments).

Application ID	String	Contention Set Number	Applicant	CPE Invitation Date	Elected	Status
1-1000-62742	IMMO	99	STARTING DOT LIMITED	09 October 2013	Yes	Evaluation Complete (/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf) (17 March 2014)
1-1025-18840	TAXI	225	Taxi Pay GmbH	09 October 2013	Yes	Evaluation Complete (/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf) (17 March 2014)
1-901-9391	OSAKA	130	Interlink Co., Ltd.	06 November 2013	Yes	Evaluation Complete (/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf) (30 July 2014)
1-1723-	TENNIS	136	TENNIS	06	Yes	Registry et al. 000039

69677			AUSTRALIA LTD	November 2013		Evaluation Complete (/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf) (17 March 2014)
1-1888-47714	MLS	144	The Canadian Real Estate Association	11 December 2013	Yes	Evaluation Complete (/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf) (17 March 2014)
1-1273-63351	GMBH	30	TLDDOT GmbH	19 February 2014	Yes	Evaluation Complete (/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf) (12 June 2014)
1-880-17627	LLC	81	Dot Registry LLC	19 February 2014	Yes	Evaluation Complete (/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf) (12 June 2014)
1-880-35979	INC	102	Dot Registry LLC	19 February 2014	Yes	Evaluation Complete (/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf) (12 June 2014)
1-880-35508	LLP	45	Dot Registry LLC	19 February 2014	Yes	Evaluation Complete (/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf) (12 June 2014)
1-1083-39123	RADIO	33	European Broadcasting Union (EBU)	19 February 2014	Yes	Evaluation Complete (/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf) (10 September 2014)
1-1032-95136	HOTEL	51	HOTEL Top-Level-Domain S.a.r.l	19 February 2014	Yes	Evaluation Complete (/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf) (12 June 2014)

1-1675-51302	ART	72	EFLUX.ART, LLC	19 February 2014	Yes	Evaluation Complete (/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf) (10 September 2014)
1-1097-20833	ART	72	Dadotart, Inc.	20 February 2014	Yes	Evaluation Complete (/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf) (10 September 2014)
1-912-59314	ECO	22	Big Room Inc.	12 March 2014	Yes	Evaluation Complete (/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf) (7 October 2014)
1-1309-46695	KIDS	1,330	DotKids Foundation Limited	27 October 2015	Yes	Evaluation Complete (/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf) (8 April 2016)
1-1713-23699	GAY	179	dotgay llc	23 April 2014	Yes	Evaluation Complete (/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf) (7 October 2014)
1-1713-23699	GAY	179	dotgay llc	26 January 2015	RR 14-44 (/https://www.icann.org/resources/pages/14-44-2014-10-22-en)	Re-Evaluation Complete (/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf) (8 October 2015)
1-959-51046	MUSIC	106	.music LLC	18 June 2014	Yes	Evaluation Complete (/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf) (7 October 2014)
1-890-52063	SHOP	1,593	GMO Registry, Inc.	8 October 2014	Yes	Evaluation Complete (/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf)

						(13 March 2015)
1-1830-1672	SHOP	649	Commercial Connect LLC	26 November 2014	Yes	<p>Evaluation Complete (/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf)</p> <p>(21 May 2015)</p>
1-1192-28569	MED	1,732	HEXAP SAS	3 February 2015	No	Not elected
1-1309-81322	SPA	524	Asia Spa and Wellness Promotion Council Limited	3 February 2015	Yes	<p>Evaluation Complete (/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf)</p> <p>(22 July 2015)</p>
1-1911-56672	CPA	974	American Institute of Certified Public Accountants	8 April 2015	Yes	<p>Evaluation Complete (/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf)</p> <p>(3 September 2015)</p>
1-1744-1971	CPA	1,609	CPA AUSTRALIA LTD	8 April 2015	Yes	<p>Evaluation Complete (/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf)</p> <p>(3 September 2015)</p>
1-1115-14110	MUSIC	448	DotMusic Limited	29 July 2015	Yes	<p>Evaluation Complete (/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf)</p> <p>(10 February 2016)</p>
1-1702-73085	MERCK	461	Merck Registry Holdings, Inc.	25 March 2016	Yes	<p>Evaluation Complete (/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf)</p> <p>(10 August 2016)</p>
1-980-7217	MERCK	1673	Merck KGaA	25 March 2016	Yes	<p>Evaluation Complete (/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf)</p> <p>(10 August 2016)</p>

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1-1033-22687	WEBS	539	Vistaprint Limited	28 March 2016	No	Not elected
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CPE Archive

News & Views Archive

Below find archival materials documenting milestones in the formation and implementation of Community Priority Evaluation, listed in reverse chronological order.

1 September 2017 – [Update on the Review of the New gTLD Community Priority Evaluation Process](https://newgtlds.icann.org/en/applicants/cpe/process-review-update-01sep17-en.pdf)

(<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-01sep17-en.pdf>) [PDF, 117 KB]

As a follow-up to the update provided on [2 June 2017](https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf) (<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>) [PDF, 405 KB], ICANN has published a subsequent update regarding the review of the CPE process. Please find the links to the announcement and update below.

- [ICANN Provides Update on Review of the Community Priority Evaluation Process](https://www.icann.org/news/announcement-2017-09-01-en) (<https://www.icann.org/news/announcement-2017-09-01-en>)
- [View Update](https://newgtlds.icann.org/en/applicants/cpe/process-review-update-01sep17-en.pdf) (<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-01sep17-en.pdf>) [PDF, 117 KB]

2 June 2017 – [Update on the Review of the New gTLD Community Priority Evaluation Process](https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf)

(<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>) [PDF, 366 KB]

As a follow-up to the update provided by Chris Disspain on [26 April 2017](https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf) (<https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>) [PDF, 405 KB], ICANN has published a subsequent update regarding the review of the CPE process. Please find the links to the announcement and update below.

- [ICANN Provides Update on Review of the Community Priority Evaluation Process](https://www.icann.org/news/announcement-4-2017-06-02-en) (<https://www.icann.org/news/announcement-4-2017-06-02-en>)
- [View Update](https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf) (<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>) [PDF, 366 KB]

10 August 2016 – Additional CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 2 applications, and updated application and contention set statuses accordingly.

- [View CPE results \(/en/applicants/cpe#invitations\)](/en/applicants/cpe#invitations)

8 April 2016 – Additional CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 1 application, and updated application and contention set statuses accordingly.

- [View CPE results \(/en/applicants/cpe#invitations\)](/en/applicants/cpe#invitations)

10 February 2016 – Additional CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 1 application, and updated application and contention set statuses accordingly.

- [View CPE results \(/en/applicants/cpe#invitations\)](/en/applicants/cpe#invitations)

8 October 2015 – Additional CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 1 application, and updated application and contention set statuses accordingly.

- [View CPE results \(/en/applicants/cpe#invitations\)](/en/applicants/cpe#invitations)

3 September 2015 – Additional CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 2 applications, and updated application and contention set statuses accordingly.

- [View CPE results \(/en/applicants/cpe#invitations\)](/en/applicants/cpe#invitations)
- [View Contention Set Status \(https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus\)](https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus)

22 July 2015 – Additional CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 1 application, and updated application and contention set statuses accordingly.

- [View CPE results \(http://newgtlds.icann.org/en/applicants/cpe#invitations\)](http://newgtlds.icann.org/en/applicants/cpe#invitations)
- [View Contention Set Status \(https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus\)](https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus)

21 May 2015 – Additional CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 1 application, and updated application and contention set statuses accordingly.

- [View CPE results \(/en/applicants/cpe#invitations\)](/en/applicants/cpe#invitations)
- [View Contention Set Status \(https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus\)](https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus)

13 March 2015 – Additional CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 1 application, and updated application and contention set statuses accordingly.

- [View CPE results \(/en/applicants/cpe#invitations\)](/en/applicants/cpe#invitations)
- [View Contention Set Status \(https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus\)](https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus)

7 October 2014 – CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 3 applications, and updated application and contention set statuses accordingly.

- [View CPE results \(/en/applicants/cpe#invitations\)](/en/applicants/cpe#invitations)
- [View Contention Set Status \(https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus\)](https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus)

10 September 2014 – CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 3 applications, and updated application and contention set statuses accordingly.

- [View CPE results \(/en/applicants/cpe#invitations\)](/en/applicants/cpe#invitations)
- [View Contention Set Status \(https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus\)](https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus)

10 September 2014 – CPE Eligibility Criteria, FAQs and Timeline Updated

ICANN has made minor revisions to the CPE eligibility criteria for both a standard invitation and an accelerated invitation to align with recent changes put forth in the "[Update on Application Status and Contention Sets](/en/applicants/advisories/application-contention-set-14mar14-en)" Advisory (</en/applicants/advisories/application-contention-set-14mar14-en>). These revisions reflect the current definitions of "active" and "on-hold" for both applications and contention sets. For more details, please see the updated [eligibility criteria \(/en/applicants/cpe#eligibility\)](/en/applicants/cpe#eligibility) below. The corresponding questions and answers on the [FAQ page \(/en/applicants/cpe/faqs-10sep14-en.pdf\)](/en/applicants/cpe/faqs-10sep14-en.pdf) [PDF, 377 KB] have also been updated, and the timeline has also been updated to reflect changes made in the last FAQ revision.

13 August 2014 – CPE Frequently Asked Questions (FAQs) Updated

ICANN has updated the CPE FAQs. The update includes revisions to existing answers based on lessons learned over the past nine months of CPE operations as well as the addition of answers to questions regarding Accelerated Invitation to CPE.

- [View CPE FAQs \(/en/applicants/cpe/faqs-13aug14-en.pdf\)](/en/applicants/cpe/faqs-13aug14-en.pdf) [PDF, 119 KB]

7 August 2014 – Community Priority Evaluation (CPE) Panel Process Document Released

ICANN has published the Economist Intelligence Unit's (EIU) process documents for Community Priority Evaluation (CPE). This document provides detail of the process the EIU employs to perform the CPE.

- [View CPE Panel Process Document \(/en/applicants/cpe/panel-process-07aug14-en.pdf\)](/en/applicants/cpe/panel-process-07aug14-en.pdf) [PDF, 314 KB]

30 July 2014 – Additional Community Priority Evaluation (CPE) Result Released

ICANN has published the Community Priority Evaluation (CPE) Results for 1 application, and updated application and contention set statuses accordingly.

- [View CPE results \(/en/applicants/cpe#invitations\)](/en/applicants/cpe#invitations)
- [View Contention Set Status \(https://gtldresult.icann.org/application-result/applicationstatus/stringcontentionstatus\)](https://gtldresult.icann.org/application-result/applicationstatus/stringcontentionstatus)

12 June 2014 – Additional Community Priority Evaluation (CPE) Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 5 applications, and updated application and contention set statuses accordingly.

- [View CPE results \(/en/applicants/cpe#invitations\)](/en/applicants/cpe#invitations)
- [View Contention Set Status \(https://gtldresult.icann.org/application-result/applicationstatus/stringcontentionstatus\)](https://gtldresult.icann.org/application-result/applicationstatus/stringcontentionstatus)

28 May 2014 – Accelerated Invitation to Elect CPE

In effort to maintain program momentum, ICANN has enhanced the CPE invitation process to allow for community applicants to begin the CPE process earlier. The new process provides the community applicant the ability to Opt-In to a CPE invite sooner than the standard Eligibility Criteria. If they qualify, the community applicant can request an invitation to elect CPE. This would allow them to initiate the CPE process sooner than current requirements allow. Select the following link for more information about the process

- [View Eligibility Criteria for Accelerated Invitation to Elect CPE](#)

18 March 2014 – First Community Priority Evaluation (CPE) Results Released

ICANN has published the first four results of the Community Priority Evaluation (CPE) process.

- [View CPE results](#)

25 October 2013 – Additional Community Priority Evaluation Resources Available

Community Priority Evaluation FAQs and a CPE processing timeline are now available.

- [View Resources](#)

09 October 2013 – CPE Invitations Sent to Eligible Applicants

Find out which applicants have been invited and where their applications are in the process. This information will be updated regularly as invitations are sent and evaluations are performed and completed.

- [Read the Announcement \(/en/announcements-and-media/announcement-27sep13-en\)](/en/announcements-and-media/announcement-27sep13-en)
- [View CPE Invitations](#)

27 September 2013 – Final Community Priority Evaluation Guidelines Published

The Economist Intelligence Unit finalized its CPE Guidelines after considering ICANN community feedback. The Guidelines have been made public to ensure quality, consistency and transparency in the evaluation process.

- [Read the Announcement \(/en/announcements-and-media/announcement-27sep13-en\)](/en/announcements-and-media/announcement-27sep13-en)
- [Download the CPE Guidelines \(/en/applicants/cpe/guidelines-27sep13-en.pdf\)](/en/applicants/cpe/guidelines-27sep13-en.pdf) [PDF, 1.85 MB]

10 September 2013 – CPE Teleconference Content Available

ICANN holds a teleconference to discuss the details of Community Priority Evaluation with applicants.

- [Teleconference Recording \(http://audio.icann.org/new-gtlds/cpe-10sep13-en.mp3\)](http://audio.icann.org/new-gtlds/cpe-10sep13-en.mp3) [MP3, 15.2 MB]
- [Additional Questions & Answers \(http://newgtlds.icann.org/en/applicants/cpe/podcast-qa-10sep13-en.pdf\)](http://newgtlds.icann.org/en/applicants/cpe/podcast-qa-10sep13-en.pdf) [PDF, 546 KB]

09 September 2013 – Feedback on Draft CPE Guidelines

Applicants respond to ICANN's call for input on the Community Priority Evaluation Guidelines created by panel firm EIU.

- [Draft CPE Guidelines \(/en/applicants/cpe/guidelines-16aug13-en.pdf\)](/en/applicants/cpe/guidelines-16aug13-en.pdf)
- [Community Feedback \(/en/applicants/cpe#guidelines\)](/en/applicants/cpe#guidelines)

16 August 2013 – CPE Draft Guidelines & Community Review

EIU, the CPE panel firm, develops a set of guidelines based on the criteria in the Applicant Guidebook to be used in the evaluation process. Applicants and community members are invited to provide feedback.

- [Announcement: Community Priority Evaluation Guidelines Posted for Community Review and Input \(/en/announcements-and-media/announcement-4-16aug13-en\)](/en/announcements-and-media/announcement-4-16aug13-en)
- [Community Priority Evaluation \(CPE\) Guidelines \(/en/applicants/cpe/guidelines-16aug13-en.pdf\)](/en/applicants/cpe/guidelines-16aug13-en.pdf) [PDF, 803 KB]

16 August 2013 – CPE Resources

ICANN publishes a set of resources to guide eligible applicants through the Community Priority Evaluation process.

- [Community Priority Evaluation Resources \(/en/applicants/cpe#resources\)](/en/applicants/cpe#resources)

14 June 2013 – Community Priority Evaluation Early Election

ICANN offers a means for applicants to indicate their intent to elect for Community Priority Evaluation prior to the launch of CPE operations.

- [Community Priority Evaluation: Now Open for Early Election \(/en/announcements-and-media/announcement-4-14jun13-en\)](/en/announcements-and-media/announcement-4-14jun13-en)

CPE Resources Archive

- [Draft CPE Guidelines \(/en/applicants/cpe/guidelines-16aug13-en.pdf\)](/en/applicants/cpe/guidelines-16aug13-en.pdf) [PDF, 803 KB] (Published 16 August 2013)
Economist Intelligence Unit (EIU), the firm selected to manage Community Priority Evaluation, published a set of draft Guidelines that panelists will use to score Community applicants. Before finalizing, applicants and the community were invited to review and provide feedback.
- Community Feedback on Draft CPE Guidelines is available for review below:
 - [At-Large Advisory Committee \(ALAC\) \(http://atlarge.icann.org/en/correspondence/statement-cpe-guidelines-09sep13-en.pdf\)](http://atlarge.icann.org/en/correspondence/statement-cpe-guidelines-09sep13-en.pdf) [PDF, 252 KB]
 - [Big Room Inc. \(/en/applicants/cpe/guidelines-comment-big-room-02sep13-en.pdf\)](/en/applicants/cpe/guidelines-comment-big-room-02sep13-en.pdf) [PDF, 267 KB]
 - [Community TLD Applicant Group \(CTAG\) \(/en/applicants/cpe/guidelines-comment-ctag-29aug13-en.pdf\)](/en/applicants/cpe/guidelines-comment-ctag-29aug13-en.pdf) [PDF, 315 KB]
 - [Donuts Inc. \(/en/applicants/cpe/guidelines-comment-extend-donuts-20sep13-en.pdf\)](/en/applicants/cpe/guidelines-comment-extend-donuts-20sep13-en.pdf) [PDF, 41 KB]
 - [Donuts Inc. \(/en/applicants/cpe/guidelines-comment-donuts-20sep13-en.pdf\)](/en/applicants/cpe/guidelines-comment-donuts-20sep13-en.pdf) [PDF, 394 KB]
 - [DotMusic Limited \(/en/applicants/cpe/guidelines-comment-dotmusic-07sep13-en.pdf\)](/en/applicants/cpe/guidelines-comment-dotmusic-07sep13-en.pdf) [PDF, 581 KB]
 - [Dot Registry, LLC \(/en/applicants/cpe/guidelines-comment-dot-registry-04sep13-en.pdf\)](/en/applicants/cpe/guidelines-comment-dot-registry-04sep13-en.pdf) [PDF, 390 KB]
 - [.music llc \(/en/applicants/cpe/guidelines-comment-music-06sep13-en.pdf\)](/en/applicants/cpe/guidelines-comment-music-06sep13-en.pdf) [PDF, 155 KB]
 - [Radix, Top Level Domain Holdings / Minds & Machines, Famous Four Media, Fegistry, LLC \(/en/applicants/cpe/guidelines-comment-radix-minds-machines-20sep13-en.pdf\)](/en/applicants/cpe/guidelines-comment-radix-minds-machines-20sep13-en.pdf) [PDF, 108 KB]
 - [Radix, Top Level Domain Holdings / Minds & Machines, Famous Four Media, Fegistry, LLC \(/en/applicants/cpe/guidelines-comment-redline-radix-minds-machines-20sep13-en.pdf\)](/en/applicants/cpe/guidelines-comment-redline-radix-minds-machines-20sep13-en.pdf) [PDF, 316 KB]
 - [Ray Fassett \(/en/applicants/cpe/guidelines-comment-nexus-20sep13-en.pdf\)](/en/applicants/cpe/guidelines-comment-nexus-20sep13-en.pdf) [PDF, 760 KB]
 - [TLDDOT GmbH \(.GmbH Top-Level-Domain\) \(/en/applicants/cpe/guidelines-comment-tlddot-gmbh-30aug13-en.pdf\)](/en/applicants/cpe/guidelines-comment-tlddot-gmbh-30aug13-en.pdf) [PDF, 48 KB]

Exhibit D



New gTLD Program
Community Priority Evaluation Report

Report Date: 11 June 2014

Application ID:	1-1032-95136
Applied-for String:	HOTEL
Applicant Name:	HOTEL Top-Level-Domain s.a.r.l

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Prevailed
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application met the requirements specified in the Applicant Guidebook. Your application prevailed in Community Priority Evaluation.</p>	

Panel Summary

Overall Scoring	15 Point(s)	
<u>Criteria</u>	<u>Earned</u>	<u>Achievable</u>
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	3	4
#3: Registration Policies	4	4
#4: Community Endorsement	4	4
Total	15	16
Minimum Required Total Score to Pass <u>14</u>		

Criterion #1: Community Establishment	4/4 Point(s)
1-A Delineation	2/2 Point(s)
<p>The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition, and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p> <p>The community defined in the application (“HOTEL”) is:</p>	

The .hotel namespace will exclusively serve the global Hotel Community. The string “Hotel” is an internationally agreed word that has a clear definition of its meaning: According to DIN EN ISO 18513:2003, “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.” Therefore only entities which fulfil this definition are members of the Hotel Community and eligible to register a domain name under .hotel. .hotel domains will be available for registration to all companies which are member of the Hotel Community on a local, national and international level. The registration of .hotel domain names shall be dedicated to all entities and organizations representing such entities which fulfil the ISO definition quoted above:

1. Individual Hotels
2. Hotel Chains
3. Hotel Marketing organizations representing members from 1. and/or 2.
4. International, national and local Associations representing Hotels and Hotel Associations representing members from 1. and/or 2.
5. Other Organizations representing Hotels, Hotel Owners and other solely Hotel related organizations representing on members from 1. and/or 2.

These categories are a logical alliance of members, with the associations and the marketing organizations maintaining membership lists, directories and registers that can be used, among other public lists, directories and registers, to verify eligibility against the .hotel Eligibility requirements.

This community definition shows a clear and straightforward membership. The community is clearly defined because membership requires entities/associations to fulfill the ISO criterion for what constitutes a hotel. Furthermore, association with the hotel sector can be verified through membership lists, directories and registers.

In addition, the community as defined in the application has awareness and recognition among its members. This is because the community is defined in terms of its association with the hotel industry and the provision of specific hotel services.

The Community Priority Evaluation panel determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for Delineation.

Organization

Two conditions need to be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

The community as defined in the application has at least one entity mainly dedicated to the community. There are, in fact, several entities that are mainly dedicated to the community, such as the International Hotel and Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA) and China Hotel Association (CHA), among others. According to the application,

Among those associations the International Hotel and Restaurant Association (IH&RA) is the oldest one, which was founded in 1869/1946, is the only global business organization representing the hotel industry worldwide and it is the only global business organization representing the hospitality industry (hotels and restaurants) worldwide. Officially recognized by United Nations as the voice of the private sector globally, IH&RA monitors and lobbies all international agencies on behalf of this industry. Its members represent more than 300,000 hotels and thereby the majority of hotels worldwide.

The community as defined in the application has documented evidence of community activities. This is confirmed by detailed information on IH&RA’s website, as well as information on other hotel association websites.

The Community Priority Evaluation panel determined that the community as defined in the application

satisfies both the conditions to fulfill the requirements for Organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. Hotels have existed in their current form since the 19th century, and the oldest hotel association is IH&RA, which, according to the entity's website, was first established in 1869 as the All Hotelmen Alliance. The organization has been operating under its present name since 1997.

The Community Priority Evaluation panel determined that the community as defined in the application fulfills the requirements for Pre-existence.

1-B Extension

2/2 Point(s)

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates considerable size and longevity for the community. The application received a maximum score of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of a considerable size. The community for .HOTEL as defined in the application is large in terms of the number of members. According to the applicant, "the global Hotel Community consists of more than 500,000 hotels and their associations".

In addition, the community as defined in the application has awareness and recognition among its members because the community is defined in terms of association with the provision of hotel services.

The Community Priority Evaluation panel determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for Size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the .HOTEL community are of a lasting, non-transient nature.

In addition, the community as defined in the application has awareness and recognition among its members because the community is defined in terms of association with the provision of hotel services.

The Community Priority Evaluation panel determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for Longevity.

Criterion #2: Nexus between Proposed String and Community

3/4 Point(s)

2-A Nexus

2/3 Point(s)

The Community Priority Evaluation panel determined that the application met the criterion for Nexus as

specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string identifies the name of the community, without over-reaching substantially beyond the community. The application received a score of 2 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus, the applied-for string must identify the community. “Identify” means that the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community.

The applied-for string (.HOTEL) identifies the name of the community. According to the applicant,

The proposed top-level domain name, “HOTEL”, is a widely accepted and recognized string that globally identifies the Hotel Community and especially its members, the hotels.

The string nexus closely describes the community, without overreaching substantially beyond the community. The string identifies the name of the core community members (i.e. hotels and associations representing hotels). However, the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the gTLD. However, these entities are considered to comprise only a small part of the community. Therefore, the string identifies the community, but does not over-reach substantially beyond the community, as the general public will generally associate the string with the community as defined by the applicant.

The Community Priority Evaluation panel determined that the applied-for string identifies the name of the community as defined in the application. It therefore partially meets the requirements for Nexus.

2-B Uniqueness

1 / 1 Point(s)

The Community Priority Evaluation panel determined that the application met the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the string has no other significant meaning beyond identifying the community described in the application. The application received a maximum score of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string .HOTEL must have no other significant meaning beyond identifying the community described in the application. The Community Priority Evaluation panel determined that the applied-for string satisfies the condition to fulfill the requirements for Uniqueness.

Criterion #3: Registration Policies

4/4 Point(s)

3-A Eligibility

1 / 1 Point(s)

The Community Priority Evaluation panel determined that the application met the criterion for Eligibility, as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by restricting eligibility to the narrow category of hotels and their organizations as defined by ISO 18513, and verifying this association through membership lists, directories and registries. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.

3-B Name Selection	<i>1/1 Point(s)</i>
<p>The Community Priority Evaluation panel determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for gTLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.</p> <p>To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by specifying that eligible applicants will be entitled to register any domain name that is not reserved or registered at the time of their registration submission. Furthermore, the registry has set aside a list of domain names that will be reserved for the major hotel industry brands and sub-brands. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Name Selection.</p>	
3-C Content and Use	<i>1/1 Point(s)</i>
<p>The Community Priority Evaluation panel determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.</p> <p>To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by specifying that each domain name must display hotel community-related content relevant to the domain name, etc. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Content and Use.</p>	
3-D Enforcement	<i>1/1 Point(s)</i>
<p>The Community Priority Evaluation panel determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application provided specific enforcement measures as well as appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.</p> <p>Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures constituting a coherent set. The applicant's registry will establish a process for questions and challenges that could arise from registrations and will conduct random checks on registered domains. There is also an appeals mechanism, whereby a registrant has the right to request a review of a decision to revoke its right to hold a domain name. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies both conditions to fulfill the requirements for Enforcement.</p>	

Criterion #4: Community Endorsement	<i>4/4 Point(s)</i>
4-A Support	<i>2/2 Point(s)</i>
<p>The Community Priority Evaluation panel determined that the application fully met the criterion for Support</p>	

specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the applicant had documented support from the recognized community institution(s)/member organization(s). The application received a maximum score of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. “Recognized” means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed.

The Community Priority Evaluation panel determined that the applicant was not the recognized community institution(s)/member organization(s). However, the applicant possesses documented support from the recognized community institution(s)/member organization(s), and this documentation contained a description of the process and rationale used in arriving at the expression of support. These groups constitute the recognized institutions to represent the community, and represent a majority of the overall community as defined by the applicant. The Community Priority Evaluation Panel determined that the applicant fully satisfies the requirements for Support.

4-B Opposition

2/2 Point(s)

The Community Priority Evaluation panel determined that the application met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received the maximum score of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received relevant opposition from, at most, one group of non-negligible size. According to the Applicant Guidebook, “To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant”. “Relevance” and “relevant” refers to the communities explicitly and implicitly addressed.

The application received letters of opposition, which were determined not to be relevant, as they were either from groups of negligible size, or were from entities/communities that do not have an association with the applied for string. The Community Priority Evaluation Panel determined that these letters therefore were not relevant because they are not from the recognized community institutions/member organizations, nor were they from communities/entities that have an association with the hotel community. In addition, some letters were filed for the purpose of obstruction, and were therefore not considered relevant. The Community Priority Evaluation Panel determined that the applicant satisfies the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

Exhibit E



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Sent via email
August 6, 2016

Internet Corporation for Assigned Names and Numbers (ICANN)

Attn: Board members
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536 USA
Phone: +1.310.301.5800
Fax: +1.310.823.8649
Email: correspondence@icann.org

**Re: 9 August 2016 Special Meeting of the ICANN Board of Directors
regarding agenda item *Dot Registry LLC v. ICANN (01-14-0001-5004)*
Independent Review Process (“IRP”) Declaration of 29 July 2016**

Dear ICANN Board,

On August 9, 2016, you will hold a Special Meeting to consider next steps in the *Dot Registry LLC v. ICANN* Independent Review Panel (“IRP”) Declaration, among other things. Dot Registry’s IRP Declaration can give us guidance to achieve a favorable outcome for all parties.

Most importantly, the un rebutted evidence must guide the ICANN Board in determining next steps. Namely, the Board must compare the EIU’s seven page CPE Report, absent any citation to research performed, to Navigant’s 90 page expert report, prepared by Michael Flynn, with over 200 external citations to research performed. The Navigant report alone is sufficient and compelling to assist the Board with determining that Dot Registry’s applications should have passed CPE had the EIU done its job neutrally and objectively, with transparency, integrity and fairness. To disregard the Navigant report would be to disregard the IRP ruling in favor of Dot Registry. The ICANN Board has all the evidence before it in this matter and there’s no additional information to discover, as attested by ICANN’s own in-house counsel in the IRP proceeding.

Dot Registry LLC (“Dot Registry”) applications for .INC, .LLC, and .LLP align with the verification/validation requirements in the Government Advisory Committee (“GAC”) Beijing advice on Category 1 highly regulated strings. Dot Registry has received unanimous approval from the National Association of
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Registry et al. 000053



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Secretaries of State (“NASS”), the collective voice of all 50 U.S. States and Territories Secretaries of State or their equivalents, who do regulate the .INC, .LLC, and .LLP communities in the U.S. and who are in position to determine best practices and compliance with the laws related to corporate formation.

Several of these secretaries of State, including the Honorable Jeffrey Bullock, are interested in expanding the scope of our applications outside the U.S., to include other nations. The Secretaries are willing to work with us to expand outside the U.S. borders and lead by example. The Secretaries of State have vast knowledge of corporate formation and are willing to help develop protocols to secure business registrations and promote eCommerce opportunities throughout other nations. We can go beyond the GAC requirements to work together on developing ecommerce across borders.

Dot Registry proposes that the ICANN Board pass a resolution on August 9, 2016 to proceed to contracting with Dot Registry and sign registry agreements for .INC, .LLC, and .LLP. We would also like the ICANN community to consider earmarking some of the New gTLD funds to help developing nations who want .INC, .LLC, and/or .LLP corporate designations and need the development of International protocols. In addition, Dot Registry would ask that ICANN staff approve contract amendments related to onboarding these developing nations as they are ready, which will not be unreasonably withheld or delayed.

As the first round of New gTLDs winds down, this is a perfect time to “test” if GAC advice on Category 1 highly regulated strings can be successfully implemented, which we know it can be. Developing the necessary PICs is a regulator function, not an ICANN function. ICANN is not in a position to do that; however, our community officials (i.e., Secretaries of State) are in a position to do so.

Dot Registry is the only steward for these highly regulated strings. Standard applicants are not willing to protect them, because if they were, they would have included appropriate safeguards in their applications. If these strings are delegated to a standard applicant, without any mandated PICs such as verification or validation protocols, consumer and business fraud has the ability to escalate out of control.

Dot Registry is committed to building a robust verification/validation system to ensure that a business who owns a .INC, .LLC, or .LLP domain is in good standing
208 W 19th, Kansas City, MO 64108, USA dotregistry.org 816.200.7080



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with the regulator and the domain name is tied to an actual business. Dot Registry's proposal checks ICANN's boxes for implementing GAC Advice on Category 1 highly regulated strings, a positive resolution of an unfavorable IRP Declaration, and it supports ICANN's mission to operate a secure and stable Internet.

We believe, despite all that we've been through, that the ICANN Board can and will do the right thing on August 9th and proceed to contracting with Dot Registry for .INC, .LLC, and .LLP.

Should you have any questions or concerns, you may reach me directly at +1.816.200.7080 Central Time.

DOT REGISTRY LLC

Sincerely,

A handwritten signature in black ink, appearing to read "S. Jolles", with a stylized flourish at the end.

Shaul Jolles
Chief Executive Officer

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01-14-0001-5004

In the matter of an Independent Review Process

DOT REGISTRY, LLC,

Claimant,

v.

*INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS ("ICANN"),*

Respondent

Expert Report of Michael A. Flynn

July 13, 2015

Navigant Economics
1999 Harrison Street, Suite 2700
Oakland, California 94612

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A. Introduction and Background

1. Claimant Dot Registry, LLC (“Dot Registry”) filed community-based gTLD (“generic Top-Level Domain) applications for the strings .INC,¹ .LLC² and .LLP³ in the gTLD application round that opened on January 12, 2012, under procedures established by the Internet Corporation for Assigned Names and Numbers (“ICANN”). In 2014, these applications apparently underwent three separate Community Priority Evaluations (“CPEs”) supposedly carried out by three separate Community Priority Evaluation Panels of the Economist Intelligence Unit (“EIU”) under contract to ICANN. In three *Community Priority Evaluation Reports* dated June 11, 2014,⁴ the EIU found that these three Dot Registry community applications “did not prevail”, owing to the fact that each received just 5 points, well short of the minimum 14 points (out of 16 possible points) needed to be granted “Community Priority” status. Dot Registry has requested an independent review of ICANN’s actions and inactions in connection with the performance and results of these three CPEs under the auspices of a panel of the International Centre for Dispute Resolution (hereinafter, the “ICDR Panel”).⁵
2. In connection with this ICDR proceeding between Dot Registry and ICANN, I have been asked by counsel for Dot Registry to review the record materials, to perform any research or other information gathering I deem necessary, and to form my expert opinion regarding:
 - a. Whether the determinations of the EIU in respect of Dot Registry’s community-based applications for the .INC, .LLC and .LLP gTLDs conformed to the principles and methodology set forth in Module 4 of ICANN’s *gTLD Applicant Guidebook* (the “AGB”),⁶ and

¹ Application 1-880-35979 (the “.INC Application”), attached as Exhibit 4.

² Application 1-880-17627 (the “.LLC Application”), attached as Exhibit 5.

³ Application 1-880-35597 (the “.LLP Application”), attached as Exhibit 6.

⁴ These EIU CPE Reports will be referred to, and attached as, respectively, the “.INC Report” (Exhibit 7), the “.LLC Report” (Exhibit 8) and the “.LLP Report” (Exhibit 9).

⁵ ICDR Case No. 01-14-0001-5004.

⁶ Version 2012-06-04, dated 4 June 2012 (attached as Exhibit 1).

EXPERT REPORT

- b. Whether those determinations are consistent with the EIU's CPE determinations in connection with the .RADIO,⁷ .HOTEL,⁸ .OSAKA⁹ and .ECO¹⁰ community applications.
3. I am aware of the identity of the parties to this ICDR proceeding, their legal counsel and the members of the ICDR Panel. I consider myself to be independent from them, and I do not have a conflict of interest in acting as an expert in this proceeding.
4. I understand that I have an overriding duty to assist the ICDR Panel and to provide independent expert evidence. I also understand that my expert report is to be objective and impartial and that it is to include everything I consider relevant to the opinions I express.
5. A complete list of the documents and related materials I have reviewed in connection with this assignment may be found at **Attachment A**.
6. I have reached the conclusions set forth in this report following my review of the case-related materials that have been provided to me, and other research I have performed, through June 24, 2015. If additional information relevant to my assignment and opinions in this matter becomes available, and if asked to do so by counsel for Dot Registry or the ICDR Panel, I may supplement this report.

⁷ EIU CPE Report on Application 1-1083-39123 dated 11 September 2014 (the ".RADIO Report") and attached as Exhibit 10.

⁸ EIU CPE Report on Application 1-1032-95136 dated 11 June 2014 (the ".HOTEL Report") and attached as Exhibit 11.

⁹ EIU CPE Report on Application 1-901-9391 dated 29 July 2014 (the ".OSAKA Report") and attached as Exhibit 12.

¹⁰ EIU CPE Report on Application 1-912-59314 dated 6 October 2014 (the ".ECO Report") and attached as Exhibit 13.

B. Qualifications and Experience

7. I am a Director with Navigant's Oakland, California office. I have been both a testifying and consulting expert economist for over twenty-five years, specializing in antitrust, economic damages, intellectual property, class actions and other complex business litigation and consulting engagements. My *curriculum vitae* may be found at **Attachment B**.
8. Navigant is compensated on an hourly basis at a rate of \$590 per hour for my time spent on this engagement.
9. I have had earlier experience in connection with ICANN's current gTLD expansion program. In 2011, while serving as a consultant to the Association of National Advertisers, I co-authored a letter to Congress recommending that ICANN be required to fulfill its undertakings under its *Affirmation of Commitments*¹¹ with the U.S. Department of Commerce before embarking on its current gTLD expansion program. Following that, from 2012 through mid-2014, I was an independent, unaffiliated member of the ICANN community, during which time I briefly served as a community volunteer in connection with ICANN's effort to demonstrate, on an *ex post* basis, that its gTLD expansion then currently under way did in fact achieve the stated objectives of increased competition, consumer choice and consumer trust in the Domain Name System (DNS). I discontinued my involvement as a volunteer in 2014 following the U.S. government's announcement of its intention to transfer oversight of ICANN's Domain Name Functions to an appropriate successor.¹²

¹¹ <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>

¹² "NTIA Announces Intent to Transition Key Internet Domain Name Functions", press release dated March 14, 2014 (<http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>).

C. Summary of Conclusions

10. Upon careful study, I conclude that each of Dot Registry’s three community applications—for .INC, .LLC and .LLP—should have prevailed in their respective 2014 CPEs and have been awarded community priority status.
11. In particular, I conclude that Dot Registry’s community applications for the .INC and .LLP strings should each have received scores of **15 points** (out of the maximum possible score of 16 points), one more than the 14 points each needed to be granted community priority status. Dot Registry’s application for the .LLC string should have received the maximum possible score of **16 points**. These three correct scores are in sharp contrast to the identical scores of just 5 points each that the EIU actually awarded to the .INC, .LLC and .LLP applications.
12. The 5-point scores actually received by Dot Registry’s .INC, .LLC and .LLP community applications were the result of what I consider to be the EIU failures to adhere to the AGB. These include:
 - a. Making unauthorized modifications to, or applying incorrect interpretations of, the criteria for CPEs set forth in the AGB before then “finding” that the Dot Registry applications failed to satisfy the EIU versions of the AGB criteria.
 - b. The EIU denial of Dot Registry’s .INC, .LLC and .LLP community applications turned on its interpretations of just a handful of the AGB criteria:
 - i. Under Criterion #1: What is meant by—and needed to satisfy—the AGB requirement for “awareness and recognition of a community among [a community’s] members”, especially in view of the fact that this term is not defined by the AGB?
 - ii. Also under Criterion #1: Does the “Organized” criterion require that there be “at least one” entity mainly dedicated to the community, or “only one”? Also, does the “Organized” criterion’s “mainly dedicated” term require that this entity have no other responsibilities besides those related to the community at issue?
 - iii. Under Criterion #2: What does it mean for a string to “over-reach *substantially* beyond the community [emphasis added]”? (The AGB does not include a definition or metric for this term.)

- iv. Under Criterion #3: What is the meaning of—or limitation posed by—the AGB requirement for “*appropriate* appeal mechanisms”, especially since the AGB states that with respect to “Enforcement”, “scoring of applications against [this criterion] will be done from a *holistic perspective with due regard for the particularities of the community explicitly addressed* [emphasis added]”?
13. The EIU applied markedly different—and less demanding—interpretations of these criteria in connection with its approval of the .RADIO, .HOTEL, .OSAKA and .ECO community applications. Had the EIU applied the same interpretations to Dot Registry’s applications for .INC, .LLC and .LLP, these applications would have prevailed, in my assessment.

D. Overview of ICANN’s Community Priority Evaluation (CPE) Process

14. **Community Priority Evaluation (CPE)** is one of the two methods¹³ established by ICANN to resolve “string contention” – the situation in which two or more applicants have applied for the same gTLD—arising under ICANN’s current program to further expand the number of gTLDs.¹⁴ The important point is that ICANN’s rules give priority to “community applications” over other applications for the same string. If there are multiple applicants for a given gTLD string, ICANN’s rules give first “priority” to any “community applicant” for that string. If a community application for a particular string prevails (i.e., achieves the necessary 14 the points) in its CPE, the applicant must be awarded the string over the other non-community applicants vying for the same string. Otherwise, the string contention would be resolved at auction, with the right to contract for the gTLD awarded to the highest winning bidder.

15. **Community Applications must prevail in their “Community Priority Evaluation” (CPE).** The CPE is to be conducted in accordance with ICANN’s AGB.¹⁵ ICANN contracted with the EIU to conduct the CPEs of community applications. The EIU has published two documents in connection with its selection by ICANN to perform CPEs:
 - a. **Community Priority Evaluation (CPE) Guidelines Prepared by The Economist Intelligence Unit.**¹⁶ This document explains how the EIU will interpret and implement the AGB’s *Community Priority Evaluation Criteria*. There is a clear statement in its first section titled **Interconnection between Community Priority Evaluation (CPE) Guidelines and the Applicant Guidebook (AGB)** that:

¹³ The other is an auction among the contending applicants.

¹⁴ Prior to the current expansion, there were twenty gTLDs: the first seven (.COM, .NET and .ORG , .EDU, .GOV, .INT, .MIL) were created in the 1980s. Anyone could register a second-level domain name under the first three, but special restrictions limited who could register second-level domains under the last four. Since 2000—but prior to the expansion currently under way—thirteen more gTLDs were added: .BIZ, .INFO, .NAME and .PRO (the “unsponsored” gTLDs) plus.AERO, .COOP, .MUSEUM, .ASIA, .CAT, .JOBS, .MOBI, .TEL and .TRAVEL (the “sponsored” TLDs that imposed restrictions on who could register a second-level domain under each).

¹⁵ Specifically, CPE’s are governed by 4.2.3 *Community Priority Evaluation Criteria* in Module 4 of ICANN’s gTLD APPLICANT GUIDEBOOK, version of 2012-06-04 (the “AGB”) pages 4-9 to 4-19 (Exhibit 1).

¹⁶ Version 2.0 dated September 27, 2013 (the “EIU Guidelines”) is attached as Exhibit 2.

The CPE Guidelines are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB. *This document does not modify the AGB framework, nor does it change the intent or standards laid out in the AGB. The Economist Intelligence Unit (EIU) is committed to evaluating each applicant under the criteria outlined in the AGB.* The CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process [emphasis added].¹⁷

Notwithstanding the foregoing, the EIU made material modifications to the AGB framework when applying it to Dot Registry's .INC, .LLC and .LLP applications.¹⁸

- b. **Community Priority Evaluation Panel and its Processes.**¹⁹ Regarding the CPE evaluations undertaken by the EIU pursuant to the EIU's selection by ICANN, this document reiterates on its first page that:

The evaluation process respects the principles of fairness, transparency, avoidance of potential conflicts of interest, and non-discrimination. *Consistency of approach in scoring applications is of particular importance* [emphasis added].

In my opinion, the EIU did not adhere to this commitment.

16. **The Community Priority Evaluation Criteria** are set forth in Module 4 of the AGB.²⁰ There are four principal criteria, each worth a possible maximum of 4 points. As mentioned, an application must receive a total score of at least 14 points in order to prevail.
17. **Criterion #1: Community Establishment** (4 points possible) is comprised of two main sub criteria: **1-A Delineation** (2 points) and **1-B Extension** (2 points).

¹⁷ EIU Guidelines, (Exhibit 2), p. 2.

¹⁸ The resulting modified criteria were not applied during the EIU's review of the .RADIO, .HOTEL, .OSAKA and .ECO community applications. Instead, as I discuss below, these latter applications were effectively given a "pass" regarding these criteria.

¹⁹ This document, attached as Exhibit 3, is dated 7 August 2014, by which point the EIU had already completed 10 of the total of 17 CPEs it has accomplished to date.

²⁰ Section 4.2.3, pp. 4-9 to 4-19 (attached at Exhibit 1).

- a. Under the **1-A Delineation** prong of **Criterion #1: Community Establishment**, the Community's membership definition is evaluated to determine whether the Community is "clearly delineated, organized, and pre-existing." There are three determinants of the application's score under **1-A Delineation**:
- i. Delineation²¹ which in turn requires:
 - 1. A clear and straightforward membership definition, *and*
 - 2. Awareness and recognition of a community (as defined by the applicant) among its members.²²
 - ii. Organization²³ which in turn requires:
 - 1. Documented evidence of community activities, *and*
 - 2. At least one entity mainly dedicated to the community.
 - iii. Pre-existence²⁴ which requires that the community must have been active prior to September 2007.
- b. Under the **1-B Extension** prong of **Criterion #1**, the question to be answered is whether the Community is of "considerable size and longevity." There are two components:

²¹ "Delineation' relates 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." (AGB, 4-11)

²² Despite the critical role played by this requirement in the EIU's review of the .INC, .LLC and .LLP applications, the AGB does not provide any definition or explanation for it. In addition, the EIU effectively waived this requirement for the .RADIO, .HOTEL, .OSAKA and .ECO community applications by "finding" the requisite "awareness and recognition of a community" in their respective community definitions themselves. See Exhibits 10 through 13.

²³ "Organized' implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities." (Ibid.)

²⁴ "Pre-existing' means that a community has been active as such since before the new gTLD policy recommendations were completed in September 2007." (Ibid.)

- i. Size²⁵ which requires that:
 1. The community is of considerable size, *and*
 2. There is awareness and recognition of a community among its members.
- ii. Longevity²⁶ which requires that:
 1. The community was in existence prior to September 2007, *and*
 2. There is awareness and recognition of a community among its members.

18. **Criterion #2: Nexus between Proposed String and Community** (4 points possible) also imposes two principal sub criteria: **2-A Nexus** (3 points possible) and **2-B Uniqueness** (1 point).

- a. Under the **2-A Nexus** prong²⁷ of **Criterion #2**, the essential question is whether the string
 - i. *Matches* the name of the community or is a well-known short-form or abbreviation of the community (3 points), *or*
 - ii. *Identifies* the community without matching the name of the community or “over-reaching substantially beyond the community” (2 points), *or*

²⁵ “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers.” (Ibid.)

²⁶ “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature.” (Ibid., 4-12)

²⁷ “With respect to ‘Nexus’, for a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community...for a score of 2, the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community.” (Ibid., 4-13) The AGB does not define or explain the term “over-reaching substantially”.

- iii. Neither matches nor identifies the community (0 points).
 - b. Under the **2-B Uniqueness** prong of **Criterion #2**, the question is whether the string has any other significant meaning beyond identifying the community. Under the AGB, this question is reached only if the application first achieves a score of 3 or 2 on the **2-A Nexus** prong of **Criterion #2**.²⁸
19. **Criterion #3: Registration Policies** (4 points possible) tests the community application along four separate dimensions related to the registration policies that will be applied by registrars to applicants for second-level domain names.²⁹ There is 1 point possible for each these four elements: **3-A Eligibility**, **3-B Name selection**, **3-C Content and Use** and **3-D Enforcement**.
- a. Because all the three Dot Registry applications met and received 1 point each for each of the first three elements, only the fourth, **3-D Enforcement** is at issue in, and therefore relevant to, this proceeding. The first three are not discussed further in this report.
 - b. Under **3-D Enforcement**, the registration policies (set forth in the community application) that will be applied to prospective registrants of second-level domain names are evaluated to determine whether or not those

Policies include specific enforcement measures (e.g., investigation practices, penalties, take down procedures) constituting a coherent set with *appropriate* appeal mechanisms [emphasis added].³⁰

where

²⁸ According to the AGB, “uniqueness implies a requirement that the string does identify the community, i.e. scores 2 or 3 for ‘Nexus,’ in order to be eligible for a score of 1 for ‘Uniqueness’.” (Ibid., 4-14)

²⁹ If its community applications for .INC, .LLC and .LLP succeed, Dot Registry would eventually enter into agreements with *registrars* who would be the ones to actually register eligible second-level domains under .INC, .LLC or .LLP. The focus of the **3-D Enforcement** sub criterion is the set of rules that Dot Registry’s agreements would impose on these registrars to govern their dealings with would-be registrants of second-level domains under .INC, .LLC or .LLP.

³⁰ Ibid., 4-15. I regard the adjective “appropriate” to be significant, as I explain below.

“Enforcement” means the tools and provisions set out by the registry to prevent and remedy any breaches of the [registration] conditions by registrants [of second-level domains].³¹

20. **Criterion #4: Community Endorsement** (4 points possible) has two components (each worth a maximum of 2 points): **4-A Support** and **4-B Opposition**:

a. Under **4-A Support** (2 points possible), it is determined whether

- i. “Applicant is, or has documented support from, the recognized community institution(s)/member organization(s) or has otherwise documented authority to represent the community (2 points),”³² *or*
- ii. The Applicant has “documented support from at least one group with relevance, but insufficient support for a score of 2 (1 point),”³³ *where*
- iii. “‘Recognized’ means the institution(s) [or] organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community.”³⁴

b. Under **4-B Opposition** (2 points possible), the question is whether

- i. There is no opposition of relevance to the application (2 points), *or*

³¹ Ibid., 4-16. A community application was supposed to set out the applicant’s enforcement and appeals mechanisms in the application section titled: **20(e). Provide a description of the applicant’s intended registration policies in support of the community-based purpose of the applied-for gTLD.**

³² Ibid., 4-17. The AGB adds that “the plurals...for a score of 2 relate to case of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.” Ibid., 4-18.

³³ Ibid.

³⁴ Ibid., 4-17 and 4-18.

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- ii. The application has relevant opposition from one group of non-negligible size (1 point),³⁵ *or*
- iii. The application has relevant opposition from two or more groups of non-negligible size (0 points).

³⁵ As explained below, there was initial opposition from the European Commission (“EC”) to Dot Registry’s application for the .LLP string on the ground that the “LLP” abbreviation is used in the United Kingdom. However, the EIU erroneously attributed that opposition to all three of Dot Registry’s strings (.INC, .LLC and .LLP) rather than just .LLP. The EIU compounded its error by failing to notice that the EC “opposition” to the .LLP string was withdrawn almost immediately after its initial submission (and long before the EIU consideration of the .INC, .LLC and .LLP applications). See Exhibit 21.

E. Examination of the EIU’s Review of Dot Registry’s Community Application for the .INC TLD

21. As set forth in Exhibit 7, the EIU awarded these scores to the Dot Registry community application for the .INC string on the four principal criteria set forth in the AGB:

Criterion #1: Community Establishment	0 points (out of 4)
Criterion #2: Nexus between Proposed String and Community	0 points (out of 4)
Criterion #3: Registration Policies	3 points (out of 4)
<u>Criterion #4: Community Endorsement</u>	<u>2 points (out of 4)</u>
Total	5 points (out of 16)

22. Having awarded it just 5 out of the minimum necessary score of 14 points, the EIU declared that the Dot Registry application for .INC did not prevail:

After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in community priority evaluation.³⁶

23. As I explain in greater detail below, had the EIU correctly adhered to the AGB, it instead would have awarded the following scores:

Criterion #1: Community Establishment	4 points (out of 4)
Criterion #2: Nexus between Proposed String and Community	3 points (out of 4)
Criterion #3: Registration Policies	4 points (out of 4)
<u>Criterion #4: Community Endorsement</u>	<u>4 points (out of 4)</u>
Total	15 points (out of 16)

³⁶ .INC Report (Exhibit 7), p. 1.

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24. Thus, as I explain below, it is my conclusion that the Dot Registry community application for the .INC TLD would have prevailed if the EIU had evaluated it correctly according to the AGB.

E.1. .INC Criterion #1: Community Establishment

25. The *community* that is the subject of the Dot Registry application for the .INC string is the **Community of Registered U.S. Corporations**.³⁷ The AGB specifically provides for such communities under *Criterion 1 Guidelines*:

With respect to “Delineation” and “Extension,” it should be noted that *a community can consist of legal entities* [emphasis added, examples omitted]. All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members.³⁸

26. Importantly, there is nothing in the AGB specifying how a community must “act” (as a community or anything else) nor does the AGB say anything about how community members must “associate themselves”.³⁹
27. This community is clearly delineated. The Community of U.S. Corporations is clearly delineated because membership in it requires the objectively-verifiable satisfaction of explicit, overt requirements. This is because membership requires the successful, active completion of the requirements to register as a corporation with the Secretary State or equivalent authority in one of the U.S. states, territories or the District of Columbia,⁴⁰ coupled with the continued maintenance of such registrations in conformity with the applicable laws and regulations. Thus, the .INC community (alternatively, the

³⁷ New gTLD Application Submitted to ICANN by Dot Registry LLC for the String INC, posted 13 June 2013, Application ID: 1-880-35979 (“.INC application”) (Exhibit 4), p. 2.

³⁸ AGB, (Exhibit 1), p. 4-12.

³⁹ Nevertheless, the EIU specifically faulted the .INC, .LLC and .LLP applications on this very point.

⁴⁰ This is the Secretary of State in 37 of the 50 U.S. states and Puerto Rico. The exceptions are: Alaska (Commissioner of the Department of Commerce, Community and Economic Development); Arizona (Arizona Corporation Commission); District of Columbia (Superintendent of Corporations); Hawaii (Director, Department of Commerce and Consumer Affairs); Maryland (Director, Department of Assessments and Taxation); Massachusetts (Secretary of the Commonwealth); Michigan (Director, Department of Licensing and Regulatory Affairs); New Jersey (State Treasurer); New Mexico (Public Regulation Commission); Pennsylvania (Secretary of the Commonwealth); Utah (Director, Division of Corporations and Commercial Code); Virginia (State Corporation Commission); Wisconsin (Secretary, Department of Financial Institutions); Guam (Director, Department of Revenue and Taxation); Northern Marianas Islands (Registrar of Corporations); and U.S. Virgin Islands (Commissioner, Department of Licensing and Consumer Affairs). For ease of exposition, “Secretary of State” will be used to refer to all of these authorities.

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Community of Limited Liability Companies or the Community of Limited Liability Partnerships) has “a clear and straight-forward membership definition” that should have been given a perfect score for Delineation under both the AGB and the EIU Guidelines.

28. There is at least one entity mainly dedicated to the Community of U.S. Corporations. The offices of the Secretaries of State were established by law in each state or territory to administer such registrations, which are the *sine qua non* of membership in the .INC, LLC and LLP communities. It is apparent that even the *EIU Guidelines* permit the several Secretary of State offices to have additional functions and responsibilities (such as, for example, administering elections). According to the *EIU Guidelines*,

“Organized” implies that there is *at least one entity* mainly dedicated to the community, with documented evidence of community activities [emphasis added].⁴¹

The *EIU Guidelines* immediately add the following:

“Mainly” could imply that *the entity administering the community may have additional roles/functions beyond administering the community*, but one of the key or primary purposes/functions of the entity is to administer a community or a community organization [emphasis added].⁴²

29. Nonetheless, the EIU expressed the following view:

In addition, the offices of the Secretaries of State of US states are not mainly dedicated to the community *as they have other roles/functions* beyond processing *corporate* registrations [emphasis added].⁴³

Interestingly, the EIU used precisely the same wording to dispose of Dot Registry’s .LLC and .LLP community applications, even though the records that LLCs and LLPs file with their respective Secretaries of State obviously are not “corporate” records. This suggests that the Dot Registry community applications for .LLC and .LLP may not have been

⁴¹ Exhibit 2, p. 4.

⁴² Ibid.

⁴³ .INC Report (Exhibit 7), p, 2,

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evaluated as independent applications, as was required, but rather were evaluated as a group with the .INC application.

30. There is documented evidence of community activities. The publicly accessible records of corporate registrations maintained by the Secretaries of State constitute documented evidence of the activities of the Community of U.S. Corporations. Owing to the fact that these entities are the repositories of the documents needed to accomplish the initial registrations of community members as U.S. corporations and thereafter to maintain these registrations, there is considerable documentary evidence of these defining community activities.
31. The Community of U.S. Corporations has been in active existence since long before September 2007. Corporations have been formed in the U.S. since the early 1800s; thus the Community of U.S. Corporations easily satisfies this criterion.
32. The EIU Guidelines specifically provide that a community consisting of legal entities is permitted by the Applicant Guidebook. The *EIU Guidelines* specifically say that a community comprised of legal entities is a viable community under the AGB, “provided the requisite awareness and recognition of the community is at hand among the members.”⁴⁴ As I explain next, the members of the Community of U.S. Corporations possess that awareness and recognition.
33. The individual members of the .INC community have the requisite awareness and recognition of that community.⁴⁵ This is because its members are required to actively complete a number of conscious, overt and externally observable steps to register as corporations in the first place. Thereafter, they must regularly and consciously take additional overt and externally observable actions over time to maintain their memberships (i.e., their corporate registrations) in good standing. Thus, membership in the .INC community must be consciously sought and actively achieved; such membership is neither passive nor inadvertent.
34. Indeed, it is by that decision itself to become a corporation—and to satisfy the many legal steps required to register as a corporation and to maintain that registration—that

⁴⁴ Exhibit 2, p. 6.

⁴⁵ The AGB does not provide any further definition or explanation for “awareness and recognition of a community among its members”.

applicants demonstrate (1) their awareness and recognition of the community of corporations and (2) their intention to formally become members of it.

35. So the EIU got it right when it said that the only requirement for membership in the community of corporations “is formal registration as a corporation with the relevant US state.”⁴⁶ In other words, it is by their individual decisions to register as corporations and their completion of the steps necessary to do so that the members of the community of corporations evidence their awareness and recognition of that community and their intention to become members of that community. This by itself should have been sufficient to award the application the full 4 points.
36. According to the *gTLD Applicant Guidebook*, there are two criteria that must be achieved in order for Dot Registry’s community application for the .INC TLD to prevail on **Criterion #1: Community Establishment**. The EIU was supposed to determine whether or not the Dot Registry application for the .INC string evidenced the requisite **Delineation** (sub criterion **1-A**) and **Extension (1-B)**. In its CPE Report, the EIU concluded that the Dot Registry application failed both of these prongs of **Criterion #1: Community Establishment**. However, for the reasons explained below, I conclude otherwise.

- **.INC 1-A Delineation**

Maximum score	2 points
EIU score	0 points
Correct score	2 points

37. Dot Registry’s score under sub criterion **1-A Delineation** was supposed to have been determined by whether or not the .INC community demonstrated the necessary Delineation,⁴⁷ Organization and Preexistence. According to the EIU’s interpretation of the *Applicant Guidebook*, the Delineation sub criterion in turn required, among other things, an “awareness and recognition of a community (as defined by the applicant) among its

⁴⁶ .INC Report (Exhibit 7), p. 2.

⁴⁷ The AGB unhelpfully uses “Delineation” at two different levels of the analytical framework for a community application: First, “1-A Delineation” is the name given to one of the two principal sub criteria under **Criterion #1: Community Establishment** (the other is “1-B Extension”). Then “Delineation” is used a second time to refer to one of the three “sub sub criteria” *under* “1-A Delineation” (the other two are “Organization” and “Pre-existence”). In this report—in an attempt to minimize the obvious potential for confusion—these different-level usages are distinguished as **1-A Delineation** and Delineation, respectively.

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members” as a necessary condition. If the EIU failed the application on this “awareness and recognition of a community among its members” requirement, it did not matter whether the other requirements for Delineation or the requirements for Organization and Preexistence were satisfied. The application would still lose both of the 2 points available under **1-A Delineation**.

Delineation

38. The EIU agreed that the .INC community shows a clear and straightforward membership, thus satisfying the first prong of the Delineation sub criterion:

While broad, the community is clearly defined, as membership requires formal registration as a corporation with the relevant US state. In addition, corporations must comply with US state law and show proof of best practices in commercial dealings to the relevant state authorities.

39. In my opinion, Dot Registry’s .INC community is in fact *better* defined than are the communities at issue in the .HOTEL, .RADIO, .ECO and .OSAKA applications that prevailed before the EIU. Neither the *Applicant Guidebook* nor the *EIU Guidelines* provide a concrete meaning for “define” and “definition”. If these are taken to mean or include—as I would regard as reasonable—a rule or standard that would enable an external observer to confidently say whether or not a particular entity was a community member, it is my opinion that each of the three Dot Registry communities (.INC, .LLC and .LLP) are *better* defined than the communities in the community applications (.HOTEL, .RADIO, .ECO and .OSAKA) that *did* prevail in EIU CPE Evaluations. For example:
40. The application for .HOTEL clearly stated that “only entities which fulfil [the ISO definition of “Hotel”] are members of the Hotel Community and eligible to register a domain name under .hotel.” Next, it quoted that definition (“A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available”) before declaring

“Therefore only entities which fulfill this definition are members of the Hotel Community and eligible to register a domain name under .hotel [emphasis added].”⁴⁸

⁴⁸ .HOTEL Report (Exhibit 11), p. 2.

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41. But when the applicant then added “hotel marketing organizations”, “associations representing hotels and hotel associations” and “other organizations representing hotels, hotel owners and other solely hotel related organizations” – entities that clearly are *not* hotels under the definition provided by the applicant—the EIU concluded nevertheless that:

This community definition shows a clear and straightforward membership. The community is clearly defined because membership requires entities/associations to fulfill the ISO criterion for what constitutes a hotel [“a hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.”].⁴⁹

The EIU’s conclusion in respect of .HOTEL makes no sense at all. The applicant’s community definition clearly included entities (such as marketing organizations, associations and organizations representing hotels, etc.) that do *not* satisfy the ISO criterion for what constitutes a hotel.

42. The EIU’s logic in scoring the .RADIO community application for Delineation is even more bewildering. First, the EIU approvingly quoted the applicant for the following:

The Radio industry is composed of a huge number of *very diverse* [emphasis added] radio broadcasters: public and private; international and local; commercial or community-oriented; general purpose, or sector-specific; talk or music; big and small. All licensed radio broadcasters are part of the .radio community, and so are the associations, federations and unions they have created... Also included are the radio professionals, those making radio the fundamental communications tool that it is.

However, the Radio industry keeps evolving and today, many stations are not only broadcasting in the traditional sense, but also webcasting and streaming their audio content via the Internet. *Some are not broadcasters in the traditional sense* [emphasis added]: Internet radios are also part of the Radio community, and as such will be acknowledged by the .radio TLD, as will podcasters. In all cases certain minimum standards on streaming or updating schedules will apply.

⁴⁹ Ibid.

The .radio community also comprises the often overlooked amateur radio, which uses radio frequencies for communications to small circles of the public. Licensed radio amateurs and their clubs will also be part of the .radio community.

Finally, the community includes a variety of companies providing specified services or products to the Radio industry.⁵⁰

43. Surprisingly, the EIU nonetheless concluded:

This community definition shows a clear and straightforward membership and is therefore well defined [emphasis added]. Association with, and membership in, the radio community can be verified through licenses held by professional and amateur radio broadcasters; membership and radio -related associations, clubs and unions; internet radios that meet certain minimum standards; radio-related service providers that can be identified through trademarks; and radio industry partners and providers.⁵¹

44. Even more surprising is what the EIU concluded next:

[T]he community as defined in the application has awareness and recognition among its members. This is because the community as defined consists of entities and individuals that are in the radio industry [footnote omitted], *and as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community* [emphasis added].⁵²

45. One is left wondering whether the EIU's "standards" have any constancy at all if the EIU is able to conclude that the .RADIO community is "clearly defined" and that, *solely on the basis of their participation in this "clearly defined industry"*, they have "an awareness and recognition of their inclusion in the industry community."

⁵⁰ .RADIO Report (Exhibit 10), pp. 1-2.

⁵¹ Ibid. p. 2.

⁵² Ibid.

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46. Applying the EIU's logic to the .INC community (a community that the EIU also found to be "clearly defined"), it necessarily follows that members of the .INC community similarly have "an awareness and recognition of their inclusion" in the .INC community.
47. In any event, I conclude that the .INC community does meet the AGB requirement for Delineation because there is ample evidence that:
- a. membership in the .INC community is both clear and straightforward,
 - b. members of the .INC community possess the requisite awareness and recognition of that community, and that
 - c. INCs from different sectors and regions *do* associate themselves with being part of the broader Community of U.S. Corporations.

Organization

48. According to the EIU, "two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities. The *EIU Guidelines* add that:
- "Mainly" could imply that the entity administering the community may have additional roles/functions beyond administering the community, but one of the key or primary purposes/functions of the entity is to administer [the community].⁵³
49. This requirement is satisfied by the individual Secretaries of State of the U.S. states, territories and the District of Columbia. These entities were constitutionally and/or legislatively established to administer the community of corporations within their respective jurisdictions. Moreover, these constitutional and/or legislative provisions clearly identify the community of corporations authorized to conduct business within their jurisdictions.
50. Inexplicably, the EIU decided otherwise. But it did so after first re-writing the requirements in the AGB and ignoring its own *EIU Guidelines*:

⁵³ Exhibit 2, p. 4.

The [.INC] community as defined in the application does not have at least one entity mainly dedicated to the community. Although responsibility for corporate registrations and the regulations pertaining to corporate formation are vested in each individual US state, these government agencies are *fulfilling a function*, rather than *representing* the community. In addition, the offices of the Secretaries of State of US states are not *mainly* dedicated to the community as they have other roles/functions beyond processing corporate registrations [emphases added].⁵⁴

51. According to the *Applicant Guidebook* and the *EIU Guidelines*, the relevant question is whether or not the several Secretaries of State are *dedicated* to the community of corporations, not whether they are merely “fulfilling a function” relevant to the community or whether they only “represent” it. It appears that the EIU first rewrote the requirement for Organization and then found that the .INC community failed to satisfy the EIU’s rewritten version.
52. Moreover, the EIU ignored its own *Guidelines*, which clearly provide that “the entity administering the community may have additional roles/functions beyond administering the community.”⁵⁵ All that is required is that “*one* of the key or primary purposes/functions of the entity is to administer” [emphasis added] the community.⁵⁶
53. Finally, the EIU decided that the .INC community “does not have documented evidence of community activities” for the reason that “there is no entity mainly dedicated to the community as defined in the .INC application.”⁵⁷ This was because, said the EIU, the several Secretaries of State were not *mainly* dedicated to the community of corporations. As discussed above, the EIU ignored its own *EIU Guidelines*, which explicitly allow for the possibility that “the entity administering the community may have additional roles/functions beyond administering the community.”⁵⁸
54. In view of the foregoing, I conclude that there is considerable evidence of community activities. It consists of the overt steps taken, and records created, in connection with the

⁵⁴ .INC Report (Exhibit 7), p. 2.

⁵⁵ Exhibit 2, p. 4.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

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individual decisions made on behalf of would be corporations to register as such under the applicable laws, and thereafter to maintain these registrations.

55. Also in view of the foregoing, I conclude that Dot Registry community application for the .INC string does fulfill both requirements for Organization.

Pre-existence

56. The only requirement for Pre-existence is that the .INC community must have been active prior to September 2007. The EIU concluded that this putative community could not possibly have been active prior to that date because it deemed the .INC community to be an invention of the Dot Registry applicant in order “to obtain a sought-after-after corporate identifier as a gTLD string.”⁵⁹ The EIU “justified” this conclusion on the ground that “corporations would typically not associate themselves with being part of the [.INC] community as defined by the applicant.”⁶⁰ The EIU did not offer any research or other evidence to support this assertion.
57. In my opinion, the EIU is clearly in error. First, it is implicitly imposing a requirement of its own invention—rather than one set forth in the AGB—regarding how putative community members must “associate themselves.” Second, there is ample evidence showing that corporations *do* associate themselves with being part of the community of U.S. corporations writ large. Such evidence is outlined below.
58. In view of the foregoing, it is my opinion that Dot Registry’s .INC application actually satisfies all three of the requirements—Delineation, Organization and Pre-existence—for **1-A Delineation**. The EIU should have awarded it the maximum possible 2 points.

- **.INC 1-B Extension**

Maximum score	2 points
EIU score	0 points
Correct score	2 points

⁵⁹ .INC Report (Exhibit 7), p. 3.

⁶⁰ Ibid.

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59. Next, according to the AGB, Dot Registry’s score under sub criterion **1-B Extension** was supposed to be determined by whether or not the .INC community demonstrated the necessary Size and Longevity. But the EIU held that each of these two sub criteria also required the necessary “awareness and recognition of a community (as defined by the applicant) among its members.”⁶¹ Supposedly unable to detect the requisite “awareness and recognition of a community,” the EIU was unpersuaded by the fact that the .INC community met the other requirements for Size and Longevity. *Essentially, the EIU failed Dot Registry’s applications for .INC, .LLC and .LLP solely because the EIU did not find an “awareness and recognition” of a community among the respective members. To the EIU, this justified its decision to award 0 points under both 1-A Delineation and 1-B Extension in spite of the fact that these applications met all of the other AGB requirements. The loss of all 4 points under Criterion #1: Community Establishment effectively guaranteed that Dot Registry’s applications for .INC, .LLC and .LLP would not prevail.*

Size

60. The EIU conceded that the .INC community is of considerable size because it “is large in terms of [its] number of members [citing figures from the Dot Registry application on the number of new U.S. corporations registered in a single year and the total number currently registered].”⁶²
61. But the EIU discounted this showing on the ground that the .INC community did not have the requisite “awareness and recognition of a community among its members.”

This is because corporations operate in vastly different sectors, which sometimes have little or no association with one another. *Research showed* that firms are typically organized around specific industries, locales, and other criteria not related to the entities [sic] structure as an INC. *Based on the Panel’s research*, there is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook. These incorporated firms would therefore not typically associate themselves with being part of the community as defined by the applicant [emphases added].⁶³

⁶¹ Ibid.

⁶² Ibid. p. 3.

⁶³ .INC Report (Exhibit 7), p. 3 2. It would be very useful—and likely illuminating—to be able to review the EIU’s “research”. See Section J below.

62. I have already addressed this particular misapprehension on the part of the EIU. To repeat, I find nothing in the AGB regarding how community members are supposed to “associate themselves”. And the EIU’s misapprehension is amply refuted by the examples below, which show that corporations do associate among themselves as corporations in general, without necessarily limiting themselves to particular industries, locales or sectors. There is no indication as to what research the EIU conducted.
63. In my opinion, the EIU should have concluded that Dot Registry’s .INC application satisfied both requirements for Size.

Longevity

64. The AGB requires that two conditions be fulfilled in order for Dot Registry’s .INC application to meet the Longevity sub criterion: the .INC community must demonstrate longevity and it must display an awareness and recognition of a community among its members. The EIU decided that the .INC application did neither, based on its previous misapprehensions that (a) the .INC community was “construed” because “corporations would typically not associate themselves with being part of the [.INC] community”, and (b) the putative .INC community “does not have awareness and recognition of a community among its members.”⁶⁴
65. Both of these judgments by the Panel are in error, as has already been explained above. Accordingly, I conclude that Dot Registry’s .INC application satisfied the Longevity requirement under **1-B Extension**.
66. Because the .INC application had also met the conditions for Size, the Panel should have awarded it the maximum possible 2 points for **1-B Extension**.
67. Next, I address the EIU CPE Panel’s general conclusions that Dot Registry’s .INC community failed to fulfill either of the two AGB requirements for Organization under **1-A Delineation**, namely that there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

⁶⁴ .INC Report (Exhibit 7), p. 4.

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68. There are several entities dedicated to the Community of U.S. Corporations. Chief among them is the **National Association of Secretaries of State (NASS)**⁶⁵ that was cited in Dot Registry's application for .INC.

69. According to the NASS website

Founded in 1904, the **National Association of Secretaries of State (NASS)** is the nation's oldest, nonpartisan professional organization for public officials. Members include the 50 states, the District of Columbia, Puerto Rico and American Samoa. NASS serves as a medium for the exchange of information between states and fosters cooperation in the development of public policy. The association has key initiatives in the areas of elections and voting and state business services, as well as issues-oriented Task Forces. NASS Committees cover a range of topics related to the Office of the Secretary of State/Lieutenant Governor...NASS is a 501(c)(3) non-profit that utilizes its support from *corporate affiliates* to help further the association's stated mission by funding daily operations, supporting high-caliber programming at NASS conferences, underwriting NASS research, surveys and other educational materials [emphasis added].⁶⁶

70. The membership of the **NASS** itself is limited to public officials such as Secretaries of State and Lieutenant Governors. According to the NASS website

Most NASS member offices handle the registration of domestic and/or foreign corporations (profit and non-profit). Transactions include filings of incorporation, partnerships (including limited partnerships), articles of merger/consolidation, and articles of dissolution.⁶⁷

71. On the NASS home page, the first two Featured Links are titled "Prevent Business ID Theft" and "Find Business Services". After these, the link to "Get Help with Voting" is listed third. This appears to undermine the EIU CPE Panel's dismissal of Secretaries of State on the ground that

⁶⁵ Website: <http://www.nass.org>

⁶⁶ "About NASS," accessed June 2015, <http://www.nass.org/about-nass/about/>

⁶⁷ <http://www.nass.org/state-business-services/corporate-registration/>

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[T]he offices of the Secretaries of State of US states are not mainly dedicated to the [community of corporations] as they have other roles/functions beyond processing corporate registrations.⁶⁸

72. Importantly, NASS prominently features the “NASS Corporate Affiliate Program”⁶⁹ as “an excellent way to share ideas and build relationships with key state decision makers while supporting the civic mission of [NASS].” These Corporate Affiliates include applicant Dot Registry LLC⁷⁰ and are listed individually at the NASS website.⁷¹ NASS also publishes “Surveys and Reports”⁷² that are primarily for the benefit of corporations and other businesses. These include:

- *Report: State Strategies to Subvert Fraudulent Uniform Commercial Code Filings* (Released 2012; updated April 2014)
- *NASS Summary of Business Entity Information Collected by States* (March 2014)
- *NASS Survey on Administrative Dissolution of Business Entities* (March 2014)
- *White Paper Streamlining for Success: Enhancing Business Transactions with Secretary Of State Offices* (February 2014)
- *Updated NASS Company Formation Task Force Report and Recommendations* (September 2012)
- *NASS White Paper - Developing State Solutions to Business Identity Theft: Assistance, Prevention, and Detection* (January 2012)

⁶⁸ .INC Report (Exhibit 7), p. 2.

⁶⁹ <http://www.nass.org/corppaffiliates/about-corp-affiliate-program/>

⁷⁰ Posted on the NASS website is a white paper authored by Dot Registry LLC titled “ICANN New gTLD Process” (**white-paper-dot-registry-winter 15.pdf**) that was distributed at the NASS Winter 2015 meetings.

⁷¹ <http://www.nass.org/contact/corp-affiliates/>

⁷² These are listed at <http://www.nass.org/reports/surveys-a-reports/>

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- *NASS Business Identity Theft Toolkit & NASS Business Identity Theft Fact Sheet* (July 2011)
- *Updated Report: State Business Entity Laws* (May 2009)

73. Perhaps the EIU CPE Panel's certainty that

[T]here is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook. There is no evidence that these incorporated firms would associate themselves with being part of the community [of U.S. corporations] as defined by the applicant.⁷³

can partially be explained by the fact that corporations are legal, not human, persons. They can and do act only through their officers and their boards of directors. It is through such actions on the part of their officers and their boards, including their interactions with their regulators, that corporations also demonstrate their awareness and recognition of a community.

74. Despite the EIU CPE Panel's apparent certainty that they do not exist, there are many societies, associations and other organizations whose membership and activities coincide with the Community of U.S. Corporations. Importantly, none of these are limited to particular industries or regions of the U.S. They include:

75. **The Business Roundtable.**⁷⁴ According to its website:

Business Roundtable members are the chief executive officers of leading U.S. companies. Collectively, *they represent every sector of the economy* [emphasis added] and bring a unique and important perspective to bear on policy issues that imp act the economy. Roundtable members are thought leaders, advocating for policy solutions that foster U.S. economic growth and competitiveness.

...

Business Roundtable was established in 1972 through the merger of three existing organizations.... These groups founded Business Roundtable on the belief that in a

⁷³ .INC Report (Exhibit 7), p. 2.

⁷⁴ Website: <http://businessroundtable.org/>

pluralistic society, the business sector should play an active and effective role in the formation of public policy.

76. **The National Association of Corporate Directors (NACD).**⁷⁵ According to its website

The National Association of Corporate Directors is the recognized authority focused on advancing exemplary board leadership and establishing leading boardroom practices. Informed by more than 35 years of experience, NACD delivers insights and resources that more than 15,000 corporate director members rely upon to make sound strategic decisions and confidently confront complex business challenges. NACD provides world-class director education programs, national peer exchange forums, and proprietary research to promote director professionalism, ultimately enhancing the economic sustainability of the enterprise and bolstering stakeholder confidence. Fostering collaboration among directors, investors, and governance stakeholders, NACD is shaping the future of board leadership.

77. **The Society of Corporate Secretaries & Governance Professionals.**⁷⁶ According to its website:

Founded in 1946, the Society of Corporate Secretaries and Governance Professionals, Inc. (the "Society") is a non-profit organization (Section 501(c)(6)) comprised principally of corporate secretaries and business executives in governance, ethics and compliance functions at public, private and not-for-profit organizations. Members are responsible for supporting their board of directors and executive management in matters such as board practices, compliance, regulation and legal matters, shareholder relations and subsidiary management.

The Society seeks to be a positive force for responsible corporate governance, providing news, research and "best practice" advice and providing professional development and education through seminars and conferences. The Society is administered by a national staff located in New York City, by members who

⁷⁵ Website: <https://www.nacdonline.org/>

⁷⁶ Website: <http://www.governanceprofessionals.org>

serve on board and standing committees and through the member activities of 21 local chapters.

78. **The Society of Corporate Compliance and Ethics (SCCE).**⁷⁷ According to its website

The Society of Corporate Compliance and Ethics (SCCE) is a 501(c)6 member-based association for regulatory compliance professionals. SCCE was established in 2004 and is headquartered in Minneapolis, MN. We provide training, certification, networking, and other resources to nearly 5,000 members. Our members include compliance officers and staff from a wide range of industries. The need for guidance in meeting regulatory requirements extends to a wide range of sectors, including academics, aerospace, banking, construction, entertainment, government, financial services, food and manufacturing, insurance, and oil, gas and chemicals. SCCE assists compliance managers and corporate boards in all. Our [events](#), [products](#), and [resources](#) aim to educate and update our members with the latest news and resources available. We offer training, certification, and publications committed to improving the quality and acknowledgment of the compliance industry. SCCE helps members protect their companies and advance their careers through services including education, updates on regulatory requirements and enforcement, and access to a rich professional network. SCCE currently has more almost 5,000 members. Plus over 2,500 compliance professionals hold the Corporate Compliance & Ethics Professional (CCEP) certification and over 500 hold the Corporate Compliance & Ethics Professional-International (CCEP-I).

79. In view of the NASS and the other organizations discussed above, it is my opinion that the EIU erred when it concluded that

[T]his application [for .INC by Dot Registry] refers to a “community” construed to obtain a sought-after corporate identifier as a gTLD string, *as these corporations would typically not associate themselves with being part of the community as defined by the applicant* [emphasis added].⁷⁸

80. In particular, the EIU erred in concluding that

⁷⁷ Website: <http://www.corporatecompliance.org>

⁷⁸ .INC Report (Exhibit 7), p. 4.

[C]orporations operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC. Based on the Panel’s research, *there is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook. There is no evidence that these incorporated firms would associate themselves with being part of the community as defined by the applicant* [emphases added].⁷⁹

Again, the AGB requires only that the constituents of a community be *members* of that community. There is no requirement that members of a community “*act*” as a community (whatever that might mean). Moreover, as I have shown above, there is ample evidence of INCs from different regions and economic sectors acting as members of—and associating themselves with—being part of the Community of U.S. Corporations that Dot Registry has defined. Again, it is not clear to me what research was undertaken by the EIU.

E.2. .INC Criterion #2: Nexus between Proposed String and Community

81. In applying this criterion, the EIU CPE Panel was supposed to determine whether or not Dot Registry’s .INC string is commonly known by others as the identification/name of the community of registered U.S. corporations (for a score of 3 points) or whether that .INC string closely describes that community without “over-reaching substantially beyond” the community of registered U.S. corporations.”⁸⁰
82. In its community application, Dot Registry itself disclosed that the .INC string is used outside of the U.S.:

Our research indicates that Inc. as [a] corporate identifier is used in three other jurisdictions (Canada, Australia, and the Philippines) though their formation regulations are different from the United States in their entity designations would not fall within the boundaries of our community definition.⁸¹

⁷⁹ .Ibid., p. 2.

⁸⁰ AGB, p. 4-13 (Exhibit 1)

⁸¹ .INC Application (Exhibit 4), p. 6.

- **.INC 2-A Nexus**

Maximum score	3 points
EIU score	0 points
Correct score	2 points

83. To receive the maximum, score of 3 points for **2-A Nexus**, Dot Registry’s .INC string must match the community of registered US corporations or be a well-known short-form or abbreviation of the community name. To receive a partial score of 2 points for Nexus, the [.INC] string must identify the community where “identify” means that the applied-for [.INC] string should closely describe the community [of registered U.S. corporations] or community members, without over-reaching *substantially* beyond that community.⁸²
84. The EIU CPE Panel faulted the Dot Registry application on the supposed ground that
- The applied-for string (.INC) over-reaches *substantially*, as the string indicates a wider or related community of which the applicant is a part that is not specific to the applicant’s community...While the string identifies the name of the community, it captures a wider geographical remit than the [.INC] community has, as the corporate identifier is used in Canada, Australia and the Philippines. *Therefore, there is a substantial over-reach* between the proposed [.INC] string and [the community of registered U.S. corporations] as defined by the applicant [emphases added].⁸³
85. It is unclear how—and according to what standard or metric—the Panel determined that the usage of “Inc.” in Australia, Canada and the Philippines caused the Dot Registry application (targeting the community of U.S. corporations) amounts to *substantial* overreach.
86. Based on the dictionary meaning of “substantial”,⁸⁴ the use of “Inc.” in Australia, Canada and the Philippines would have to be so “considerable” or “great” in comparison to its use in the U.S. that such usage would “largely” but not “wholly” equal to its usage in the U.S.

⁸² AGB, p. 4-13.

⁸³ .INC Report (Exhibit 7), pp. 4-5.

⁸⁴ According to the *Merriam Webster’s Collegiate Dictionary* (10th ed.), “substantial” is defined as “considerable in quantity: significantly great” (Definition 3 b) or “being largely but not wholly that which is specified” (Definition 5).

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itself. In my opinion, this would require that the economic magnitude/significance of the usage of “Inc.” in these three countries amounts to, at a minimum, significantly more than half of the appropriately-measured economic magnitude of its usage in the U.S. itself.

87. But on closer examination, it is clear that the EIU did not regard it as necessary to provide any quantification of the supposed “over-reach” in order to determine whether or not it was “substantial”. Instead, the EIU decided for itself that *any* over-reach was *ipso facto* “substantial,” without there being any need to measure it.⁸⁵
88. According to the AGB, only if a string “over-reach[es] *substantially* [emphasis added] beyond the community” would a community application be denied any points whatsoever under **2-A Nexus**. Importantly, the AGB does not provide any metric for determining whether any “over-reach” —even assuming it exists at all—is “substantial”. Presumably, if an applied-for string “over-reaches” only slightly, this should result in a score of 2 points. It would not be grounds for giving a community application 0 points under the **2-A Nexus** criterion, sufficient to ensure that the application could not prevail.
89. It appears that the EIU took it upon itself to first re-write the AGB criteria. Where the AGB is concerned only with *substantial* over-reach (something it neither defines nor quantifies), the EIU effectively dropped the *substantial* condition and decided that *any* “over-reach” —no matter how small or even trivial—is *ipso facto substantial*. Here is the criterion as restated by the EIU:
- “Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has.⁸⁶
90. In short, *any* “geographical or thematic remit” that is “wider” than the community—no matter by how little or how much, quantitatively speaking—is deemed to be a “substantial over-reach” by the EIU that justifies awarding the community application at issue 0 points under **2-A Nexus**.
91. It is my considered view that Dot Registry’s .INC string qualifies for at least a score of 2 points under **2-A Nexus** because it is commonly known as the identifying abbreviation for U.S. corporations. To the extent that “Inc.” is also used in Canada, Australia and the Philippines, such usage is not *substantial*, as I demonstrate next.

⁸⁵ EIU Guidelines (Exhibit 2), p. 7.

⁸⁶ EIU Guidelines (Exhibit 2), p. 6.

92. To test whether or not Dot Registry's .INC TLD string *substantially* overreaches, the EIU first should have assembled and analyzed data showing the incidence of the corporate delimiters "Inc." and "Corp." (in comparison to other possible business entity abbreviations such as "Ltd.", "GmbH", AB, SARL, and the like) in countries other than the U.S. Next, it should have determined the economic significance of such usage (for example, by determining the relative number and size of the business entities in Canada, Australia and the Philippines that use "Inc." or "Corp." and then compared that economic significance to the economic significance of U.S. companies that use "Inc." or "Corp.")
93. What the EIU should have done was to identify and analyze representative data on the actual usage of "Inc." in each of Australia and Canada and the Philippines in comparison to its usage in the U.S. But again, it does not appear that the EIU made any effort even to investigate, much less to quantify, the economic significance of the non-U.S. usage.⁸⁷
94. Upon investigation, it does appear that "Inc." is used in Australia, but not to designate corporations. Instead, its use there appears to be restricted to nonprofit associations. In Canada, "Inc." is used along with "Ltd.", "Limited", "Corporation" and "Incorporated". "Inc." also is used in the Philippines along with the abbreviations "Corp." and "Co." (although it also appears that the use of "Co." is reserved for partnerships in the Philippines.) I was unable to find any use of "Inc." (or "Incorporated") in any other country.
95. Next I turned to the actual incidence and economic significance of the usage of "Inc." in each of the three countries that Dot Registry identified. In order to do this, it first was necessary to identify and analyze a large, representative, publicly-available data set showing the distribution and economic significance of all corporate identifiers in each of Australia, Canada, the Philippines and the U.S.
96. I elected to use the *Forbes Global 2000* data set published by Forbes on May 7, 2014.⁸⁸ This data set identified the largest 2,000 of the world's public companies, based on a composite ranking using four metrics measured as of April 1, 2014: sales, profits, assets and market

⁸⁷ As noted above, the EIU appears to have looked no further than the information volunteered by Dot Registry itself.

⁸⁸ <http://www.forbes.com/sites/forbespr/2014/05/07/forbes-11th-annual-global-2000-the-worlds-biggest-public-companies/>. See Exhibit 14.

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value.⁸⁹ I chose to use the fourth metric—market value (alternatively, market capitalization or “market cap”)—as the measure of each company’s relative economic significance.

97. A total of 560 U.S. corporations were included in the *Forbes Global 2000*. These 560 corporations had an aggregate market capitalization of \$18,188.1 trillion dollars.⁹⁰ I adopted this figure as an appropriate proxy for the usage of “Inc.” or “Corp.” in the U.S. Then the relevant question I sought to answer was: What was the corresponding market capitalizations of the *Forbes Global 2000* companies in Australia, Canada and the Philippines that use the identifiers “Inc.” or “Corp.”?
98. It is my opinion that a comparison of these equivalent market capitalization figures for Australia, Canada and the Philippines to the \$18,188.1 trillion market cap of the 560 U.S. corporations in the *Forbes Global 2000* would provide a reasonable basis for determining the extent to which the use of “Inc.” or “Corp.” in these three countries was economically significant. This in turn would be an appropriate basis for determining whether or not Dot Registry’s .INC string *substantially* “over-reaches” the community of U.S. corporations. Here is what I found:
99. A total of 36 Australian business entities were included in the 2014 edition of the *Forbes Global 2000* data set. As I have tabulated in Exhibit 14, these 36 firms had an aggregate market capitalization of \$1,008.7 billion, or 5.5% percent of the aggregate market cap of the U.S. corporations in the same data set. Next, using information available in the *Forbes* data set, I was able to readily determine the identifier used by 29 of these 36 Australian entities: just one used “Inc.”; all of the remaining 28 were officially designated as “Ltd.” or “Limited”.
100. From this, I estimated that 1/29—or just 3.4%—of the Australian aggregate market cap of \$1,008.7 billion (or \$34.8 billion) should be attributed to Australian entities using “Inc.” or “Corp.” This \$34.8 billion amounted to only 0.2% of the aggregate market capitalization of the 560 U.S. Corporations in the *Forbes Global 2000*. (Exhibit 14)
101. Similarly, a total of 57 Canadian businesses were listed in the 2014 *Forbes Global 2000* data set with an aggregate market capitalization of \$1,210.0 billion, or 6.7 percent of the

⁸⁹ Measured in U.S. dollars as of April 1, 2014, after conversion from the local currencies by Forbes.

⁹⁰ All four metrics reported in the *Forbes Global 2000* are measured in U.S. dollars, which greatly facilitated my calculations.

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aggregate market cap of the 560 U.S. corporations in the data set. Again, using other information available in the *Forbes* data, I estimated that 75.5% (i.e., 37/49) of these Canadian corporations were identified by “Inc.” or “Corp.” (The rest used “Ltd.” or “Limited”.)

102. From this, I estimated that 75.5% of the Canadian aggregate market cap of \$1,210.0 billion in the *Forbes* data set, or \$913.7 billion, could be attributed to Canadian entities using “Inc.” or “Corp.”
103. A total of 10 Filipino business entities were included in the 2014 edition of the *Forbes Global 2000* data set. As summarized in Exhibit 14, these 10 firms had an aggregate market capitalization of \$72.2 billion, or 0.4% percent of the aggregate market cap of the 560 U.S. corporations in the *Forbes* data. Then, using other information contained in the *Forbes* data set, I determined that 6 out of 9 or 66.7% used the identifiers “Inc.” or “Corp.”⁹¹
104. This enabled me to estimate that 66.7% of the aggregate \$72.2 billion in market capitalization—or \$48.1 billion—should be attributed to Filipino entities that used the “Inc.” or “Corp.” identifiers.
105. This finally allowed me to answer the question: In comparison to their usage in the U.S., can the usage of “Inc.” or “Corp.” in Australia, Canada and the Philippines *combined* be considered *substantial*? Put differently, is the non-U.S. usage of the .INC string so great that it “over-reaches substantially” beyond the U.S.?
106. As a result of the foregoing analysis (summarized in Exhibit 14), I have concluded that the Dot Registry’s restriction of the .INC string to the U.S. does *not* amount to *substantial* “over-reach”. This is because the best estimate of the aggregate market capitalization of the companies in Australia, Canada and the Philippines using the “Inc.” or “Corp.” identifier in the *Forbes Global 2000* is \$34.8 billion + \$913.7 billion + \$48.1 billion, or a total \$996.6 billion. This is just 5.5%—not a *substantial* fraction⁹²—of the total market capitalization of \$18,188.1 billion of the 560 U.S. corporations in the *Forbes* data.
107. But the data I analyzed do show that there is some—albeit small—usage of “Inc.” outside the U.S. While such usage is not “substantial”, it still means that the .INC string does not

⁹¹ The others used “Co.”, which I understand identifies a general partnership in the Philippines.

⁹² Specifically, it does not even begin to approach—much less exceed—half of the total market capitalization of the U.S. corporations in the *Forbes* data.

identify *only* U.S. corporations. While Dot Registry’s definition of the .INC community cannot be characterized as *excessively* broad, it does result in some “over-reach.” I conclude that this limits it to a score of 2 points on the **2-B Nexus** criterion.

- **.INC 2-B Uniqueness**

Maximum score	1 point
EIU score	0 points
Correct score	1 point

108. According to the EIU

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application *and must also have a score of 2 or 3 on Nexus*.

109. As has already been shown above, the Dot Registry application for the .INC string should have been given a score of 2 on the **2-A Nexus** criterion. Consequently, the only remaining question is whether or not the .INC string has any other significant meaning. The EIU did not address this question on the ground that it had determined (erroneously, in my opinion) that the Dot Registry application for the .INC string should be awarded 0 points for **2-A Nexus**.

110. While I understand that some in the ICANN community have suggested that the .INC string also signifies “Incomplete” or “Incoming”, it also is my understanding that these suggestions appear to have originated with rival, non-community applicants for the .INC string. In any event, it is difficult to imagine that the EIU would have taken these suggestions seriously if it had actually evaluated the Dot Registry application under **2-B Uniqueness** on the merits.

E.3. .INC Criterion #3: Registration Policies

111. In the EIU’s original evaluation, the Dot Registry application for the .INC string was awarded the maximum of 1 point for each of the first three sub criteria (**3-A Eligibility**, **3-B Name Selection** and **3-C Content and Use**) but 0 points for the **3-D Enforcement**, the fourth sub criterion.

112. I concur with the EIU’s analysis and scoring of the Dot Registry application on the **3-A Eligibility**, **3-B Name Selection** and **3-C Content and Use** sub criteria.

- **.INC 3-A Eligibility**

Maximum score	1 point
EIU score	1 point
Correct score	1 point

- **.INC 3-B Name Selection**

Maximum score	1 point
EIU score	1 point
Correct score	1 point

- **.INC 3-C Content and Use**

Maximum score	1 point
EIU score	1 point
Correct score	1 point

113. However, I understand that the EIU faulted the Dot Registry application for the .INC string under the **3-D Enforcement** criterion on the ground that, while it did articulate specific enforcement measures, it did not outline an “appropriate” appeals mechanism. I disagree.

- **.INC 3-D Enforcement**

Maximum score	1 point
EIU score	0 point
Correct score	1 point

114. The EIU found that Dot Registry’s application for the .INC string did not meet the criterion for **3-D Enforcement**, on the ground that—while it did include the requisite enforcement measures—it did not satisfy the AGB requirement for an appeals process:

The [Dot Registry] applicant outlined policies that include specific enforcement measures constituting a coherent set. For example, if a registrant wrongfully applied for and was awarded a second level domain name, the right to hold this domain name will be immediately forfeited. (Comprehensive details are provided in Section 20e of the applicant documentation). However, the application did not outline *an appeals process* [emphasis added]. The

Community Priority Evaluation panel determined that the application satisfies only one of the two conditions to fulfill the requirements for Enforcement.⁹³

115. But in so ruling, the EIU misstated the requirement that the Dot Registry supposedly failed to meet. The AGB requires only “*appropriate* appeals mechanisms”, and states further that:

“Enforcement” means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.

...

With respect to...“Enforcement,” scoring of applications against [this sub criterion] will be done from a *holistic perspective, with due regard for the particularities of the community explicitly addressed*. [Example omitted] More restrictions do not automatically result in a higher score. *The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD* and demonstrate continuing accountability to the community named in the application [emphases added].⁹⁴

116. The community-based purpose of Dot Registry’s .INC TLD is

To build confidence, trust, reliance, and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically serve the Community of Registered Corporations. Through our registry service, we will foster consumer peace of mind with confidence by ensuring that all domains bearing our gTLD string are members of the Registered Community of Corporations. Our verification process will create an unprecedented level of security for online consumers by authenticating each of our registrant’s right to conduct business in the United States.

...

The “.INC” gTLD will be exclusively available to members of the Community of Registered Corporations, as verified through the records of each registrant’s Secretary of State’s office (or other state official where applicable) [emphasis added].⁹⁵

⁹³ .INC Report (Exhibit 7), p. 6.

⁹⁴ AGB (Exhibit 1), p. 4-16.

⁹⁵ .INC Application (Exhibit 4), p. 7.

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117. It is important not to overlook the fact that the fundamental requirement for membership in the .INC community—and the right to register a second-level domain under the .INC TLD—is the possession and maintenance of a valid corporate registration with office of the appropriate Secretary of State. In this regard, the records of the relevant Secretary of State’s office are dispositive: Either the would-be registrant of a second-level .INC domain is validly registered with that Secretary of State, or it is not.
118. The essential point is that in order to register a second level domain under .INC, an applicant must be a duly, currently registered Corporation as determined by the relevant Secretary of State. That determination would *not* be Dot Registry’s or its registrars’ to make; their role would be limited to verifying that the applicant has secured the necessary registration from the relevant Secretary of State or equivalent authority and that that registration is current.
119. Dot Registry will verify that the registrant of a second-level domain is a registered U.S. corporation at the time of its registration.⁹⁶ Thereafter a registrant’s “active” status would be verified on an annual basis with the relevant Secretary of State, as detailed in the Dot Registry application for .INC:
- Dot Registry or its designated agent will annually verify each registrant’s community status. Verification will occur in a process similar to the original registration process for each registrant, in which the registrars will verify each registrant’s “Active” status with the applicable state authority. Each registrar will evaluate whether its registrants can still be considered “Active” members of the Community of Registered Corporations...⁹⁷
120. But because only duly registered corporations would be allowed to register second level domains under .INC, and because the several Secretaries of State are the ultimate arbiters of whether or not a putative corporation is indeed duly registered, it would not be within the authority of Dot Registry to provide a mechanism by which a would-be applicant could “appeal” a determination by a Secretary of State to Dot Registry or its registrars. The latter must respect the Secretary of State’s determination.

⁹⁶ .INC Application (Exhibit 4) at p. 7.

⁹⁷ Ibid.

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121. I also note that the Dot Registry application for the .INC string does provide opportunities for redress on issues that would not raise the possibility that Dot Registry or its registrars were arrogating the authority of the relevant Secretary of State. For example, Dot Registry's application did provide for a "quasi appeals process" in the event it was unable to verify an applicant's eligibility for the .INC string with the relevant Secretary of State. This is because the application made explicit allowance for a 30 day probationary period to allow registrants to directly address the relevant Secretary of State.

Any registrant found to be "Inactive," or [ceases to be registered with the State, is dissolved and/or forfeits the domain for any reason, or is administratively dissolved by the State] will be issued a probationary warning by their registrar, allowing for the registrant to restore its active status or resolve its dissolution with the applicable Secretary of State's office. If the registrant is unable to restore itself to "Active" status within the defined 30 day probationary period, their previously assigned ".INC" will be forfeited....

[A]ny entity acquiring a ".INC" domain through the processes described in this guideline that does not meet the registration criteria and wishes to maintain the awarded domain will be allowed a 30 day grace period after the renewal verification process to correct any non-compliance issues in order to continue operating their acquired domain.⁹⁸

122. Dot Registry has also committed to implementation of the full panoply of ICANN's registrant rights protection mechanisms, including but not limited to:

Support for and interaction with the Trademark Clearinghouse ("Clearinghouse"); use of the Trademark Claims Service; segmented Sunrise Periods allowing for the owners of trademarks listed in the Clearinghouse to register domain names that consist of an identical match of their listed trademarks; subsequent Sunrise Periods to give trademark owners or registrants that own the rights to a particular name the ability to block the use of such name; [and] stringent takedown policies in order to properly operate the registry.⁹⁹

Dot Registry will provide all ICANN required rights mechanisms, including Trademark Claims Service, Trademark Post-Delegation Dispute Resolution

⁹⁸ Ibid., pp. 17-18.

⁹⁹ Ibid., p. 18.

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Procedure (PDDRP), Registration Restriction Dispute Resolute Procedure (RRDRP), UDRP, URS and Sunrise service.¹⁰⁰

123. If the EIU had actually taken the “holistic perspective” called for by the AGB, it would have given “due regard for the particularities” of the .INC community discussed above, and awarded Dot Registry’s .INC application the maximum possible 1 point available under **3-D Enforcement**.

124. At the same time, it should be noticed how vague, unformed or merely aspirational were the provisions for an “appropriate appeals mechanism” for certain community applications (.RADIO, .HOTEL, .ECO, .GAY and .ART submitted by Dadotart) that nonetheless were awarded the maximum possible score for **3-D Enforcement** by the EIU.¹⁰¹

125. The .RADIO application provided only that

An appeals process is available for all administrative measures taken in the framework of the enforcement program. The first instance of the appeals process is managed by the .radio Registry, while appeals are heard by an independent alternative dispute resolution provider.¹⁰²

This is the *entirety* of the provision for an appropriate appeals process in the .RADIO community application.

126. The EIU concluded that the .ART (Dadotart) community application satisfied the requirement for an appeals mechanism on the basis of this provision (again, quoted in its entirety):

An appeals process will be available for all administrative measures taken in the framework of the enforcement program. The first instance of the appeals process will be managed by the registry service provider. The PAB [“Policy Advisory Board”] set up by Dadotart provides the second and last instance of an appeals process by itself or entrusted to an alternative

¹⁰⁰ .INC Application (Exhibit 4) at p. 23.

¹⁰¹ .RADIO application (Exhibit 16), .HOTEL application (Exhibit 17), .ECO application (Exhibit 19), .GAY application (Exhibit 20), .ART application (Exhibit 18).

¹⁰² .RADIO application (Exhibit 16), p. 24.

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dispute resolution provider the charter of the appeals process will be promulgated by the PAB.¹⁰³

127. And interestingly, the words “appeal” or “appeals” do not appear *at all* in the .HOTEL and .ECO community applications. Yet the EIU awarded each the maximum possible 1 point score for **3-D Enforcement**, saying

There is also an appeals mechanism, whereby a registrant has the right to request a review of a decision to revoke its right to hold a domain name.¹⁰⁴

and

There is also an appeals mechanism, whereby a registrant has the right to seek the opinion of an independent arbiter approved by the registry.¹⁰⁵

E.4. .INC Criterion #4: Community Endorsement

128. This section of my report relates to the .INC community as identified and defined in the Dot Registry application.

- **.INC 4-A Support**

Maximum score	2 points
EIU score	1 point
Correct score	2 points

129. According to its CPE Report, the EIU determined that the Dot Registry application only “partially” met the criterion for **4-A Support**, in that it had documented support from at least one group with relevance to the .INC community. But the EIU did not award the maximum possible score of 2 points because the Dot Registry application did not have “documented support” from the “recognized” community institution(s), where

¹⁰³ .ART (Dadotart) application (Exhibit 18).

¹⁰⁴ .HOTEL report (Exhibit 11), p. 5.

¹⁰⁵ .ECO report (Exhibit 13), p. 8.

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“recognized” means the institution(s) that are clearly recognized by the community members as representative of the community.

130. I am baffled by the EIU’s “determination”. First of all, there can be no question that the Secretaries of State for the several U.S. states and the National Association of Secretaries of State (NASS) *are* recognized by U.S. corporations as representing the community of corporations. Nevertheless, the EIU once again invoked the notion that there is a meaningful distinction between government entities (in particular, the respective Secretaries of State of U.S. states) “fulfilling a function” as opposed to “representing the community” and, specifically, that the Secretaries of State of U.S. states

are not the recognized community institutions...as these government agencies are fulfilling a function, rather than representing the community.¹⁰⁶

One cannot help but notice that, in the context of the .OSAKA community application,¹⁰⁷ the EIU apparently was not troubled by the fact that the Osaka Prefectural government (the “entity mainly dedicated to the community”) was merely fulfilling its function. The EIU’s unwillingness to afford the same deference to US Secretaries of State or to their National Association is strikingly inconsistent.

131. It also is important to underscore the fact that the several Secretaries of State are either elected or appointed governmental officers. As such, they lack the freedom available to a non-governmental body or private organization to simply favor or even endorse one applicant for a particular string over rival applicants. But it must not be forgotten that:
- a. Several state-level Secretaries of State as well as NASS clearly expressed the position that the .INC TLD should be awarded *only* to a community applicant,
 - b. These same Secretaries of State and NASS were aware of the Dot Registry community application for the .INC string,
 - c. The Dot Registry application was the *only* community application for that string, and

¹⁰⁶ .INC Report (Exhibit 7), p. 2.

¹⁰⁷ See the .OSAKA Report (Exhibit 12).

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- d. These Secretaries of State and NASS communicated with ICANN at the request of Dot Registry. This constellation of facts strongly suggests that the several Secretaries of State and NASS—while not permitted to officially endorse it—nevertheless are in support of the Dot Registry application for the .INC string.¹⁰⁸

132. Next I address the several complaints referenced in the EIU’s CPE report, namely that “[T]he viewpoints expressed in these letters were not consistent across states” and that

- a. Dot Registry “was not the recognized [.INC] community institution.”
- b. Nor did Dot Registry “have documented authority to represent the [.INC] community.”
- c. Nor did Dot Registry have “documented support from a majority of the recognized community institutions.”

133. The EIU has acknowledged that it did receive letters of support from “a number” of Secretaries of State:

The application included letters from a number of Secretaries of State of US states, which were considered to constitute support from groups with relevance, as each Secretary of State has responsibility for corporate registrations and the regulations pertaining to corporate formation in its jurisdiction.¹⁰⁹

But the EIU summarily dismissed these letters on the ground that

These entities are not the recognized community institution(s)/member organization(s), *as these government agencies are fulfilling a function, rather than representing the community* [emphasis added].¹¹⁰

The viewpoints expressed in these letters were not consistent across states. While several US states expressed clear support for the applicant during the

¹⁰⁸ I understand that NASS was a joint requestor on Dot Registry’s Reconsideration Requests.

¹⁰⁹ .INC Report (Exhibit 7), p. 7.

¹¹⁰ Again, this is an irrelevant, meaningless distinction that is nowhere to be found in the AGB that I have already addressed above.

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Letters of Support verification process, others either provided qualified support, refrained from endorsing one particular applicant over another, or did not respond to the verification request.¹¹¹

But I am not aware of any evidence that the EIU reached out to *every* explicit or implicit member of the .RADIO, .HOTEL, .OSAKA and .ECO communities or that it received an expression of “clear support” from *each* such member. Therefore, this appears to be another example of the EIU’s uneven treatment of the Dot Registry community applications, compared to the treatment the EIU accorded to the .RADIO, .HOTEL, .OSAKA and .ECO community applications.

134. In arguing that the EIU should have awarded the maximum possible 2 points to the .INC application for sub criterion **4-A: Support**, I both rely on and distinguish this passage from the AGB’s Criterion 4 Guidelines:

With respect to ‘Support,’ it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations... Also with respect to ‘Support,’ the plurals and brackets for a score of 2 relate to cases of multiple institutions/organizations. In such cases there must be documented support from institution/organizations representing a majority of the overall community addressed in order to score 2.¹¹²

135. I would argue first that the National Association of Secretaries of State is “the only national Association relevant to” the .INC community and that the .INC application has documented support from NASS. Second, in view of the fact that measured by the value of the registered corporations, the Delaware Secretary of State arguably represents the majority of U.S. corporations. His support for the Dot Registry .INC application can therefore be seen as evidence of majority support. This conclusion is further supported by the several additional letters of support offered by other Secretaries of State for the Dot Registry .INC application.

¹¹¹ .INC Report (Exhibit 7), p. 7.

¹¹² AGB (Exhibit 1), p. 4-18.

136. Since the Dot Registry application for the .INC TLD has the support of both NASS and the Delaware Secretary of State, the EIU should have awarded it the maximum 2 points for **4-A: Support**.

- **.INC 4-B Opposition**

Maximum score	2 points
EIU score	1 point
Correct score	2 points

137. According to its CPE Report, the EIU determined that the Dot Registry application only “partially” met the criterion for Opposition “as the application received relevant opposition from one group of non-negligible size:”

The [.INC] application received several letters of opposition, *one of which was determined to be relevant opposition* from an organization of non-negligible size. This opposition was from a community that was not identified in the application *but which has an association to the applied-for string*. Opposition was on the grounds that limiting registration to US registered *corporations* only would unfairly exclude non-US businesses [emphases added].¹¹³

138. I have recently been able to review email correspondence¹¹⁴ between ICANN and the EIU regarding this particular “finding”. That correspondence confirms that the European Commission (“EC”) was the source of the supposedly “relevant opposition” that was submitted as an “Application Comment”¹¹⁵ on behalf of the EC on 4 March 2014. However, the only specific concern raised in that EC comment was in respect of Dot Registry’s separate community application for the .LLP string, not the .INC application. *There never was any relevant “opposition” to Dot Registry’s .INC application.*

139. In any event, just three weeks later, the EC submitted a follow-up “Application Comment”¹¹⁶ dated 25 March 2014 stating that its concern regarding Dot Registry’s .LLP application had been resolved and that the EC was withdrawing its previous “Comment”.

¹¹³ .INC Report (Exhibit 7), p. 7.

¹¹⁴ ICANN_DR-00215-217 and attached as Exhibit 21.

¹¹⁵ Ibid., Comment ID: tjwufnw.

¹¹⁶ Ibid., Comment ID: 7s164151.

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Notably, in this follow-up “Application Comment”, the EC specifically asked “that ICANN forward a copy of this communication to the Economist Intelligence Unit.”

140. Based on the email correspondence I reviewed, the EIU dismissed its lapse on the ground that it cost Dot Registry’s .INC application only 1 point at most and “this would have had no material impact on the final outcome of the [.INC] evaluation.”¹¹⁷
141. But in light of this recently produced email correspondence between ICANN and the EIU, it is clear that *there actually never was any relevant opposition at all* to Dot Registry’s .INC community application. The EIU should have awarded it the maximum score of 2 points that were possible under the **4-B Opposition** criterion.¹¹⁸

E.5. .INC Conclusion

142. It is my conclusion that, had the EIU CPE Panel correctly followed the AGB, and if it had accorded Dot Registry’s .INC application the same the same degree of deference it appears to have employed in connection with the .HOTEL, .RADIO and .OSAKA TLD applications, it would have awarded Dot Registry’s community application for the .INC string 15 points, one more than the 14 point minimum it needed to prevail.

¹¹⁷ ICANN_DR-00215-217 and attached as Exhibit 21.

¹¹⁸ While the EIU appears to have tried to minimize its error as “not material”, it actually should be seen as troubling: First, the EC opposition was *never* about Dot Registry’s .INC application. That should immediately have been apparent to both the EIU Panel and ICANN. Therefore, it is immaterial whether or not both the original EU “opposition” (to the .LLP application) and the EC’s subsequent withdrawal of that “opposition” were communicated to ICANN during the 14-day window that began on 19 February 2014. The more troubling fact is that ICANN and the EIU either never noticed—or did not care—that (1) the supposed EU “opposition” was to an entirely different string (.LLP), and (2) that opposition was withdrawn within three weeks of the date it was communicated to ICANN and nearly 80 days before the date of the EIU CPE Report on the .INC string.

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F. Summary of the EIU’s Review of Dot Registry’s Community Applications for the .LLC and .LLP TLDs

143. In its *Community Priority Evaluation Reports* (“EIU CPE Reports”) dated 11 June 2014 for applicant Dot Registry’s .LLC¹¹⁹ and .LLP¹²⁰ strings, the EIU CPE Panel awarded scores that were identical to those given Dot Registry’s .INC application:

Criterion #1: Community Establishment	0 points (out of 4)
Criterion #2: Nexus between Proposed String and Community	0 points (out of 4)
Criterion #3: Registration Policies	3 points (out of 4)
<u>Criterion #4: Community Endorsement</u>	<u>2 points (out of 4)</u>
Total	5 points (out of 16)

144. Having awarded each of the .LLC and .LLP applications just 5 out of the minimum necessary score of 14 points, the Panel declared that the Dot Registry applications for .LLC and .LLP did not prevail.

145. For the same reasons set forth above in connection with Dot Registry’s application for the .INC TLD, had the Panel correctly adhered to ICANN’s AGB and its own *EIU Guidelines*, and had the Panel accorded the .LLC and .LLP applications the same degree of deference it gave to the .HOTEL, .RADIO, .ECO and .OSAKA TLD applications, it would have awarded both the .LLC and the .LLP application more than the 14 points needed to prevail.

F.1. .LLC and .LLP: Criterion #1: Community Establishment

146. The *community* that is the subject of the Dot Registry application for the .LLC string is defined as businesses registered as Limited Liability Companies within the United States or its territories.¹²¹ The *community* that is the subject of the Dot Registry application for the .LLP string is defined as businesses registered as Limited Liability Partnerships within the United States or its territories.¹²²

¹¹⁹ Dated 11 June 2014 for Application ID 1-880-17627 (Exhibit 8).

¹²⁰ Dated 11 June 2014 for Application ID 1-880-35508 (Exhibit 9).

¹²¹ .LLC Application (Exhibit 5), p. 12.

¹²² .LLP Application (Exhibit 6), p. 12.

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147. As noted above with respect to the .INC application, the AGB specifically provides for such communities under Criterion 1 Guidelines:

With respect to “Delineation” and “Extension,” it should be noted that *a community can consist of legal entities* [emphasis added, examples omitted]. All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members.¹²³

148. These communities are clearly delineated. The Community of U.S. Limited Liability Corporations and the Community of U.S. Limited Liability Partnerships are both clearly delineated because membership in each requires the objectively-verifiable satisfaction of explicit, overt requirements. This is because membership requires successful, active completion of the requirements to register as an LLC or LLP with the Secretary State or equivalent authority in one of the U.S. states, territories or the District of Columbia,¹²⁴ coupled with the continued maintenance of such registrations in conformity with applicable laws and regulations. I conclude that the .LLC and .LLP communities have “a clear and straight-forward membership definition” that should have been scored high for Delineation under both the AGB and the EIU Guidelines.
149. There is at least one entity mainly dedicated to the LLC and LLP communities. The offices of the Secretaries of State were established by law in each state or territory to administer the LLC and LLP business registrations, which are the *sine qua non* of membership in these communities. To respond to the EIU’s apparent misunderstanding, the *EIU Guidelines* do permit the offices of the Secretaries of State offices to have additional functions and responsibilities, such as, for example, administering elections. It cannot be disputed that administering their respective jurisdictions’ LLC and LLP communities is a key purpose and function of these offices.
150. There is documented evidence of community activities. The publicly accessible records of LLC and LLP registrations maintained by the Secretaries of State constitute documented evidence of the activities of the LLC and LLP communities. Owing to the fact that these entities are the repositories of the documents needed to accomplish the initial registrations of community members as U.S. LLCs or LLPs and thereafter to

¹²³ AGB (Exhibit 1), p. 4-12.

¹²⁴ See footnote 40 above.

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maintain these registrations, there is considerable documentary evidence of these defining community activities.

151. Both the .LLC community and the .LLP community have been in active existence since before September 2007. I understand that the first U.S. LLC was formed under Wyoming law in the late 1970s. In 1980, the U.S. Internal Revenue Service issued a letter ruling accepting LLCs, and by 1996, nearly every U.S. state had an LLC statute. LLPs have been common in the U.S. since the 1990s, and by 1996, over 40 U.S. states had adopted LLP statutes. In light of the foregoing, I conclude that both the .LLC community and the .LLP community were in existence before 2007.
152. The EIU Guidelines provide that a community consisting of legal entities is permitted by the AGB. The *EIU Guidelines* specifically say that a community comprised of legal entities is a viable community under the AGB, “provided the requisite awareness and recognition of the community is at hand among the members.” For the reasons given in the next paragraph, I conclude that the members, respectively, of the LLC Community and of the LLP Community have the requisite awareness and recognition.
153. The individual members of both the .LLC community and the .LLP community have the requisite awareness and recognition of their communities.¹²⁵ This is because their respective members must consciously make a choice as to which community they want to be a member of and then actively complete a number of overt and externally observable and verifiable steps in order to register themselves as either limited liability companies or limited liability partnerships in the first place. Thereafter, they must regularly and consciously take additional overt and externally observable actions to maintain their memberships in either the .LLC community or the .LLP community in good standing. Thus, membership in either the .LLC community or the .LLP community must be consciously sought and actively achieved; such membership is neither passive nor inadvertent and membership in the community is readily verifiable.¹²⁶

¹²⁵ Again, the AGB does not provide any definition or explanation for “awareness and recognition of a community among its members”.

¹²⁶ The EIU agreed that both the .LLC community and the LLP community show a clear and straightforward membership. By the standard implicit in the EIU’s approval of the .RADIO, .HOTEL and .OSAKA community applications, that fact—combined with the fact that active, legal steps were needed in order to become members of both these communities—should have been sufficient to demonstrate that the members of the .LLC and .LLP communities have the requisite awareness and recognition of a community among their respective members.

154. The Dot Registry applications for the .LLC and .LLP TLDs satisfy the requirements under **Criterion #1: Community Establishment** because they evidence the requisite **Delineation** (sub criterion 1-A) and **Extension (1-B)**. Although the EIU concluded that each of the .LLC and the .LLP applications failed both of these prongs of **Criterion #1: Community Establishment**, I conclude otherwise, for the reasons explained below.

- **.LLC and .LLP: 1-A Delineation**

Maximum score	2 points
EIU score	0 points
Correct score	2 points

Delineation

155. The Panel agreed that both the .LLC and the .LLP communities show a clear and straightforward membership. Thus each application satisfies the first prong of the Delineation sub criterion. The EIU agrees.

While broad, the [.LLC] community is clearly defined, as membership requires formal registration as a limited liability company with the relevant US state. In addition, limited liability companies must comply with US state law and show proof of best practice[s] in commercial dealings to the relevant state authorities.¹²⁷

Also, according to the EIU:

While broad, the [.LLP] community is clearly defined, as membership requires formal registration as a limited liability partnership with the relevant US state (LLPs operate in about 40 US states). In addition, limited liability partnerships must comply with US state law and show proof of best practice[s] in commercial dealings to the relevant state authorities.¹²⁸

156. In my opinion, the Panel was in error when it concluded that LLCs and LLPs

¹²⁷ .LLC Report (Exhibit 8), p. 2.

¹²⁸ .LLP Report (Exhibit 9), p. 2.

operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an [LLC or LLP]. Based on the Panel’s research, *there is no evidence of LLCs [or LLPs] from different sectors acting as a community as defined by the Applicant Guidebook. There is no evidence that these limited liability companies [or limited liability partnerships] would associate themselves with being part of the community as defined by the applicant* [emphases added].¹²⁹

157. It is by the actions they take *to become and remain* LLCs and LLPs that these entities associate themselves with being part of these communities as defined by Dot Registry. Again, the *Applicant Guidebook* requires only that the constituents of a community be *members* of that community. There is no requirement that members of a community must “*act*” as a community, whatever that might mean. Businesses make conscious decisions—legally, commercially and in respect of their tax liabilities—as to why they choose to organize as an LLC, LLP or INC. Through this choice of legal organization they make certain representations to the public-at-large and to other businesses regarding their business, tax status and regulatory obligations. Largely, the drivers that lead a business in any one industry sector to choose a particular legal form will be the same as those for a business in another business sector. In my opinion, there is, therefore, no doubt that there are distinct, identifiable and relevant communities associated with the LLC, LLP and INC corporate identifiers.
158. As I discussed above in connection with Dot Registry’s .INC community, both the .LLC and the .LLP communities actually are *better* defined than were the communities at issue in the .HOTEL, .RADIO, .ECO and .OSAKA applications that prevailed before the EIU. As I noted earlier, the AGB and the *EIU Guidelines* do not provide a concrete meaning for “define” and “definition”. If these are taken to mean or include a rule or standard that would enable an external observer to confidently say whether or not a particular entity was a community member, it is my opinion that the .LLC and .LLP communities are *better* defined than the communities in the community applications (.HOTEL, .RADIO, .ECO and .OSAKA) that prevailed in the EIU’s evaluations.
159. Because the evidence shows that

¹²⁹ .LLC Report (Exhibit 8) and .LLP Report (Exhibit 9), respectively, p. 2.

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- membership in the .LLC and .LLP communities is both clear and straightforward,
- members of the .LLC and .LLP communities possess the requisite awareness and recognition of their respective communities, and even that
- both LLCs and LLPs from different sectors and regions of the U.S. *do* associate themselves with being part of, respectively, the broader community of U.S. limited liability companies or the broader community of U.S. limited liability partnerships,

I conclude that the both the .LLC community and the .LLP community meet the AGB requirement for Delineation.

Organization

160. For the same reasons given above at paragraphs 48 through 55 regarding the EIU’s scoring of Dot Registry’s .INC community application, I conclude that Dot Registry’s .LLC and .LLP community applications also fully meet the AGB requirements for Organization.
161. As is the case with the .INC community, this requirement is satisfied by the individual Secretaries of State of the U.S. states, territories and the District of Columbia. These entities were constitutionally and/or legislatively established to administer the LLC and LLP communities within their respective jurisdictions. Moreover, the records of the Secretaries of State of the U.S. states, territories and the District of Columbia clearly identify the community of LLCs and the community of LLPs authorized to conduct business within their respective jurisdictions.
162. As it did in respect of the .INC community application, the EIU decided that neither the .LLC nor the .LLP applications met the AGB requirements for Organization. But to get to this conclusion, the Panel first needed to rewrite the relevant AGB requirements:

The [.LLC or .LLP] community as defined in the application does not have at least one entity mainly dedicated to the community. Although responsibility for *corporate* [sic] registrations and the regulations pertaining to [sic] *corporate* formation are vested in each individual US state, these government agencies are *fulfilling a function*, rather than *representing* the community. In addition, the

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offices of the secretaries of State of US states are not *mainly* dedicated to the community as they have other roles/functions beyond processing corporate registrations [emphases added].¹³⁰

163. As a preliminary matter, LLCs and LLPs are not corporations, and the appearance in the quotation above of the “corporate” adjective strongly suggests that the Panel merely cut and pasted the conclusion quoted above from its .INC CPE Report. In other words, it does not appear that the Panel actually carried out any specific research relevant to the .LLC or .LLP communities to reach this conclusion.
164. But as I have noted above in connection with Dot Registry’s .INC application, the proper question under the AGB is whether or not the several Secretaries of State are dedicated to the .LLC and .LLP communities, not whether they are merely “fulfilling a function” relevant to these communities or whether they merely “represent” them. I conclude that the Panel was able to “find” that the .LLC and .LLP community applications failed to satisfy the AGB requirement for Organization only after effectively rewriting that requirement.
165. I am equally perplexed by the Panel’s supposed “finding” in respect of both the .LLC and .LLP applications that the Secretaries of State “are not *mainly* dedicated to the [.LLC and .LLP communities] as they have other roles/functions [emphasis added].” As I have pointed out earlier, the Panel ignored what the AGB and its own *Guidelines* have to say regarding Organization. The AGB explains that:

“Organized” implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.¹³¹

The EIU’s own *Guidelines* add this further explanation:

*“Mainly” could imply that the entity administering the community may have additional roles/functions beyond administering the community, but one of the key or primary purposes/functions of the entity is to administer a community or a community organization [emphasis added].*¹³²

¹³⁰ Ibid.

¹³¹ AGB (Exhibit 1), p. 4-11.

¹³² EIU Guidelines (Exhibit 2), p. 4.

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166. There is sufficient documented evidence of .LLC and .LLP community activities. It consists of the overt steps taken and records created in connection with the individual decisions made on behalf of would be LLCs and LLPs to register as such under the applicable laws, and thereafter to maintain these registrations in good standing.
167. Yet the Panel’s sole justification for its identical findings that the .LLC and .LLP communities “[do] not have documented evidence of community activities” was that “there is no entity *mainly* dedicated to the community” in the .LLC and .LLP applications.¹³³ Because there is no such requirement in either the AGB or the *EIU Guidelines*, I conclude that the EIU had no basis for concluding that those applications did not fulfill the AGB conditions for Organization.
168. The previously discussed **National Association of Secretaries of State (NASS)**¹³⁴ also constitutes an entity mainly dedicated to the .LLC and .LLP communities. According to the NASS website
- Most NASS member offices handle the registration of domestic and/or foreign corporations (profit and non-profit). Transactions include filings of incorporation, *partnerships (including limited partnerships)*, articles of merger/consolidation, and articles of dissolution [emphasis added].¹³⁵
169. There are at least three LLCs listed among the NASS Corporate Affiliates.¹³⁶ The first two Featured Links listed on the NASS home page (“Prevent Business ID Theft” and “Find Business Services”) and NASS “Surveys and Reports”¹³⁷ are relevant to LLCs and LLPs. As previously noted, these include:

Report: State Strategies to Subvert Fraudulent Uniform Commercial Code Filings
(Released 2012; updated April 2014)

NASS Summary of Business Entity Information Collected by States (March 2014)

¹³³ .LLC Report (Exhibit 8), p. 3 and .LLP Report (Exhibit 9), p. 2

¹³⁴ Website: <http://www.nass.org>.

¹³⁵ <http://www.nass.org/state-business-services/corporate-registration/>.

¹³⁶ <http://www.nass.org/contact/corp-affiliates/>.

¹³⁷ These are listed at <http://www.nass.org/reports/surveys-a-reports/>.

NASS Survey on Administrative Dissolution of Business Entities (March 2014)

White Paper Streamlining for Success: Enhancing Business Transactions with Secretary Of State Offices (February 2014)

Updated NASS Company Formation Task Force Report and Recommendations (September 2012)

NASS White Paper - Developing State Solutions to Business Identity Theft: Assistance, Prevention, and Detection (January 2012)

NASS Business Identity Theft Toolkit & NASS Business Identity Theft Fact Sheet (July 2011)

Updated Report: State Business Entity Laws (May 2009)

170. In view of the foregoing, I conclude that Dot Registry community applications for the .LLC and .LLP strings fulfill both requirements for Organization.

Pre-existence

171. The only requirement for Pre-existence is that the .LLC and .LLP communities must have been active prior to September 2007. However, the EIU decided that these communities could not possibly have been active prior to that date because it deemed them to be Dot Registry's inventions in order "to obtain a sought-after-after *corporate*¹³⁸ identifier as a gTLD string [emphasis added]."¹³⁹ As was the case with Dot Registry's .INC application, the EIU sought to justify this conclusion on the ground that limited liability companies and limited liability partnerships "would typically not associate themselves with being

¹³⁸ As I have noted, the EIU did not appear to notice or care that neither LLCs nor LLPs are *corporations*, meaning that the EIU's use of the adjective "corporate" was clearly inappropriate. This supports the inference that the EIU did not independently evaluate each of the .INC, .LLC and .LLP applications. Rather, it appears likely that the Panel simply "cut and pasted" the text of its findings in connection with the .INC application into its CPE Reports for .LLC and .LLP. Note that all three CPE Reports bear the same 11 June 2014 date.

¹³⁹ .LLC and .LLP Reports (Exhibits 8 and 9), respectively, p. 3.

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part of the community as defined by the applicant.”¹⁴⁰ (The Panel did not offer any research or other evidence to support this statement.)

172. This last conclusion by the EIU CPE Panel appears to be clearly erroneous. As previously discussed, it is predicated on a requirement of the EIU’s own invention—one not found in the AGB—regarding how supposed community members must “associate themselves.”
173. In summary, it is my conclusion that Dot Registry’s .LLC and .LLP community applications do satisfy all three of the requirements— Delineation, Organization and Pre-existence – for **1-A Delineation**. The EIU CPE Panel should have awarded each of these applications the maximum possible 2 points.

- **.LLC and .LLP: 1-B Extension**

Maximum score	2 points
EIU score	0 points
Correct score	2 points

174. According to the AGB, Dot Registry’s scores under sub criterion **1-B Extension** were supposed to be determined by whether or not the .LLC and .LLP communities demonstrated the necessary Size and Longevity. But as it did in connection with the Delineation sub criterion, the EIU CPE Panel held that each of these two sub criteria first required “awareness and recognition of a community (as defined by the applicant) among its members.” After declaring this “awareness and recognition” to be nonexistent, the Panel simply discounted the evidence showing that the .LLC and .LLP applications met the other requirements for Size and Longevity.

Size

175. The Panel concurred that both the .LLC and .LLP communities are of considerable size.
176. But the Panel discounted this showing on the ground that the .LLC and .LLP communities did not have the requisite “awareness and recognition of a community among [their] members”. Using the same language (complete with typo) it offered in connection with its rejection of the .INC application, the EIU offered this explanation:

¹⁴⁰ Ibid.

This is because [alternatively, limited liability companies and limited liability partnerships] operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities [sic] structure as an [LLC or LLP]. Based on the Panel's research, there is no evidence of [LLCs or LLPs] from different sectors acting as a community as defined by the Applicant Guidebook. These [limited liability companies or limited liability partnerships] would therefore not typically associate themselves with being part of the community as defined by the applicant.¹⁴¹

177. I have already addressed this misapprehension on the part of the Panel. But to repeat, I can find nothing in the AGB regarding how community members are supposed to “act” or “associate themselves”.
178. Since the EIU agreed that the communities in the .LLC and .LLP applications were both of considerable size, and since the overt actions taken by members to join the .LLC and .LLP communities evidence their “awareness and recognition” of these communities, the EIU should have concluded that Dot Registry's .LLC and .LLP applications satisfied both of the AGB requirements for Size.

Longevity

179. The AGB required that two conditions be fulfilled in order for Dot Registry's .LLC and .LLP applications to meet the Longevity sub criterion: each of these two communities must demonstrate longevity and each must display an awareness and recognition of a community among its members. However, the Panel decided that the .LLC and .LLP applications did neither, based on its previous misapprehensions that (a) the .LLC and .LLP communities were “construed” because LLCs and LLPs would typically not associate themselves with being part of the communities defined by Dot Registry, and (b) these putative communities do “not have awareness and recognition of a community among its members.”

¹⁴¹ Ibid.

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180. As I have explained above, it is my opinion that both of these judgments by the Panel are erroneous. I conclude that Dot Registry’s .LLC and .LLP applications satisfied the Longevity requirement under **1-B Extension**.

181. Because both the .LLC and .LLP applications also met the conditions for Size, the Panel should have awarded them the maximum possible 2 points for **1-B Extension**.

F.2. .LLC and .LLP: Criterion #2: Nexus between Proposed String and Community

182. In applying this criterion, the EIU CPE Panel was supposed to determine whether or not the .LLC and .LLP strings applied for by Dot Registry (a) match the names of, respectively, the community of limited liability companies and the community of limited liability partnerships or are well-known short-forms or abbreviations for those communities, and (b), have no other significant meanings beyond identifying these two communities.

- **.LLC: 2-A Nexus**

Maximum score	3 points
EIU score	0 points
Correct score	2 points

183. To receive the maximum score for **2-A Nexus**, the .LLC and .LLP strings must *match* the communities of U.S. limited liability companies and U.S. limited liability partnerships, respectively, or be well-known short-forms or abbreviations of these community names.¹⁴² In either case, the .LLC and .LLP strings must not “over-reach *substantially* [emphasis added]” beyond their respective communities.¹⁴³

184. According to the AGB, for an applied-for string to receive a score of 3 for **2-A Nexus**, it should be the case that the string is “*commonly* known by others as the identification/name of the community [emphasis added].” To qualify for a score of 2, “the applied-for string should closely describe the community or the community members, without over-reaching *substantially* beyond the community [emphasis added].”

¹⁴² AGB (Exhibit 1), pp. 4-12 to 4-14.

¹⁴³ Ibid.

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185. So the correct scores for the .LLC and .LLP strings under **2-A Nexus** should have been determined by whether or not these strings are *commonly* known by others to refer to **U.S.** limited liability companies and **U.S.** limited liability partnerships (for a score of 3 points) or, at a minimum, by whether any over-reach by the “LLC” and “LLP” strings beyond these U.S. communities is “substantial”. In the latter case, a score of 2 points would be indicated if such “over-reach” exists but is not substantial.
186. Using identically the same language that it employed in connection with the .INC application (including its reference to a “corporate identifier”), the EIU CPE Panel faulted the Dot Registry application for the .LLC string under **2-A Nexus** on the ground that

The applied-for string (.LLC) over-reaches substantially, as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community... While the string identifies the name of the community, it captures a wider geographical remit than the [.LLC] community has, as the *corporate* [sic] identifier is used in other jurisdictions (outside the US). Therefore, there is a *substantial* over-reach [emphasis added] between the proposed [.LLC] string and [the community of registered U.S. limited liability companies] as defined by the applicant [emphases added].¹⁴⁴

187. The Panel rendered identically the same judgment (and with the same misplaced reference to a “corporate identifier”) regarding Dot Registry’s application for the .LLP string under the **2-A Nexus** sub criterion:

The applied-for string (.LLP) over-reaches substantially, as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community... While the string identifies the name of the community, it captures a wider geographical remit than the [.LLP] community has, as the *corporate* [sic] identifier is used in Poland, the UK, Canada and Japan, amongst others. Therefore, there is a *substantial* over-reach [emphasis added] between the proposed [.LLP] string and [the community of registered U.S. limited liability partnerships] as defined by the applicant [emphases added].¹⁴⁵

¹⁴⁴ .LLC Report (Exhibit 8), pp. 4-5.

¹⁴⁵ .LLP Report (Exhibit 9), pp. 4-5.

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188. I do not understand how the EIU decided that the .LLC string “over-reaches substantially, as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community.”¹⁴⁶ In particular, the EIU does not appear to have conducted any independent research or fact-finding before rendering this judgment. Dot Registry’s .LLC application does not name any other countries that supposedly use the “LLC” string, saying only:

LLC is a recognized abbreviation in all 50 states and US territories denoting the registration type of a business entity. Our research indicates that while other jurisdictions use LLC as a corporate identifier, their definitions are quite different and there are no other known associations or definitions of LLC in the English language.¹⁴⁷

Even if some non-U.S. jurisdictions have established business forms that, closely or distantly, are functional approximations of U.S. LLCs, *none* of these are called LLCs or are referred to by the English term “limited liability company”.

189. I am equally perplexed by the EIU’s finding that “The applied-for string (.LLP) over-reaches *substantially* [emphasis added], as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community.”¹⁴⁸ Again, the EIU does not appear to have conducted any independent research or fact-finding before arriving at this judgment. I note that Dot Registry’s .LLP application did volunteer that

Our research indicates that LLP as a corporate identifier is used in eleven other jurisdictions (Canada, China, Germany, Greece, India, Japan, Kazakhstan, Poland, Romania, Singapore, and the United Kingdom) though their formation regulations are different from the United States and their entity designations would not fall within the boundaries of our [.LLP] community definition.¹⁴⁹

¹⁴⁶ .LLC Report (Exhibit 8), p. 4.

¹⁴⁷ .LLC Application (Exhibit 5), p. 17.

¹⁴⁸ .LLP Report (Exhibit 9), p. 4.

¹⁴⁹ .LLP Application (Exhibit 6), p. 17.

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But seizing on the information volunteered by Dot Registry itself, the EIU concluded immediately that:

While the [.LLP] string identifies the name of the community, it captures a wider geographical remit than the community has, as the *corporate* [sic] identifier is used in Poland, the UK, Canada and Japan, amongst others. Therefore, there is *substantial over-reach* between the proposed string and the community as defined by the applicant [emphases added].¹⁵⁰

190. The EIU’s conclusions that both the .LLC and .LLP strings “over-reach substantially” is particularly troubling. According to the AGB, a string must “over-reach *substantially* beyond the community” before the EIU would be allowed to deny any points under **2-A Nexus**. As I have already pointed out, the AGB does not provide a metric for determining whether any “over-reach” –even assuming it exists at all– is “substantial”. If an applied-for string “over-reaches” only somewhat rather than “substantially”, a community application should still be awarded 2 points under **2-A Nexus**.
191. But the EIU first effectively re-wrote the AGB criteria. Where the AGB is concerned only with “*substantial* over-reach” (something it neither defines nor measures), the EIU deems *any* over-reach—no matter how little—to be “*substantial*”:
- “Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has.¹⁵¹
192. In other words, *any* “geographical or thematic remit” that is “wider” than the community—no matter how small or even *de minimis* the supposed “over-reach”—is deemed to be *substantial over-reach* by the EIU and justifies awarding the community application at issue 0 points under **2-A Nexus**. In my view this is incorrect.
193. Insofar as the EIU’s treatment of Dot Registry’s community applications for .LLC and .LLP are concerned, there are two related questions:
- a. Are the strings “LLC” or “LLP”, or the English language business legal forms “limited liability company” or “limited liability partnership” used at all outside of the U.S.?

¹⁵⁰ .LLP Report (Exhibit 9), p. 4.

¹⁵¹ EIU Guidelines (Exhibit 2), p. 7.

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b. Where the answer is “yes”, is that use *substantial* in comparison to the corresponding use in the U.S.?

194. It does not appear that any non-U.S. country authorizes the formation of limited liability companies. For this reason, no non-U.S. country uses the abbreviation “LLC” to designate a domestic limited liability company. I therefore conclude that Dot Registry’s application for the .LLC string does not “over-reach” at all.
195. With the exception India, Singapore and the United Kingdom, it does not appear that any other English-speaking, non-U.S. country uses the abbreviation “LLP” or the English legal designation “limited liability partnership”. The occurrence of LLPs in the United Kingdom can be distinguished because it is my understanding that UK LLPs actually are more nearly equivalent to U.S. LLCs. Moreover, because the EU has withdrawn the concern it initially expressed regarding Dot Registry’s .LLP application, I conclude that only the use of “LLP” in Singapore and India could even potentially amount to “substantial over-reach”.
196. To support its judgment that “there is a substantial over-reach between the proposed string and the community as defined by the applicant,” the EIU quoted this passage from the Dot Registry community application for the .LLP string:

Our research indicates that LLP as corporate identifier [sic] is used in eleven other jurisdictions (Canada, China, Germany, Greece, India, Japan, Kazakhstan, Poland, Romania, Singapore, and the United Kingdom) though their formation regulations are different from the United States and their entity designations would not fall within the boundaries of our [LLP] community definition.¹⁵²

197. Apparently relying on that Dot Registry statement, the EIU then concluded:

While the [LLP] string identifies the name of the community, it captures a wider geographical remit than the community has, as the corporate identifier is used in Poland, the UK, Canada and Japan, amongst others. Therefore, there is

¹⁵² .LLP Application (Exhibit 6), p. 17. I understand that the different legal form “limited partnership” or “L.P.” is used in Canada, rather than “limited liability partnership” or “LLP”.

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a substantial over-reach between the proposed string and [the] community as defined by the applicant.¹⁵³

198. Seven of these countries—China, Germany, Greece, Japan, Kazakhstan, Poland and Romania—that supposedly use “LLP” can be discounted immediately because none uses the *English* term “limited liability partnership” or the abbreviation “LLP” to refer to their possibly-equivalent domestic entities. That leaves only Canada, India, Singapore and the United Kingdom as potential sources of any “over-reach”. However, I understand that Canada uses only the different “limited partnership” or “LP” designation, not “LLP”. The U.K. does authorize the use of “LLP”, but I understand that in the U.K. this form actually is equivalent to the U.S. “LLC”, not the U.S. “LLP”. In any event, the European Union (of which the UK is a member), acting through the European Commission, affirmatively notified ICANN that the EC’s earlier opposition to Dot Registry’s .LLP community application “in the particular case of .llp (used in the UK)” was the result of “inaccurate research information” provided by unspecified “other interested parties.”¹⁵⁴
199. I conclude, therefore, that any “over-reach” by Dot Registry’s “LLP” string would be the result of its use in India and Singapore. Compared to the U.S., where the first LLPs were legally authorized in 1992, LLPs in India and Singapore are more recent phenomena; these were first introduced in Singapore in 2005 and in India around 2009.
200. It is my understanding that the “limited liability partnership” or “LLP” business form is adopted primarily by licensed professionals such as attorneys, accountants and architects who gain the economic efficiencies that can be achieved by combining their individual practices without at the same time incurring liability for their partners’ actions. Therefore, any “over-reach” due to the usage of “LLP” in India or Singapore in comparison to the U.S. should be proportional to the total number of attorneys, accountants and architects in India and Singapore in comparison to the U.S. totals.
201. A reasonable first approximation is that the number of firms comprised of attorneys, accountants and architects in India and Singapore compared to the U.S. should be roughly proportional to the economies of India and Singapore (measured by their respective GDPs) in comparison to the U.S. economy (measured by its GDP).

¹⁵³ .LLP Report (Exhibit 9), p. 4.

¹⁵⁴ Comment submitted to ICANN by Camino Manjon, GAC member, European Commission on 25 March 2014 (Exhibit 21) (<https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/12413>)

202. According to World Bank data, in 2013 the U.S. GDP stood at \$16,768 billion (measured in U.S. dollars). Using the same data source, the GDPs of India and Singapore were \$6,776 billion and \$425 billion, respectively. By this measure, the size of the India and Singapore economies were 40.41% and 2.53%, respectively, of the U.S. economy, or 42.94% combined (i.e., slightly less than 43%).¹⁵⁵
203. Measured in this way, Dot Registry’s definition of the .LLP community does “over-reach”. However, because I estimate that the usage of “LLP” in India and Singapore combined is only about 43% of its usage in the U.S., I conclude that this “over-reach” is not “substantial”.¹⁵⁶
204. Again, this is based on the dictionary definition of “substantial”. Under that definition, the usage of “LLP” in India and Singapore would have to be so “considerable” or “great” in comparison to its use in the U.S. that such usage would be “largely” but not “wholly” equal to its usage in the U.S. itself. Because the usage of “LLP” in India and Singapore (in comparison to its usage in the U.S.) would be proportional to the size of these two economies (again, in comparison to the U.S.), “substantial over-reach” would require that the combined size of these two economies would have to be significantly greater than half the size of the U.S. economy.
205. But because there is some “over-reach” implicit in Dot Registry’s application for the .LLP string (even though it is not “substantial”), the AGB specifies that the .LLP application should have received 2 points, rather than the maximum possible 3 points.

- **.LLC and .LLP: 2-B Uniqueness**

Maximum score	1 point
EIU score	0 points
Correct score	1 point

206. According to the EIU

¹⁵⁵ See Exhibit 15.

¹⁵⁶ Again, I rely on the *Merriam Webster’s Collegiate Dictionary* (10th ed.), in which “substantial” is defined as “considerable in quantity: significantly great” (Definition 3 b) or “being largely but not wholly that which is specified” (Definition 5).

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application *and it must also score a 2 or 3 on Nexus* [emphasis added].¹⁵⁷

207. As I have already been shown above, the Dot Registry applications for the .LLC and .LLP strings should have been given scores of 3 and 2 points, respectively, on the **2-A Nexus** criterion. Consequently, Dot Registry’s scores on the **2-B Uniqueness** criterion depends only on whether the .LLC and .LLP strings have any other significant meaning beyond “Limited Liability Company” and “Limited Liability Partnership”. The EIU did not address this question because it had already decided (wrongly, in my opinion) that Dot Registry’s applications for these two strings amounted to “substantial over-reach”.
208. I have been unable to find any claim that the strings “LLC” and “LLP” have meanings other than “Limited Liability Company” and “Limited Liability Partnership”, respectively. Therefore, I conclude that Dot Registry’s community applications for .LLC and .LLP should have been awarded the maximum possible score of 1 point each for **2-B Uniqueness**,

F.3. .LLC and .LLP: Criterion #3: Registration Policies

209. In the EIU’s original evaluations, the Dot Registry applications for the .LLC and .LLP strings were awarded the maximum of 1 point for each of the first three sub criteria (**3-A Eligibility, 3-B Name Selection and 3-C Content and Use**) but 0 points for the fourth sub criterion (**3-D Enforcement**).
210. I concur with the EIU’s analysis and scoring of the Dot Registry application on the **3-A Eligibility, 3-B Name Selection and 3-C Content and Use** sub criteria.

- **.LLC and .LLP: 3-A Eligibility**

Maximum score	1 point
EIU score	1 point
Correct score	1 point

¹⁵⁷ .LLC and .LLP Reports (Exhibits 8 and 9), respectively, p. 5.

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- **.LLC and .LLP: 3-B Name Selection**

Maximum score	1 point
EIU score	1 point
Correct score	1 point

- **.LLC and .LLP: 3-C Content and Use**

Maximum score	1 point
EIU score	1 point
Correct score	1 point

211. However, I understand that the EIU faulted the Dot Registry applications for the .LLC and .LLP strings under the **3-D Enforcement** criterion on the ground that, while they did articulate specific enforcement measures, these applications did not outline an appeals process.

- **.INC 3-D Enforcement**

Maximum score	1 point
EIU score	0 point
Correct score	1 point

212. The EIU found that Dot Registry’s applications for the .LLC and .LLP strings did not meet the criterion for **3-D Enforcement**, because while they did include the requisite enforcement measures, these two applications did not satisfy the AGB requirement for an appeals process.

213. But here again, the Panel misstated the requirement that the Dot Registry supposedly failed to meet. The AGB requires only “*appropriate* appeals mechanisms”, and states further that:

“Enforcement” means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.

...

With respect to...“Enforcement,” scoring of applications against [this sub criterion] will be done from a *holistic perspective, with due regard for the particularities of the community explicitly addressed*. [Example omitted] More restrictions do not automatically result in a higher score. *The restrictions and corresponding enforcement mechanisms proposed by the applicant should show*

an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.¹⁵⁸

214. The community-based purpose of Dot Registry's .LLC string is

To build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically serve the Community of Registered Limited Liability Companies. Through our registry service, we will foster consumer peace of mind with confidence by ensuring that all domains bearing our gTLD string are members of the Community of Registered Limited Liability Companies. Our verification process will create an unprecedented level of security for online consumers by authenticating each of our registrant's right to conduct business in the United States.

...

*The ".LLC" gTLD will be exclusively available to members of the Community of Registered Limited Liability Companies, as verified through each applicant's Secretary of States office" (or other state official where applicable) [emphasis added].*¹⁵⁹

215. Similarly, the community-based purpose of Dot Registry's .LLP string is

To build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically serve the Community of Registered Limited Liability Partnerships. Through our registry service, we will foster consumer peace of mind with confidence by ensuring that all domains bearing our gTLD string are members of the Community of Registered Limited Liability Partnerships. Our verification process will create an unprecedented level of security for online consumers by authenticating each of our registrant's right to conduct business in the United States.

...

The ".LLP" gTLD will be exclusively available to members of the Community of Registered Limited Liability Partnerships, as verified through each

¹⁵⁸ AGB (Exhibit 1), p. 4-16 [emphases added].

¹⁵⁹ .LLC Application (Exhibit 5), p. 7.

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applicants’s Secretary of States office” (or other state official where applicable)
[emphasis added].¹⁶⁰

216. It is important not to overlook the fact that the fundamental requirement for membership in the .LLC and .LLP communities—and the right to register a second-level domain under these TLDs—is the possession and maintenance of a valid registration as either a limited liability company or a limited liability partnership with the office of the appropriate Secretary of State. In this regard, the records of the relevant Secretary of State’s office are dispositive: Either the would-be registrant of a second-level .LLC or .LLP domain is validly registered with that Secretary of State, or it is not.
217. The essential point is that in order to register a second level domain under .LLC or .LLP, an applicant must be a duly, currently registered LLC or LLP as determined by the relevant Secretary of State. That determination would *not* be Dot Registry’s to make; its role would be limited to verifying that the applicant has secured the necessary registration from the relevant Secretary of State or equivalent authority and that that registration is current.
218. Dot Registry will verify that the registrant of a second-level domain is a registered U.S. corporation at the time of its registration.¹⁶¹ Thereafter a registrant’s “active” status would be verified on an annual basis with the relevant Secretary of State, as detailed in the Dot Registry applications for the .LLC and .LLP strings.
219. But because only duly registered LLCs and LLPs would be permitted to register second level domains under .LLC or .LLP, and because the several Secretaries of State are the ultimate arbiters of whether or not an applicant is indeed duly registered, it would not be within the authority of Dot Registry to provide a mechanism by which a would-be applicant could “appeal” a determination by a Secretary of State to Dot Registry or its registrars. The latter must respect the Secretary of State’s determination.
220. I also note that the Dot Registry applications for the .LLC and .LLP strings do provide opportunities for redress on issues that would not raise the possibility that Dot Registry or its registrars were arrogating the authority of the relevant Secretary of State. For example, Dot Registry’s applications do provide for a “quasi appeals process” in the event it was unable to verify an applicant’s eligibility for the .LLC or .LLP string with the

¹⁶⁰ .LLP Application (Exhibit 6), p. 7.

¹⁶¹ .LLC and .LLP Applications (Exhibits 5 and 6), respectively, p. 7.

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relevant Secretary of State. This is because the application made explicit allowance for a 30 day probationary period to allow registrants to directly address the relevant Secretary of State.

221. Dot Registry has also committed to implementation of the full panoply of ICANN's registrant rights protection mechanisms, including but not limited to:

Support for and interaction with the Trademark Clearinghouse ("Clearinghouse"); use of the Trademark Claims Service; segmented Sunrise Periods allowing for the owners of trademarks listed in the Clearinghouse to register domain names that consist of an identical match of their listed trademarks; subsequent Sunrise Periods to give trademark owners or registrants that own the rights to a particular name the ability to block the use of such name; [and] stringent takedown policies in order to properly operate the registry.¹⁶²

Dot Registry will provide all ICANN required rights mechanisms, including Trademark Claims Service, Trademark Post-Delegation Dispute Resolution Procedure (PDDRP), Registration Restriction Dispute Resolute Procedure (RRDRP), UDRP, URS [and] Sunrise service.¹⁶³

222. If the EIU had actually taken the "holistic perspective" called for by the AGB, it would have given "due regard for the particularities" of the .LLC and .LLP communities discussed above, and awarded both Dot Registry applications the maximum possible 1 point available for **3-D Enforcement**.
223. I also refer to and incorporate here my remarks at paragraphs 124 to 127 above regarding the EIU's determinations in respect of **3-D Enforcement** in connection with certain other community applications.

¹⁶² .LLC and .LLP Applications (Exhibits 5 and 6), respectively, pp.18-19.

¹⁶³ Ibid., p. 24.

F.4. .LLC and .LLP: Criterion #4: Community Endorsement

- **.LLC and .LLP: 4-A Support**

Maximum score	2 points
EIU score	1 point
Correct score	2 points

224. The EIU determined that the Dot Registry applications for .LLC and .LLP only “partially” met the criterion for **4-A Support**.¹⁶⁴ While the Panel acknowledged that these applications had documented support from at least one group with relevance to the .LLC and .LLP communities, it did not award the maximum possible score of 2 points because the Dot Registry applications did not have documented support from the “recognized” community institution(s), where “recognized” means the institution(s) that are clearly recognized by the community members as representative of the community.

225. Again, I cannot understand these “determinations”. First of all, there can be no question that the Secretaries of State for the several U.S. states and the National Association of Secretaries of State (NASS) *are* recognized by U.S. LLCs and LLPs as representing these two communities. Instead, the Panel once again invoked its unsupported position that there is a dispositive difference between a government entity’s “fulfilling a function” vs. “representing the community” and specifically that the Secretaries of State of US states

are not the recognized community institutions...as these government agencies are fulfilling a function, rather than representing the community.¹⁶⁵

As noted earlier, the EIU did not insist that the Osaka Prefectural government (the “entity mainly dedicated to the community”) was merely fulfilling its function. The Panel’s unwillingness to afford the same deference to US Secretaries of State or to their National Association appears to be strikingly inconsistent.

226. Also, as noted earlier, it is important to underscore the fact that the several Secretaries of State are either elected or appointed governmental officers. As such, they lack the freedom available to a non-governmental body or private organization to simply endorse one applicant for a string over competitors. But it must not be forgotten (a) that several

¹⁶⁴ .LLC and .LLP Reports (Exhibits 8 and 9), respectively, p. 6.

¹⁶⁵ Ibid.

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state-level Secretaries of State as well as NASS clearly expressed the position that the .LLC and .LLP TLDs should be awarded only to a community applicant, (b) that these same Secretaries of State and NASS were aware of the Dot Registry community application for the .LLC and .LLP strings, (c) that the Dot Registry application was the *only* community application for these strings, and (d) that these Secretaries of State and NASS communicated with ICANN at the request of Dot Registry. This sequence of facts argues strongly that the several Secretaries of State and NASS—while not permitted to officially endorse them—do support these two Dot Registry applications.

227. It is also necessary to address the Panel’s complaint that “[T]he viewpoints expressed in these letters [it received from several Secretaries of State] were not consistent across states” and that

While several US states expressed clear support for the applicant during the Letters of Support verification process, others either provided qualified support, refrained from endorsing one particular applicant over another, or did not respond to the verification request.¹⁶⁶

I can find no evidence in the record that the EIU reached out to *every* environmental organization in the world and insisted on getting positive expressions of “clear support” from each before approving the .ECO community application. Nor did the Panel require such unanimity from every organization relevant to the .RADIO, .HOTEL and .OSAKA applications. I regard this as another example of the Panel’s uneven treatment of these four community applications that it approved, compared to its treatment of the .INC, .LLC, and LLP applications.

228. In arguing that the EIU should have awarded the maximum possible 2 points to the .LLC and .LLP applications for sub criterion **4-A: Support**, I both rely on and distinguish this passage from the AGB’s Criterion 4 Guidelines:

With respect to ‘Support,’ it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations... Also with respect to ‘Support,’ the plurals and brackets for a score of

¹⁶⁶ .LLC Report (Exhibit 8), p. 7; .LLP Report (Exhibit 9), pp. 6-7.

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2 relate to cases of multiple institutions/organizations. In such cases there must be documented support from institution/organizations representing a majority of the overall community addressed in order to score 2.¹⁶⁷

- 229. In this context, I would argue first that the NASS is “the only national Association relevant to” the .LLC and .LLP communities and that these two applications have documented support from NASS.
- 230. In summary, since the Dot Registry applications for the .LLC and .LLP TLDs do have the support of NASS, the EIU should have awarded each application the maximum 2 points for **4-A: Support**.

- **.LLC and .LLPC 4-B Opposition**

Maximum score	2 points
EIU score	1 point
Correct score	2 points

- 231. According to its CPE Report, the EIU determined that the Dot Registry community applications for the .LLC and .LLP TLDs only “partially” met the criterion for Opposition “as the[se] application[s] received relevant opposition from one group of non-negligible size:”

The [alternatively, .LLC and .LLP] application received several letters of opposition, *one of which was determined to be relevant opposition* from an organization of non-negligible size. This opposition was from a community that was not identified in the application *but which has an association to the applied-for string*. Opposition was on the grounds that limiting registration to US registered *corporations* only would unfairly exclude non-US businesses [emphases added].¹⁶⁸

¹⁶⁷ AGB (Exhibit 1), p. 4-18.

¹⁶⁸ .LLC and .LLP Reports (Exhibits 8 and 9), p. 7.

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232. Again, I have recently been able to review email correspondence¹⁶⁹ between ICANN and the EIU regarding this particular “finding”. That correspondence confirms that the European Commission (“EC”) was the source of the supposedly “relevant opposition” that was submitted as an “Application Comment”¹⁷⁰ on behalf of the European Commission on 4 March 2014. However, the only specific concern raised in that EC comment was in respect of Dot Registry’s separate community application for the .LLP string, not the .LLC or .INC applications.
233. In any event, just three weeks later, the EC submitted a follow-up “Application Comment”¹⁷¹ dated 25 March 2014 stating that its concern regarding Dot Registry’s .LLP application had been resolved and that the EC was withdrawing its previous “Comment”. Notably, in this follow-up “Application Comment”, the EC specifically asked “that ICANN forward a copy of this communication to the Economist Intelligence Unit.”
234. It appears that the EIU tried to minimize its lapse on the ground that it only cost each of Dot Registry’s applications 1 point and “this would have had no material impact on the final outcome of the evaluation.”¹⁷²
235. But in light of this recently produced email correspondence between ICANN and the EIU, it is clear that *there actually never was any relevant opposition at all* to Dot Registry’s .LLC community application and that the supposed opposition to its .LLP application had been withdrawn. The EIU should have awarded the .LLC and .LLP applications the maximum score of 2 points that were possible under the **4-B Opposition** criterion.

¹⁶⁹ ICANN_DR-00215-217 (Exhibit 21).

¹⁷⁰ Exhibit 21, Comment ID: tjwufnw.

¹⁷¹ Exhibit 21, Comment ID: 7s164151.

¹⁷² While the EIU attempted to minimize its error by characterizing it as “not material”, it actually should be seen as troubling: First, the EU opposition was *never* about Dot Registry’s .LLC application. That should immediately have been apparent to both the EIU and ICANN. Therefore, it is immaterial to Dot Registry’s .LLC application whether or not both the original EU “opposition” (to the .LLP application) and the EU’s subsequent withdrawal of that “opposition” were communicated to ICANN during the 14-day window that began on 19 February 2014. The more troubling fact is that ICANN and the EIU either never noticed—or did not care—that (1) the supposed EU “opposition” was to a different string (.LLP) altogether, and (2) that opposition was withdrawn within three weeks of the date it was communicated.

F.5. .LLC and .LLP Conclusion

236. It is my conclusion that, had the EIU correctly followed the AGB and its own *EIU Guidelines*, and if it had applied the same standards it employed in connection with the .HOTEL, .RADIO, and .OSAKA TLD applications, it would have awarded Dot Registry's community application for the .LLC string the maximum possible 16 points, two more than it needed to prevail.
237. Similarly, it is my conclusion that, had the EIU correctly followed the AGB and its own *EIU Guidelines*, and if it had applied the same standards it employed in connection with the .HOTEL, .RADIO, and .OSAKA TLD applications, it would have awarded Dot Registry's community application for the .LLP string a total of 15 points, one more than it needed to prevail.

G. The clear and manifest differences in the EIU’s treatment of the .RADIO, .HOTEL and .OSAKA community applications compared to .INC, .LLC and .LLP

238. In this report, I rely on two fundamental assumptions:
- a. The EIU was required to apply the criteria for community applications as written in the AGB, and
 - b. The EIU was required to apply these criteria consistently across different community applications.
239. As supported by the discussion below, I find that the EIU did not apply the criteria for community applications as set forth in the AGB, and it did not apply the criteria consistently across different community applications. It is my opinion that the EIU treated the .INC, .LLC and .LLP applications differently both in terms of the criteria used to judge these applications as well as the standard of scrutiny applied. The EIU was not fair, balanced and consistent in its treatment of the .INC, .LLC and .LLP applications, and it is not possible to conclude that the EIU acted reasonably in exercising whatever discretion it may have been granted under the AGB criteria. Rather, the EIU’s failure to apply the AGB criteria, and its disparate treatment of the .INC, .LLC and .LLP applications with reference to other community priority applications is, in my view, manifest and evident.
240. When reviewing the EIU’s determinations regarding Dot Registry’s applications for the .INC, .LLC and .LLP strings, it is not possible to overlook the instances in which the EIU effectively rewrote the AGB criteria, rather than applying those criteria as written to these three community applications. In comparison to the uncritical, even highly deferential treatment it afforded to the .RADIO, .HOTEL and .OSAKA community applications, the EIU, in denying the applications for the .INC, .LLC and .LLP strings, applied requirements and distinctions that it simply invented out of whole cloth. Then, after finding that the .INC, .LLC and .LLP applications failed to satisfy its rewritten criteria, the EIU announced that these Dot Registry applications “did not prevail.”
241. Another unavoidable feature of the EIU’s determinations is its seeming animus toward the community applications for the .INC, .LLC, and .LLP strings. The EIU appears to have treated these applications with a level of unjustified skepticism—seemingly bordering on hostility—as it effectively condemned them as “construed” communities

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designed “to obtain a sought-after corporate identifier as a gTLD string.” This is evident in the determination that the EIU included conspicuously in its CPE Reports for each of the .INC, .LLC, and .LLP strings:

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after and after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). *The Community Priority Evaluation panel determined that this application refers to a “community” construed to obtain a sought-after corporate identifier as a gTLD string*, as [variously, these corporations, these limited liability companies, these limited liability partnerships, and the regulatory authorities and associations] would typically not associate themselves with being part of the community as defined by the applicant. *The community therefore could not have been active prior to the above date* [emphases added].¹⁷³

242. The EIU proceeded to award each these three applications 0 points under **Criteria #1: Community Establishment**, which was sufficient to insure that they would not prevail. At the same time, it accepted uncritically the more poorly delineated and more heterogeneous “communities” proposed in connection with the .RADIO, .HOTEL, and .OSAKA community applications.
243. In its CPE Report on .RADIO (Exhibit 10), the EIU offered this quotation from the European Broadcasting Union application in support of its finding that the .RADIO community “shows a clear and straightforward membership and is therefore well defined”:

The Radio industry is comprised of a huge number of very diverse radio broadcasters: public and private; international and local; commercial or community-oriented; general purpose for sector-specific; talk or music; big and small. All licensed radio broadcasters are part of the .radio community,

¹⁷³ .INC Report (Exhibit 7), p. 3; .LLC Report (Exhibit 8), p. 3; .LLP Report (Exhibit 9), p. 3.

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and so are the associations, federations and unions they have created ... Also included are the radio professionals, those making radio the fundamental communications tool that it is.

However, the Radio industry keeps evolving and today, many stations are not only broadcasting in the traditional sense, but also webcasting and streaming their radio content via the Internet. Some are not broadcasters in the traditional sense: Internet radios are also part of the Radio community, and as such will be acknowledged by the .radio TLD, as will podcasters. In all cases certain minimum standards on streaming or updating schedules will apply.

The .radio community also comprises the often overlooked amateur radio, which uses radio frequencies for communications to small circles of the public. Licensed radio amateurs and their clubs will also be part of the .radio community.

Finally, the community includes a variety of companies providing specific services or products to the Radio industry.¹⁷⁴

244. In my opinion, this “definition” is more ambiguous and less well delineated than those offered by Dot Registry in its applications for the .INC, .LLC and .LLP strings. Nevertheless, the EIU judged the .RADIO “community” to be well-defined:

This [.RADIO] community definition shows a clear and straightforward membership and is therefore well-defined [emphasis added]. Association with, and membership in, the radio community can be verified through licenses held by professional and amateur radio broadcasters; membership in radio -related associations, clubs and unions; Internet radios that meet certain minimum standards; radio-related service providers that can be identified through trademarks; and radio partners and providers.¹⁷⁵

245. One is left to wonder just what—both in general and specifically—are “radio-related associations, clubs and unions”? How would membership in any of these be verified? What are the “certain minimum standards” that define “Internet radios” and how would

¹⁷⁴ .RADIO Report (Exhibit 10), pp. 1-2.

¹⁷⁵ .RADIO Report (Exhibit 10), p. 2.

these be verified? How do “trademarks” unambiguously identify “radio-related services providers”, and what are these “trademarks”? What is a radio “partner”? What businesses, associations and individuals are “radio partners” or “providers”, and what businesses, associations and individuals would not be so regarded?

246. In its CPE Report on .HOTEL (Exhibit 11), the EIU offered this quotation from the HOTEL Top-Level Domain s.a.r.l application in support of its finding that the .HOTEL community “shows a clear and straightforward membership” and is “clearly defined”:

The .hotel namespace will exclusively serve the global Hotel Community. The string “Hotel” is an internationally agreed word that has a clear definition of its meaning: according to DIN EN ISO 18513:2003, “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available,” *Therefore only entities which fulfill this definition are members of the Hotel Community and eligible to register a domain name under .hotel* [emphasis added] .hotel domains will be available for registration to all companies which are which are member [sic] of the Hotel Community on a local, national and international level. The registration of .hotel domain names shall be dedicated to all entities and organizations representing such entities which fulfill the ISO definition quoted above:

1. Individual Hotels
2. Hotel Chains
3. Hotel Marketing organizations representing members from 1. and/or 2.
4. International, national and local Associations representing Hotels and Hotel Associations representing members from 1. and/or 2.
5. Other organizations representing Hotels, Hotel Owners and other solely Hotel related organizations representing on [sic] members from 1. and/or 2.

These categories are a logical alliance of members, with the associations and the marketing organizations maintaining membership lists, directories and registers that can be used, among other public lists, directories and registers, to verify eligibility against the .hotel Eligibility [sic] requirements.¹⁷⁶

¹⁷⁶ .HOTEL Report (Exhibit 11), p. 2

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247. In my opinion, this “definition” also is more ambiguous and less well delineated than those offered by Dot Registry in its applications for the .INC, .LLC and .LLP strings. Nevertheless, the EIU judged the .HOTEL “community” to be “clearly defined”:

This community definition shows a clear and straightforward membership. The community is clearly defined because membership requires entities/associations to fulfill the ISO criterion for what constitutes a hotel. Furthermore, association with the hotel sector can be verified through membership lists, directories and registers.¹⁷⁷

248. But if—as the applicant HOTEL Top-Level-Domain s.a.r.l stated—only entities which fulfill the DIN EN ISO 18513:2003 definition (that “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available”) are members of the Hotel Community and eligible to register a domain name under .hotel, how could the EIU say the .HOTEL community “was clearly defined”? In the “definition” approvingly quoted by the EIU, the .HOTEL community also includes Hotel Marketing organizations representing individual hotels and hotel chains; international, national and local associations representing Hotels, and Hotel Associations representing individual hotels and hotel chains; and other organizations representing Hotels, Hotel Owners and other solely Hotel related organizations, individual hotels and hotel chains which *are not* included within the DIN EN ISO 18513:2003 definition.

249. In its CPE Report on .OSAKA (Exhibit 12), the EIU offered this quotation from the Interlink Co., Ltd. application in support of its finding that the .OSAKA community “shows a clear and straightforward membership” and is “clearly defined”:

Members of the community are defined as those who are within the Osaka geographical area as well as those who self identify as having a tie to Osaka, or the culture of Osaka. Major participants of the community include, but are not limited to the following:

- a. Legal entities
- b. Citizens
- c. Governments and public sectors
- d. Entities, including natural persons who have a legitimate purpose in addressing community.¹⁷⁸

¹⁷⁷ Ibid.

¹⁷⁸ .OSAKA Report (Exhibit 12), p. 2.

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250. It also is my opinion that this “definition” of the .OSAKA community is more ambiguous and less well delineated than those offered by Dot Registry in its applications for the .INC, .LLC and .LLP strings. Nevertheless, the EIU judged the .OSAKA “community” to be “clearly defined”:

This community definition shows a clear and straightforward membership. The community is clearly defined because membership is dependent on having a clear connection to a defined geographic area.¹⁷⁹

251. But if “members of the [Osaka] community are defined as those who are within the Osaka geographical area *as well as those who self-identify as having a tie to Osaka, or the culture of Osaka,*” who precisely are the “legal entities”, the “citizens”, and the “governments and public sectors” subsumed by this definition? Indeed, how would an outside observer verify such “self-identification”? Geographically, which of these lie outside of Osaka, or even outside of Japan? Where might one find a listing or specific delineation of the “entities, including natural *persons who have a legitimate purpose in addressing the [.OSAKA] community* [emphases added]. Also, what constitutes a “legitimate purpose”? Who are the entities and persons who would not be deemed to have such a “legitimate purpose”?
252. I conclude that none of the “communities” proposed in connection with the .RADIO, .HOTEL and .OSAKA applications actually is “well defined” at all—not even in principle and certainly not in comparison to the communities associated with the .INC, .LLC and .LLP strings. In my opinion, the “definitions” for the .RADIO, .HOTEL and .OSAKA “communities” fail to delineate clear boundaries around their claimed “memberships”. Although the EIU concluded that membership in each could be “verified”, the practical challenges to doing so would be enormous, indeed, impracticable.
253. Where the EIU’s “research” into the operations and organization of the members of the .INC, .LLC and .LLP communities allowed it to conclude that these communities “do not have awareness and recognition of a community among [their] members”¹⁸⁰ and was

¹⁷⁹ Ibid.

¹⁸⁰ Again, here is the complete statement of the EIU’s finding:

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sufficient to insure that these Dot Registry applications did not prevail, the EIU appears to have found it unnecessary to conduct similar “research” into the operations and organization of the .RADIO, .HOTEL and .OSAKA communities. Instead, the EIU appears to have found the necessary “awareness and recognition of a community among [their] members” *in the community definitions themselves*. For example:

254. The EIU found that the .RADIO community had the requisite “awareness and recognition of a community among its members” simply by virtue of the fact that it was defined to consist of entities and individuals in the radio industry:

[T]he community as defined in the application has awareness and recognition among its members. *This is because the community as defined consists of entities and individuals that are in the radio industry* [footnote omitted], and *as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community* [emphases added].¹⁸¹

As I have observed above, the “definition” offered for the .RADIO community reads more like an ad hoc laundry list.

255. The EIU appears to have had an even easier time discerning in “awareness and recognition of a community among its members” in the case of the .HOTEL community. All that it needed to do was to look at the definition proffered for that community:

[T]he community as defined in the application has awareness and recognition among its members. *This is because the community is defined in terms of its*

[T]he community as defined in the application does not have awareness and recognition of a community among its members. This is because [alternatively, corporations, limited liability companies, and limited liability partnerships] operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities [sic] structure as an [alternatively, INC, LLC and LLP]. Based on the Panel’s research, there is no evidence of [again, INCs, LLCs and LLPs] from different sectors acting as a community as defined by the Applicant Guidebook. There is no evidence that these [alternatively, incorporated firms, limited liability companies and limited liability partnerships] would associate themselves with being part of the community as defined by the applicant.

¹⁸¹ .RADIO Report (Exhibit 10), p. 2.

association with the hotel industry and the provision of specific hotel services
[emphasis added].¹⁸²

It is not clear to me how the mere satisfaction of DIN EN ISO 18513:2003 (“A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.”) causes the resulting “community” to have the requisite awareness and recognition among its members.

256. The EIU appears to have had a still easier time discerning the requisite “awareness and recognition of a community” on the part of the members of the .OSAKA community. All it needed was this non sequitur:

[T]he community as defined in the application has awareness and recognition among its members. *This is because of the clear association with the Osaka geographical area, as according to the applicant, “the Osaka Community is largely defined by its prefectural borders* [emphasis added].”¹⁸³

Again, it is anything but clear to me why the fact that “the Osaka Community is largely defined by its prefectural borders” — a questionable assertion at best when that community was vaguely defined to include “those who self identify as having a tie to Osaka, or the culture of Osaka” and “entities, including natural persons who have a legitimate purpose in addressing the [Osaka] community” — was sufficient to insure that the putative Osaka “community” possessed the necessary awareness and recognition among its members.

¹⁸² .HOTEL Report (Exhibit 11), p. 2.

¹⁸³ .OSAKA Report (Exhibit 12), p. 2.

H. The EIU’s imposition of invented requirements— not present in the AGB— on the .INC, .LLC, strings

257. All community applicants had to rely on— and adhere to— the same requirements set forth in the final June 2012 version of the AGB. But in comparison to the EIU’s seemingly uncritical treatment of the .RADIO, .HOTEL and .OSAKA applications under the AGB, and in spite of its clear commitment that the *EIU Guidelines* do “not modify the AGB framework, nor does it change the intent or standards laid out in the AGB,” the EIU appears— without input from or disclosure to the applicants— to have first made material modifications to the AGB criteria before applying them *only to* the .INC, .LLC, and .LLP strings.
258. For example, the EIU offered this “explanation” for its decision to award no points to these three applications in connection with the **1-A Delineation** sub criterion under **Criterion #1: Community Establishment**
- Based on the Panel’s research, there is no evidence of INCs [alternatively, LLCs, and LLPs] from different sectors *acting as a community* as defined by the Applicant Guidebook. There is no evidence that these incorporated firms *would associate themselves* with being part of the community as defined by the applicant [emphases added].¹⁸⁴
259. But in the context of community-based applications, the AGB requires only that the community (and its members) *be* a community. I find nothing in the AGB requiring community members to “*act* as a community”. Nor does the AGB include any requirement regarding whether— or how— community members “would *associate themselves*” with “being part of a community” or anything else. The EIU appears to have made these criteria up on its own. In fact, in my view, businesses do make a conscious and considered decision regarding the form of the business organization they adopt because of what the chosen form of business organization represents by way of rights and regulatory obligations.
260. In connection with the **1-A Delineation** sub criterion under **Criterion #1: Community Establishment**, the EIU also offered this “explanation” to justify its decision to award no points to Dot Registry’s .INC, .LLC and .LLP applications:

¹⁸⁴ .INC Report (Exhibit 7),, p. 2.

The community as defined in the application does not have at least one entity mainly dedicated to the community. Although responsibility for corporate registrations and the regulations pertaining to corporate formation are vested in each individual US state, *these government agencies are fulfilling a function, rather than representing the community*. In addition, the offices of the Secretaries of State of US states are not mainly dedicated to the community *as they have other roles/functions beyond processing corporate registrations* [emphases added].¹⁸⁵

261. The AGB does not even contain the terms “fulfilling a function” and “representing the community”, much less does it state that there is a critical, dispositive distinction between them. In fact, the AGB actually requires only that a community be “organized”, meaning “that there is at least one entity mainly *dedicated* [emphasis added] to the community, with documented evidence of community activities.”¹⁸⁶ Importantly, I can find nothing in the AGB prohibiting this “dedicated entity” from having additional responsibilities.
262. By the EIU’s logic, the Osaka Prefecture (that the EIU deemed to be the entity mainly dedicated to the .OSAKA community) also is merely “fulfilling a function” rather than “representing” the community. Notably, the EIU found documented evidence of community activities for the .OSAKA community by accessing the website of the Osaka Prefectural government.¹⁸⁷ As I explain above, if the EIU had looked at the website of the NASS, it would have found similar evidence of the community activities of the .INC, .LLC and .LLP communities.
263. The EIU often imposed a hierarchical or prerequisite relationship among what actually are separate and mutually independent AGB requirements. At other times, the EIU used “therefore” to link conclusions to premises that actually have no necessary connection at all. These practices on the part of the EIU often resulted in obvious non sequiturs.
264. For example, in its evaluation of the .INC application for Organization (required under **1-A Delineation**), the EIU stated – correctly – that:

¹⁸⁵ Ibid.

¹⁸⁶ AGB (Exhibit 1), page 4-11.

¹⁸⁷ .OSAKA Report (Exhibit 12), p. 2.

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Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.¹⁸⁸

As stated, these are logically independent criteria, each capable of being satisfied and verified separately. But the EIU’s “logic” conflates them with its assertion that an applicant’s failure to satisfy one prong *necessarily* requires the conclusion—with no need to conduct any further investigation—that the applicant has also failed the second, independent prong:

As there is no entity that is mainly dedicated to the community as defined in the .INC application, [it follows that] *there is no documented evidence of community activities* [emphasis added].¹⁸⁹

In other words, by assuming the premise that “there is no entity that is mainly dedicated to the community,” the Panel was able to dismiss even the logical possibility that documented community activities could exist.

265. The EIU used similar “reasoning” in deciding that the .INC community “was not active prior to September 2007”:

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). The Community Priority Evaluation panel determined that this application refers to a “community” construed to obtain a sought-after corporate identifier

¹⁸⁸ .INC Report (Exhibit 7), p. 2.

¹⁸⁹ Ibid. In fact, there actually is considerable evidence. In addition to the voluminous documentary record created when community members actively seek to join the .INC community and thereafter to maintain their registrations that are maintained by the Secretaries of State, there also is the activity of associations of corporations *qua* corporations, as I have shown above. Similar documentary records combined with the activities of the associations that include LLCs and LLPs that are discussed above constitute similar evidence for the .LLC and .LLP communities.

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as a gTLD string, as these corporations would typically not associate themselves with being part of the community has defined by the applicant. *The community therefore could not have been active prior to the above date* (although its constituent parts were active) [emphasis added].¹⁹⁰

266. In its evaluation of the .INC application under **1-A Delineation** for Delineation and under **1-B Extension** for both Size and Longevity, the Panel “reasoned” as follows:
- a. Because corporations operate in vastly different sectors, which sometimes have little or no association with one another, and because the Panel’s research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC,¹⁹¹ it follows that there is no evidence of INCs from different sectors acting as a community as defined by the AGB.
 - b. Therefore, these incorporated firms would not *typically* associate themselves with being members of [the community of corporations].
 - c. Therefore, the community as defined in the .INC application does not have awareness and recognition of a community among its members.
 - d. Therefore, the Dot Registry applications for .INC, .LLC and .LLP did not satisfy the requirements under **1-A Delineation** for Delineation and under **1-B Extension** for both Size and Longevity.
267. In my opinion, the preceding is fraught with errors:
- a. First, is nothing in the AGB requiring communities to “act as a community” or even explaining what that might mean. Again, all the AGB requires is that the putative community *be* a community.
 - b. Even if it were true that “firms are typically organized around specific industries, locales, and other criteria” unrelated to whether or not they are

¹⁹⁰ .INC Report (Exhibit 7), p. 3.

¹⁹¹ As explained in the preceding footnote, the EIU’s “research” can be charitably described as, at best, incomplete.

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corporations (and the EIU has not offered evidence to support this assertion), it does *not* “follow” that they cannot *be* a community.”¹⁹²

- c. Whether or not incorporated firms would “*typically* associate themselves with being members” of the community of corporations is irrelevant. I am unable to find a “typicality” test or criterion in the AGB.
- d. “Awareness and recognition of a community” is not defined or explained at all by the AGB. Nor does the AGB make any attempt to explain why such “awareness and recognition of a community” can exist only if community members “act as a community” or “associate themselves with being members”.

268. Despite this, the EIU’s reliance on the above “logic” insured that the Dot Registry community applications for .INC, .LLC and .LLP would receive 0 points under **Criterion #1: Community Establishment**, which in turn assured that these applications would not prevail.

¹⁹² The communities at issue in the .RADIO, .HOTEL and .OSAKA applications include members whose organizing principles are, at best, only partially or tangentially related to their ostensible communities. These include, for example, the “variety of companies providing specific products or services to the Radio industry” (.RADIO Report, Exhibit 10) It appears that these “products or services” could include anything and their provision to hotels need not be a significant portion of the respective companies’ sales. Where the .HOTEL community was defined to include unspecified “Other organizations representing Hotels, Hotels Owners and other solely Hotel related organizations” (.HOTEL Report, Exhibit 11), that logically could also include chambers of commerce, visitor bureaus, travel organizations and publishers of business directories, to name but a few. Also, “those who self-identify as having a tie to Osaka or the culture of Osaka” (.OSAKA Report, Exhibit 12) could be located anywhere in the world and whose “tie” to Osaka might be secondary at best, or even inconsequential.

I. The EIU’s inconsistent treatment of different community applications.

269. In my opinion, it is important to understand the instances in which the EIU CPE Panel treated individual community applications differently.
270. Where the .INC community application was faulted by the Panel because it did not have awareness and recognition of a community among its members (owing to the “fact” that corporations “operate in vastly different sectors”), the Panel found that the .RADIO community possessed the requisite awareness and recognition among its members on the basis of little more than this circular, tautological argument:
- [T]he [.RADIO] community as defined in the application has awareness and recognition among its members. This is because the community as defined consists of entities and individuals that are in the radio industry [footnote omitted], and as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community.¹⁹³
271. In .HOTEL, the Panel accepted “detailed information” on the website of the International Hotel *and Restaurant* Association (“IH&RA”, described by the applicant as “the only global business organization representing the hotel industry worldwide”¹⁹⁴) as sufficient to satisfy the requirement for documented evidence of .HOTEL community activities. The Panel appears not to have been troubled by the fact that the IH&RA also appears to be significantly devoted to the *restaurant* industry, which is *not* part of the .HOTEL community as defined by the applicant. Yet the Panel faulted Dot Registry’s .INC application’s citation to the offices of U.S. Secretaries of State for documented evidence of .INC community activities on the ground that “the offices of the Secretaries of States of US states are not mainly dedicated to the [.INC] community *as they have other roles/functions beyond processing corporate registrations* [emphasis added].” The EIU did not seem troubled by this inconsistency.
272. Nonetheless, the EIU found that the definition *alone* of the .HOTEL community was sufficient to demonstrate awareness and recognition of a community among its members “because the [.HOTEL] community is defined in terms of its association with the hotel industry and the provision of specific hotel services.”¹⁹⁵

¹⁹³ .RADIO Report (Exhibit 10), p. 2.

¹⁹⁴ .HOTEL Report (Exhibit 11), p. 2.

¹⁹⁵ Ibid.

273. The .INC community was not so fortunate. The Panel judged it to be “a ‘community’ construed to obtain a sought-after corporate identifier as a gTLD string, as these corporations would typically not associate themselves with being part of the community as defined by the applicant.”¹⁹⁶
274. The EIU reported—on the basis of no apparent research or data—that
- [T]he .HOTEL string nexus closely describes the [HOTEL] community, without overreaching substantially beyond the community. The string identifies the name of the core community members (i.e. hotels and associations representing hotels).¹⁹⁷ However, the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the gTLD. *However, these entities are considered to comprise only a small part of the community.* Therefore the string identifies the community, but does not overreach substantially beyond the community, as the general public will generally associate the string with the community as defined by the applicant [emphasis added].¹⁹⁸
275. The EIU did not disclose the data or methodology that allowed it to “consider” the “entities that are related to hotels, such as hotel marketing associations, that represent hotels and hotel chains” to “comprise only a small part of” the .HOTEL community. If the EIU had been consistent, it would have concluded that, even though “these entities are considered to comprise only a small part of the community,” their inclusion would still amount to “over-reach”. And if the EIU viewed such “over-reach” in the same manner it employed in connection with the .INC, .LLC and .LLP community applications, it would have concluded that *any* such over-reach was *ipso facto*

¹⁹⁶ .INC Report (Exhibit 7), p. 3. Again, see above for evidence to the contrary.

¹⁹⁷ This actually is incorrect. The .HOTEL application clearly stated that only entities satisfying the relevant ISO definition—“A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.” (Exhibit 17, p. 2)—are members of the HOTEL community. Thus, hotel marketing organizations; international, national and local associations representing hotels and hotel associations; and other organizations representing hotels, hotel owners and other solely hotel related organizations are not included in the ISO definition and, therefore, not included in the .HOTEL community.

¹⁹⁸ .HOTEL Report (Exhibit 11), p. 4.

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“substantial” and would have given the .HOTEL application 0 points under **Criterion #2: Nexus between Proposed String and Community**.

276. This is because the .INC community application was not treated so generously in this respect by the EIU, which concluded (again, without any apparent research or data) that:

The applied-for string (.INC) over-reaches *substantially*, as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community... While the string identifies the name of the community, it captures a wider geographical remit than the community has, as the corporate identifier is used in Canada, Australia and the Philippines. Therefore, there is a *substantial* over-reach between the proposed string and the community as defined by the applicant [emphases added].¹⁹⁹

277. As discussed above, there is a major problem with this judgment by the EIU: the AGB does not specify any metric or ranges of permissible and impermissible values, or, most importantly, a “critical value” beyond which any “over-reach” is deemed “substantial.” Moreover, a close reading of the *EIU Guidelines*—which are intended to clarify, not replace the scoring criteria in the AGB—supports the conclusion that, to the EIU, *any* “over-reach”—no matter how small—would *ipso facto* be “substantial”.²⁰⁰

¹⁹⁹ .INC Report (Exhibit 7), pp. 4-5.

²⁰⁰ The *EIU Guidelines* (Exhibit 2) state (at p. 7) that ““Over-reaching substantially” (which is sufficient to cost a community application all 4 points available under **Criterion #2: Nexus between Proposed String and Community**) “means that the string indicates a wider geographical or thematic remit than the community has.” Elsewhere in this report, I take and explain the position that any geographic “over-reach” must, at a minimum, significantly exceed 50 percent before it can be regarded as “substantial”.

J. The EIU’s Unsupported, Undocumented and Unverifiable Assertions Regarding its “Research” and “Evidence”

278. At a number of points in the CPE Reports for the .INC, .LLC, and .LLP community applications, the EIU alluded to its unspecified and undocumented “research” to support broad generalizations that it then used to justify awarding no points whatsoever to the Dot Registry applicant at important steps in CPE process. The following passage is typical:

Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC [alternatively, LLC and LLP]. Based on *the Panel’s research, there is no evidence* of INCs [alternatively, LLCs and LLPs] from different sectors acting as a community as defined by the Applicant Guidebook. . . . *There is no evidence* that these incorporated firms would associate themselves with being part of the community as defined by the applicant [emphases added].²⁰¹

279. In my view, the EIU should be required to disclose the specific “research” it supposedly conducted in conjunction with its consideration of the .INC, .LLC and .LLP applications and to explain how that specific “research” supports each of its following conclusions:

- a. Firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC.²⁰²
- b. Firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLC.²⁰³
- c. Firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLP.²⁰⁴
- d. There is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook.²⁰⁵

²⁰¹ .INC, .LLC and .LLP Reports (Exhibits 7, 8 and 9, respectively), p. 2.

²⁰² .INC Report (Exhibit 7), p. 2.

²⁰³ .LLC Report (Exhibit 8), p. 2.

²⁰⁴ .LLP Report (Exhibit 9), p. 2.

²⁰⁵ .INC Report (Exhibit 7), p. 2.

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- e. There is no evidence of LLCs from different sectors acting as a community as defined by the Applicant Guidebook.²⁰⁶
- f. There is no evidence of LLPs from different sectors acting as a community as defined by the Applicant Guidebook.²⁰⁷
- g. There is no evidence that these incorporated firms would associate themselves with being part of the [INC] community as defined by the applicant.²⁰⁸
- h. There is no evidence that these limited liability companies would associate themselves with being part of the [LLC] community as defined by the applicant.²⁰⁹
- i. There is no evidence that these limited liability partnerships would associate themselves with being part of the [LLP] community as defined by the applicant.²¹⁰

280. At the same time, the EIU should be asked to explain why it apparently did not find it necessary to look for similar evidence in connection with its evaluations of the .RADIO, .HOTEL and .OSAKA community applications.

281. In any event, I conclude that the EIU's supposed "research" cost each of Dot Registry's applications (for .INC, .LLC and .LLP) all 4 possible points under **Criterion #1: Community Establishment** (i.e., the 2 points that were possible for **1-A Delineation** as well as the 2 points available under **1-B Extension**). Put plainly, the EIU's supposed "research" was sufficient to insure that these three Dot Registry applications could not prevail.

²⁰⁶ .LLC Report (Exhibit 8), p. 2.

²⁰⁷ .LLP Report (Exhibit 9), p. 2.

²⁰⁸ .INC Report (Exhibit 7), p. 2.

²⁰⁹ .LLC Report (Exhibit 8), p. 2.

²¹⁰ .LLP Report (Exhibit 9), p. 2.

Respectfully submitted

July 13, 2015



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BIOGRAPHY

Mr. Flynn has been both a testifying and consulting expert economist for nearly twenty-five years, specializing in antitrust, economic damages, intellectual property, class actions and other complex business litigation and consulting engagements. In addition to assuming overall responsibility for the preparation of expert submissions, including designing and directing the supporting analyses and drafting the reports themselves, Mr. Flynn also serves as an expert economic consultant to counsel, assisting in preliminary case analysis, discovery strategy, expert discovery and dispositive motions and trial. He has case experience in a broad range of industries, markets and products, including, among others:

- **Insurance** (including business interruption, workers compensation, auto, life, and property and casualty).
- **Healthcare** (including hospital and physician services, brand name prescription drugs and other pharmaceuticals, and medical instruments and hospital products).
- **Energy** (including petroleum, natural gas and gasoline, with specific case experience in production, pipelines, royalties, refining, distribution, and marketing).
- **Professional sports** (including professional sports leagues, teams, stadiums and franchise relocations).
- **Computer and electronics hardware and software** (including network operating systems, digital media software and video game consoles and software).
- **Transportation** (including passenger airlines and waterborne freight).
- **Other consumer and producer goods** (including infant formula, high-pressure laminates, carbon dioxide and consumer credit reports).

Mr. Flynn was enrolled as a National Science Foundation Fellow in the PhD Program in Economics of the Massachusetts Institute of Technology, Cambridge, Massachusetts, from 1971 to 1974, where he completed all general and field qualifying examinations for the PhD degree. Mr. Flynn received his AB degree from the University of California, Berkeley, where he was the recipient of the Department of Economics Citation as the Outstanding Graduating Senior.

PROFESSIONAL EXPERIENCE

- 2012 – Present** **Navigant Economics, Oakland, California**
Director
- 2011 – 2012** **AFE Consulting, Oakland, California**
Director
- 1989 – 2011** **LECG LLC (formerly The Law & Economics Consulting Group), Emeryville, California**
Principal (1999-2011)
Senior Managing Economist (1996-1999)
Managing Economist (1996)
Senior Economist (1989-1995)
- 1983 – 1988** **American President Lines, Ltd. (Now APL, Part of NOL Group), Oakland, California**
Director of Economics, Corporate Planning Department
- 1976 – 1982** **Data Resources, Inc. (now Global Insight, Inc.), Lexington, Massachusetts, and San Francisco, California**
Senior Economist and Managing Consultant

TEACHING EXPERIENCE

Instructor in Economics at Wellesley College (1974-1976), University of Massachusetts (1974-1975) and Boston University (1978).

Taught undergraduate and graduate courses, including *Introduction to Microeconomics*, *Introduction to Macroeconomics*, *Intermediate Economic Theory*, *Statistics and Econometrics*, *Mathematical Economics*, *Money and Banking*, and *Managerial Economics*.

ARTICLES/PUBLICATIONS/PRESENTATIONS

***An Economic Analysis of the California Energy Commission's Fuel Delivery Temperature Study and the "Hot Fuel" Allegations* (White Paper presented to the California Energy Commission, January 2009, and published by the National Institute of Standards and Technology/National Conference on Weights and Measures, *Report of the 94th National Conference on Weights and Measures*, NIST Special Publication 1099, November 2009).**

***The Analysis of Professional Sports Leagues as Joint Ventures* (with Richard J. Gilbert), *The Economic Journal*, 111 (February 2001), pp. F233-F252.**

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Using Economists to Overcome the Hart-Scott-Rodino Hurdle, March 1998, San Francisco, California. (Presentation to the *Continuing Legal Education Conference on Mergers, Acquisitions & Joint Ventures* sponsored by Corporate Counsel Institutes and Business Development Associates.)

Economics (with Leonard Waverman and Melvyn Fuss) Chapter 8 in *THE LITIGATOR'S GUIDE TO EXPERT WITNESSES*, Mark J. Freiman and Mark L. Berenblut, eds., 1997.

RETENTIONS AS TESTIFYING EXPERT

John Mosley, Individually, and Clinton Body Shop, Inc.; Daniel Mosley, Individually, and Clinton Body Shop of Richland Inc. v. GEICO Insurance Company; Progressive Insurance Company; Direct General Insurance Company, U.S. District Court, Southern District of Mississippi, Jackson Division (Case No. 3:13-cv-00161 LG-JMR).

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Retained on behalf of Defendants, 2007-2008 and 2012-2013.

Deposition Testimony on behalf of Defendants, August 2013.

Trial Testimony on behalf of Defendants, August 2013.

CenterPoint Energy Services, Inc. v. Air Products, LLC and The Premcor Refining Group, Inc., District Court of Harris County, Texas (295th Judicial District Cause No. 2007-70853).

Expert Report on behalf of Defendants, June 2009

Rebuttal Expert Report on behalf of Defendants, April 2010

Supplemental Expert Report on behalf of Defendants, April 2010

Deposition Testimony on behalf of Defendants, April 2010.

Fuel Delivery Temperature Study (pursuant to California AB 868)

Presentation to Staff of the California Energy Commission, November 2009

Presentation to the California Energy Commission, December 2009.

RETENTIONS AS TESTIFYING EXPERT (cont.)

Easley, Hornung, Inc. and Creole Engineering Sales Company, Inc. v. Timothy A. Shimko; Frank E. Piscitelli; Shimko & Piscitelli, a Law Partnership; Carter Dodge; Patrick G. Grattan; and, Geary, Shea, O'Donnell & Grattan, a Law Partnership, et al., California Superior Court, County of San Mateo, Southern Branch (Civil Case No. 436492).

Report to Counsel on behalf of Defendants, April 2005.

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Expert Report on behalf of Plaintiff, June 2004.

Supplemental Expert Report on behalf of Plaintiff, July 2004.

Deposition Testimony on behalf of Plaintiff, July 2004.

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Expert Declaration on behalf of The Farmers Group, Inc., September 2002.

Novell, Inc. v. Network Systems Technology, Inc., et al., U.S. District Court for the Northern District of Georgia, Atlanta Division (Civil Action File No. 1:00-cv-0773-RLV).

Expert Report on behalf of Plaintiff, December 2001.

Novell, Inc. v. MBC Enterprises, LLC, et al.; Novell, Inc. v. Computer Recyclers, Inc., et al., U.S. District Court for the District of Utah (Consolidated Case 2:98-cv-00200- ST).

Expert Report on behalf of Plaintiff, June 2000.

Supplemental Expert Report on behalf of Plaintiff, August 2000.

Trial Testimony on behalf of Plaintiff, November 2001.

Adobe Systems Incorporated v. One Stop Micro dba Signal Computing, et al., U.S. District Court for the Northern District of California (San Jose Division), (Case No. 5:97-cv-20980-JW-PVT).

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RETENTIONS AS TESTIFYING EXPERT (cont.)

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Declaration on behalf of Claimant OACCA, May 1999.
Expert Report on behalf of Claimant OACCA, June 1999.
Expert Report on behalf of Claimant OACCA, March 2000.
Deposition Testimony on behalf of Claimant OACCA, March 2000.
Testimony before Arbitrator on behalf of Claimant OACCA, April 2000.

Novell, Inc. v. CPU Distributing, Inc.; Terry L. Green; and Leroy Hunter, U.S. District Court for the Southern District of Texas (Houston Division) (Case No. 4:97-cv-2326).

Expert Report on behalf of Plaintiff, September 1998.

Novell, Inc. v. Network Trade Center, Inc. and Mark Bondiatt, U.S. District Court for the District of Utah (Case No. 2:95-cv-00523-JTG).

Testimony before Special Master on behalf of Plaintiff, May 1998.

Novell, Inc. v. Vandy Micro Corp., et al., U.S. District Court, Central District of California (Case No. 2:96-cv-00507-MRP-Mc).

Expert Report on behalf of Plaintiff, February 1997.
Trial Testimony on behalf of Plaintiff, June 1997.

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Expert Report on behalf of Plaintiff, February 1997.

Novell, Inc. v. Softcom Computers, et al., U.S. District Court, Central District of California (Case No. 2:96-cv-00492-MRP-Mc).

Expert Report on behalf of Plaintiff, February 1997.

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Expert Report on behalf of Plaintiff, February 1997.

RETENTIONS AS CONSULTING EXPERT

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Retained on behalf of Defendants, 2014.

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Retained on behalf of Plaintiffs, 2008-2012.

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Retained on behalf of the Premier Defendants, 2010.

Application of San Pablo Bay Pipeline Company LLC for Approval of Tariffs for the San Joaquin Valley Crude Oil Pipeline before the California Public Utilities Commission

Retained on behalf of Applicant, 2008-2010.

Starr International Company, Inc. v. American International Group, Inc. (including counterclaims against Starr International Company and Maurice R. Greenberg by American International Group), U.S. District Court, Southern District of New York.

Retained on behalf of Starr International Company, 2005-2009.

Ronald W. De Ruuk, as Bankruptcy Administrator for Holding Tusculum B.V., Claimant, against Louis Dreyfus S.A.S., Respondent, Court of Arbitration, International Chamber of Commerce, Geneva, Switzerland.

Retained on behalf of Claimant, 2007-2008.

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Retained on behalf of Defendant, 2007-2008.

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Retained on behalf of Counterclaim Defendant Amgen, 2007.

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Retained on behalf of Defendant Wilsonart International, 2002-2006.

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Retained on behalf of Defendants, 2001-2003.

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Retained on behalf of Defendant, 2004-2005.

Grand Sprinkler Inc. v. The Toro Company, U.S. District Court, District of Arizona.
Retained on behalf of Defendant, 2003-2004.

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Retained on behalf of Defendant, 1999-2003.

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Retained on behalf of Defendant The Toro Company, 2001-2002.

United States ex rel. v. Shell Oil Co., et al., U.S. District Court, Eastern District of Texas.
Retained on behalf of Shell Oil Co., 1999-2000.

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Retained on behalf of Defendant, 2000.

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***eBay, Inc. v. Bidder's Edge, Inc.*, U.S. District Court, Northern District of California
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Retained on behalf of Plaintiff, 2000.

***Brand Name Prescription Drugs Antitrust Litigation (MDL 997)*, U.S. District Court,
Northern District of Illinois.**

Retained on behalf of Defendant Abbott Laboratories, 1995-1999.

***Lease Oil Antitrust Litigation (MDL 1206)*, U.S. District Court, Southern District of
Texas.**

Retained on behalf of Defendants, 1995-1999.

***Oil Changer, Inc. v. Quaker State Corporation and Pennzoil Company*, U.S. District
Court, Northern District of California.**

Retained on behalf of Defendants, 1999.

***National Football League v. Oakland Raiders* (and related litigation), U.S. District
Court, Central District of California, and Superior Court of the State of California,
County of Los Angeles.**

Retained on behalf of the National Football League, 1997-1998.

***Zeneca Limited v. Pharmachemie B.V.*, U.S. District Court, District of Massachusetts.**

Retained on behalf of Plaintiff, 1998.

***Zeneca Limited v. Mylan Pharmaceuticals, Inc.*, U.S. District Court, Western District
of Pennsylvania.**

Retained on behalf of Plaintiff, 1998.

***Qualcomm, Incorporated v. Motorola Inc.*, U.S. District Court, Southern District of
California.**

Retained on behalf of Plaintiff, 1998.

***Novell, Inc. v. Network Trade Center, Inc., et al.*, U.S. District Court, District of Utah.**

Retained on behalf of Plaintiff, 1996-1998.

***St. Louis Convention and Visitors Commission v. National Football League, et al.*,
U.S. District Court, Eastern District of Missouri.**

Retained on behalf of Defendants, 1997.

RETENTIONS AS CONSULTING EXPERT (cont.)

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Northern District of California.
Retained on behalf of Plaintiff, 1997.

Theresa Aguilar, et al. v. Atlantic Richfield Corporation, et al., Superior Court of the
State of California, County of San Diego.
Retained on behalf of Defendants, 1997.

Cadence Design Systems, Inc. v Avant! Corporation, US District Court, Northern
District of California.
Retained on behalf of Plaintiff, 1996.

Nestlé Food Co. v. Abbott Laboratories, et al., U.S. District Court, Central District of
California.
Retained on behalf of Defendant Abbott Laboratories, 1994-1995.

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District of Florida.
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Retained on behalf of Defendants, 1995.

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Columbia.
Retained on behalf of Defendant, 1993-1994.

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Insurance Commissioner, State of California.
Retained on behalf of Applicant, 1994.

RETENTIONS AS CONSULTING EXPERT (cont.)

In the Matter of the Rates of: State Farm Companies, Before The Insurance Commissioner, State of California.

Retained on behalf of Applicant, 1994.

In the Matter of the Rates of: 20th Century Insurance Companies, Before The Insurance Commissioner, State of California.

Retained on behalf of Applicant, 1994.

United States v. Eastman Kodak Co., U.S. District Court, Western District of New York.

Retained on behalf of Intervenor Fuji Photo Film, 1992-1993.

Infant Formula Antitrust Litigation (MDL 878), U.S. District Court, Northern District of Florida.

Retained on behalf of Defendant Abbott Laboratories, 1992-1993.

In the Matter of: Abbott Laboratories, Docket No. 9523, Before Administrative Law Judge, Federal Trade Commission.

Retained on behalf of Respondent, 1992-1993.

In the Matter of: Prudential Insurance Company, et al., before The Insurance Commissioner, State of California.

Retained on behalf of Respondent, 1993.

Texas Instruments, Inc. v. Dell Computer Corp., U.S. District Court, Northern District of Texas.

Retained on behalf of Plaintiff, 1991-1992.

Nintendo of America v. Louis Galoob Toys, U.S. District Court, Northern District of California.

Retained on behalf of Defendant, 1991.

Atari Corp. v. Nintendo Company, Ltd., U.S. District Court, Northern District of California.

Retained on behalf of Plaintiff, 1989-1992.

Michael A. Flynn
Director, Navigant Economics, LLC
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PROFESSIONAL AFFILIATIONS

Member, American Economic Association

Associate Member, Section of Antitrust Law, American Bar Association

Veteran, United States Army

Attachment A: Documents and Related Materials Reviewed

1 .ART Application (ID 1-1097-20833), Dadotart Inc.
2 .ART Application (ID 1-1675-51302), EFLUX.ART, LLC
3 .ART Community Priority Evaluation Report, Application ID 1-1097-20833, September 10, 2014
4 .ART Community Priority Evaluation Report, Application ID 1-1675-51302, September 10, 2014
5 .ECO Application (ID 1-912-59314), Big Room Inc.
6 .ECO Community Priority Evaluation Report, Application ID 1-912-59314, October 6, 2014
7 .GAY Application (ID 1-1713-23699), dotgay llc
8 .GAY Community Priority Evaluation Report, Application ID 1-1713-23699, October 6, 2014
9 .GMBH Application (1-1273-63351), TLDDOT GmbH
10 .GMBH Community Priority Evaluation Report, Application ID 1-1273-63351, June 11, 2014
11 .HOTEL Application (ID 1-1032-95136), HOTEL TLD s.a.r.l
12 .HOTEL Community Priority Evaluation Report, Application ID 1-1032-95136, June 11, 2014
13 .IMMO Application (ID 1-1000-62742), Starting Dot
14 .IMMO Community Priority Evaluation Report, Application ID 1-1000-62742, March 17, 2014
15 .INC Application (ID 1-880-35979), Dot Registry LLC
16 .INC Community Priority Evaluation Report, Application ID 1-880-35979, June 11, 2014
17 .LLC Application (ID 1-880-17627), Dot Registry LLC
18 .LLC Community Priority Evaluation Report, Application ID 1-880-17627, June 11, 2014
19 .LLP Application (ID 1-880-35508), Dot Registry LLC
20 .LLP Community Priority Evaluation Report, Application ID 1-880-35508, June 11, 2014
21 .MLS Application (ID 1-1888-47714), Canadian Real Estate Association
22 .MLS Community Priority Evaluation Report, Application ID 1-1888-47714, March 17, 2014
23 .MUSIC Application (ID 1-959-51046), .MUSIC LLC
24 .MUSIC Community Priority Evaluation Report, Application ID 1-959-51046, October 6, 2014
25 .OSAKA Application (ID 1-901-9391), Interlink Co., Ltd.
26 .OSAKA Community Priority Evaluation Report, Application ID 1-901-9391, July 29, 2014
27 .RADIO Application (ID 1-1083-39123), European Broadcasting Union
28 .RADIO Community Priority Evaluation Report, Application ID 1-1083-39123, September 10, 2014
29 .SHOP Application (ID 1-890-52063), GMO Registry, Inc.
30 .SHOP Community Priority Evaluation Report, Application ID 1-890-52063, March 13, 2015
31 .TAXI Application (ID 1-1025-18840), Taxi Pay GmbH
32 .TAXI Community Priority Evaluation Report, Application ID 1-1025-18840, March 17, 2014
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New gTLD Program
Community Priority Evaluation Report

Report Date: 11 June 2014

Application ID:	1-880-35979
Applied-for String:	INC
Applicant Name:	Dot Registry LLC

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

Panel Summary

Overall Scoring	5 Point(s)	
	Earned	Achievable
#1: Community Establishment	0	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	3	4
#4: Community Endorsement	2	4
Total	5	16
Minimum Required Total Score to Pass 14		

Criterion #1: Community Establishment	0/4 Point(s)
1-A Delineation	0/2 Point(s)
<p>The Community Priority Evaluation panel determined that the community as identified in the application did not meet the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community demonstrates insufficient delineation, organization and pre-existence. The application received a score of 0 out of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u></p> <p>Two conditions must be met to fulfill the requirements for delineation: there must be a clear straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p>	

The community defined in the application (“INC”) is:

Members of the community are defined as businesses registered as corporations within the United States or its territories. This would include Corporations, Incorporated Businesses, Benefit Corporations, Mutual Benefit Corporations and Non-Profit Corporations. Corporations or “INC’s” as they are commonly abbreviated, represent one of the most complex business entity structures in the U.S. Corporations commonly participate in acts of commerce, public services, and product creation....

A corporation is defined as a business created under the laws of a State as a separate legal entity, that has privileges and liabilities that are distinct from those of its members. While corporate law varies in different jurisdictions, there are four characteristics of the business corporation that remain consistent: legal personality, limited liability, transferable shares, and centralized management under a board structure. Corporate statutes typically empower corporations to own property, sign binding contracts, and pay taxes in a capacity separate from that of its shareholders.

This community definition shows a clear and straightforward membership. While broad, the community is clearly defined, as membership requires formal registration as a corporation with the relevant US state. In addition, corporations must comply with US state law and show proof of best practice in commercial dealings to the relevant state authorities.

However, the community as defined in the application does not have awareness and recognition of a community among its members. This is because corporations operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC. Based on the Panel’s research, there is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook. There is no evidence that these incorporated firms would associate themselves with being part of the community as defined by the applicant.

The Community Priority Evaluation panel determined that the community as defined in the application only satisfies one of the two conditions to fulfill the requirements for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

The community as defined in the application does not have at least one entity mainly dedicated to the community. Although responsibility for corporate registrations and the regulations pertaining to corporate formation are vested in each individual US state, these government agencies are fulfilling a function, rather than representing the community. In addition, the offices of the Secretaries of State of US states are not mainly dedicated to the community as they have other roles/functions beyond processing corporate registrations. According to the application:

Corporations can be formed through any jurisdiction of the United States. Therefore members of this community exist in all 50 US states and its territories. Corporation formation guidelines are dictated by state law and can vary based on each State’s regulations. Persons form a corporation by filing required documents with the appropriate state authority, usually the Secretary of State. Most states require the filing of Articles of Incorporation. These are considered public documents and are similar to articles of organization, which establish a limited liability company as a legal entity. At minimum, the Articles of Incorporation give a brief description of proposed business activities, shareholders, stock issued and the registered business address.

The community as defined in the application does not have documented evidence of community activities. As there is no entity that is mainly dedicated to the community as defined in the .INC application, there is no

documented evidence of community activities.

The Community Priority Evaluation panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to a get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). The Community Priority Evaluation panel determined that this application refers to a “community” construed to obtain a sought-after corporate identifier as a gTLD string, as these corporations would typically not associate themselves with being part of the community as defined by the applicant. The community therefore could not have been active prior to the above date (although its constituent parts were active).

The Community Priority Evaluation panel determined that the community as defined in the application does not fulfill the requirements for pre-existence.

1-B Extension

0/2 Point(s)

The Community Priority Evaluation panel determined that the community as identified in the application did not meet the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not demonstrate considerable size or longevity for the community. The application received a score of 0 out of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of a considerable size. The community for .INC as defined in the application is large in terms of number of members. According to the application:

With almost 470,000 new corporations registered in the United States in 2010 (as reported by the International Association of Commercial Administrators) resulting in over 8,000,000 total corporations in the US, it is hard for the average consumer to not conduct business with a corporation.

However, as previously stated, the community as defined in the application does not have awareness and recognition of a community among its members. This is because corporations operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC. Based on the Panel’s research, there is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook. These incorporated firms would therefore not typically associate themselves with being part of the community as defined by the applicant.

The Community Priority Evaluation panel determined that the community as defined in the application only satisfies one of the two conditions to fulfill the requirements for size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application does not demonstrate longevity. As mentioned previously, according to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to a get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). The Community Priority Evaluation panel determined that this application refers to a “community” construed to obtain a sought-after corporate identifier as a gTLD string, as these corporations would typically not associate themselves with being part of the community as defined by the applicant. Therefore, the pursuits of the .INC community are not of a lasting, non-transient nature.

Additionally, as previously stated, the community as defined in the application does not have awareness and recognition of a community among its members. This is because corporations operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC. Based on the Panel’s research, there is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook. These incorporated firms would therefore not typically associate themselves with being part of the community as defined by the applicant.

The Community Priority Evaluation panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community	0/4 Point(s)
2-A Nexus	0/3 Point(s)
<p>The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string identifies the community, but over-reaches substantially beyond the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.</p> <p>To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus, the applied-for string must identify the community. “Identify” means that the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community.</p> <p>The applied-for string (.INC) over-reaches substantially, as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community. According to the application documentation:</p> <p style="padding-left: 40px;">“.INC” was chosen as our gTLD string because it is the commonly used abbreviation for the entity type that makes up the membership of our community. In the English language the word incorporation is primarily shortened to Inc. when used to delineate business entity types. For example, McMillion Incorporated would additionally be referred to as McMillion Inc. Since all of our community members are incorporated businesses we believed that “.INC” would be the simplest, most straightforward way to accurately represent our community.</p> <p style="padding-left: 40px;">Inc. is a recognized abbreviation in all 50 states and US Territories denoting the corporate status of an entity. Our research indicates that Inc. as corporate identifier is used in three other jurisdictions (Canada, Australia, and the Philippines) though their formation regulations are different from the United States and their entity designations would not fall within the boundaries of our community definition.</p> <p>While the string identifies the name of the community, it captures a wider geographical remit than the</p>	

community has, as the corporate identifier is used in Canada, Australia and the Philippines. Therefore, there is a substantial over-reach between the proposed string and community as defined by the applicant.

The Community Priority Evaluation panel determined that the applied-for string over-reaches substantially beyond the community. It therefore does not meet the requirements for nexus.

2-B Uniqueness

0/1 Point(s)

The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application and it must also score a 2 or a 3 on Nexus. The string as defined in the application does not demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus and is therefore ineligible for a score of 1 for Uniqueness. The Community Priority Evaluation panel determined that the applied-for string does not satisfy the condition to fulfill the requirements for Uniqueness.

Criterion #3: Registration Policies

3/4 Point(s)

3-A Eligibility

1/1 Point(s)

The Community Priority Evaluation panel determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by limiting eligibility to registered corporations and by cross-referencing their documentation against the applicable US state's registration records in order to verify the accuracy of their application, etc. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.

3-B Name Selection

1/1 Point(s)

The Community Priority Evaluation panel determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.

To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining a comprehensive list of name selection rules, such as requirements that second level domain names should match or include a substantial part of the registrant's legal name, and specifying that registrants will not be able to register product line registrations, amongst other requirements. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Name Selection.

3-C Content and Use	<i>1/1 Point(s)</i>
<p>The Community Priority Evaluation panel determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.</p> <p>To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by noting that all registrants must adhere to the content restrictions outlined in the applicant’s abuse policies. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Content and Use.</p>	
3-D Enforcement	<i>0/1 Point(s)</i>
<p>The Community Priority Evaluation panel determined that the application did not meet the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the application provided specific enforcement measures but did not include appropriate appeal mechanisms. The application received a score of 0 out of 1 point under criterion 3-D: Enforcement.</p> <p>Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures constituting a coherent set. For example, if a registrant wrongfully applied for and was awarded a second level domain name, the right to hold this domain name will be immediately forfeited. (Comprehensive details are provided in Section 20e of the applicant documentation). However, the application did not outline an appeals process. The Community Priority Evaluation panel determined that the application satisfies only one of the two conditions to fulfill the requirements for Enforcement.</p>	

Criterion #4: Community Endorsement	
2/4 Point(s)	
4-A Support	<i>1/2 Point(s)</i>
<p>The Community Priority Evaluation panel determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.</p> <p>To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. “Recognized” means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed.</p> <p>The Community Priority Evaluation panel determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from a majority of the recognized community institution(s)/member organization(s). However, the applicant possesses documented support from at least one group with relevance and this documentation contained a description of the process and rationale used in arriving at the expression of support.</p>	

The application included letters from a number of Secretaries of State of US states, which were considered to constitute support from groups with relevance, as each Secretary of State has responsibility for corporate registrations and the regulations pertaining to corporate formation in its jurisdiction. These entities are not the recognized community institution(s)/member organization(s), as these government agencies are fulfilling a function, rather than representing the community. The viewpoints expressed in these letters were not consistent across states. While several US states expressed clear support for the applicant during the Letters of Support verification process, others either provided qualified support, refrained from endorsing one particular applicant over another, or did not respond to the verification request. Letters of support from other entities did not meet the requirement for relevance based on the Applicant Guidebook criteria, as they were not from the recognized community institutions/member organizations. The Community Priority Evaluation Panel determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

1/2 Point(s)

The Community Priority Evaluation panel determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application received relevant opposition from one group of non-negligible size. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one group of non-negligible size.

The application received several letters of opposition, one of which was determined to be relevant opposition from an organization of non-negligible size. This opposition was from a community that was not identified in the application but which has an association to the applied-for string. Opposition was on the grounds that limiting registration to US registered corporations only would unfairly exclude non-US businesses. The remaining letters were either from groups/individuals of negligible size, or were not from communities which were not mentioned in the application but which have an association to the applied for string. The Community Priority Evaluation Panel determined that the applicant partially satisfied the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

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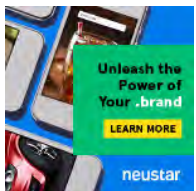


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.hotel avoids auction with CPE win

Kevin Murphy, June 13, 2014, 04:50:42 (UTC), [Domain Registries](#)

A new gTLD applicant backed by the hotel industry has won a Community Priority Evaluation, meaning it gets to automatically win the .hotel contention set without going to auction.

If the decision stands, no fewer than six rival applicants for the string — including the likes of Donuts, Radix, Famous Four and Minds + Machines — are going to have to withdraw their applications.

It's a bit of a shocker.

The CPE winner is HOTEL Top-Level-Domain, which scored 15 out of 16 available points in the CPE. The minimum required to vanquish all foes is 14 points.

The company will have spent a fair bit of cash fighting the CPE, but nothing compared to the millions of dollars an auction for .hotel would be likely to fetch.

Crucially, where HOTEL prevailed was on the “Nexus” criterion — demonstrating a link between the string and the community supporting the application — where four points are available.

In the first four CPE results to come through, [back in March](#), each applicant scored a 0 on Nexus and none scored more than 11 points overall.

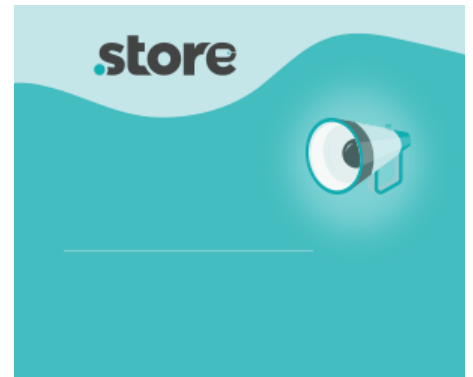
Dot Registry, which failed four CPEs (.inc, .llc, .corp and .llp) this week, also repeatedly flunked on this count.

HOTEL, however, scored a 3.

Rival applicants [such as Donuts and M+M](#) had argued that HOTEL's stated community failed to take into account smaller hoteliers, such as bed and breakfast owners.

But the CPE panelist decided that the application did not “substantially overreach”:

The string nexus closely describes the community, without overreaching substantially beyond the community. The string identifies the name of the core community members (i.e. hotels and associations representing hotels). However, the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel



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Former NTIA chief Redl now working for Amazon

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US official Heineman joins GoDaddy

Web.com got pwned

Surprise! ICANN throws out complaints about .org price caps

Somber mood as ICANN 66 opens in Montreal

America has Amazon's back in gTLD fight at ICANN 66

New (kinda) geo-TLD rules laid out at ICANN 66

Emoji domains get a 🤔 after broad study

Industry veteran Jay Daley tapped to lead IETF

Verisign likely to get its billion-dollar .com pricing windfall

ICANN enters talks to kill off Whois for good

Form an orderly queue: New Zealand wants a new back-end

Brexit hell: .eu suspension plan put on hold

chains and which may not be automatically associated with the gTLD. However, these entities are considered to comprise only a small part of the community. Therefore, the string identifies the community, but does not over-reach substantially beyond the community, as the general public will generally associate the string with the community as defined by the applicant.

There's no formal appeals mechanism for CPE, but rival applicants could try their luck with more general ICANN procedures such as Requests for Reconsideration.

HOTEL Top-Level-Domain is a Luxembourg-based entity, founded in 2008 to apply for the gTLD, backed by about a dozen international hotelier associations, including the International Hotel and Restaurant Association.

The IHRA counts 50 major hotel chain brands among its members and claims to be officially recognized by the UN for its lobbying work on behalf of the hospitality industry.

HOTEL intends to keep the .hotel gTLD restricted "initially" to only hotels as defined in the international standard ISO 18513.

Registrants will be verified against hotel industry databases. This will happen post-registration, but before the domain name can be activated in the DNS.

In other words, unless you're a member of the hotel industry, you won't be getting to use a .hotel domain name. Domainers are apparently not wanted.

All .hotel names will also be checked a year from registration to ensure that they have a web site displaying relevant content. Redirection to other TLDs may be allowed.

I was so convinced that the CPE was designed in such a way that it would be failed by all the applicants which had applied for it, I **bet \$50** (to go to an applicant-nominated charity) that none would.

If HOTEL wants to let me know which charity they want the \$50 to go to, I'll get it donated forthwith. I'm just glad I didn't offer to eat my underwear.

Policies are guidelines, not actual day to day run of a system. At the end of the day someone has to do the job, and tha... [read more](#)

Owen:
You might want to update the headline to read "women" instead of "girls". Just slightly biased..... [read more](#)

John L:
Section 2.10(c) of the new .org agreement specifically requires uniform renewal pricing. You don't have to like the agre... [read more](#)

John:
How does the multi-stakeholder model function when all of the details are confidential and behind closed doors? How c... [read more](#)

Mark Thorpe:
It's about damn time ICANN looked into this bad deal! "PIR has already rejected ICANN's request to publish its requ... [read more](#)

Mark Thorpe:
Exactly, John!... [read more](#)

John Colascione:
I thought ICANN stated there were not in a position to make a call on the deal. Sounds like that was nonsense.... [read more](#)

John:
This entire matter was self-inflicted by ICANN. ICANN created this entire mess. On June 30th – ICANN migrated .ORG o... [read more](#)

John Laprise:
I know that the ICANN board and org have been getting an earful from stakeholders. People complain about the machinery b... [read more](#)

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COMMENTS (1)

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June 13, 2014 at 6:59 am

Great result! Congratulations to Johannes, Dirk and Katrin. Kudos to the EIU and ICANN for getting this right. Looking forward to many other very worthy Community Applicants with appropriate policies and demonstrable support prevailing as well.

Donuts, Radix, Famous Four and Minds + Machines will be fine since they found a way to continue making money by "losing" private auctions treating each TLD as a commodity without much differentiation. .HOTEL is in very good hands.

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Coalitions vs. Communities and new top level domain names

BY ANDREW ALLEMANN — FEBRUARY 26, 2016 POLICY & LAW 3 COMMENTS

Many groups seeking community status were coalitions, not the entire community.

ICANN's new top level domain name program guidebook afforded communities two ways to get a leg up in acquiring a new top level domain name.

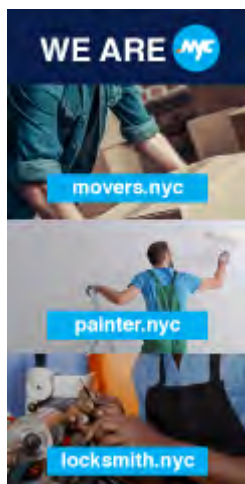
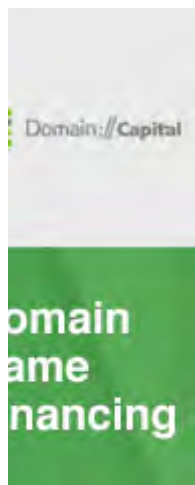
First, they could file a community objection against any applicant. If it won the objection, the losing applicant wouldn't be able to proceed with its application.



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Second, a community that applied for its top level domain name could apply for Community Priority Evaluation. If it met strict guidelines, its application would automatically win, and rival applicants wouldn't be able to get the domain name.

Here are the results of community objections:

Passed

- .Architect International Union of Architects vs. Donuts
- .Bank International Banking Federation vs. Dotsecure Inc
- .Charity Independent Objector vs. Donuts
- .Insurance Financial Services Roundtable vs. Dotfresh Inc
- .Med Independent Objector vs. Google and Medistry (later reconsidered)
- .Medical Independent Objector vs. Donuts
- .Mobile CTIA vs. Amazon
- .Polo United States Polo Association vs. Ralph Lauren
- .Rugby International Rugby Board vs. dot Rugby Ltd and Donuts
- .Ski Fédération Internationale de Ski vs. Donuts
- .Sport SPORTACCORD vs. dot Sport Limited
- .Sports SPORTACCORD vs. Donuts

Failed

- .Amazon Independent Objector vs.

Partners & Sponsors



Amazon.com

.Band American Association of Independent Music vs. Donuts and Red Triangle

.Basketball FIBA vs. dot Basketball Limited and Donuts

.Book Rakuten vs. Amazon.com

.Charity Independent Objector vs. Famous Four

.Cloud Cloud Industry Forum Limited vs. Symantec, Google and Amazon

.Fly FairSearch.org vs. Google

.Game Entertainment Software Association vs. Amazon.com

.Gay ILGBSIA vs. Minds + Machines, Top Level Design and Rightside

.Gay Metroplex Republicans of Dallas vs. dotgay llc

.Gold World Gold Council vs. Donuts

.Halal UAE vs. Asia Green IT

.Islam UAE vs. Asia Green IT

.Health ICANN ALAC vs. Donuts and DotHealth, LLC

.Healthcare Independent Objector vs. Donuts

.Hotels Hotel Consumer Protection Coalition and HOTREC vs. Booking.com

.Insurance American Insurance Association vs. Dotfresh Inc and Donuts

.Insure American Insurance Association vs. Donuts

.Kosher OU Kosher vs. Kosher Marketing Assets

.LGBT ILGBTIA va. Afilias

.Lotto European State Lotteries Association vs. Afilias

.Mail Universal Postal Union vs. Google,

Amazon, Donuts, WhitePages TLD and
GMO
.Map FairSearch vs. Google
.Merck and .MerckMSD Merck CGaA vs.
Merck Registry Holdings
.Mobile CTIA vs. Dish
.Music A2IM vs. DotMusic Inc, dot music
Limited, Amazon, Google,
Entertainment Names Inc and Donuts
.Music IFACCA vs. .music LLC
.PersianGulf Gulf Cooperation Council
vs. Asia Green IT
.Resien Bundesverband der Deutschen
Tourismuswirtschaft vs. Donuts
.Republican Republican National
Committee vs. Rightside
.Search ICOMP vs. Google and
FairSearch.org vs. Google
.Shop Japan Association of New
Economy vs. Amazon.com
.Song A2IM vs. Amazon.com
.Tunes A2IM vs. Amazon.com
.アマゾン Independent Objector vs.
Amazon.com
.亚马逊 Independent Objector vs.
Amazon.com
.慈善 Independent Objector vs. Excellent
First Limited

23 applicants elected Community
Priority Evaluation. Here's how they
fared:

Passed

.Osaka Interlink Co, Ltd (15/16)
.Radio European Broadcasting Union
(14/16)

.Hotel Hotel Top-Level-Domain s.a.r.l.
(15/16)
.Eco Big Room Inc (14/16)
.Spa Asia Spa and Wellness Promotion
Council (14/16)

Failed

.Immo StartingDot (4/16)
.Taxi Taxi Pay GmbH (6/16)
.Tennis Tennis Australia Ltd (11/16)
.MLS Canadian Real Estate Association
(11/16)
.GmbH TLDDot GmbH (5/16)
.LLC Dot Registry LLC (5/16)
.Inc Dot Registry LLC (5/16)
.LLP Dot Registry LLC (5/16)
.Art Eflux.art (7/16)
.Art Dadotart Inc (7/16)
.Gay dotgay LLC (10/16)
.Music .Music LLC (3/16)
.Music DotMusic Limited (10/16)
.Shop GMO Registry (6/16)
.Shop Commercial Connect (5/16)
.CPA American Institute of Certified
Public Accountants (11/16)
.CPA CPA Australia Ltd (12/16)

(A decision for .kids is still outstanding.)

I was against the idea of “community”
status and benefits from the beginning.
It seemed like something that could be
gamed.

ICANN and the community certainly
thought about gaming and tried to put
in protections against it. Still, the results

include some questionable decisions that seem at odds with each other.

I think one of the biggest mistakes ICANN made was not putting examples in its applicant guidebook. I'm sure a lawyer made this decision. But ICANN could have prevented many of these issues by noting certain concepts that universally touch everyone, such as music and sports, could clearly not be a "community" top level domain.

I've had trouble expressing this idea in the past. But I think I have a concise explanation now: it's the difference between coalitions and communities.

Some companies that sought community status created *coalitions* of people and groups interested in a top level domain name. But these coalitions are not the community.

Music literally touches every human being. Islam is a religion claiming a quarter of the world's population. Shopping is something we all do.

How can an applicant claim to represent the entirety of these communities?

A mistake in the guidebook left this open to interpretation. Some applicants successfully argued that they represented a *subset* of a community. By narrowly defining a community and

applying it to a broad term, they were able to show they represented the community.

I hope that community definitions are more specific for the next round of new TLDs, or the idea of community applicants is removed. Given the results from this round, something will certainly change next time around.

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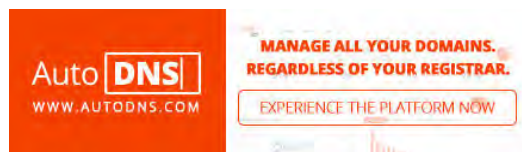


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 3 Comments

Tags: [community applicants](#), [new tlds](#)



Comments



Constantine
Roussos (.MUSIC)

says

February 26, 2016 at 3:00
pm

Andrew,

You have clearly not read the Applicant Guidebook and your analysis is flawed because you are ignoring key criteria. Please refute these comments below if you believe your analysis is precise (it is not):

1) "How can an applicant claim to represent the entirety of these communities?"

Many or most do not claim they represent all of the community in its entirety. In fact they claim they claim they represent a "majority" of the community they defined.

The AGB includes this specific criterion question:

"[t]here are multiple institutions/organizations

supporting the application, with documented support from institutions/organizations representing a majority of the overall community addressed?"

According to the AGB:
"Also with respect to "Support," the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2," (AGB, Module 4, 4-18).

For example, .RADIO was determined to that the "[.RADIO] applicant possesses documented support from institutions/organizations representing a majority of the community addressed." (.RADIO CPE, p.7).

As you can see the “entirety” mandate is just one of many options that ICANN has allowed. “Majority” of the community defined is another.

2) You claim that a coalition i.e. an alliance was not explicitly mentioned in the AGB. Again, you are mistaken.

AGB, Attachment to Module 2, Evaluation Questions and Criteria: “Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required,” (AGB, Module 2, Notes, 20A, A-14).

I note that in the case of a “logical alliance” or an “alliance of groups” (which is permitted by the AGB) that ICANN mandates details of each constituent part (i.e. it is required). This means each constituent member

must be detailed e.g.
“music label”, “music
attorney” and so forth.
Applicants must follow
instructions.

For .HOTEL, ICANN and
the EIU stated that
.HOTEL has cohesion
because their delineated
“categories are a logical
alliance of members.”
(.HOTEL CPE, p.2)

Further, the CPE
Guidelines state: “With
respect to “Delineation”
and “Extension,” it should
be noted that a
community can consist
of...a logical alliance of
communities,” CPE
Guidelines, p.4).

Conclusion:

The AGB is specific in
some aspects. It
specifically states that a
community that is a
“logical alliance” or an
“alliance of groups”
qualifies as illustrated
above. Further, the
criterion of representing
a community in its
entirety that you present

as a requirement is not a requirement but one of a few options to score maximum points for “support.” The “majority” criterion assessment applies as well and it relates to the community that is defined. If the definition is a “delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature,” that relate to music” (DotMusic’s community definition that was disregarded by the Economist and ICANN) then (according to the AGB process guidelines) that is the definition that the entire Community Priority Evaluation is graded against, including whether there is cohesion or not with respect to that community definition. According to Oxford dictionary, an “alliance” is defined as “a union or association formed for mutual benefit, especially between organizations”

or “a state of being joined or associated.”

Applicants were asked to follow specific AGB procedures when it comes to CPE and to answer the questions based on explicit instructions. Community applicants relied on answering those questions based on the AGB. ICANN’s responsibility (and the EIU’s) were to apply established AGB procedures. Just like in the case of .MUSIC, you, ICANN and the EIU (in the case of .MUSIC) disregarded the “majority of the community defined” criterion and only applied the “entirety” test.

Are you stating in your article that the “majority of the defined addressed community” criterion does not exist and should not be applied in CPE when the AGB specifically states that this specific criterion process must be followed because it is a

permissible option to
earn maximum points?

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Reply



DLB says

February 26,

2016 at 8:25 pm

Did someone at ICANN ask you to write this b.s.? You should have looked up the definition of “community” first. Communities are not all equal. Communities can be defined by geographic borders, common interests, social agendas, by laws/regulations, etc. The AGB only states “cohesion” must exist but does not state how (paying fees, membership forms, attending meetings or industry related events, etc.). ICANN and the EIUs failures were to understand that communities, like people, come in all different sizes, shapes, locations, and

kinds. If you think about it, we are all a member of some community.

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Reply



Rubens Kuhl says
February 26,
2016 at 10:39 pm

One problem with community priority is that it's not just priority, it's an automatic kill to other applications. One possible solution is to make CPE actually be a priority level. For instance, if by restricting the TLD to specific registrants a registry loses 80% of the potential registrants, its bid in an auction could be valued 5x; this would provide for equal conditions among those two applications.

Note that doesn't preclude community objection in getting a TLD or eliminating a TLD for the same sector; .bank,

.insurance, .ski and .archi are clear examples of this mechanism that we will also see in a next round.

But by making CPE a sort of handicap factor, evaluating it will be easier, as will be agreeing to outcomes.

This could also be used to apply a social value to public safety, like in a TLD verifying credentials to perform some activities instead of just taking those credentials at face value: such a TLD would have much less registrars and many less registrants due to both less registrars and verifications, but if that is valued into a factor, such application could still beat others at auction.

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 ANOTHER CRUMPLED TIN CAN

 OUTWARD

Will ICANN's Dotgay Do-Over Be Done Well?

By MARC NAIMARK
MARCH 23, 2015 • 3:02 PM

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Registry et al. 000196



Can ICANN fix its community priority application process?

Photo by 360b/Shutterstock.com

In late January, dotgay LLC announced some good news for those of us who favor LGBTQ community control of a dedicated space on the Web: Following a lively campaign by Internet users and LGBTQ organizations, the Internet Corporation for Assigned Names and Numbers questioned the work of the Economic Intelligence Unit, the entity it had charged with reviewing the application of dotgay LLC to own the future .gay generic top level domain, and ordered EIU to carry out a new review with a new team of evaluators. Reopening the application may lead to approval of dotgay LLC as owner of .gay, but unless the review takes into account the inherently blurred borders of the LGBTQ community, we may end up with a second, and definitive, rejection of the existence of an online “gay” community from ICANN.

As I’ve written before ([here](#), [here](#), and [here](#)), the creation of the .gay domain space has been a long and troubled process. The new domain is part of ICANN’s controversial decision to create new domain names alongside stalwarts like .com, .org, or .uk. This has already given us new extensions like .wedding, .london, and .audi. The whole scheme has been called a giant scam, aimed at forcing existing brand owners to buy new domains to protect their intellectual property. Such is the case of the new .sucks domain, where the only way for a company like General Motors to avoid the creation of a website at generalmotors.sucks is to buy the domain, at an annual cost of \$2,500, a situation described by former Sen. Jay Rockefeller, D-W.Va., as “little more than a predatory shakedown scheme.”

ICANN offered some protection for strings (a sequence of letters like c-o-m or g-a-y), which an applicant could claim represent a “community.” If such strings were recognized as having community interest, an applicant could apply to own it, providing it succeeded in a “community priority evaluation,” which would be carried out by a third party on behalf of ICANN. Had dotgay LLC succeeded in its CPE application, which was adjudicated by EIU, it would have earned the right to own .gay, gaining automatic priority over the three “standard” (i.e., purely commercial) operators who had also applied for the string, and whose presumptive victory raised fears that .gay would devolve to a sea of porn and homophobia, rather than seeing realized dotgay LLC’s commitment to .gay serving LGBTQ organizations and businesses.

EIU carried out the community priority evaluation for .gay and determined that dotgay LLC did not earn enough points on the CPE scorecard. The EIU’s strange understanding of what a “gay” community should be—the EIU seemed to expect that LGBTQ people would all carry some sort of membership card—led to an uproar, with an online campaign describing ICANN as “broken” and calling on it to reconsider its decision. The protest campaign was a success, with ICANN using a technicality (EIU failed to take into account 54 letters of community support for dotgay LLC) to instruct EIU to carry out a new evaluation, using a new team.

The commercial rivals of dotgay LLC contest this decision (of course) and say that if there is a new evaluation, it should limit itself to considering the 54 letters. They note, correctly, that even if this reconsideration gave full points to dotgay LLC, its score would still be insufficient to support its application for community priority status. Surely ICANN is aware of this: They could have recognized EIU's mistake but determined that since it wouldn't make a significant difference in the final score, there was no point in carrying out a new evaluation. That ICANN did not avail itself of this option is a clear sign that it is seeking a real in-depth review of the application, possibly even suggesting a desired outcome to EIU, one that it cannot unilaterally impose for fear of litigation from the noncommunity applicants for .gay. That's because if dotgay LLC's CPE application fails, the string goes to auction, where its three rivals will bid for this desirable online real estate. Nothing about the way this process has gone so far suggests that the three commercial applicants would politely demur if ICANN overruled EIU and simply handed the domain to dotgay LLC.

Assuming EIU takes ICANN's hint that it would like to see another outcome, how can the evaluator achieve the desired result? As noted, simply reviewing the missing letters won't do the trick. At the first, failed, evaluation, dotgay LLC earned 10 out of a possible 16 points, and even if a new evaluation taking into account the letters raised that total to 12, it would still fall short of the 14 points needed.

At the heart of the matter is ICANN's attempt to establish a one-size-fits-all concept of community. When there is a clear institutional patron for the application (e.g., the Republican State Leadership Committee for .gop, or the Pontificium Consilium de Communicationibus Socialibus for .catholic), it's clear who can represent the proposed community. When there's a corporate interest such as hoteliers for .hotel or Audi dealerships for .audi (both strings have been approved as "communities"), the commonality of interest is easy to determine. But rules are not for the obvious cases. Indeed, ICANN would have done well to start with .gay as a case study for potential issues in determining whether a community exists, and if so who can represent its interests.

ICANN failed to think broadly when creating the community priority evaluation process. If EIU is to work within the dodgy set of rules established by ICANN, it needs to look at the entirety of dotgay LLC's application. And it must engage in a dialog that will bring any blurry bits of the evaluation into focus. Alas, the only party able to make the application and its context clear is dotgay LLC, and while ICANN rules allow EIU to consult applicants, they don't require that it do so. This seems crazy: ICANN does not independently determine the existence of "communities"; it counts on applicants to do so. The least it could do would be to require that the applicant asserting the existence of a community and its fitness to defend that community's interests be offered the opportunity to make its case and respond to any questions before a final determination is made.

There are matters that seem obvious to LGBTQ people but that appear to have puzzled the EIU. One example is the participation of allies in the LGBTQ Registry et al. 000200

community. The fact that dotgay LLC referred to allies in its community priority application seems to have confounded EIU: If non-LGBTQ people can be part of the community, then such a community becomes congruent with the entire population of the world and loses its *raison d'être*. This is just one example of a strange call by EIU that a dialog with dotgay LLC could avert. In this case, allies are not just non-LGBTQ people; they are non-LGBTQ people who support and defend equality for the LGBTQ population.

ICANN has hinted that this do-over should be a thorough review of the community priority application. It needs to tell EIU that the review must include a full dialog with the applicant. The “gay” community never ceases to talk about just what it is, who’s in, who’s out, and what letters need to be included in the LGBTQ family of initialisms. Before telling us that we’re not a community, EIU should join the conversation about what it means to be gay, when being “gay” can range from the homosexual man facing death at the hands of ISIS, a newlywed lesbian in California, a questioning teen in a suburban high school, a trans woman in Florida fighting to obtain access to the appropriate public bathrooms, an ally like Australian rugby star David Pocock who has just been criticized for calling out homophobic teammates, or any of the other multiple shapes and colors our community embraces.

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INS



ICANN struggles to beat echo chamber after .Gay decision

BY ANDREW ALLEMANN — OCTOBER 21, 2014 POLICY & LAW 23 COMMENTS

Many responses to .gay community application decision are oversimplifying what happened...and getting it wrong.

In headlines and tweets, it's pretty easy to knock ICANN for a recent decision not granting .gay applicant dotgay llc community status for the domain name.



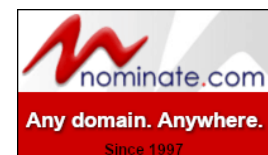
Adam Lauziere @AdamLauziere · Oct 19

Every day I wake up remembering there is still hate out there for the gay community. Thanks for that @ICANN. #ICANNisBroken



Clark Massad @cmassad Oct 14

How dare @ICANN deny that a gay community exists in all its diversity #ICANNisBroken @dotgay #GottWrong



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LGBT Group Blocked From Using '.gay' Domain Because It's Not Gay Enough



JAMES COOK

OCT 15, 2014, 7:44 AM

2,813

6

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The reality, for anyone who takes the time to understand it, is that ICANN didn't determine anything about whether there's a gay community. Nor did it (or anyone) block dotgay llc from using .gay.

But the reality is difficult to disseminate in 140 characters or less, so the echo chamber continues to blast ICANN for the decision.

Let's start with a key point: ICANN didn't make the decision on the .gay application. It was Economist Intelligence Unit (EIU), with which ICANN contracted to handle Community Priority Evaluations for new top level domain names. (It's worth noting that EIU is affiliated with The Economist, which has long supported gay rights.)

Next, understand that EIU did not say gays aren't a community. It just said:

“ The applied-for string neither matches the name of the community as defined by the application nor does it identify the defined community without over-reaching substantially, as required for a full or partial score on Nexus.

EIU has a set of guidelines with which to determine if a new top level domain name applicant should be granted community status. The guidelines are in the new TLD applicant guidebook; a set of rules created in advance by the internet community. The

threshold is strong, given that a community applicant automatically wins a contention set.

You can argue whether or not the requirements for community status were good. You can question how .hotel and .eco prevailed but .gay didn't. Frankly, many people are surprised that *any* applications have gained community status given the strong threshold.

But to say ICANN or EIU thinks there's no "gay community" is simply incorrect.

Finally, this decision *does not prevent* dotgay llc from running .gay. It just means it doesn't automatically win the contention set for it. It must compete with three other applicants to run the domain name.

I've heard rumblings that it can't compete with commercial interests, i.e., the other applicants. I'm not so sure. Given the level of support it claimed in its community priority request, it seems possible that it could raise the money required to win the contention set. Surely a number of companies and organizations would chip in.

To summarize:

1. ICANN didn't say gays aren't a community.
2. EIU merely determined that dotgay llc's application and community request don't meet the requirements under the new TLD program for community status.
3. dotgay llc can still run the .gay domain name.

That's not quite reduced to 140 characters, but it's as close as I can get.

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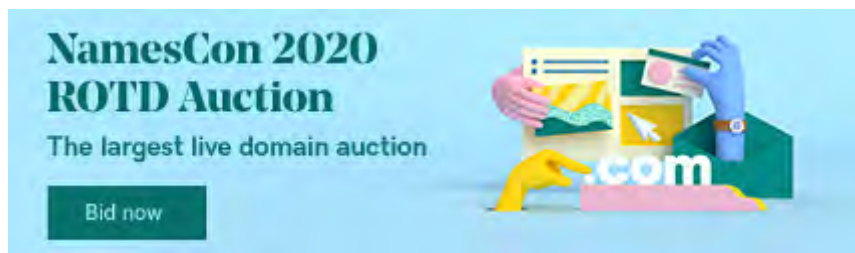
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1. [.Gay fails community test, again](#)
2. [Donuts: Verisign trying to intimidate, bully competitors with .XYZ lawsuit](#)
3. [Here are the Exhibit and Witness lists for the Verisign v. XYZ trial](#)

 23 Comments

Tags: [.gay](#), [new tlds](#)



Comments



Acro says

October 21, 2014 at 11:01 am

That's what happens when a single entity attempts to 'represent' an entire global group of individuals, whether that is gender/sexual definition or religion. I would expand the list to include ethnic minorities as well.

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[Reply](#)



Jay Boucher says

October 21, 2014 at 12:39 pm

What you seem to not mention is the EIU guidelines were created after the community applications were submitted. ICANN defines the EIU as an extension of ICANN, so they are in fact part of the process and culpable. And yes, dotgay llc can now go to auction against the others. The fact they we're trying to create a community vs a commodity for .gay should be noted, for not only the protections of its users and visitors, but for charitable and philanthropic aspect as well. At at least in all of this, the #ICANNisBroken tag got people to really notice that the process is broken, evident by the GAC communique recommending several major changes to CPE.

★ Loading...

Reply



Andrew Allemann says

October 21, 2014 at 12:57 pm

Jay, the rules by which community bids were evaluated were in the guidebook, published before applications were submitted.

I agree that the objections process has been riddled with seemingly conflicting decisions, but any suggestion that ICANN doesn't respect the gay LGBTQ community because of this decision is nonsense.

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Reply



Jay Boucher says

October 21, 2014 at 1:38 pm

Well the EIU guidelines that were published after applications were submitted allow for less flexibility around community than the AGB infers. The simple fact that even the Economist uses “gay” interchangeably with the LGBTQIA acronyms in their own reporting on our community shows a clear double standard. Giving zero of four for Nexus is flat out wrong. Just search a few articles on the Economist website to get your proof. The outrage that LGBTQIA people are expressing in social media represents years of being discriminated against in the name of process and policy. ICANN is yet another example being highlighted with the .GAY TLD. It’s easy to say that the community still has a fair chance to get .GAY to operate in alignment with community interest, but does anyone really believe that the only way to properly determine if the gay community should have that right is if they can pay for it? Give it a break. The only opposition to the community model is coming from the competitive bids, and it’s sad to see that their wishes are being granted by ICANN and those ICANN has hired to do the evaluations. Who is really being protected here? Not the gay community.

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Reply



Andrew Allemann says

October 21, 2014 at 2:15 pm

Jay and Fred – by mentioning that this is affiliated with The Economist, I was trying to show that there wasn't some institutional bias at play here. Obviously, it wasn't Economist journalists who were decided the objection.

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Reply



Fred Nor says

October 21, 2014 at 1:20 pm

In general, I tend to agree with the commentary provided on Domain Wire, but on this subject, I do have to disagree openly. First, EIU was hired by ICANN to conduct the evaluations. That doesn't provide ICANN with the convenience of denying responsibility for, or distancing themselves from the decision. EIU acted as agent for ICANN. If not, then ICANN could conceivably use that same "distancing" to vacate the findings of the EIU, state

that they were wrong and that .gay is a community. Second, you state, that dotGay LLC could survive an auction. While that may well be true, the purpose of the Community application was to provide recognition of a community. To argue, "well they can always go to auction" is rather disingenuous. It basically means, "well you were poorly evaluated but you always have a back up plan". Third, going back to the comment regarding the Economist and its support of the gay community, while this is true and is commendable, it is flawed in relation to the community application. First, EIU in fact redefined what the gay community is for the purposes of this application. Their new definition is contrary to their own inclusive definition of the gay, lesbian, bisexual and transgender community in the articles of the Economist as a publication. So for their readership, they use one definition of the inclusive term "gay" and for their application review, they used another which was much more myopic in its view and disenfranchised a grouping which commonly includes itself under the term "gay" for equal rights, marriage equality, protection from discrimination and employment protection where in many U.S. states and many countries, it is still legal (yes even in the US) simply to terminate an employee for being a sexual minority.

Finally, and what many fail to acknowledge is that while having 100's of endorsements from gay, lesbian, bisexual and transgender organizations who supported the term as an inclusive term for representing sexual minorities, the EIU caused the .gay applicant to lose points because of one (singular) objection. Interestingly, despite requests to do so the EIU and ICANN never investigated the validity of the singular objection. As a matter of fact,

they went through great pains to avoid responding to requests for an investigation of the objection. Had either done so, they would likely have found evidence (vis-a-vis a document trail) that the objection was financed by a competing applicant. This was an applicant that needed the community application to be denied so that the applicant would have the opportunity to obtain the TLD at auction.

With these facts, I hope that you can see that your premise and logic in support of ICANN is seriously undermined and that indeed, #ICANNisBroken when it comes to the community application process.

Perhaps the greatest flaw in regards to this particular community is societal tendency to believe that they need to grant permission to minorities to allow them to define themselves on their own. It is tantamount to asking ICANN, for their permission before an individual can self identify as a member of this grouping. In fact it is insulting. It is analogous to those non-Native Americans who claim that the term "Redskin" is not an insult. If you are a Native American, and you are offended by the term then it is indeed an insult. A non-Native American does not get a "veto" and is not authentically empowered to claim it is not offensive. Unless, the EIU review team can demonstrate that they had a cross section of reviewers who were members of sexual minorities (gay, lesbian, bisexual and transgender) then they lack sufficient emotional, ideological and experiential understanding to understand or redefine a community that has worked for generations to bravely form their own identity and community.

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Reply



Andrew Allemann says

October 21, 2014 at 2:21 pm

Fred,

I appreciate your comments. I think you've taken some of my points and made presumptions based on them. For example,

"...you state, that dotGay LLC could survive an auction. While that may well be true, the purpose of the Community application was to provide recognition of a community. To argue, "well they can always go to auction" is rather disingenuous. It basically means, "well you were poorly evaluated but you always have a back up plan"

I don't think they were poorly evaluated. I don't think the applicant qualifies under the guidelines that were provided in the applicant guidebook. I think the disconnect comes in with something like .hotel being granted community status; I certainly don't think that was the intention of Community Priority.

"Perhaps the greatest flaw in regards to this particular community is societal tendency to believe that they need to grant permission to minorities to allow them to define themselves on their own"

ICANN doesn't care how people define themselves. It does care if a new TLD should be granted based on this definition. It's worth noting that the applicant itself wants to require people to essentially be "authenticated" to be eligible to register the domains.

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Reply



Fred Nor says

October 21, 2014 at 9:59 pm

Allen, thank you for your respectful response. I think we will have to disagree in regards to ICANN and the definition of gay community. In fact ICANN said that the historical (and indeed cultural inclusion) of the members traditionally identified with the gay community is "over reaching". To disenfranchise gay women, intersex or transgendered people is a unilateral redefinition of the community as that community defines itself. That shows a de facto lack of support of the community en toto, in favor of a incredibly narrow and presumed straight definition of what is permitted to represent the gay community. to say that ICann doesn't care how a community and in the very same sentence state that it does care if a community TLD be granted based on this definition is a bit of an oxymoron. Who's is more qualified to define our community, our members or ICANN?

In your original article you stated that you are hearing rumblings that dotGay cannot support the commercialization of the TLD. Myron where or whom are those rumblings coming from? It seems does not seem to be supported by a specific citation. This is similar to when Fox News says "sources say" or "some would say" when they are responding to a matter that they find objectionable to their views (please note I am drawing an analogy and not intending to be insulting to your journalistic skill sets)

In regards to your comment about organizations and companies chipping in, I am compelled to remind you that these organizations are most often not for profit and lack the financial resources to "chip in".

finally in regards to your comment about , "even dotGay requiring authentication". I support it for one simple inescapable fact. The straight community is not a target of political, religious or "traditional" organizations that view it simple existence as a threat in some manner. authentication allows the gay community to protect itself from hate speech and bad actors who call for violent, brutal and fatal treatment of Straight people, while our community of gay men, gay women, bisexual, transgendered and intersex people face this every day. I will leave you with three potential strings that should be an eye opener for readers.

- 1). WestborobaptistChurch.gay
- 2) GoKilla.gay
- 3) HowToBeatA.gay.

Again, I greatly respect and appreciate your indulgence and willingness to provide a discussion forum.

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Reply



Andrew Allemann says
October 22, 2014 at 8:27 am

Hi Fred,

Regarding the question of people saying they can't afford to pay, I talked to multiple people at ICANN last week who refuted my idea that they can just win at auction. They said it's unlikely they can beat their competitors financially.

I find that hard to believe. I feel like this is something a company like Google would take up.

Regarding the example domain names you give, those indeed would be unfortunate registrations. I'll point out something I've been saying for years: there's nothing fundamentally different between a new TLD and an existing domain name. People could

easily go register any of the domains you have above, just moving "gay" to the left of the dot and slapping .com on the end. There's really no difference between this and having .gay to the right of the dot. Fortunately, no one has registered any of these domains in .com.

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Reply



Konstantinos Zournas
says
October 22, 2014 at 8:51

am

Andrew, he knows that. He is just making a bullshit argument so he can impress some people that don't know anything about domains. He thinks creating fear will get his way. He also trying to get some headlines for the media: "If dotgay llc doesn't gets .gay then GoKilla.gay will be registered the next day and 50 gays will die". Quite impressive Fred but no one bites.

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Jay Boucher says

October 22, 2014 at
10:33 am

@Konstantinos-maybe- because, as you self-admit (<http://onlinedomain.com/about-us/>) English is not your primary language, or you're just drumming up your own hysteria, but there's nowhere that Fred Nor says '50 gays will die' if a certain domain is registered. Your ignorance, bordering on arrogance, is exactly why dotgay llc put forth a plan to protect and support the community. Please tone down the exaggerations in order to have a civil discussion.

At this point, I am going to do the gentlemanly thing and agree to disagree with you, and wish you well.

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Fred Nor says

October 22, 2014 at
10:42 am

Andrew...Konstantinos has stated that I claimed 50 gays would die. Would someone

kindly read through my comments and point that out to me? I never made such a statement. I also have no media interest..I am debating a topic in a civil manner. If someone is setting up an interview for me with the BBC or CNN, please do let me know as I will likely need to get a haircut and iron a shirt. I have avoided using the comments fraught with hysteria that my industry colleague is using to throw an online temper tantrum.

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Konstantinos Zournas
says

October 22, 2014 at
11:48 am

I will just quote you to saw you how YOU started this unnecessary fear hunt:

“Does your creation of music cause you to be stoned to death? Does it cause employment discrimination? Does it cause you angst when you tell your family that you are in fact a musician? Does your creation of

music cause you to be beaten in the street because of a prejudice?"

"I will leave you with three potential strings that should be an eye opener for readers.

- 1). WestborobaptistChurch.gay
- 2) GoKilla.gay
- 3) HowToBeatA.gay."

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Konstantinos Zournas
says

October 22, 2014 at
11:50 am

@Jay Boucher

I think you got this other way around. The hysteria is coming from Fred and his "GoKilla.gay" domains.

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Konstantinos Zournas says
October 21, 2014 at 5:17 pm

No one should be getting a community status.

Does dotGay LLC represent all gay people in the world? No.

The same applies to any other communities like eco and hotel and plumbers and pretty much everything else.

And of course .music shouldn't get a community status. Even if it represented all pro musicians in the world. I create music everyday. Why should they own .music?

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[Reply](#)



Rubens Kuhl says
October 21, 2014 at 6:47 pm

Besides .osaka, which was a curious case of a city hall not wanting to decide between possible registry operators, all the other contested community applications have questionable reasons of being called a community. It's a very rare condition to actually being a community and being in a contention set, and there is no CPE approval so far that couldn't go the opposite direction and be right.

I think AGB tried to address a very specific corner case of a clash between a community and a generic term, most likely in different languages, that hasn't happened in this round.

It could happen in future rounds, but for this round, if every contention set was simply decided on an auction basis, it wouldn't be unfair in any of the cases.

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Fred Nor says

October 21, 2014 at 8:46 pm

Konstantinos, your comment regarding .gay is so incredibly over-simplified it's actually painfully disingenuous. The purpose of the TLD is to represent those who wish to participate in a community. That community is historically inclusive of gay men, gay women, bisexuals, transgendered and intersex persons. To draw an analogy between .gay and .music to support your position on string contention for .music demonstrates a fundamental lack of knowledge when it comes to being discriminated against for being a sexual minority. Does your creation of music cause you to be stoned to death? Does it cause employment discrimination? Does it cause you angst when you tell your family that you are in fact a musician? Does your creation of music cause you to be beaten in the street because of a prejudice? So please, if you are going to promote your own agenda for .music have the respect and decency to NOT do it at the expense of a minority grouping that is often ostracized and lives in fear. It demonstrates

uninformed heterosexual presumptions on life as gay men gay women, bisexual or transgender persons. It's also phenomenally unkind.

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Reply



Konstantinos Zournas says
October 21, 2014 at 10:05 pm

My comment is simply the truth.

The TLD is still there and anyone will be able to register a domain. This is about who will be making the money from these domains.

This has nothing to do with any community.

Nobody attacked the gays. Do you understand the difference between gay people and .gay the domain?

And no, I don't want a US company claiming to "represent" the gay community in Greece.

And there is no such thing as a unified world gay community that can be represented by a single company.

I could have created dotgay2 llc in Greece and with the Greek community's support could apply for .gay community status.

How would be fair to all gay people in the world?

Are we doing a contest of who has suffered more? What about blacks? Jews? Women? Men? What are you talking about? What do stones have to do with .gay the domain names?

I don't have any agenda with .music. I have an agenda with those who have an agenda to promote a company on the backs of gay people. Got it?

.Gay domains WILL BE AVAILABLE! Get one and stop complaining about a just decision.

So Fred why don't you tell us who you are and who you work for?

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Fred Nor says

[October 22, 2014 at 9:54 am](#)

Konstantinos, last question first. I am Fred Nor – I do not work for dotGay LLC if that is what you are inferring. It is up to you to believe that or not.

Whether you chose to believe it, does not undermine my opinion or commentary.

Now working backwards, how does dotGay have an agenda "on the backs of gay people". Your comment assumes a detriment to the gay community, when there is none. How are they harmed by the presentation of an inclusive top level domain? What gay person would be disenfranchised by such a community?

Are we doing a contest on who is suffering more? No, that was not indicated and for clarity, no minority should suffer because they are simply a minority. To introduce an argument on who suffered more has no relevance to community standard for a TLD. If those you call out as also having suffered had applied for a community TLD as a unifying TLD, then yes I would have fully supported that. It's rather odd that you would introduce a such divisive comparisons to justify the fact that .gay was not awarded a community TLD.

In regards to your comment, is there such a thing of a "unified world community that can be represented by a world community?" Well yes, yes there is, particularly when you take note of the fact that in the application dotGAY LLC called for the establishment of an independent board where a majority of the profits from .gay would be distributed to gay organizations world-wide. Note that this independent board would not have any participants from dotGay LLC. Do you believe it would be better that ONE company, operated by openly straight people be the sole owner of .gay and not be compelled to benefit the gay community?

I take note that you don't want a US company representing the gay community in Greece. Do you have a particular issue with the company being in the US? Did another company in another country or across multiple countries apply for the TLD as a community? No they didn't, so please don't fault the company for being based in the US, particularly when its leadership and ownership is made up of people from multiple countries.

Yes – you could have established a company in Greece representing the interests of gay people in Greece. So why didn't you? Perhaps you would be willing to undertake such an enterprise in the next round of TLD's? If not, your argument has undermined itself.

When you state that “this is about who will make money from the domains” When 2/3rds of the monies earned are going back to the community, who will make the money from the TLD. In the case of the community application, it will be gay men, gay women, bisexuals and transgendered.

Finally and forgive me for being so blunt, but when one redefines the gay community as did the EIU, indeed a community that has struggled hard to establish itself, has indeed been attacked. I hope that is a notion that you come to understand and appreciate.

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[Reply](#)

Konstantinos Zournas says
October 22, 2014 at 10:39 am

Registry et al. 000228



“What gay person would be disenfranchised by such a community?” DomainIncite replied to that very well as to the dotgay application.

The real question is how is the gay community be disenfranchised is another applicant wins .gay and releases the .gay domains? It won't be.

I introduced it because others have suffered but they didn't apply for a community gtld. And gay people didn't really apply, did they? It was a COMPANY that did.

So now you infer that dotgay llc is operated by gay people and the other 3 companies by straight people??? Even if that is true (no one knows and knows wants to know) what does this have to do with domains?

You know what? 66% to the gay community is not enough. First of all why should we have one company choosing who gets what money? And why not 100%? And I mean a true 100%. Not 100% after the CEO gets a 2 million salary. If that was the case maybe I would support it. Now? NO.

I don't want any COMPANY “representing” gay people or any other group of people for that matter. It is not a problem with the US.

I didn't do it because it is wrong to do it. dotgay llc is in this for the money. Period.

And again: 100% to the community? Maybe, if you get all gay communities in the world to vote for a board that will decide who gets the money.

66% and the CEO getting millions each year?

NO.

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[Reply](#)



Fred Nor says

October 22, 2014 at 10:32 am

Konstantinos: Thanks for making perverse assumptions simply because your argument has been undermined. I gather you are a true gentlemen in a debate. You do realize that in my disagreement with you I maintained a civil discourse and never once insulted you personally. It's interesting that you have stooped to such a level because of a difference of opinion, while you have failed to address the concerns pointed out to you. I hope in future disagreements if there are any, you can maintain a level of maturity, professionalism and civility.

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[Reply](#)



Konstantinos Zournas says

October 22, 2014 at 11:56 am

I have nothing more to say to you.
You brought the discussion to this level with
your bullshit fear loving domains.
Yes you did insulted me and you keep doing it.

If you think that calling your argument
“bullshit” then you know what an insult is.
Probably more like what you wrote here and a
lot worse.

This matter is closed. .Gay is going to auction.
Bye.

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[Reply](#)



Fred Nor says

October 22, 2014 at 12:21 pm

Perhaps it is going to auction...perhaps it
is not but I am genuinely pleased to say
Good bye to you as well.

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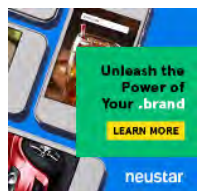
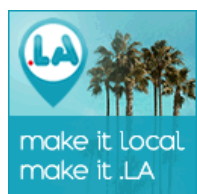
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Community gTLD applicants flunk on "nexus"

Kevin Murphy, March 19, 2014, 21:31:20 (UTC), [Domain Policy](#)

The first four Community Priority Evaluation results are in, and all four applicants flunked by failing to prove a "nexus" between the new gTLD string and the community they purport to represent.

No applicant score more than 11 points of the 14 necessary to pass. A total of 16 points are available.

Winning a CPE automatically wins a contention set — all the other applicants for the same new gTLD must withdraw — so it's a deliberately difficult test.

The scoring mechanism has been debated for years. Scoring 14 points unless the gTLD string exactly matches the name of your organization has always struck me as an almost impossible task.

The first four results appear to substantiate this view. Nobody scored more than 0 on the "nexus" requirement, for which 4 points are available.

The four CPE applicants were: Starting Dot (.immo), Taxi Pay (.taxi), Tennis Australia (.tennis) and the Canadian Real Estate Association (.mls). All four were told:

The string does not identify or match the name of the community, nor is it a well-known short-form or abbreviation of the community.

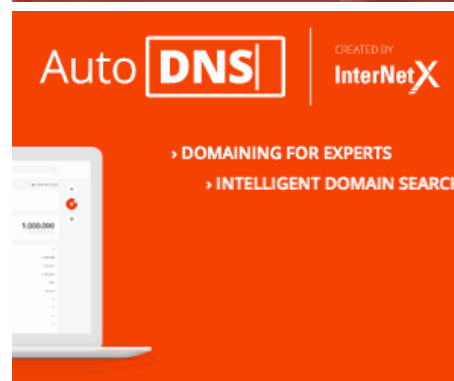
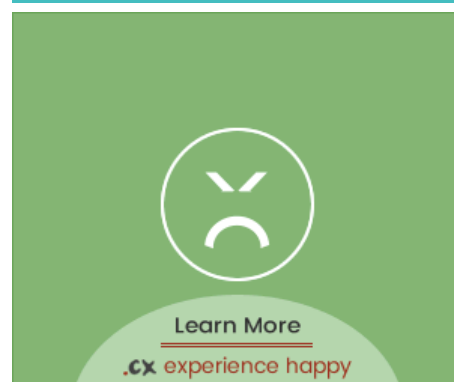
In some cases, the evaluation panel used evidence from the applicant's own applicant to show that the string "over-reaches" the community the applicant purported to represent.

The application for .Taxi defines a core community of taxi companies and drivers, as well as peripheral industries and entities.

...

While the string identifies the name of the core community members (i.e. taxis), it does not match or identify the peripheral industries and entities that are included in the definition of the community

In other cases, the panel just used basic common sense. For example, Tennis Australia was told:



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Rubens Kuhl:

Registry et al. 000232

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Somber mood as ICANN 66 opens in Montreal

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New (kinda) geo-TLD rules laid out at ICANN 66

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Tennis refers to the sport and the global community of people/groups associated with it, and therefore does not refer specifically to the Tennis Australia community.

Starting Dot (.immo) and Taxi Pay (.taxi) both also scored 0 on the "Community Establishment" criteria where, again, 4 points were available.

In that part of the CPE, the applicants have to show that their community is clearly delineated, organized, and long-standing.

In both cases, the panel found that the communities were too eclectic, too disorganized and too young — neither existed before the new gTLD program kicked off in September 2007.

It's not looking promising for any of the 14 CPE applicants listed by ICANN [here](#). I'll give \$50 to a charity of the applicant's choosing if any of them scores more than 14 points.

Related posts (automatically generated):

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[Applicants call for new gTLD objections appeals process](#)

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COMMENTS (5)

Rubens Kuhl

March 19, 2014 at 11:46 pm

You could lose the bet on .OSAKA, because there is a clear nexus between OSAKA and the City of Osaka, which endorsed both applications. The City of Osaka is almost as old as Japan itself, predating the new gTLD program, the Internet, electronic computers and mechanical computers.

Reply

Kevin Murphy

March 20, 2014 at 12:15 am

I didn't notice Osaka. Looks like I'm screwed.

Reply

zack

March 19, 2014 at 11:54 pm

osaka would win

give it to Care

Reply

Tony Dag

March 21, 2014 at 5:49 pm

Good job CPE panel. I love it when common sense wins the day!!

Reply

Rubens Kuhl

March 21, 2014 at 9:42 pm

Policies are guidelines, not actual day to day run of a system. At the end of the day someone has to do the job, and tha... [read more](#)

Owen:

You might want to update the headline to read "women" instead of "girls". Just slightly biased..... [read more](#)

John L:

Section 2.10(c) of the new .org agreement specifically requires uniform renewal pricing. You don't have to like the agre... [read more](#)

John:

How does the multi-stakeholder model function when all of the details are confidential and behind closed doors? How c... [read more](#)

Mark Thorpe:

It's about damn time ICANN looked into this bad deal! "PIR has already rejected ICANN's request to publish its requ... [read more](#)

Mark Thorpe:

Exactly, John!... [read more](#)

John Colascione:

I thought ICANN stated there were not in a position to make a call on the deal. Sounds like that was nonsense.... [read more](#)

John:

This entire matter was self-inflicted by ICANN. ICANN created this entire mess. On June 30th – ICANN migrated .ORG o... [read more](#)

John Laprise:

I know that the ICANN board and org have been getting an earful from stakeholders. People complain about the machinery b... [read more](#)

Exhibit F

ARIF HYDER ALI

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January 16, 2018

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: FTI's Reports

Dear ICANN Board and Board Accountability Mechanisms Committee members:

We write on behalf of our client, DotMusic Limited (“DotMusic”), regarding FTI Consulting’s (“FTI”) evaluation and the FTI Report (the “Report”).

The Report was clearly designed as a “fig leaf” to protect ICANN and the CPE provider from being accountable for flaws that were endemic to the CPE process. ICANN’s Board should conclude that the Report has methodological flaws and is incomplete. ICANN’s Board should critically evaluate the Report and not accept its wholesale conclusions. It speaks volumes that the investigation lacks transparency and the identities of the personnel involved are shrouded in mystery.

In late 2016, ICANN announced that it was conducting “an *independent review*” of the CPE Process.¹ During a public forum organized at ICANN’s March 2017 meeting in Copenhagen, John Jeffrey, ICANN’s General Counsel, confirmed that:

- FTI will be “digging in very deeply” and that there will be “a full look at the community priority evaluation;”²

¹ Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016) (emphasis added), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>; see Minutes | Board Governance Committee (BGC) Meeting (18 Oct. 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

² John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf.

- ICANN instructed FTI “to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and . . . trying to understand the complex process of the new gTLD program and the community priority evaluation process;”³ and
- “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a **full look** at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”⁴

Despite these assurances, the opposite occurred. FTI did not “dig [] in very deeply” or “try to understand the complex process” of the CPE or conduct a “full look” into it. For nearly a year, ICANN continued to stonewall behind its assertion that it was undertaking a purported “independent review” of the CPE process,⁵ while at the same time concealing FTI’s true mandate and narrow evaluation methodology from the CPE applicants. It was only on 13 December 2017, *after* FTI completed its investigation of the CPE process (without inviting comments from a single CPE applicant), that ICANN published FTI’s evaluation and findings regarding the CPE process.

FTI was tasked to perform a “full look” at the CPE Process as part of its independent review.⁶ Its investigative team was required to exercise “diligence, critical analysis and

³ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁴ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12 (emphasis added), http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁵ Adopted Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

⁶ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

professional skepticism in discharging professional responsibilities” and to ensure that its conclusions are “supported with evidence that is relevant, reliable and sufficient.”⁷ The FTI’s investigation did not live up to its instructions to perform a comprehensive look at the CPE process; its narrow mandate⁸ and evaluation methodology were deliberately designed to protect ICANN. FTI admitted it did not re-evaluate the CPE applications or rely upon the substance of the reference material or even assess the propriety or reasonableness of the research undertaken by the CPE Provider. Fundamentally, it refused to interview the CPE applicants. In fact, the FTI deliberately ignored the information and materials provided by the applicants.

On 18 January 2017, Article 19,⁹ a U.K. based human rights organization, and the Council of Europe organized a webinar on Community Top-level Domains (TLDs) and Human Rights to discuss community objections, the CPE process, ICANN’s accountability mechanisms, and concepts for the next gTLD application rounds. The speakers included Cherine Chalaby, (then an ICANN Board Member and current Chairman of ICANN); Mark

⁷ Association of Certified Fraud Examiners, CFE Code of Professional Standards (10 Sep. 2014), p. 2, https://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/Code-of-Standards-2014.pdf. FTI “followed the internal investigative methodology . . . codified by the Association of Certified Fraud Examiners (ACFE).” Scope 1 Report, p. 3.

⁸ FTI failed to address other significant issues with the CPE process, including that: (1) the CPE Provider, the Economist Intelligence Unit (“EIU”), improperly implemented and applied additional processes and CPE criteria *after* receiving the community applications; (2) the EIU acted contrary to the New gTLD Applicant Guidebook (“AGB”) when collecting and interpreting information for the CPE; (3) the EIU permitted third parties to perform substantive tasks in the CPE process for community applications, in contravention of the AGB and the EIU’s own additional processes; (4) the EIU implemented the CPE contrary to human rights principles; (5) the EIU and ICANN failed to properly consider documentation supporting community applications, including expert reports; (6) ICANN and the EIU permitted panelists with clear conflicts of interest to participate in the evaluation of community applications; (7) ICANN improperly accepted and adopted the EIU’s determinations, with all of the aforementioned problems, without question and without possibility of appeal; (8) the CPE process developed and enforced by ICANN does not conform with ICANN’s core principles; and (9) ICANN’s actions related to the CPE process violated its own Bylaws.

⁹ Article 19 (last visited 10 Jan. 2018), <https://www.article19.org/>.

Carvell, GAC Vice-Chair & Co-Chair of the GAC Working Group on Human Rights and International Law, and Chris Disspain, ICANN Board Member.

During the webinar, the Board members admitted that the CPE Provider inconsistently applied the AGB and unfairly treated the community priority applicants. For example, Cherine Chalaby stated:

In terms of the community priority evaluation, *I personally would comment that I have observed inconsistencies applying the AGB scoring criteria for CPE* and that's a personal observation and *there was an objective of producing adequate rationale for all scoring decisions but I understand from feedback that this has not been achieved in all cases*. So this is one of the recommendations, the recommendation of fixing that area, I think that it is an important recommendation that ought to be taken into account very seriously.¹⁰

Likewise, Mark Carvell stated that:

But as the round progressed and many of these applicants found themselves in contention with wholly commercially-based applicants, they found that they were starting to lose ground and that they were not actually enjoying the process for favoring them, for giving them priority that they had expected.

...

The GAC during this time, you know, could not intervene on behalf of individual applicants. I found that personally very frustrating because that was not what the GAC was there to do. We were there to ensure the process was fair and the design of the round and so on, all the processes would

¹⁰ ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), pp. 20-21, https://community.icann.org/download/attachments/53772757/transcript_cwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2.

operate fairly. ***That was not happening.*** Became as I say an issue of increasing concern for many of us on the GAC.¹¹

Therefore, the Board's adoption of the FTI's findings will be fundamentally inconsistent with the unfairness and inconsistency issues that Board itself recognized in the CPE process.

As neutral investigator hired by ICANN to pursue a "***independent review***" of the CPE Process, FTI should have also attempted to gather additional information and alternate explanations from community priority applicants, including DotMusic, to ensure that it was conducting a fair and thorough investigation about the CPE Process. Instead, FTI sheltered the EIU's decisions, no matter how irrational or arbitrary, thus seriously calling into question its own credibility. As a result, FTI's findings are unreliable, unfair, and incorrect, while at the same time raising potential serious conflict of interest, bias and collusion concerns.

Accordingly, we request that the ICANN Board take no action with respect to the conclusions reached by FTI, until DotMusic, and indeed all affected parties, have been provided with the underlying materials reviewed by the FTI, and subsequently had an opportunity to respond to the FTI Report. To do otherwise would violate DotMusic's right to be heard.

DotMusic reserves all of its rights and remedies in all available fora whether within or outside of the United States of America.



Sincerely,

Arif Hyder Ali

¹¹ ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), p. 12, https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2 and (emphasis added).

Exhibit G

INDEPENDENT REVIEW PROCESS (IRP)
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01-15-0002-8061

Despegar Online SRL

Donuts, Inc.

Famous Four Media Limited

Fegistry, LLC

Radix FZC

-vs-

ICANN

-vs-

Little Birch, LLC

Minds + Machines Group Limited

Final Declaration

IRP Panel

Thomas H. Webster

Dirk P. Tirez

Peter J. Rees QC (Chair)

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A. Introduction and Procedural History

1. This Final Declaration is issued by this Independent Review Process (“IRP”) Panel pursuant to the Bylaws of the Internet Corporation for Assigned Names and Numbers (“ICANN”). This IRP has been administered under the International Centre for Dispute Resolution (“ICDR”) International Dispute Resolution Procedures as amended and in effect as of 1 June 2014 along with ICANN’s Supplementary Procedures.
2. On 4 March 2015, following a failed Cooperative Engagement Process with ICANN, Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC submitted a Request for IRP in relation to ICANN’s treatment of the generic top-level domain (“gTLD”) string .hotel (“the .hotel IRP”).
3. On 17 April 2015, ICANN submitted its Response to this Request.
4. On 15 March 2015, following a failed Cooperative Engagement Process with ICANN, Little Birch, LLC and Minds + Machines Group Limited submitted a Request for IRP in relation to ICANN’s treatment of the gTLD string .eco (“the .eco IRP”).
5. On 27 April 2015, ICANN submitted its Response to this Request.
6. On 12 May 2015, the ICDR confirmed to the parties that the cases regarding .hotel IRP and .eco IRP would be merged and the parties agreed to keep written submissions separate but recognized that the issues presented by the two cases were closely linked and that the parties’ interests in the proceedings were so similar that both should be dealt with during a single hearing.
7. Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, Little Birch, LLC and Minds + Machines Group Limited are all represented by Flip Petillion and Jan Janssen of Crowell & Moring LLP and ICANN is represented by Jeffrey A. LeVee and Rachel Zernik of Jones Day.
8. The IRP Panel consisting of Thomas H. Webster, Dirk P. Tirez and Peter J. Rees QC (Chair) (“Panel”), having been duly constituted to consider these two Requests, conducted a preparatory conference with the party representatives on 25 August 2015 at which, and following consultation with the party representatives, the procedure was fixed by the Panel for the further conduct of the IRP.

9. On 7 October 2015, the Panel received a letter from Fasken Martineau seeking to make submissions to the Panel on behalf of Big Room Inc. (“Big Room”) whilst acknowledging that Big Room was not a party to the IRP.
10. On 19 October 2015, Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, and Minds + Machines Group Limited submitted a Reply to ICANN’s Response in the .hotel IRP matter, and Little Birch, LLC and Minds + Machines Group Limited submitted a Reply to ICANN’s Response in the .eco IRP matter.
11. On 10 November 2015, ICANN submitted its Sur-Replies in both the .hotel IRP and the .eco IRP matters.
12. On 20 November 2015, the Panel received an e-mail from HOTREC seeking to make submissions to the Panel whilst acknowledging that HOTREC was not a party to the IRP.
13. On 2 December 2015, in advance of the telephone hearing due to take place on 7 December 2015, the Panel sent an e-mail to the representatives of the parties asking a number of questions.
14. On 4 December 2015, the parties responded in writing to the Panel’s questions.
15. On 7 December 2015, a telephone hearing took place at which the representatives of all the parties made their submissions to the Panel.

B. Factual Background - General

16. In 2005, ICANN’s Generic Names Supporting Organization (“GNSO”) began a policy development process to consider the introduction of new gTLDs. As part of this process the New gTLD Applicant Guidebook (“Guidebook”) was developed and was approved by the Board of ICANN in June 2011 and the New gTLD Program was launched.
17. The final version of the Guidebook was published on 4 June 2012. It provides detailed instructions to gTLD applicants and sets out the procedures for evaluating new gTLD applications. The Guidebook provides that new gTLD applicants may designate their applications as either standard or community based, the latter to be “*operated for the benefit of a clearly delineated community*” (Guidebook § 1.2.3.1).
18. If more than one standard application was made for the same gTLD applicants were asked to try and achieve an amicable agreement under which one or more

of them withdrew their applications. If no amicable solution could be found, applicants in contention for the same gTLD would be invited to participate in an auction for the gTLD.

19. If a community based application was made for a gTLD for which other applicants had made standard applications, the community based applicant was invited to elect to proceed to Community Priority Evaluation (“CPE”) whereby its application would be evaluated by a CPE Panel in order to establish whether the application met the CPE criteria. The CPE Panel could award up to a maximum of 16 points to the application on the basis of the CPE criteria. If an application received 14 or more points the applicant would be considered to have prevailed in CPE (Guidebook § 4.2.2). The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of 4 points (Guidebook § 4.2.3).
20. If an applicant prevails in CPE, it will proceed to the next stage of evaluation and other standard applications for the same gTLD will not proceed because the community based application will be considered to have achieved priority (Guidebook § 4.2.2).
21. ICANN appointed an external provider, the Economic Intelligence Unit (“EIU”) to constitute the CPE Panel.
22. ICANN has a Documentary Information Disclosure Policy (“DIDP”), which permits requests to be made to ICANN to make public documents “concerning ICANN’s operational activities, and within ICANN’s possession, custody or control”.
23. ICANN also has in place a process by which any person or entity, materially affected by an action of ICANN, may request review or reconsideration of that action by the Board of ICANN (“Reconsideration Request”) (Art IV.2 of ICANN’s Bylaws).
24. ICANN also has in place a process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws of ICANN (Art IV.3 of ICANN’s Bylaws), namely the IRP Process.
25. Article IV.3.4 of ICANN’s Bylaws provides:

“Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws,

and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?"*

C. Factual Background - Specific

26. Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC each submitted standard applications for .hotel. HOTEL Top-Level-Domain s.a.r.l. ("HTLD") submitted a community based application for .hotel.
27. Little Birch, LLC and Minds + Machines Group Limited each submitted standard applications for .eco. Big Room submitted a community based application for .eco.
28. On 19 February 2014, HTLD was invited to elect to proceed to CPE, which it did, and its application was forwarded to the EIU for evaluation.
29. On 12 March 2014, Big Room was invited to elect to proceed to CPE, which it did, and its application was forwarded to the EIU for evaluation.
30. On 11 June 2014, the CPE Panel from EIU issued its report, which determined that HTLD's application should receive 15 points on the CPE criteria, thereby prevailing in CPE with the consequence that the standard applications for .hotel would not proceed.
31. On 28 June 2014, Despegar Online SRL, DotHotel Inc., dot Hotel Limited, Fegistry LLC, Spring McCook LLC and Top Level Domain Holdings Limited submitted a Reconsideration Request *"to have that decision by the Community Priority Evaluation panel reconsidered"*, and, on 4 August 2014, Donuts Inc., Fair Winds Partners, LLC, Famous Four Media Limited, Minds + Machines Group Limited and Radix FZC submitted a request to ICANN pursuant to its DIDP for certain documents related to the decision of the CPE Panel.
32. On 22 August 2014, the Board Governance Committee ("BGC") of ICANN denied the Reconsideration Request to have the CPE Panel decision reconsidered and, on 3 September 2014, ICANN responded to the DIDP request

by referring to certain correspondence that was publicly available, but not providing any other documentation sought in the DIDP request.

33. On 22 September 2014, Despegar Online SRL, Radix FZC, Famous Four Media Limited, Fegistry LLC, Donuts Inc., and Minds + Machines Group Limited submitted a Reconsideration Request to “*seek reconsideration of ICANN staff’s response to the Requesters’ request for documents pursuant to ICANN’s Document Information Disclosure Policy (“DIDP”)*”, and, on 11 October 2014, the BGC of ICANN denied that Reconsideration Request.
34. On 6 October 2014, the CPE Panel from EIU issued its report, which determined that Big Room’s application should receive 14 points on the CPE criteria, thereby prevailing in CPE with the consequence that the standard applications for .eco would not proceed.
35. On 22 October 2014, Little Birch, LLC and Minds + Machines Group Limited submitted a Reconsideration Request seeking “*the reconsideration of ICANN’s Community Priority Evaluation Panel’s determination whereby [Big Room’s application] prevailed in Community Priority Evaluation*”, They also submitted a request to ICANN pursuant to its DIDP for certain documents related to the decision of the CPE Panel.
36. On 31 October 2014, ICANN responded to the DIDP request by referring to certain correspondence that was publicly available, but not providing any other documentation sought in the DIDP request, and, on 18 November 2014, the BGC of ICANN denied the Reconsideration Request to have the CPE Panel decision reconsidered.
37. On 27 February 2015, ICANN staff became aware of a configuration issue with ICANN’s online New gTLD Applicant and Global Domains Division (“GDD”) portals. It appears that, between 17 March 2014 and 27 February 2015, user credentials were used to obtain sensitive and confidential business information concerning several of the .hotel applicants.
38. On 5 June 2015, Crowell & Moring LLP wrote to the ICANN Board and the President of ICANN’s GDD “*on behalf of Travel Reservations SRL (formerly, Despegar Online SRL), Donuts Inc. (and its subsidiary applicant Spring McCook, LLC), Famous Four Media Limited (and its subsidiary applicant dot Hotel limited), Fegistry LLC, Minds + Machines Group Limited (formerly Top Level Domain Holdings Limited), and Radix FZC (and its subsidiary applicant DotHotel Inc.)*”. The letter requested “*full information concerning this data exposure issue and the actions that have been taken by ICANN to limit damages for the affected parties*” and set out a list of information sought.

39. On 5 July 2015, ICANN responded to the letter of 5 June 2015 under the heading “*Response to Documentary Information Disclosure Policy Request*”. ICANN provided further information concerning the issue and referred to certain information that was publicly available, but did not provide any other documentation.
40. Neither the Board of ICANN nor the President of ICANN’s GDD has responded to the letter of 5 June 2015.

D. Relief Requested

41. The relief requested by the Claimants in both the .hotel and .eco Requests for IRP was, essentially, the same, namely:
- Declare that ICANN breached its Articles of Incorporation, its Bylaws, and or the gTLD Guidebook;
 - Declare that ICANN must reject the determination that HTLD’s application for .hotel and Big Room’s application for .eco be granted community priority;
 - Award Claimants their costs in this proceeding; and
 - Award such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follow its Bylaws, Articles of Incorporation, or other policies, or other relief that Claimants may request after further briefing or argument.
42. In the Reply to ICANN’s Response in the .hotel IRP a further request for relief was added, namely:
- Declare that ICANN must reject HTLD’s application for .hotel.
43. In response to the questions raised by the Panel on 2 December 2015, the Claimants’ representative also asked for the following relief:
- i. That the Panel consider declaring that ICANN continues to act inconsistently with its Articles of Incorporation, its Bylaws, and or the Guidebook by:
 - upholding the determination that HTLD’s application for .hotel be granted community priority;
 - upholding HTLD’s application for .hotel; and
 - upholding the determination that Big Room’s application for .eco be granted community priority.
 - ii. That the Panel declare that ICANN has breached and continues to breach its Articles of Incorporation and/or Bylaws by upholding the

provisions of the gTLD Applicant Guidebook or of the new gTLD policy which are in violation of the Articles of Incorporation and/or Bylaws.

- iii. That the Panel examine the consistency with ICANN's Articles of Incorporation and Bylaws of:
 - the contents of the Guidebook
 - the CPE process itself
 - the selection and appointment process of the EIU as the CPE Panel, and
 - the implementation of the CPE process that has led to ICANN accepting community priority for .hotel and .eco.

E. Claimants' Submissions

44. In their submissions, the Claimants, in both the .hotel and .eco IRPs matters, criticise the CPE process as a whole and complain that the ICANN Board failed to establish, implement and supervise a fair and transparent CPE process in the selection of the CPE Panel. They also complain that the CPE process is unfair, non-transparent and discriminatory due to the use of anonymous evaluators, and that no quality review process exists for CPE Panel decisions.
45. In relation to the CPE process as a whole, the Claimants also argue that, as no opportunity is given for applicants to be heard on the substance of a CPE determination (by either the CPE Panel itself, or by ICANN upon receiving the Panel's decision), CPE determinations are made without due process.
46. However, relief in respect of these wider issues was not requested by the Claimants in either the .hotel or .eco Requests, and, although such relief was referred to by the Claimants in their response to the Panel's questions of 2 December 2015, it was confirmed by the Claimants at the hearing on 7 December 2015 that the Claimants were not, in fact, asking the Panel to make a declaration as to the selection process of the CPE Panel by ICANN, nor any declaration as to the CPE process as a whole, nor whether that process breaches ICANN's Articles of Incorporation or Bylaws, nor whether the Guidebook breaches ICANN's Articles of Incorporation or Bylaws.
47. Accordingly, for the purposes of this IRP, it is the submissions made by the Claimants which address the specific relief sought by the Claimants in relation to the granting of CPE in the .hotel and .eco applications that are relevant for the Panel.
48. In the .hotel and .eco Requests and Replies, the Claimants make the following submissions in relation to the CPE Panel's determinations on CPE:

- i. *“By accepting a third-party determination that is contrary to its policies, ICANN has failed to act with due diligence and failed to exercise independent judgment” (.hotel Request § 9, .eco Request § 9)*
- ii. *“The extraordinary outcomes for Big Room’s application for .eco and HTLD’s application for .hotel were only possible due to a completely different and clearly erroneous application of the evaluation criteria in the .eco and .hotel CPE” (.eco Request § 48)*
- iii. *“If the CPE Panel used the same standard as, e.g., in the .gay, .immo and .taxi CPEs, it would never have decided that the requirements for nexus were met” (.hotel Request § 52, .eco Request § 50)*
- iv. *“The abovementioned examples of disparate treatment in the CPE process also show that the CPE process was performed in violation of ICANN’s CPE policy” (.hotel Request § 53, .eco Request § 51)*
- v. *“the CPE Panel in the .hotel CPE committed several additional policy violations. It did not analyze whether there was a ‘community’ within the definition of that term under the rules of the Applicant Guidebook” (.hotel Request § 53)*
- vi. *“the CPE Panel in the .eco CPE committed several additional policy violations. It did not analyze whether there was a ‘community’ within the definition of that term under the rules of the Applicant Guidebook” (.eco Request § 51)*
- vii. *“The requirement of a pre-existing community and the suspicious date of incorporation of Big Room have never been examined by the CPE Panel” (.eco Request § 53)*
- viii. *“The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as inventing facts” (.hotel Request § 55)*
- ix. *“The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as neglecting obvious facts” (.eco Request § 56)*
- x. *“However, the CPE Panel’s reliance on the support of a distinct, yet undefined, community shows that the support for the .hotel gTLD came from a ‘community’ other than the one that was defined by the applicant. The need to introduce a distinct and undefined community goes against the exact purpose of the CPE policy, requiring support of the community targeted by the string. It is at odds with the CPE Panel’s findings on organization and nexus between the proposed string and the ‘community.’” (.hotel Request § 56)*
- xi. *“the CPE Panel disregarded the obvious point that the .eco string does not identify a community and that it has numerous other meanings beyond the definitions in the OED.....Big Room would not have qualified for community priority if the CPE Panel had not granted the maximum score for uniqueness of the string.” (.eco Request § 58)*
- xii. *“The CPE Panel has never considered the appropriateness of [Big Room’s] appeal process. In contrast, however, the CPE Panel did investigate the*

- appropriateness of proposed appeal processes in other CPEs requiring that the appeals processes be clearly described, failing which the application would score zero on the enforcement requirement.” (.eco Request § 59)*
- xiii. *“The Applicant Guidebook explicitly calls on the Board to individually consider an application under an ICANN accountability mechanism...such as a Request for Reconsideration” (.hotel Request § 64, .eco Request § 67) NB the Panel notes that this is not actually what the Guidebook says. It says that the “Board reserves the right to individually consider an application for a new gTLD....under exceptional circumstances”*
 - xiv. *“Claimants showed that the CPE Panel manifestly misapplied ICANN’s defined standards in the CPE. It is unclear how else to interpret such a fundamental misapplication other than as an obvious policy violation” (.eco Request § 69)*
 - xv. *“Claimants were merely asking that ICANN comply with its own policies and fundamental obligations in relation to the performance of the CPE process” (.hotel Request § 66, .eco Request § 69)*
 - xvi. *“The IRP Panel’s task is to look at whether ICANN’s unquestioning acceptance of the CPE Panel’s advice and ICANN’s refusal to review the issue raised by Claimants are compatible with ICANN’s fundamental obligations” (.hotel Reply § 4, .eco Reply § 3)*
 - xvii. *“ICANN’s reasoning would logically result in any review of the CPE being denied, no matter how arbitrary the original evaluation may be” (.hotel Reply § 4, .eco Reply § 8)*
 - xviii. *“the ICANN Board decided not to check whether or not the evaluation process had been implemented in compliance with principles of fairness, transparency, avoiding conflicts of interest and non-discrimination.” (.hotel Reply § 34, .eco Reply § 33)*
 - xix. *“One cannot investigate whether a standard was applied fairly and correctly without looking into how the standard was applied.....the ICANN Board deliberately refused to examine whether the standard was applied correctly, fairly, equitably and in a non-discriminatory manner” (.hotel Reply § 39, .eco Reply § 38)*
 - xx. *“As the IRP Panel’s task includes a review as to whether ICANN discriminated in the application of its policies and standards, the IRP Panel is obliged to consider how the standards were applied in different cases” (.hotel Reply § 45, .eco Reply § 44)*

49. In the .hotel Reply, the Claimants also make the following submissions in relation to the declaration they are seeking that ICANN must reject HTLD’s application for .hotel:

- i. *“The IRP Panel is also requested to assess ICANN’s refusal to take appropriate action to offer redress to parties affected by the data exposure issue. In coming to its conclusion, the IRP Panel may examine all the*

- relevant information that was available to ICANN in relation to the question of taking action” (.hotel Reply § 4)*
- ii. *“ICANN never showed any willingness to take appropriate measures” (.hotel Reply § 49)*
 - iii. *“In this case a crime was committed seemingly with the specific purpose of obtaining a better position within the new gTLD program, and the crime was made possible due to misuse of user credentials for which HTLD (or an individual associated to HTLD) was responsible....It would indeed not be in the public interest to allocate a critical Internet resource to an entity that is closely linked with individuals who have misused, or who have permitted the misuse of, their user credentials” (.hotel Reply § 50)*

50. Also in the .hotel Reply the Claimants submit:

“Second Claimant in the .eco case, Minds + Machines Group Limited (Minds + Machines), also applied for the .hotel gTLD. Minds + Machines fully supports the claim initiated by Claimants in this case and joins their request. That Minds + Machines join the proceedings is accepted by all Claimants” (.hotel Reply § 2)

F. ICANN’s Submissions

51. In the .hotel and .eco Responses and Sur-Replies, ICANN makes the following submissions in relation to the CPE Panel’s determinations on CPE:

- i. *“Claimants did not state a proper basis for reconsideration as defined in ICANN’s Bylaws” (.hotel Response § 4, .eco Response § 4)*
- ii. *“ICANN’s Board....has no obligation to review (substantively or otherwise) any such report” (.hotel Response § 9, .eco Response § 9)*
- iii. *“nothing in the Articles or Bylaws requires the Board [to conduct a substantive review” (.hotel Response § 9, .eco Response § 10)*
- iv. *“neither the creation nor the acceptance of the CPE Panel’s Report regarding HTLD’s Application for .HOTEL constitutes Board action” (.hotel Response § 12)*
- v. *“neither the creation nor the acceptance of the CPE Panel’s Report regarding Big Room’s Application for .ECO constitutes Board action” (.eco Response § 13)*
- vi. *“in making those decisions [acceptance of the Guidebook and the decisions by the Board to reject Claimants’ Reconsideration Request], the Board followed ICANN’s Articles and Bylaws” (.hotel Response § 13, .eco Response § 14)*
- vii. *“BGC denied Claimants’ Reconsideration Request finding that Claimants had ‘failed to demonstrate that the CPE Panel acted in contravention of*

- established policy or procedure' in rendering the Report" (.eco Response § 29)*
- viii. *"BGC denied Claimants' Reconsideration Request [in respect of the DIDP Request] finding that the Claimants had 'failed to demonstrate that ICANN staff acted in contravention of established policy or procedure' in responding to the DIDP Request" (.hotel Response § 28)*
 - ix. *"the reconsideration process does not call for the BGC to perform a substantive review of CPE Reports" (.hotel Response § 49, .eco Response § 49)*
 - x. *"Claimants do not identify any ICANN Article or Bylaws provision that the BGC allegedly violated in reviewing their Reconsideration Request" (.hotel Response § 51, .eco Response § 50)*
 - xi. *"It is not the role of the BGC (or, for that matter, this IRP Panel) to second-guess the substantive determinations of independent, third-party evaluators." (.hotel Response § 53, .eco Response § 52)*
 - xii. *"Claimants' only evidence that the CPE Panel in fact erred is the bare allegation that because certain other, completely separate, applications for entirely different strings did not prevail in CPE then .HOTEL TLD's application also should not have prevailed. Claimants' argument is baseless. The outcome of completely unrelated CPEs does not, and should nor, have any bearing on the outcome of the CPE regarding .HOTEL TLD's Application" (.hotel Response § 55)*
 - xiii. *"Claimants' only evidence that the CPE Panel in fact erred is the bare allegation that because certain other, completely separate, applications for entirely different strings did not prevail in CPE, Big Room's application also should not have prevailed. Claimants' argument is baseless. The outcome of completely unrelated CPEs does not, and should nor, have any bearing on the outcome of the CPE regarding Big Room's Application" (.eco Response § 54)*
 - xiv. *"there is not – nor is it desirable to have – a process for the BGC or the Board (through the NGPC) to supplant its own determinationover the guidance of an expert panel formed for that particular purpose" (.hotel Sur-Reply § 11, .eco Sur-Reply § 10)*

52. In the .hotel Sur-Reply, ICANN also makes the following submissions in relation to the declaration the Claimants are seeking that ICANN must reject HTLD's application for .hotel:

- i. *"Claimants argue that the Portal Configuration is relevant to this IRP, but they have not identified any Board action or inaction with respect to this issue that violates ICANN's Articles or Bylaws such that it is subject to independent review, now or ever" (.hotel Sur-Reply § 23)*

- ii. *“The ICANN Board took no action (and was not required to take action under either the ICANN Articles or Bylaws) with respect to Claimant’s letter and DIDP request” (.hotel Sur-Reply § 24)*
- iii. *“Claimants have failed to demonstrate that the Board has a duty to act with respect to Claimants’ belief as to what the Board should do. Again Claimants have also failed to show that the Board’s conduct in this regard has in any way violated ICANN’s Articles or Bylaws” (.hotel Sur-Reply § 25)*

53. Also in the .hotel Sur-Reply ICANN submits:

*“Minds + Machines Limited (“Minds + Machines”) is not a Claimant in this proceeding but, nevertheless signed the Reply and now seeks to join as an additional claimant. Article 7 of the International Center for Dispute Resolution’s International Dispute Resolution Procedures explicitly provides that “[n]o additional party may be joined after the appointment of any [neutral], unless **all parties**, including the additional party, otherwise agree” (ICDR International Dispute Resolution Procedures, Art. VII (emphasis added)). ICANN does not consent to the joinder of Minds + Machines because any claims Minds + Machines may have with respect to the CPE Report or ICANN’s response to that Report are time-barred (Bylaws, Art. IV, § 3.3 (30 day deadline to file IRP request)” (.hotel Sur-Reply § 35)*

G. The Issues

54. As has already been stated, Article IV.3.4 of ICANN’s Bylaws provides:

“Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?”*

55. Given that the wider issues of the CPE process as a whole, the appointment of EIU and the provisions of Guidebook are not being pursued, the Panel has concluded that the contested actions of the Board of ICANN in this IRP are:
- i. The denial by the BGC on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.
 - ii. The denial by the BGC on 11 October 2014 of the Reconsideration Request to seek reconsideration of ICANN staff's response to the DIDP request in relation to the .hotel CPE decision.
 - iii. The denial by the BGC on 18 November 2014, of the Reconsideration Request to have the CPE Panel decision in .eco reconsidered.
 - iv. The continued upholding of HTLD's application for .hotel in the light of the matters raised in Crowell & Moring's letter of 5 June 2015.
56. In addition, the Panel has the procedural issue to deal with of the attempt by Minds + Machines Group Limited to join the .hotel IRP.

H. Analysis - General

57. Before turning to the specific analysis of each of the issues stated above, there are some general points which the Panel wishes to highlight, which have application to one or more of the issues in question.
58. The analysis, which the Panel is charged with carrying out in this IRP, is one of comparing the actions of the Board with the Articles of Incorporation and Bylaws, and declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The Panel has identified the following relevant provisions of the Articles of Incorporation and Bylaws against which the actions, or inactions, of the Board should be compared.

Articles of Incorporation

Article 4

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

Bylaws

Article I.2

In performing its mission, the following core values should guide the decisions and actions of ICANN:

- 1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.*
- 2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.*
- 3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
- 4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.*
- 5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.*
- 6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.*
- 7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*
- 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
- 9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*
- 10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.*
- 11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.*

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice,

situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

Article II.3

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

Article III.1

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

Article IV.1

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

Article IV.3

The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

- a. evaluate requests for review or reconsideration;*
- b. summarily dismiss insufficient requests;*
- c. evaluate requests for urgent consideration;*
- d. conduct whatever factual investigation is deemed appropriate;*
- e. request additional written submissions from the affected party, or from other parties;*
- f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and*
- g. make a recommendation to the Board of Directors on the merits of the request, as necessary.*

59. In response to the questions posed by the Panel on 2 December 2015, ICANN confirmed its position as follows:

- i. The EIU's determinations are presumptively final. The Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure.
- ii. ICANN has an obligation to adhere to all of its obligations under its Articles of Incorporation and its Bylaws.
- iii. The Bylaws, and the BGC's determinations on prior Reconsideration Requests, have established a specific standard for when it is appropriate to reconsider CPE determinations (i.e., when the CPE Panel violated established policy or procedure).
- iv. When considering the Reconsideration Requests in the .eco and .hotel matters, the BGC had before it the EIU's determination and the "facts" that the Claimants had submitted with their Reconsideration Requests. The BGC also considered the Guidebook as well as other published CPE procedures. This was all the information required for the BGC to determine that the EIU had followed established policy and procedure in rendering the CPE determinations.
- v. The Board is not aware (whether through the BGC or otherwise) as to whether EIU makes any comparative analysis of other CPE determinations it has made when considering individual community priority applications.

60. During the hearing on 7 December 2015, ICANN further confirmed its position as follows:

- i. The Claimants (save for Minds + Machines Group Limited in the .hotel IRP) are not time-barred from seeking IRP of:
 - a. The denial by the BGC on 22 August 2014 of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.
 - b. The denial by the BGC on 11 October 2014 of the Reconsideration Request to seek reconsideration of ICANN staff's response to the DIDP request in relation to the .hotel CPE decision.
 - c. The denial by the BGC on 18 November 2014 of the Reconsideration Request to have the CPE Panel decision in the .eco matter reconsidered.
- ii. There is no ICANN quality review or control process, which compares the determinations of the EIU on the various CPE applications.

- iii. The core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.
- iv. The CPE process operated by the EIU involves 5 core EIU staff and 2 independent evaluators. The independent evaluators separately score each CPE application and submit their separate scores to the EIU core staff. The independent evaluators do not confer on the scoring. The independent evaluators are not the same for each CPE application; sometimes both are different and sometimes one is different.
- v. ICANN considers there is nothing in its Articles of Incorporation or Bylaws, which requires ICANN to comply with due process.
- vi. ICANN does not believe that it is subject to any general international law principle requiring it to comply with due process.
- vii. Upon receipt of a Reconsideration Request, ICANN expects the BGC to carry out a procedural review of the CPE determination, not a substantive review and that this procedural review should look at whether the EIU had followed the correct procedure and had correctly applied ICANN policies.

61. In the light of the relevant provisions of the Articles of Incorporation and Bylaws identified above, and the clarifications provided by ICANN as to its position in relation to CPE applications and Reconsideration Requests made in respect of them, the Panel will now consider each of the contested actions of the Board of ICANN in this IRP. In doing so, the Panel has taken into account, where relevant, all the submissions of the parties, including, without limitation, those specifically set out in sections E. and F. above.

62. Given the confirmation by ICANN, that a time bar is not being raised in relation to the substantive issues in this IRP, the Panel does not have to discuss this question save for when it considers Minds + Machines Group Limited's attempt to join in the .hotel IRP.

I. Analysis – Specific

1. The denial by the BGC, on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.

63. In conducting this analysis, the Panel have carefully considered the CPE report dated 11 June 2014, which determined that HTLD's community based application had prevailed, the Reconsideration Request dated 28 June 2014 and the BGC denial of the Reconsideration Request dated 22 August 2014. In doing so, the Panel has considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

64. The Panel is clear that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:

- a. whether the BGC acted without conflict of interest in taking its decision?
- b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
- c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?

65. No allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.

66. As to the requirements of due diligence and care, and the exercise of independent judgment, ICANN's position is that the review undertaken by the BGC should be a procedural review of the CPE determination, not a substantive review, and that this procedural review should look at whether the EIU had followed the correct procedure and had correctly applied ICANN policies.

67. That appears to the Panel to be correct, but what is of critical importance is the manner in which the review of whether the EIU has followed the correct procedure and has correctly applied ICANN's policies is conducted.

68. In their Reply in the .hotel IRP at §39 the Claimants submit:

“One cannot investigate whether a standard was applied fairly and correctly without looking into how the standard was applied....The ICANN Board instead limited its review to the question of whether the CPE Panel had made mention of the applicable standard. Such a limited review is not a meaningful one.”

69. The Panel agrees that if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied. It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.

70. This is particularly so given that the EIU is not subject to ICANN's core values, the EIU independent evaluators are not the same for each CPE application, there is no ICANN quality review or control process which compares the

determinations of the EIU on the various CPE applications and ICANN is not aware as to whether EIU makes any comparative analysis of other CPE determinations it has made when considering individual community priority applications.

71. In their Reconsideration Request of 28 June 2014, at page 5, the Claimants say:

“In this case, however, there are 3 instances where the Panel has not followed the [Guidebook] policy and processes for conducting CPE. Further, the Panel, and ICANN staff have breached more general ICANN policies and procedures in the conduct of this CPE.”

72. The three instances of failure to follow the Guidebook policy alleged by the Claimants are:

1. Failure to identify a “Community”;
2. Failure to consider self-awareness and recognition of the community; and
3. Failure to apply the test for Uniqueness.

73. In their Reconsideration Request, the Claimants then go into significant detail as to the ways in which they allege the EIU failed to follow the Guidebook policy. However, in the BGC denial of 22 August 2014, the BGC state:

“...while the Request is couched in terms of the Panel’s purported violations of various procedural requirements, the Requesters do not identify any misapplication of a policy or procedure, but instead challenge the merits of the Panel’s Report, which is not a basis for reconsideration”

74. The BGC’s comment quoted above is plainly wrong as any detailed reading of the Reconsideration Request shows. It is unfortunate that the BGC should have included such comments in its determination as, in the Panel’s view, this has contributed to this IRP and the clear feeling, on the part of the Claimants, that their Reconsideration Request was not treated appropriately by the BGC.

75. In their Reconsideration Request, the Claimants argue that the first question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there is a community that meets the definition of a community under the Guidebook. They say:

“The Panel did not attempt this analysis, in breach of the requirements of the policy and process for CPE.... This is not a disagreement about a finding by the Panel on this topic; the Panel did not consider this definition, nor apply the test for “community” required.... Had it

considered the matter, it would have appreciated that the applicants definition, rather than showing cohesion, depended instead on coercion.”

76. In dealing with this allegation the BGC gave consideration to the definition of community in the Guidebook and stated:

“However, the Requesters point to no obligation to conduct any inquiry as to the definition of community other than those expressed in section 4.2.3 of the Guidebook.....As such, the Requesters fault the Panel for adhering to the Guidebook’s definition of a “community” when evaluating the Application. Given that the Panel must adhere to the standards laid out in the Guidebook, this ground for reconsideration fails.

The Requesters also contend the Applicant’s proposed community, i.e., the “Hotel Community” does not qualify as a community for CPE purposes because “rather than showing cohesion, [it] depend[s] on coercion....But the Panel reached the contrary conclusion... As even the Requesters note, a request for reconsideration cannot challenge the substance of the Panel’s conclusions, but only its adherence to the applicable policies and procedures”

77. In their Reconsideration Request, the Claimants argue that the second question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there was a failure to consider self-awareness and recognition of the community. They say:

“...the Panel has imported the test for determining whether there is a “community” – self-awareness that the group is a community- into the test for “delineation”. With respect, that is an error of process that further invalidates the findings.

Even if it were not, and self-awareness and recognition are considered with Delineation, the actual response given under that enquiry about “self-awareness and recognition” shows that the Panel does not understand the test that is to be applied....

What is required is a showing by evidence that the members of the alleged community regard themselves as members of a defined community, which is recognised as such by the members, and by people outside the community.

It is important to note that the Panel finds that the alleged community is clearly delineated, because there is an ISO definition of “hotel”, and because every hotel is a member of the alleged community....

The Panel then proceeds through the proper requirements of delineation, which it names accurately – organisation and existence before 2007.”

78. In dealing with this allegation, the BGC gave consideration to the definition of delineation in the Guidebook and stated:

“The Panel began its assessment of the test for delineation by noting: “Two conditions must be met to fulfil the requirements for delineation; there must be a clear, straightforward membership definition, and there must be awareness and recognition of a community (as defined by the applicant) among its members” (Report, Pg. 1.) As the Requesters admit, the Panel then “proceeds through the proper requirements of Delineation, which it names accurately....The Requesters thus defeat their own argument, as they squarely concede the Panel assessed the “proper requirements” of the test for delineation.

Again the Requesters dispute the Panel’s allusion to the “awareness and recognition” of the Hotel Community’s members not because that reference constitutes any procedural violation, but because the Requesters simply disagree whether there is any such recognition amongst the Hotel Community’s members.....Disagreement with the Panel’s substantive conclusions, however, is not a proper basis for reconsideration”

79. In their Reconsideration Request, the Claimants argue that the third question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there was a failure properly to apply the test for Uniqueness. They say:

“The Panel has not followed ICANN policy or process in arriving at the conclusion that the string has “no other significant meaning beyond identifying the community” because it has itself cited a significant other meaning and relied on that other meaning (that the word means “an establishment with services and additional facilities where accommodation and in most cases meals are available”) in order to measure and find Delineation.

This is not a disagreement about a conclusion – this is a demonstration of a failure of process by the Panel. It cannot use the significant meaning of “hotel” under an ISO definition for one purpose (a finding under delineation), then deny that meaning and say there is “no other significant meaning” for the purpose of finding Uniqueness....

The word “hotel” means to most of the world what the ISO definition says it means – a place for lodging and meals. To assert that it means to most

people the association of business enterprises that run the hotels is unsubstantiated and absurd.”

80. In dealing with this allegation the BGC gave consideration to the definition of uniqueness in the Guidebook and stated:

“The Requesters have identified no procedural deficiency in the Panel’s determination that the uniqueness requirement was met. The Requesters concede that “HOTEL” has the significant meaning of a place for lodging and meals, and common sense dictates that the Hotel Community consists of those engaged in providing those services. The attempt to distinguish between those who run hotels and hotels themselves is merely a semantic distinction. Again, while the Requesters may disagree with the Panel’s substantive conclusion, that is not a proper basis for reconsideration.

81. As for the alleged breaches of more general ICANN policies and procedures in the conduct of the .hotel CPE, the Claimants refer to Article 7 of ICANN’s Affirmation of Commitments and Articles I.2.8, III.1 and IV.2.20 of ICANN’s Bylaws and say:

“Requestor submits that various aspects of the CPE process breach, or risk breaching, these fundamental provisions...there are a number of features which are prejudicial to standard applicants, including:

(a) Insufficient material was made available to them as to who the Panelist was, and their qualifications....

(b) There is no publication of materials to be examined by the Panel....

(c) Insufficient analysis and reasons were given on how the Panelist reached their CPE report....”

82. In dealing with this allegation the BGC stated:

“None of these concerns represent a policy or procedure violation for the purposes of reconsideration under ICANN’s Bylaws. The Guidebook does not provide for any of the benefits that the Requesters claim they did not receive during CPE of the Application. In essence, the Requesters argue that because the Guidebook’s CPE provisions do not include Requester’s “wish list” of procedural requirements, the Panel’s adherence to the Guidebook violates the broadly-phrased fairness principles embodied in ICANN’s foundational documents. Were this a proper ground for reconsideration, every standard applicant would have the ability to rewrite the Guidebook via a reconsideration request.”

- 83.** In considering the original CPE report of 11 June 2014, the Reconsideration Request dated 28 June 2014 and the BGC denial of the Reconsideration request dated 22 August 2014, the Panel have looked closely at whether the BGC simply undertook an administrative “box ticking” exercise to see whether mention was made of the relevant policy or procedure in denying the Reconsideration Request, or whether, as the Panel considers the BGC is required to do, it looked into how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
- 84.** Taking, first of all, the three instances of failure to follow the Guidebook policy alleged by the Claimants, it is clear from the BGC determination document of 22 August 2014 as a whole and, particularly, from those extracts quoted above that each one was carefully considered by the BGC in its determination, and that the BGC did properly consider how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
- 85.** In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN’s Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.
- 86.** As for the alleged breaches of more general ICANN policies and procedures in the conduct of the .hotel CPE claimed by the Claimants in the Reconsideration Request, it is clear from the face of these allegations that these are complaints about the CPE process as a whole and are not specific to the .hotel CPE. In consequence of the Claimants’ confirmation at the hearing on 2 December 2015, that relief in respect of the CPE process as a whole is not being pursued, it is not strictly necessary for the Panel to consider this further. However, the Panel wishes to put on record that it considers that the BGC, in denying the Claimants’ Reconsideration Request, acted consistently with the provisions of ICANN’s Articles of Incorporation and Bylaws and that the Claimants’ complaints in this regard are also not made out.

2. The denial by the BGC, on 11 October 2014, of the Reconsideration Request to seek reconsideration of ICANN staff’s response to the DIDP request in relation to the .hotel CPE decision.

- 87.** In conducting this analysis, the Panel has carefully considered the DIDP Request dated 4 August 2014, the Response from ICANN of 3 September 2014, the Reconsideration Request dated 19 September 2014 and the BGC denial of the Reconsideration Request dated 11 October 2014. In doing so, the Panel has

considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

- 88.** The Panel knows that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:
- a. whether the BGC acted without conflict of interest in taking its decision?
 - b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
 - c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?
- 89.** As with the previous issue, no allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.
- 90.** In line with the approach taken in the previous issue, the Panel consider that the review undertaken by the BGC should look at whether the ICANN staff, in responding to the DIDP Request, followed the correct procedure and correctly applied ICANN policies, and that, in doing so, the BGC needs to look into how the procedure was followed and how policy was applied so that the BGC has a reasonable degree of assurance that the ICANN staff correctly followed the requisite procedure and correctly applied ICANN policies.
- 91.** In their DIDP Request of 4 August 2014, the Claimants asked for four categories of documents, namely:
- 1) *“All correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication (“Communications”) between individual member of ICANN’s Board or any member of ICANN Staff and the [EIU] or any other organisation or third party involved in the selection or organisation of the CPE Panel for the Report, relating to the appointment of the Panel that produced the Report, and dated within the 12 month period preceding the date of the Report;*
 - 2) *The curriculum vitae (“CVs”) of the members appointed to the CPE Panel;*
 - 3) *All Communications (as defined above) between individual members of the CPE Panel and/or ICANN, directly relating to the creation of the Report; and*
 - 4) *All Communications (as defined above) between the CPE Panel and/or Hotel TLD or any other party prior with a material bearing on the creation of the Report.”*

92. In ICANN's Response of 3 September 2014 it was explained that ICANN, whether at Board or staff level, is not involved with the selection to the CPE Panel of the two individual evaluators that perform the scoring in the CPE process and that ICANN is not provided with information about who the evaluators on any individual CPE Panel may be. As this is all done within the EIU, ICANN, it was stated, did neither have the documentation sought in numbered request 1) above, nor did it have the CVs sought in numbered request 2) above. These are clear statements that no such documentation exists.
93. However, the Response goes on to say that to *"the extent that ICANN has documentation with the EIU for the performance of its role as the coordinating firm as it relates to the .HOTEL CPE, those documents are subject to certain of the Defined Conditions of Non-Disclosure set forth in the DIDP."* It then goes on to state the defined Conditions for Nondisclosure upon which ICANN is relying to justify nondisclosure. Five separate Conditions for Nondisclosure are listed.
94. The Response does not give any more detail as to what documents it actually has *"for the performance of its role as the coordinating firm"*, nor which specific Conditions for Nondisclosure apply to which specific documents or category of documents it actually has, and, in consequence, it is not possible to judge whether the policy for nondisclosure has been correctly applied.
95. In dealing with the documentation sought in numbered request 3) above, the Response states *"Because of the EIU's role as the panel firm, ICANN does not have any communications (nor does it maintain any communications) with the evaluators that identify the scoring for any individual CPE. As a result, ICANN does not have documents of this type."* That is a clear and comprehensive statement that such documentation does not exist.
96. However, the Response goes on to say that to *"the extent that ICANN has communications with persons from EIU who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE, (as anticipated in the CPE Panel Process Document), those documents are subject to the following Defined Conditions of Nondisclosure set forth in the DIDP"*. It then goes on to state the defined Conditions for Nondisclosure upon which ICANN is relying to justify nondisclosure. Four separate Conditions for Nondisclosure are listed.
97. The Response does not give any more detail as to what *"communications with persons from EIU who are not involved in the scoring of a CPE"*, nor which specific Conditions for Nondisclosure apply to which specific documents or category of documents it actually has and, in consequence, it is not possible to judge whether the policy for nondisclosure has been correctly applied.

98. In dealing with the documentation sought in numbered request 4) above, the Response states:

“In order to maintain the independence and neutrality of the CPE Panels as coordinated by the EIU, ICANN has limited the ability for requesters or other interested parties to initiate direct contact with the panels – the CPE Panel goes through a validation process regarding letters of support or opposition (as described in the CPE Panel Process document) but that is the extent of direct communications that the CPE Panel is expected to have. For process control purposes, from time to time ICANN is cc’d on the CPE Panel’s verification emails. These emails are not appropriate for disclosure pursuant to the following Defined Conditions of Nondisclosure set forth in the DIDP”.

It then goes on to state the single defined Condition for Nondisclosure upon which ICANN is relying to justify nondisclosure.

99. In this instance, unlike those for numbered requests 1), 2) and 3) above, ICANN has described a single category of documents and the single Condition for Nondisclosure upon which it relies, thus making it possible to judge whether the policy for nondisclosure has been correctly applied.

100. In the Panel’s view, it is unfortunate that the ICANN staff did not adopt the same approach to dealing with documents which ICANN was not prepared to disclose when responding to numbered requests 1), 2) and 3) as was adopted with numbered request 4). Simply to say that “*to the extent*” ICANN has documents which fall within the categories requested in numbered requests 1), 2) and 3) such documents are not disclosable, for a variety of reasons, without making any attempt to link categories of document to particular Conditions for Nondisclosure, gives the impression of a process not properly conducted.

101. Such an approach does not provide the confidence that those requesting disclosure of documents are entitled to have, namely that a collection of potentially responsive documents has taken place and a review has actually been conducted by the ICANN staff as to whether any of the documents identified as responsive to the request are subject to any of the Conditions of Nondisclosure, as is required by ICANN’s published policy for responding to DIDP requests. If the ICANN staff had made this clear in the response it could well have provided the Claimants with the reassurance that both procedure and policy had been followed and applied.

102. In the Reconsideration Request of 19 September 2014, the Claimants say:

“ICANN should not interpose such obstacles to access without providing a factual basis to determine if its claimed privileges have any merit. At

minimum, the BGC should review the asserted protections and independently determine if they have any supportable grounds”.

103. Such a request is understandable in the circumstances. Article 4 of ICANN’s Articles of Incorporation require it to carry out its activities *“through open and transparent processes”*. Its Core Values include:

“Making decisions by applying documented policies neutrally and objectively, with integrity and fairness”, its Bylaws include the requirement to “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”.

104. The Panel is, of course, charged with reviewing the action of ICANN’s Board, rather than its staff, but the Panel wishes to make clear that, in carrying out its activities, the Board should seek to ensure that ICANN’s staff comply with the Articles of Incorporation and Bylaws of ICANN, and that a failure of the Board to ensure such compliance is a failure of the Board itself.

105. Although the Reconsideration Request said that *“the BGC should review the asserted protections and independently determine if they have any supportable grounds”*, it is the view of the Panel that this should not have been the starting point for the BGC in looking at the actions of the ICANN staff in dealing with the DIDP Request. As has already been said, the BGC does need to have a reasonable degree of assurance that the ICANN staff has correctly followed the requisite procedure and correctly applied ICANN policies. If the BGC considers it has that assurance, the Panel does not consider the BGC is required to conduct any form of independent determination as to the decisions made by the ICANN staff. The BGC would only need to go that far if it came to the conclusion that the ICANN staff had not followed the requisite procedure and/or had not correctly applied ICANN policies.

106. It is obvious, from the face of the denial of the Reconsideration Request issued by the BGC on 11 October 2014, that such an independent determination did not take place, and it appears that the BGC were satisfied that the ICANN staff had correctly followed procedure and applied policy. In the denial the BGC quite correctly state:

“It is ICANN’s responsibility to determine whether requested documents fall within those Nondisclosure Conditions. Specifically, pursuant to the DIDP process “a review is conducted as to whether the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions]...Here, in finding that certain requested

documents were subject to Nondisclosure Conditions, ICANN adhered to the DIDP process.

- 107.** Whilst the BGC does not explicitly say that a collection process occurred, it is implicit in the BGC denial that the BGC does believe that process was followed. In dealing specifically with numbered requests 1), 2) and 3), the denial says:

“Here, in finding that certain requested documents were subject to Nondisclosure Conditions, ICANN adhered to the DIDP process. Specifically, as to “documentation with the EIU for the performance of its role” and “communications with persons from EIU who are not involved in the scoring of a CPE,” ICANN analysed the Requesters’ requests in view of the DIDP Nondisclosure Conditions, including those covering “information exchanged, prepared for, or derived from the deliberative and decision-making processes” and “confidential business information and/or internal policies and procedures.”

- 108.** The denial quotes from the DIDP response as follows:

“ICANN must independently undertake the analysis of each Condition as it applies to the documentation at issue, and make the final determination as to whether any Nondisclosure Conditions apply”

The denial then goes on to say:

In conformance with the publicly posted DIDP process.... ICANN undertook such analysis, as noted above, and articulated its conclusions in the DIDP Response. While the Requesters may not agree with ICANN’s determination that certain Nondisclosure Conditions apply here, the requesters identify no policy or procedure that ICANN staff violated in making its determination, and the Requesters’ substantive disagreement with that determination is not a basis for reconsideration.”

- 109.** The denial also reaches a similar conclusion as to the adherence by the ICANN staff to the DIDP process in determining that the potential harm caused by disclosure outweighed the public interest in disclosure.

- 110.** Whilst the Panel considers that the ICANN staff could, and should, have been more explicit as to the process they had followed in refusing disclosure, the BGC determination document of 11 October 2014 provides the requisite degree of confirmation that the correct procedure was actually followed, that the BGC did, properly, consider whether the relevant policy or procedure was actually applied by the ICANN staff and whether, in doing so, the BGC could have a reasonable degree of assurance that the ICANN staff had correctly the applied the policy or procedure.

111. In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.

3. The denial by the BGC, on 18 November 2014, of the Reconsideration Request to have the CPE Panel decision in .eco reconsidered.

112. In conducting this analysis, the Panel has carefully considered the CPE report dated 6 October 2014, which determined that Big Room's community based application had prevailed, the Reconsideration Request dated 22 October 2014 and the BGC denial of the Reconsideration request dated 18 November 2014. In doing so, the Panel has considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

113. The Panel is clear that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:

- a. whether the BGC acted without conflict of interest in taking its decision?
- b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
- c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?

114. As with the previous two issues, no allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.

115. As it did in considering the first issue, and for the reasons stated there, the Panel considers that if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied. It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.

116. In their Reconsideration Request of 22 October 2014, at page 10, the Claimants say:

“Requester therefore requests ICANN in accordance with its Reconsideration Request process to:

- Reconsider the Determination, and in particular not award a passing score in view of the [CPE] criteria set out in the [Guidebook] for the reasons expressed in this Reconsideration Request and any reasons, arguments and information to be supplemented to this Request or forming part of a new Reconsideration Request in the future;*
- Reconsider ICANN’s decision that the Requester’s application for the .eco gTLD “Will not Proceed” to contracting; and*
- Restore the “Application Status” of the Requester’s application and the Application submitted by the Applicant to “Evaluation Complete”, their respective “Contention Resolution Statuses” to “Active”, and their “Contention Resolution Result” to “In Contention”.*

117. Earlier in the Reconsideration Request (at pages 2 and 3), the Claimants argue that the concept “eco” is much broader than the community definition provided by Big Room in its community based application and say:

“the community definition contained in the Application...- in Requester’s opinion – does not meet the criteria for community-based gTLDs that have been set out in ICANN’s Applicant Guidebook”

118. The Reconsideration Request goes on to give the reasons for this assertion, which can be summarised as:

- there is no clear and unambiguous definition of the community that Big Room’s community based application is intended to serve;
- the string .eco does not closely describe the community or the community members and over-reaches substantially beyond the community referred to in the application;
- the term .eco has various meanings that are completely unrelated to the community determined in Big Room’s application; and
- the CPE Panel failed to detail the letters of opposition received.

119. The BGC’s denial states:

“The Requesters do not identify any misapplication of any policy or procedure by ICANN or the CPE Panel. Rather the Requesters simply disagree with the CPE Panel’s determination and scoring of the Application, and challenge the substantive merits of the CPE Panel’s Report. Specifically, the Requesters contend that the CPE Panel improperly applied the first, second and fourth CPE criteria set forth in the [Guidebook].

Substantive disagreement with the CPE Panel's Report, however, is not a basis for reconsideration. Since the Requesters have failed to demonstrate that the CPE Panel acted in contravention of any established policy or procedure in rendering the Report, the BGC concludes that [the Reconsideration Request] be denied"

120. The BGC denial then goes on to examine whether the EIU properly applied the Guidebook scoring guidelines and CPE Guidelines in respect of each of the items raised by the Claimants and concludes, in respect of each one, that *"the CPE Panel accurately described and applied the Guidebook scoring guidelines and CPE Guidelines"*.
121. In considering the original CPE report of 6 October 2014, the Reconsideration Request dated 22 October 2014 and the BGC denial of the Reconsideration Request dated 18 November 2014, the Panel has looked closely at whether the BGC simply undertook an administrative "box ticking" exercise to see whether mention was made of the relevant policy or procedure in denying the Reconsideration Request, or whether, as the Panel considers the BGC is required to do, it looked into how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
122. Unlike the Reconsideration Request in respect of the .hotel CPE determination, this Reconsideration Request does not raise questions as to whether the EIU followed ICANN policy and procedure. It is, indeed, correctly categorised by the BGC in its denial as a statement of substantive disagreement with the EIU's determination. Nevertheless, it is clear from the BGC determination document of 18 November 2014 as a whole that the BGC did, properly, consider how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
123. In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.

4. The continued upholding of HTLD's application for .hotel in the light of the matters raised in Crowell & Moring's letter of 5 June 2015.

124. Crowell & Moring's letter of 5 June 2015 is addressed for the attention of the Members of the ICANN Board and to Mr Akram Atallah, the President of ICANN's GDD. It makes a number of serious allegations arising from a portal

configuration issue, which ICANN has admitted occurred, and which can be summarised as follows:

- The user credentials of someone called D. Krischenowski were used to conduct over 60 searches resulting in over 200 unauthorized access incidents across an unknown number of gTLDs;
- these searches resulted in the obtaining of sensitive and confidential business information concerning several of the .hotel applicants;
- D. Krischenowski is associated with HTLD; and
- the user of those credentials was deliberately looking for sensitive and confidential business information concerning competing applicants.

125. The letter then goes on to ask for certain information in relation to the portal configuration issue.

126. The letter is clearly addressed to the Members of the Board of ICANN and its President of GDD and asks, largely, for information and not documentation. It appears that the letter was also submitted through ICANN's DIDP and, in consequence, ICANN appears solely to have treated the letter as a DIDP request. Accordingly, on 5 July 2015, the ICANN staff responded in a document entitled "*Response to Documentary Information Disclosure Policy Request*" and stated:

"ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Simple requests for non-documentary information are not appropriate DIDP requests".

127. As is clear from the face of the letter itself, it is not simply a DIDP request. The attempt by ICANN to treat it solely as such represents, at best, a basic error on its part and, at worst, an attempt by the Board to avoid dealing with what is clearly a serious and sensitive issue, which goes to the integrity of the application process for the .hotel gTLD.

128. To be fair, the DIDP Response goes on to provide much detail as to what ICANN has done in the way of forensic investigation and what that has revealed. It does not, however, state whether any consideration has been given as to the impact on the integrity of the application process for the .hotel gTLD.

129. In the Reply in the .hotel IRP, the Claimants have argued that, in the circumstances, HTLD's application for .hotel must be denied and have asked the Panel to declare that ICANN must reject HTLD's application.

130. In its Sur-Reply, ICANN argues that the Claimants have failed to identify any Board action or inaction in this regard that violates any of ICANN's Articles of Incorporation or Bylaws. ICANN states in the Sur-Reply that:

"The only Board action (or inaction) that the Claimants vaguely allude to in their Reply is that the Board did not directly respond to a letter addressed to both ICANN Board and staff requesting disclosure of information regarding the Portal Configuration issue. But, it was not the Board's responsibility to do so, and ICANN's Articles and Bylaws do not mandate that the Board reply to every letter it receives".

131. In the context of the clear problems caused by ICANN's portal configuration problem, and the serious allegations contained in the letter of 5 June 2015, this is, in the view of the Panel, a specious argument.

132. In its Sur-Reply, ICANN goes on to say:

"Although Claimants Argue that [HTLD] "is closely linked with individuals who have misused, or have permitted the misuse of, their user credentials...this argument is unsupported and asserts no conduct by the ICANN Board. Claimants have failed to demonstrate that the Board has a duty to act with respect to Claimants' beliefs as to what the Board should do."

133. Article III.1 of ICANN's Bylaws provides that *"ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."*

134. The approach taken by the ICANN Board so far in relation to this issue does not, in the view of the Panel, comply with this Bylaw. It is not clear if ICANN has properly investigated the allegation of association between HTLD and D. Krischenowski and, if it has, what conclusions it has reached. Openness and transparency, in the light of such serious allegations, require that it should, and that it should make public the fact of the investigation and the result thereof.

135. The fact that no such investigation has taken place, or if it has the results have not been published, could, in the view of the Panel, amount to Board inaction and fall within the remit of the Panel. However, at the hearing, the Panel was assured by ICANN's representative, that the matter was still under consideration by the Board and that the Panel should not view a failure to act, as at the date of the hearing, as inaction on the part of the Board.

136. In view of the fact that this issue was raised on 5 June 2015 by the Claimants, the Panel is of the view that it cannot remain under consideration by the Board

of ICANN for much longer and that, if no further, appropriate action has been taken by the date of this Declaration, the failure of the Board to act could well amount to inaction on its part.

137. This issue was raised after this IRP process had commenced and has only been the subject of relatively brief argument by the Claimants in their Reply and by ICANN in its Sur-Reply. At the hearing, not only did ICANN's representative inform the Panel that the issue was still under consideration by the Board of ICANN, but he also gave an undertaking on behalf of ICANN that if a subsequent IRP was brought in relation to this issue, ICANN would not seek to argue that it had already been adjudicated upon by this Panel.

138. In all the circumstances, the Panel has concluded it should not make a declaration on this issue in this IRP, but that it should remain open to be considered at a future IRP should one be commenced in respect of this issue.

5. The attempt by Minds + Machines Group Limited to join in the .hotel IRP.

139. As has already been stated, in the Claimants' Reply in the .hotel IRP, Minds + Machines Group Limited stated it wished to join in the proceedings and, in its Sur-Reply, ICANN objected, relying on Article 7 of the ICDR International Dispute Resolution Procedures.

140. Article 7 provides that "[n]o *additional party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree*". There is nothing in the ICANN Supplementary Procedures that is inconsistent with this provision and, accordingly, it governs the procedure of this IRP.

141. Minds + Machines Group Limited applied for the .hotel gTLD and there does not appear to be any reason why, should it have so wished, it could not have joined with the Claimants in bringing the .hotel IRP. It did not do so and no reason has been given for its failure to do so. Accordingly, pursuant to Article IV.3.3 of ICANN's Bylaws, it is now time-barred from doing so.

142. In all the circumstances, the Panel rejects the request of Minds + Machines Group Limited to join this IRP.

J. Conclusion

143. Many general complaints were made by the Claimants as to ICANN's selection process in appointing EIU as the CPE Panel, the process actually followed by

EIU in considering community based applications, and the provisions of the Guidebook. However, the Claimants, sensibly, agreed at the hearing on 7 December 2015 that relief was not being sought in respect of these issues.

144. Nevertheless, a number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.
145. At the hearing, ICANN submitted that it was not subject to a due process obligation neither pursuant to its Articles of Incorporation and Bylaws, nor pursuant to general international legal principles, notwithstanding Article 4 of its Articles of Incorporation. If this was intended as a general statement, the Panel finds this most surprising in the context of the role ICANN fulfils and the language of Article 4 itself. ICANN is a California non-profit corporation but Article 4 of the Articles of Incorporation refers to the principles of international law and local law and to the use of open and transparent processes to enable competition and open entry in Internet markets. The Panel understands the importance of administrative procedures, such as the CPE discussed below. The Panel also understands that the EIU and the BGC themselves are not adjudicatory but administrative bodies. Nevertheless, the Panel invites the Board to affirm that, to the extent possible, and compatible with the circumstances and the objects to be achieved by ICANN, transparency and administrative due process should be applicable.
146. Also, at the hearing, ICANN confirmed that, notwithstanding that different individual evaluators can be used to consider different CPE applications, the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency. It further confirmed that ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications. Much was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations by the EIU, some of which, on the basis solely of the arguments provided by the Claimants, have some merit.
147. The CPE process for this round of gTLDs is almost at an end, so there is little or nothing that ICANN can do now, but the Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations and if different applications are being evaluated by different individual evaluators, some form of outcome comparison, quality review or quality control procedure needs to be in place to ensure consistency, both of approach and marking, by evaluators. As was seen in the .eco evaluation, where a single mark is the difference between prevailing at CPE and not, there needs to be a system in

place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.

148. Further, as has already been stated:

- In its letter of 4 December 2015, ICANN confirmed that the EIU’s determinations are presumptively final, and the Board’s review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure.
- At the hearing on 7 December 2015, ICANN confirmed that the core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.

149. The combination of these statements gives cause for concern to the Panel. As has already been noted, Article I.2 of the Bylaws states:

“Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.”

150. The Panel fails to see why the EIU is not mandated to apply ICANN’s core values in making its determinations whilst, obviously, taking into account the limits on direct application of all the core values as reflected in that paragraph of the Bylaws. Accordingly, the Panel suggests that the ICANN Board should ensure that there is a flow through of the application of ICANN’s core values to entities such as the EIU.

151. Having expressed the Panel’s concern at these general issues, the Panel now turns to the specific issues which, ultimately, it was asked to consider in this IRP. The Panel has found, in relation to each of the specific issues raised in the .hotel and .eco IRPs that it is satisfied that the BGC acted consistently with the provisions of ICANN’s Articles of Incorporation and Bylaws, and that the Claimants’ complaints have not been made out.

152. In consequence, the Panel will not be making any of the declarations sought by the Claimants.

K. The Prevailing Party and Costs

153. Article IV.3.18 of the Bylaws states:

“The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all the costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances including a consideration of the reasonableness of the parties positions and their contribution to the public interest. Each party to the IRP shall bear its own expenses.”

154. The Panel confirms that it makes its declaration based solely on the documentation, supporting materials and arguments submitted by the parties and that on the basis of that documentation, supporting material and arguments, has concluded that ICANN is the prevailing party, both in respect of the .hotel IRP and the .eco IRP.

155. Although the Claimants have raised some general issues of concern as to the CPE process, the IRP in relation to the .hotel CPE evaluation was always going to fail given the clear and thorough reasoning adopted by the BGC in its denial of the Reconsideration Request and, although the ICANN staff could have responded in a way that made it explicitly clear that they had followed the DIDP Process in rejecting the Claimants’ DIDP request in the .hotel IRP, again the IRP in relation to that rejection was always going to fail given the clarification by the BGC, in its denial of the Reconsideration Request, of the process that was followed.

156. As for the .eco IRP, it is clear that the Reconsideration Request was misconceived and was little more than an attempt to appeal the CPE decision. Again, therefore, the .eco IRP was always going to fail.

157. Finally, although the letter from Crowell & Moring of 5 June 2015 raises some very serious issues, which the Panel considers the ICANN Board needs to address, in the end, the Panel has not had to adjudicate on this issue.

158. In conclusion, therefore, whilst the Panel has declared ICANN to be the prevailing party, the Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address. In the circumstances, the Panel considers that the Claimants’

contribution to the public interest merits ICANN bearing half of the costs of the IRP Provider, which is the ICDR.

159. Article IV.3.18 provides that “[e]ach party to the IRP shall bear its own expenses”. Rule 11 of ICANN’s Supplementary Procedures provides:

“In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the Requestor is not successful in the Independent Review, the IRP Panel must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees”

160. ICANN has not sought to argue that any of the Claimants failed to enter into the Cooperative Engagement Process in good faith, and there is no evidence of this in the materials before the Panel. In consequence, the panel considers that, in accordance with Article IV.3.18 of the Bylaws, each side shall bear their own expenses including legal fees.

FOR THE FORGOING REASONS, the Panel hereby:

- (1) Declares that the IRP Request made in relation to the .hotel gTLD by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC is denied;
- (2) Designates ICANN as the prevailing party in the .hotel IRP;
- (3) Declares that the IRP Request made in relation to .eco gTLD by Little Birch, LLC and Minds + Machines Group Limited is denied;
- (4) Designates ICANN as the prevailing party in the .eco IRP;
- (5) Declares that the fees and expenses of the IRP Panel members, totalling US\$113,351.52, and the fees and expenses of the ICDR, totalling US\$11,500.00, shall be born as to half by ICANN, and as to the other half collectively by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, Little Birch, LLC and Minds +Machines Group Limited (“Applicants”). Therefore, ICANN shall reimburse the Applicants collectively the sum of \$5,750.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by the Applicants; and
- (6) This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.



Dirk P. Tirez
Date: 11 FEBRUARY 2016



Thomas H. Webster
Date: 11 FEBRUARY 2016



Peter J. Rees QC
Chair of the IRP Panel
Date: 11 FEBRUARY 2016

Exhibit H

Approved Board Resolutions | Special Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

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09 Aug 2016

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3. **Executive Session - Confidential:**

a. **Ombudsman FY16 At-Risk Compensation**

Rationale for Resolution 2016.08.09.16

b. Officer Compensation**Rationale for Resolution 2016.08.09.16 – 2016.08.09.20****1. Consent Agenda:****a. Approval of Minutes**

Resolved (2016.08.09.01), the Board approves the minutes of the 25 June and 27 June 2016 Meetings of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

2. Main Agenda:**a. Root Zone (Root Zone) Evolution Review Committee (RZERC) Charter**

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) developed the proposed Root Zone (Root Zone) Evolution Review Committee (RZERC) charter in cooperation with the Implementation Oversight Task Force (IOTF) and the Cross Community Working Group on Naming Related Functions (CWG-Stewardship).

Whereas, the proposed charter is consistent with the IANA (Internet Assigned Numbers Authority) Stewardship Transition Coordination Group (ICG (IANA Stewardship Transition Coordination Group)) proposal that the Board approved and transmitted to the National Telecommunications and Information Administration (NTIA (US National Telecommunications and Information Agency)) on 10 March 2016.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) commenced a public comment period from 30 June 2016 to 10 July 2016 <<https://www.icann.org/public-comments/draft-rzerc-charter-2016-06-10-en> <(/public-comments/draft-rzerc-charter-2016-06-10-en)> on the proposed charter <<https://www.icann.org/en/system/files/files/draft-rzerc-charter-10jun16-en.pdf> <(/en/system/files/files/draft-rzerc-charter-10jun16-en.pdf)> [PDF, 43 KB].

Whereas, the public comment forum on the proposed charter closed on 10 July 2016, with ICANN (Internet Corporation for Assigned Names and Numbers) receiving seven comment submissions by both individuals and organizations/groups. Upon review of these comments, ICANN (Internet Corporation for Assigned Names and Numbers) coordinated with the impacted parts of the ICANN (Internet Corporation for Assigned Names and Numbers) community to address the concerns and revise the charter appropriately.

Whereas, the RZERC charter calls for a representative from the ICANN (Internet Corporation for Assigned Names and Numbers) Board to serve in the Committee.

Resolved (2016.08.09.02), the Board approves the RZERC charter as revised in response to public comment, and the President and CEO, or his designee(s), is authorized to take such actions as appropriate to form the RZERC.

Resolved (2016.08.09.03), the Board appoints Suzanne Woolf to serve on the RZERC.

Rationale for Resolutions 2016.08.09.02 – 2016.08.09.03

Why the Board is addressing the issue now?

On 10 March 2016, the Board approved and transmitted the IANA (Internet Assigned Numbers Authority) Stewardship Transition Coordination Group (ICG (IANA Stewardship Transition Coordination Group)) proposal to the National Telecommunications and Information Administration (NTIA (US National Telecommunications and Information Agency)) and directed ICANN (Internet Corporation for Assigned Names and Numbers) to proceed with implementation planning. One of the requirements in the naming portion of the ICG (IANA Stewardship Transition Coordination Group) proposal is the formation of a standing committee to review proposed architectural changes to the content of the DNS (Domain Name System) root zone, the systems including both hardware and software components used in executing changes to the DNS (Domain Name System) root zone, and the mechanisms used for distribution of the DNS (Domain Name System) root zone. The Committee shall, as determined necessary by its membership, make recommendations related to those changes for consideration by the ICANN (Internet Corporation for Assigned Names and Numbers) Board. The Board's approval at the recommendation of the Committee is the CWG-Stewardship's proposed replacement for NTIA (US National Telecommunications and Information Agency)'s current role, which would no longer be in place if the IANA (Internet Assigned Numbers Authority) Functions Contract lapses. As part of implementation planning, ICANN (Internet Corporation for Assigned Names and Numbers) named this standing committee Root Zone (Root Zone) Evolution Review Committee (RZERC) and worked with the community to draft a charter for the Committee.

What is the proposal being considered?

The proposed charter describes the purpose, scope of responsibilities, and composition of the Committee. The charter also sets out how the Committee will conduct itself, including frequency and method of meetings, how decisions will be made, records of proceedings, as well as conflict of interest. Lastly, the charter sets out requirements for review and amendments to the charter.

Which stakeholders or others were consulted?

ICANN (Internet Corporation for Assigned Names and Numbers) consulted with the Implementation Oversight Task Force (IOTF) as well as the CWG-Stewardship in the development of the proposed charter. ICANN (Internet Corporation for Assigned Names and Numbers) also conducted a public comment period on the

proposed charter from 10 June 2016 through 10 July 2016, following which time the comments were summarized and analyzed.

What concerns or issues were raised by the community?

Seven (7) members of the community participated in the public comment period. Members of the community raised one key concern in their comments.

The concern was that the scope of responsibilities of the RZERC as drafted seems to overlap with the responsibilities of the RSSAC (Root Server System Advisory Committee). The scope of the RZERC as drafted is to consider architectural and operational issues that impose potential risk to the root zone and the root system. Commenters suggested that this scope could be interpreted to mean that the RZERC could consider issues relating to the operation of the root servers, which is a responsibility of the RSSAC (Root Server System Advisory Committee). To address this concern, ICANN (Internet Corporation for Assigned Names and Numbers) worked with the RSSAC (Root Server System Advisory Committee) to modify the scope of the RZERC to clarify that the RZERC is expected to review proposed architectural changes to the content of the DNS (Domain Name System) root zone, the systems including both hardware and software components used in executing changes to the DNS (Domain Name System) root zone, and the mechanisms used for distribution of the DNS (Domain Name System) root zone. The Committee shall, as determined necessary by its membership, make recommendations related to those changes for consideration by the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

What significant materials did the Board review?

As part of its deliberations, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- The proposed RZERC charter
<<https://www.icann.org/en/system/files/files/draft-rzerc-charter-10jun16-en.pdf> ([/en/system/files/files/draft-rzerc-charter-10jun16-en.pdf](https://www.icann.org/en/system/files/files/draft-rzerc-charter-10jun16-en.pdf))> [PDF, 43 KB]
- Public comments <<https://forum.icann.org/lists/comments-draft-rzerc-charter-10jun16/> (<https://forum.icann.org/lists/comments-draft-rzerc-charter-10jun16/>)>
- Summary and analysis of public comments
- IANA (Internet Assigned Numbers Authority) Stewardship Transition Coordination Group (ICG (IANA Stewardship Transition Coordination Group)) proposal <<https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf> ([/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf](https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf))> [PDF, 2.32 MB]
- The RZERC charter as modified in response to public comment.

Are there positive or negative community impacts?

The Board's approval of the charter is an important step in the implementation planning process to fulfill one of the requirements from the ICG (IANA Stewardship Transition Coordination Group) proposal, which was endorsed by the global stakeholder community and approved by the Board on 10 March 2016.

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

There is no fiscal impact expected.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

The approval of the proposed charter would be an important step toward ensuring security, stability and resiliency of the DNS (Domain Name System) post transition. The RZERC's scope of responsibility will be to provide the ICANN (Internet Corporation for Assigned Names and Numbers) Board with recommendations regarding proposed architectural changes to the content of the DNS (Domain Name System) root zone, the systems including both hardware and software components used in executing changes to the DNS (Domain Name System) root zone, and the mechanisms used for distribution of the DNS (Domain Name System) root zone.

b. PTI Articles of Incorporation

Whereas, on 14 March 2014, the National Telecommunications and Information Administration (NTIA (US National Telecommunications and Information Agency)) of the United States Department of Commerce announced its intention to transition the stewardship of the IANA (Internet Assigned Numbers Authority) Functions to the global multistakeholder community.

Whereas, on 10 March 2016, Internet Corporation for Assigned Names and Numbers (ICANN (Internet Corporation for Assigned Names and Numbers)) accepted and transmitted to the NTIA (US National Telecommunications and Information Agency) the following transition documents: (i) the IANA (Internet Assigned Numbers Authority) Stewardship Transition Coordination Group's IANA (Internet Assigned Numbers Authority) Stewardship Transition Proposal, (the "ICG (IANA Stewardship Transition Coordination Group) Proposal") and (ii) the Cross Community Working Group on Enhancing ICANN (Internet Corporation for Assigned Names and Numbers) Accountability's Work Stream 1 Report (collectively, the "Transition Proposals").

Whereas, the ICG (IANA Stewardship Transition Coordination Group) Proposal included a requirement that ICANN (Internet Corporation for Assigned Names and Numbers) develop an affiliate to perform the naming-related IANA (Internet Assigned Numbers Authority) functions under a contract with ICANN (Internet Corporation for Assigned Names and Numbers), PTI. The ICG (IANA Stewardship Transition Coordination Group) Proposal required PTI to be a California Nonprofit

Public Benefit Organization, and ICANN (Internet Corporation for Assigned Names and Numbers) is to be the sole member of PTI.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) lawyers worked diligently with the independent counsel to the Cross Community Working Group to Develop an IANA (Internet Assigned Numbers Authority) Stewardship Transition Proposal on Naming Related Functions ("CWG-Stewardship") to develop Articles of Incorporation for the new PTI. Those draft Articles were posted for public comment for a period of 30 days.

Whereas, upon the close of the comment period, a detailed analysis of the comments was performed and modifications were made to the Articles in response to the public comments. ICANN (Internet Corporation for Assigned Names and Numbers) coordinated with the independent law firm on the revisions.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers)'s General Counsel has asserted that the proposed PTI Articles of Incorporation remain consistent with the Transition Proposals and recommends that ICANN (Internet Corporation for Assigned Names and Numbers) proceed to forming the affiliate to allow for implementation planning to continue.

Resolved (2016.08.09.04), the ICANN (Internet Corporation for Assigned Names and Numbers) Board authorizes ICANN (Internet Corporation for Assigned Names and Numbers)'s CEO, or his designee, to proceed with the formation of PTI, including the filing of the proposed PTI Articles of Incorporation as revised after public comment.

Rationale for Resolution 2016.08.09.04

The authorization for ICANN (Internet Corporation for Assigned Names and Numbers) to proceed with the formation of PTI, through the filing of the PTI Articles of Incorporation, is a crucial step in the planning for the implementation of the Transition Proposals. This is a key step for ICANN (Internet Corporation for Assigned Names and Numbers)'s report to NTIA (US National Telecommunications and Information Agency) on the status of implementation planning. This timely authorization to move forward with the formation of PTI is necessary to support the global multistakeholder community's work towards a successful completion of the stewardship of the IANA (Internet Assigned Numbers Authority) functions.

These PTI Articles are product of collective work of the internal and external legal teams along with the intensive work of the CWG-Stewardship. The PTI Articles were posted for a 30-day public comment period, and three comments were received. Each of the comments was considered and analyzed, and explanation was provided on whether the PTI Articles required modification to reflect the issues raised within the comment.

With the small number of comments, the Articles did not require significant change in response to those comments. The changes that were made included a

modification to the purpose of PTI to more accurately reflect PTI's limited, narrow role to perform the IANA (Internet Assigned Numbers Authority) functions. Another change was made to reflect the proper threshold needed to amend the PTI Articles.

In taking this action, the Board relied upon:

- ICG (IANA Stewardship Transition Coordination Group)'s IANA (Internet Assigned Numbers Authority) Stewardship Transition Proposal (/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf)
[PDF, 2.32 MB]
- Report of Public Comments on PTI Articles of Incorporation
- Draft PTI Articles of Incorporation

The Board also relied upon the General Counsel and Secretary's affirmation that PTI Articles reflect the Transition Proposals, as well as the inputs of independent counsel to craft the PTI Articles to support the ICG (IANA Stewardship Transition Coordination Group) Proposal.

Authorizing the formation of PTI is in line with ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to accountability and transparency. This action confirms ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to implement the Transition Proposals and all of the elements in those Proposals.

Forming PTI is not anticipated to have any impact on the security, stability or resiliency of the DNS (Domain Name System), though the PTI will be essential to ICANN (Internet Corporation for Assigned Names and Numbers)'s security, stability and resiliency work. There will be resource implications, including significant resources to support a new affiliate.

This is an Organizational Administrative Function for which public comments were received.

c. Root Zone (Root Zone) Maintainer Agreement

Whereas, the National Telecommunications and Information Agency (NTIA (US National Telecommunications and Information Agency)) officially requested that Verisign and ICANN (Internet Corporation for Assigned Names and Numbers) work together to develop a proposal on how best to transition NTIA (US National Telecommunications and Information Agency)'s administrative role associated with root zone management in a manner that maintains the security, stability, and resiliency of the Internet's domain name system in a 4 March 2015 letter to ICANN (Internet Corporation for Assigned Names and Numbers).

Whereas, in August 2015, ICANN (Internet Corporation for Assigned Names and Numbers) and Verisign submitted a proposal to NTIA (US National Telecommunications and Information Agency) in response to its request

<https://www.ntia.doc.gov/files/ntia/publications/root_zone_administrator_proposal-relatedtoiana_functionsste-final.pdf
(https://www.ntia.doc.gov/files/ntia/publications/root_zone_administrator_proposal-relatedtoiana_functionsste-final.pdf)> [PDF, 247 KB]. The proposal outlines two parts, a parallel testing period of the of Root Zone (Root Zone) Management Systems (RZMS) and a Root Zone (Root Zone) Maintainer Agreement (RZMA) with Verisign for Verisign to continue performing the root zone maintainer function it performs today under the Cooperative Agreement (<https://www.ntia.doc.gov/page/verisign-cooperative-agreement>) with the Department of Commerce.

Whereas, NTIA (US National Telecommunications and Information Agency) specified in a 9 June 2016 letter to ICANN (Internet Corporation for Assigned Names and Numbers) that a finalized RZMA and successful completion of the parallel testing period are pre-conditions to the IANA (Internet Assigned Numbers Authority) Stewardship transition.

Whereas, the completion of the RZMA is a requirement from the package of proposals that the Board approved on 10 March 2016 to transition NTIA (US National Telecommunications and Information Agency)'s stewardship of the IANA (Internet Assigned Numbers Authority) function to the global multistakeholder community and, because the RZMA exceeds US\$500,000 in total, requires that the Board approves to delegate signature authority to the CEO.

Whereas, the parallel testing period of the RZMS successfully concluded on 6 July 2016 <<https://www.icann.org/news/announcement-2016-07-14-en>
([/news/announcement-2016-07-14-en](https://www.icann.org/news/announcement-2016-07-14-en))>.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) and Verisign finalized negotiations on the terms of the proposed RZMA for Verisign to perform the root zone maintainer function, and published the proposed RZMA for a 30-day notice period as required by the IANA (Internet Assigned Numbers Authority) Stewardship Transition Coordination Group (ICG (IANA Stewardship Transition Coordination Group)) proposal <<https://www.icann.org/news/blog/root-zone-management-transition-update-preservation-of-security-stability-and-resiliency>
([/news/blog/root-zone-management-transition-update-preservation-of-security-stability-and-resiliency](https://www.icann.org/news/blog/root-zone-management-transition-update-preservation-of-security-stability-and-resiliency))>.

Whereas, the proposed RZMA contains provisions that incorporate relevant requirements from the Cross Community Working Group on Naming Related Functions (CWG-Stewardship).

Whereas, the Board Finance Committee reviewed the financial aspects and implications of the RZMA and found (i) that the proposed costs of the contract were reasonable, (ii) that the procurement process had been respected, (iii) that the costs were affordable, and recommended approval by the Board as a result.

Resolved (2016.08.09.05), the proposed RZMA is approved, and the President and CEO, or his designee(s), is authorized to take such actions as appropriate to

finalize and execute the Agreement.

Rationale for Resolutions 2016.08.09.05

Why the Board is addressing the issue now?

In a 4 March 2015 letter, the National Telecommunications and Information Agency (NTIA (US National Telecommunications and Information Agency)) "officially requested that Verisign and ICANN (Internet Corporation for Assigned Names and Numbers) work together to develop a proposal on how best to transition NTIA (US National Telecommunications and Information Agency)'s administrative role associated with root zone management in a manner that maintains the security, stability, and resiliency of the Internet's domain name system." In August 2015, ICANN (Internet Corporation for Assigned Names and Numbers) and Verisign submitted a proposal to NTIA (US National Telecommunications and Information Agency) in response to its request <https://www.ntia.doc.gov/files/ntia/publications/root_zone_administrator_proposal-relatedtoiana_functionsste-final.pdf (https://www.ntia.doc.gov/files/ntia/publications/root_zone_administrator_proposal-relatedtoiana_functionsste-final.pdf)> [PDF, 247 KB]. The proposal outlines two parts, a parallel testing period of the of Root Zone (Root Zone) Management System (RZMS) and a Root Zone (Root Zone) Maintainer Agreement with Verisign for Verisign to continue performing the root zone maintainer function it performs today under the Cooperative Agreement (<https://www.ntia.doc.gov/page/verisign-cooperative-agreement>), with the Department of Commerce.

Completion of the RZMA is also specified as one of the requirements from the package of proposals that the Board approved on 10 March 2016 to transition NTIA (US National Telecommunications and Information Agency)'s stewardship of the IANA (Internet Assigned Numbers Authority) function to the global multistakeholder community and, because it exceeds US\$500,000 in total, requires that the Board approves to delegate signature authority to the CEO.

Since last August, ICANN (Internet Corporation for Assigned Names and Numbers) and Verisign have had ongoing discussions and negotiations regarding the terms of the RZMA. Negotiations concluded in June and the proposed RZMA was published for a 30-day public notice period on 30 June 2016. The 30-day public notice period ended on 30 July 2016 and the Board has considered the proposed RZMA for approval.

What is the proposal being considered?

The proposed RZMA allows Verisign to continue providing services for root zone maintenance, root zone signing with the ZSK, and distribution of the root zone file and related files to the root zone operators at a nominal fee. The RZMA provides for an 8-year term with robust service level agreements that can be modified via a change control process should the customers of IANA (Internet Assigned Numbers Authority) require changes to these service level agreements. The change control process also allows for changes to the Root Zone (Root Zone)

Management System as root zone management evolves to meet the needs of the community. While the 8-year term of the RZMA is intended to promote the security, stability and resiliency of root zone maintenance operations by having Verisign continue in its role, the agreement also provides a capability for the community, through a consensus-based community-driven process, to cause ICANN (Internet Corporation for Assigned Names and Numbers) to transition the function to another service provider after three years. The full RZMA was posted for a 30-day public notice period on 30 June 2016 as required by the ICG (IANA Stewardship Transition Coordination Group) proposal and can be viewed at <[https://www.icann.org/iana_imp_docs/63-root-zone-maintainer-agreement-v-1-0/\(iana_imp_docs/63-root-zone-maintainer-agreement-v-1-0\)>](https://www.icann.org/iana_imp_docs/63-root-zone-maintainer-agreement-v-1-0/(iana_imp_docs/63-root-zone-maintainer-agreement-v-1-0)>).

Which stakeholders or others were consulted?

ICANN (Internet Corporation for Assigned Names and Numbers) held discussions and negotiations with Verisign, Inc. to finalize the proposed RZMA, which was then posted for a 30-day public notice period from 30 June through 30 July 2016.

What concerns or issues were raised by the community?

No significant issues or concerns were brought to ICANN (Internet Corporation for Assigned Names and Numbers)'s attention during the 30-day public notice period.

What significant materials did the Board review?

As part of its deliberations, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- Verisign Cooperative Agreement with the United States Government <[https://www.ntia.doc.gov/page/verisign-cooperative-agreement\(https://www.ntia.doc.gov/page/verisign-cooperative-agreement\)>](https://www.ntia.doc.gov/page/verisign-cooperative-agreement(https://www.ntia.doc.gov/page/verisign-cooperative-agreement)>)>
- 4 March 2015 letter from NTIA (US National Telecommunications and Information Agency)
- Verisign/ICANN (Internet Corporation for Assigned Names and Numbers) Proposal in Response to NTIA (US National Telecommunications and Information Agency) Request – Root Zone (Root Zone) Administrator Proposal Related to the IANA (Internet Assigned Numbers Authority) Functions Stewardship Transition <[https://www.ntia.doc.gov/files/ntia/publications/root_zone_administrator_proposal-relatedtoiana_functionsste-final.pdf\(https://www.ntia.doc.gov/files/ntia/publications/root_zone_administrator_proposal-relatedtoiana_functionsste-final.pdf\)>](https://www.ntia.doc.gov/files/ntia/publications/root_zone_administrator_proposal-relatedtoiana_functionsste-final.pdf(https://www.ntia.doc.gov/files/ntia/publications/root_zone_administrator_proposal-relatedtoiana_functionsste-final.pdf)>)> [PDF, 247 KB]
- Root Zone (Root Zone) Maintainer Agreement <[https://www.icann.org/iana_imp_docs/63-root-zone-maintainer-agreement-v-1-0/\(iana_imp_docs/63-root-zone-maintainer-agreement-v-1-0\)>](https://www.icann.org/iana_imp_docs/63-root-zone-maintainer-agreement-v-1-0/(iana_imp_docs/63-root-zone-maintainer-agreement-v-1-0)>)>

- [IANA \(Internet Assigned Numbers Authority\) Stewardship Transition Coordination Group \(ICG \(IANA Stewardship Transition Coordination Group\)\) proposal <https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf \(/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf\)>](https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf) [PDF, 2.32 MB]

What factors has the Board found to be significant?

The Board carefully considered the RZMA to ensure it contains provisions that would allow ICANN (Internet Corporation for Assigned Names and Numbers) to meet the requirements of the community for the transition, such as:

- The ability to modify service level agreements due to recommendations from the Customer Standing Committee
- The ability to make modifications to the Root Zone (Root Zone) Management System due to recommendations from the Root Zone (Root Zone) Evolution Review Committee
- The ability for the community, through a consensus-based community-driven process, to cause ICANN (Internet Corporation for Assigned Names and Numbers) to transition the maintainer function to another service provider
- The Board also carefully considered the terms of the RZMA to ensure that the maintainer function can continued to be operated in a secure, stable, and reliable manner post transition.

Are there positive or negative community impacts?

A key goal of the proposed RZMA and continued engagement with Verisign, Inc. for the performance of the maintainer function is to provide secure and stable operations of the root zone through the IANA (Internet Assigned Numbers Authority) Stewardship transition and beyond. The Board's approval of the proposed RZMA would ensure that expectations of IANA (Internet Assigned Numbers Authority) customers will continue to be met.

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

Verisign, Inc. has historically solely performed the maintainer function at no cost and contracting directly with Verisign, Inc. for the continued performance of this work is desirable to ensure continuity, security and stability during the transition period. The terms of the RZMA allow for the community, through a consensus-based community-driven process, to cause ICANN (Internet Corporation for Assigned Names and Numbers) to transition the maintainer function to another service provider. This contract creates a nominal annual fee of USD 300,000 per year due to Verisign, Inc. for the performance of the maintainer function. The ICANN (Internet Corporation for Assigned Names and Numbers) Board Finance Committee has reviewed the financial aspects and implications of the proposed

RZMA and recommended approval of the RZMA to the ICANN (Internet Corporation for Assigned Names and Numbers) Board, on the basis of this review.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

The Board's approval of the proposed RZMA would ensure continuity, security and stability of the operation of the root zone during the transition period and beyond.

d. **ICANN (Internet Corporation for Assigned Names and Numbers) Restated Articles of Incorporation**

Whereas, on 14 March 2014, the National Telecommunications and Information Administration (NTIA (US National Telecommunications and Information Agency)) of the United States Department of Commerce announced its intention to transition the stewardship of the IANA (Internet Assigned Numbers Authority) Functions to the global multistakeholder community.

Whereas, on 10 March 2016, Internet Corporation for Assigned Names and Numbers (ICANN (Internet Corporation for Assigned Names and Numbers)) accepted and transmitted to the US National Telecommunications and Information Agency the following transition documents: (i) the IANA (Internet Assigned Numbers Authority) Stewardship Transition Coordination Group's IANA (Internet Assigned Numbers Authority) Stewardship Transition Proposal, (the "ICG (IANA Stewardship Transition Coordination Group) Proposal") and (ii) the Cross Community Working Group on Enhancing ICANN (Internet Corporation for Assigned Names and Numbers) Accountability's Work Stream 1 Report (collectively, the "Transition Proposals").

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Articles of Incorporation need to be restated in order to align with the new ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws and for consistency with the Transition Proposals.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) lawyers worked diligently with the independent counsel to the CCWG-Accountability to develop Restated Articles of Incorporation for ICANN (Internet Corporation for Assigned Names and Numbers). Those Restated Articles were posted for public comment for over 40 days.

Whereas, upon the close of the comments, a detailed analysis of the comments was performed and modifications were made to the Articles in response to the public comments. ICANN (Internet Corporation for Assigned Names and Numbers) coordinated with the independent law firms on the revisions.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers)'s General Counsel has asserted that the proposed Restated ICANN (Internet

Corporation for Assigned Names and Numbers) Articles of Incorporation remain consistent with the Transition Proposals and recommends that the Board approve the amendment to ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles and authorize ICANN (Internet Corporation for Assigned Names and Numbers) to proceed to filing at the appropriate time.

Resolved (2016.08.09.06), the ICANN (Internet Corporation for Assigned Names and Numbers) Board approves the proposed amendments to ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation, which shall be deemed effective upon the expiration the IANA (Internet Assigned Numbers Authority) Functions Contract between ICANN (Internet Corporation for Assigned Names and Numbers) and NTIA (US National Telecommunications and Information Agency).

Resolved (2016.08.09.07), the ICANN (Internet Corporation for Assigned Names and Numbers) Board authorizes ICANN (Internet Corporation for Assigned Names and Numbers)'s CEO, or his designee, to proceed with the filing of the Restated Articles of Incorporation once they are effective.

Rationale for Resolutions 2016.08.09.06 – 2016.08.09.07

The adoption of the Restated Articles of Incorporation is another key step in the planning for the implementation of the Transition Proposals. The Board is being taking this action now to support ICANN (Internet Corporation for Assigned Names and Numbers)'s transition planning status report to NTIA (US National Telecommunications and Information Agency) due on 12 August 2016. The adoption of amendments to ICANN (Internet Corporation for Assigned Names and Numbers) Articles of Incorporation completes the changes to ICANN (Internet Corporation for Assigned Names and Numbers)'s key governance documents that is necessary to align with the Transition Proposals and support the global multistakeholder community's work towards a successful completion of the stewardship of the IANA (Internet Assigned Numbers Authority) functions.

These Restated Articles were developed jointly between the legal teams in coordination with the ICANN (Internet Corporation for Assigned Names and Numbers) community. The external counsel to the CCWG-Accountability, as well as ICANN (Internet Corporation for Assigned Names and Numbers)'s lawyers, worked closely with the CCWG-Accountability to confirm its understanding and support of the document. The proposed Restated Articles were posted for public for over 40 days, including a requested extension. Six comments were received. Each of the comments was considered and analyzed, and explanation was provided on whether the Articles required modification to reflect the issues raised within the comment. The legal teams continued their close coordination in developing the necessary updates to the Articles.

The changes to the draft Articles based on comments were limited.

In taking this action, the Board relied upon:

- [ICG \(IANA Stewardship Transition Coordination Group\)'s IANA \(Internet Assigned Numbers Authority\) Stewardship Transition Proposal \(/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf\)](#)
[PDF, 2.32 MB]
- Cross Community Working Group on [Enhancing ICANN \(Internet Corporation for Assigned Names and Numbers\) Accountability \(CCWG-Accountability\) Work Stream 1 Report \("Report"\) to the ICANN \(Internet Corporation for Assigned Names and Numbers\) Board \(/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf\)](#) [PDF, 6.03 MB]
- Report of Public Comments Proposed Restated Articles of Incorporation (clean and redline to existing Articles)

The Board also relied upon the General Counsel and Secretary's affirmation that the Restated Articles reflect the Transition Proposals, as well as the work of the independent counsel to craft the Articles in support of the Transition Proposals.

The adoption of these Articles is in line with ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to accountability and transparency, as this completes the key governance document that ICANN (Internet Corporation for Assigned Names and Numbers) needs to put in place to provide the community with the new and enhanced accountability tools. This action confirms ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to adopt the accountability changes.

The adoption of these Restated Articles is not anticipated to have any impact on the security, stability or resiliency of the DNS (Domain Name System). The resource implications for these Restated Articles are the same as the potential resource implications identified for the implementation of the new ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws.

This is an Organizational Administrative Function for which public comments were received.

e. **GNSO (Generic Names Supporting Organization) Policy Recommendations on Privacy & Proxy Services Accreditation**

Whereas, on 31 October 2013, the [GNSO \(Generic Names Supporting Organization\) Council](#) approved the charter for a Working Group to conduct a Policy Development Process that had been requested by the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board](#) concerning the accreditation by [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) of privacy and proxy domain name registration service providers, as further described at <http://gns0.icann.org/en/drafts/raa-pp-charter-22oct13-en.pdf> (<http://gns0.icann.org/en/drafts/raa-pp-charter-22oct13-en.pdf>) [PDF, 463 KB].

Whereas, the [PDP \(Policy Development Process\)](#) followed the prescribed [PDP \(Policy Development Process\)](#) steps as stated in the [ICANN \(Internet Corporation](#)

for Assigned Names and Numbers) Bylaws, resulting in a Final Report being delivered to the GNSO (Generic Names Supporting Organization) Council on 8 December 2015.

Whereas, the Privacy & Proxy Services Accreditation Issues PDP (Policy Development Process) Working Group (WG (Working Group)) reached Full Consensus (Consensus) on all its final recommendations (see <http://gns0.icann.org/en/issues/raa/ppsai-final-07dec15-en.pdf> (<http://gns0.icann.org/en/issues/raa/ppsai-final-07dec15-en.pdf>) [PDF, 1.24 MB]).

Whereas, the GNSO (Generic Names Supporting Organization) Council reviewed and discussed the final recommendations of the Privacy & Proxy Services Accreditation Issues PDP (Policy Development Process) WG (Working Group), and adopted the recommendations on 21 January 2016 by a unanimous vote (see <http://gns0.icann.org/en/council/resolutions-201601> (<http://gns0.icann.org/en/council/resolutions#201601>)).

Whereas, the GNSO (Generic Names Supporting Organization) Council vote exceeded the required voting threshold (i.e. supermajority) to impose new obligations on ICANN (Internet Corporation for Assigned Names and Numbers) contracted parties.

Whereas, in accordance with the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, a public comment period was opened on the approved recommendations to provide the community with a reasonable opportunity to comment on their adoption prior to action by the ICANN (Internet Corporation for Assigned Names and Numbers) Board, and the comments received have been summarized and reported (see <https://www.icann.org/en/system/files/files/report-comments-ppsai-recommendations-31mar16-en.pdf> ([/en/system/files/files/report-comments-ppsai-recommendations-31mar16-en.pdf](https://www.icann.org/en/system/files/files/report-comments-ppsai-recommendations-31mar16-en.pdf)) [PDF, 299 KB]).

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws provide that the Board is to request the GAC (Governmental Advisory Committee)'s opinion regarding "any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges" and "take duly into account any advice timely presented" as a result.

Whereas, the Board notified the GAC (Governmental Advisory Committee) of the publication of the GNSO (Generic Names Supporting Organization)'s final recommendations for public comment on 19 February 2016 (see [https://gacweb.icann.org/download/attachments/27492514/2016-02-19-Steve-Crocker-to-Thomas-Schneider-GNSO-\(Generic-Names-Supporting-Organization\)-PDP-\(Policy-Development-Process\).pdf?version=1&modificationDate=1456046942000&api=v2](https://gacweb.icann.org/download/attachments/27492514/2016-02-19-Steve-Crocker-to-Thomas-Schneider-GNSO-(Generic-Names-Supporting-Organization)-PDP-(Policy-Development-Process).pdf?version=1&modificationDate=1456046942000&api=v2) (<https://gacweb.icann.org/download/attachments/27492514/2016-02-19-Steve-Crocker-to-Thomas-Schneider-GNSO-PDP.pdf?version=1&modificationDate=1456046942000&api=v2>)) [PDF, 819 KB]).

Whereas, in its Marrakech Communiqué issued on 9 March 2016 the [GAC \(Governmental Advisory Committee\)](#) advised the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Board that it needed more time to consider potential public policy concerns relating to the adoption of the final [PDP \(Policy Development Process\)](#) recommendations (see [https://gacweb.icann.org/download/attachments/28278854/GAC \(Governmental Advisory Committee\) Morocco 55 Communique FINAL.pdf?version=1&modificationDate=1458046221000&api=v2](https://gacweb.icann.org/download/attachments/28278854/GAC_(Governmental_Advisory_Committee)_Morocco_55_Communique_FINAL.pdf?version=1&modificationDate=1458046221000&api=v2) (<https://gacweb.icann.org/download/attachments/28278854/GAC%20Morocco%2055%20Communique%20FINAL.pdf?version=1&modificationDate=1458046221000&api=v2>). [PDF, 567 KB].

Whereas, on 15 May 2016 the Board acknowledged receipt of the [GNSO \(Generic Names Supporting Organization\)](#)'s [PDP \(Policy Development Process\)](#) recommendations and resolved to consider them at its first meeting following ICANN56 to enable the [GAC \(Governmental Advisory Committee\)](#) to provide timely advice, if any (see <https://www.icann.org/resources/board-material/resolutions-2016-05-15-en-2.a> (</resources/board-material/resolutions-2016-05-15-en#2.a>)).

Whereas, in its Helsinki Communiqué issued on 30 June 2016 the [GAC \(Governmental Advisory Committee\)](#) advised the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Board to direct that the [GAC \(Governmental Advisory Committee\)](#)'s concerns be effectively addressed to the greatest extent feasible by the Implementation Review Team that is to be convened to implement the adopted recommendations (see https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee?preview=/27132037/43712639/20160630_GAC%20ICANN%2056%20Communique_FINAL%20.pdf (https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee?preview=/27132037/43712639/20160630_GAC%20ICANN%2056%20Communique_FINAL%20.pdf)). [PDF, 328 KB].

Resolved (2016.08.09.08), the Board hereby adopts all the final recommendations of the [Privacy & Proxy Services Accreditation Issues PDP \(Policy Development Process\)](#) Working Group, as passed by a unanimous vote of the [GNSO \(Generic Names Supporting Organization\)](#) Council on 21 January 2016 ("Privacy/Proxy Policy Recommendations").

Resolved (2016.08.09.09), the Board directs the President and CEO, or his authorized designee, to develop and execute an implementation plan, including costs and timelines, for the [Privacy/Proxy Policy Recommendations](#) consistent with [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Bylaws Annex A and the Implementation Review Team Guidelines & Principles endorsed by the Board on 28 September 2015 (see <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en-2.f>) (</resources/board-material/resolutions-2015-09-28-en#2.f>)), and to continue communication with the community on such work. In the event that policy issues arise in the course of implementation discussions, they should be referred back to the [GNSO \(Generic Names Supporting Organization\)](#) in accordance with the framework for implementation associated with [GNSO \(Generic Names Supporting Organization\)](#) policy

recommendations, including the Implementation Review Team Guidelines & Principles.

Resolved (2016.08.09.10), the Board acknowledges the GAC (Governmental Advisory Committee)'s advice from the Helsinki Communiqué regarding the Privacy/Proxy Policy Recommendations. The Board will consider the GAC (Governmental Advisory Committee)'s advice and provide input to the Implementation Review Team for consideration in implementation planning.

Rationale for Resolutions 2016.08.09.08 – 2016.08.09.10

Why is the Board addressing the issue now?

In initiating negotiations with the Registrar Stakeholder Group for new form of Registrar Accreditation Agreement (RAA (Registrar Accreditation Agreement)) in October 2011, the ICANN (Internet Corporation for Assigned Names and Numbers) Board also requested an Issue Report from the GNSO (Generic Names Supporting Organization) that, upon the conclusion of the RAA (Registrar Accreditation Agreement) negotiations, would start a GNSO (Generic Names Supporting Organization) PDP (Policy Development Process) to address remaining issues not dealt with in the RAA (Registrar Accreditation Agreement) negotiations. In June 2013, the ICANN (Internet Corporation for Assigned Names and Numbers) Board approved a new 2013 RAA (Registrar Accreditation Agreement), and the topic of accrediting privacy and proxy services was identified as the sole issue to be resolved through a GNSO (Generic Names Supporting Organization) PDP (Policy Development Process). This topic had also been noted by the Whois Review Team in its Final Report, published in May 2012, in which the Review Team had highlighted the current lack of clear and consistent rules regarding these services, resulting in unpredictable outcomes for stakeholders. The Review Team thought that appropriate regulation and oversight over such services would address stakeholder needs and concerns, and recommended that ICANN (Internet Corporation for Assigned Names and Numbers) consider an accreditation system. Until the development of an accreditation program, only certain aspects of such services are covered by an interim specification to the 2013 RAA (Registrar Accreditation Agreement), which is due to expire on 1 January 2017 or the implementation by ICANN (Internet Corporation for Assigned Names and Numbers) of an accreditation program, whichever first occurs.

The GNSO (Generic Names Supporting Organization) Council approved all the final recommendations from the PDP (Policy Development Process) Working Group's Final Report dated 8 December 2015 at its meeting on 21 January 2016, as well as a Recommendations Report to the Board in February 2016. In accordance with the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, a public comment period was opened to facilitate public input on the adoption of the recommendations following which the PDP (Policy Development Process) recommendations were forwarded to the Board for its review. On 15 May 2016, the Board resolved to consider action on the recommendations at the first Board meeting following ICANN56 in Helsinki,

Finland, to enable the GAC (Governmental Advisory Committee) to provide timely advice on public policy concerns raised by the PDP (Policy Development Process) recommendations, if any. The GAC (Governmental Advisory Committee)'s advice in its Helsinki Communiqué was for the Board to direct that the GAC (Governmental Advisory Committee)'s concerns be effectively addressed to the greatest extent possible during the implementation phase of the PDP (Policy Development Process) recommendations.

What is the proposal being considered?

The GNSO (Generic Names Supporting Organization)'s policy recommendations include minimum mandatory requirements for the operation of privacy and proxy services; the maintenance of designated contact points for abuse reporting and the publication of a list of accredited providers; requirements related to the handling of requests for disclosure and/or publication of a customer's contact details by certain third party requesters; conditions regarding the disclosure and publication of such details as well as the refusal to disclose or publish; and principles governing the de-accreditation of service providers. The full list and scope of the final recommendations can be found in Annex A of the GNSO (Generic Names Supporting Organization) Council's Recommendations Report to the Board (see <http://gns0.icann.org/en/drafts/council-board-ppsai-recommendations-09feb16-en.pdf> (<http://gns0.icann.org/en/drafts/council-board-ppsai-recommendations-09feb16-en.pdf>)) [PDF, 491 KB].

Which stakeholders or others were consulted?

As required by the GNSO (Generic Names Supporting Organization)'s PDP (Policy Development Process) Manual, the Working Group reached out to all GNSO (Generic Names Supporting Organization) Stakeholder Groups and Constituencies as well as other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) for input during the early phase of the PDP (Policy Development Process). The Working Group also held open community sessions at all the ICANN (Internet Corporation for Assigned Names and Numbers) Public Meetings that occurred during the life cycle of this PDP (Policy Development Process). It also sought input on potential implementation issues from ICANN (Internet Corporation for Assigned Names and Numbers)'s Registrar Services and Compliance teams. Public comment periods were opened for the Preliminary Issue Report that preceded the PDP (Policy Development Process), the Working Group's Initial Report, and the GNSO (Generic Names Supporting Organization) Council's adoption of the Working Group's Final Report. The final recommendations as detailed in the Final Report were completed based on the Working Group's review and analysis of all the public comments and input received in response to its Initial Report.

Following the GAC (Governmental Advisory Committee)'s advice in its Marrakech Communiqué of 9 March 2016 and the Board's resolution of 15 May 2016, discussions also took place amongst the Board and community on the topic at ICANN56 in Helsinki, Finland.

What concerns or issues were raised by the community?

A significant number of public comments were received by the Working Group concerning the possibility that a distinction might be made between domain name registrants with domains serving non-commercial purposes and registrants who conduct online financial transactions. This had been an open question in the Working Group's Initial Report, as at the time a number of Working Group members had supported that distinction. As a result of further Working Group deliberations following review of the public comments received, the Working Group reached consensus on a recommendation that no such distinction be made for purposes of accrediting services.

Concerns had also been expressed over the need to ensure that there are adequate safeguards in place for maintaining the privacy of customer data, and that a reasonable balance is struck as between a legitimate need for access to information (e.g. by law enforcement and intellectual property rights-holders) and that of protecting privacy. Many public comments received in response to the Working Group's Initial Report also highlighted the potential dangers of disclosing private information without cause, including the threat to the physical safety of certain groups of domain name registrants and privacy/proxy customers. The Working Group's final recommendations include a number of suggested principles and policies that aim to provide more concrete guidance than exists at present for privacy and proxy services, third party requesters of customer information, and domain name registrants in relation to topics such as the handling of customer notifications, information requests and domain name transfers.

The Working Group also received several comments concerning the lack of a detailed framework for the submission and confidential handling of disclosure requests from law enforcement authorities, including from the GAC (Governmental Advisory Committee)'s Public Safety Working Group. In its Initial Report, the Working Group sought community input on the question as to whether and how such a framework might be developed as well as on more specific questions such as whether it should be mandatory for accredited providers to comply with express requests from law enforcement authorities in the provider's jurisdiction not to notify a customer. Based on input received, the Working Group agreed that accredited privacy and proxy service providers should comply with express law enforcement requests not to notify a customer where this is required by applicable law. Providers would be free to voluntarily adopt more stringent standards or otherwise cooperate with law enforcement authorities. The Working Group's Final Report also contains a suggestion for certain minimum requirements that could be included if such a framework is to be developed during the implementation phase of the adopted PDP (Policy Development Process) recommendations.

What significant materials did the Board review?

The Board reviewed the PDP (Policy Development Process) Working Group's Final Report, the GNSO (Generic Names Supporting Organization) Council's

Recommendations Report on the topic to the Board, the summary of public comments received in response to the public comment period that was opened following the GNSO (Generic Names Supporting Organization) Council's adoption of the recommendations contained in the Final Report, and GAC (Governmental Advisory Committee) advice received on the topic, as provided in the Marrakech and Helsinki Communiqués.

What factors did the Board find to be significant?

The recommendations were developed following the GNSO (Generic Names Supporting Organization) Policy Development Process as set out in Annex A of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws and have received the unanimous support of the GNSO (Generic Names Supporting Organization) Council. As outlined in the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the Council's supermajority support obligates the Board to adopt the recommendations unless, by a vote of more than two-thirds, the Board determines that the recommended policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

The Bylaws also allow for input from the GAC (Governmental Advisory Committee) in relation to public policy concerns that might be raised if a proposed policy is adopted by the Board. The GAC (Governmental Advisory Committee) had raised this possibility with respect to this PDP (Policy Development Process) and the Board will continue to consider the advice that the GAC (Governmental Advisory Committee) provided.

Are there positive or negative community impacts?

Developing a full accreditation program for privacy and proxy service providers will require significant resources and take a substantial period of time. It is likely that the interim specification contained in the 2013 RAA (Registrar Accreditation Agreement) will need to be extended beyond its current expiration date of 1 January 2017, to allow for development of such a program.

Implementing the GNSO (Generic Names Supporting Organization)'s recommendations will result in a more uniform set of standards for many aspects of privacy and proxy services, including more consistent procedures for the handling, processing and determination of third party requests by accredited providers, into which reasonable safeguards to protect consumer privacy can be incorporated and public policy concerns highlighted by the GAC (Governmental Advisory Committee) addressed as far as possible. At present, there is no accreditation scheme in place for privacy and proxy services and no agreed community-developed set of best practices for the provision of such services. This PDP (Policy Development Process) represents an attempt to develop a sound basis for the development and implementation of an accreditation framework by ICANN (Internet Corporation for Assigned Names and Numbers) and is part of ICANN (Internet Corporation for Assigned Names and Numbers)'s

on-going efforts to improve the Whois system, including implementing recommendations made previously by the Whois Review Team.

Nevertheless, as highlighted above, the implementation of all the recommendations from the PDP (Policy Development Process) will be time and resource-intensive due to the scale of the project and the fact that this will be the first time ICANN (Internet Corporation for Assigned Names and Numbers) has implemented such a program for this industry sector. While the RAA (Registrar Accreditation Agreement) may serve as a useful reference point for this program, the Working Group's Final Report acknowledged that this may not be the most appropriate model for a number of reasons. Ensuring that the implementation planning addresses as fully as possible the public policy concerns that have been identified by the GAC (Governmental Advisory Committee), including possibly developing a disclosure framework for law enforcement authorities, is likely to form a substantial part of the implementation work.

The Working Group's Final Report also notes areas where additional work may be required, which could increase the community's workload in the near term. For example, the issue of privacy and proxy services in the context of domain name transfers will need to be addressed in the next review of the Inter-Registrar Transfer Policy.

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

There may be fiscal impacts on ICANN (Internet Corporation for Assigned Names and Numbers) associated with the creation of a new accreditation program specifically covering providers of privacy and proxy services. The implementation plan should take into account costs and timelines for implementation. As the current interim specification in the RAA (Registrar Accreditation Agreement) applicable to such services is due to expire on 1 January 2017, consideration will also need to be given to extending its duration upon adoption of the PDP (Policy Development Process) recommendations.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

There are no security, stability or resiliency issues relating to the DNS (Domain Name System) that can be directly attributable to the implementation of the PDP (Policy Development Process) recommendations. While the accreditation of privacy and proxy service providers is part of the overall effort at ICANN (Internet Corporation for Assigned Names and Numbers) to improve the Whois system, it does not affect or change either the Whois protocol (including the rollout of the new RDAP) or the current features of the Whois system. The Working Group made its final recommendations with the understanding that implementation of its recommendations would be done in the context of any other policy or technical changes to the Whois system, which are outside the scope of this PDP (Policy Development Process).

f. **Consideration of BGC Recommendation on Reconsideration Request 16-3 (.GAY)**

Item removed from agenda.

g. **Consideration of Dot Registry v. ICANN (Internet Corporation for Assigned Names and Numbers) IRP Final Declaration**

Whereas, on 29 July 2016, an Independent Review Process (IRP) Panel (Panel) issued its Final Declaration in the IRP filed by Dot Registry, LLC (Dot Registry) against ICANN (Internet Corporation for Assigned Names and Numbers) (Final Declaration).

Whereas, the Panel majority declared that "the actions and inactions of the Board were inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws" in that "the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations," and that the evidence before the Panel did not support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions. (See Final Declaration, ¶¶ 151-152.)

Whereas, the Panel majority further declared that "Dot Registry is the prevailing party" and that ICANN (Internet Corporation for Assigned Names and Numbers) shall pay to Dot Registry US\$235,294.37 "upon demonstration that these incurred costs have been paid in full." (Id. ¶ 154.)

Whereas, "[t]he Panel majority decline[d] to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority." (Id. at ¶ 153.)

Whereas, the Panel majority did not make any recommendations to the Board as to what, if any, subsequent action the Board should take in furtherance of the Final Declaration.

Whereas, Dot Registry has stated in a letter to the Board, among other things, that its "90 page expert report" is "sufficient and compelling to assist the Board with determining that Dot Registry's applications should have passed CPE" and requesting that ICANN (Internet Corporation for Assigned Names and Numbers) "proceed to contracting with Dot Registry for .INC, .LLC, and .LLP. (See <https://www.icann.org/en/system/files/correspondence/jolles-to-icann-board-06aug16-en.pdf> (/en/system/files/correspondence/jolles-to-icann-board-06aug16-en.pdf) [PDF, 1.5 MB]).

Whereas, the Panel considered and challenged the current standard of review employed by the BGC in reviewing Reconsideration Requests.

Whereas, in accordance with Article IV, section 3.21 of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, the Board has considered the Final Declaration.

Resolved (2016.08.09.11), the Board accepts the findings of the Final Declaration that: (i) Dot Registry is the prevailing party in the Dot Registry, LLC v. ICANN (Internet Corporation for Assigned Names and Numbers) IRP; and (ii) ICANN (Internet Corporation for Assigned Names and Numbers) shall pay to Dot Registry US\$235,294.37 upon demonstration that these incurred costs have been paid in full.

Resolved (2016.08.09.12), the Board has noted the other findings in the Declaration and the findings regarding the Panel majority's statements with respect to the standard of review for Reconsideration Requests referenced above, and will consider next steps in relation to Dot Registry's Reconsideration Requests or the relevant new gTLDs before the Board takes any further action.

Resolved (2016.08.09.13), in light of the recent letter received from Dot Registry and the factual inaccuracies that have been reported in online blogged reports, the Board directs the Secretary, or his designee(s), to post the Board briefing materials on this matter simultaneously with the resolutions.

Rationale for Resolutions 2016.08.09.11 – 2016.08.09.13

Dot Registry, LLC (Dot Registry) initiated Independent Review Process (IRP) proceedings challenging the Board Governance Committee's (BGC's) denial of Dot Registry's Reconsideration Requests regarding the Community Priority Evaluation (CPE) reports finding that Dot Registry's applications for .INC, .LLC, and .LLP, respectively, did not prevail in CPE.

Dot Registry applied for the opportunity to operate the new top-level domains .LLC, .INC, and .LLP. Dot Registry is one of nine applicants for .LLC, one of eleven applicants for .INC, and one of four applicants for .LLP. Dot Registry, however, is the only applicant that submitted community-based applications for these gTLDs.

The CPE panels evaluating Dot Registry's applications (CPE Panels) determined that the applications did not meet the criteria required to prevail in CPE, awarding only five of the 14 points needed to prevail in CPE (CPE Reports). Dot Registry filed Reconsideration Requests 14-30, 14-32, and 14-33, seeking reconsideration of the CPE Reports. On 24 July 2014, the Board Governance Committee (BGC) denied the Reconsideration Requests, finding that Dot Registry had "failed to demonstrate that the Panels acted in contravention of established policy or procedure in rendering their respective CPE Reports..."

Dot Registry initiated this IRP on 22 September 2014, challenging the BGC's denial of Dot Registry's Reconsideration Requests, as well as purportedly challenging ICANN (Internet Corporation for Assigned Names and Numbers)'s appointment of the Economist Intelligence Unit (EIU) as the third party provider to

conduct CPEs, and the Board's response to advice from ICANN (Internet Corporation for Assigned Names and Numbers)'s Governmental Advisory Committee (Advisory Committee) regarding .LLC, .INC, and .LLP.

In a 2-1 decision, the Panel majority declared Dot Registry to be the prevailing party, and determined that "the actions and inactions of the Board were inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws." (Final Declaration at ¶ 151.) Specifically, the Panel majority declared that "the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations" and that there was not sufficient evidence to "support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions." (Id. at ¶¶ 151-152.) The Panel majority further declared that ICANN (Internet Corporation for Assigned Names and Numbers) "shall pay to Dot Registry, LLC \$235,294.37 representing said fees, expenses and compensation previously incurred by Dot Registry, LLC upon determination that these incurred costs have been paid in full." (Id. at ¶ 154.)

The Board has noted that the Panel majority stated that "in reaching these conclusions, the Panel is not assessing whether ICANN (Internet Corporation for Assigned Names and Numbers) staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the [Applicant Guidebook (Guidebook)]." (Id. at ¶ 152.) Further, it is also noted that "[t]he Panel majority decline[d] to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority." (Id. at ¶ 153.)

The Panel majority did consider and challenge the current standard of review employed by the BGC in reviewing Reconsideration Requests, stating that it thought the standard to be applied by the BGC in "evaluating a Reconsideration Request" should be: "Is the action taken consistent with the Articles, the Bylaws, and the [Guidebook]?" (Id. at ¶ 79.) The Panel majority further indicated that, in reviewing Reconsideration Requests, "the BGC must determine whether the CPE (in this case the EIU) and ICANN (Internet Corporation for Assigned Names and Numbers) staff respected the principles of fairness, transparency, avoiding conflicts of interest, and non-discrimination as set out in the ICANN (Internet Corporation for Assigned Names and Numbers) Articles, Bylaws and [Guidebook]" (id. at ¶ 88), and that third parties such as the EUI are "obligated to comply with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles and Bylaws." (Id. at ¶ 101.)

The Board acknowledges the important statements by the Panel with respect to the standard of review for Reconsideration Requests and will consider next steps in relation to Dot Registry's Reconsideration Requests or the relevant new gTLDs before the Board takes any further action.

As required, the Board has considered the Final Declaration. As this Board has previously indicated, the Board takes very seriously the results of one of ICANN

(Internet Corporation for Assigned Names and Numbers)'s long-standing accountability mechanisms.

Accordingly, and for the reasons set forth in this Resolution and Rationale, the Board has accepted the Panel's Final Declaration as indicated above.

The Board also notes that it has received a letter from Dot Registry, dated 6 August 2016, stating, among other things, that its "90 page expert report" is "sufficient and compelling to assist the Board with determining that Dot Registry's applications should have passed CPE" and requesting that ICANN (Internet Corporation for Assigned Names and Numbers) "proceed to contracting with Dot Registry for .INC, .LLC, and .LLP." (See Attachment B to Reference Materials and <https://www.icann.org/en/system/files/correspondence/jolles-to-icann-board-06aug16-en.pdf> (/en/system/files/correspondence/jolles-to-icann-board-06aug16-en.pdf) [PDF, 1.5 MB].) The Board would like to reiterate that "[t]he Panel majority decline[d] to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority." (*Id.* at ¶ 153.)

Further, the Board notes that there are numerous other applications pending for these gTLDs (nine for .INC, eight for .LLC, and three for .LLP), which also must be considered. Accordingly, as noted above, the Board will consider next steps before taking any further action with respect to Dot Registry's Reconsideration Requests, or the .INC, .LLC, or .LLP applications.

Finally, the Board also notes that there have been online blogged reports about what the Final Declaration actually says, yet many of the items reported on have been factual inaccuracies, which have been identified and corrected in Attachment C to the Reference Materials related to this agenda item.

This action is not expected to have any direct financial impact on the organization, although there could be some indirect costs, such as analysis relating to the standard on Reconsideration Requests. This action will not have any direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

h. **Consideration of Request for Cancellation of HOTEL Top-Level Domain S.a.r.l's (HTLD's) Application for .HOTEL**

Whereas, Travel Reservations SRL (formerly Despegar Online SRL), Famous Four Media Limited, Fegistry LLC, Minds + Machines Group Limited, Donuts Inc., and Radix FZC (collectively, .HOTEL Claimants) have requested that ICANN (Internet Corporation for Assigned Names and Numbers) cancel HOTEL Top-Level Domain S.a.r.l's (HTLD's) application for .HOTEL.

Whereas, the .HOTEL Claimants' request is premised on Dirk Krischenowski's apparent business connections to HTLD, coupled with his exploitation of the

portal issue that allowed parties to access confidential information of various applicants for new gTLDs, including information of several of the .HOTEL Claimants.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers)'s forensic investigation of the portal issue determined that Mr. Krischenowski's unauthorized access to confidential information did not occur until after HTLD submitted its application in 2012 and after HTLD elected to participate in CPE on 19 February 2014.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has not uncovered any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD's application for .HOTEL; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's application to prevail in CPE.

Resolved (2016.08.09.14), the Board concludes that cancellation of HTLD's application for .HOTEL is not warranted.

Resolved (2016.08.09.15), the Board directs the President and CEO, or his designee(s), to move forward with processing HTLD's application for .HOTEL.

Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15

HTLD and the .HOTEL Claimants each applied for .HOTEL and were all placed in a contention set. As HTLD's application was community-based, its application was invited to participate in Community Priority Evaluation (CPE) on 19 February 2014. HTLD prevailed in CPE on 11 June 2014, thereby excluding the .HOTEL Claimants from continuing through the process.

The .HOTEL Claimants have argued that Mr. Krischenowski's exploitation of the portal issue that allowed parties to access confidential information of various applicants for new gTLDs, including information of several of the .HOTEL Claimants, coupled with Mr. Krischenowski's apparent business connections to HTLD, is cause for ICANN (Internet Corporation for Assigned Names and Numbers) to cancel HTLD's .HOTEL application.

ICANN (Internet Corporation for Assigned Names and Numbers)'s forensic investigation of the portal issue revealed that the user credentials of Mr. Krischenowski and his associates, Mr. Oliver Süme and Ms. Katrin Ohlmer, were responsible for numerous instances of suspected intentional unauthorized access to other applicants' confidential information, which occurred from March through October 2014. Mr. Krischenowski acknowledged that he accessed confidential information of other users, but denied that he acted improperly or unlawfully. Among other things, Mr. Krischenowski claimed that he did not realize the portal issue was a malfunction, and that he used the search tool in good faith. Mr. Krischenowski and his associates also certified to ICANN (Internet Corporation for Assigned Names and Numbers) that they would delete or destroy all information

obtained, and affirmed that they had not used and would not use the information obtained, or convey it to any third party.

With respect to claims about Mr. Krischenowski's involvement with HTLD when he accessed the confidential information, ICANN (Internet Corporation for Assigned Names and Numbers) has been informed that he was not directly linked to HTLD's .HOTEL application as an authorized contact or as a shareholder, officer or director. Mr. Krischenowski was a 50% shareholder and managing director of HOTEL Top-Level-Domain GmbH, Berlin (GmbH Berlin), which was a minority (48.8%) shareholder of HTLD.

ICANN (Internet Corporation for Assigned Names and Numbers) has not uncovered any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD's application for .HOTEL; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's application to prevail in CPE. HTLD submitted its application in 2012, elected to participate in CPE on 19 February 2014, and prevailed in CPE on 11 June 2014. Mr. Krischenowski's first instance of unauthorized access to confidential information did not occur until early March 2014; and his searches relating to the .HOTEL Claimants did not occur until 27 March, 29 March and 11 April 2014. Therefore, even assuming that Mr. Krischenowski did obtain confidential information belonging to the .HOTEL Claimants, this would not have had any impact on the CPE process for HTLD's .HOTEL application. Specifically, whether HTLD's application met the CPE criteria was based upon the application as submitted in May 2012, or when the last documents amending the application were uploaded by HTLD on 30 August 2013 – all of which occurred before Mr. Krischenowski or his associates accessed any confidential information, which occurred from March 2014 through October 2014. In addition, there is no evidence, or claim by the .HOTEL Claimants, that the CPE Panel had any interaction at all with Mr. Krischenowski or HTLD during the CPE process, which began on 19 February 2014.

In furtherance of the Board's 10 March 2016 resolution directing ICANN (Internet Corporation for Assigned Names and Numbers)'s "President and CEO, or his designee(s), to complete the investigation of the issues alleged by the .HOTEL Claimants regarding the portal configuration as soon as feasible and to provide a report to the Board for consideration following the completion of that investigation" (see 10 March 2016 Board Resolutions, available at <https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a> ([/resources/board-material/resolutions-2016-03-10-en#2.a](https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a))), ICANN (Internet Corporation for Assigned Names and Numbers) informed HTLD of the .HOTEL Claimants' request that ICANN (Internet Corporation for Assigned Names and Numbers) cancel HTLD's .HOTEL application, provided HTLD an opportunity to respond, and sought information from HTLD regarding its association with Mr. Krischenowski. In response, Mr. Philipp Grabensee, the now sole Managing Director of HTLD, confirmed for ICANN (Internet Corporation for Assigned Names and Numbers) that at the time of the challenged conduct, Mr. Krischenowski was a 50% shareholder and managing director of GmbH Berlin, which was a minority (48.8%) shareholder of HTLD. Mr. Grabensee also confirmed that Mr.

Krischenowski acted as a consultant for HTLD's application at the time it was submitted (in 2012), and that Mr. Krischenowski represented HTLD in three string confusion objections initiated by HTLD against applications by Despegar and Booking.com in 2013.

Mr. Grabensee also stated that, in accessing the proprietary information, Mr. Krischenowski did not act on HTLD's behalf or in support of its application for .HOTEL. Mr. Grabensee noted that Mr. Krischenowski did not use HTLD's Login ID, did not inform HTLD's personnel about "his action," "did not provide any of the accessed information" to HTLD or its personnel, and HTLD "personnel did not have any knowledge about Mr. Krischenowski's action, and did not consent to it or approve it."

Lastly, Mr. Grabensee noted the following recent changes to HTLD's relationship with Mr. Krischenowski: (i) the business consultancy services between HTLD and Mr. Krischenowski were terminated as of 31 December 2015; (ii) Mr. Krischenowski stepped down as a managing director of GmbH Berlin effective 18 March 2016; (iii) Mr. Krischenowski's wholly-owned company transferred its 50% shares in GmbH Berlin to Ms. Ohlmer (via her wholly-owned company); (iv) GmbH Berlin will transfer its shares in HTLD to Afiliis plc; and (v) Mr. Grabensee is now the sole Managing Director of HTLD.

The Board had the opportunity to consider all of the materials submitted relating to the .HOTEL Claimants' request for cancellation of HTLD's .HOTEL application. Following consideration of all relevant information provided and for the reasons set forth in the Resolution and Rationale, the Board has determined that cancellation of HTLD's .HOTEL application is not warranted, and the .HOTEL Claimants' request is therefore denied.

The Board takes these claims seriously and the Board members have exercised independent judgment in making this decision, which it deems in the best interest of the organization and the community as a whole. The Board, however, does acknowledge that, based on the information available, Mr. Krischenowski may have taken some improper actions in relation to the portal configuration issue, and the Board is considering whether this conduct should be addressed directly with Mr. Krischenowski.

This decision has no direct financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

3. Executive Session - Confidential:

a. Ombudsman FY16 At-Risk Compensation

Whereas, the Compensation Committee recommended that the Board approve payment to the Ombudsman of his FY16 at-risk compensation.

Resolved (2016.08.09.16), the Board hereby approves a payment to the Ombudsman of his FY16 at-risk compensation component.

Rationale for Resolution 2016.08.09.16

Annually the Ombudsman has an opportunity to earn a portion of his compensation based on specific performance goals set by the Board, through the Compensation Committee. This not only provides incentive for the Ombudsman to perform above and beyond his regular duties, but also leads to regular touch points between the Ombudsman and Board members during the year to help ensure that the Ombudsman is achieving his goals and serving the needs of the ICANN (Internet Corporation for Assigned Names and Numbers) community.

Scoring of the Ombudsman's objectives results from both the Ombudsman self-assessment, as well as review by the Compensation Committee, with a recommendation to the Board.

Scoring the Ombudsman's annual performance objectives is in furtherance of the goals of ICANN (Internet Corporation for Assigned Names and Numbers) and helps increase the Ombudsman's service to the ICANN (Internet Corporation for Assigned Names and Numbers) community. While there is a fiscal impact from the results of the scoring, that impact is already accounted for in the annual budget. This action will have no impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

b. Officer Compensation

Whereas, the attraction and retention of high caliber staff is essential to ICANN (Internet Corporation for Assigned Names and Numbers)'s operations and ICANN (Internet Corporation for Assigned Names and Numbers) desires to ensure competitive compensation for staff.

Whereas, independent market data provided by outside expert compensation consultants indicates that current and proposed increases to compensation amounts for the President, GDD, General Counsel & Secretary, CFO, COO, CIO, and SVP, Policy Development Support and General Manager, ICANN (Internet Corporation for Assigned Names and Numbers) Regional Headquarters - Istanbul are within ICANN (Internet Corporation for Assigned Names and Numbers)'s target of the 50th to 75th percentile for total cash compensation based on comparable market data for the respective positions.

Whereas, independent market data provided by outside expert compensation consultants indicates that current compensation for the CFO is below ICANN (Internet Corporation for Assigned Names and Numbers)'s target of the 50th to 75th percentile for total cash compensation based on comparable market data for the respective positions.

Whereas, the compensation for the President, GDD, the General Counsel & Secretary, the CFO, and the SVP, Policy Development Support and General Manager, ICANN (Internet Corporation for Assigned Names and Numbers) Regional Headquarters - Istanbul, has not been adjusted since an effective date of 1 July 2014.

Whereas, the compensation adjustments for the COO and the CIO will establish better alignment with compensation review timeline of the other four Officers.

Whereas, each Board member has confirmed that they are not conflicted with respect to compensation packages for any of ICANN (Internet Corporation for Assigned Names and Numbers)'s Officers.

Resolved (2016.08.09.17), the Board grants the President and CEO the discretion to adjust the compensation for FY17, effective 1 July 2016, of: (i) Akram Atallah, President, GDD; (ii) John Jeffrey, General Counsel & Secretary; and (iii) David Olive, SVP, Policy Development Support and General Manager, ICANN (Internet Corporation for Assigned Names and Numbers) Regional Headquarters – Istanbul, in accordance with the independent study on comparable compensation, subject to a limitation that their annual base salaries for FY17 shall not increase by more than 6% for from their current base salaries.

Resolved (2016.08.09.18), the Board grants the President and CEO the discretion to adjust the compensation for FY17, effective 1 July 2016, of Xavier Calvez, the CFO, in accordance with the independent study on comparable compensation, subject to a limitation that his annual base salary for FY17 shall not increase by more than 10% from his current annual base salary.

Resolved (2016.08.09.19), the Board grants the President and CEO the discretion to adjust the compensation for FY17, effective 1 July 2016, of Susanna Bennett, the COO, in accordance with the independent study on comparable compensation, subject to a limitation that her annual base salary for FY17 shall not increase by more than 3% from her current annual base salary.

Resolved (2016.08.09.20), the Board grants the President and CEO the discretion to adjust the compensation for FY17, effective 1 July 2016, of Ashwin Rangan, the CIO, in accordance with the independent study on comparable compensation, subject to a limitation that his annual base salary for FY17 shall not increase by more than 5% from his current annual base salary.

Rationale for Resolution 2016.08.09.16 – 2016.08.09.20

Attracting and retaining high caliber staff by providing a competitive compensation package is crucial to the organization. An improving job market will

make more opportunities available for high caliber performers outside of ICANN (Internet Corporation for Assigned Names and Numbers).

ICANN (Internet Corporation for Assigned Names and Numbers)'s President and CEO has requested that he be granted the discretion to increase the FY17 base salaries of: (i) the President, GDD, the General Counsel & Secretary, and the SVP, Policy Development Support and General Manager, ICANN (Internet Corporation for Assigned Names and Numbers) Regional Headquarters - Istanbul) by up to 6% of their current base salaries; (ii) the CFO by up to 10% of his current base salary; (iii) the COO by up to 3% of her current base salary; and (iv) the CIO by up to 5% of his current base salary. The President and CEO has also informed the Board that he intends to also exercise the same discretion with respect to the other members of ICANN (Internet Corporation for Assigned Names and Numbers)'s Executive Team who are not Officers (which does not require Board approval).

ICANN (Internet Corporation for Assigned Names and Numbers) is in a critical phase that calls for continuity of certain skill and expertise, particularly with ongoing key projects including the New gTLD (generic Top Level Domain) Program, Affirmation of Commitments and other organizational reviews underway, the U.S. Governments' IANA (Internet Assigned Numbers Authority) stewardship transition, expanding contractual compliance, and enhanced globalization efforts, among many others. Each of these projects requires knowledgeable and skilled executives to ensure ICANN (Internet Corporation for Assigned Names and Numbers)'s operational goals and objectives are met while ensuring that risk is mitigated to the greatest extent possible. Adhering to ICANN (Internet Corporation for Assigned Names and Numbers)'s employment philosophy, and providing competitive compensation, will help ensure these goals are achieved.

It should be noted, however, that previously it had been discussed that the plan was to only seek authorization to increase relevant Officers' salaries every two years. Last year, the Board authorized the President and CEO to use his discretion to adjust the base salary of the two Officers whose current compensation had not been adjusted since they started working for ICANN (Internet Corporation for Assigned Names and Numbers). These adjustments were made effective 1 July 2015, which is the same date on which all other staff realizes their salary adjustments.

In trying to better align the timing of compensation review and increases for all staff, it is being recommended that Officer's base salaries be reviewed for adjustment this year and each year hereafter. This is a change from the current two year Officer compensation review and adjustment cycle.

Continuity and retention of key personnel during key organization phases is beneficial to all aspects of the organization. Thus, salary adjustments provided under this resolution likely will have a positive impact on the organization and its effort to fulfill its mission, as well as on the transparency and accountability of the organization. There will be some fiscal impact to the organization, but that impact will not have an effect on the overall current fiscal year budget and will be

covered in the FY17 budget. This resolution will not have any direct impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

Published on 11 August 2016

Exhibit I

New gTLD (generic Top Level Domain) Applicant and GDD Portal Update

This page is available in:

English |

العربية (<http://www.icann.org/news/announcement-2015-04-30-ar>) |

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30 April 2015 – The Internet Corporation for Assigned Names and Numbers (ICANN (Internet Corporation for Assigned Names and Numbers)) today announced that the first phase of its investigation into a data exposure issue in the New gTLD (generic Top Level Domain) Applicant and GDD (Global Domains Division) portals has concluded. These portals contain information from applicants to ICANN (Internet Corporation for Assigned Names and Numbers)'s New gTLD (generic Top Level Domain) Program and new gTLD (generic Top Level Domain) registry operators. No other systems were affected.

Two consulting firms reviewed and analyzed all log data going back to the activation of the New gTLD (generic Top Level Domain) Applicant portal on 17 April 2013 and the activation of the GDD portal on 17 March 2014. The results of the investigation currently indicate that the portal users were able to view data that was not their own. Based on the investigation to date, the unauthorized access resulted from advanced searches conducted using the login credentials of 19 users, which exposed 330 advanced search result records, pertaining to 96 applicants and 21 registry operators. These records may have included attachment(s). These advanced searches occurred during 36 user sessions out of a total of nearly 595,000 user sessions since April 2013. The parties whose data was viewed will be informed shortly. Information will include what portion of their data was seen and when it was seen.

ICANN (Internet Corporation for Assigned Names and Numbers) is contacting the user or users who appear to have viewed information that was not their own and requiring that they provide an explanation of their activity. We are also asking them to certify that they will delete or destroy all information obtained and to certify that they have not and will not use the data or convey it to any third party.

"We realize that any compromise of our users' data is unacceptable and take this situation, as well as user trust, very seriously," said ICANN (Internet Corporation for Assigned Names and Numbers)'s Chief Information and Innovation Officer, Ashwin Rangan. "Since I joined ICANN (Internet Corporation for Assigned Names and Numbers) last year, we have increased our focus on quickly hardening our digital services. We have already taken several steps to accomplish this objective and guard ICANN (Internet Corporation for Assigned Names and Numbers)'s digital assets against escalating cyber threats, however there is more to do. We deeply regret this incident and pledge to accelerate our efforts to harden all of our digital services, many of which have been in service for as long as 15 years."

In mid-year 2014, ICANN (Internet Corporation for Assigned Names and Numbers) engaged a third-party expert to assess its information technologies portfolio of assets. ICANN (Internet Corporation for Assigned Names and Numbers) adopted the CSC (formerly SANS Institute) 20-factors framework to assess its defenses. Following the assessment ICANN (Internet Corporation for Assigned Names and Numbers) launched a comprehensive, multi-year program and started to immediately address factors that deserve urgent attention. Additional information on this program will be announced in the next few weeks.

Rangan noted, "We are approaching these improvements in a careful sequence, so that service delivery to our community is not disrupted while systems are being hardened."

ICANN (Internet Corporation for Assigned Names and Numbers) is continuing to investigate the circumstances surrounding the access to this information and has not made a final determination regarding the nature of the access. By 27 May 2015 ICANN (Internet Corporation for Assigned Names and Numbers) intends to disclose to affected users

the identity of any user(s) that viewed their information without authorization.

About ICANN (Internet Corporation for Assigned Names and Numbers)

ICANN (Internet Corporation for Assigned Names and Numbers)'s mission is to ensure a stable, secure and unified global Internet. To reach another person on the Internet you have to type an address into your computer - a name or a number. That address has to be unique so computers know where to find each other. ICANN (Internet Corporation for Assigned Names and Numbers) coordinates these unique identifiers across the world. Without that coordination we wouldn't have one global Internet. ICANN (Internet Corporation for Assigned Names and Numbers) was formed in 1998. It is a not-for-profit public-benefit corporation with participants from all over the world dedicated to keeping the Internet secure, stable and interoperable. It promotes competition and develops policy on the Internet's unique identifiers. ICANN (Internet Corporation for Assigned Names and Numbers) doesn't control content on the Internet. It cannot stop spam and it doesn't deal with access to the Internet. But through its coordination role of the Internet's naming system, it does have an important impact on the expansion and evolution of the Internet. For more information please visit: [www.icann.org/\(!\)](http://www.icann.org/).

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[Third Accountability and
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\(ATRT3\) Draft Report
\(/news/announcement-2-2019-
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Application Round Is Now
Open \(/news/announcement-
2019-12-16-en\)](#)

[Revised Schedule for Public
Comment Period on Two Key
ICANN \(Internet Corporation
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\(/news/announcement-2019-
12-13-en\)](#)

[IANA \(Internet Assigned
Numbers Authority\) Customer
Engagement Survey Results
Available
\(/news/announcement-2019-
12-11-en\)](#)

Announcement: New gTLD (generic Top Level Domain) Applicant and GDD Portals Update

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Português (<http://www.icann.org/news/announcement-2015-05-27-pt>)



The Internet Corporation for Assigned Names and Numbers (ICANN (Internet Corporation for Assigned Names and Numbers)) today provided an update on its investigation into a data exposure issue in the New gTLD (generic Top Level Domain) Applicant and GDD (Global Domains Division) portals, first reported on **1 March 2015** (</news/announcement-2015-03-01-en>).

In its 30 April **announcement** (</news/announcement-2015-04-30-en>), ICANN (Internet Corporation for Assigned Names and Numbers) noted its intention to disclose to affected users the identity of any user(s) that viewed their information without authorization by 27 May 2015. This activity has been completed. Specifically, ICANN (Internet Corporation for Assigned Names and Numbers):

- Notified the users whose credentials were used to access information that did not appear to belong to them;
- Requested these users provide an explanation of their activity; and
- Requested these users certify that they will delete or destroy all information obtained and that they have not used and will not use the information or convey it to any third party.

In addition, ICANN (Internet Corporation for Assigned Names and Numbers) has provided the affected parties with the name(s) of the user(s) whose credentials were used to view their information without their authorization or by individuals that were not officially designated by their organization to access certain data.

Investigation Results

Based on the information that ICANN (Internet Corporation for Assigned Names and Numbers) has collected to date our investigation leads us to believe that over 60 searches, resulting in the unauthorized access of more than 200 records, were conducted using a limited set of user credentials.

The remaining user credentials, representing the majority of users who viewed data, were either used to:

- Access information pertaining to another user through mere inadvertence and the users do not appear to have acted intentionally to obtain such information. These users have all confirmed that they either did not use or were not aware of having access to the information. Also, they have all confirmed that they will not use any such information for any purpose or convey it to any third party; or
- Access information of an organization with which they were affiliated. At the time of the access, they may not have been designated by that organization as an authorized user to access the information.

We will continue to provide information and respond to questions from affected parties as we continue our investigation.

Additional Information

The New gTLD (generic Top Level Domain) Applicant and GDD portals contain information from applicants to ICANN (Internet Corporation for Assigned Names and Numbers)'s New gTLD (generic Top Level Domain) Program and new gTLD (generic Top Level Domain) registry operators. No other systems were affected by this issue.

ICANN (Internet Corporation for Assigned Names and Numbers) sincerely regrets this incident. We continue to deploy security-based updates on a regular basis. Enhancing the security controls and privacy of the ICANN (Internet Corporation for Assigned Names and Numbers) portals is part of a broader, multi-year effort to harden all of ICANN (Internet Corporation for Assigned Names and Numbers)'s digital services.

About ICANN (Internet Corporation for Assigned Names and Numbers)

ICANN (Internet Corporation for Assigned Names and Numbers)'s mission is to ensure a stable, secure and unified global Internet. To reach another person on the Internet you have to type an address into your computer - a name or a number. That address has to be unique so computers know where to find each other. ICANN (Internet Corporation for Assigned Names and Numbers) coordinates these unique identifiers across the world. Without that coordination we wouldn't have one global Internet. ICANN (Internet Corporation for Assigned Names and Numbers) was formed in 1998. It is a not-for-profit public-benefit corporation with participants from all over the world dedicated to keeping the Internet secure, stable and interoperable. It promotes competition and develops policy on the Internet's unique identifiers. ICANN (Internet Corporation for Assigned Names and Numbers) doesn't control content on the Internet. It cannot stop spam and it doesn't deal with access to the Internet. But through its coordination role of the Internet's naming system, it does have an important impact on the expansion and evolution of the Internet. For more information please visit: [www.icann.org/\(!\)](http://www.icann.org/).

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[IANA \(Internet Assigned
Numbers Authority\) Customer
Engagement Survey Results
Available
\(/news/announcement-2019-
12-11-en\)](#)

Exhibit J

Reconsideration Request Form

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requesters Information

Requesters are represented by:

Name: Flip Petillion, Crowell & Moring LLP

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number: Contact Information Redacted

Requesters are:

Requester #1

Name: Travel Reservations SRL ('TRS', formerly Despegar Online SRL)

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #2

Name: Spring McCook, LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #3

Name: Minds + Machines Group Limited (formerly Top Level Domain Holdings Limited)

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #4

Name: Famous Four Media Limited

Address: Contact Information Redacted

Email: Contact Information Redacted

And its subsidiary applicant:

Name: dot Hotel Limited

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #5

Name: Radix FZC
Address: Contact Information Redacted
Email: Contact Information Redacted

And its subsidiary applicant:

Name: dot Hotel Inc.
Address: Contact Information Redacted
Email: Contact Information Redacted

Requester #6

Name: Fegistry LLC
Address: Contact Information Redacted
Email: Contact Information Redacted

2. Request for Reconsideration of (check one only):

- Board action/inaction**
 Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

Requesters seek reconsideration of both actions and inactions of ICANN's Board of Directors. The specific actions/inactions of the Board are set forth in more detail below, specifically in response to Questions 8 and 10, and relate to the Board Resolutions 2016.08.09.14 and 2016.08.09.15, approved on 9 August 2016, published on 11 August 2016 and communicated to Requesters on 15

August 2016 (hereinafter, the 'Decision').

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

4. Date of action/inaction:

On 11 August 2016, the Board published the Decision apparently taken on 9 August 2016.

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

5. On what date did you become aware of the action or that action would not be taken?

Requesters learned of the Decision on 15 August 2016, when ICANN informed Requesters of the Decision.

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

6. Describe how you believe you are materially affected by the action or inaction:

As the ICANN Board did not offer Requesters a meaningful review of their complaints regarding HTLD's application for .hotel, the Decision prevented Requesters – who had applied for the gTLD string .hotel (application IDs 1-927-25198; 1-1249-36568; 1-1500-16803; 1-1181-77853; 1-1059-97519; 1-1913-57874) themselves – from self-resolving the string contention, as contemplated by the GNSO policy, and, ultimately, from allowing one of the applicants to

operate the .hotel gTLD.

Requesters manifestly meet the standing requirements for an RfR and ultimately an IRP. Requesters suffered from the same violations of ICANN's Articles of Incorporation (Aol) and Bylaws, as recognized in other cases¹ and as acknowledged by the ICANN Board².

However, in contrast with other cases³, Requesters were materially affected by these violations as, without those violations, Requesters would have prevailed in their actions against HTLD's application for .hotel.

Dot Registry – *i.e.*, the applicant for .inc, .llc and .llp who requested community priority – never had a chance of succeeding in a community priority evaluation (CPE). Although, like any applicant, Dot Registry is entitled to ICANN respecting its Aol and Bylaws – and it may initiate whatever procedure to that purpose – until date it has not been proven that Dot Registry has been materially harmed by ICANN's violation of the Aol and Bylaws. A refusal of Dot Registry's solicited community priority would be in line with the CPE criteria, as the purpose of community-based applications has never been to eliminate competition among applicants for a generic word TLD or to pick winners and losers within a diverse commercial industry, and because the CPE criteria were specifically developed to prevent "undue priority [being given] to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string" (Applicant Guidebook, Module 4-9).

In the case of .hotel, ICANN violated its Aol and Bylaws and policy by giving

¹ See *e.g.*, ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*; 38. Board Governance Committee determination on Request for Reconsideration 14-44 of 20 January 2015.

² In accepting the Dot Registry IRP Declaration, the Board acknowledged it had violated its Aol and Bylaws in the CPE.

³ Mentioned in footnotes 1 and 2.

undue priority to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string, and by awarding the .hotel gTLD to an unreliable applicant.

ICANN's actions required, and still require, Requesters to incur unnecessary costs to guarantee observance of ICANN's Aol, Bylaws and policies. As will be shown below, the ICANN Board agreed to refund these costs to parties who did not show material harm.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

ICANN's failure to follow the policies created by the GNSO as well as its own Bylaws, Articles of Incorporation, and the Affirmation of Commitments creates inconsistency, injects unfairness and a lack of transparency in the process, and calls into question the fairness of the gTLD program as a whole. The Decision creates unequal treatment between applicants, and creates uncertainty for both existing and future gTLD applicants. ICANN had clear policies to deny community priority to mere industries, and to disqualify applicants who were not trustworthy. As ICANN fails to abide by these policies, the Decision creates a dangerous precedence that will encourage third parties who seek to game the application process and who vigorously defend positions that are unattainable in an attempt to discourage third parties that play by the book.

This situation will inevitably have a chilling effect on new entrants into the gTLD space.

In addition, the Decision goes against the core objectives of the new gTLD

program: a competitive process for opening up the top level of the Internet's namespace to foster diversity and to encourage competition to the benefit of Internet users across the globe. In its consideration of violations of its Aol, Bylaws and policies, ICANN must do more than perform a purely procedural review; it must perform a meaningful review with due respect for an applicant's fundamental rights, and ICANN's core mission.

8. Detail of Board or Staff Action – Required Information

Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

Board action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. "Material information" means facts that are material to the decision.

If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act.

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for

reconsideration. Please keep this guidance in mind when submitting requests.

Provide the Required Detailed Explanation here:

(You may attach additional sheets as necessary.)

As will be demonstrated in greater detail below, the Board (1) disregarded material information, (2) relied on false and inaccurate material information, (3) failed to take material action, and (4) took action in violation of GNSO-created policy and ICANN's own Articles of Incorporation, Bylaws and Affirmation of Commitments.

I. The ICANN Board disregarded material information

A. The ICANN Board failed to consider the impact of (its acceptance of) the IRP Declaration in the *Dot Registry* case

On 29 July 2016, the IRP Panel in the matter between Dot Registry, LLC and ICANN issued its final IRP Declaration (the "*Dot Registry* IRP Declaration"). On 9 August 2016, the ICANN Board accepted the *Dot Registry* IRP Declaration, naming Dot Registry the prevailing party because the ICANN Board "failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations" in ICANN's handling of the CPE process.

The ICANN Board's acceptance of the *Dot Registry* IRP Declaration is incompatible with the ICANN Board's acceptance of the IRP Declaration regarding the .hotel gTLD (the "*Despegar et al.* IRP Declaration"). Both IRPs criticized the insufficiencies of ICANN's handling of the CPE process. But the *Dot Registry* IRP Panel considered that these insufficiencies amounted to a violation of ICANN's Aol and Bylaws, whereas the *Despegar et al.* IRP Panel came to the

opposite conclusion. The ICANN Board cannot accept both conclusions, as they are incompatible. The close relationship between these two IRP Declarations makes them an indivisible whole, which requires the ICANN Board to consider them together to avoid the risk of irreconcilable decisions.

The Board could only have accepted both IRP Declarations if it had addressed the insufficiencies of the CPE process, as recommended in the *Despegar et al.* IRP Declaration, that is 1) to put “a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators”⁴, 2) “to ensure consistency, both of approach and marking”⁵, and 3) to affirm that “transparency and administrative due process” are applicable⁶. “Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address.” Para. 158.

The reason why the *Dot Registry* IRP Panel came to the opposite conclusion to the *Despegar et al.* IRP Panel, is because – as revealed in the *Dot Registry* IRP Declaration – the *Despegar et al.* IRP Panel relied on false and inaccurate material information. When the ICANN Board accepted the *Despegar et al.* IRP Declaration, it relied on the same false and inaccurate material information. (see below under II.)

B. The ICANN Board failed to consider the unfair competitive advantage HTLD obtained by maliciously accessing trade secrets of competing prospective registry operators

In the Decision, the ICANN Board decided not to cancel HTLD’s application,

⁴ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 147.

⁵ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 147.

⁶ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 145.

based on the fact that ICANN had not “uncovered any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD's application for .HOTEL; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's application to prevail in CPE.” The rationale also states that the ICANN Board had “the opportunity to consider all of the materials submitted relating to the .HOTEL Claimants' request for cancellation of HTLD's .HOTEL application. Following consideration of all relevant information provided and for the reasons set forth in the Resolution and Rationale, the Board has determined that cancellation of HTLD's .HOTEL application is not warranted, and the .HOTEL Claimants' request is therefore denied.”

The mere statement that the Board had “the opportunity to consider” all of the materials submitted by Requesters and that it did consider “all relevant information” does not show that all relevant information – submitted by Requesters or third parties – was actually considered. As a matter of fact, the Decision is based on findings which Requesters showed to be irrelevant. The arguments brought forward by Requesters have not been addressed in the Decision. More specifically, the ICANN Board did not address the unfair competitive advantage HTLD obtained via the illegal access of sensitive business information of its direct competitors. The ICANN Board also failed to address the argument that it is inappropriate – and contrary to ICANN's Aol, Bylaws and GNSO policy – to allocate a critical Internet resource to a party that has been cheating (or acquiesced in fraudulent actions). Finally, the ICANN Board did not

address the fact that the CPE result on HTLD's application was seriously criticized for being inconsistent with other CPE results and unreasonable, and that it would be discriminatory not to address these inconsistencies, whereas the Board has addressed inconsistency issues in similar situations. In its consideration of the *Dot Registry* IRP Declaration, the ICANN Board increased the disparate treatment towards Requesters.

Requesters explained to the ICANN Board – but the Board failed to consider – that it is of no relevance whether or not HTLD has used this information in the framework of ICANN's evaluation of .hotel. What matters is that the information was accessed with the obvious intent to obtain an unfair advantage over direct competitors. The future registry operator of the .hotel gTLD will compete with other registry operators. In the unlikely event that HTLD were allowed to operate the .hotel gTLD, HTLD would have an unfair advantage over competing registry operators, because of its access to sensitive business information of Requesters. HTLD could use this unfair advantage to adapt its commercial strategy, pricing, technical infrastructure, etc., an advantage HTLD would never have obtained, had it not illegally accessed sensitive business information of its direct competitors.

II. The ICANN Board relied on false and inaccurate material information

The *Despegar et al.* IRP Panel's conclusion that the insufficiencies of the CPE process did not amount to a violation of ICANN's Aol, Bylaws and core values was based upon the premise that the EIU was not mandated to apply ICANN's

core values⁷, and upon the false premise that the EIU's determinations are presumptively final⁸ and are made independently by the EIU, without ICANN's active involvement. In this respect, ICANN 'informed' Requesters and the IRP Panel that "[b]ecause of the EIU's role as the panel firm, ICANN does not have any communications (nor does it maintain any communications) with the evaluators that identify the scoring of any individual CPE".⁹ The IRP Panel concluded: "That is a clear and comprehensive statement that such documentation does not exist"¹⁰, and the IRP Panel proceeded upon this premise. However, as the *Dot Registry* IRP Declaration has clearly shown, this turned out to be false.

Indeed, the findings in the *Dot Registry* IRP Declaration reveal that ICANN staff was "intimately involved in the CPE" and "in the production of the CPE [result]"¹¹ "The ICANN staff supplied continuing and important input on the CPE reports."¹² As the CPE reports identify the scoring of CPEs, ICANN did have communications with the evaluators that identify the scoring of individual CPEs. Moreover, ICANN's description in the *Despegar et al.* IRP of the EIU as the "panel firm" or independent evaluator, making "presumptively final" determinations was misleading. Because of ICANN's staff intimate involvement in the process, the EIU cannot be qualified as a "panel firm" or independent evaluator. The findings of the *Dot Registry* IRP Panel also reveal that the EIU was "simply a consultant to ICANN", and that ICANN had agreed with the EIU

⁷ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, paras. 148-151.

⁸ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, paras. 148-151.

⁹ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 95.

¹⁰ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 95.

¹¹ ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, paras. 93, 101.

¹² ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 93.

that the EIU “would operate largely in the background, and that ICANN would be solely responsible of all legal matters pertaining to the application process”.¹³

ICANN was “solely responsible to applicants ... for the decisions it decide[d] to issue”, and “each decision [had to] be issued by ICANN in its own name only.”¹⁴

The intimate involvement of ICANN staff, and the fact that ICANN had to issue decisions in its own name is material to the IRP Determinations in the *Despegar et al.* and *Dot Registry* cases. Both IRP Panels agreed¹⁵, and ICANN acknowledged¹⁶, that ICANN staff is bound to conduct itself in accordance with ICANN’s Aol and Bylaws. The *Despegar et al.* IRP Panel considered:

“The Panel is, of course, charged with reviewing the action of ICANN’s Board, rather than its staff, but the Panel wishes to make clear that, in carrying out its activities, the Board should seek to ensure that ICANN’s staff comply with the Articles of Incorporation and Bylaws of ICANN, and that a failure of the Board to ensure such compliance is a failure of the Board itself.”¹⁷

The *Despegar et al.* Panel’s reliance on false information that the EIU served as an independent panel (*i.e.*, without intimate involvement of ICANN staff) was material to the IRP Declaration. It is now established that the ICANN staff was intimately involved. The finding that such intimate involvement of the ICANN staff existed was material to the outcome in the *Dot Registry* case. The Requesters and the *Despegar et al.* Panel were given incomplete and misleading information on the ICANN staff involvement in the CPE and that fact is the only reason for a divergent outcome between both IRP Declarations.

¹³ ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 91.

¹⁴ ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 92.

¹⁵ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 104; ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, paras. 88, 100

¹⁶ ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 100.

¹⁷ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 104.

Moreover, the fact that material information was hidden from Requesters and the *Despegar et al.* Panel is a clear transparency violation. Requesters specifically asked for all communications, agreements between ICANN and the CPE Panel. Requesters and the *Despegar et al.* Panel were told by ICANN staff and the ICANN Board that this information was inexistent and/or could not be disclosed. However, the *Dot Registry* IRP Declaration reveals that ICANN did possess information, which it had first once more pretended to be inexistent, and that it afterwards disclosed to Dot Registry, while it failed to disclose similar information to Requesters, although Requesters had explicitly asked for this information and the *Despegar et al.* Panel had expressly questioned ICANN about this information at the IRP hearing. It is inexcusable that ICANN did not inform Requesters and the Panel at that time that it had disclosed the information to Dot Registry. ICANN should have informed Requesters and the Panel spontaneously about the existence and the content of this material information.

III. The ICANN Board failed to take material action

A. The ICANN Board failed to properly investigate and address illegal actions that are attributable to HTLD

The Decision's rationale shows that the ICANN Board relied on unverified and implausible statements that Mr. Krischenowski "did not inform HTLD's personnel about 'his action,' 'did not provide any of the accessed information' to HTLD or its personnel, and HTLD 'personnel did not have any knowledge about Mr. Krischenowski's action, and did not consent to it or approve it.'"¹⁸. ICANN does

¹⁸ See rationale to the Decision.

not show it has done anything to check the veracity of these statements.

Moreover, for the very first time in this matter, Requesters learnt from the Decision that Mr. Krischenowski was not the only individual affiliated to HTLD, who violated Requesters' trade secrets. Mr. Oliver Süme and Ms. Katrin Ohlmer (identified in the Decision as Mr. Krischenowski's associates) were also "responsible for numerous instances of suspected intentional unauthorized access to other applicants' confidential information, which occurred from March through October 2014"¹⁹. Again, this is new information for Requesters and Requesters have not been able so far to perform a thorough check on Mr. Süme and Ms. Ohlmer's background. But summary research shows that ICANN and its Board have not done any check at all. Ms. Ohlmer was the CEO of HTLD at the time she obtained unauthorized access to other applicants' confidential information. She was listed as CEO in HTLD's application until 17 June 2016, and she also acquired shares from Mr. Krischenowski in a HTLD affiliated company after Mr. Krischenowski's actions were subject to serious challenge. Nevertheless, the Decision is based on Mr. Krischenowski's actions and affiliation to HTLD only. While Mr. Krischenowski's actions, combined with HTLD's inaction towards him, are a sufficient reason to disqualify HTLD as an applicant, the fact that HTLD's CEO committed the same violations is an even stronger reason for disqualification. As HTLD's CEO, Ms. Ohlmer would have been able to use the illegally obtained information to HTLD's benefit. While the information may not have directly impacted HTLD's position as an applicant, it is clear that the information could have been used to improve its position towards

¹⁹ See rationale to the Decision.

competing registry operators, both existing ones and prospective ones. It would be completely incredible if a CEO were to obtain unauthorized access to confidential information on numerous occasions without the intention to use this information to its advantage. Moreover, the competitive advantage obtained via this information allowed HTLD to improve its market value. HTLD's shareholders must have benefited from it, when selling their shares.

B. The ICANN Board failed to remedy the violations of its Aol and Bylaws in the CPE process for Requesters, while the ICANN Board is addressing these issues for other applicants

The ICANN Board is addressing the violations of its Aol and Bylaws in the CPE for Dot Registry (cfr. ICANN Board Resolutions 2016.08.09.11 - 2016.08.09.12).

The ICANN Board even agreed to refund Dot Registry's legal costs.

Requesters suffered from the same violations. However, the ICANN Board did not remedy these violations for Requesters.

IV. The ICANN Board took action in violation of GNSO-created policy and ICANN's Aol, Bylaws and Affirmation of Commitments

A. The ICANN Board's refusal to cancel HTLD's application for .hotel is unjustified and a violation of ICANN's core obligations

Allowing HTLD's application to proceed goes against everything that ICANN stands for. It amounts to an acquiescence in criminal acts that were committed with the obvious intent to obtain an unfair advantage over direct competitors. Such acquiescence is contrary to ICANN's obligations under its Articles of Incorporation and Bylaws and to ICANN's mandate to operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with

relevant principles of international law and applicable international conventions and local law and through open and transparent processes that enable competition and open entry in Internet-related markets. When the background screening criteria for new gTLD applicants were introduced, ICANN affirmed the right to deny an otherwise qualified application, recognizing ICANN's duty "to protect the public interest in the allocation of critical Internet resources" (gTLD Applicant Guidebook (v. 2012-06-04), Module 1-24). In this respect, ICANN made clear that "applications from any entity with or including any individual [who] has ever been convicted of any crime involving the use of computers [...] or the Internet to facilitate the commission of crimes" were going to be "automatically disqualified from the program" (gTLD Applicant Guidebook (v. 2012-06-04), Module, 1-22).

In the case at hand, ICANN caught not one, but multiple representatives of HTLD stealing trade secrets of competing applicants via the use of computers and the Internet. The situation is even more critical as the crime was committed with the obvious intent of obtaining sensitive business information of a competing applicant. It is clearly not in the public interest, and the public interest will not be protected, if critical Internet resources are allocated to HTLD. Allocating the .hotel TLD to HTLD is not in accord with any of the core values that should guide the decisions and actions of ICANN. It goes against ICANN's mandate to act in conformity with, *inter alia*, open and transparent processes that enable competition and open entry in Internet-related markets.

B. The ICANN Board discriminated against Requesters by accepting Dot Registry IRP Determination and refusing to reconsider its position on the CPE determination re .hotel

As already explained under section III.B above, the ICANN Board is addressing the violations of its Aol and Bylaws in the CPE for Dot Registry, and has provided a remedy to Dot Registry. ICANN also provided remedies for the applicant for .gay. Moreover, ICANN disclosed information to Dot Registry, but not to Requesters, although Requesters had asked for the same or similar information. ICANN did not provide a justification why it treats Requesters differently, although Requesters are situated similarly.

C. The ICANN Board turned a blind eye to HTLD's misdeeds following the fruitless attempt by one interest holder in HTLD application to evade responsibility for the illegal actions of other interest-holders in the same application

HTLD and some of its shareholders acted in a way that was untrustworthy and in violation of the application's terms and conditions. It seems that ultimately HTLD was paid off, or was promised that it would be paid off, by the other interest-holder in the same application, Afilias.

After Mr. Krischenowski's illegal actions had been challenged and ICANN had informed HTLD that it was taking the situation seriously, Mr. Krischenowski's wholly-owned company transferred its interests in HTLD's application to the wholly-owned company of HTLD's CEO at the time. ICANN has now revealed that illegal access to trade secrets of competitors was also made through HTLD's CEO's email account.

One interest-holder cannot disclaim responsibility for another interest-holder's actions by buying him out. Those with an interest in an application must rise and

fall together; one ought not to benefit from the other's misdeeds. The point is all the stronger where the misdeeds are carried out by the applicant's acting CEO and consultant(s).

The (belated) replacement of the CEO and consultant(s)/associates and a change in the shareholder structure do not excuse nor annihilate illegal activities, committed by previous management and staff. The sale to Afiliias of shares (or Afiliias' promise to acquire shares) held by fraudulent interest-holders and the management reshuffle, are fruitless attempts to cover up the applicant's misdeeds. The ICANN Board cannot turn a blind eye to HTLD's illegal actions, simply because the shareholder and management structure recently changed.

Moreover, the ICANN Board cannot ignore the fact that HTLD made these changes only after it was informed that ICANN was taking the matter seriously, and more than two years after it had obtained illegal access to trade secrets of competitors. HTLD claims that it only learned about Mr. Krischenowski's illegal actions on 30 April 2015. This claim – however doubtful it may be – cannot be made for the illegal actions of HTLD's CEO, Ms. Ohlmer. Moreover, HTLD kept Mr. Krischenowski on as a consultant until 31 December 2015. He also remained the managing director of a HTLD-related company and a major shareholder. Ms. Ohlmer remained CEO until long after her misdeeds, and she even acquired shares in HTLD after ICANN had informed HTLD it was taking the situation seriously. The ICANN Board now turning a blind eye to HTLD's misdeeds contradicts that ICANN is taking the situation seriously.

9. What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

Requesters ask ICANN to reverse the Decision. The ICANN Board is requested to declare that HTLD's application for .hotel is cancelled, and to take whatever steps towards HTLD it deems necessary. The ICANN Board is also requested to take all necessary steps to ensure that Requesters' applications for .hotel remain in contention until Requesters have self-resolved the contention set, or until Requesters have resolved the contention set in an auction, organized by ICANN.

In the event that ICANN does not immediately reverse its Decision, Requesters ask that ICANN engage in conversations with Requesters and that a hearing is organized. In such event, ICANN is requested to refrain from executing the registry agreement with HTLD, and to provide full transparency about all communications between ICANN, the ICANN Board, HTLD, the EIU and third parties (including but not limited to individuals and entities supporting HTLD's application) regarding HTLD's application for .hotel.

In the unlikely event that the ICANN Board does not decide to cancel HTLD's application immediately, Requesters request that the ICANN Board takes the necessary steps to ensure a meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of the *Dot Registry* case.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

The Decision directly harms the Requesters, as it blocks the Requesters from self-resolving the string contention, as contemplated by the GNSO policy, and, ultimately, from allowing one of the applicants to operate the .hotel gTLD.

In addition, Requesters have invested significant time and effort in defending their application for .hotel against the unreasoned and inconsistent advice of the CPE panel, given in contravention of ICANN's Aol and Bylaws. As a result of ICANN's acceptance of this advice, the Requesters' applications for .hotel have all suffered unnecessary delays and are currently experiencing further delays because of the Decision.

Although the requested relief in this Reconsideration Request does not compensate for the lost time, costs and effort, it reverses most of the harm in that the relief would allow Requesters to proceed with fairly competing for the .hotel gTLD.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Requesters' harm is identical, as explained in section 6 above.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

At this stage, all relevant documents are believed to be in ICANN's possession.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Fly Petition

Signature

25 August 2016

Date

Exhibit K

DECLARATION OF EIU Contact Information Redacted

I, EIU Contact Information Redacted, declare as follows:

1. I am the EIU Contact Information Redacted of The Economist Intelligence Unit (“EIU”) and have been employed by the EIU for seventeen years. I have personal knowledge of the matters set forth herein and am competent to testify thereto. I am responsible for all business and content aspects of the EIU’s public policy business, which includes relationships with governments, regulators, NGOs and non-profits. I have led the EIU’s engagement with ICANN since the EIU first responded to ICANN’s Request for Proposals in 2009. I negotiated the EIU’s services contract with ICANN and have communicated regularly during the last six years with ICANN’s senior management on the gTLD program. During this time, I also served as EIU Contact Information Redacted for EIU’s work on behalf of ICANN.

2. I make this declaration in conjunction with the Independent Review proceeding that Dot Registry has initiated against ICANN, ICDR Case No. 01-14-0001-5004. I understand that the Panel in the proceeding has ordered that certain documents in ICANN’s possession that reflect communications with the EIU should be produced to Dot Registry, and the EIU does not object to this disclosure in connection with the Panel’s work. Indeed, ICANN has now posted on its website the contract between ICANN and the EIU. As discussed herein, however, the EIU requests that the disclosure be limited for use in the Independent Review proceeding only so that these documents do not enter the public realm, for example, by being posted on ICANN’s website or used by other gTLD applicants.

3. The EIU is a privately held company working as a vendor to ICANN. We are not a gTLD decision-maker but simply a consultant to ICANN. Beginning in 2010, when we began contract discussions with ICANN, the EIU made it clear to ICANN that its public involvement in the application review process should be limited. The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process. Although the names of all vendors, including EIU, were disclosed on the ICANN website, ICANN assured us that the EIU would have no direct involvement with the applicants.

4. One of the EIU's functions was to perform Community Priority Evaluations or "CPE" for gTLD applicants that submitted the necessary paperwork to have their applications considered as "community" applications. Dot Registry is one such applicant. In this regard, ICANN told the EIU that the EIU's work papers would not be disclosed or published beyond a limited number of general-process documents. The EIU therefore had an expectation of privacy and believes that it would be inappropriate for our communications with ICANN to be at risk of public release.

5. Release of our communications with ICANN would undoubtedly have a chilling effect on future communications between EIU and ICANN, and could compromise the quality of future Community Priority Evaluations. All gTLD applications are evaluated in accordance with the gTLD Applicant Guidebook (the "Guidebook"), and there are occasions where questions arise as to processes under the Guidebook. Accordingly, the EIU and ICANN have engaged in many discussions around processes (e.g., issuing clarifying questions to applicants) and ensuring that the analysis

set forth in the evaluation results is clear, concise and consistent with the Guidebook. This has, at times, necessitated wide-ranging discussions. Such open and frank discussions would be much less likely to occur if the EIU knew that its communications with ICANN were subject to public disclosure. As a result, if the Panel orders the production of documents without confidentiality protections, the EIU is quite concerned that the quality and consistency of future CPE determinations would be negatively impacted.

6. There is also a significant risk that an applicant or other party to the application process – including Dot Registry and other applicants that have been involved in the CPE process or have monitored CPE applications of other applicants – will take an email or other communication between ICANN and the EIU out of context, thereby misinterpreting or misunderstanding it or the ultimate result of the EIU’s work. Indeed, by definition, any excerpt taken from an e-mail or other document will be out of context (for example, a single word, phrase, or data point) because it is only a snapshot of a long and iterative process. From the EIU’s perspective, this poses substantial reputational risk to the company because inaccurate, inappropriate or incorrect judgments could be made about EIU’s role and views based on individual communications. The EIU is part of The Economist Group, a well-known and highly regarded publishing company, publisher of The Economist magazine. Given the adversarial nature of ICANN’s accountability processes—disappointed applicants hiring legal counsel to challenge ICANN’s processes—the EIU and its parent company face considerable, and we believe inappropriate, reputational risk. The EIU has always strictly followed the procedures laid out in the Guidebook. The reputation of EIU and its parent firm, which have been

carefully built and preserved over more than 170 years, should not be subject to damage in the public arena because of administrative or legal challenges that are solely and exclusively the province of ICANN.

7. Although it is our understanding that, under the Guidebook and the application that all gTLD applicants submitted, gTLD applicants are not entitled to file lawsuits against ICANN or its vendors (including the EIU) to challenge ICANN's determinations, we remained concerned that disappointed applicants may seek legal redress against the EIU. While such suits would be groundless and frivolous, the EIU would be forced to defend them, imposing potentially considerable costs on our company.

8. The EIU is performing its CPE services for ICANN under a fixed price-per-application process. Administrative challenges by applicants to ICANN have, of necessity, required the further and extensive participation of EIU staff; this has already posed a considerable cost and resource burden on EIU, which we are unlikely to be able to recover from ICANN. If our communications with ICANN are at risk of disclosure through the current process, other disappointed applicants are likely to seek similar redress. This could open the floodgates and compel ICANN to make additional and extensive requests of EIU, imposing yet more costs on EIU (such as additional consultations with our legal counsel, document review, etc).

9. Finally, if the IRP Panel rejects ICANN's request to keep the EIU's documents confidential, the EIU would, at a minimum, request that the names of any individuals employed by, or working for, EIU be redacted from emails or other documents that are produced. The Guidebook does not require the disclosure of these names to applicants, and the EIU has not disclosed any of the names to applicants. There

is considerable risk to the personal safety of our staff if these names are published. On a number of occasions during the CPE period, applicants and other third parties have improperly contacted EIU staff or contractors regarding evaluations. ICANN has explicitly stated that such contact by applicants and third parties with EIU staff and contractors should not happen. Nonetheless, it has occurred. More importantly, a reading of blogs, web posts and other public communications associated with the ICANN application process makes it clear that some members of the wider community are hostile, angry and feel aggrieved by the new gTLD process. We believe it would be extremely inappropriate to place our staff at risk of harassment, or of personal harm, by potentially disclosing their identities through any of the ICANN administrative proceedings.

I declare under penalty of perjury under the laws of California and the United States that the foregoing is true and accurate. This declaration was signed on April 13th, 2015 at 4:30pm.

EIU Contact Information Redacted

JONES DAY

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April 15, 2015

VIA EMAIL

Mr. Scott Donahey
Mr. Mark Kantor
Hon. Charles N. Brower

Re: *Dot Registry v. ICANN*; ICDR Case No. 01-14-0001-5004

Dear Mr. Chairman and Members of the Panel:

The Panel's Amended Procedural Order No. 2 requires ICANN to produce certain documents related to the Community Priority Evaluation ("CPE") of Dot Registry's applications for .LLC, .LLP, and .INC., including: (1) ICANN's contract with the Economist Intelligence Unit ("EIU") for the performance of CPEs; and (2) documents relating to ICANN's consideration of the work performed by the EIU with respect to Dot Registry's applications.

With the EIU's consent, ICANN has already produced to Dot Registry ICANN's contract with the EIU (including amendments and Statements of Work), and ICANN has made those documents available on ICANN's website. (*See* <http://newgtlds.icann.org/en/applicants/cpe>.) And while the EIU also has agreed that documents responsive to the second category may be produced to Dot Registry, the EIU has asked that these documents—which include emails between ICANN and the EIU regarding the CPEs for Dot Registry's applications, draft CPE reports, and an EIU presentation to ICANN—be produced to Dot Registry only with assurances of confidentiality and protection.

This Panel, of course, has the authority to require such assurances. Article 37 of the International Centre for Dispute Resolution ("ICDR") Arbitration Rules provides that the Panel "may take measures for protecting trade secrets and confidential information" disclosed in the course of this independent review proceeding. ICANN requests that the Panel exercise this authority in this instance.

Independent Review proceedings such as this one are not court proceedings and not subject to the same presumption of openness that one finds in U.S. and other courts. Even so, ICANN generally posts all material documents filed in connection with Independent Review proceedings on its website.

Members of the Panel
 April 15, 2015
 Page 2

Here, however the harm that would be suffered by an independent third-party—the EIU—outweighs any argued public “right” to access these confidential documents. *See* Arbitration Rules of the World Intellectual Property Organization, Article 54(c) (tribunal shall determine whether confidential materials are “of such a nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality”).

As detailed in the accompanying declaration of EIU Contact Information Redacted EIU Contact Information Redacted the EIU expected (with good reason) that its communications with ICANN would be maintained as confidential. (EIU Contact Information Redacted ¶¶ 3-4; *see also* 26 July 2011 New gTLD Program Consulting Agreement, Para 5) (contemplating that the parties will exchange “proprietary, secret, or confidential” information and requiring that that information be maintained in confidence)). The public disclosure of these confidential communications would cause concrete harm to the EIU.

Specifically, EIU Contact Information Redacted EIU Contact Information Redacted explains that “ensuring that the analysis set forth in the [CPE] results is clear, concise and consistent with the Guidebook . . . has, at times, necessitated wide-ranging discussions” with ICANN, and the public disclosure of those discussions would have a chilling effect on further communications between the EIU and ICANN, compromising the ability of the EIU to perform future CPEs. (EIU Contact Information Redacted ¶ 5.) In addition, the EIU is concerned that the selective, out-of-context dissemination of these communications could injure its reputation and encourage the filing of frivolous lawsuits (even though the Application Guidebook prevents New gTLD applicants from filing lawsuits against ICANN or its vendors, including the EIU, with respect to the evaluation of their applications). (*Id.* ¶¶ 6-7)

In order to prevent this harm to the EIU and to the CPE deliberative process, ICANN respectfully requests that the Panel order that ICANN’s communications with the EIU—including emails, draft reports, and presentations—be subject to confidentiality conditions requiring that:

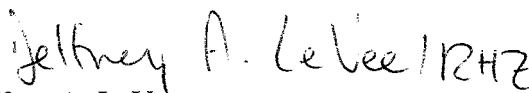
- (1) Documents exchanged by the parties may not be used for any purpose other than participating in the IRP;
- (2) Documents exchanged by the parties may not be publicly posted or disclosed in any manner, unless the EIU chooses to do so; and
- (3) Reference to such documents or information from such documents in the parties’ written submissions must be redacted prior to public posting.

Members of the Panel
April 15, 2015
Page 3

Notably, counsel to Dot Registry agreed voluntarily to these same confidentiality conditions in another pending IRP, *DotConnect Africa v. ICANN*, and there is no intellectual basis for any distinction here. There, as here, ICANN produced its confidential communications with a third-party evaluator of new gTLD applications, and the Claimant agreed not to use those documents for any purpose other than the IRP. As a result, the parties have posted on ICANN's website redacted versions of their memorials.

If Dot Registry objects to the application of confidentiality conditions even in light of the EIU's position and the declaration of ^{EIU Contact Information} Redacted and in the event the Panel finds that such conditions are not appropriate in this matter, ICANN would request that, at the very minimum, the Panel permit ICANN to redact the names of individual EIU employees and evaluators. As ^{EIU Contact Information} Redacted attests in his declaration, on a number of occasions during the CPE period, new gTLD Applicants and other third parties have improperly contacted EIU personnel regarding evaluations. (^{EIU Contact Information} Redacted ¶ 9.) The names of these personnel were not to be disclosed during the course of the new gTLD process. Given the fact that certain members of the community feel aggrieved by the new gTLD process, it would be highly inappropriate to place the EIU's personnel at risk of harassment or other personal harm by publicly disclosing their identities.

Very truly yours,


Jeffrey A. LeVee

cc: Counsel for Dot Registry

Enclosure

Exhibit L

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01-14-0001-5004

In the matter of an Independent Review

DOT REGISTRY, LLC,

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

PROCEDURAL ORDER NO. 3

Independent Review Panel:

May 4, 2015

The Honorable Charles N. Brower

Mark Kantor

M. Scott Donahey, Chair

1. Subject to the execution of the Confidentiality and Non-Disclosure Undertaking described in Paragraph 8 below and set out in Annex A, attached hereto, no later than May 18, 2015, the Internet Corporation for Assigned Names and Numbers (“ICANN”) shall produce to the Panel and Dot Registry, LLC (“Dot Registry”) all documents responsive to the Panel’s directive as set out in Section 2 of Amended Procedural Order No. 2. The documents produced to Dot Registry may be redacted only as to exclude pricing information or information pertaining to the geographic names review, and ICANN shall label the redacted information accordingly (e.g., “confidential pricing information redacted”). The documents that ICANN produces to the Panel shall be unredacted and shall indicate the portions of the documents that have been redacted in the production made to Dot Registry and the reasons given for such redactions.

2. The Panel notes that the Panel sought *inter alia* all non-privileged communications and other documents within ICANN’s possession, custody or control referring or describing:
 - (a) The engagement by ICANN of the EIU to perform Community Priority Evaluations. That request covers internal ICANN documents and communications, not just communications with the EIU, referring to or describing the subject of the Panel’s request (the engagement to perform Community Priority Evaluations).
 - (b) The work done and to be done by the EIU with respect to the Determination of the ICANN Board of Governance Committee on Dot Registry’s Reconsideration Request. That request again covers internal ICANN documents and communications, not solely communications with EIU, referring to or describing the subject of the Panel’s request (the work done and to be done by the EIU with respect to the Determination), as well as the work-product itself in its various draft and final iterations.
 - (c) Consideration by ICANN of the work performed by the EIU in connection with Dot Registry’s applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU, referring to or describing the subject of the Panel’s request (consideration by ICANN of the work performed by the EIU).

- (d) Acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU, referring to or describing the subject of the Panel's request (both acts done and decisions taken by ICANN with respect to the EIU work.).

The Panel notes that in Section 2 of its Amended Procedural Order No. 2 material provided by ICANN to the Panel, but not yet to Dot Registry, appears not to include, among other matters, internal ICANN documents and communications referring to or describing the above subject matters that the Panel would have expected to be created in the ordinary course of ICANN in connection with these matters. It may be that the Panel was less than clear in its requests. The Panel requests that ICANN consider again whether the production was fully responsive to the foregoing requests.

3. The production shall include names of EIU personnel involved in the work contemplated and the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP with respect to Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC), and 14-33 (.LLP), dated July 24, 2014, in that such information may be relevant to the requirements of Sections 2.4.2, 2.4.3, 2.4.3.1, and 2.4.3.2 of Module 2 of the Applicant Guidebook. The Panel expects strict compliance by Dot Registry and its counsel with Paragraph 8 of this Order and the Confidentiality and Non-Disclosure Undertaking procedure set forth therein and in Annex 1 attached hereto.
4. Not later than June 8, 2015, Dot Registry shall be entitled to make an additional written submission, to which shall be appended the witness statements, expert reports and other relevant and material evidence on which Dot Registry relies. Without limiting such matter as Dot Registry may choose to address therein, that written submission shall (a) identify with specificity the material disputed matters of fact, if any, at issue in this proceeding, (b) identify with specificity its allegations under ICANN Bylaws Art. IV, Sections 3.1 and 3.2, if any, that ICANN has failed to comply with its obligations under paragraph 4 of the ICANN Articles of Incorporation, and (c) discuss the standard to be applied by this Panel in resolving any such allegations to the extent the allegation does not fall within the scope of the standards of review mentioned in ICANN Bylaws Art. IV, Section 4 or Supplementary Procedures Paragraph 8.
5. Not later than June 29, 2015, ICANN shall be entitled to make an additional written submission, to which shall be appended the witness statements, expert

reports and other relevant and material evidence on which ICANN relies, replying to Dot Registry's additional submission referred to in paragraph 3, above. Without limiting such matters as ICANN may choose to address therein, that written submission shall (a) identify with specificity the material disputed matters of fact, if any, at issue in this proceeding, (b) address any specific allegations made by Dot Registry under ICANN Bylaws Art. IV, Sections 3.1 and 3.2, if any, that ICANN has failed to comply with its obligations under Paragraph 4 of the ICANN Articles of Incorporation, and (c) discuss the standard to be applied by this Panel in resolving any such allegation by Dot Registry to the extent such allegation does not fall within the scope of the standards of review mentioned in ICANN Bylaws Art. IV, Section 4 or Supplementary Procedures Paragraph 8.

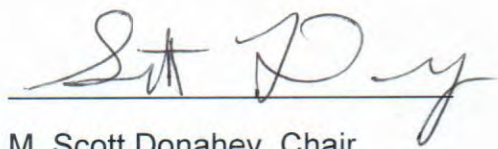
6. The Panel shall advise the parties (a) promptly after receipt of the documents referred to in Paragraphs 1, 2, and 3, above, as to page limits, if any, for the written submissions referred to in Paragraphs 4 and 5, above, and (b) promptly after receipt of ICANN's written submission referred to in Paragraph 5, above, as to whether the Panel would find an additional round of written submissions useful.
7. The Panel defers ruling on Dot Registry's request for authorization to make document production requests and Dot Registry's request for an in-person hearing until after completion of the steps specified in Paragraphs 1 through 5, above and of any further step ordered by the Panel as provided in Paragraph 6(b), above.
8. CONFIDENTIALITY
 - a. Documents exchanged by the parties or produced to the Panel at the Panel's directive which contain confidential information:
 - i. May not be used for any purpose other than participating in ICDR Case No. 01-14-0001-5004, and;
 - ii. May not be referenced in any, and any information contained therein must be redacted from any, written submissions prior to public posting.
 - b. All counsel, paralegals, and employees engaged by the law firm representing a party who is the recipient of confidential information as set out in subparagraph a, above, and who as part of their work handle or otherwise work with such confidential information, and the principals of the party who is

the recipient of such confidential information shall each execute a Confidentiality and Non-Disclosure Undertaking in the form attached hereto as Annex 1.

9. The parties are directed to meet and confer and attempt to agree on the meaning of the term "local law," as contained in Article 4 of ICANN's Articles of Incorporation and to advise the Panel of the nature of any such agreement. If by May 15, 2015, the parties have been unable to agree on the meaning of "local law," then, no later than May 20, 2015, each party shall submit to the Panel a letter brief of no more than five pages presenting its position as to the meaning of "local law" and the authorities therefor.

10. The parties are directed to meet and confer and attempt to agree that in circumstances where a provision of the ICANN By-Laws may be found to be inconsistent with a provision of the ICANN Articles of Incorporation, whether the provision of the ICANN By-Laws or that of the ICANN Articles of Incorporation is to prevail, and to advise the Panel of the nature of any such agreement. If by May 15, 2015, the parties have been unable to agree on which provision is to prevail, then, no later than May 20, 2015, each party shall submit to the Panel a letter brief of no more than three pages presenting its position as to the provision that should prevail and the authorities therefor.

On behalf of the Panel

A handwritten signature in cursive script, appearing to read "M. Scott Donahey", written over a horizontal line.

M. Scott Donahey, Chair

ANNEX 1

CONFIDENTIALITY AND NON-DISCLOSURE UNDERTAKING

This Confidentiality and Non-Disclosure Undertaking is given to the Independent Review Panel in the matter of an Independent Review Proceeding between Dot Registry, LLC and the Internet Corporation for Assigned Names and Numbers, ICDR Case No. 01-14-0001-5004. I acknowledge that as part of my work on or participation in this proceeding I will be given access to information that is of a personal, confidential, and/or proprietary nature which has been designated as "CONFIDENTIAL."

I therefore agree:

1. To hold all CONFIDENTIAL information in trust and strict confidence and agree that shall be used only for the purposes of this IRP Proceeding and shall not be used for any other purpose, or disclosed to any third party.
2. To keep any CONFIDENTIAL information in my control or possession in a physically secure location to which only I and other persons who have signed a Confidentiality and Non-Disclosure Undertaking have access.
3. To take all necessary steps to keep such CONFIDENTIAL information secure and to protect such CONFIDENTIAL information from unauthorized use, reproduction or disclosure.
4. To maintain the absolute confidentiality of personal, confidential and proprietary information in recognition of the privacy and proprietary rights of others at all times, and in both professional and personal situations.
5. To comply with all privacy laws and regulations which apply to the collection, use, and disclosure of personal information.
6. At the conclusion of the IRP Proceedings or upon order, to return all confidential information, including code, written notes, photographs, sketches, memoranda, or notes taken in any format to whomever gave me access to such CONFIDENTIAL information, who in turn will see that it is returned to the party who provided such information.
7. Not to disclose CONFIDENTIAL information to any employee, consultant, or third party, unless he or she is authorized to, has agreed to, and has executed this Confidentiality and Non-Disclosure Undertaking and has been approved by the IRP Panel in its official capacity to possess such CONFIDENTIAL information.

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I understand that this Confidentiality and Non-Disclosure Undertaking survives the termination of ICDR Case No. 01-14-0001-5004.

The laws of the State of California shall govern this Agreement and its validity, construction and effect.

I fully understand and accept the responsibilities set out above relating to CONFIDENTIAL information.

Name: _____

Email Address: _____

Signature: _____ Date: _____

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Exhibit M

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01 – 14 - 0001 – 5004

In the matter of an Independent Review
Concerning ICANN Board Action re
Determination of the Board Governance Committee
Reconsideration Requests 14-30, 14-32, 14-33 (24 July 2014)

DOT REGISTRY, LLC, for itself and on behalf of The NATIONAL ASSOCIATION OF
SECRETARIES OF STATE

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),

Respondent

DECLARATION OF THE INDEPENDENT REVIEW PANEL

29 July 2016

The Honorable Charles N. Brower

Mark Kantor

M. Scott Donahey, Chair

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I. INTRODUCTION

A. Internet Corporation for Assigned Names and Numbers (ICANN)

1. ICANN is a nonprofit public-benefit corporation organized under the laws of the State of California. ICANN was incorporated on September 30, 1998. Jon Postel, a computer scientist at that time at the University of Southern California, and Esther Dyson, an entrepreneur and philanthropist, were the two most prominent organizers and founders. Postel had been involved in the creation of the Advanced Research Projects Agency Network ("ARPANET"), which morphed into the Internet. The ARPANET was a project of the United States Department of Defense and was initially intended to provide a secure means of communication for the chain of command during emergency situations when normal means of communication were unavailable or deemed insecure.

2. Prior to ICANN's creation, there existed seven generic Top Level Domains (gTLDs), which were intended for specific uses on the Internet: *.com*, which has become the gTLD with the largest number of domain name registrations, was intended for commercial use; *.org*, intended for the use of non-commercial organizations; *.net*, intended for the use of network related entities; *.edu*, intended for United States higher education institutions; *.int*, established for international organizations; *.gov*, intended for domain name registrations for arms of the United States federal

government and for state governmental entities; and, finally, *.mil*, designed for the use of the United States military.

3. ICANN's "mission," as set out in its bylaws, is "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems." Bylaws, Art. 1, § 1. ICANN has fulfilled this function under a contract with the United States Department of Commerce.

4. The original ICANN Board of Directors was self-selected by those active in the formation and functioning of the fledgling Internet. ICANN's bylaws provide that its Board of Directors shall have 16 voting members and four non-voting liaisons. Bylaws, Art. VI, § 1. ICANN has no shareholders. Subsequent Boards of Directors have been selected by a Nominating Committee, as provided in Art. VII of the Bylaws.

5. ICANN gradually began to introduce a select number of new gTLDs, such as *.biz* and *.blog*. In 2005, the ICANN Board of Directors began considering the invitation to the general public to operate new gTLDs of its own creation. In 2008, the Board of Directors adopted 19 specific Generic Name Supporting Organization (GNSO) recommendations for the implementation of a new gTLD programs. In 2011 the Board approved the Applicant Guidebook and the launch of a new gTLD program. The application window opened on January 12, 2012, and ICANN immediately began receiving applications.

B. Board Governance Committee (BGC)

6. The Board Governance Committee was created by Charter, approved by the ICANN Board of Directors on October 13, 2012. Among its responsibilities is to consider and respond to reconsideration requests submitted to the Board pursuant to ICANN's Bylaws and to work closely with the Chair and Vice Chair of the Board and with ICANN's CEO. Charter, Sections 1.6 and 2.6, and 2.1.3. At the hearing of this matter, and consistent with the position taken by ICANN before other Independent Review Panels, counsel for ICANN confirmed that the conduct of the BGC was the conduct of the Board for purposes of these proceedings.

7. The BGC is composed of at least three, but not more than 6 voting Board Directors and not more than 2 Liaison Directors, as determined and appointed annually by the Board. Only the voting Board of Directors members shall be voting members of the BGC. Charter, Section 3.

8. A preliminary report with respect to actions taken at each BGC meeting, whether telephonic or in-person, shall be recorded and distributed to BGC members within two working days, and meeting minutes are to be posted promptly following their approval by the BGC. Charter, Section 6. No such preliminary report was produced to the Panel in these proceedings.

C. Dot Registry LLC (Dot Registry)

9. Dot Registry is a limited liability company registered under the laws of the State of Kansas. Dot Registry was formed in 2011 in order to apply to ICANN for the rights to operate five new gTLD strings: *.corp*, *.inc*, *.llc*, *.llp*, and *.ltd*. Dot Registry applied to be the only community applicant for the new gTLD strings *.inc*, *.llc*, and *.llp*. Dot Registry submitted each of its three applications for listed strings on 13 June 2012. Dot Registry submitted these applications for itself and on behalf of the National Association of Secretaries of State (NASS). Dot Registry is an affiliate of the NASS, which is “an organization which acts as a medium for the exchange of information between states and fosters cooperation in the development of public policy, and is working to develop individual relationships with each Secretary of State’s office in order to ensure our continued commitment to honor and respect the authorities of each state.” New gTLD Application Submitted to ICANN by: Dot Registry LLC, String: INC, Originally Posted: 13 June 2012, Application ID: 1-880-35979, Exhibit C-007, Para. 20(b), p. 14 Of 66. For ease of reading, this Declaration shall refer to “Dot Registry” as the disputing party, but the Panel recognizes that Dot Registry and the NASS jointly made the Reconsideration Requests at issue in these proceedings.

10. The mission/purpose stated in its respective applications for the three strings was “to build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically

serve the respective communities of “registered corporations,” “registered limited liability companies,” and/or “registered limited liability partnerships.” Under Dot Registry’s proposal, a registrant would have to demonstrate that it has registered to do business with the Secretary of State of one of the United States in the form corresponding to the gTLD (corporation for *.inc*, limited liability company for *.llc*, and limited liability partnership for *.llp*.)

11. With each of its community applications, Dot Registry deposited an additional \$22,000, so as to be given the opportunity to participate in a Community Priority Evaluation (“CPE”). A community application that passes a CPE is given priority for the gTLD string that has successfully passed, and that gTLD string is removed from the string contention set into which all applications that are identical or confusingly similar for that string are placed. The successful community CPE applicant is awarded that string, unless there are more than one successful community applicant for the same string, in which case the successful applicants would be placed into a contention set.

D. The Economist Intelligence Unit (EIU)

12. The EIU describes itself as “the business information arm of the Economist Group, publisher of the Economist.” “The EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world’s leading provider of country intelligence, the EIU

helps executives, governments and institutions by providing timely, reliable and impartial analysis.” Community Priority Evaluation Panel and Its Processes, at 1.

13. The EIU responded to a request for proposals received from ICANN to undertake to act as a Community Priority Panel. The task of a Community Priority Panel is to review and score community based applications which have elected the community priority evaluation based on information provided in the application plus other relevant information available (such as public information regarding the community represented).” Applicant Guidebook (“AGB”), § 4.2.3. The AGB sets out specific Criteria and Guidelines which a Community Priority Panel is to follow in performing its evaluation. *Id.*

14. Upon its selection by ICANN, the EIU negotiated a services contract with ICANN whereby the EIU undertook to perform Community Priority Evaluations (CPEs) for new gTLD applicants. Declaration of ^{EIU Contact Information Redacted}
EIU Contact Information Redacted of the EIU
(hereinafter ^{EIU Contact Information Redacted} Declaration”), ¶¶ 1 and 4, at 1 and 2.

15. ^{EIU Contact Information Redacted} declared that EIU was “not a gTLD decision-maker but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process.” ^{EIU Contact Information Redacted} Declaration, ¶ 3,

at 2. Further, ICANN confirmed at the hearing that ICANN “accepts” the CPE recommendations from the EIU, a statement reiterated in the Minutes for the BGC meeting considering the subject Reconsideration Requests: “Staff briefed the BGC regarding Dot Registry, LLC’s (‘Requestor’s’) request seeking reconsideration of the Community Priority Evaluation (‘CPE’) Panel’s Reports, and ICANN’s acceptance of those Reports.” (Emphasis added.)

16. Under its contract with ICANN, the EIU agreed to a Statement of Work. Statement of Work No:[2], ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names, March 12th 2012 (“EIU SoW”). Under Section 10, Terms and Conditions, supplemental terms were added to the Master Agreement between the parties. Among those terms are the following:

“(ii) ICANN will be free in its complete discretion to decide whether to follow [EIU’s] determination and to issue a decision on that basis or not;

(iii) ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue and the [EIU] shall have no responsibility nor liability to ICANN for any decision issued by ICANN except to the extent the [EIU’s] evaluation and recommendation of a relevant application constitutes willful misconduct or is fraudulent, negligent or in breach of any of {EIU’s} obligations under this SoW;

(iv) each decision and all associated materials must be issued by ICANN in its own name only, without any reference to the [EIU] unless agreed in writing in advance.” EIU SoW, at 14.

17. In order to qualify to provide dedicated services to a defined community, an applicant must undergo an evaluation of its qualifications to serve such community, the criteria for which are set out in the Community Priority Evaluation Guidelines (“CPE Guidelines”). The CPE Guidelines were developed by the Economist Intelligence Unit (“EIU”) under contract with ICANN. According to the EIU, “[t]he CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.” CPE Guidelines Prepared by the EIU, Version 2.0 (“CPE Guidelines”), at 2. In the CPE Guidelines, the EIU states that “the evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.” CPE Guidelines, at 22.

18. This message was reiterated in the EIU Community Priority Evaluation Panel and its Processes, where it states that the CPE process “respects the principles of fairness, transparency avoidance of potential conflicts of interest, and non-discrimination. Consistency in approach in scoring applications is of particular importance.” Community Priority Evaluation Panel and its Processes, at 1.

II. PROCEDURAL HISTORY

A. Community Priority Evaluation and Reconsideration

19. On June 11, 2014, the EIU issued three Community Priority Evaluation Reports, one for each of the three new gTLDs that are the subject of this

proceeding. In order to prevail on each of its applications, Dot Registry would have to have been awarded 14 out of a possible 16 points per application. In the evaluation of each of its three applications, Dot Registry was awarded a total per application of 5 points. Thus, each of the applications submitted did not prevail.

20. The practical result of this failure to prevail is that Dot Registry would be placed in a contention set for each of the proposed gTLDs with other applicants who had applied for one or more of the proposed gTLDs.

21. On April 11, 2013, Dot Registry submitted three Requests for Reconsideration to the BGC, requesting that the BGC reconsider the denial of Dot Registry's applications for Community Priority.

22. The bases for Dot Registry's requests for reconsideration were the following:

- a. The CPE Panel failed to validate all letters of support of and in opposition to its application for Community Priority status;
- b. The CPE Panel failed to disclose the sources, the substance, the methods, or the scope of its independent research;
- c. The CPE Panel engaged in "double counting," which practice is contrary to the criteria established in the AGB;
- d. The Panel failed to evaluate each of Dot Registry's applications independently;
- e. The Panel failed to properly apply the CPE criteria set out in the guidebook for community establishment, community organization, pre-existence, size, and longevity;
- f. The Panel used the incorrect standard in its evaluation of the nexus criterion;

- g. The failure in determining Nexus, led to a failure in determining “uniqueness.”
- h. The Panel erroneously found that Dot Registry had failed to provide for an appropriate appeals process in its applications;
- i. The Panel applied an erroneous standard to determine community support, a standard not contained in the CPE;
- j. The Panel misstated that the European Commission and the Secretary of State of Delaware opposed Dot Registry’s applications and failed to note that the Secretary of State of Delaware had clarified the comment submitted and that the European Commission had withdrawn its comment.

23. In response to Dot Registry’s Requests for Reconsideration of its applications, on July 24, 2014, The Board Governance Committee (“BGC”) issued its Determination that “[Dot Registry] has not stated grounds for reconsideration.” The BGC’s Determination was based on the failure of Dot Registry to show “that either the Panels or ICANN violated any ICANN policy or procedure with respect to the Reports, or ICANN acceptance of those Reports.” Determination of the Board Governance Committee (BGC) Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014.

B. History of Independent Review Process

24. As all of the party’s substantive submissions and the IRP Panel’s procedural orders are posted on the ICANN web site covering IRP Proceedings (<https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en>), this section will serve only to highlight those that contain significant procedural or substantive rulings.

25. On September 22, 2014, Dot Registry requested Independent Review of the denial of reconsideration of each of its three applications. On October 27, 2014, ICANN filed its Response to Dot Registry's request for Independent Review.

26. On November 19, 2014, Dot Registry requested the appointment of an Emergency Panelist and for interim measures of protection. On November 26, 2014, the emergency panelist, having been appointed, issued Procedural Order No. 1, setting out a schedule for the hearing and resolution of the request for interim measures of protection.

27. On December 8, 2014, ICANN filed a Response to Dot Registry's request for emergency relief.

28. On December 23, 2014, the Emergency Independent Review Panelist issued the Emergency Independent Review Panelist's Order on Request for Emergency Measures of Protection. The Order made the following rulings:

1. The Emergency Independent Review Panelist finds that emergency measures of protection are necessary to preserve the pending Independent Review Process as an effective remedy should the Independent Review Panel determine that the award of relief is appropriate.
2. It is therefore ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP, and .LLC until the conclusion of the pending Independent Review Process.
3. The administrative fees of the ICDR shall be borne as incurred. The compensation of the Independent Review Panelist shall be borne equally by both parties. Each party shall bear all other costs, including its attorneys' fees and expenses, as incurred.

4. This Order renders a final decision on [Dot Registry's] Request for emergency Independent Review Panel and Interim Measures of Protection. All other requests for relief not expressly granted herein are hereby denied

29. The Independent Review Process Panel (the "IRP Panel"), having been duly constituted, issued a total of thirteen procedural orders, in addition to that issued by the Emergency Independent Review Panelist.

All of the orders were issued by the unanimous IRP Panel. The following are descriptions of portions of those orders particularly germane to the present Declaration.

30. On March 26, 2015, the Independent Review Process Panel [the "IRP Panel"] having been duly constituted, the IRP Panel issued an Amended Procedural Order No. 2. Among other matters covered therein, pursuant to its powers under ICDR Rules of Arbitration, Art. 20, 4 ("At any time during the proceedings, the [panel] may order the parties to produce documents, exhibits or other evidence it deems necessary or appropriate") the IRP Panel ordered ICANN to produce to the Panel certain documents and gave each party the opportunity to request of the other additional documents.

31. The order which required production of certain documents to the Panel read as follows:

Pursuant to the Articles of Incorporation and Bylaws of the Internet Corporation for Assigned Names and Numbers ("ICANN") and the International Arbitration Rules and Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process of the International Centre for Dispute

Resolution (“ICDR”), the Panel hereby requires ICANN to produce to the Panel and Dot Registry, LLC (“Dot Registry”) no later than April 3, 2015, all non-privileged communications and other documents within its possession, custody or control referring to or describing (a) the engagement by ICANN of the Economist Intelligence Unit (“EIU”) to perform Community Priority Evaluations, including without limitation any Board and staff records, contracts and agreements between ICANN and EIU evidencing that engagement and/or describing the scope of EIU’s responsibilities thereunder, and (b) the work done and to be done by the EIU with respect to the Determination of the ICANN Board of Governance Committee on Dot Registry’s Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC) and 14-33 (.LLP), dated July 24, 2014, including work done by the EIU at the request, directly or indirectly, of the Board of Governance Committee on or after the date Dot Registry filed its Reconsideration Requests, and (c) consideration by ICANN of, and acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry’s applications for .INC, .LLC, and/or .LLP, including at the request, directly or indirectly, of the Board of Governance Committee.

32. In Procedural Order No. 3, issued May 24, 2015, the Panel’s order to ICANN to produce documents was clarified as follows:

The Panel notes that the Panel sought *inter alia* all non-privileged communications and other documents within ICANN’s possession, custody or control referring or describing:

- (a) The engagement by ICANN of the EIU to perform Community Priority Evaluations. That request covers internal ICANN documents and communications, not just communications with the EIU, referring to or describing the subject of the Panel’s request (the engagement to perform Community Priority Evaluations).
- (b) The work done and to be done by the EIU with respect to the Determination of the ICANN board of governance Committee on Dot Registry’s Reconsideration Request. That request again covers internal ICANN documents and communications, not solely communications with EIU, referring to or describing the subject of the Panel’s request (the work done and to be done by the EIU with

- respect to the Determination). As well as the work-product itself in its various draft and final iterations.
- (c) Consideration by ICANN of the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU referring to or describing the subject of the Panel's request (consideration by ICANN of the work performed by the EIU).
 - (d) Acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU, referring to or describing the subject of the Panel's request (both acts done and decisions taken by ICANN with respect to the EIU work).

The Panel notes that in Section 2 of its amended Procedural Order No. 2, material provided by ICANN to the Panel, but not yet to Dot Registry, appears not to include, among other matters, internal ICANN documents and communications referring to or describing the above subject matters that the Panel would have expected to be created in the ordinary course of ICANN in connection with these matters. It may be that the Panel was less than clear in its requests. The Panel requests that ICANN consider again whether the production was fully responsive to the foregoing requests.

The production shall include names of EIU personnel involved in the work contemplated and the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP with respect to Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC), and 14-33 (.LLP), dated July 24, 2024, in that such information may be relevant to the requirements of Sections 2.4.2, 2.4.3, 2.4.3.1, and 2.4.3.2 of Module 2 of the Applicant Guidebook. The Panel expects strict compliance by Dot Registry and its counsel with Paragraph 8 of this Order and the Confidentiality and Non-Disclosure Undertaking procedure set forth therein and in Annex 1 attached hereto.

Procedural Order No. 3 included, among other provisions, a confidentiality provision, which provided in pertinent part:

"Documents exchanged by the parties or produced to the Panel at the Panel's directive which contain confidential information:

- i. May not be used for any purpose other than participating in ICDR Case No. 01-14-0001-5004, and;
- ii. May not be referenced in any, and any information contained therein must be redacted from any, written submissions prior to posting.

33. In Procedural Order No. 6, issued June 12, 2015, the Panel reiterated its document production order, made express that the BGC was covered by the reference to the “Board,” and required that documents withheld on the basis of privilege be identified in a privilege log. On June 19, 2015, Counsel for ICANN submitted a confirming attestation, the required privilege log, and an additional responsive email. *See. also*, Procedural Order No. 8, issued August 26, 2015, paragraph 3, first sentence.

34. On July 6, 2015, the IRP Panel issued Procedural Order No. 7. That order memorialized the parties’ stipulations that the term “local law” as used in Article 4 of ICANN’s Articles of Incorporation was a reference to California law and that under California law, in the event of a conflict between a corporation’s Bylaws and Articles, the Articles of Incorporation would prevail.

35. In Procedural Order No. 8, “[t]he Panel designate[d] the place of these proceedings as New York, New York.”

36. In Procedural Order No. 12, issued February 26, 2016, the Panel ordered that the hearing would be by video conference and would be limited to seven hours. No live percipient or expert witness testimony would be permitted, and only the witness statements and documents

previously submitted by the parties and accepted by the panel would be admitted. (ICANN had previously submitted one witness declaration, that of ^{EIU Contact Information Redacted} of the EIU. Dot Registry had previously submitted four witness declarations and one expert witness declaration.) The hearing would consist of arguments by counsel and questions from the Panel. A stenographic transcript of the proceedings would be prepared.

37. On March 29, 2016, a one-day hearing by video conference was held with party representatives and counsel and the Panel present in either Washington, D.C. or Los Angeles, California. Each party presented arguments in support of its case, and the Panel had the opportunity to ask questions of counsel. A stenographic transcript of the proceedings was made. During the hearing, Dot Registry attempted to introduce live testimony from a fact witness. The Panel declined to hear testimony from the proffered witness. Hearing Tr., at p. 42, ll. 11-15. At the conclusion of the hearing, the Panel requested that the parties address specific questions in a post-hearing memorial.

38. On April 8, 2016, the parties filed post-hearing memorials addressing the questions posed by the Panel.

39. On May 5, 2016, the parties stipulated to the correction of limited inaccuracies in the stenographic transcript, which changes were duly noted by the Panel.

III. SUBMISSIONS OF THE PARTIES

A. Dot Registry

40. Dot Registry states that the applicable law(s) to be applied in this proceeding are ICANN's Articles of Incorporation ("Articles") and Bylaws, relevant principles of international law (such as good faith) and the doctrine of legitimate expectations, applicable international conventions, the laws of the State of California ("California law"), the Applicant Guidebook ("AGB"), the International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR Rules"), and the Supplementary Procedures for the Independent Review Process (the "Supplemental Rules"). Prior declarations of IRP panels have "precedential value." Additional Submission of Dot Registry, LLC ("DR Additional Submissions"), ¶¶3, at 2-3, and notes 11, 12, and 15. Request of Dot Registry LLC for Independent Review Process ("DR IRP Request"), ¶¶ 55, at 20. The Standard of Review should be de novo. DR Additional Submission, ¶¶¶ 4-7, at 3-5.

41. Dot Registry effectively argues that actions of the ICANN staff and the EIU constitute actions of the ICANN board, because, under California law and ICANN's Bylaws, ICANN's board of directors is "ultimately responsible" for the conduct of the new gTLD program. Since ICANN is a California nonprofit public-benefit corporation, all of its activities must be undertaken by or under the direction of its Board of Directors. DR

Additional Submission, ¶¶ 12-14, at 7-8 and notes 37-40; IRP Request, ¶ 62.

42. Dot Registry asserts that ICANN's staff and the EIU are "ICANN affiliated parties," and as such ICANN is responsible for their actions. AGB, Module 6.5.

43. In any event, Dot Registry takes the position that ICANN is responsible for the acts of EIU and the ICANN staff, since EIU can only recommend to ICANN for ICANN's ultimate approval, and ICANN has complete discretion as to whether to follow EIU's recommendations. DR Additional Submission, ¶18, at 11 (citing EIU SoW, §10(b)(ii) – (iv), (vii), at 6.

44. Dot Registry asserts that the EIU also has the understanding that ICANN bears the responsibility for the actions of the EIU in its role as ICANN's evaluator. DR Additional Submission, ¶19, at 11, citing Declaration of EIU Contact Information Redacted

of the EIU, § 3, at 2. In addition, the CPEs were issued on ICANN letterhead, not EIU letterhead. Indeed, on the final page of the CPEs generated by the EIU, there is a disclaimer, which states in pertinent part that "these Community Priority Evaluation results do not necessarily determine the final result of the application." *See, e.g.*, CPE Report 1-990-35979, Report Date: 11 June 2014.

45. Dot Registry contends that under California law the business judgment rule protects the individual corporate directors from complaints by shareholders and other specifically defined persons who are analogous to

shareholders, but does not protect a corporation or a corporate board from actions by third parties. DR Post-Hearing Brief, at 4 – 7.

46. Even assuming *arguendo* that the business judgment rule applies to the present proceeding, Dot Registry argues that it would not protect ICANN, since the ICANN Board and BGC failed to comply with the Articles, Bylaws, and the AGB, performed the acts at issue without making a reasonable inquiry, and failed to exercise proper care, skill and diligence. DR Post Hearing Brief, at 7 – 8.

47. Dot Registry alleges that EIU altered the AGB requirements only as to Dot Registry's applications in the following respects, and thus engaged in unjustified discrimination (disparate treatment) and non-transparent conduct:

- a) Added a requirement in its evaluation that the community must "act" as a community, and that a community must "associate as a community;"
- b) Added the requirement that the organization must have no other function but to represent the community;
- c) Utilized the increased requirement for "association" to abstain from evaluating the requirements of "size" or "longevity;"
- d) Misread Dot Registry's applications in order to find that Dot Registry's registration policies failed to provide "an appropriate appeals mechanism;"

- e) Altered the AGB criteria that the majority of community institutions support the application to require that every institution express “consistent” support;
- f) Altered the requirement that an application must have no relevant opposition to require that an application have no opposition.

See, e.g., Dot Registry Reconsideration Request re *.llc*, Version of 11 April 2013, at 4 -17 (Exhibit C-017).

48. Dot Registry asserts that the EIU applied different standards to other CPE applications, applying those standards inconsistently across all applicants.

49. While EIU required Dot Registry to demonstrate that its communities “act” and “associated” as communities, it did not require that other communities do so.

50. EIU also required that *.llc*, and *.llp* community members be participants in a clearly defined-industry and that the “members” have an awareness and recognition of their inclusion in the industry community.

51. While noting that “research” supported its conclusions, the EIU failed to identify the research conducted, what the results of the research were, or how such results supported its conclusions.

52. Dot Registry also argued that the Board of Governance Committee (“BGC”) breached its obligations to ensure fair and equitable, reasonable and non-discriminatory treatment.

53. In response to a request for reconsideration, the BGC has the authority to:

- a) conduct a factual investigation (Bylaws, Art. 11, § 3, d);
- b) request additional written submissions from the affected party or other parties (Bylaws, Art. IV, § 3, e);
- c) ask ICANN staff for its views on the matter (Bylaws, Art. IV, § 11);
- d) request additional information or clarification from the requestor (Bylaws, Art. IV, §12);
- e) conduct a meeting with requestor by telephone, email, or in person (*Id.*);
- f) request information relevant to the request from third parties (Bylaws, Art. IV, § 13).

The BCG did none of these.

54. Dot Registry requested that the IRP Panel make a final and binding declaration:

- a) that the Board breached its Articles, its Bylaws and the AGB including by failing to determine that ICANN staff and the EIU improperly and discriminatorily applied the AGB criteria for community priority status in evaluating Dot Registry's applications;
- b) that ICANN and the EIU breached the articles, Bylaws and the AGB, including by erring in scoring Dot Registry's CPE applications for *.inc*, *.llc*, and *.llp* and by treating Dot Registry's applications discriminatorily;

- c) that Dot Registry's CPE applications for the *.inc*, *.llc*, and *.llp* strings satisfy the CPE criteria set forth in the AGB and that Dot Registry's applications are entitled to community priority status;
- d) recommending that the Board issue a resolution confirming the foregoing;
- e) awarding Dot Registry its costs in this proceeding, including, without limitation, all legal fees and expenses; and
- f) awarding such other relief as the Panel may find appropriate in the circumstances.

Claimant's Post-Hearing Brief, April 8, 2016 ("DR Post-Hearing Brief"), at 9.

55. Finally, Dot Registry stated that it "does not believe that a declaration recommending that the Board should send Dot Registry's CPE applications to a new evaluation by the EIU would be proper." DR Post-Hearing Brief, at 9.

B. ICANN

56. ICANN asserts that ICANN's Articles and Bylaws and the Supplementary Procedures apply to an IRP proceeding. ICANN's Response to Claimant Dot Registry LLC's Request for Independent Review Process, October 27, 2014 ("ICANN Response"), ¶21, at 8, and ¶

29, at 9. ICANN's Response to Claimant Dot Registry LLC's Additional Submission ("Response to Additional Submission"), ¶2, at 1; ¶ 8, at 3.

57. ICANN argues that "there is only one Board action at issue in this IRP, the BGC's review of the reconsideration requests Dot Registry filed challenging the CPE Reports." Response to Additional Submission, ¶ 8, at 3.

58. ICANN contends that this standard only applies as to the BGC's actions (or inactions) in its reconsideration of the EIU or ICANN staff actions. Response to Additional Submission, ¶ 10, at 4; ¶13, at 5

59. ICANN argues that the Bylaws make clear that the IRP review does not extend to actions of ICANN staff or of third parties acting on behalf of ICANN staff, such as the EIU.

60. ICANN contends that, when the BGC responds to a Reconsideration Request, the standard applicable to the BGC's review looks to whether or not the CPE Panel violated "any established policy or procedure." ICANN Response, ¶45, at 20, ¶¶ 46 and 47, at 21. Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10; ¶ 19, at 8.

61. ICANN argues that Dot Registry failed to show that the EIU violated any established policies and procedures, on one occasion referring to "rules and procedures," in another to "established ICANN policy(ies)," and in another to "appropriate policies and procedures." Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10, and ¶19, at 8

62. ICANN contends that Dot Registry failed to show that the BGC actions in its reconsideration were not in accordance with ICANN's Articles and Bylaws. Response to Additional Submission, ¶¶ 21, at 9, and ¶ 23 at 10. However, ICASNN has never argued in these proceedings that Dot Registry failed timely or properly to raise claims of *inter alia* disparate treatment/unjustified discrimination, lack of transparency or other alleged breaches of Articles, Bylaws, or AGB by the BGC, only that Dot Registry failed to prove its case on those matters.

63. ICANN agrees that “the ‘rules’ at issue when assessing the Board’s conduct with respect to the New gTLD Program include relevant provisions of the Guidebook.” Letter of Jeffrey A. LeVee, Jones Day LLP, to the Panel, dated October 12, 2015, at 6.

64. In response to a question from the Panel, ICANN asserts that, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel (R-12), ICANN did not require the ICANN staff and EIU to adhere to ICANN's Bylaws. ICANN denied that the reference therein that “the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination” and its request “that candidates include a ‘statement of the candidate’s plan for ensuring fairness, nondiscrimination and transparency” obligated the EIU and the ICANN staff to adhere to any of ICANN's Articles or Bylaws. ICANN's Post-Hearing Brief, ¶¶ 6, 7, and 8, at 4.

65. In response to the Panel’s question as to whether the Call for Expressions of Interest called for EIU to comply with other ICANN policies and procedures, ICANN stated that the Call for Expressions of Interest required applicants to “respect the principles of fairness, transparency and . . . non-discrimination.” ICANN’s Post-Hearing Submission, dated April 8, 2016, at ¶ 5.

66. ICANN asserts that California’s business judgment rule applies to ICANN and “requires deference to actions of a corporate board of directors so long as the board acted ‘upon reasonable investigation, in good faith and with regard for the best interests of’ the corporation, and ‘exercised discretion clearly within the scope of its authority.’” Post—Hearing Brief, ¶ 1, at 1, and *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4th 249, 265 (1999).

IV. DECLARATION OF PANEL

A. Applicable Principles of Law

67. The Panel declares that the principles of law applicable to the present proceeding are ICANN’s Articles of Incorporation, its Bylaws, the laws of the State of California, the Supplemental Rules, and the ICDR Rules of Arbitration. The Panel does not find that there are “relevant principles of international law and applicable international conventions” that would assist it in the task now before it.

68. The review undertaken by the Panel is based on an objective and independent standard, neither deferring to the views of the Board (or the

BGC), nor substituting its judgment for that of the Board. As the IRP in the *Vistaprint v. ICANN* Final Declaration stated (ICDR Case No. 01-14-0000-6505, 9 October 2015:

123. The Bylaws state the IRP Panel is 'charged' with 'comparing' contested actions of the board to the Articles and Bylaws and 'declaring' whether the Board has acted consistently with them. The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgement in taking a decision believed to be in the best interests of ICANN. In the IRP Panel's view this more detailed listing of a defined standard cannot be read to remove from the Panel's remit the fundamental task of comparing actions or inactions of the Board with the articles and Bylaws and declaring whether the Board has acted consistently or not. Instead, the defined standard provides a list of questions that can be asked, but not to the exclusion of other potential questions that might arise in a particular case as the Panel goes about its comparative work. For example, the particular circumstance may raise questions whether the Board acted in a transparent or non-discriminatory manner. In this regard the ICANN Board's discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board's conduct must be measured.

124. The Panel agrees with ICANN's statement that the Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board. However, this does not fundamentally alter the lens through which the Panel must view its comparative task. As *Vistaprint* has urged, the IRP is the only accountability mechanism by which ICANN holds itself accountable through independent third party review of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel's review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel's primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN's commitment to maintain and improve robust mechanisms for accountability, as required by ICANN's Affirmation of Commitments, Bylaws and core values.

125. The IRP Panel is aware that three other IRP Panels have considered this issue of standard of review and degree of deference to be accorded, if any, when assessing the conduct of ICANN's Board. All of the have reached the same conclusion: the

board's conduct is to be reviewed and appraised by the IRP Panel using an objective and independent standard without any presumption of correctness. (Footnote omitted).

69. In this regard, the Panel concludes that neither the California business judgment rule nor any other applicable provision of law or charter documents compels the Panel to defer to the BGC's decisions. The Bylaws expressly charge the Panel with the task of testing whether the Board has complied with the Articles and Bylaws (and, as agreed by ICANN, with the AGB). Bylaws, Article IV, Section 3.11, c provides that an "IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." Additionally, the business judgment rule does not in any event extend under California law to breaches of obligation as contrasted with its application to the exercise of discretionary board judgment within the scope of such an obligation.

70. An IRP Panel is tasked with declaring whether the ICANN Board has, by its action or inaction, acted inconsistently with the Articles and Bylaws. It is not asked to declare whether the applicant who sought reconsideration should have prevailed. Thus, the Dissent's focus on whether Dot Registry should have succeeded in its application for community priority is entirely misplaced. As counsel for ICANN explained:

Mr. LeVee: ***

. . . the singular purpose of an independent review proceeding, as confirmed time and again by other independent review panels, is to test whether the conduct of the board of ICANN and only of the

board of ICANN was consistent with ICANN's articles and with ICANN's bylaws.

Hearing Tr., p. 75, l. 24 – p. 76, l. 5.

B. Nature of Declaration

71. The question has arisen in some prior Declarations of IRP Panels whether Panel declarations are “binding” or “non-binding.” While this question is an interesting one, it is clear beyond cavil that this or any Panel’s decision on that question is not binding on any court of law that might be called upon to decide this issue.

72. In order of precedence from Bylaws to Applicant Guidebook, there have been statements in the documents which the Panel, or a reviewing court, might consider in its determination as to the finality of an IRP Panel Declaration.

73. As noted, above, Bylaws, Article IV, Section 3.11, c specifies that an “IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws. Bylaws, Article IV, Section 3.11, d provides that the IRP Panel may “recommend that the Board stay any action or decision . . . until such time as the Board reviews and acts upon the opinion of the IRP. Article IV, Section 3.21 provides that “[t]he declarations of the IRP Panel . . . are final and have precedential value.”

74. The ICDR Rules contains a provision that “[a]wards . . . shall be final and binding on the parties.” ICDR Rules, Art. 27(1).

75. The Applicant Guidebook requires that any applicant “AGREE NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION.” AGB, Module 6, Section 6 (all caps as in original).

Assuming *arguendo* this waiver would be found to be effective, it would not appear to reach the question of finality of a Panel Declaration.

76. One Panel has declared that its declaration is non-binding (*ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, at ¶134), while another has declared that its declaration is binding. *DCA Trust v. ICANN*, ICDR Case No. 50-2013-001083, Declaration on IRP Procedures, August 14, 2014, at ¶¶ 98, 100-107, 110-111, and 115.

77. Other panels have either expressed no opinion on this issue, or have found some portion of the declaration binding, and another portion non-binding. Further, the Panel understands that this issue may have arisen before one or more courts of law, but that no final decisions have yet been rendered.

78. Since any declaration we might make on this issue would not be binding on any reviewing court, the Panel does not purport to determine whether its declaration is binding or non-binding.

C. The Merits

1) The EIU, ICANN Staff, and the BGC Were Obligated to Follow ICANN's Articles and Bylaws in Performing Their Work in this Matter

79. Whether the BGC is evaluating a Reconsideration Request or the IRP Panel is reviewing a Reconsideration Determination, the standard to be applied is the same: Is the action taken consistent with the Articles, the Bylaws, and the AGB?

80. The BGC's determination that the standard for its evaluation is that a requestor must demonstrate that the ICANN staff and/or the EIU acted in contravention of established policy or procedure is without basis.

81. In response to the three reconsideration requests at issue, the BGC states that "ICANN has previously determined that the reconsideration process can be properly invoked for challenges to determinations rendered by third party service providers, such as EIU, where it can be stated that a Panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination." Reconsideration Determination of Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014, Section IV, at 7-8.

82. For this proposition, the BGC cites its own decision in the *Booking.com B.V. v. ICANN* Reconsideration Request Determination 13-5,

1 August 2013. In that case the BGC references a previous section of the Bylaws, that contains language currently in Section IV, 2, a, which states in pertinent part, that a requestor may show it has been “adversely affected by one or more staff actions or inactions that contradict ICANN policy(ies).”

83. Curiously, the BGC ignores Article IV, Section 1, entitled ‘PURPOSE,’ which sets out the purpose of the Accountability and Review provisions. Article IV, Section 1 applies to both reconsiderations by the BGC, as well as to the IRP process. It states: “In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article 1 of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions . . . are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III. . . .” (Emphasis added).

84. Indeed, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel, including from the EIU, ICANN insisted that the evaluation process employed by prospective community priority panels “respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.” As discussed, *infra*, at ¶¶ 101 – 106, all of these principles are embodied in ICANN’s Bylaws, and

are applicable to conduct of the BGC, ICANN staff and the authority exercised by the EIU pursuant to contractual delegation from ICANN.

85. ICANN further required all applicants for evaluative panels, including the EIU, to include in their applications a statement of the applicants' plan for ensuring that the above delineated principles are applied. ICANN Call for Expressions of Interest (Exhibit R-12), Section 5.5 at 6.

86. Subsequent to its engagement by ICANN, the EIU prepared the Community Priority Evaluation Guidelines, Version 2.0 (27 September 2013 (Exhibit R-1), under supervision from ICANN, incorporating the same principles. At page 22 of the Guidelines, it states: "The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest and non-discrimination. Consistency of approach in scoring Applications will be of particular importance." (Emphasis added). These CPE Guidelines "are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB."

87. Even if one were to accept the BGC's contention that it only need look to whether ICANN staff or the EIU violated "established policies and procedures," nowhere has ICANN argued that fairness, transparency, avoiding potential conflicts of interest, and non-discrimination are **not** established policies and procedures of ICANN. Indeed, given that all of these criteria are called out in provisions of ICANN's Articles and Bylaws

as quoted elsewhere in this declaration, it would be shocking if ICANN were to make such an argument.

88. Accordingly, the Panel majority declares that in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflicts of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB. These matters were clearly raised in Dot Registry's submissions. The Panel majority declares that the BGC failed to make the proper determinations as to compliance by ICANN staff and the EIU with the Articles, Bylaws, and AGB, let alone to undertake the requisite due diligence or to conduct itself with the transparency mandated by the Articles and Bylaws in the conduct of the reconsideration process.

89. The Panel majority further declares that the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations. ICANN cannot avoid its responsibilities by contracting with a third party to perform ICANN's obligations. It is the responsibility of the BGC in its reconsideration to insure such compliance. Indeed, the CPEs themselves were issued on the letterhead of ICANN, not that of the EIU, and Module 5 of the Applicant Guidebook states that "ICANN's Board of Directors has

ultimate responsibility for the New gTLD Program.” AGB, Module 5, at 5-4.

90. Moreover, ICANN tacitly acknowledged as much by submitting the Declaration of EIU Contact Information Redacted

of the Economist Intelligence Unit, the person who negotiated the services agreement with ICANN. EIU Contact Information Redacted also served as Project Director for EIU’s work on behalf of ICANN.

91. In his declaration, EIU Contact Information Redacted states that the EIU is “not a gTLD decision-maker, but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible of all legal matters pertaining to the application process.”

92. Further, as noted above in paragraph 8 of EIU Contact Information Redacted Declaration, Section 10 of the EIU SoW provides that “ICANN will be free in its complete discretion to decide whether or not to follow [EIU’s] determination,” that “ICANN will be solely responsible to applicants . . . for the decisions it decides to issue,” and that “each decision must be issued by ICANN in its own name only.”

93. Moreover, EIU did not act on its own in performing the CPEs that are the subject of this proceeding. ICANN staff was intimately involved in the process. The ICANN staff supplied continuing and important input on the CPE reports, See, documents produced to the Panel in response to the Panel’s Document Production Order, ICANN _DR-00461-466. DR00182-

194, DR 00261—267, DR00228-234, DR00349-355, DR-00547-553, DR00467- 473 and DR00116-122.

94. One example is particularly instructive. In its Request for Reconsideration for *.inc*, Dot Registry complained that “the Panel repeatedly relies on its ‘research.’ For example, the Panel states that its decision not to award any points to the **.INC** Community Application for 1-A Delineation is based on ‘[r]esearch [that] showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an *.inc*’ and also that ‘[b]ased on the Panel’s research there is no evidence of incs from different sectors acting as a community as defined by the Applicant Guidebook.” “Thus, the Panel’s ‘research’ was a key factor in its decision not to award at least four (but possibly more) points to the *.inc* Community Application. However, despite the significance of this ‘research,’ the Panel never cites any sources or gives any information about its substance or the methods or scope of the ‘research.’” Dot Registry Request for Reconsideration re *.inc*, § 8, B at 5-6.

95. The BGC made short shrift of this argument. “The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to ‘cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” (Citations omitted.) “As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to ‘perform independent

research, if deemed necessary to reach informed scoring decisions.”

(Citations omitted). “The Requestor cites no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope or methods of its independent research.” Reconsideration Response, § V.B at 11.

96. A review of the documents produced and the ongoing exchange between the EIU and the ICANN staff reveal the origin of the “research” language found in the final version of the CPEs.

97. The original draft CPEs prepared by the EIU, dated 19 May 2014 at page 2, paragraph beginning “However . . .” contain no reference to any “research.” See DR00229, 00262, and 00548.

98. The first references to the use of “research” comes from ICANN staff. “Can we add a bit more to express the research and reasoning that went into this statement? . . .Possibly something like, ‘based on the Panel’s research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00468. “While I agree, I’d like to see some substantiation, something like . . . ‘based on our research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00548.

99. The CPEs as issued read in pertinent part at page 2, in paragraph beginning “However . . .,” “Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLC. Based on the Panel’s research, there

is no evidence of LLCs from different sectors acting as a community as defined in the Applicant Guidebook.”

100. Counsel for ICANN at the hearing acknowledged that ICANN staff is bound to conduct itself in accordance with ICANN's Articles and Bylaws.

Panelist Donahey: So when you hear the word “ICANN” or see the word “ICANN in the bylaws or articles you believe that that is a , is a reference to ICANN’s board and its constituent bodies?

Mr. LeVee: Including its staff, yes

Panelist Kantor: My chair anticipated a question I was going to ask, but he combined it with a question about constituent bodies. I believe I heard, Mr. LeVee, that you said that while the CPE panel is not bound by the provisions I identified, ICANN staff is. Is that correct?

[Mr. LeVee:] Yes. ICANN views its staff as being obligated to conform to the various article and bylaw provisions that you cite.

Hearing Tr., p. 197, l. 20 – p. 198, l.1; p. 199, l. 17 - p. 200, l. 2 (emphasis added).

101. The facts that ICANN staff was intimately involved in the production of the CPE and that ICANN staff was obligated to follow the Articles and Bylaws, further support the Panel majority's finding that ICANN staff and the EIU were obligated to comply with ICANN's Articles and Bylaws. Moreover, when the issues were posed in the Reconsideration Requests, in the course of determining whether or not ICANN staff and the EIU had acted in compliance with the Articles, Bylaws, and the AGB, the BGC was obligated under the Bylaws to exercise due diligence and care in having a reasonable amount of facts in front of them and exercise independent

judgment in taking the decision believed to be in the best interests of ICANN.

2) The Relevant Provisions of the Articles and Bylaws and Their Application

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations. Articles of Incorporation, Art. 4

In performing its mission, the following core values should guide the decisions and actions of ICANN:

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values. Bylaws, Art. I, § 2. CORE VALUES.

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition. Bylaws, Art. II, § 3. Non-Discriminatory Treatment.

The Board shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. Bylaws, Art. III, §1.

In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of these bylaws. Art. IV, § 1.

103. In addition, the BGC failed several transparency obligations. As well as failing to enforce the transparency obligations in the Articles, Bylaws, and AGB with respect to the research purportedly undertaken by the EIU, the BGC is also subject to certain requirements that it make public the staff work on which it relies. Bylaws, Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the

matter, which comments shall be made publicly available on the Website.”
Bylaws, Art. IV.2.14 provides that “The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.”

104. The Panel is tasked with determining whether the ICANN Board acted consistently with the provisions of the Articles and Bylaws. Bylaws Article IV, Section 3.11, c states that “[t]he IRP Panel shall have the authority to declare whether an action of inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.” As accepted by ICANN, the Panel is also tasked with determining whether the ICANN Board acted consistently with the AGB. Moreover, the Bylaws provide:

Requests for [] independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision believed to be in the best interests of the company?

Bylaws. Art. IV, §3.4.

ICANN's counsel stated at the hearing that the concept of inaction or the omission to act is embraced within "actions of the Board."

Panelist Kantor: At an earlier stage in these proceedings, the panel asked some questions, and we were advised that action here includes both actions and omissions. Does that apply to conduct of ICANN staff or only to conduct of the ICANN Board?

Mr. LeVee: Only to Board.

Hearing Tr., p. 192, l. 25 – p. 193, l. 6.

105. Thus, ICANN confirmed that omissions by the Board to comply with its duties under the Articles and Bylaws constituted breaches of the Articles and Bylaws for purposes of an IRP. See, *also*, ICANN's response to Dot Registry's Submission, ¶ 10 (10 August 2015) ("the only way in which conduct of ICANN staff or third parties is reviewable is to the extent that the board allegedly breached ICANN's Articles or Bylaws in acting (or failing to act) with respect to that conduct.") and Letter of Jeffrey A. LeVee, Jones, Day LLP, to the Panel, October 12, 2015, at 6 ("ICANN agrees with the statements in Paragraph 53 of the Booking.com IRP Panel's Declaration that . . . the term "action" as used in Article IV, Section 3 of ICANN's Bylaws encompasses inactions by the ICANN Board")

106. As discussed, *supra*, at ¶¶ 47-52, Dot Registry contended that the CPE lacked transparency, such as the subject of the research performed, the sources referenced in the performance of the research, the manner in which the research was performed, the results of the research, whether the researchers encountered sources that took issue with the results of

the research, etc. Thus, Dot Registry adequately alleged a breach by ICANN staff and the EIU of the transparency obligations found in the Articles, Bylaws, and AGB.

107. Dot Registry further asserted that it was treated unfairly in that the scoring involved double counting, and that the approach to scoring other applications was inconsistent with that used in scoring its applications. *Id.*

108. Dot Registry alleged that it was subject to different standards than were used to evaluate other Community Applications which underwent CPE, and that the standards applied to it were discriminatory. *Id.*

109. Yet, the BGC failed to address any of these assertions, other than to recite that Dot Registry had failed to identify any “established policy or procedure” which had been violated.

110. Article IV, Section 3.4 of the Bylaws calls upon this Panel to determine whether the BGC, in making its Reconsideration Decision “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision believed to be in the best interests of the company.”

Consequently, the Panel must consider whether, in the face of Dot Registry’s Reconsideration Requests, the BGC employed the requisite due diligence and independent judgment in determining whether or not ICANN staff and the EIU complied with Article, Bylaw, and AGB obligations such as transparency and non-discrimination.

111. Indeed, the BGC admittedly did not examine whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations. It failed to make any reasonable investigation or to make certain that it had acted with due diligence and care to be sure that it had a reasonable amount of facts before it.

112. An exchange between Panelist Kantor and counsel for ICANN underscores the cavalier treatment which the BGC accorded to the Dot Registry Requests for Reconsideration.

Panelist Kantor: Mr. LeVee, in those minutes or in the determinations on the reconsideration requests, is there evidence that the Board considered whether or not the CPE panel report or any conduct of the staff complied with the various provisions of the bylaws to which I referred, core values, inequity, nondiscriminatory treatment, or to the maximum extent open and transparent.

Mr. LeVee: I doubt it. Not that I'm aware of. As I said, the Board Governance Committee has not taken the position that the EIU or any other outside vendor is obligated to conform to the bylaws in this respect. So I doubt they would have looked at that subject.

Hearing Tr., p. 221, l. 17 – p. 222, l. 8.

113. Notably, the Panel question above inquired as to whether the Board considered *either* the conduct of the CPE panel (*i.e.*, the EIU) or the conduct of ICANN staff. Counsel's response that he doubted whether consideration was given relied solely upon the BGC's position that *the EIU* was not obligated to comply with the Bylaws. Regardless of whether that position is correct, ICANN acknowledges that the conduct of *ICANN staff* (as described *supra*, at ¶¶89-101) is bound by the Articles, Bylaws, and AGB. ICANN's argument fails to recognize that in any event the conduct

of ICANN staff is properly the subject of review by the BGC when raised in a Request for Reconsideration, yet no such review of the allegedly discriminatory and non-transparent conduct of ICANN staff was undertaken by the BGC.

114. One of the questions on which an IRP Panel is asked to “focus” is whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts” in front of it. In making this determination, the Panel must look to the allegations in order to determine what facts would have assisted the BGC in making its determination.

115. As discussed, *supra*, at ¶¶ 51 and 94 - 95, the requestor argued that the EIU repeatedly referred to “research” it had performed in making its assessment, without disclosing the nature of the research, the source(s) to which it referred, the methods used, or the information obtained. This is effectively an allegation of lack of transparency.

116. Transparency was yet another of the principles which an applicant for the position of Community Priority Evaluator, such as EIU, was required to respect. Indeed, an applicant for the position was required to submit a plan to ensure that transparency would be respected in the evaluation process. *See, generally, supra*, ¶¶ 17 – 18.

117. Transparency is one of the essential principles in ICANN’s creation documents, and its name reverberates through its Articles and Bylaws.

118. In ICANN's Articles of Incorporation, Article 4 refers to "open and transparent processes." Among the Core Values listed in its Bylaws intended to "guide the decisions and actions of ICANN" is the "employ[ment of] open and transparent policy development mechanisms." Bylaws, Art. I, § 2.7.

119. Indeed, ICANN devotes an entire article in its bylaws to the subject. Article III of the Bylaws is entitled, "TRANSPARENCY." It states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." Bylaws, Art. III, § 1.

120. Moreover, in the very article that establishes the Reconsideration process and the Independent Review Process, it states in Section 1, entitled "PURPOSE:"

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III. Emphasis added.

121. By their very terms, these obligations govern conduct not only by the Board, but by "ICANN," which necessarily includes its staff.

122. It seems fair to say that transparency is one of the most important of ICANN's core values binding on both the ICANN Board and the ICANN

staff, and one that its contractor, EIU, had pledged to follow in its work for ICANN. The BGC had an obligation to determine whether ICANN staff and the EIU complied with these obligations. An IRP Panel is charged with determining whether the Board, which includes the BGC, complied with its obligations under the Articles and the Bylaws. The failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those obligations is itself a failure by the Board to comply with its obligations under the Articles and Bylaws.

123. Has the BGC been given the tools necessary to gather this information as Part of the Reconsideration process? The section on reconsideration (Bylaws, Art. IV, Section 2) provides it with those tools. It gives the BGC the power to “conduct whatever factual investigation is deemed appropriate” and to “request additional written submissions from the affected party, or from other parties.” Bylaws, Art. IV, § 2.3, d and e. The BGC is entitled to “ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the website.” Bylaws, Art. IV, §2.11. The BGC is also empowered to “request information relevant to the request from third parties, and any information collected from third parties shall be provided to the requestor [for reconsideration].” Bylaws, Art. IV, § 2.13.

124. The requestor for reconsideration in this case also complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to

other successful applicants. If this were true, the EIU would not only have failed to respect the principles of fairness and non-discrimination it had assured ICANN that it would respect, it would not have lived up to its own assurance to all applicants for CPEs in its CPE Guidelines (Exhibit R-1) that “consistency of approach in scoring applications will be of particular importance.” *See, supra*, ¶¶ 18 and 83.

125. The BGC need only have compared what the ICANN staff and EIU did with respect to the CPEs at issue to what they did with respect to the successful CPEs to determine whether the ICANN staff and the EIU treated the requestor in a fair and non-discriminatory manner. The facts needed were more than reasonably at hand. Yet the BGC chose not to test Dot Registry’s allegations by reviewing those facts. It cannot be said that the BGC exercised due diligence and care in having a reasonable amount of facts in front of it.

126. The Panel is called upon by Bylaws Art. IV.3.4 to focus on whether the Board, in denying Dot Registry’s Reconsideration Requests, exercised due diligence and care in having a reasonable amount of facts in front of it and exercised independent judgment in taking decisions believed to be in the best interest of ICANN. The Panel has considered above whether the BGC complied with its “due diligence” duty. Here the Panel considers whether the BGC complied with its “independent judgment” duty.

127. The Panel has no doubt that the BGC believes its denials of the Dot Registry Reconsideration Requests were in the best interests of ICANN.

However, the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment in taking those decisions. The only documentary evidence in the record in that regard is the text of the Reconsideration Decisions themselves and the minutes of the BGC meeting at which those decisions were taken. No witness statements or testimony with respect to those decisions were presented by ICANN, the only party to the proceeding who could conceivably be in possession of such evidence.

128. The silence in the evidentiary record, and the apparent use by ICANN of the attorney-client privilege and the litigation work-product privilege to shield staff work from disclosure to the Panel, raise serious questions in the minds of the majority of the Panel members about the BGC's compliance with mandatory obligations in the Bylaws to make public the ICANN staff work on which it relies in reaching decisions about Reconsideration Requests.

129. Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website."

130. Bylaws Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party."

131. Elsewhere in the Bylaws and the Articles of Incorporation, as discussed above, ICANN undertakes general duties of transparency and accountability that are also implicated by ICANN's decision to shield relevant staff work from public disclosure by structuring the staff work to benefit from legal privilege.

132. The documents disclosed by ICANN to the Panel pursuant to the Panel's document orders do not include any documents sent from BGC members to ICANN staff or sent from any Board members to any other Board members. The privilege log submitted by ICANN in these proceedings does not list any documents either sent from Board members to any ICANN staff or sent from any Board member to any other Board member, only a small number of documents sent from ICANN staff to the BGC. The only documents of the BGC that were disclosed to the Panel are the denials of the relevant Reconsideration Request themselves, the agendas for the relevant BGC meetings found on the ICANN website, and the Minutes of those meetings also found on the ICANN website.

133. No documents from ICANN staff to the BGC have been disclosed to the Panel. The privilege log lists one document, dated July 18, 2014, which appears to be the ICANN in-house legal counsel submission to the BGC of the "board package" for the July 24, 2014 BGC meeting at which Dot Registry's Reconsideration Requests were considered. The Panel infers that package included an agenda for the meeting, the CPEs themselves and draft denials prepared by ICANN staff, consistent with a

statement to that effect by ICANN counsel at the hearing. As explained by ICANN counsel at the hearing, that package also apparently included ICANN staff recommendations regarding the CPEs and the Reconsideration Requests, prepared by ICANN legal counsel. The Panel presumes the “package” also included Dot Registry’s Reconsideration Requests, setting out Dot Registry’s views arguing for reconsideration.

134. There is nothing in either the document production record or the privilege log to indicate that the denials drafted by ICANN staff were modified in any manner after presentation by staff to the BGC. Rather, from that record it would appear that the denials were approved by the BGC without change. It is of course possible that changes were in fact made to the draft denials involving ICANN legal counsel, but not produced to the Panel. However, nothing in the privilege log indicates that to be the case.

135. The privilege log submitted by ICANN in this proceeding also lists one other document dated August 15, 2014, which appears to be the “board package” for the August 22, 2014 BGC meeting at which the BGC *inter alia* approved the Minutes for the July 24 BGC meeting. Since the agenda and the Minutes for that August 22 meeting, as available on the ICANN website, do not show any reference to the gTLDs at issue in this IRP, it would appear that the material in the August 15 privileged document related to this dispute is only the draft of the Minutes for the July 24 BGC meeting, which Minutes were duly approved at the August 22 BGC

meeting according to the Minutes for that latter meeting. Thus, the August 15 privileged document adds little to assist the Panel in deciding whether the Board exercised the requisite diligence, due care and independent judgment.

136. Every other document listed on the privilege log is an internal ICANN staff document, not a BGC document.

137. From this disclosure and from statements by ICANN counsel at the hearing, the Panel considers that no documents were submitted to the BGC for the July 24, 2014 BGC meeting other than the agenda for the meeting, the CPEs and Dot Registry's Reconsideration Requests themselves, ICANN staff's draft denials of those Reconsideration Requests, and explanatory recommendations to the BGC from ICANN staff in support of the denials. Moreover, it appears the BGC itself and its members generated no documents except the denials themselves and the related BGC Minutes. ICANN asserted privilege for all materials sent by ICANN staff to the BGC for the BGC meeting on the Reconsideration Requests.

138. The production by ICANN of BGC documents was an issue raised expressly by the unanimous Panel in Paragraph 2 of Procedural Order No. 4, issued May 27, 2015:

Among the documents produced by ICANN in response to the Panel's document production request, the Panel expected to find documents that indicated that the ICANN Board had considered the recommendations made by the EIU concerning Claimant's Community Priority requests, that the ICANN board discussed those recommendations in a meeting of the Board or in a meeting of one or more of its committees or subcommittees

or by its staff under the ICANN Board's direction, the details of such discussions, including notes of the participants thereto, and/or that the ICANN Board itself acted on the EIU recommendation by formal vote or otherwise; or if none of the above, documents indicating that the ICANN board is of the belief that the recommendations of the EIU are binding. If no such documents exist, the Panel requests that ICANN's counsel furnish an attestation to that effect.

139. By letter dated May 29, 2015, counsel for ICANN made the requested confirmation, referring to the Reconsideration Decisions and appending the BGC meeting minutes for the non-privileged record.

140. It is of course entirely possible that oral conversations between staff and members of the BGC, and among members of the BGC, occurred in connection with the July 24 BGC meeting where the BGC determined to deny the reconsideration requests. No ICANN staff or Board members presented a witness statement in this proceeding, however. Also, there is no documentary evidence of such a hypothetical discussion, privileged or unprivileged. Thus apart from *pro forma* corporate minutes of the BGC meeting, no evidence at all exists to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff.

141. Counsel for ICANN conceded at the hearing that ICANN legal counsel supplied the BGC with recommendations, but asserted the BGC does not rely on those recommendations.

2 *** I
3 will tell you that the Board Governance
4 Committee is aided by the Office of General
5 Counsel, which also consults with Board
6 staff.

7 The Office of General Counsel does
8 submit recommendations to the Board
9 Governance Committee, and of course, those
10 documents are privileged. For that reason,
11 we did not turn them over. We don't rely on
12 them in issuing the Board Governance
13 Committee reports, we don't cite them, and we
14 don't produce them because they are prepared
15 by counsel.

Hearing Tr., p. 94, l. 2 – 15.

For several reasons, the assertion that the BGC does not rely on ICANN staff recommendations, and thus is not obligated to make those staff views public pursuant to Bylaws Arts. I.2.7 and I.2.10, is simply not credible.

142. First, according to Bylaws Art. IV.2.14, the BGC is to act on Reconsideration Requests “on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.” Thus, the Bylaws themselves expect the BGC to look to the public written record, including staff views, in making its decisions.

143. Moreover, according to the documents produced by ICANN in this proceeding and the ICANN privilege log, the BGC apparently had no substantive information before it other than the CPEs, the recommendations of ICANN staff regarding the CPEs, including the recommendations of the Office of General Counsel, and the contrary arguments of Dot Registry contained in the Reconsideration Requests. The Minutes for the July 24 BGC meeting state succinctly that “Staff

briefed the BGC regarding Dot Registry, LLC's ("Requester's") request seeking reconsideration of the Community Priority Evaluation ("CPE") Panels' Reports, and ICANN's acceptance of those Reports."

144. Counsel for ICANN made similar points at the hearing.

12 MR. LEVEE: I can.

13 So the Board Governance Committee
14 had the EIU, the three EIU reports, and it
15 had the lengthy challenge submitted by Dot
16 Registry regarding those reports. As I've
17 said before, the Board Governance Committee
18 does not go out and obtain separate
19 substantive advice, because the nature of its
20 review is not a substantive review.
21 So I don't know what else it would
22 need, but my understanding is that apart from
23 privileged communication, what it had before
24 it was the materials that I've just
25 referenced, EIU's reports and Dot Registry's
1 reconsideration requests, which had attached
2 to it a number of exhibits.

3 MR. KANTOR: So in evaluating that
4 request and the CPE panel report, would it be
5 correct to say that the diligence and care
6 the Board Governance Committee took in having
7 a reasonable amount of facts in front of it,
8 were those two submissions an [sic] inquiry of
9 staff which is privileged?

10 MR. LEVEE: Yes.

11 MR. KANTOR: Subclause C: How did
12 the Board Governance Committee go about
13 exercising its independent judgment in taking
14 the decisions it took on the reconsideration
15 requests? Again, with as much specificity as
16 you can reasonably undertake.

17 MR. LEVEE: The primary thing I
18 obviously have to refer you to is the report,
19 the 23-page report of the Board Governance
20 Committee. I, I don't have other materials
21 that I have tendered to the panel to say that
22 the Board members exercised their independent
23 judgment, beyond the fact that they wrote a

24 document which goes pretty much point by
25 point through the complaints that Dot
1 Registry asserted, evaluated each of those
2 points independently, and reached the
3 conclusions that they reached.
4 MR. DONAHEY: Were there drafts of
5 that 23-page report?
6 MR. LEVEE: Yes.
7 MR. DONAHEY: And were those
8 produced?
9 MR. LEVEE: They were not.
10 MR. DONAHEY: And was that because
11 they were privileged?
12 MR. LEVEE: Yes.
13 MR. KANTOR: Mr. LeVee, what exists
14 in the record before this panel to show that
15 the Board Governance Committee exercised its
16 judgment independent from that of ICANN's
17 staff, including office [of] general counsel?
18 MR. LEVEE: The record is simply
19 that the six voting members of the Board
20 Governance Committee authorized this
21 particular report after discussing the
22 report. I cannot give you a length of time
23 that it was discussed. I don't have a record
24 of that, but I can tell you, as reflected in
25 many other situations where similar questions
1 have been asked, that the voting members of
2 the Board take these decisions seriously.
3 They are then reflected in minutes of the
4 Board Governance Committee which are
5 published on ICANN's website.
6 Candidly, I'm not sure what else I
7 could provide.

Hearing Tr., at pp. 217-219.

145. The BGC thus had before it substantively only the views of the EIU
accepted by ICANN staff (the CPEs), the "reports" (i.e., the
reconsideration decisions drafted by staff), the staff's own briefing, and the
contrary views of Dot Registry. As the Reconsideration Decisions
themselves evidence, the BGC certainly did not rely on Dot Registry's

arguments. The BGC therefore simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff.

146. The Minutes of the July 24, 2014 BGC meeting state that “After discussion and consideration of the Request[s],” the BGC denied the Reconsideration Requests. Similarly, counsel for ICANN argued at the hearing that “the six voting members of the Board Governance Committee authorized this particular report after discussing the report. *** I can tell you, as reflected in many other situations where similar questions have been asked, that the voting members of the Board take these decisions seriously.”

147. Arguments by counsel are not, however, evidence. ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes. The Panel is well aware that such a *pro forma* statement is regularly included in virtually all corporate minutes recording decisions by board of director committees, regardless of whether or not the discussion was more than rubber-stamping of management decisions.

148. If there is any evidence regarding the extent to which the BGC did in fact exercise independent judgment in denying these Reconsideration Request, rather than relying exclusively on the recommendations of

ICANN staff without exercising diligence, due care and independent judgment, that evidence is shielded by ICANN's invocation of privileges in this matter and ICANN's determination under the Bylaws to avoid witness testimony in IRPs.

149. ICANN is, of course, free to assert attorney-client and litigation work-product privileges in this proceeding, just as it is free to waive those privileges. The ICANN Board is not free, however, to disregard mandatory obligations under the Bylaws. As noted above, Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website." (emphasis added). Bylaws, Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party" (emphasis added). The transparency commitments included in the Core Values found in Bylaws, Art. I, §2 are part of a balancing process. However, the obligations in the Bylaws to make that staff work public are compulsory, not optional, and do not provide for any balancing process.

150. None of the ICANN staff work supporting denial of Dot Registry's Reconsideration Requests was made public, even though it is beyond doubt that the BGC obtained and relied upon information and views submitted by ICANN staff (passed through ICANN legal counsel and thus

subject to the shield of privilege) in reaching its conclusions. By exercising its litigation privileges, though, the BGC has put itself in a position to breach the obligatory requirements of Bylaws Art. IV.2.11 and Art. IV.2.14 to make that staff work public. ICANN has presented no real evidence to this Panel that the BGC exercised independent judgment in reaching its decisions to deny the Reconsideration Requests, rather than relying entirely on recommendations of ICANN staff. Thus, the Panel is left highly uncertain as to whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision.” And, by shielding from public disclosure all real evidence of an independent deliberative process at the BGC (other than the *pro forma* meeting minutes), the BGC has put itself in contravention of Bylaws IV.2.11 and IV.2.14 requiring that ICANN staff work on which it relies be made public.\

D. Conclusion

151. In summary, the Panel majority declares that ICANN failed to apply the proper standards in the reconsiderations at issue, and that the actions and inactions of the Board were inconsistent with ICANN’s Articles of Incorporation and Bylaws.

152. The Panel majority emphasizes that, in reaching these conclusions, the Panel is not assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB. There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority's approach. Rather the Panel majority has concluded that, in making its reconsideration decisions, the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publically available the ICANN staff work on which the BGC relied). The Panel majority further concludes that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions.

153. The Panel majority declines to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority. The IRP Panel is tasked specifically "with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws." Bylaws, Art. IV, §3.4. This is what the Panel has done.

154. Pursuant to the ICANN Bylaws, Art. IV, Section 3.18, the Panel declares that Dot Registry is the prevailing party. The administrative fees and expenses of the International Centre for Dispute Resolution (“ICDR”) totaling \$4,600.00 and the compensation and expenses for the Panelists totaling \$461,388.70 shall be borne entirely by ICANN. Therefore, ICANN shall pay to Dot Registry, LLC \$235,294.37 representing said fees, expenses and compensation previously incurred by Dot Registry, LLC upon demonstration that these incurred costs have been paid in full.

155. The Panel retains jurisdiction for fifteen days from the issuance of this Declaration solely for the purpose of considering any party’s request to keep certain information confidential, pursuant to Bylaws, Article IV, Section 3.20. If any such request is made and has not been acted upon prior to the expiration of the fifteen-day period set out above, the request will be deemed to have been denied, and the Panel’s jurisdiction will terminate.

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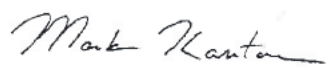
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156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2016

For the Panel Majority

A handwritten signature in cursive script that reads "Mark Kantor". The signature is written in black ink and is positioned above a horizontal line.

Mark Kantor

M. Scott Donahey, Chair

156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2018

For the Panel Majority

Mark Kantor

A handwritten signature in dark ink, appearing to read "M. Scott Donahey", written over a horizontal line.

M. Scott Donahey, Chair

DISSENTING OPINION OF JUDGE CHARLES N. BROWER

1. With the greatest of regard for my two eminent colleagues, I respectfully dissent from their Declaration (“the Declaration”). In my view, Dot Registry LLC’s (“Dot Registry”) Community Priority Evaluation (“CPE”) Applications to operate three generic top level domains (“gTLDs”) (.INC, .LLC, and .LLP) were properly denied, as were Dot Registry’s Reconsideration Requests to the Board Governance Committee (“BGC”) of the Internet Corporation for Assigned Names and Numbers (“ICANN”). Dot Registry’s requests for relief before this Independent Review Proceeding (“IRP”) Panel should have been rejected in their entirety.
2. I offer four preliminary observations:
3. **First**, the Declaration commits a fundamental error by disregarding the weakness of Dot Registry’s underlying CPE Applications. The applications never had a chance of succeeding. The “communities” proposed by Dot Registry for three types of business entities (INCs, LLCs, and LLPs) do not demonstrate the characteristics of “communities” under any definition. They certainly do not satisfy the standards set forth in ICANN’s Applicant Guidebook (“AGB”), which require applicants to prove “awareness and recognition of [being] a community,” in other words “more . . . cohesion than a mere commonality of interest,”¹ because the businesses in question function in unrelated industries and share nothing in common whatsoever other than their corporate form. As ICANN stated:

*[A] plumbing business that operated as an LLC would not necessarily feel itself to be part of a “community” with a bookstore, law firm, or children’s daycare center simply based on the fact that all four entities happened to organize themselves as LLCs (as opposed to corporations, partnerships, and so forth). Although each entity elected to form as an LLC, the entities literally share nothing else in common.*²
4. That foundational flaw in Dot Registry’s underlying CPE Applications alone precluded Dot Registry from succeeding at the CPE stage because failure to prove Criterion #1, “Community Establishment,” deprives an applicant of four points, automatically disqualifying the applicant from reaching the minimum passing score of 14 out of a possible 16 points. Therefore while I do not agree that any violation of ICANN’s Articles of Incorporation (“Articles”) or ICANN’s Bylaws (“Bylaws”) occurred in this case, even if it had, this Panel should have concluded that those violations amounted to nothing more than

¹ AGB § 4.2.3 (“‘Community’ - Usage of the expression ‘community’ has evolved considerably from its Latin origin – ‘*communitas*’ meaning ‘fellowship’ – while still implying more of cohesion than a mere commonality of interest. Notably, as ‘community’ is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.”).

² ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2016, ¶ 6.

harmless error.³

5. Moreover, the BGC in entertaining a Reconsideration Request is entitled to take its views of the underlying CPE into account in deciding whether or not to exercise its discretion under the Bylaws Article IV.3.d to “conduct whatever factual investigation is deemed appropriate,” Article IV.3.e to “request additional written submissions . . . from other parties,” Article IV.8.11 or to “ask the ICANN staff for its views on the matter.” As ICANN stated in the hearing of this case:

*The fact that you may have your own personal views as to whether the EIU got it right or got it wrong may or may not inform you, your thinking in terms of whether the Board Governance Committee, in assessing the EIU's reports from a procedural standpoint, did so correctly, in essence.*⁴

Hence the BGC’s approach to a Reconsideration Request is in no way necessarily divorced from such views as it may have regarding the underlying subject of the Request.

6. ***Second***, the Declaration purports to limit its analysis to action or inaction of the ICANN Board, but in fact it also examines the application of ICANN’s Articles and Bylaws to ICANN staff and to third-party vendor, the Economic Intelligence Unit (“EIU”). ICANN has conceded that its staff members are subject to its Articles and Bylaws,⁵ but ICANN clarified that staff conduct is not reviewable in an IRP,⁶ and ICANN has explained that the EIU is neither bound by the Articles or Bylaws, nor may EIU conduct be reviewed in an IRP.⁷ The Declaration suggests that it “is *not* assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB.”⁸ The Declaration, however, repeatedly concludes that ICANN staff and the EIU are bound by the Articles and Bylaws.⁹ Despite the Declaration’s statement to the contrary,¹⁰ I cannot

³ I have no quarrel with the Declaration insofar as it recognizes that this Panel should not “substitute our judgment for the judgment of the [CPE Panels] as to whether Dot Registry is entitled to Community priority.” Declaration ¶ 153. However, I disagree with the Declaration’s statement that “the Dissent’s focus on whether Dot Registry should have succeeded in its action is entirely misplaced.” Declaration ¶ 70. ICANN stated that it expects the IRP Panel might consider the merits of Dot Registry’s underlying CPE Applications when resolving this dispute, *See* Hearing Transcript dated 29 Mar. 2016, at 254:14–20, and Dot Registry expressly asked the Panel to rule on its CPE Applications. *See* Claimant’s Post-Hearing Brief dated 8 Apr. 2016, ¶ 21 (“As Dot Registry considers it is the Panel’s role to independently resolve this dispute, it affirmatively requests that the Panel not recommend a new EIU evaluation. Instead, Dot Registry requests that the Panel conclusively decide—based on the evidence presented in the final version of the Flynn expert report, including the annexes detailing extensive independent research—that Dot Registry’s CPE applications are entitled to community priority status and recommend that the Board grant the applications that status.”).

⁴ Hearing Transcript dated 29 Mar. 2016, at 254:14–20.

⁵ *See* Hearing Transcript dated 29 Mar. 2016, at 196–97, 199–200, 209.

⁶ *See* Hearing Transcript dated 29 Mar. 2016, at 187–88, 200.

⁷ *See* ICANN’s Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 5–8; ICANN’s Response to Claimant Dot Registry’s Additional Submission dated 10 Aug. 2015, ¶ 9.

⁸ Declaration ¶ 152. (Emphasis added.)

⁹ *See* Declaration, Heading IV.C(1) and paragraphs 84–89, 100–01, 106, 110, 122, 124.

¹⁰ *See* Declaration ¶ 152 (“There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority’s approach.”).

help but think that the implicit foundation for the Declaration's entire analysis is that ICANN staff and the EIU committed violations of the Articles and Bylaws which, in turn, should have triggered a more vigorous review process by the ICANN Board in response to Dot Registry's Reconsideration Request.

7. In my view, my co-Panelists have disregarded the express scope of their review as circumscribed by Article IV.3.4 of ICANN's Bylaws, which focuses solely on the ICANN Board and not on ICANN staff or the EIU:

Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. *did the Board act without conflict of interest in taking its decision?*
- b. *did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

(Emphasis added.)

8. ***Third***, in concluding that "the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws,"¹¹ the Declaration has effectively rewritten ICANN's governing documents and unreasonably elevated the organization's obligations to act transparently and to exercise due diligence and care above any other competing principle or policy. Tensions exist among ICANN's "Core Values." Article I.2 of ICANN's Bylaws states: "Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values."
9. The Declaration recognizes that the "transparency commitments included in the Core Values found in Bylaws, Art. I, § 2 are part of a balancing process," but it goes on to state, in the context of discussing communications over which ICANN claimed legal privilege, that "the obligations in the Bylaws to make [] staff work public are compulsory, not optional, and do not provide for any balancing process."¹² This analysis is misguided. To begin with, Bylaws Article I.2 ("Core Values") concludes thus:

These core values are deliberately expressed in very general terms, so that

¹¹ Declaration ¶ 151.

¹² See Declaration ¶¶ 149–50.

*they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, **situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible.** Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values. (Emphasis added.)*

Moreover, the cited provisions are in no way “compulsory.” Article IV.2.11 states that “the [BCG] **may** ask the ICANN staff for its views on the matter, which comments shall be made available on the Website [of ICANN],” and Article IV.2.14 provides that “The [BCG] shall act on a Reconsideration Request on the basis of the public written record, including information submitted by . . . the ICANN staff . . .” (Emphasis added.) Thus if the BGC chooses not to “ask the ICANN staff for its views on the matter,” no such views become part of the “public written record.” The BGC is not mandated to inquire of the ICANN staff, and there is no indication in the record of the proceedings before the BGC, or in the present proceeding, that the BGC exercised its discretion in that regard. All four of the items listed on ICANN’s privilege log addressed to the BGC that the Declaration cites were originated by attorneys. Furthermore, the Declaration itself in paragraph 150 records that “it is beyond doubt that the BGC obtained and relied upon information and views **submitted** by ICANN staff,” not solicited by the BGC. (Emphasis added.)

10. The Declaration otherwise disregards any “balance among competing values” and focuses myopically on transparency and due diligence while ignoring the fact that ICANN may have been promoting competing values when its Board denied Dot Registry’s Reconsideration Requests. For example:

- ICANN was “[p]reserving and enhancing [its] operational stability [and] reliability” by denying meritless Reconsideration Requests. **(Core Value 1)**
- ICANN was “delegating coordination functions” to relevant third-party contractors (the EIU) and also to ICANN staff in assisting with the Determination on the Reconsideration Requests. **(Core Value 3)**
- ICANN was “[i]ntroducing and promoting competition in the registration of domain names” because there are collectively 21 other competing applications for the three gTLDs in question. **(Core Value 6)**
- ICANN was “[a]cting with a speed that is responsive to the needs of the Internet” because it dealt with meritless Reconsideration Requests in an expedient manner. **(Core Value 9)**

11. ***Fourth***, Dot Registry has gone to great lengths to frame this IRP as an “all or nothing” endeavor, repeatedly reminding the Panel that no appeal shall follow the IRP.¹³ Under the guise of protecting its rights, Dot Registry has attempted to expand the scope of the IRP, and, in my view, has abused the process at each step of the way. For example:

- Dot Registry submitted four fact witness statements¹⁴ and a 96-page expert report to reargue the merits of its CPE Applications,¹⁵ none of which were submitted with Dot Registry’s Reconsideration Requests to the BGC, even though Article IV.2.7 of ICANN’s Bylaws permitted Dot Registry to “submit [with its Reconsideration Requests already] all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.”
- Dot Registry insisted that it be allowed to file a 75-page written submission despite the requirement set forth in Article 5 of ICANN’s Supplementary Procedures that “initial written submissions of the parties [in an IRP] shall not exceed 25 pages each in argument, double-spaced and in 12-point font.”¹⁶
- Dot Registry filed a 70-page written submission in response to limited procedural questions posed by the Panel, using the opportunity to reargue at great length the merits of the proceeding despite the Panel’s warning that “submissions be focused, succinct, and not repeat matters already addressed.”¹⁷
- Dot Registry requested that the Panel hold an in-person, five-day hearing even though Article IV.3.12 of ICANN’s Bylaws directs IRP Panels to “conduct [their] proceedings by email and otherwise via the Internet to the maximum extent feasible” and Article 4 of ICANN’s Supplementary Procedures refers to in-person hearings as “extraordinary.”¹⁸
- Dot Registry introduced a fact witness to testify at the hearing¹⁹ in plain violation of Article IV.3.12 of ICANN’s Bylaws (“the hearing shall be limited to argument only”), paragraph 2 of the Panel’s Procedural Order No. 11 (“There will be no live percipient or expert witness testimony of any kind permitted at the hearing. Nor may a party attempt to produce new or additional evidence.”), and paragraph 2 of the Panel’s Procedural Order No. 12 (same).

¹³ See, e.g., Dot Registry’s Additional Submission dated 13 July 2015, ¶ 4.

¹⁴ See Witness Statement of Elaine F. Marshall dated 17 Apr. 2015; Witness Statement of Jeffrey W. Bullock dated 24 Apr. 2015; Witness Statement of Shaul Jolles dated 13 July 2015; and Witness Statement of Tess Pattison-Wade dated 13 July 2015.

¹⁵ See Expert Report of Michael A. Flynn dated 13 July 2015.

¹⁶ See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 4.

¹⁷ See Submission of Dot Registry, LLC on the Law Applicable to ICANN and the Structure of the IRP Proceedings dated 12 Oct. 2015 (see especially paragraphs 29–54); Procedural Order No. 6 dated 26 Aug. 2015, ¶ 2.

¹⁸ See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 6.

¹⁹ See Hearing Transcript dated 29 Mar. 2016, at 37–42.

12. The Panel has been extremely generous in accommodating Dot Registry’s procedural requests, most of which, in my view, fall outside the purview of an IRP. The Declaration loses sight of this context, and ironically the core principle underlying the Declaration’s analysis is that Dot Registry has been *deprived of due process and procedural safeguards*. I vigorously disagree. Dot Registry has been afforded every fair opportunity to “skip to the front of the line” of competing applicants and obtain the special privilege of operating three community-based gTLDs. Its claims should be denied. The denial would not take Dot Registry out of contention for the gTLDs, but, as the Declaration correctly acknowledges, would merely place Dot Registry “in a contention set for each of the proposed gTLDs with [all of the other 21 competing] applicants who had applied for one or more of the proposed gTLDs.”²⁰ In this respect, I find the Declaration disturbing insofar as it encourages future disappointed applicants to abuse the IRP system.

* * *

13. Turning to the merits of the dispute, the Declaration determines that ICANN failed to apply the proper standards in ruling on Dot Registry’s Reconsideration Requests, and it concludes that the actions and inactions of the ICANN Board violated ICANN’s Articles and Bylaws in four respects. I would note that Dot Registry did not specifically ask this Panel to assess whether or not the BGC applied the proper standard of review when evaluating Dot Registry’s Reconsideration Requests.²¹ Therefore, I believe that the Declaration should not have addressed the BGC’s standard of review. As to the four violations, I have grouped them by subject matter (“Discrimination,” “Research,” “Independent Judgment,” and “Privilege”) and address each in turn.

Discrimination

14. The Declaration finds that the ICANN Board breached its obligation of due diligence and care, as set forth in Article IV.3.4(b) of the Bylaws, in not having a reasonable amount of facts in front of it concerning whether the EIU or ICANN staff treated Dot Registry’s CPE Applications in a discriminatory manner. That is, the ICANN Board should have investigated further into whether the CPE Panels applied an inconsistent scoring approach between Dot Registry’s applications and those submitted by other applicants.²² A critical mistake of the Declaration is its view that Dot Registry, when filing its Reconsideration Requests, actually “complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to other successful applicants.”²³ A review of Dot Registry’s three Reconsideration Requests

²⁰ Declaration ¶ 20.

²¹ See Dot Registry’s Request for Independent Review Process dated 22 Sept. 2014, ¶ 65; Dot Registry’s Additional Written Submission dated 13 July 2015, ¶ 42; Claimant’s Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 20–21.

²² See Declaration ¶¶ 98–100, 103–04, 122.

²³ Declaration ¶¶ 47–48, 124.

filed with the BGC reveals otherwise. In response to issue number 8 on each of the three “Reconsideration Request Forms,” entitled “Detail of Board or Staff Action — Required Information,” Dot Registry listed the alleged bases for reconsideration:

*The inconsistencies with established policies and procedures include: (1) the Panel's failure to properly validate all letters of support and opposition; (2) the Panel's repeated reliance on "research" without disclosure of the source or substance of such research; (3) the Panel's "double counting"; (4) the Panel's apparent evaluation of the [.INC/.LLC/.LLP] Community Application in connection with several other applications submitted by Dot Registry; and (5) the Panel's failure to properly apply the CPE criteria in the AGB in making the Panel Determination.*²⁴

15. As can be discerned from Dot Registry’s own submissions, it raised NO allegations concerning discrimination. Paragraph 22 of the Declaration paraphrases the bases for Dot Registry’s Reconsideration Requests — again, notably NOT including any allegations concerning discrimination — but then the Declaration inexplicably states in paragraph 47 that Dot Registry had alleged “unjustified discrimination (disparate treatment).”
16. My colleagues are mistaken. Dot Registry never asked the BGC for relief on any grounds relating to discrimination. As if Dot Registry’s formal request for relief in its Reconsideration Requests, quoted above, were not clear enough, the remainder of the documents confirms that nowhere did Dot Registry mention or even allude to discrimination. Its Reconsideration Requests do not even use the words “discrimination,” “discriminate,” “discriminatory,” “disparate,” or “unequal.” To the extent that my colleagues take the position that Dot Registry’s discrimination argument was somehow “embedded” within the Reconsideration Requests, I respectfully disagree. At most, Dot Registry referred in passing to an appeals mechanism used in another application (.edu),²⁵ and it noted, again in passing, that the BGC had ruled a certain way with regard to .MED,²⁶ but Dot Registry never articulated any proper argument about discrimination. It is undisputed that Dot Registry has alleged discrimination in this IRP²⁷ — but of course it only raised those arguments after the BGC issued its Determination on Dot Registry’s Reconsideration Requests. By holding the BGC accountable for failing to act in response to a complaint that Dot Registry never even advanced below, the Declaration commits an obvious error.

²⁴ See Reconsideration Request for Application 14-30 at 4; Reconsideration Request for Application 14-32 at 3; Reconsideration Request for Application 14-33 at 3.

²⁵ See Reconsideration Request for Application 14-30 at 16 & n.39; Reconsideration Request for Application 14-32 at 14 & n.39; Reconsideration Request for Application 14-33 at 14 & n.35.

²⁶ See Reconsideration Request for Application 14-30 at 6-7; Reconsideration Request for Application 14-32 at 4-5; Reconsideration Request for Application 14-33 at 4-5.

²⁷ See Dot Registry’s Additional Written Submission dated 17 July 2015, at 15-17; Dot Registry’s Submission dated 12 Oct. 2015, at 27-30.

Research

17. The Declaration finds that the ICANN Board also breached the same obligation of due diligence and care in having a reasonable amount of facts in front of it concerning transparency. More specifically, it concludes that the BGC did not take sufficient steps to see if ICANN staff and the EIU acted transparently when undertaking “research” that went into the CPE Reports.²⁸ The only references to “research” in the CPE Reports are the same two sentences that are repeated three times verbatim in each of the CPE Reports:

Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an [INC, LLC, LLP]. Based on the Panel's research, there is no evidence of [INCs, LLCs, LLPs] from different sectors acting as a community as defined by the Applicant Guidebook.²⁹ (Emphasis added.)

18. The Declaration traces the origins of this language back to correspondence between ICANN staff and the EIU in which the former suggested that the latter refer to “research” in a draft of what would eventually become the final CPE Reports in order to further “substantiate” the conclusion that INCs/LLCs/LLPs do not constitute “communities.”³⁰ The Declaration observes that Dot Registry had asserted in its Reconsideration Requests that the CPE Reports “repeatedly relie[d]” upon research as a “key factor” without “cit[ing] any sources or giv[ing] any information about [] the substance or the methods or scope of the ‘research.’”³¹ My colleagues are troubled by what they view as ICANN’s Board making “short shrift” of Dot Registry’s position concerning the “research.”³² The BGC disposed of Dot Registry’s argument as follows:

The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to “cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to “perform independent research, if deemed necessary to reach informed scoring decisions.[”] The Requestor cites to no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope, or methods of its independent research. As such, the Requestor’s argument does not support reconsideration.³³

19. The Declaration views this analysis by the BGC as insufficient. It concludes that the

²⁸ Declaration ¶¶ 94–99, 106, 111, 115–22.

²⁹ Community Priority Evaluation Report for “INC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLP” dated 11 June 2014, at 2, 3, 4.

³⁰ Declaration ¶¶ 96–99.

³¹ Declaration ¶ 94 (quoting Dot Registry’s Reconsideration Requests).

³² Declaration ¶ 95.

³³ Determination of the Board Governance Committee Reconsideration Request 14-30, 14-32, 14-33 dated 24 July 2014, at 11 (internal citations omitted).

“failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those [transparency] obligations is itself a failure by the Board to comply with its [transparency] obligations under the Articles and Bylaws.”³⁴

20. The Declaration suffers from several fatal flaws. To begin with, it consists of a thinly veiled rebuke of actions taken by the EIU and ICANN staff. Although the Declaration does not explicitly so state, it hints at a strong disapproval of the cooperation between the EIU and ICANN staff in drafting the CPE Reports, and it all but says that the EIU and ICANN staff violated ICANN’s transparency policies by citing “research” in the CPE Reports but failing to detail the nature of that “research.” As noted above, however, this Panel’s jurisdiction is expressly limited to reviewing the action or inaction of the ICANN Board and no other individual or entity. ICANN itself has recognized that “the only way in which the conduct of ICANN staff or third parties is reviewable [by an IRP Panel] is to the extent that the Board allegedly breached ICANN’s Articles or Bylaws in acting (or failing to act) with respect to that conduct.”³⁵ In my opinion, my co-Panelists’ conclusion that ICANN’s Board breached its Articles and Bylaws is driven by their firm belief that ICANN staff and the EIU should have disclosed their research. This reasoning places the “cart before the horse” and fails on that basis alone.
21. Nor has the Declaration given proper consideration to the BGC’s analysis (quoted in paragraph 18 above) or to ICANN’s position as articulated in one of its written submissions to this Panel:

[T]he CPE Panels were not required to perform any particular research, much less the precise research preferred by an applicant. Rather, the Guidebook leaves the issue of what research, if any, to perform to the discretion of the CPE panel: “The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.”

[T]he research performed by the EIU is not transmitted to ICANN, and would not have been produced in this IRP because it is not in ICANN’s custody, possession, or control. The BGC would not need this research in order to determine if the EIU had complied with the relevant policies and procedures (the only issue for the BGC to assess with respect to Dot Registry’s Reconsideration Requests).³⁶

Moreover, as noted in paragraph 5 above, it was reasonable for the BGC not to exercise its discretion to inquire into the details of the EIU’s research, given the rather obvious absence of merit in Dot Registry’s CPE submissions for .INC, .LLC, and .LLP.

22. Had my co-Panelists fully considered the BGC’s Determination on the Reconsideration Requests and ICANN’s analysis, they would have found that both withstand scrutiny. Section 4.2.3 of the AGB establishes a CPE Panel’s right — but not obligation — to perform

³⁴ Declaration ¶ 122.

³⁵ ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 10.

³⁶ See ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 44 (citing AGB § 4.2.3) (emphasis in original).

research, which it “deem[s] necessary to reach [an] informed scoring decision.” The Declaration effectively transforms that discretionary right into an affirmative obligation to produce any research performed by any ICANN personnel or even by third parties such as the EIU. The Declaration cites for support general provisions concerning transparency that, it says, “reverberate[] through [ICANN’s] Articles and Bylaws,”³⁷ but it notably fails to cite any clause specifically requiring the disclosure of “research.” There is no such clause. ICANN, its staff, and its third-party vendors should not be penalized for having exercised the right to perform research when they were never required to do so in the first place. I disagree with the Declaration which forces the BGC to “police” any voluntary research performed by ICANN staff or the EIU and spell out the details of that research for all unsuccessful CPE applicants during the reconsideration process.

23. In any event, any reader of the underlying CPE Reports rejecting Dot Registry’s applications would be hard pressed to find that the reasoning and conclusions expressed in those reports would no longer hold up if the two sentences referring to “research” had never appeared in those reports. My colleagues are fooling themselves if they think that extracting those ancillary references to “research” from the CPE Reports would have meant that the CPE Panels would have awarded Dot Registry with four points for “Community Establishment.” Any error relating to the disclosure of that research was harmless at best.

Independent Judgment

24. The Declaration cites Article IV.3.4(c) of ICANN’s Bylaws, which instructs IRP Panels to focus on, *inter alia*, whether “the Board members exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company.”³⁸ It finds that “the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment.”³⁹ Besides the text of the BGC’s Determination on the Reconsideration Requests and the minutes of the BGC meeting held concerning that determination, which my co-Panelists dismiss as “*pro forma*” and “routine boilerplate,” the Declaration finds nothing to support the conclusion that the BGC did anything more than “rubber stamp” work supplied by ICANN staff.⁴⁰ The Declaration chastises ICANN for submitting “no witness statements or testimony” or documents to prove that its Board acted independently.⁴¹ In response to an assertion from ICANN’s counsel that the Board did not rely on staff recommendations, the Declaration retorts, “[That] is simply not credible.”⁴² Ultimately, it holds ICANN in violation of Article IV.3.4(c) on the basis that ICANN presented “no real evidence” that the BGC exercised independent judgment.⁴³

³⁷ See Declaration ¶¶ 117–21.

³⁸ Declaration ¶ 126.

³⁹ Declaration ¶¶ 127, 147.

⁴⁰ Declaration ¶¶ 126, 140, 147.

⁴¹ Declaration ¶¶ 127, 147.

⁴² Declaration ¶ 141.

⁴³ Declaration ¶¶ 126, 147, 150.

25. The Declaration⁴⁴ relies heavily on Articles IV.2.11 and IV.2.14 of ICANN's Bylaws which state:

The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website.

The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.

26. The Declaration interprets these Articles by finding that the "obligations in the Bylaws to make . . . staff work public are compulsory, not optional."⁴⁵
27. Once again, the Declaration elevates the mantra of transparency above all else. It is worth recalling, as is set forth in paragraph 9 above, that Article IV.2.11 vests in the BGC the right — but not the obligation — to seek staff views. ICANN has explained that there are no records of "staff . . . views" or "information submitted . . . by the ICANN staff," as contemplated by Articles IV.2.11 and IV.2.14. It should be noted that the privilege log submitted by ICANN does show that there were 14 e-mail exchanges between ICANN officials and their counsel relating to Dot Registry, which controverts the "rubber-stamping" conclusion of the Declaration.⁴⁶ ICANN's Senior Counsel has even gone so far as to submit a signed, notarized attestation (albeit after being compelled to do so by the Panel)⁴⁷ that ICANN had produced all non-privileged documents in its possession responding to the Panel's inquiries concerning ICANN's internal communications.⁴⁸ The Panel, nonetheless, deems ICANN's position "simply not credible."⁴⁹ Credibility determinations have no place in this IRP, especially in relation to counsel.⁵⁰ The Declaration has effectively gutted the meaning of Articles IV.2.11 and IV.2.14 as discretionary tools available to ICANN and converted them into affirmative obligations that ICANN produce enough evidence in an IRP to prove that its Board acted independently.
28. Curiously, the Declaration refers not even once to "burden of proof." It was wise not to do so, notwithstanding that both Dot Registry and ICANN contended that the other Party bore a burden of proof, given that nowhere in the Bylaws relating to the BGC or to this IRP is there

⁴⁴ See Declaration ¶¶ 128, 142, 149–50.

⁴⁵ Declaration ¶ 149.

⁴⁶ See Privilege Log (attached to Letter from ICANN to the Panel dated 19 June 2015).

⁴⁷ See Procedural Order No. 6 dated 12 June 2015, ¶ 4.

⁴⁸ See Attestation of Elizabeth Le dated 17 June 2015.

⁴⁹ Declaration ¶ 151.

⁵⁰ Note that the Declaration also repeatedly refers to the "Declaration" submitted by EIU Contact Information Redacted on behalf of ICANN as evidence showing that ICANN staff worked closely with the EIU. See Declaration ¶¶ 14, 15, 36, 43, 90–92. EIU Contact Information Redacted did not submit a traditional "witness statement." He is the EIU Contact Information Redacted of the EIU. He wrote one five-page declaration dated 13 April 2015 that was submitted by ICANN to Dot Registry as part of the document-production process in this dispute.

any provision for a burden of proof. To the contrary, the present IRP is governed by Bylaws Article IV.3.4, which prescribes that this Panel “shall be charged with comparing contested actions of the Board [BGC] to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of [them].” Nevertheless, it is self-evident that the Declaration not only placed the burden on ICANN to prove that its Board acted independently, but the Declaration’s repeated references to the “silence in the evidentiary record”⁵¹ make it clear that the Declaration viewed ICANN’s failure to submit evidence as *the single decisive factor* behind its holding. None of the previous IRP panels has placed the burden on ICANN to disprove a claimant’s case.⁵² Why would they? Guided by the mandate of Bylaws Article IV.3.4, the Panel should simply have taken the record before it, compared it to the requirements of the Articles of Incorporation and the Bylaws, weighed the record and the Parties’ arguments, and then, without imposing any burden of proof on either Party, have proceeded to its decision.

29. Applying that approach to this particular dispute should have led the Panel to the two most obvious pieces of evidence on point: the 23-page Determination on the Reconsideration Requests and the minutes of the Board meeting during which its members voted on that Determination. In my view, the 23-page Determination on the Reconsideration Requests is thorough and sufficient in and of itself to show that the ICANN Board fully and independently considered Dot Registry’s claims. Each argument advanced by Dot Registry was carefully recorded, analyzed, dissected, and rejected. What more could be necessary? Another IRP Panel, deciding the dispute in *Vistaprint Limited v. ICANN*, apparently agreed. It stated:

*In contrast to Vistaprint's claim that the BGC failed to perform its task properly and “turned a blind eye to the appointed Panel's lack of independence and impartiality”, the IRP Panel finds that the BGC provided in its 19-page decision a detailed analysis of (i) the allegations concerning whether the ICDR violated its processes or procedures governing the SCO proceedings and the appointment of, and challenges to, the experts, and (ii) the questions regarding whether the Third Expert properly applied the burden of proof and the substantive standard for evaluating a String Confusion Objection. On these points, the IRP Panel finds that the BGC's analysis shows serious consideration of the issues raised by Vistaprint and, to an important degree, reflects the IRP Panel's own analysis.*⁵³

30. The minutes of the ICANN Board meeting held on 24 July 2014 also show that “[a]fter discussion and consideration of the Request, the BGC concluded that the Requester has failed to demonstrate that the CPE Panels acted in contravention of established policy or procedure in rendering their Reports.”⁵⁴ The Declaration summarily dismisses those

⁵¹ Declaration ¶ 128.

⁵² See Hearing Transcript dated 29 Mar. 2016, at 91:8–18, 174:14–19.

⁵³ *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel, ¶ 159.

⁵⁴ See <https://www.icann.org/resources/board-material/minutes-bgc-2014-07-24-en>.

minutes as “boilerplate” and “*pro forma*.”⁵⁵ Here, too, the Declaration is mistaken. It is to be appreciated that the minutes only go into minimal detail, but the Declaration fails to accord any meaning or weight whatsoever to the words “discussion and consideration.” The words must mean what they say: ICANN’s Board “discussed” and “considered” Dot Registry’s Reconsideration Requests and decided to deny them for all of the reasons set forth in the Determination on the Reconsideration Requests.

31. To accept the analysis set forth in the Declaration, one must start from the premise that ICANN’s Board Members had to “wrestle” with difficult issues raised by Dot Registry’s Reconsideration Requests and therefore a long paper trail must exist reflecting inquiries, discussions, drafts, and so forth. A sober review of the record, however, suggests that the Board never needed to engage in any prolonged deliberations, because it was never a “close call.” Dot Registry’s CPE applications only received 5 out of 16 points (far short of the 14 points necessary to prevail), and its Reconsideration Requests largely reargued the merits of its underlying CPE Applications. The ICANN Board assessed and denied Dot Registry’s weak applications with efficiency. It should have no obligation to detail its work beyond that which it has done.

32. Instead of doing as it should have done, however, and in addition to converting discretionary powers of the BGC under the Bylaws into unperformed mandatory investigations, the Panel engaged in repeated speculation in paragraph after paragraph: it “infer[red],” para. 133; “presume[d],” para. 133; stated that “it would appear,” para. 134; “consider[ed],” para. 137; found that since “[n]o ICANN staff or Board members presented a witness statement in this proceeding,” and there is “no documentary evidence of such a hypothetical discussion,” i.e., “oral conversations between staff and members of the BGC, and among members of the BGC, . . . in connection with the July 24 session BGC meeting where the BGC determined to deny the reconsideration requests,” . . . “no evidence at all exists [‘apart from *pro forma* corporate minutes of the BGC meeting’] to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff,” para. 140; found that “[t]he BGC . . . simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff,” para. 145; and concluded that “ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes . . . regardless of whether or not the discussion was more than rubber-stamping of management decisions,” para. 147. (Emphasis in original.)

Privilege

33. Related to the last issue and relying once more on its mistaken interpretation of Articles IV.2.11 and IV.2.14 of ICANN’s Bylaws when viewed in combination as mandating public posting of unsolicited comments from ICANN staff, the Declaration finds that the ICANN

⁵⁵ Declaration ¶ 147.

Board breached its obligation to make ICANN staff work publicly available by claiming legal privilege over communications involving ICANN's Office of General Counsel.⁵⁶ It is undisputed that ICANN submitted a three-page privilege log, listing 14 documents, and ICANN's counsel did not hide the fact that ICANN had withheld from its productions those communications concerning Dot Registry that involved ICANN's Office of General Counsel.⁵⁷

34. The question for the Panel is whether ICANN's transparency obligations, particularly those found in the provisions quoted at paragraph 25 above, even as wrongly interpreted by the majority Declaration, prohibited ICANN from claiming legal privilege over communications otherwise reflecting ICANN staff views on Dot Registry's Reconsideration Requests. ICANN's Bylaws could have included limiting language recognizing that ICANN's obligations under Articles IV.2.11 and IV.2.14 to make staff work available to the public would be subject to legal privilege, but the Bylaws do not do so. On the other hand, neither do the Bylaws expressly state that ICANN's transparency obligations trump ICANN's right to communicate confidentially with its counsel, as any other California corporation is entitled to do.⁵⁸ Article III of ICANN's Bylaws, entitled "Transparency," does not specifically answer the question before the Panel. My colleagues rely heavily on the first provision of the Article, which states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner." My colleagues do not cite the only provision found within Article III that does address "legal matters," albeit in the context of Board resolutions and meeting minutes, which suggests that ICANN's general transparency obligations do NOT trump its right to withhold legally privileged communications.⁵⁹ As such, I would not have found ICANN in violation of its Bylaws but I would have favored a Declaration adopting an approach similar to that taken recently by another IRP Panel, *Despegar v. ICANN*, in which the Panel rejected all of the claims brought by the claimants but suggested that ICANN's Board address an issue outside of the IRP context.⁶⁰ This Panel just as easily could have urged ICANN to clarify how legal privilege fits within its transparency obligations without granting Dot Registry's applications in this IRP.

⁵⁶ Declaration ¶¶ 133, 135-37, 143, 148-50.

⁵⁷ Declaration ¶ 141. The Declaration suggests that ICANN has raised both attorney-client privilege and work-product privilege, *see* Declaration ¶¶ 128 and 149, although the last column in ICANN's privilege log lists "attorney-client privilege" as the only applicable privilege to each document listed.

⁵⁸ *See* Hearing Transcript dated 29 Mar. 2016, at 211:17-24.

⁵⁹ *See* ICANN Bylaws, Article III.5.2 ("[A]ny resolutions passed by the Board of Directors at [a] meeting shall be made publicly available on the Website; provided, however, that any actions relating to . . . legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN) . . . are not appropriate for public distribution, [and] shall not be included in the preliminary report made publicly available."); ICANN Bylaws, Article III.5.4 (same regarding meeting minutes).

⁶⁰ *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157-58 ("[A] number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.").

Conclusion

35. In my view Dot Registry, apparently with the collaboration of the National Association of Secretaries of State (“NASS”), has quite boldly gamed the system, seeking CPEs which all of the other 21 applicants for the three gTLDs in issue thought were obviously unattainable, since they ventured no such applications, in hopes of outflanking, hence defeating, all of them by bulldozing ICANN in the present proceeding. As noted above, the majority Declaration entirely overlooks the fact that the BGC was empowered, but not required, by the rules governing its proceeding to make certain inquiries, and takes no account of how the exercise of the BGC’s discretion in this regard can legitimately be affected by the patent lack of any kind of “community” among all INCs, LLCs, or LLPs. At the hearing I questioned whether the willingness of the NASS to support Dot Registry in its gamble might not be due to its members’ independent interest in the possibility that their enforcement function would be facilitated if Dot Registry’s applications were to be successful:

JUDGE BROWER: ... Suppose I'm the secretary of state of Delaware or the head of the NASS, and your client comes to me with his proposition of the applications that have been put before us. And the secretary of state says, oh, wow, this is a great enforcement possibility for us. If you get these domain names approved by ICANN and a provision of being able to use it is that one is registered with the secretary of state of one of the states, that's for me, wow, what a great sort of enforcement surveillance mechanism, because I don't have to pay anything for it. It's better than anything we've been able to do, because I will know anyone using the LLC or LLP or INC as a domain name actually has legitimate -- should have a legitimate legal status. So that's my motive, okay? I'll do anything I can to get that done, and he says, sure, I'll sign anything. I'll say they got it all wrong. Does that make -- would that make any difference?

MR. ALI: I mean I wouldn't want to speak for the Delaware secretary of state or any other secretary of state. I think that's precisely the sort of question that you could have put to them if they were in front of you. I mean what their motivations were or what their motivations are, I think it would be highly inappropriate for me to try and get. I would not want to offer you any sort of speculation, but I would say that the obverse of not having that I would say surveillance power, they have that anyway if you want to call it surveillance, because the registration, "surveillance" sounds somewhat sinister, particularly in today's environment of being someone who has some background. So I would simply say that the -- by not having this particular institution as we proposed by Dot Registry, the prospects of consumer fraud and abuse are absolutely massive, because if somebody were to gain the rights to these TLDs, or maybe it's not just one company or one applicant, but three different applicants, not a single one of which is based in the United States, just think of the prospect of a company registered who knows where, representing to the world that it's an INC. That would be highly problematic. That would be -- that would create the potential for significant consumer fraud. I mean consumer fraud on the internet is multibillion dollar

liability. This stands, if it's not done properly, to create absolute havoc. And so the secretary of state, in his or her execution of his or her mission, might well be motivated by wanting to prevent further consumer fraud, but that's an entirely legitimate purpose. That's really my own speculation.

*JUDGE BROWER: No, I don't argue with the legitimate purpose. The question is whether it is a basis of community.*⁶¹

I believe that this exchange speaks for itself.

36. The majority Declaration unilaterally reforms the entire BGC procedure for addressing Reconsideration Requests and also what heretofore has been expected of an IRP Panel. The majority would have done better to stick to the rules itself, and, as the IRP Panel did in *Despegar v. ICANN*, suggest that the ICANN Board “give due consideration” to general issues of concern raised by the Claimant.⁶² The present Declaration, in finding the BGC guilty of violating the ICANN Articles and By-Laws, has itself violated them.
37. The majority Declaration intentionally avoids any recommendations to the Board as to how it should respond to this Declaration. This IRP Panel is, of course, empowered to make recommendations to the Board.⁶³ Since the Declaration, if it is to be given effect, has simply concluded that the BGC violated transparency, did not have before it all of the facts necessary to make a decision, and failed to act independently — all procedural defects having nothing to do with the merits of Dot Registry’s three applications for CPEs — it appears to me that the only remedy that would do justice to Dot Registry, as the majority Declaration sees it, and also to all of the other 21 applicants for the same three gTLDs, hence to ICANN itself, would be for the Board to “consider the IRP Panel declaration at the Board’s next meeting,” as it is required to do under Article IV.3.21 of the Bylaws, and for the BGC to take whatever “subsequent action on th[e] declaration[.]” it deems necessary in light of the findings of the Declaration.⁶⁴ In other words, I would recommend that the Board, at most, request the BGC to rehear the original Reconsideration Requests of Dot Registry, making the inquiries and requiring the production of the evidence the majority Declaration has found wanting. Considering the limits of the Declaration, which has not touched on the merits of Dot Registry’s three CPE applications, it would, in my view, be wholly inappropriate for the Board to grant Dot Registry’s request that its three applications now be approved without further ado.
38. For all of the above-mentioned reasons, I would have rejected each of Dot Registry’s claims and named ICANN as the prevailing party. I respectfully dissent.

⁶¹ Hearing Transcript dated 29 Mar. 2016, at 65:6-67:23.

⁶² *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157–58.

⁶³ ICANN Bylaws, Article IV.3.11(d) (“The IRP Panel shall have the authority to: ... recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.”); ICANN Bylaws, Article IV.3.21 (“Where feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”).

⁶⁴ ICANN Bylaws, Article IV.3.21.

29 July 2016

Charles N. Brower

Charles N. Brower

Exhibit N

Reconsideration Request Form

Version of 1 October 2016

ICANN's Board Governance Committee (BGC) is responsible for receiving requests for review or reconsideration (Reconsideration Request) from any person or entity that believes it has been materially and adversely affected by the following:

- (a) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (b) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (c) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information.

The person or entity submitting such a Reconsideration Request is referred to as the Requester.

Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <https://www.icann.org/resources/pages/governance-committee-2014-03-21-en>.

This form is provided to assist a Requestor in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12-point font. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Requesters are represented by:

Name: Flip Petillion, Jan Janssen, PETILLION bvba

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional): Contact Information Redacted

Requesters are:

Requester #1

Name: Travel Reservations SRL ('TRS', formerly Despegar Online SRL)

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #2

Name: Minds + Machines Group Limited (formerly Top Level Domain Holdings Limited)

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #3

Name: Radix FZC

Address: Contact Information Redacted

Email: Contact Information Redacted

And its subsidiary applicant:

Name: dot Hotel Inc.

Address: Contact Information Redacted

Contact Information Redacted

Email: Contact Information Redacted

Requester #4

Name: Fegistry LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

2. Description of specific action you are seeking to have reconsidered.

ICANN Board Resolutions 2018.03.15.08 – 2018.03.15.11, taken on 15 March 2018 (hereinafter, the 'Decision').

3. Date of action/inaction:

15 March 2018

4. On what date did you become aware of the action or that action would not be taken?

Requesters became aware of the Decision on 20 March 2018. ICANN informed Requesters via email on 19 March 2018 at 11:04 pm CET.

5. Describe how you believe you are materially and adversely affected by the action or inaction:

Through its ICANN, the ICANN Board failed to offer Requesters a meaningful review of their complaints regarding HTLD's application for .hotel, the CPE process and the CPE Review Process.

The Decision makes a meaningful review of main arguments expressed by Requesters impossible. Indeed, Requesters urged the ICANN Board to address

Requesters' concerns and to hear Requesters *before* (not after) proceeding further in its consideration of the CPE Process Review. Unless the ICANN Board simply decides to cancel HTLD's application – which it ought to do for the reasons set out in Reconsideration Request 16-11 – the ICANN Board must address the fatal flaws of the CPE and the CPE Process Review, as identified by Requesters in the framework of Reconsideration Request 16-11. These fatal flaws cannot be addressed if the ICANN Board were to uphold its Decision, in which it accepts the findings of the CPE Process Review and finds that no overhaul or change to the CPE process is necessary. Unless the ICANN Board decides to cancel HTLD's application, upholding the Decision would preclude the ICANN Board from granting the remedies requested by Requesters in the framework of Reconsideration Request 16-11 and unjustly deprive Requesters from a meaningful review.

Without a meaningful review of Requesters' complaints, Requesters – who had applied for the gTLD string .hotel themselves – risk being prevented from self-resolving the string contention, as contemplated by the GNSO policy, and, ultimately, from allowing one of the applicants to operate the .hotel gTLD.

Requesters manifestly meet the standing requirements for a Request for Reconsideration (RfR) and ultimately an IRP.

6. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

ICANN's failure to follow the policies created by the GNSO as well as its own Bylaws, Articles of Incorporation, Commitments and Core values creates

inconsistency, injects unfairness and a lack of transparency in the process, and calls into question the fairness of the gTLD program as a whole.

This situation will inevitably have a chilling effect on new entrants into the gTLD space.

7. Detail of the ICANN Action/Inaction

ICANN's challenged action is (i) contrary to ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies); and (ii) taken without consideration of material information.

Since 27 July 2017 already, Requesters are asking for more transparency about the community priority evaluation (CPE) process and the CPE Process Review.

On 16 January 2017, Requesters informed ICANN that the concerns about the lack of transparency remained unaddressed despite ICANN's publication of the report of the CPE process reviewer. Requesters reiterated and further substantiated their concerns in their letters of 1 February 2018 and 22 February 2018.

Requesters asked that ICANN and the ICANN Board address Requesters' concerns and hear Requesters *before* (not after) proceeding further in its consideration of the CPE Process Review. Requesters made clear that, in addition to the lack of transparency in the CPE process and the CPE Process Review, they were concerned about the methodology used by the CPE Process

reviewer, and about the due process and policy violations, disparate treatment and inconsistencies that had not been considered.

On 15 March 2018, the ICANN Board accepted the findings set forth in the CPE Process Review Reports and decided that no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary. In doing so, the ICANN Board simply rubberstamped the BAMC's recommendation to accept the CPE Process Reviewer's findings concerning the CPE Process Review. No explanation whatsoever is given as to why the ICANN Board accepted the BAMC's recommendation.

Moreover, both the BAMC's recommendation and the ICANN Board's acceptance of this recommendation were made without considering Requester's well-substantiated arguments against accepting the findings set forth in the CPE Process Review Reports. The BAMC and the ICANN Board failed to address any of the fatal flaws of the CPE process and of the CPE Process Review.

As these flaws have already been explained in the framework of Reconsideration Request 16-11, Requesters will not repeat them here. In sum, Requesters have clearly established that:

- i. ICANN's organisation of the CPE Process Review lacked transparency
- ii. The CPE Process Review itself was not transparent and has been executed without the necessary diligence and care
- iii. The CPE Process Review revealed a lack of independence of the CPE provider

- iv. The CPE Process Reviewer failed to analyse the consistency issues of CPE decisions

Accepting the results of the CPE Process and of the CPE Process Review without addressing these flaws is inconsistent with ICANN's Mission, Commitments and Core Values. ICANN's acceptance of the results of the CPE Process and of the CPE Process Review is not a consistent, neutral, objective and fair application of ICANN's documented policies.

In addition, the lack of transparency surrounding the CPE Process Review made it impossible for anyone, including the ICANN Board, to assess the weight of the conclusions made by the CPE Process Reviewer. Although the scope of the CPE Process Review was too limited, the review revealed that the CPE Provider was not independent. The CPE Process Review Reports uncritically repeated the conclusions found in the CPE Panel's reports and did not discuss or consider the various fairness, nondiscrimination and consistency objections. The CPE Process Review Reports uncritically repeated the conclusions found in the CPE Panel's reports and did not ask whether the criteria the CPE Panel claimed to apply were the criteria laid out in the Applicant Guidebook and GNSO Policy. The approach followed by the CPE Process Reviewer was a "description" of the CPE Panel's reports, but not an "evaluation" to determine whether the CPE Panel's reports were actually following the applicable guidelines in a neutral and nondiscriminatory manner.

8. What are you asking ICANN to do now?

In addition to the Request, made in the framework of Reconsideration Request 16-11, Requesters request that – unless ICANN finally decides to cancel HTLD’s application – ICANN reconsiders the ICANN Board Resolutions 2018.03.15.08 – 2018.03.15.11 and reverses the decisions in which the ICANN Board (i) accepted the findings set forth in the CPE Process Review Reports, (ii) concluded that no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary, (iii) declared that the CPE Process Review has been completed.

In the event that ICANN does not immediately reverse its Decision, Requesters ask that ICANN engage in conversations with Requesters and that a hearing is organised. In such event, Requesters request that, prior to the hearing, ICANN provides full transparency regarding all communications between (i) ICANN, the ICANN Board, ICANN’s counsel and (ii) the CPE Process Reviewer. Requesters ask ICANN to provide full transparency on its consideration of the CPE Process and the CPE Process Review and to list and give access to all material the BAMC and the ICANN Board considered during its meetings on the CPE Process and the CPE Process Reviews.

For reasons of procedural economy, Requesters propose that this request for reconsideration be handled together with Reconsideration Request 16-11 that was put on hold pending completion of the CPE Process Review.

9. Please state specifically the grounds under which you have the standing and the right to assert this Reconsideration Request, and the grounds or justifications that support your request.

Maintaining the Decision would mean that the ICANN Board fails to offer Requesters a meaningful review of their complaints regarding HTLD's application for .hotel, the CPE process and the CPE Review Process made in the framework of Reconsideration Request 16-11. The lack of a meaningful review directly harms the Requesters, as they are not offered a fair chance to defend their applications for .hotel. Without a meaningful review of Requesters' complaints, Requesters – who had applied for the gTLD string .hotel themselves – risk being prevented from self-resolving the string contention, as contemplated by the GNSO policy, and, ultimately, from allowing one of the applicants to operate the .hotel gTLD.

In addition, Requesters have invested significant time and effort in defending their application for .hotel against the unreasoned and inconsistent advice of the CPE panel, given in contravention of ICANN's Articles of Incorporation and Bylaws. As a result of (i) ICANN's acceptance of this advice in contravention of its Mission, Commitments, Core Values and policies Mission, and (ii) ICANN's failure to address the insufficiencies of this advice and the review of the advice (also in contravention of ICANN's Mission, Core Values and policies), the Requesters' applications for .hotel have all suffered unnecessary delays and are currently experiencing further delays because of the Decision.

Although the requested relief in this Reconsideration Request does not compensate for the lost time, costs and effort, it reverses the harm that would

result from not being given a fair opportunity to defend their application for .hotel. Unless ICANN finally decides to cancel HTLD's application, a reversal of the Decision is necessary to ensure a meaningful review of Requesters' pending Reconsideration Request 16-11.

10. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

10a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm substantially the same for all of the Requestors? Explain.

Requesters' harm is identical, as explained in section 5 above and in Reconsideration Request 16-11.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <https://www.icann.org/resources/pages/accountability/reconsideration-en>.

At this stage, all relevant documents are believed to be in ICANN's possession.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction.

The Board Governance Committee may dismiss a Reconsideration Requests if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

For all Reconsideration Requests that are not summarily dismissed, except where the Ombudsman is required to recuse himself or herself and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request. The BGC shall make a final recommendation to the Board with respect to a Reconsideration Request following its receipt of the Ombudsman's evaluation (or following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable).

The final recommendation of the BGC shall be documented and promptly (i.e., as soon as practicable) posted on the ICANN Website and shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the BGC's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the ICANN Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the BGC's final recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.

The ICANN Board shall not be bound to follow the recommendations of the BGC. The ICANN Board's decision on the BGC's recommendation is final and not subject to a Reconsideration Request.



Signature

14 April 2018

Date

Exhibit O

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 16-11
16 NOVEMBER 2018**

The Requestors, Travel Reservations SRL, Famous Four Media Limited (and its subsidiary applicant dot Hotel Limited), Fegistry LLC, Minds + Machines Group Limited, Spring McCook, LLC, and Radix FZC (and its subsidiary applicant dot Hotel Inc.) (collectively, Requestors) submitted standard applications¹ for the .HOTEL generic top-level domain (gTLD). The Requestors seek reconsideration of ICANN Board Resolutions 2016.08.09.14 and 2016.08.09.15 (collectively, the 2016 Resolutions), which directed ICANN organization to move forward with the processing of the prevailing community application for the .HOTEL gTLD (HTLD’s Application) submitted by Hotel Top-Level Domain S.a.r.l (HTLD).² The Requestors do not challenge the application of the Community Priority Evaluation (CPE) criteria to HTLD’s Application or a particular finding by the CPE Provider on any of the CPE criteria. Instead, the Requestors claim that the 2016 Resolutions are inconsistent with ICANN org’s Articles of Incorporation (Articles) and Bylaws because by accepting the CPE report determining that HTLD’s Application prevailed in CPE, the Board is awarding “undue priority . . . to an application that refers to a ‘community’ construed merely to get a sought-after generic word as a gTLD string” when “the purpose of community based applications has never been to eliminate competition among applicants for a generic TLD.”³ The Requestors also assert that in deciding

¹ Applicants may apply for a standard or community-based gTLD. A “community-based gTLD is a gTLD that is operated for the benefit of a clearly delineated community. . . . [A]n application that has not been designated as community-based will be referred to . . . as a standard application.” Applicant Guidebook (Guidebook), Module 1, §1.2.3. (<https://newgtlds.icann.org/en/applicants/agb/intro-04jun12-en.pdf>).

² As discussed in further detail below, HTLD’s Application prevailed in CPE and thus prevailed over all other applications in the .HOTEL contention set. See Applicant Guidebook, Module 4.2, § 4.2.3 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

³ Request 16-11 § 6, at Pgs. 5-6.

to proceed with HTLD’s Application, the Board did not consider “the unfair competitive advantage” that HTLD allegedly gained by exploiting a privacy configuration in the New gTLD Applicant portal (Portal Configuration) to obtain confidential information of competing applicants.⁴ The Requestors also allege that the Board discriminated against Requestors by refusing to reconsider the Board’s position regarding the CPE results on HTLD’s Application when the Board did so for other applicants.⁵

I. Brief Summary

The Requestors and HTLD submitted applications for the .HOTEL gTLD and were placed in the same contention set. As a community-based application, HTLD participated and prevailed in CPE.⁶ CPE is a method of string contention resolution.⁷ As a result, HTLD’s Application prevailed over all other applications in the .HOTEL contention set and none of the Requestors’ applications for .HOTEL will proceed.

In 2014, some of the Requestors submitted Reconsideration Requests 14-34 and 14-39, challenging HTLD’s Application CPE results and ICANN org’s response to Requestors’ requests for documents relating to the HTLD CPE, respectively.⁸ Both Requests were denied by the Board Governance Committee (BGC).⁹ Thereafter, some of the Requestors (the IRP Claimants)

⁴ *Id.*, § 8, at Pg. 9-11. On 1 March 2015, ICANN org discovered that, under certain circumstances, an authenticated user of the new gTLD applicant and GDD portals could access the data of, or related to, other users without permission. See <https://www.icann.org/news/announcement-2015-03-01-en>, <https://www.icann.org/news/announcement-2015-04-30-en> and <https://www.icann.org/news/announcement-2015-05-27-en>.

⁵ Request 16-11, § 8, Pg. 18.

⁶ See HTLD CPE Report (<https://newgtlds.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>).

⁷ Guidebook, Module 4, § 4.2 (<https://newgtlds.icann.org/en/applicants/agb>).

⁸ See Request 14-34 (<https://www.icann.org/resources/pages/14-34-2014-07-01-en>) and Request 14-39 (<https://www.icann.org/resources/pages/14-39-2014-09-23-en>).

⁹ Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>). Since 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with initial review of reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

filed an independent review process (IRP) challenging the BGC's determinations on Requests 14-34 and 14-39 (Despegar IRP).¹⁰ While the Despegar IRP was pending, the IRP Claimants added a claim in the IRP that HTLD's Application should be rejected because an individual that was at one time associated with HTLD purportedly exploited the privacy configuration of the new gTLD applicant portal to access confidential data of other applications, including data associated with some of the Requestors' .HOTEL applications.¹¹

In 2016, the Despegar IRP Panel declared ICANN to be the prevailing party.¹² The IRP Panel declined to make a finding on the Portal Configuration issue because it was raised after the IRP process had commenced and the issue was still under consideration by the ICANN Board.¹³ The Board accepted the Despegar IRP Panel's findings and directed ICANN org to complete the investigation of the issues alleged by the IRP Claimants regarding the Portal Configuration.¹⁴

Pursuant to the Board's directive, as described in detail below, ICANN org conducted a thorough forensic investigation of the Portal Configuration and related allegations by the IRP Claimants. ICANN org found no evidence that HTLD received any unfair advantage in the CPE process as a result of the Portal Configuration or that any information obtained as a result of the Portal Configuration was used to support HTLD's Application in CPE.

¹⁰ See Despegar IRP Panel Declaration (<https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>). Travel Reservations SRL (one of the Requestors) was formerly known as Despegar Online SRL. Request 16-11, § 1, at Pg. 1 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>).

¹¹ *Id.* at ¶ 49. See also Additional Submission Reply to ICANN's Response by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC, dated 19 Oct. 2015, Pgs. 18-20, (<https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-additional-submission-19oct15-en.pdf>).

¹² *Id.* ¶ 151.

¹³ *Id.* ¶¶ 134-38.

¹⁴ Resolutions 2016.03.10.10 – 2016.03.10.11 (<https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>).

After taking into consideration all relevant information concerning the forensic investigation into the Portal Configuration, the Board passed the 2016 Resolutions, concluding that the cancellation of HTLD's Application was not warranted, and directed ICANN org to move forward with processing HTLD's Application.¹⁵

Thereafter, the Requestors submitted Request 16-11 seeking reconsideration of the 2016 Resolutions.¹⁶

While Request 16-11 was pending, the ICANN Board and BGC directed ICANN org to undertake a review of certain aspects of the CPE process (CPE Process Review). As discussed in further detail in the Facts section below, the CPE Process Review (i) evaluated the process by which ICANN org interacted with the CPE Provider; (ii) evaluated whether the CPE criteria were applied consistently throughout and across each CPE report; and (iii) compiled the research relied upon by the CPE Provider for the evaluations which are the subject of pending Reconsideration Requests.¹⁷ The BGC determined that the pending Reconsideration Requests relating to CPEs, regardless of the basis for those requests, including Request 16-11, would be placed on hold until the CPE Process Review was completed.¹⁸

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).¹⁹

On 15 March 2018, the Board passed Resolutions 2018.03.15.08 through 2018.03.15.11 (2018 Resolutions), which accepted the findings in the CPE Process Review Reports; declared

¹⁵ *Id.*

¹⁶ Request 16-11.

¹⁷ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>;
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

¹⁸ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

¹⁹ See <https://www.icann.org/news/announcement-2017-12-13-en>.

the CPE Process Review complete; concluded that, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program; and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to CPEs that had been placed on hold.²⁰

Subsequently, the BAMC invited the Requestors to provide a telephonic presentation to the BAMC in support of Request 16-11, which the Requestors did on 19 July 2018. The BAMC also invited the Requestors to submit additional written materials in response to the CPE Process Review Reports.

The BAMC has reviewed all relevant materials and submissions by the Requestors in support of Request 16-11 to date. The BAMC finds that reconsideration is not warranted because the Board considered all material information, did not disregard any material information, and did not rely on false or inaccurate material information when it adopted the 2016 Resolutions. Moreover, the BAMC finds that there is no evidence supporting the Requestors' claim that the Board failed to consider the purported "unfair advantage" HTLD obtained as a result of the Portal Configuration. The BAMC also finds that there is no evidence supporting the Requestors' claim that the Board discriminated against the Requestors accepting the CPE results on HTLD's Application. Accordingly, there is no evidence that the Board's adoption of the 2016 Resolutions were based on false information or that the Board failed to consider material information in doing so, and the BAMC recommends that the Board deny Request 16-11.

II. Facts.

As referenced above, in their challenge of the 2016 Resolutions, the Requestors raise

²⁰ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

arguments relating to the CPE result of HTLD's Application, the Portal Configuration, and the overall CPE process. The following are the key facts relevant to the Requestors' claims.

A. The .HOTEL Contention Set

Seven applications were submitted for the .HOTEL gTLD: six standard applications submitted by the Requestors and one community-based application submitted by HTLD.²¹ All seven applications were placed into a contention set.²² As a designated community-based application, HTLD participated and prevailed in CPE.²³ As a result, HTLD's Application prevailed over all other applications in the .HOTEL contention set and none of the Requestors' applications for the .HOTEL will proceed.

B. The Requestors' Challenges to the CPE Result Regarding HTLD's Application.

On 28 June 2014, the Requestors challenged the CPE result of HTLD's Application through Reconsideration Request 14-34.²⁴ The BGC denied Request 14-34 because the Requestors did not identify any misapplication of a policy or procedure by the CPE Provider. Rather, the Requestors simply disagreed with the merits of the CPE Provider's Report, which the BGC determined was not a proper basis for reconsideration.²⁵

On 22 September 2014, the Requestors filed a second Reconsideration Request: Request 14-39. This Request challenged ICANN org's response to the Requestors' request for documentary information relating to the CPE of HTLD's Application pursuant to ICANN's Documentary Information Disclosure Policy (2014 DIDP).²⁶ On 11 October 2014, the BGC

²¹ See <https://gtldresult.icann.org/applicationstatus/applicationdetails/1562>.

²² See Contention Set Diagram, HOTEL (<https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/51>).

²³ See CPE Report (<https://newgtlds.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>).

²⁴ Request 14-34 (<https://www.icann.org/en/system/files/files/request-despegar-online-et-al-28jun14-en.pdf>).

²⁵ BGC Determination on Request 14-34 (<https://www.icann.org/en/system/files/files/determination-despegar-online-et-al-22aug14-en.pdf>).

²⁶ Request 14-39 (<https://www.icann.org/en/system/files/files/request-despegar-online-et-al-22sep14-en.pdf>).

determined that the Requestors' claims did not support reconsideration and denied Request 14-39.²⁷

On 4 March 2015, some of the Requestors filed the Despegar IRP, challenging, among other things, the BGC's Determinations on Requests 14-34 and 14-39.²⁸ While the Despegar IRP was pending, the IRP Claimants raised new claims concerning the Portal Configuration. The IRP Claimants asserted that "ICANN must reject HTLD's Application for .hotel"²⁹ because the user who purportedly exploited the Portal Configuration issue to access confidential data of other applications, including some of the Requestors' applications for .HOTEL, was associated with HTLD.³⁰ On 11 February 2016, the Despegar IRP Panel declared ICANN the prevailing party.³¹ The Panel specifically declared that

in relation to each of the specific issues raised in the .hotel . . . IRP[] that it is satisfied that the BGC acted consistently with the provisions of ICANN's Articles [] and Bylaws, and that the Claimants' complaints have not been made out.³²

The Despegar IRP Panel also noted that the IRP Claimants raised a number of serious concerns with respect to the Portal Configuration. The Panel declined to make a finding on this claim because it was raised well after the IRP process had commenced and the ICANN Board was still considering it.³³ The Board subsequently accepted the findings of the Despegar IRP

²⁷ BGG Determination on Request 14-39, Pg. 4 (<https://www.icann.org/en/system/files/files/determination-despegar-online-et-al-11oct14-en.pdf>).

²⁸ Despegar IRP Request, Pgs. 8-10 (<https://www.icann.org/en/system/files/files/irp-request-redacted-10mar15-en.pdf>).

²⁹ *Id.* ¶49.

³⁰ See Additional Submission Reply to ICANN's Response by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC, dated 19 Oct. 2015, at Pgs. 18-20 (<https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-additional-submission-19oct15-en.pdf>).

³¹ Despegar IRP Panel Declaration (<https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>).

³² *Id.* ¶151.

³³ *Id.* ¶¶ 134-38.

Panel and directed ICANN org to complete the investigation of the issues alleged by the IRP Claimants regarding the Portal Configuration.³⁴

Pursuant to the Board's directive, ICANN org completed an investigation of the issues regarding the Portal Configuration and provided the Board with its findings. The details of the forensic investigation are discussed in detail in the following section. After consideration of all relevant information concerning the forensic investigation into the Portal Configuration and the Requestors' claims relating to the Portal Configuration, the Board passed the 2016 Resolutions.³⁵ The 2016 Resolutions concluded that the cancellation of HTLD's Application was not warranted, and directed ICANN org to move forward with processing HTLD's Application.³⁶

C. The Portal Configuration.

In late February 2015, ICANN org discovered that the privacy settings for the new gTLD applicant and GDD portals had been misconfigured, which resulted in authorized users of the portals (New gTLD Program applicants and new gTLD registry operators) being able to see information belonging to other authorized users without the permission.³⁷

Upon becoming aware of the Portal Configuration issue, ICANN org took the portals offline to re-configure the privacy settings and to prevent any further unauthorized access. ICANN org also began a forensic investigation to identify instances of unauthorized access to information on the portals.³⁸ ICANN org retained two independent firms to review and analyze

³⁴ Resolutions 2016.03.10.10 – 2016.03.10.11 (<https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Portal Configuration Notice (<https://www.icann.org/news/announcement-2015-03-01-en>); New gTLD Applicant and GDD Portals Q&A (<https://www.icann.org/en/system/files/files/new-gtld-applicant-portal-qa-rysg-20aug15-en.pdf>).

³⁸ See New gTLD Applicant and GDD Portal Update (<https://www.icann.org/news/announcement-2015-03-01-en>); Update: New gTLD Applicant and GDD Portal Back Online (<https://www.icann.org/news/announcement-3-2015-03-02-en>); Update: New gTLD Applicant and GDD Portal Q&A Published

the full set of log files detailing activity on the portals going back to when the portals first launched. The firms confirmed that over 60 searches, resulting in the unauthorized access of more than 200 records, were conducted from March through October 2014 using a limited set of user credentials issued to Mr. Dirk Krischenowski and his associates, Mr. Oliver Süme and Ms. Katrin Ohlmer.³⁹

ICANN org informed the parties whose data was viewed and provided them with information regarding: (1) the name(s) of the user(s) whose credentials were used to view their information without their authorization or by individuals that were not officially designated by their org to access certain data; (2) any explanation(s) and/or certification(s) that the user(s) provided to ICANN regarding the unauthorized access; (3) the date(s) and time(s) of access; and (4) what portion(s) of their data was seen.⁴⁰ Some of the Requestors were among the affected parties whose data relating to their .HOTEL applications were viewed by Mr. Krischenowski.⁴¹

ICANN org also contacted the users, including Messrs. Krischenowski and Süme and Ms. Ohlmer, who appeared to have viewed information that was not their own, and required that they provide an explanation of their activity. ICANN org also asked them to certify that they will delete or destroy all information obtained and to certify that they have not and will not use the data or convey it to any third party.⁴²

(<https://www.icann.org/news/announcement-4-2015-03-02-en>); New gTLD Applicant and GDD Portal Update (<https://www.icann.org/news/announcement-2015-04-30-en>).

³⁹ See Announcement: New gTLD Applicant and GDD Portals Update (<https://www.icann.org/news/announcement-2015-05-27-en>); Response to DIDP Request No. 20150605-1 (<https://www.icann.org/en/system/files/files/didp-response-20150605-1-petillion-05jul15-en.pdf>); ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

⁴⁰ Announcement: New gTLD Applicant and GDD Portals Update (<https://www.icann.org/news/announcement-2015-05-27-en>); Response to DIDP Request No. 20150605-1 (<https://www.icann.org/en/system/files/files/didp-response-20150605-1-petillion-05jul15-en.pdf>).

⁴¹ See 23 February 2016 Letter from ICANN org to Despegar (Guillermo Luis Perrone), (<https://www.icann.org/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf> at Pgs. 95-96).

⁴² Announcement: New gTLD Applicant and GDD Portals Update (<https://www.icann.org/news/announcement-2015-05-27-en>).

Mr. Krischenowski acknowledged that he accessed confidential information of other users, but denied that he acted improperly or unlawfully. Among other things, Mr. Krischenowski claimed that he did not realize the portal issue was a malfunction, and that he used the search tool in good faith. Mr. Krischenowski and his associates also certified to ICANN that they would delete or destroy all information obtained, and affirmed that they had not used and would not use the information obtained, or convey it to any third party.⁴³

ICANN's investigation revealed that at the time that Mr. Krischenowski accessed confidential information, he was not directly linked to HTLD's Application as an authorized contact or as a shareholder, officer, or director. Rather, Mr. Krischenowski was a 50% shareholder and managing director of HOTEL Top-Level-Domain GmbH, Berlin (GmbH Berlin), which was a minority (48.8%) shareholder of HTLD. Mr. Philipp Grabensee, the sole Managing Director of HTLD, informed ICANN org that Mr. Krischenowski was "not an employee" of HTLD, but that Mr. Krischenowski acted as a consultant for HTLD's Application at the time it was submitted in 2012. Mr. Grabensee further verified that HTLD "only learned about [Mr. Krischenowski's access to the data] on 30 April 2015 in the context of ICANN's investigation." Mr. Grabensee stated that the business consultancy services between HTLD and Mr. Krischenowski were terminated as of 31 December 2015.⁴⁴

⁴³ Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

⁴⁴ Letter from Mr. Philipp Grabensee to ICANN (<https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>). The Requestors assert that Ms. Ohlmer has also been associated with HTLD. *See* Request 16-11 § 8, at Pg. 15. The Board considered this information when passing the 2016 Resolutions. *See* Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>). The BAMC concludes that Ms. Ohlmer's prior association with HTLD, which the Requestors acknowledge ended no later than 17 June 2016 (Request 16-11 § 8, at Pg. 15) does not support reconsideration because there is no evidence that any of the confidential information that Ms. Ohlmer (or Mr. Krischenowski) improperly accessed was provided to HTLD or resulted in an unfair advantage to HTLD's Application in CPE.

In its investigation, ICANN org did not uncover any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD's Application; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's Application to prevail in CPE. HTLD submitted its application in 2012, elected to participate in CPE on 19 February 2014, and prevailed in CPE on 11 June 2014. Mr. Krischenowski's first instance of unauthorized access to confidential information did not occur until early March 2014; and his searches relating to the .HOTEL applicants did not occur until 27 March, 29 March and 11 April 2014.⁴⁵

On 29 July 2015 and 8 March 2016, Despegar requested that ICANN cancel HTLD's Application.⁴⁶

On 9 August 2016, after the conclusion of ICANN org's Portal Configuration investigation, the Board considered the Requestors' request for cancellation of HTLD's Application.⁴⁷ The Board concluded that, even assuming that Mr. Krischenowski did obtain confidential information belonging to the .HOTEL applicants, this would not have had any impact on the CPE process for HTLD's Application. Specifically, whether HTLD's Application met the CPE criteria was based upon the application as submitted in May 2012, or when the last documents amending the application were uploaded by HTLD on 30 August 2013⁴⁸ – all of which occurred before Mr. Krischenowski or his associates accessed any confidential

⁴⁵ Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

⁴⁶ See Letter from Requestors to ICANN org (<https://www.icann.org/en/system/files/correspondence/petition-to-atallah-08mar16-en.pdf>). See also Briefing Materials (2) for Special Meeting of the ICANN Board (Minutes), 9 August 2016 at Pgs. 95-96 (<https://www.icann.org/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf>).

⁴⁷ Resolutions 2016.08.09.14 – 2016.08.09.15, dated 8 August 2016 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

⁴⁸ *Id.*

information, which occurred from March 2014 through October 2014. HTLD did not submit a change request during CPE to amend its application, nor did it submit any documentation that could have been considered by the CPE panel.⁴⁹ In fact, the last documents amending HTLD's Application were uploaded on 16 August and 30 August 2013 (change of address and additional endorsements), well before the unauthorized access.⁵⁰ The Board also concluded that there was no evidence or claim by the Requestors that the CPE Panel had any interaction at all with Mr. Krischenowski or HTLD during the CPE process, which began on 19 February 2014.⁵¹ The Board declined to cancel HTLD's Application⁵² and directed ICANN org to move forward with processing HTLD's Application.⁵³

D. Request 16-11.

The Requestors submitted Request 16-11⁵⁴ asserting that the 2016 Resolutions are inconsistent with ICANN org's Articles and Bylaws because by accepting the CPE results of HTLD's Application, the Board is awarding "undue priority [] to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string" when "the purpose of community based applications has never been to eliminate competition among applicants for a generic TLD."⁵⁵ The Requestors also asserted that in deciding to proceed with HTLD's Application, the Board did not consider "the unfair competitive advantage" that HTLD allegedly gained by exploiting the Portal Configuration to obtain trade secrets of competing

⁴⁹ Briefing Materials in Support of Resolutions 2016.08.09.14 – 2016.08.09.15, Pgs. 95-96 (<https://www.icann.org/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf>).

⁵⁰ *See id.* at Pgs. 156-158.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Request 16-11 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>).

⁵⁵ *Id.*, § 6, at Pgs. 5-6.

applicants.⁵⁶ The Requestors also alleged that the Board discriminated against the Requestors by refusing to reconsider its position on HTLD’s CPE determination when it did so for other applicants and asked the Board to conduct a meaningful review of the .HOTEL CPE to ensure consistency of approach in the application of the CPE criteria by the CPE Provider.⁵⁷ The Requestors did not challenge the application of particular CPE criteria to HTLD’s Application or a particular finding by the CPE Provider on any of the CPE criteria.

On 16 December 2016, at the BGC’s invitation, the Requestors made a telephonic presentation to the BGC regarding Request 16-11.⁵⁸ Pursuant to the BGC’s request during the presentation, the Requestors provided the Board with a written statement of their position concerning Request 16-11.⁵⁹ The Requestors argued that even though Krischenowski’s unauthorized access to confidential information did not occur until after HTLD submitted its application and elected to participate in CPE, the information HTLD obtained “would create an unfair advantage for HTLD over competing registry operators in the event that HTLD were allowed to operate the .hotel gTLD,” and Krischenowski’s behavior was “unacceptable to the Internet behavior and it should remain so because it is in violation of the application rules and not in the interest of the Internet community as a whole.”⁶⁰

E. The CPE Process Review.

On 17 September 2016, the Board directed ICANN org to undertake a review of the “process by which ICANN [org] interacted with the CPE Provider, both generally and

⁵⁶ *Id.*, § 8, at Pg. 9-11.

⁵⁷ Request 16-11, §§ 8-9, at Pgs. 18, 20.

⁵⁸ Minutes, Board Governance Committee Meeting, 16 December 2016 (<https://www.icann.org/resources/board-material/minutes-bgc-2016-12-16-en>).

⁵⁹ Letter from Crowell and Moring to ICANN Board, dated 28 December 2016 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf>).

⁶⁰ *Id.* at Pg. 2.

specifically with respect to the CPE reports issued by the CPE Provider” as part of the Board’s oversight of the New gTLD Program (Scope 1).⁶¹ The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the IRP proceeding initiated by Dot Registry, LLC.

The BGC later determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3).⁶² Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the pending Requests relating to the CPE process, including Request 16-11, would be on hold until the CPE Process Review was completed.⁶³

FTI Consulting, Inc.’s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. On 13 December 2017, ICANN org published FTI’s reports issued in connection with the CPE Process Review (the CPE Process Review Reports).

With respect to Scope 1, FTI concluded:

there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.⁶⁴

⁶¹ ICANN Board Rationale for Resolution 2016.09.17.01 (<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>).

⁶² <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁶³ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁶⁴ Scope 1 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>).

FTI also concluded that “ICANN organization had no role in the evaluation process and no role in writing the initial draft CPE report,” and reported that the “CPE Provider stated that it never changed the scoring or the results [of a CPE report] based on ICANN organization’s comments.”⁶⁵

For Scope 2, “FTI found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner.”⁶⁶

For Scope 3, FTI compiled the research relied upon by the CPE Provider for the evaluations which are the subject of the pending Reconsideration Requests relating to CPE.⁶⁷ The results of Scope 3 of the CPE Process Review are set forth in the CPE Process Review Reports, and are not relevant to the issues raised in Request 16-11.⁶⁸

On 15 March 2018, the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.⁶⁹ As part of the process, the BAMC invited the Request 16-11 Requestors to “submit additional information relating to Request 16-11, provided the submission is limited to any new information/argument based upon the CPE Process Review Reports” by 2 April 2018. The BAMC also invited the

⁶⁵ *Id.*, at Pg. 9, 15.

⁶⁶ Scope 2 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

⁶⁷ Scope 3 Report, at Pg. 3-4 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>).

⁶⁸ *See id.*

⁶⁹ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

Request 16-11 Requestors to “make a telephonic oral presentation to the BAMC in support of” Request 16-11. The BAMC requested “that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-11 and that is not already covered by the written materials.”⁷⁰

F. The Requestors’ Response to the CPE Process Review.

The Requestors challenged the Board’s acceptance of the CPE Process Review Reports in a series of letters in January and February 2018.⁷¹

Subsequently, the Requestors accepted the BAMC’s invitation to submit additional materials and to provide a telephonic presentation to the BAMC, and on 9 April 2018, the Requestors submitted a letter to the Board concerning the 2018 Resolutions. The Requestors asserted that the Board passed the resolutions “without considering Request[o]rs’ arguments against accepting the findings set forth in the CPE Process Review Reports,” and “[i]nstead . . . considered that Request[o]rs will have the opportunity to address their arguments in support of . . . Request 16-11.”⁷² The Requestors asserted that the 2018 Resolutions “make[] a meaningful review of [the] main arguments expressed by Request[o]rs impossible.”⁷³ The Requestors believed that “upholding [the 2018 Resolutions] would preclude the ICANN Board from

⁷⁰ 19 March 2018 email from ICANN org to Flip Petillion, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-bamc-recommendation-attachment-1-14jun18-en.pdf>.

⁷¹ See 16 January 2018 letter from Petillion to BAMC (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-16jan18-en.pdf>); 1 February 2018 letter from Petillion to BAMC, (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>); and 22 February 2018 letter from Petillion to BAMC (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-22feb18-en.pdf>). Although the subject lines of these letters reference Request 16-11, the letters challenged the Board action concerning the CPE Process Review, which is the subject of Request 18-6, filed by a subset of the Requestors. Accordingly, the Board has considered and addressed the claims raised in these letters in its consideration of Request 18-6.

⁷² 9 April 2018 letter from Petillion to Board at Pg. 1 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-09apr18-en.pdf>).

⁷³ *Id.*

granting the remedies requested by Request[ors] in the framework of . . . Request 16-11.”⁷⁴ The Requestors concluded that the 2018 Resolutions were “either careless and incompetent or prejudiced.”⁷⁵

On 14 April 2018, a subset of the Requestors⁷⁶ submitted Request 18-6, challenging the 2018 Resolutions.⁷⁷ The Requestors claimed that the 2018 Resolutions are contrary to ICANN org’s commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.⁷⁸ The Board denied Request 18-6 on 18 July 2018.⁷⁹

G. Relief Requested

The Requestors ask the BAMC to:

1. “[R]everse the [2016 Resolutions] . . . and declare that HTLD’s application for .hotel is cancelled, and . . . take whatever steps towards HTLD it deems necessary”;
2. “[T]ake all necessary steps to ensure that Requestors’ applications for .hotel remain in contention until Requestors have self-resolved the contention set, or until Requestors have resolved the contention set in an auction, organized by ICANN”;
3. “[E]ngage in conversations with Requestors,” organize a hearing, and “refrain from executing the registry agreement with HTLD, and . . . provide full transparency about all communications between ICANN, the ICANN Board, HTLD, the [CPE Provider] and third parties . . . regarding HTLD’s application for .hotel”; and

⁷⁴ *Id.* at Pg. 1-2.

⁷⁵ *Id.* at Pg. 2.

⁷⁶ Spring McCook, LLC, Famous Four Media Limited, and dot Hotel Limited, all parties to Request 16-11, were *not* parties to Request 18-6. Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC, dot Hotel Inc., and Fegistry LLC are parties to Request 16-11 and 28-6. *Compare* Request 18-6 § 1, at Pg. 2-3 (<https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-request-redacted-14apr18-en.pdf> with [Request 16-11, § 1, at Pg. 1-3](#)).

⁷⁷ Request 18-6, § 2, at Pg. 3.

⁷⁸ *Id.* § 7, at Pg. 6-7.

⁷⁹ Board action on Request 18-6 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g>).

4. If the Board decides to not cancel HTLD’s Application, then it should “take[] the necessary steps to ensure a meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of the *Dot Registry* [IRP Panel Declaration].”⁸⁰

III. Issues Presented.

The issue is as follows:

1. Whether the Board’s adoption of the 2016 Resolutions occurred without consideration of material information or were taken as a result of its reliance on false or inaccurate material information.

IV. The Relevant Standards for Reconsideration Requests.

Article IV, Section 2.1 and 2.2 of ICANN’s Bylaws⁸¹ provide in relevant part that any entity may submit a request “for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) One or more Staff actions or inactions that contradict established ICANN policy(ies);
- (b) One or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act; or
- (c) One or more actions or inactions of the ICANN Board that are taken as a result of the Board’s reliance on false or inaccurate material information.⁸²

⁸⁰ Request 16-11, § 9, Pg. 20.

⁸¹ The BAMC has considered Request 16-11 under the 11 February 2016 version of the Bylaws (the version in effect when the Requestors submitted Request 16-11).

⁸² ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.1, 2.2.

Where, as here, the reconsideration request seeks reconsideration of Board action, the operative version of the Bylaws direct the BAMC⁸³ to review the request and provide a recommendation to the Board.⁸⁴ Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁸⁵

Reconsideration requests from different parties may be considered in the same proceeding if: (1) the requests involve the same general action or inaction; and (ii) the parties submitting the requests are similarly affected by such action or inaction.⁸⁶

On 26 April 2017, the BGC placed Request 16-11 on hold, and it remained on hold until 15 March 2018 when the Board directed the BAMC to proceed with its evaluation of Request 16-11. Accordingly, the BAMC has reviewed Request 16-11 and all relevant materials, and issues this Recommendation.

V. Analysis and Rationale.

A. The Board Adopted The 2016 Resolutions After Considering All Material Information And Without Reliance On False Or Inaccurate Material Information.

The Requestors appear to be dissatisfied with ICANN org’s investigation of the Portal Configuration and the Board’s decision to allow HTLD’s Application to proceed, asserting that ICANN org “failed to properly investigate and address illegal actions.”⁸⁷ However, under the relevant Bylaws, reconsideration is permitted only to challenge Board actions taken either: (a)

⁸³ As noted above, *supra* n.2, the BAMC is currently tasked with reviewing and making recommendations to the Board on reconsideration requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

⁸⁴ *See* ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.3, 2.10, 2.15.

⁸⁵ *Id.*

⁸⁶ *Id.* § 2.8.

⁸⁷ Request 16-11, § 8, Pg. 14.

without consideration of material information, or (b) in reliance on false or inaccurate material information.⁸⁸ The Requestors fail to identify any material information that the Board allegedly failed to consider or any Board action taken in reliance on false or inaccurate material information. As such, the Requestors fail to identify a proper basis for reconsideration.

1. The Requestors Have Not Identified False or Misleading Information that the Board Relied Upon, or Material Information that the Board Did Not Consider, In Investigating The Portal Configuration.

The Requestors assert that reconsideration is warranted because ICANN org “failed to properly investigate and address illegal actions,” insofar as ICANN org did not verify Mr. Krischenowski’s affirmation that he did not and would not provide the information he accessed to HTLD or its personnel.⁸⁹ However, contrary to the Requestors’ claim, ICANN org *did* verify that statement when it obtained HTLD’s confirmation that none of its personnel received that information.⁹⁰ ICANN org concluded that Mr. Krischenowski’s affirmation that he and his associates did not and would not share the confidential information with HTLD, coupled with HTLD’s confirmation that it did not receive the confidential information, was sufficient verification under ICANN org’s policies and procedures, and the Requestors have not identified a policy or procedure that required ICANN org to undertake different or additional verification processes.

Even if Mr. Krischenowski (or his associates) had obtained sensitive business documents belonging to the Requestors, it would not have had any impact on the CPE process for HTLD’s Application, for a number of reasons. First, CPE is performed by the CPE Provider, and entails

⁸⁸ Bylaws, Article IV, § 2.2.

⁸⁹ Request 16-11, § 8, Pg. 14.

⁹⁰ See Letter from Mr. Philipp Grabensee to ICANN organization (<https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>).

scoring each application according to four specified criteria: (i) community establishment; (ii) nexus between the proposed string and community; (iii) registration policies; and (iv) community endorsement.⁹¹ The Requestors have not explained how confidential documents belonging to the other applicants for .HOTEL could impact these criteria, which do not consider other entities' confidential information.

Second, even if the information obtained by Mr. Krischenowski could have had an impact in some way on the CPE process (there is no evidence that it did, as discussed below), that information was not obtained by Mr. Krischenowski until late in March 2014, when the CPE process for HTLD's Application was already underway. While Mr. Krischenowski's access occurred prior to the issuance of the CPE Report in June 2014, HTLD did not submit a change request during CPE to amend its application, nor did it submit any documentation that could have been considered by the CPE panel.⁹² In fact, the last documents amending HTLD's Application were uploaded on 16 August and 30 August 2013 (the change of address and additional endorsements), well before the unauthorized access.⁹³ There is no evidence that the CPE Panel had any interaction at all with Mr. Krischenowski during the CPE process, and therefore there is no reason to believe that the CPE Panel ever received the confidential information that Mr. Krischenowski obtained.⁹⁴

Nor does the BAMC agree with the Requestors' assertion that ICANN org "failed to properly investigate" the Portal Configuration. As detailed above, ICANN org undertook a careful and thorough analysis of the Portal Configuration. Pursuant to the Board's directive on

⁹¹ See Guidebook, § 4.2.

⁹² Briefing Materials in Support of Resolutions 2016.08.09.14 – 2016.08.09.15, Pgs. 95-96 (<https://www.icann.org/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf>).

⁹³ See *id.* at Pgs. 156-158.

⁹⁴ *Id.* at Pg. 95-96.

10 March 2016, ICANN org completed its investigation of the issues raised by the Requestors regarding the Portal Configuration. The Requestors have not identified any false or inaccurate material information they allege the Board relied on, and for the reasons discussed in section V.A.2 below, the Board *did* consider the evidence that the Requestors claim it ignored. Indeed, as noted above, ICANN org did not uncover—and the Requestors have not identified—any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD’s Application; or (ii) any information obtained by Mr. Krischenowski enabled HTLD’s Application to prevail in CPE.⁹⁵

Moreover, the Requestors have not offered any evidence that Mr. Krischenowski shared the Requestors’ confidential information with HTLD.⁹⁶ In the course of ICANN org’s investigation, Mr. Krischenowski affirmed that he and his associates had not used and would not use the information obtained, or convey it to any third party,⁹⁷ and HTLD confirmed that Mr. Krischenowski did not inform HTLD’s personnel about “his action” and “did not provide any of the accessed information” to HTLD or its personnel.⁹⁸ The Board’s conclusion that Mr. Krischenowski did not provide confidential information to HTLD is not changed simply because Mr. Krischenowski was a 50% shareholder and managing director of a minority (48.8%) shareholder of HTLD.⁹⁹ Without evidence that the confidential information was shared, Mr. Krischenowski’s corporate holdings alone are not sufficient to demonstrate that HTLD received

⁹⁵ Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

⁹⁶ See Request 16-11.

⁹⁷ ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

⁹⁸ Letter from Mr. Philipp Grabensee to ICANN organization (<https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>).

⁹⁹ *Id.*

any of the information that Mr. Krischenowski accessed and/or that HTLD gained some “unfair advantage” from Mr. Krischenowski’s access to the information.

This evidence also undermines the Requestors’ argument that information Mr. Krischenowski obtained “would create an unfair advantage for HTLD over competing registry operators in the event that HTLD were allowed to operate the .hotel gTLD.”¹⁰⁰ Because ICANN org’s investigation determined that there was no evidence that HTLD received the Requestors’ confidential information, the Requestors’ assertion that the information will create an unfair advantage for HTLD if it is allowed to operate the .HOTEL gTLD does not support reconsideration.

2. The Requestors Have Not Identified False or Misleading Information that the Board Relied Upon, or Material Information that the Board Did Not Consider, In Deciding to Allow HTLD’s Application To Proceed.

The Requestors claim that the Board “failed to consider the unfair competitive advantage HTLD obtained by maliciously accessing trade secrets of prospective registry operators.”¹⁰¹ The Requestors state that “allowing HTLD’s Application to proceed ... amounts to an acquiescence in criminal acts.”¹⁰² The BAMC considers these claims very seriously, but must conclude that they do not support reconsideration, insofar as the Requestors do not identify any action taken by the Board without material information or in reliance on false or inaccurate information. Rather, the Requestors appear to simply disagree with the Board’s actions in adopting the 2016 Resolutions; however, the Requestor’s disagreement with the merits of the Board’s decision, alone, without evidentiary support that it was taken without material

¹⁰⁰ Letter from Crowell and Moring to ICANN Board, dated 28 December 2016, at Pg. 2 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf>).

¹⁰¹ Request 16-11, § 8, Pg. 9.

¹⁰² *Id.* at Pg. 16.

information or in reliance on false or inaccurate information, is not a proper basis for reconsideration.¹⁰³

As discussed in more detail above, the Requestors have not identified any material information that the Board failed to consider (nor any false material information that the Board relied on) when it accepted ICANN org's conclusion that Mr. Krischenowski's and his associates' access to confidential information had no effect on the CPE outcome of HTLD's Application and that HTLD did not receive any unfair benefit from Mr. Krischenowski's access to the information.

The Board's decision to allow HTLD's Application to proceed was made following a comprehensive investigation, and was well reasoned and consistent with ICANN org's Articles and Bylaws. In particular, in reaching its decision that HTLD's Application should not be excluded, the Board carefully considered the results of ICANN org's forensic review and investigation of the Portal Configuration and the Requestors' claims relating the alleged impact of Portal Configuration on the CPE of HTLD's Application. The details of ICANN org's investigation into these matters are described above.

Further, the Board did consider the actions of Mr. Krischenowski and his associates. The Board evaluated the timeline of events, Mr. Krischenowski's affirmations that he did not and would not share the confidential information with any third party, and HTLD's confirmation that it did not receive the confirmation. Based on all of this evidence, the Board determined that the Requestors were not harmed as a result of the information Mr. Krischenowski and his associates obtained through the portal misconfiguration. As discussed above, ICANN org did not uncover any evidence that: (i) the information Mr. Krischenowski may have obtained as a

¹⁰³ *Id.* at Pg. 9.

result of the Portal Configuration was used to support HTLD’s Application; or (ii) any information obtained by Mr. Krischenowski enabled HTLD’s Application to prevail in CPE. The Requestors provide no evidence otherwise nor do the Requestors cite to any evidence demonstrating the alleged unfair competitive advantage gained by HTLD as a result of the Portal Configuration that the Board failed to consider. Accordingly, the Requestors’ claims do not support reconsideration.

The Requestors also ignore the evidence uncovered by ICANN org during its investigation of the Portal Configuration. In particular, as evidenced in the letters exchanged with HTLD, at the time of his apparent access to materials belonging to the Requestors, Mr. Krischenowski was not an employee of HTLD, did not use HTLD’s login ID to access the portal, and was merely a 50% shareholder in an entity that was a minority shareholder in HTLD.¹⁰⁴ Moreover, the Requestors fail to identify the specific harm they will have suffered as a result of Mr. Krischenowski’s actions, and even concede that the information obtained by Mr. Krischenowski and his associates “may not have directly impacted HTLD’s position as an applicant.”¹⁰⁵ As such, contrary to Requestors’ assertions, the Board fully considered whether the Portal Configuration conferred an unfair competitive advantage to HTLD, and concluded that the misconfiguration had no bearing on the CPE process for .HOTEL or the Requestors’ applications for .HOTEL.

Despite all of this, the Requestors maintain that the information Mr. Krischenowski obtained “would create an unfair advantage for HTLD over competing registry operators in the event that HTLD were allowed to operate the .hotel gTLD,” and Mr. Krischenowski’s behavior

¹⁰⁴ Letter from Mr. Philipp Grabensee to ICANN (<https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>).

¹⁰⁵ Request 16-11, § 8, Pg. 15.

was “unacceptable to the Internet behavior and it should remain so because it is in violation of the application rules and not in the interest of the Internet community as a whole.”¹⁰⁶ But the Requestors do not identify any false or inaccurate information or any information that the Board did not consider, to support this argument. Accordingly, this argument does not support reconsideration.

In conclusion, far from relying upon incomplete or false information, the Board carefully considered all of the materials and issues presented and came to a well-reasoned decision based on these considerations in adopting the 2016 Resolutions.

B. The Board Did Not Rely Upon False Or Misleading Information In Accepting The Despegar IRP Panel’s Declaration.

Although Request 16-11 challenges the Board’s conduct as it “relate[s] to the Board Resolutions 2016.08.09.14 and 2016.08.09.15, approved on 9 August 2016,”¹⁰⁷ which concern the Board’s consideration of the request for cancellation of HTLD’s Application, the Requestors also appear to challenge the Board’s acceptance of the Despegar IRP Panel’s Declaration. In particular, the Requestors assert that “the Despegar et al. IRP Panel relied on false and inaccurate material information,” such that “[w]hen the ICANN Board accepted the Despegar et al. IRP Declaration, it relied on the same false and inaccurate material information.”¹⁰⁸

As an initial matter, the Requestors’ claim is time-barred. The Board’s resolution accepting the findings of the Despegar IRP Panel’s Declaration was published on 10 March 2016.¹⁰⁹ Request 16-11 was submitted on 25 August 2016, over five months after the Board’s

¹⁰⁶ Letter from Crowell and Moring to ICANN Board, dated 28 December 2016, at Pg. 2 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf>).

¹⁰⁷ Request 16-11, § 3, Pg. 3.

¹⁰⁸ *Id.*, § 8, Pg. 9.

¹⁰⁹ 2016 Resolutions (<https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>).

acceptance of the Despegar IRP Panel’s Declaration, and well past the 15-day time limit to seek reconsideration of a Board action.¹¹⁰

1. The Requestors’ Claims Regarding the Dot Registry and Corn Lake IRP Panel Declarations Do Not Support their Claims of Discrimination.

Even had the Requestors timely challenged the Board’s acceptance of the Despegar IRP Panel’s Declaration, their claims do not support reconsideration. The Requestors cite to the IRP Panel Declaration issued in *Dot Registry, LLC v. ICANN* (Dot Registry IRP Panel Declaration) to support their claim that the Despegar IRP Panel Declaration was based “upon the false premise that the [CPE Provider’s] determinations are presumptively final and are made independently by the [CPE Provider], without ICANN’s active involvement.”¹¹¹ In particular, the Requestors claim that the Dot Registry IRP Panel Declaration demonstrates that “ICANN did have communications with the evaluators that identify the scoring of individual CPEs,”¹¹² such that the Despegar IRP Panel relied upon false information (namely ICANN org’s representation in its Response to the 2014 DIDP Request that ICANN org does not engage in communications with individual evaluators, which was the subject of Request 14-39), when it found ICANN org to be the prevailing party. As a result, the argument goes, the ICANN Board also relied upon false information when it accepted the Despegar IRP Panel Declaration. The Requestors also argue that they are “situated similarly” to the Dot Registry claimants, and therefore if the Board refuses to grant the Requestors relief when the Board granted the Dot Registry claimants relief, then the Board is discriminating against the Requestors in contradiction to ICANN’s Articles and Bylaws. The Dot Registry IRP Declaration and the Board’s response to it, however, do not support the Requestors’ request for reconsideration.

¹¹⁰ ICANN Bylaws, 11 February 2016, Art. IV, § 2.5.

¹¹¹ Request 16-11, § 8, Pg. 12.

¹¹² *Id.* (emphasis in original).

As an initial matter, the findings of one IRP Panel cannot be summarily applied in the context of an entirely separate, unrelated, and different IRP. The Dot Registry IRP concerned the .LLC, .INC, and .LLP gTLD strings. The Despegar IRP, by contrast, concerned .HOTEL. During the CPE process, .LLC, .INC, and .LLP were each awarded 5 out of 16 points, and therefore did not prevail in CPE; the .HOTEL string was awarded 15 out of 16 points, and therefore did prevail in CPE.¹¹³ Different issues were considered in each IRP, based on different arguments presented by different parties concerning different applications and unrelated factual situations. As such, there is no support for the Requestors' attempt to apply the findings of the Dot Registry IRP Declaration to the Despegar IRP.

The Requestors similarly cite the Board's acceptance of the final declaration in *Corn Lake, LLC v. ICANN*, (Corn Lake IRP Declaration) and decision "to extend its final review procedure to include review of Corn Lake's charity expert determination."¹¹⁴ The Requestors argue that a refusal to implement some form of review mechanism here would amount to inconsistent and discriminatory treatment, in violation of the Bylaws.¹¹⁵ The argument does not support reconsideration. The Corn Lake IRP Declaration explains that ICANN org has "discretion to make decisions regarding its review processes as set out in the Applicant Guidebook, which may well require it to draw nuanced distinctions between different applications or categories of applications. Its ability to do so must be preserved as being in the best interest of the Internet community as a whole."¹¹⁶ As was the case with the Dot Registry IRP, the circumstances in the Corn Lake IRP and the Board's subsequent decision concerning

¹¹³ See .LLC, .INC, .LLP, and .HOTEL CPE Reports (<https://newgtlds.icann.org/en/applicants/cpe>).

¹¹⁴ Letter from Crowell and Moring to ICANN Board, dated 28 December 2016, at Pg. 4-5 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf>).

¹¹⁵ *Id.*

¹¹⁶ Corn Lake IRP Declaration, ¶ 8.98 (<https://www.icann.org/resources/pages/corn-lake-v-icann-2015-04-07-en>).

.CHARITY involved different facts and distinct considerations specific to the circumstances in Corn Lake’s application. As such, the Board’s action there does not amount to inconsistent or discriminatory treatment; it is instead an example of the way that the Board must “draw nuanced distinctions between different [gTLD] applications,”¹¹⁷ and is consistent with ICANN org’s Articles and Bylaws.

2. The CPE Process Review Confirms that ICANN Org did not have any Undue Influence on the CPE Provider with respect to the CPEs Conducted.

The Requestors argue that ICANN org exerted undue influence over the CPE Provider’s execution of CPE.¹¹⁸ The ICANN Board considered and addressed this assertion in the 2018 Resolutions, and the BAMC incorporates that reasoning here by reference.¹¹⁹

The standards governing CPE are set forth in Module 4.2 of the Guidebook. CPE will occur only if a community-based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.¹²⁰ CPE is performed by an independent panel composed of two evaluators who are appointed by the CPE Provider.¹²¹ A CPE panel’s role is to determine whether the community-based application fulfills the four community priority criteria set forth in Module 4.2.3 of the Guidebook. The four criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. To prevail in CPE, an applicant must receive at least 14 out of 16 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points.

¹¹⁷ *Id.*

¹¹⁸ Request 16-11, § 8, at Pg. 12-13.

¹¹⁹ 2018 Resolutions (<https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>).

¹²⁰ Guidebook, Module 4.2.

¹²¹ *Id.* Module 4.2.2.

The CPE Process Review’s Scope 1 Report confirms that “there is no evidence that ICANN org had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process,” including with respect to HTLD’s Application.¹²² The Requestors believe that the Scope 1 Report demonstrates that “the CPE Provider was not independent from ICANN. Any influence by ICANN in the CPE was contrary to the policy, and therefore undue.”¹²³ The Requestors do not identify what “policy” they are referring to, but regardless, their disagreement with the conclusions of the Scope 1 Report do not support reconsideration. This is because the Requestors do not dispute that, when ICANN org provided input to the CPE Provider, that input did *not* involve challenging the CPE Provider’s conclusions, but rather was to ensure that the CPE Reports were clear and “that the *CPE Provider’s* conclusions”—not ICANN org’s conclusions—were “supported by sufficient reasoning.”¹²⁴ The Requestors also cite “phone calls between ICANN and the CPE Provider to discuss ‘various issues,’” claiming that those calls “demonstrate that the CPE Provider was not free from external influence from ICANN” org and was therefore not independent.¹²⁵

Neither of these facts demonstrates that the CPE Provider was “not independent” or that ICANN org exerted undue influence over the CPE Provider. These types of communications instead demonstrate that ICANN org protected the CPE Provider’s independence by focusing on ensuring that the CPE Provider’s conclusions were clear and well-supported, rather than

¹²² FTI Scope 1 Report at Pg. 3 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>).

¹²³ 1 February 2018 letter from Petillion to BAMC, at Pg. 3 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>).

¹²⁴ 1 February 2018 letter from Petillion to BAMC, at Pg. 3, citing FTI Scope 1 Report, at Pg. 12 (emphasis added).

¹²⁵ *Id.*

directing the CPE Provider to reach a particular conclusion. This argument therefore does not support reconsideration.

Because the Scope 1 Report demonstrates that ICANN org did not exert undue influence on the CPE Provider and CPE process, it disproves the Requestors' claim that "the *Despegar et al.* IRP Panel was given incomplete and misleading information" which is based solely on the premise of ICANN org's undue influence in the CPE process.¹²⁶

3. The Requestors Have Not Demonstrated that ICANN Org was Obligated to Produce Communications Between ICANN Org and the CPE Panel.

The Requestors suggest that there is unfairness by virtue of the fact that certain communications between ICANN org and the applicable CPE panel were produced in the Dot Registry IRP, but not in the Despegar IRP.¹²⁷ There is no support for the Requestors' assertions in this regard and reconsideration is not warranted on this basis.

Dispositive of this claim is the fact that ICANN org was not ordered by the IRP Panel to produce any documents in the Despegar IRP, let alone documents that would reflect communications between ICANN org and the CPE panel. And no policy or procedure required ICANN org to voluntarily produce documents during the Despegar IRP or thereafter.¹²⁸ In contrast, during the Dot Registry IRP, the Dot Registry IRP Panel ordered ICANN org to produce all documents reflecting "[c]onsideration by ICANN of the work performed by the [CPE Provider] in connection with Dot Registry's application" and "[a]cts done and decisions taken by ICANN with respect to the work performed by the [CPE Provider] in connection with Dot

¹²⁶ *Id.*, at Pg. 3.

¹²⁷ See Letter from Crowell and Moring to ICANN Board, dated 28 December 2016, at Pg. 3 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf>).

¹²⁸ Nothing in ICANN's Bylaws, the DIDP, or other policy or procedure requires ICANN to voluntarily produce in the course of an IRP documents that were properly withheld in response to a DIDP request.

Registry's applications."¹²⁹ ICANN org's communications with the CPE panels for .INC, .LLC, and .LLP fell within the scope of such requests, and thus were produced. Ultimately, ICANN org acted in accordance with applicable policies and procedures, including ICANN's Bylaws, in both instances.¹³⁰

4. The Requestors Have Not Demonstrated that a New CPE Review of HTLD's Application is Appropriate.

Finally, without identifying particular CPE criteria, the Requestors ask the Board to "ensure meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of the *Dot Registry* [IRP Panel Declaration]."¹³¹ To the extent the Requestors are asserting that the outcome of the CPE analysis of HTLD's Application is inconsistent with other CPE applications, this argument was addressed in Scope 2 of the CPE Process Review. There, "FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner."¹³² Additionally, for the reasons discussed in above, neither the .HOTEL CPE nor the 2016 Resolutions evidence inconsistent or discriminatory treatment toward the Requestors. For these reasons, this argument does not support reconsideration.

C. The 2018 Resolutions Are Consistent With ICANN's Mission, Commitments, Core Values and Established ICANN Policy(ies).

¹²⁹ Procedural Order No. 3, *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004 (<https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en>).

¹³⁰ The Requestors were fully aware that communications occurred between ICANN staff and the CPE panel, since such communications are expressly contemplated in the CPE Panel Process Document and ICANN disclosed the existence of these communications in the 2014 DIDP Response. See CPE Panel Process Document (<https://newgtlds.icann.org/en/applicants/cpe>) ("The Economist Intelligence Unit works with ICANN when questions arise or when additional process information may be required to evaluate an application.").

¹³¹ Request 16-11, § 9, Pg. 20.

¹³² Scope 2 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

The Requestors' criticisms of the 2018 Resolutions focus on the transparency, methodology, and scope of the CPE Process Review. None support reconsideration. The BAMC notes that it addressed the Requestors' concerns regarding the 2018 Resolutions in its Recommendation on Request 18-6,¹³³ which the Board adopted on 18 July 2018.¹³⁴ The rationales set forth by the BAMC, and the Board in its determination of Request 18-6, are incorporated herein by reference.

VI. Recommendation

The BAMC has considered the merits of Request 16-11 and, based on the foregoing, concludes that the Board acted consistent with the Guidebook and did not violate ICANN's Mission, Commitments and Core Values when it passed the 2016 Resolutions. Accordingly, the BAMC recommends that the Board deny Request 16-11.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws applicable to Request 16-11 provides that the BAMC shall make a final determination or recommendation with respect to a reconsideration request within thirty days, unless impractical. To satisfy the thirty-day deadline, the BAMC would have to have acted by 24 September 2016. However, Request 16-11 was placed on hold pending completion of the CPE Process Review. The Requestors were then provided an opportunity to supplement their arguments in light of the CPE Process Review results, and to make a second presentation to the BAMC. The Requestors submitted additional written materials in January, February, and April 2018. Accordingly, the first opportunity that the BAMC had to fully consider Request 16-11 was 16 November 2018.

¹³³ BAMC Recommendation on Request 18-6 (<https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-bamc-recommendation-14jun18-en.pdf>).

¹³⁴ Resolution 2918.07.18.09 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g>).

Exhibit P

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 18-6
14 JUNE 2018**

The Requestors, Travel Reservations SRL, Fegistry LLC, Minds + Machines Group Limited, and Radix FZC (and its subsidiary applicant dot Hotel Inc.) seek reconsideration of ICANN Board Resolutions 2018.03.15.08 through 2018.03.15.11 (collectively, the 2018 Resolutions) which concluded the Community Priority Evaluation (CPE) Process Review.¹

I. Brief Summary

The Requestors each submitted standard applications for the .HOTEL generic top-level domain (gTLD). Another applicant, Hotel Top-Level Domain S.a.r.l (HTLD), submitted a community-based application for .HOTEL (HTLD Application). HTLD participated and prevailed in CPE. As a result, HTLD was awarded priority for the .HOTEL string thereby eliminating all other applicants for the .HOTEL string, including the Requestors' applications.

Following the CPE of HTLD Application, some of the Requestors challenged the HTLD CPE Report through the Reconsideration process (Reconsideration Requests 14-34² and 14-39³) and the independent review process (IRP) (Despegar IRP).⁴ On 12 February 2016, the Despegar IRP Panel declared ICANN to be the prevailing party in the Despegar IRP.⁵

¹ Request 18-4, § 3, at Pg. 1.

² See Reconsideration Request 14-34, available at <https://www.icann.org/resources/pages/14-34-2014-07-01-en>.

³ See Reconsideration Request 14-39, available at

⁴ See Despegar IRP Panel Declaration, available at <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>. Travel Reservations SRL (one of the Requestors) was formerly known as Despegar Online SRL. Request 16-11, § 1, at Pg. 2, available at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>.

⁵ See Despegar IRP Panel Declaration, available at <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

The Board accepted the findings of the Despegar IRP Panel,⁶ and directed that the HTLD Application move forward to the next stage of the New gTLD Program (the 2016 Resolutions).⁷ Thereafter, a group of standard applicants for the .HOTEL gTLD, including the Requestors, submitted Reconsideration Request 16-11 (Request 16-11), seeking reconsideration of the 2016 Resolutions.⁸

While Request 16-11 was pending, the ICANN Board directed ICANN org to undertake the CPE Process Review to evaluate the process by which ICANN org interacted with the CPE Provider.⁹ The BGC thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report; and (ii) compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations which are the subject of certain pending Reconsideration Requests relating to the CPE process.¹⁰ The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-11, would be placed on hold until the CPE Process Review was completed.¹¹

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).¹²

⁶ ICANN Board Resolutions 2016.03.10.10 – 2016.03.10.11, available at <https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>.

⁷ *Id.*

⁸ Request 16-11.

⁹ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

¹⁰ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

¹¹ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, see <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP) (withdrawn on 15 February 2018, see <https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf>), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

¹² See <https://www.icann.org/news/announcement-2017-12-13-en>.

On 15 March 2018, the Board passed the 2018 Resolutions, which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.¹³

On 14 April 2018, the Requestors submitted Request 18-6, challenging the 2018 Resolutions.¹⁴ The Requestors claim that the 2018 Resolutions are contrary to ICANN org's commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.¹⁵

The BAMC has considered Request 18-6 and all relevant materials and recommends that the Board deny Request 18-6 because the Board considered all material information when it adopted the 2018 Resolutions, which are consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies). Specifically, as noted in the Resolutions, the Board has considered the CPE Process Review Reports.¹⁶ The CPE Process Review Reports identify the materials considered by FTI.¹⁷ Additionally, as noted in the rationale of the Resolutions, the Board acknowledged receipt of, and took into consideration, the correspondence received after the publication of the CPE Process Review Reports in adopting the Resolutions.¹⁸

II. Facts.

¹³ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹⁴ Request 18-6, § 2, at Pg. 3, available at <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-request-redacted-14apr18-en.pdf>.

¹⁵ *Id.* § 7, at Pg. 6-7.

¹⁶ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹⁷ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹⁸ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

A. The CPE Provider's Evaluation of the HTLD Application.

HTLD submitted a community-based application for .HOTEL.¹⁹ The Requestors each submitted standard (meaning, not community-based) applications for .HOTEL, and all of the .HOTEL applications were placed into a contention set. HTLD was invited to, and did, participate in CPE for .HOTEL.²⁰

On 11 June 2014, the CPE Provider issued a CPE report, concluding that the HTLD Application prevailed in CPE.²¹

The Requestors have challenged the CPE Provider's determination that the HTLD Application satisfied the requirements for community priority, and the Board's decision not to cancel the HTLD Application, via numerous DIDP Requests, Reconsideration Requests, and the Despegar IRP. All of those challenges have been resolved, with the exception of Request 16-11, which is pending.

The Requestors submitted Request 16-11 on 25 August 2016, asserting that the 2016 Resolutions are inconsistent with ICANN's Articles of Incorporation and Bylaws.²²

B. The CPE Process Review.

While Request 16-11 was still pending, ICANN's Board, as part of the Board's oversight of the New gTLD Program, directed ICANN org to undertake a review of the process by which ICANN org interacted with the CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program.²³ The Board's

¹⁹ See <https://gtldresult.icann.org/applicationstatus/applicationdetails/1562>.

²⁰ CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. See Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>.

²¹ See CPE Report at Pg. 1, available at <https://newgtlds.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

²² Request 16-11, § 6, at Pg. 6 available at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>.

²³ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

action was part of the ongoing discussions regarding various aspects of the CPE process as well as issues that were identified in the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC (Dot Registry IRP).²⁴

Subsequently, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to the CPE process.²⁵ The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for evaluations that are the subject of pending reconsideration requests (Scope 3).²⁶ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. The BGC determined that the then eight pending Reconsideration Requests relating to the CPE process, including Request 16-11, would be on hold until the CPE Process Review was completed.²⁷

On 13 December 2017, ICANN organization published CPE Process Review Reports.²⁸

With respect to Scope 1, FTI concluded:

there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.²⁹

²⁴ *Id.*

²⁵ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

²⁶ *Id.*

²⁷ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

²⁸ See <https://www.icann.org/news/announcement-2017-12-13-en>.

²⁹ Scope 1 Report, at Pg. 2, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

FTI also concluded that “ICANN organization had no role in the evaluation process and no role in writing the initial draft CPE report,” and reported that the “CPE Provider stated that it never changed the scoring or the results [of a CPE report] based on ICANN organization’s comments.”³⁰

For Scope 2, “FTI found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner.”³¹

For Scope 3, “FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in the CPE Provider’s working papers to the extent that such material was not otherwise cited in the final CPE report.”³² FTI observed that all eight of the relevant CPE reports (which are the ones at issue in the Reconsideration Requests placed on hold) referenced research. Two of the eight relevant CPE reports included citations for each reference to research. Of the remaining six relevant CPE reports, while the reports did not include citations to each reference to research, in five of the six instances, FTI found citations to, or the materials that corresponded with, the research in the working papers underlying the reports. In the other instance (for which two CPE reports were done on the same application) FTI did not find citations to each reference to research in the working papers underlying the Second CPE Report. However, FTI did find citations to the research referenced in the Second CPE Report in the working papers underlying the First CPE Report.³³

Accordingly, based on FTI’s observations, it is possible that the research being referenced in the

³⁰ *Id.*, at Pg. 9, 15.

³¹ Scope 2 Report, at Pg. 2, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

³² Scope 3 Report, at Pg. 3-4, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

³³ *Id.* at Pg. 4.

relevant CPE report was the research for which citations were found in the working papers underlying the first CPE on that particular application.³⁴

On 15 March 2018, the Board passed the 2018 Resolutions, which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.³⁵

The Board instructed the BAMC to consider the remaining Requests in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC (Transition Process),³⁶ and with a Roadmap for the review of the pending Reconsideration Requests (Roadmap).³⁷ The Roadmap provides, in relevant part, that

Following the completion of the oral presentations and additional written submissions, if any, the BAMC will consider the merits of the pending requests in one or two meetings as soon as practicable. The BAMC's review will take into consideration any additional written submissions . . . , materials presented in the oral presentations . . . , any materials previously submitted in support of the reconsideration request including any additional materials that were submitted in connection with the CPE Process Review, if any, and the findings set forth in the CPE Process Review Reports.³⁸

The Board noted that the requestors with pending reconsideration requests each will have an opportunity to submit supplemental materials

³⁴ *Id.* at Pg. 34.

³⁵ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

³⁶ Available at <https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>.

³⁷ 2018 Resolutions. See also Roadmap, available at <https://www.icann.org/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf>.

³⁸ Roadmap, at Pg. 2.

and make a presentation to the BAMC to address how the CPE Process Review is relevant to their pending Reconsideration Requests. Any specific claims they might have related to the FTI Reports with respect to their particular applications can be addressed then, and ultimately will be considered in connection with the determination on their own Reconsideration Requests.³⁹

C. The Requestors' Response to the CPE Process Review.

On 16 January 2018, the Request 16-11 Requestors submitted a letter to the BAMC concerning the CPE Process Review Reports.⁴⁰ They stated that “a first cursory review of the report[s] already shows that Requestors’ concerns about the lack of transparency remain unaddressed.”⁴¹ The Request 16-11 Requestors were “concerned about the methodology used by [FTI], and about due process and policy violations, disparate treatment and inconsistencies that have not been considered.”⁴² The Requestors stated that they “trust[ed] that . . . ICANN shall hear Request[o]rs before proceeding further in this matter.”⁴³

On 1 February 2018, the Request 16-11 Requestors submitted a second letter to the BAMC expressing concerns about the CPE Process Review’s transparency, methodology, and scope. The Request 16-11 Requestors asked the BAMC to “address these inconsistencies—in the event that you do not simply decide to cancel HTLD’s application . . . and to ensure a meaningful review of the CPE regarding .hotel.”⁴⁴

On 19 March 2018, consistent with the Roadmap, the BAMC invited the Request 16-11 Requestors to “submit additional information relating to Request 16-11, provided the submission is limited to any new information/argument based upon the CPE Process Review Reports” by 2

³⁹ *Id.*

⁴⁰ <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-16jan18-en.pdf>.

⁴¹ *Id.* at Pg. 1.

⁴² *Id.*

⁴³ *Id.* at Pg. 2.

⁴⁴ *Id.* at Pg. 4.

April 2018. The BAMC also invited the Request 16-11 Requestors to “make a telephonic oral presentation to the BAMC in support of” Request 16-11. The BAMC requested “that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-11 and that is not already covered by the written materials.”⁴⁵ On 22 March 2018, the Request 16-11 Requestors accepted the BAMC’s invitation to make a telephonic presentation and asked for an extension on its deadline to 9 April 2018 submit additional materials in support of Request 16-11,⁴⁶ which the BAMC granted.⁴⁷

On 9 April 2018, the Request 16-11 Requestors submitted a letter to the Board concerning the 2018 Resolutions, asserting that the Board passed the 2018 Resolutions “without considering Request[o]rs’ arguments against accepting the findings set forth in the CPE Process Review Reports,” and “[i]nstead . . . considered that Request[o]rs will have the opportunity to address their arguments in support of . . . Request 16-11.”⁴⁸ The Request 16-11 Requestors claimed that the 2018 Resolutions “make[] a meaningful review of [the] main arguments expressed by Request[o]rs impossible” and that “upholding [the 2018 Resolutions] would preclude the ICANN Board from granting the remedies requested by Request[o]rs in the framework of . . . Request 16-11.”⁴⁹ The Request 16-11 Requestors concluded that the 2018 Resolutions were “either careless and incompetent or prejudiced.”⁵⁰

D. Request 18-6.

⁴⁵ Attachment 1, 19 March 2018 Email from ICANN to the Requestor.

⁴⁶ Attachment 2, 22 March 2018 Email from the Requestor to ICANN.

⁴⁷ Attachment 3, 23 March 2018 Email from ICANN to the Requestor.

⁴⁸ 9 April 2018 letter from Petillion to Board at Pg. 1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-09apr18-en.pdf>.

⁴⁹ *Id.* at Pg. 1-2.

⁵⁰ *Id.* at Pg. 2.

On 14 April 2018, the Requestors submitted Request 18-6, challenging the 2018 Resolutions.⁵¹ As they did in the above-referenced correspondence concerning Request 16-11, the Requestors asserted that the 2018 Resolutions “would preclude the ICANN Board from granting the remedies requested by Request[o]rs in the framework of Reconsideration Request 16-11, and unjustly deprive Request[o]rs from a meaningful review.”⁵² The Requestors incorporated the concerns they raised “in the framework of Reconsideration Request 16-11” and reiterated their concerns about the CPE Process Review’s transparency, methodology, and scope.⁵³ The Requestors claimed that the 2018 Resolutions are contrary to ICANN organization’s commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.⁵⁴ The Requestors also requested that Request 18-6 and Request 16-11 be heard together.⁵⁵

E. Relief Requested

The Requestors ask the BAMC to:

1. “[R]everse” the 2018 Resolutions;
2. Grant Requestors a hearing;
3. “[P]rovide[] full transparency regarding all communications between (i) ICANN, the ICANN Board, ICANN’s counsel and (ii) the CPE Process Reviewer”; and
4. “[P]rovide full transparency on its consideration of the CPE Process and the CPE Process Review and to list and give access to all material the BAMC and the ICANN Board considered during its meetings on the CPE Process and the CPE Process

⁵¹ Request 18-6, § 2, at Pg. 3.

⁵² *Id.* § 5, at Pg. 4.

⁵³ *Id.* § 7, at Pg. 5-7.

⁵⁴ *Id.* § 7, at Pg. 6-7.

⁵⁵ *Id.* § 8, at Pg. 8.

Review.”⁵⁶

III. Issue Presented.

The issue is whether the Board’s adoption of the 2018 Resolutions contradicted ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies). The BAMC will not consider Request 16-11 in conjunction with Request 18-6 because the Requests were filed under different Bylaws with different standards for Reconsideration and involve different subject matters. Further, while Article 4, Section 4.2(j) of the Bylaws allow different Reconsideration Requests to be heard as the same time, as long as “(i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction,”⁵⁷ here, the two Requests involve different actions. Accordingly, the sole issue here is, as referenced above, whether the Board’s adoption of the 2018 Resolutions contracted ICANN’s Missions, Commitments, Core Values and/or established ICANN policy(ies).

IV. The Relevant Standards for Reconsideration Requests.

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity may submit a request “for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.⁵⁸

⁵⁶ Request 18-6, § 8, at Pg. 8.

⁵⁷ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(j).

⁵⁸ ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.⁵⁹ Pursuant to the Bylaws, where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.⁶⁰ Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁶¹

On 19 May 2018, the BAMC determined that Request 18-6 is sufficiently stated and sent Request 18-6 to the Ombudsman for review and consideration.⁶² The Ombudsman thereafter recused himself from this matter.⁶³ Accordingly, the BAMC has reviewed Request 18-6 and issues this Recommendation.

V. Analysis and Rationale.

A. The 2018 Resolutions Are Consistent With ICANN’s Mission, Commitments, Core Values and Established ICANN Policy(ies).

The Requestors’ criticisms of the Resolutions focus on the transparency, methodology, and scope of the CPE Process Review. But, the Requestors provide no evidence demonstrating how the Resolutions violate ICANN’s commitment to fairness, or that the Board’s action is inconsistent with ICANN’s commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with

⁵⁹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

⁶⁰ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

⁶¹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

⁶² Ombudsman Action Regarding Request 18-6, Pg. 2, <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-ombudsman-action-23may18-en.pdf>.

⁶³ Ombudsman Action Regarding Request 18-6, Pg. 1.

efficiency and excellence. Rather, it appears that the Requestors simply do not agree with findings of the CPE Process Review Reports and the Board’s acceptance of those findings. As demonstrated below, these are not sufficient bases for reconsideration.

1. The CPE Process Review Satisfied Applicable Transparency Obligations.

The Requestors argue that the CPE Process Review—and therefore the 2018 Resolutions—are contrary to ICANN’s commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.⁶⁴ Specifically, the Requestors believe that the CPE Process Review lacked transparency concerning: (1) “the selection process for the CPE process reviewer ([FTI]), and the names and curricula vitae of the FTI individuals involved in the review”; (2) the “instructions FTI received from ICANN [organization]”; (3) the “criteria and standards that FTI used to perform the CPE process review”; (4) the “documents or the recordings of the interviews on which [FTI’s] findings are based”; and (5) the “questions that were asked during [FTI’s] interviews.”⁶⁵

As an initial matter, ICANN org provided details concerning the selection process for the CPE process reviewer almost one year ago, in furtherance of its effort to operate to the maximum extent feasible in an open and transparent manner.⁶⁶ In the same document, ICANN org provided information concerning the scope of FTI’s investigation.⁶⁷ Similarly, the CPE Process Review Reports themselves provide extensive detail concerning FTI’s “criteria and standards”

⁶⁴ Request 18-6, § 7, at Pg. 6-7.

⁶⁵ 1 February 2018 letter from Petition to BAMC at Pg. 1-2, available at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petition-to-icann-bamc-redacted-01feb18-en.pdf>.

⁶⁶ See CPE Process Review Update, 2 June 2017, available at <https://newgtlds.icann.org/en/applicants/cpe>.

⁶⁷ See *id.*

for conducting the CPE Process Review.⁶⁸ Accordingly, none of these arguments support reconsideration.

Concerning FTI's documents, recordings, and interview questions, as noted in the CPE Process Review Reports, many of the materials that FTI reviewed are publicly available documents, and are equally available to the Requestors.⁶⁹ Additionally, FTI requested, received, and reviewed (1) emails from ICANN organization (internal to ICANN personnel as well external emails exchanged with the CPE Provider) and (2) the CPE Provider's working papers, including draft reports, notes, and spreadsheets.⁷⁰ While the Requestors did not file a request for documentary information pursuant to the Documentary Information Disclosure Policy (DIDP), these materials are the subject of two DIDP Requests, which were submitted by parties in January 2018. ICANN organization considered the request and concluded that ICANN organization explained that those documents would not be made publicly available because they were subject to certain Nondisclosure Conditions.⁷¹ These same Nondisclosure Conditions apply to the Requestors' claim. Moreover, the reasoning set forth in the BAMC's Recommendations on Reconsideration Requests 18-1 and 18-2, denying reconsideration on those DIDP Responses are applicable here and are therefore incorporated herein by reference.⁷² The Requestors here provide no evidence that ICANN org's decision not to disclose these materials contravened any

⁶⁸ See, e.g., FTI Scope 1 Report at Pg. 3, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

⁶⁹ Scope 1 Report at Pgs. 3-6.

⁷⁰ *Id.* at Pg. 6.

⁷¹ See ICANN organization Response to DIDP Request 20180115-1, at Pg. 21-22, available at <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-response-redacted-14feb18-en.pdf>.

⁷² See BAMC Recommendation on Request 18-1, available at <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>; see also BAMC Recommendation on Request 18-2, available at <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-bamc-recommendation-request-05jun18-en.pdf>.

applicable policies, or ICANN’s Mission, Commitments, or Core Values. Accordingly, this argument does not support reconsideration.

2. The Requestors’ Challenges to FTI’s Methodology Do Not Warrant Reconsideration.

The Requestors assert that the Board should not have acknowledged or accepted the CPE Process Review Reports because FTI’s methodology was flawed.⁷³ Specifically, the Requestors complain that FTI: (1) did not explain why the CPE Provider refused to produce email correspondence; and (2) did not try to contact former employees of the CPE Provider.⁷⁴

As a preliminary matter, FTI, not the Board or ICANN organization, defined the methodology for the CPE Process Review Reports.⁷⁵ The Board selected FTI because it has “the requisite skills and expertise to undertake” the CPE Process Review, and relied on FTI to develop an appropriate methodology.⁷⁶ The Requestors have not identified a policy or procedure (because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Process Review.

With respect to the first concern, the CPE Provider *did* produce to FTI, and FTI *did* review, the CPE Provider’s working papers, draft reports, notes, and spreadsheets for all CPE Reports.⁷⁷ FTI also received and reviewed emails (and attachments) produced by ICANN organization between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations.⁷⁸ The Requestors are correct that FTI

⁷³ 1 February 2018 letter from Petillion to BAMC at Pg. 2., available at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>. See also Request 18-6, § 7, at Pg. 7.

⁷⁴ 1 February 2018 letter from Petillion to BAMC, at Pg. 2.

⁷⁵ See, e.g., Scope 2 Report at Pg. 3-9, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

⁷⁶ See CPE Process Review Update, 2 June 2017, available at <https://newgtlds.icann.org/en/applicants/cpe>.

⁷⁷ See Scope 2 Report at Pg. 7-8.

⁷⁸ See Scope 2 Report at Pg. 7-8.

requested additional materials from the CPE Provider such as the internal correspondence between the CPE Provider’s personnel and evaluators, but the CPE Provider refused to produce certain categories of documents, claiming that pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and internal and external emails were not “working papers.”⁷⁹ No policy or procedure exists that would require ICANN organization to reject the CPE Process Review Reports because the CPE Provider did not produce internal emails. This argument does not support reconsideration.

Similarly, with respect to the second concern, FTI interviewed the “only two remaining [CPE Provider] personnel,” who were both “part of the core team for all 26 evaluations” in the CPE Process review.⁸⁰ Other team members were no longer employed by the CPE Provider when FTI conducted its investigation, and were therefore not available for FTI to interview.⁸¹ Neither FTI nor the Board were required to search out every former CPE Provider employee who had any role in any CPE evaluation, particularly when FTI already had access to two individuals who were core members of *every* CPE evaluation team and the working papers of the CPE reports that the entire core team worked on. The Requestor has not identified a policy or procedure requiring FTI to do more (including to explain why it did not seek out former employees) because none exists. Reconsideration is not warranted on this ground.

The Requestors also claim that FTI’s methodology was flawed because FTI did not identify that the CPE Provider determined that the HTLD Application “provided for an appeal system,” when in fact the application “d[id] not provide for an appeal system” as required under

⁷⁹ See *id.* See also EIU Consulting Agreement Statement of Work #2 – Application Evaluation Services_12Mar2012, at Pg. 8, available at <https://newgtlds.icann.org/en/applicants/cpe#process-review>.

⁸⁰ EIU Consulting Agreement Statement of Work #2 at Pg. 9.

⁸¹ Scope 1 Report, at Pg. 14, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

Criterion 3, Registration Policies.⁸² The Requestors claim that “[t]he Despegar et al. IRP Panel considered [this] inconsistenc[y] to have merit,” and the “existence of said inconsistencies has never been contested.”⁸³ This assertion as to the Despegar IRP Panel Declaration is an overstatement. The Despegar IRP Panel stated that: (1) ICANN org had confirmed that the CPE Provider did not have a “process for comparing the outcome of one CPE evaluation with another in order to ensure consistency,” nor did ICANN organization have a process for doing so; and that (2) “[m]uch was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations, . . . some of which, *on the basis solely of the arguments provided by [the Requestors]*, have some merit.”⁸⁴ The Despegar IRP Panel did not make a determination concerning these arguments, nor was it asked to. Accordingly, the IRP Panel’s side note concerning the Requestors’ allegations of inconsistencies does not support reconsideration.

3. The Requestors’ Challenge to the Scope of the CPE Process Review Does Not Warrant Reconsideration.

The Requestors’ remaining complaints about the CPE Process Review Reports all relate to the scope of FTI’s investigation.⁸⁵ The Requestors believe that FTI “sum[med] up” but did not “analyze” “the different reasons that the CPE Provider provided to demonstrate adherence to the community priority criteria,” that it did not analyze “the inconsistencies invoked by applicants in [reconsideration requests], IRPs or other processes,” and that FTI “did not examine the gTLD applications underlying the CPE [evaluations].”⁸⁶ Essentially, the Requestors wanted

⁸² 1 February 2018 letter from Petillion to BAMC, at Pg. 3, citing Despegar IRP Panel Declaration, ¶ 146.

⁸³ *Id.* at Pg. 4

⁸⁴ Despegar IRP Panel Declaration, ¶ 146 (emphasis added).

⁸⁵ See 1 February 2018 letter from Petillion to BAMC, *available at* <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>. See also Request 18-6, § 7, at Pg. 7.

⁸⁶ *Id.*

FTI to substantively re-evaluate the CPE applications, which was beyond the scope of the CPE Process Review. Therefore, the Requestor’s arguments concerning the scope of the CPE Process Review do not support reconsideration of the HTLD CPE Report.

4. The 2018 Resolutions Are Consistent with ICANN’s Mission, Commitments, Core Values, and Established Policy(ies).

Finally, the Requestors assert that the Board should reconsider the 2018 Resolutions because they are contrary to ICANN’s commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner,⁸⁷ and they will prevent Requestors from obtaining “a meaningful review of their complaints regarding HTLD’s application for .hotel, the CPE process and the CPE Review Process.”⁸⁸ Relatedly, the Requestors make a passing reference to a concern about “due process . . . violations.”⁸⁹

As an initial matter, the BAMC notes that when the Board acknowledged and accepted the CPE Process Review Reports, it directed the BAMC to consider the Reports along with all of the materials submitted in support of the relevant reconsideration requests.⁹⁰ The BAMC will consider the CPE Process Review Reports in the course of its evaluation of Request 16-11 (just as the BAMC will consider all of the materials submitted by the Requestors in connection with Request 16-11), but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-11.

The BAMC will carefully review and consider all of the materials that the Requestors submitted in support of Request 16-11. The BAMC notes that it provided the Requestors an

⁸⁷ Request 18-6, § 7, at Pg. 6-7.

⁸⁸ *Id.* § 5, at Pg. 3.

⁸⁹ 16 January 2018 letter from Petillion to BAMC, at Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-16jan18-en.pdf>.

⁹⁰ See ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, available at <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

opportunity to make a telephone presentation concerning the effect of the CPE Process Review on Request 16-11, which the Requestors accepted. The BAMC will consider all of the Requestors' arguments, and consider the CPE Process Review Reports as one of many reference points in its consideration of Request 16-11. Accordingly, reconsideration is not warranted based on the argument that the BAMC will consider the CPE Process Review Reports to the exclusion of the Requestors' submissions in Request 16-11.

As to the Requestors' due process claims, the BAMC recognizes ICANN org's commitment to conform with *relevant* principles of international law and conventions. However, any commitment to provide due process is voluntary and not coextensive with government actors' obligations. Constitutional protections do not apply with respect to a corporate accountability mechanism. California non-profit public benefit corporations, such as ICANN organization, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.⁹¹ Pursuant to this explicit authority, ICANN org established the Reconsideration Request and IRP processes, as well as the procedures that would govern those processes. ICANN organization was not required to establish any internal corporate accountability mechanism, but instead did so voluntarily. Accordingly, the Requestor does not have the "right" to due process or other "constitutional" rights with respect to ICANN's accountability mechanisms.

Even if ICANN organization *did* have due process obligations, and even though the "rights" the Requestors invoke do not apply to corporate accountability mechanisms, the Requestors have not explained how the alleged misapplication of ICANN org's policies resulted in a denial of due process. ICANN org *did* take due process into account when it designed the

⁹¹ Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation's bylaws).

accountability mechanisms, including the Reconsideration Request process that the Requestors exercised by submitting Request 16-11 and the IRP Process that the Requestors exercised in the Despegar IRP. ICANN org’s accountability mechanisms—that is, Reconsideration Requests and the Independent Review Process—consider the CPE Provider’s compliance with the Guidebook and with ICANN organization’s Articles of Incorporation and Bylaws. They consider whether the CPE Provider complied with its processes, which requires the adjudicator (the BAMC, Board, or an Independent Panel) to consider the outcome in addition to the process. Accordingly, the accountability mechanisms, including this reconsideration request, provide affected parties like the Requestor with avenues for redress of purported wrongs, and substantively review the decisions of third-party service providers, including the CPE Provider. This is not grounds for reconsideration.

For all of the reasons discussed above, reconsideration is not warranted.

VI. Recommendation

The BAMC has considered the merits of Request 18-6 and, based on the foregoing, concludes that the Board acted consistent with the Guidebook and did not violate ICANN’s Mission, Commitments and Core Values when it passed the 2018 Resolutions. Accordingly, the BAMC recommends that the Board deny Request 18-6.

Exhibit Q



The Internet Corporation for Assigned Names and Numbers

26 April 2017

Re: Update on the Review of the New gTLD Community Priority Evaluation Process

Dear All Concerned:

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the Community Priority Evaluation (CPE) process. Recently, we discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. The Board decided it would like to have some additional information related to how ICANN interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, we asked that the President and CEO, or his designee(s), undertake a review of the process by which ICANN has interacted with the CPE provider. ([Resolution 2016.09.17.01](#))

Further, during our 18 October 2016 meeting, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course.

The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests.

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<http://icann.org>

Registry et al. 000502



Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: [14-30](#) (.LLC), [14-32](#) (.INC), [14-33](#) (.LLP), [16-3](#) (.GAY), [16-5](#) (.MUSIC), [16-8](#) (.CPA), [16-11](#) (.HOTEL), and [16-12](#) (.MERCK).

For more information about CPE criteria, please see ICANN's [Applicant Guidebook](#), which serves as basis for how all applications in the New gTLD Program have been evaluated. For more information regarding Reconsideration Requests, please see ICANN's [Bylaws](#).

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Disspain". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Chris Disspain
Chair, ICANN Board Governance Committee

Exhibit R

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01-14-0001-5004

In the matter of an Independent Review

DOT REGISTRY, LLC,

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

AMENDED PROCEDURAL ORDER NO. 2

Independent Review Panel:

March 26, 2015

The Honorable Charles N. Brower

Mark Kantor

M. Scott Donahey, Chair

1. On February 11, 2015, the Panel requested the parties' suggestions regarding the conduct of these proceedings. Having received and considered the suggestions of the parties, the Panel has determined the initial steps to be taken by the parties in the process.
2. Pursuant to the Articles of Incorporation and Bylaws of the Internet Corporation for Assigned Names and Numbers ("ICANN") and the International Arbitration Rules and Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process of the International Centre for Dispute Resolution ("ICDR"), the Panel hereby requires ICANN to produce to the Panel and Dot Registry, LLC ("Dot Registry") no later than April 3, 2015, all non-privileged communications and other documents within its possession, custody or control referring to or describing (a) the engagement by ICANN of the Economist Intelligence Unit ("EIU") to perform Community Priority Evaluations, including without limitation any Board and staff records, contracts and agreements between ICANN and EIU evidencing that engagement and/or describing the scope of EIU's responsibilities thereunder, and (b) the work done and to be done by the EIU with respect to the Determination of the ICANN Board of Governance Committee on Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC) and 14-33 (.LLP), dated July 24, 2014, including work done by the EIU at the request, directly or indirectly, of the Board of Governance Committee on or after the date Dot Registry filed its Reconsideration Requests, and (c) consideration by ICANN of, and acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP, including at the request, directly or indirectly, of the Board of Governance Committee.
3. Not later than April 24, 2015, Dot Registry shall be entitled to make an additional written submission, to which shall be appended the witness statements, expert reports and other relevant and material evidence on which Dot Registry relies. Without limiting such matter as Dot Registry may choose to address therein, that written submission shall (a) identify with specificity the material disputed matters of fact, if any, at issue in this proceeding, (b) identify with specificity its allegations under ICANN Bylaws Art. IV, Sections 3.1 and 3.2, if any, that ICANN has failed to comply with its obligations under paragraph 4 of the ICANN Articles of Incorporation, and (c) discuss the standard to be applied by this Panel in resolving any such allegations to the extent the allegation does not fall within the

scope of the standards of review mentioned in ICANN Bylaws Art. IV, Section 4 or Supplementary Procedures Paragraph 8.

4. Not later than May 15, 2015, ICANN shall be entitled to make an additional written submission, to which shall be appended the witness statements, expert reports and other relevant and material evidence on which ICANN relies, replying to Dot Registry's additional submission referred to in paragraph 3, above. Without limiting such matters as ICANN may choose to address therein, that written submission shall (a) identify with specificity the material disputed matters of fact, if any, at issue in this proceeding, (b) address any specific allegations made by Dot Registry under ICANN Bylaws Art. IV, Sections 3.1 and 3.2, if any, that ICANN has failed to comply with its obligations under Paragraph 4 of the ICANN Articles of Incorporation, and (c) discuss the standard to be applied by this Panel in resolving any such allegation by Dot Registry to the extent such allegation does not fall within the scope of the standards of review mentioned in ICANN Bylaws Art. IV, Section 4 or Supplementary Procedures Paragraph 8.
5. The Panel shall advise the parties (a) promptly after receipt of the documents referred to in Paragraph 2, above, as to page limits, if any, for the written submissions referred to in Paragraphs 3 and 4, above, and (b) promptly after receipt of ICANN's written submission referred to in Paragraph 4, above, as to whether the Panel would find an additional round of written submissions useful.
6. The Panel defers ruling on Dot Registry's request for authorization to make document production requests and Dot Registry's request for an in-person hearing until after completion of the steps specified in Paragraphs 1 through 4, above.
7. The Panel also defers ruling on (a) whether the designation of a *situs* for this proceeding is, or is not, appropriate and, if so, what location should be designated and (b) whether the determinations of the Panel, are, or are not, binding. The Panel notes that a *situs* for this proceeding may be relevant for issues of convenience and fairness, if an in-person hearing proves to be appropriate in the Panel's view, as well as for legal issues if the determinations of the Panel are later asserted by a party to be binding. The Panel invites the parties to seek to reach mutual agreement on a *situs* for this proceeding other than one in the State of California or in the District of Columbia, on a without prejudice basis as to the issues aforementioned.

8. In light of the fact that Dot Registry elected not to include with its Request for Independent Review Process “[a]ll necessary evidence to demonstrate requestor’s claims,” including “expert evidence in writing,” which evidence Paragraph 5- of the Supplementary Procedures states “should be part of the [‘initial written’] submission” seeking an Independent Review, the Panel is presently disposed to take such election into account at such time as it may be called upon to deal with issues of costs.
9. The Panel anticipates that the parties will direct the attention of the Panel to filings and rulings in other IRP matters as appropriate. Notwithstanding, the Panel wishes to remind the parties that the IRP filings and rulings are publicly available and that the Panel may consult such filings and rulings even if they are not called to the Panel’s attention by the parties.
10. Written submissions by the parties shall be served both by email and by express delivery routed as follows:
 - a. One copy for each Panelist;
 - b. One copy for the other party;
 - c. One copy for the Case Manager of the ICDR.

On behalf of the Panel

A handwritten signature in cursive script, appearing to read "Scott Donahey", written over a horizontal line.

M. Scott Donahey, Chair

Exhibit S

13 DECEMBER 2017

COMMUNICATIONS BETWEEN ICANN ORGANIZATION AND THE CPE PROVIDER

PREPARED FOR JONES DAY



CRITICAL THINKING AT THE CRITICAL TIME™

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I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the “process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider” as part of the New gTLD Program.¹ The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.²

On 18 October 2016, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests relating to the CPE process.³ The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review would also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of pending Reconsideration Requests (Scope 3).⁴ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.’s (FTI) Global Risk and Investigations Practice and Technology Practice were retained by Jones Day on behalf of its client ICANN organization in order to conduct the CPE Process Review.

On 26 April 2017, Chris Disspain, the Chair of the BGC, provided additional information about the scope and status of the CPE Process Review.⁵ Among other things, he

¹ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

² *Id.*

³ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁴ *Id.*

⁵ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

identified eight Reconsideration Requests that would be on hold until the CPE Process Review was completed.⁶ On 2 June 2017, ICANN organization issued a status update.⁷ ICANN organization informed the community that the CPE Process Review was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN issued the 2 June 2017 status update.

On 1 September 2017, ICANN organization issued a second update, advising that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed.⁸ The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. On 4 October 2017, FTI completed its investigative process relating to the second track.

This report addresses Scope 1 of the CPE Process Review and specifically details FTI's evaluation and findings regarding ICANN organization's interactions with the CPE Provider with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program.

⁶ See *id.* The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, see <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁷ <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

⁸ <https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>.

II. Executive Summary

FTI concludes that there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process. This conclusion is based upon FTI's review of the written communications and documents described in Section III below and FTI's interviews with relevant personnel. While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization.

III. Methodology

FTI followed the international investigative methodology, which is a methodology codified by the Association of Certified Fraud Examiners (ACFE), the largest and most prestigious anti-fraud organization globally and which grants certification to members who meet the ACFE's standards of professionalism.⁹ This methodology is used by both law enforcement and private investigative companies worldwide. This methodology begins with the formation of an investigative plan which identifies documentation, communications, individuals and entities that may be potentially relevant to the investigation. The next step involves the collection and review of all potentially relevant materials and documentation. Then, investigators interview individuals who, based upon the preceding review of relevant documents, may have potentially relevant information. Investigators then analyze all the information collected to arrive at their conclusions.

Here, FTI did the following:

- Reviewed publicly available documents pertaining to CPE, including:

⁹ www.acfe.com. FTI's investigative team, which includes published authors and frequent speakers on investigative best practices, holds this certification.

1. New gTLD Applicant Guidebook (the entire Applicant Guidebook with particular attention to Module 4.2): <https://newgtlds.icann.org/en/applicants/agb>;
2. CPE page: <https://newgtlds.icann.org/en/applicants/cpe>;
3. CPE Panel Process Document: <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>;
4. CPE Guidelines document: <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>;
5. Updated CPE FAQs: <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>;
6. Contract and SOW between ICANN organization and the CPE Provider, available at: <https://newgtlds.icann.org/en/applicants/cpe>;
7. CPE results and reports: <https://newgtlds.icann.org/en/applicants/cpe#invitations>;
8. Preparing Evaluators for the New gTLD Application Process: <https://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>;
9. New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest: <https://www.icann.org/news/announcement-2009-02-25-en>;
10. Evaluation Panels: <https://newgtlds.icann.org/en/program-status/evaluation-panels>;
11. Evaluation Panels Selection Process: <https://newgtlds.icann.org/en/about/evaluation-panels-selection-process>;
12. Application Comments: <https://gtldcomment.icann.org/applicationcomment/viewcomments>;
13. External media: news articles on ICANN organization in general as well as the CPE process in particular;
14. BGC's comments on Recent Reconsideration Request: <https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>;
15. Relevant Reconsideration Requests: <https://www.icann.org/resources/pages/accountability/reconsideration-en>;

16. CPE Archive Resources:
<https://newgtlds.icann.org/en/applicants/cpe#archive-resources>;
17. Relevant Independent Review Process Documents:
<https://www.icann.org/resources/pages/accountability/irp-en>;
18. New gTLD Program Implementation Review regarding CPE, section 4.1:
<https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>;
19. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>;
20. Community Priority Evaluation>Timeline:
<https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>;
21. Community Priority Evaluation Teleconference – 10 September 2013, Additional Questions & Answers:
<https://newgtlds.icann.org/en/applicants/cpe/podcast-qa-10sep13-en.pdf>;
22. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>;
23. Board Governance Committee:
<https://www.icann.org/resources/pages/governance-committee-2014-03-21-en>;
24. ICANN Bylaws:
<https://www.icann.org/resources/pages/governance/bylaws-en>;
25. Relevant Correspondence related to CPE:
<https://www.icann.org/resources/pages/correspondence>;
26. Board Resolution 2016.09.17.01 and Rationale for Resolution:
<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>;
27. Minutes of 17 September 2016 Board Meeting:
<https://www.icann.org/resources/board-material/minutes-2016-09-17-en>;
28. BGC Minutes of the 18 October 2016 Meeting:
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>;

29. Letter from Chris Disspain to All Concerned Parties, dated 17 April 2016: <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>; and
 30. New gTLD Program Implementation Review Report: <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>; and
 31. Case 15-00110, In a matter of an Own Motion Investigation by the ICANN Ombudsman: <https://omblog.icann.org/index.html%3Fm=201510.html>.
- Requested, received, and reviewed the following from ICANN organization:
 1. Internal emails among relevant ICANN organization personnel relating to the CPE process and evaluations (including email attachments); and
 2. External emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including email attachments).
 - Requested the following from the CPE Provider:
 1. Internal emails among relevant CPE Provider personnel, including evaluators, relating to the CPE process and evaluations (including email attachments);
 2. External emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments); and
 3. The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets.

FTI did not receive documents from the CPE Provider in response to Items 1 or 2. FTI did receive and reviewed documents from ICANN organization that were responsive to the materials FTI requested from the CPE Provider in Item 2 (i.e., emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments)). FTI received and reviewed documentation produced by the CPE Provider in response to Item 3.

- Interviewed relevant ICANN organization personnel

- Interviewed relevant CPE Provider personnel
- Compared the information obtained from both ICANN organization and the CPE Provider.

IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.¹⁰ CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.¹¹ CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).¹²

As noted, the standards governing CPE are set forth in Module 4.2 of the Applicant Guidebook.¹³ In addition, the CPE Provider published the CPE Panel Process Document, explaining that the CPE Provider was selected to implement the Applicant Guidebook's CPE provisions.¹⁴ The CPE Provider also published supplementary guidelines (CPE Guidelines) that provided more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.¹⁵ The CPE Provider personnel interviewed by FTI stated that the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process.

¹⁰ See Applicant Guidebook, Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

¹¹ See *id.* at Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹² *Id.*

¹³ <https://newgtlds.icann.org/en/applicants/agn>.

¹⁴ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

¹⁵ See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

Based upon the materials reviewed and interviews with ICANN organization and CPE Provider personnel, FTI learned that each evaluation began with a notice of commencement from ICANN organization to the CPE Provider via email. As part of the notice of commencement, ICANN organization identified the materials in scope, which included: application questions 1-30a, application comments, correspondence, objection outcomes, and outside research (as necessary). ICANN organization delivered to the CPE Provider the public comments available at the time of commencement of the CPE process. The CPE Provider was responsible for gathering the application materials, including letters of support and correspondence, from the public ICANN organization website.¹⁶

The CPE Provider personnel responsible for CPE consisted of a core team, a Project Director, a Project Coordinator, and independent evaluators. Before the CPE Provider commenced CPE, all evaluators, including members of the core team, confirmed that no conflicts of interest existed. In addition, all evaluators underwent regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which was followed by regular training sessions to ensure that all evaluators had the same understanding of the evaluation process and procedures.¹⁷

Two independent evaluators were assigned to each evaluation. The evaluators worked independently to assess and score the application in accordance with the Applicant Guidebook and CPE Guidelines. According to the CPE Provider interviewees, each evaluator separately presented his/her findings in a database and then discussed his/her findings with the Project Coordinator. Then, the Project Coordinator created a spreadsheet that included sections detailing the evaluators' conclusions on each criterion and sub-criterion. The core team then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet. The interviewees stated

¹⁶ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

¹⁷ *Id.*

that, at times, the evaluators came to different conclusions on a particular score or issue. In these circumstances, the core team evaluated each evaluator's work and then referred to the Applicant Guidebook and CPE Guidelines in order to reach a conclusion as to scoring. Consistent with the CPE Panel Process Document, before the core team reached a conclusion, an evaluator may be asked to conduct additional research to answer questions that arose during the review.¹⁸ The core team would then deliberate and come up with a consensus as to scoring. FTI interviewed both ICANN organization and CPE Provider personnel about the CPE process and interviewees from both organizations stated that ICANN organization played no role in whether or not the CPE Provider conducted research or accessed reference material in any of the evaluations. That ICANN organization was not involved in the CPE Provider's research process was confirmed by FTI's review of relevant email communications (including attachments) provided by ICANN organization, inasmuch as FTI observed no instance where ICANN organization suggested that the CPE Provider undertake (or not undertake) research. Instead, research was conducted at the discretion of the CPE Provider.¹⁹

ICANN organization had no role in the evaluation process and no role in writing the initial draft CPE report. Once the CPE Provider completed an initial draft CPE report, the CPE Provider would send the draft report to ICANN organization. ICANN organization provided feedback to the CPE Provider in the form of comments exchanged via email or written on draft CPE reports as well as verbal comments during conference calls.

V. Analysis

FTI undertook its analysis after carefully studying the materials described above and evaluating the substance of the interviews conducted. The materials and interviews provided FTI with a solid understanding of CPE. The interviews in particular provided FTI with an understanding of the mechanics of the CPE process as well as the roles

¹⁸ CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

¹⁹ See Applicant Guidebook §4.2.3 at 4-9 ("The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.").

undertaken both separately and together by ICANN organization personnel and the CPE Provider during the process.

FTI proceeded with its investigation in four parts, which are separately detailed below: (i) analysis of email communications among relevant ICANN organization personnel and between relevant ICANN organization personnel and the CPE Provider (including email attachments); (ii) interviews of relevant ICANN organization personnel; (iii) interviews of relevant CPE Provider personnel; and (iv) analysis of draft CPE reports.

A. ICANN Organization’s Email Communications (Including Attachments) Did Not Show Any Undue Influence Or Impropriety By ICANN Organization.

In an effort to ensure the comprehensive collection of relevant materials, FTI provided ICANN organization with a list of search terms and requested that ICANN organization deliver to FTI all email (including attachments) from relevant ICANN organization personnel that “hit” on a search term. The search terms were designed to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI’s investigation. In FTI’s experience, it is a best practice to begin with a broader collection and then refine the search for relevant materials as the investigation progresses. As a result, the search terms were quite broad and included the names of ICANN organization and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website. FTI’s Technology Practice worked with ICANN organization to ensure that the materials were collected in a forensically sound manner. In total, ICANN organization provided FTI with 100,701 emails, including attachments, in native format. The time period covered by the emails received dated from 2012 to March 2017.

An initial review of emails produced to FTI confirmed FTI’s expectation that the initial search terms were overbroad and returned a large number of emails that were not relevant to FTI’s investigation. As a result, FTI performed a targeted key word search to

identify emails pertinent to the CPE process and reduce the time and cost of examining irrelevant or repetitive documents. FTI developed and tested these additional terms using FTI Technology's Ringtail eDiscovery platform, which employs conceptual analysis, duplicate detection, and interactive visualizations to assist in improving search results by grouping documents with similar content and highlighting those that are more likely to be relevant.

Based on FTI's review of email communications provided by ICANN organization, FTI found no evidence that ICANN organization had any undue influence on the CPE reports or engaged in any impropriety in the CPE process. FTI found that the vast majority of the emails were administrative in nature and did not concern the substance or the content of the CPE results. Of the small number of emails that did discuss substance, none suggested that ICANN acted improperly in the process.

1. The Vast Majority of the Communications Were Administrative in Nature.

The email communications that FTI reviewed and which were provided by ICANN organization were largely administrative in nature, meaning that they concerned the scheduling of telephone calls, CPE Provider staffing, timelines for completion, invoicing, and other similar logistical issues. Although FTI was not able to review the CPE Provider's internal emails relating to this work, as indicated above, FTI did interview relevant CPE Provider personnel, and each confirmed that any internal email communications largely addressed administrative tasks.

2. The Email Communications that Addressed Substance did not Evidence any Undue Influence or Impropriety by ICANN Organization.

Of the email communications reviewed by FTI, only a small number discussed the substance of the CPE process and specific evaluations. These emails generally fell into three categories. First, ICANN organization's emails with the CPE Provider reflected questions or suggestions made to clarify certain language reflected in the CPE Provider's draft reports. In these communications, however, FTI observed no instances

where ICANN organization recommended, suggested, or otherwise interjected its own views on what specific conclusion should be reached. Instead, ICANN organization personnel asked the CPE Provider to clarify language contained in draft CPE reports in an effort to avoid misleading or ambiguous wording. In this regard, ICANN organization's correspondence to the CPE Provider largely comprised suggestions on a particular word to be used to capture a concept clearly. FTI observed no instances where ICANN dictated or sought to require the CPE Provider to use specific wording or make specific scoring decisions.

Second, ICANN organization posed questions to the CPE Provider that reflected ICANN organization's efforts to understand how the CPE Provider came to its conclusions on a specific evaluation. Based on a plain reading, ICANN organization's questions were clearly intended to ensure that the CPE Provider had engaged in a robust discussion on each CPE criterion in the CPE report.

The third category comprised emails from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines.²⁰

Across all three categories, FTI observed instances where the CPE Provider and ICANN organization engaged in a discussion about using the correct word to capture the CPE Provider's reasoning. ICANN organization also advised the CPE Provider that the CPE Provider's conclusions, as stated in draft reports, at times were not supported by sufficient reasoning, and suggested that additional explanation was needed. However, ICANN organization did not suggest that the CPE Provider make changes in final scoring or adjust the rationale set forth in the CPE report.

Throughout its review, FTI observed instances where ICANN organization and the CPE Provider agreed to discuss various issues telephonically. Emails would then follow

²⁰ The CPE Provider may, at its discretion, provide a clarifying question (CQ) to be issued via ICANN organization to the applicant to clarify statements in the application materials and/or to inform the applicant that letter(s) of support could not be verified. See CPE Panel Process Document (<https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

these telephone calls and note that the latest drafts reflected the telephone discussions that had occurred. FTI reviewed the drafts as noted in these communications and compared them with prior versions of the draft reports that were exchanged and confirmed that there was no evidence of undue influence or impropriety by ICANN organization, as described further below.

Ultimately, the vast majority of ICANN organization's emails were administrative in nature. FTI found no email communications that indicated that ICANN organization had any undue influence on the CPE Provider or engaged in any impropriety in the CPE Process.

B. Interviews With ICANN Organization Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.

In March 2017, FTI met with several ICANN organization employees in order to learn more about their interactions with the CPE Provider. FTI interviewed the following individuals who interacted with the CPE Provider over time regarding CPE.

- Chris Bare
- Steve Chan
- Jared Erwin
- Cristina Flores
- Russell Weinstein
- Christine Willett

Each of the ICANN organization personnel that FTI interviewed confirmed that the interactions between ICANN organization and the CPE Provider took place via email (including attachments which were primarily comprised of draft reports with comments in red line form) and conference calls.

The interviewees explained that the initial draft reports received from the CPE Provider (particularly for the first four reports) were not particularly detailed, and, as a result,

ICANN organization asked the CPE Provider a lot of “why” questions to ensure that the CPE Provider’s rationale was sufficiently conveyed. The interviewees stated that they emphasized to the CPE Provider the importance of remaining transparent and accountable to the community in the CPE reports. Based on a plain reading of ICANN organization’s comments to draft CPE reports, none of ICANN organization’s comments were mandatory, meaning that ICANN organization never dictated that the CPE Provider take a specific approach. FTI observed no instances where ICANN organization endeavored to change the scoring or outcome of any CPE. This was confirmed by both ICANN organization personnel and CPE Provider personnel in FTI’s interviews. If changes were made in response to ICANN organization’s comments, they usually took the form of the CPE Provider providing additional information to explain its scoring decisions and conclusions.

The CPE reports became more detailed over time. The ICANN organization personnel who were interviewed noted that, over time, the majority of communications took place via weekly conference calls. Most of ICANN organization’s interaction with the CPE Provider consisted of asking for supporting citations to the CPE Provider’s research or that more precise wording be used. ICANN organization personnel noted that they observed robust debate among CPE Provider personnel concerning various criteria, but that the CPE Provider strictly evaluated the applications against the criteria outlined in the Applicant Guidebook and the CPE Guidelines. The interviewees confirmed that ICANN organization never questioned or sought to alter the CPE Provider’s conclusions.

C. Interviews With CPE Provider Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.

FTI asked to interview relevant CPE Provider personnel involved in the CPE process. The CPE Provider stated that only two CPE Provider staff members remained. In June 2017, FTI interviewed the two remaining staff members, who were members of the core team for all CPEs that were conducted. During the interview, in addition to understanding the CPE process described above, see section IV above, FTI

endeavored to understand the interactions between the CPE Provider and ICANN organization.

The interviewees confirmed that ICANN organization was not involved in scoring the criteria or the drafting of the initial reports, but rather the CPE Provider independently scored each criterion. The interviewees stated that they were strict constructionists and used the Applicant Guidebook as their “bible”. Further, the CPE Provider stated that it relied first and foremost on material provided by the applicant. The CPE Provider informed FTI that it only accessed reference material when the evaluators or core team decided that research was needed to address questions that arose during the review.

The CPE Provider also stated that ICANN organization provided guidance as to whether or not a particular report sufficiently detailed the CPE Provider’s reasoning. The CPE Provider stated that it never changed the scoring or the results based on ICANN organization’s comments. The only action the CPE Provider took in response to ICANN organization’s comments was to revise the manner in which its analysis and conclusions were presented (generally in the form of changing a word or adding additional explanation). The CPE Provider stated that it also received guidance from ICANN organization with respect to whether a proposed Clarifying Question was permissible under applicable guidelines.

In short, the CPE Provider confirmed that ICANN organization did not impact the CPE Provider’s scoring decisions.

D. FTI’s Review Of Draft CPE Reports Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.

FTI requested and received from the CPE Provider all draft CPE reports, including any drafts that reflected feedback from ICANN organization. ICANN organization provided feedback in redline form. Some draft reports had very few or no comments, while others had up to 20 comments. In some drafts, the comments were just numbered and not attributed to a particular person. As such, at times it was difficult to discern which

comments were made by ICANN organization versus the CPE Provider.²¹ Of the comments that FTI can affirmatively attribute to ICANN organization, all related to word choice, style and grammar, or requests to provide examples to further explain the CPE Provider's conclusions. This is consistent with the information provided by ICANN organization and the CPE Provider during their interviews and in the email communications provided by ICANN organization.

For example, FTI observed comments from ICANN organization personnel suggesting that the CPE Provider include more detailed explanation or explicitly cite resources for statements that did not appear to have sufficient factual or evidentiary support. In other instances, the draft reports reflected an exchange between ICANN organization and the CPE Provider in response to ICANN organization's questions regarding the meaning the CPE Provider intended to convey. It is clear from the exchanges that ICANN organization was not advocating for a particular score or conclusion, but rather commenting on the clarity of reasoning behind assigning one score or another.

In general, it was not uncommon for the CPE Provider to make revisions in response to ICANN organization's comments. As noted above, these revisions generally took the form of additional information to add further detail to the stated reasoning. However, none of these revisions affected the scoring or results. At other times, the CPE Provider did not make any revisions in response to ICANN organization's comments.

Overall, ICANN organization's comments generally were not substantive, but rather reflected ICANN organization's suggestion that a revision could make the CPE report clearer. Based on FTI's investigation, there is no evidence that ICANN organization ever suggested that the CPE Provider change its rationale, nor did ICANN organization dictate the scoring or CPE results.

²¹ Some comments to draft CPE reports followed verbal conversations between CPE Provider staff and ICANN organization; the CPE Provider stated that it did not possess notes documenting these conversations.

VI. Conclusion

Following a careful and comprehensive investigation, which included several interviews and an extensive review of available documentary materials, FTI found no evidence that ICANN organization attempted to influence the evaluation process, scoring or conclusions reached by the CPE Provider. As such, FTI concludes that there is no evidence that ICANN organization had any undue influence on the CPE Provider or engaged in any impropriety in the CPE process.

Exhibit T

Subject: [didp] Response to DIDP Request 20180110-1
Date: Friday, February 9, 2018 at 7:46:53 PM Pacific Standard Time
From: DIDP (sent by didp <didp-bounces@icann.org>)
To: Contact Information Redacted
CC: DIDP

Dear Mr. Ali,

Attached please find the response to your request submitted pursuant to ICANN's Documentary Information Disclosure Policy, submitted on 10 January 2018.

Best regards,
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

To: Arif Ali on behalf of DotMusic Limited

Date: 10 February 2018

Re: Request No. 20180110-1

Thank you for your request for documentary information dated 10 January 2018 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers' (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of DotMusic Limited (DotMusic). For reference, a copy of your Request is attached to the email transmitting this Response.

Items Requested

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process (the CPE Process Review or the Review):

1. All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
2. All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
3. The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”
4. All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;
5. All emails provided to FTI that (1) are “largely administrative in nature,” (2) discuss[] the substan[ce] of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;”
6. All draft CPE Reports concerning .MUSIC, both with and without comments;
7. All draft CPE Reports concerning .MUSIC in redline form, and/or feedback or suggestions given by ICANN to the CPE Provider;

8. All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN's questions "regarding the meaning the CPE Provider intended to convey;"
9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff;
10. The 13 January 2017 engagement letter between FTI and ICANN;
11. All of the "CPE Provider's working papers associated with" DotMusic's CPE;
12. "The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;"
13. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant ICANN organization personnel;"
14. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant CPE Provider personnel;"
15. FTI's investigative plan used during its independent review;
16. FTI's "follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;"
17. All communications between ICANN and FTI regarding FTI's independent review;
18. All communications between ICANN and the CPE Provider regarding FTI's independent review; and
19. All communications between FTI and the CPE Provider regarding FTI's independent review.

Response

The CPE Process Review

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications. ([Applicant Guidebook](#), Module 4.2 at Pg. 4-7; see also <https://newgtlds.icann.org/en/applicants/cpe>.) CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a

maximum of 16 points) to earn priority and thus prevail over other applications in the contention set. ([Applicant Guidebook](#) at Module 4.2 at Pg. 4-7.) CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process.

CPE is performed by an independent provider (CPE Provider). As part of the evaluation process, the CPE panels review and score a community application submitted to CPE against four criteria: (i) Community Establishment; (ii) Nexus between Proposed String and Community; (iii) Registration Policies; and (iv) Community Endorsement.

Consistent with ICANN organization's Mission, Commitments, and Core Values set forth in the Bylaws, and specifically in an effort to operate to the maximum extent feasible in an open and transparent manner, ICANN organization provided added transparency into the CPE process by establishing a CPE webpage on the New gTLD microsite, at <http://newgtlds.icann.org/en/applicants/cpe>, which provides detailed information about CPEs. In particular, the following information can be accessed through the CPE webpage:

- CPE results, including information regarding to the Application ID, string, contention set number, applicant name, CPE invitation date, whether the applicant elected to participate in CPE, and the CPE status. (<http://newgtlds.icann.org/en/applicants/cpe#invitations>)
- CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>)
- CPE Provider Contract and Statement of Work Information (SOW) (<http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>)
- CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>)
- Draft CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-16aug13-en.pdf>)
- Community Feedback on Draft CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe#invitations>)
- Updated CPE Frequently Asked Questions (<http://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>)
- CPE Processing Timeline (<http://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>)

On 17 September 2016, the Board directed the President and CEO, or his designees, to undertake a review of the “process by which ICANN [organization] interacted with the

[Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the Board's oversight of the New gTLD Program (Scope 1). (<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.) The Board's action was part of the ongoing discussions regarding various aspects of the CPE process.

Thereafter, the Board Governance Committee (BGC) determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3). (<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.) Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the following pending Reconsideration Requests would be on hold until the CPE Process Review was completed: 14-30 (.LLC),¹ 14-32 (.INC),² 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK). ([Letter from Chris Disspain, 26 April 2017](#).)

In November 2016, FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE Process Review following consultation with various candidates. On 13 January 2017, FTI was retained by ICANN's outside counsel, Jones Day, to perform the review. ([CPE Process Review Update, 2 June 2017](#), at Pg. 2-3.)

On 2 June 2017, in furtherance of its effort to operate to the maximum extent feasible in an open and transparent manner, and to provide additional transparency on the progress of the CPE Process Review, ICANN organization issued a status update. ([CPE Process Review Update, 2 June 2017](#).) Among other things, ICANN organization informed the community that FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. (See [CPE Process Review Update, 2 June 2017](#).)

The [2 June 2017 update](#) also provided the community with additional information regarding the CPE Process Review, including that it was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second

¹ Reconsideration Request 14-30 was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-30-dotregistry-request-redacted-07dec17-en.pdf>.

² Reconsideration Request 14-32 was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN organization issued the 2 June 2017 status update. (See [CPE Process Review Update, 2 June 2017.](#))

On 1 September 2017, ICANN organization issued a second update on the CPE Process Review. ICANN organization advised that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed. ([CPE Process Review Update, 1 September 2017.](#)) The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. (See [CPE Process Review Update, 1 September 2017.](#)) On 4 October 2017, FTI completed its investigative process relating to the second track. (See [Minutes of BGC Meeting, 27 Oct. 2017.](#))

On 13 December 2017, consistent with its commitment to transparency, ICANN organization published FTI's three reports on the CPE Process Review (CPE Process Review Reports or the Reports) on the CPE webpage, and issued an announcement advising the community that the Reports were available. (<https://newgtlds.icann.org/en/applicants/cpe#process-review>; <https://www.icann.org/news/announcement-2017-12-13-en>.)

For Scope 1, "FTI conclude[d] that there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process....While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization." ([Scope 1 Report](#), Pg. 4.)

For Scope 2, "FTI conclude[d] that the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook and the CPE Guidelines throughout each CPE." ([Scope 2 Report](#), Pg. 3.)

For Scope 3, "[o]f the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL, and .MERCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the reports. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting

referenced research not otherwise cited in the corresponding final CPE report. In one instance—the second .GAY final CPE report—FTI observed that while the final report referenced research, the citation to such research was not included in the final report or the working papers for the second .GAY evaluation. However, because the CPE Provider performed two evaluations for the .GAY application, FTI also reviewed the CPE Provider’s working papers associated with the first .GAY evaluation to determine if the citation supporting research referenced in the second .GAY final CPE report was reflected in those materials. Based upon FTI’s investigation, FTI found that the citation supporting the research referenced in the second .GAY final CPE report may have been recorded in the CPE Provider’s working papers associated with the first .GAY evaluation.” ([Scope 3 Report](#), Pg. 4.)

DotMusic’s DIDP Request

DotMusic’s DIDP Request seeks the disclosure of documentary information concerning the CPE Process Review. First, as a preliminary matter, the Request seeks many of the same categories of documents that it previously requested in prior DIDPs, to which ICANN has responded. (See Request Nos. [20160429-1](#), [20170505-1](#), and [20170610-1](#).) Further, the Request seeks documentary information which ICANN organization has already made publicly available. As ICANN organization explained in its responses to DotMusic’s previous Requests, and as further discussed below, ICANN organization has provided extensive updates concerning the CPE Process Review on the CPE webpage. ([CPE Webpage, New gTLD microsite](#).) ICANN organization provided updates concerning the CPE Process Review in April 2017, June 2017, and September 2017, and published all three of FTI’s Reports in December 2017. ([CPE Webpage, New gTLD microsite](#).) Additionally, a September 2016 Board resolution and October 2016 BGC minutes, both available on ICANN organization’s website ([Board Resolution 2016.09.17.01](#), [BGC Minutes dated 18 October 2016](#)) reflect more information about the status and direction of the CPE Process Review. Many of the Items sought in the Request were addressed in these publications.

Second, in addition to having been previously requested, many of the Items within the instant Request are overlapping and seek the same information. For example, and as discussed below, Item 1, which seeks emails among relevant ICANN organization personnel relating to the CPE process and evaluations, Item 2, which seeks emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations, and Item 5, which seeks three categories of emails provided to FTI, are all encompassed by Item 4, which requests all emails provided to FTI by ICANN organization. Thus, in responding to the Requests, ICANN organization grouped the Items that are overlapping.

Third, DotMusic’s blanket assertion that none of the DIDP Defined Conditions of Nondisclosure (Nondisclosure Conditions) apply because ICANN’s commitment to transparency under the Articles of Incorporation and Bylaws requires the disclosure of the materials used by FTI in the CPE Process Review misstates the DIDP Process and misapplies ICANN organization’s Mission, Commitments, and Core Values, and

adopting it would render the Nondisclosure Conditions meaningless. (See Request at 1-2.)

The DIDP exemplifies ICANN organization's Commitments and Core Values supporting transparency and accountability by setting forth a procedure through which documents concerning ICANN organization's operations and within ICANN organization's possession, custody, or control that are not already publicly available are made available unless there is a compelling reason for confidentiality. (DIDP.) Consistent with its commitment to operating to the maximum extent feasible in an open and transparent manner, ICANN organization has published process guidelines for responding to requests for documents submitted pursuant to DIDP (DIDP Response Process). (See [DIDP Response Process](#).) The DIDP Response Process provides that following the collection of potentially responsive documents, "[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN organization's website]." (DIDP Response Process; see also [Nondisclosure Conditions](#).) Thereafter, if ICANN organization concludes that a document falls within a Nondisclosure Condition, "a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure." (DIDP Response Process.) "Information that falls within any of the [Nondisclosure Conditions] may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure." (DIDP.)

Moreover, the Nondisclosure Conditions, and the entire DIDP, were developed through an open and transparent process involving the broader community. The DIDP was developed as the result of an independent review of standards of accountability and transparency within ICANN organization, which included extensive public comment and community input. (See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.) Following the completion of the independent review of standards of accountability and transparency in 2007, ICANN organization sought public comment on the resulting recommendations, and summarized and posted publicly the community feedback. (<https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.) Based on the community's feedback, ICANN organization proposed changes to its frameworks and principles to "outline, define and expand upon the organisation's accountability and transparency," (<https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>), and sought additional community input on the proposed changes before implementing them. (<https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.)

However, neither the DIDP nor ICANN organization's Commitments and Core Values supporting transparency and accountability obligates ICANN organization to make public every document in ICANN organization's possession. The DIDP sets forth circumstances (Nondisclosure Conditions) for which those other commitments or core values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public comment, that the

community has agreed are presumed not to be appropriate for public disclosure (and the *Amazon EU S.A.R.L. Independent Review Process Panel* confirmed are consistent with ICANN's Articles of Incorporation and Bylaws). The public interest balancing test in turn allows ICANN organization to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, ICANN organization may appropriately exercise its discretion, pursuant to the DIDP, in determining that certain documents are not appropriate for disclosure, without contravening its commitment to transparency.

As the Amazon EU S.A.R.L. Independent Review Process Panel noted in June of 2017:

[N]otwithstanding ICANN's transparency commitment, both ICANN's By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.

([Amazon EU S.A.R.L. v. ICANN, ICDR Case No. 01-16-000-7056, Procedural Order](#) (7 June 2017), at Pg. 3.) ICANN organization's Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that "in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission." (ICANN Bylaws, 22 July 2017, [Art. 1, Section 1.2\(c\)](#).)

Indeed, a critical competing Core Value here is ICANN organization's Core Value of operating with efficiency and excellence (ICANN Bylaws, at [Art. 1, Section 1.2\(b\)\(v\)](#))) by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider's Confidential Information. ICANN organization's contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN organization is required to "maintain [the CPE Provider's Confidential Information] in confidence," and "use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care." (New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.) Confidential Information includes "all proprietary, secret or confidential information or data relating to either of the parties and its operations, employees, products or services, and any Personal Information." (<https://newgtlds.icann.org/en/applicants/cpe>.) The materials that the CPE Provider shared with ICANN organization, ICANN organization's counsel, and FTI reflect the CPE Provider's Confidential Information, including confidential information relating to its operations, products, and services (i.e. its methods and procedures for conducting CPE analyses), and Personal Information (i.e., its employees' personally identifying information).

As part of ICANN’s commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual obligation, ICANN seeks consent from the contractor to release information.³ (See, e.g., [Response to DIDP Request No. 20150312-1](#) at Pg. 2.) Here, ICANN organization endeavored to obtain consent from the CPE Provider to disclose certain information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN organization’s request, and has threatened litigation should ICANN organization breach its contractual confidentiality obligations. ICANN organization’s contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN organization to breach its contract with the CPE Provider. The community-developed Nondisclosure Conditions specifically contemplate nondisclosure obligations like the one in ICANN organization’s contract with the CPE Provider: there is a Nondisclosure Condition for “[i]nformation . . . provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.” ([DIDP.](#))

Items 1, 2, 4, 5, and 9

Items 1, 2, 4, 5, and 9 seek either the same or overlapping documentary information. Items 1, 2, 4, and 5 seek email correspondence among ICANN organization personnel (Item 1), between ICANN organization personnel and CPE Provider personnel (Item 2), and that ICANN organization provided to FTI (Items 4 and 5). Item 9 seeks documents provided to FTI by ICANN organization staff, including Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, and Christine Willett. DotMusic previously requested these materials in DIDP Request 20160429-1, which sought disclosure of, among other things, internal communications and correspondence between ICANN organization and the CPE Provider, and Request 20170505-1, which sought disclosure of, among other things, “materials provided to the evaluator [FTI] by” the CPE Provider and by ICANN organization. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5; [Response to DIDP Request 20160429-1](#), at Pgs. 3-7.)

As set forth in the Scope 1 Report, FTI requested that ICANN provide “[i]nternal emails among relevant ICANN organization personnel relating to the CPE process and evaluations,” and “[e]xternal emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations.” ([Scope 1 Report](#), at Pg. 6). FTI’s request encompassed the documents that DotMusic now requests in Items 1, 2, 4, 5, and 9. In response to FTI’s request, ICANN organization provided FTI with 100,701 emails, including attachments. The time period covered by the emails received dated from 2012 to March 2017. The 100,701 emails (including attachments) produced to FTI encompasses the documents responsive to Items 1, 2, 5, and 9 that are in ICANN’s possession, custody or control.

³ Of note, and as discussed within the Transparency Subgroup of the Work Stream 2 effort for the Cross Community Working Group on Enhancing ICANN Accountability, ICANN’s contracting practice has evolved such that nondisclosure agreements are not entered into as a matter of course, but instead require a showing of business need.

As noted in the Scope 1 Report, a large number of the emails were not relevant to FTI's investigation. ([Scope 1 Report](#), at Pgs. 10-11.) The Scope 1 Report states that the emails "generally fell into three categories. First, ICANN organization's emails with the CPE Provider reflected questions or suggestions made to clarify certain language reflected in the CPE Provider's draft reports." "Second, ICANN organization posed questions to the CPE Provider that reflected ICANN organization's efforts to understand how the CPE Provider came to its conclusions on a specific evaluation." Third, ICANN organization's emails included "emails from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines." ([Scope 1 Report](#), at Pgs. 11-12).

ICANN organization's internal communications relating to the CPE process and evaluations (Items 1, 4, 5 and 9) are subject to the following Nondisclosure Conditions:

- Confidential business information and/or internal policies and procedures.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

Indeed, DotMusic acknowledges in the instant Request that the materials it seeks reflect "ICANN's deliberative and decision-making process."⁴

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

DotMusic asserts that "the attorney-client privilege does not bar disclosure of any requested document" because all requested documents were provided to FTI, which DotMusic describes as a third party. (DIDP Request 20180110-1, at Pg. 2.) DotMusic cites California's Evidence Code and *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229 (2004) for support of its argument. (*Id.*) However, under California's Evidence Code, "[a] disclosure that is itself privileged is not a waiver of any privilege." (Cal. Evid. Code § 912(c).) And *McKesson HBOC* explains that

where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain

⁴ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

that person's assistance so that the attorney will better be able to advise his client, the disclosure is not a waiver of the privilege.

(115 Cal. App. 4th 1229, 1236-37 (2004).) Here, ICANN organization's outside counsel, Jones Day—not ICANN organization—retained FTI.⁵ Counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN organization.⁶ Therefore, FTI's draft and working materials are protected by the attorney-client privilege under California law.

Further, even if the attorney-client privilege did not apply to documents shared with FTI (which it does), disclosing the content and choice of documents that ICANN organization and the CPE Provider provided to FTI pursuant to ICANN organization's outside counsel's direction, and FTI's draft and working materials, "might prejudice an[] internal . . . investigation"—that is, the CPE Process Review. (DIDP.) Accordingly, such documentary information is subject to a Nondisclosure Condition.

ICANN organization's communications with the CPE Provider relating to the CPE process and evaluations (Items 2, 4, 5 and 9) are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

Again, DotMusic acknowledges that the materials it seeks reflect "ICANN's deliberative and decision-making process."⁷

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

⁵ See FTI's CPE Process Review Reports, each of which indicate they were "Prepared for Jones Day", <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>

⁶ See also *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th 671, 774 (2013) (application of attorney-client privilege to communications to third parties "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted . . . clearly includes communications to a consulting expert" (internal quotation marks and citations omitted)).

⁷ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

The CPE Provider's correspondence with ICANN organization contains the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.⁸

ICANN organization notes that the correspondence between the CPE Provider and ICANN organization reflects the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those communications, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency. As noted, ICANN sought the CPE Provider's consent to waive the confidentiality, but this was not granted.

- Confidential business information and/or internal policies and procedures.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 5 seeks

[a]ll emails provided to FTI that (1) are "largely administrative in nature," (2) discuss[] the substan[ce] of the CPE process and specific evaluations," and (3) are "from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines

To the extent that this Item includes internal email correspondence among the CPE Provider personnel, as noted in the Scope 1 Report, FTI did not receive such documents. ([Scope 1 Report](#) at Pg. 6.) As such, ICANN organization is not in possession, custody, or control of those documents. .

⁸ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

Items 3, 13, 14, and 15

Items 3, 13, 14, and 15 seek FTI's list of search terms (Item 3), notes, transcripts, recordings, and documents created in response to FTI's interviews of ICANN organization personnel (Item 13) and of CPE Provider personnel (Item 14), and FTI's investigative plan (Item 15). DotMusic previously requested certain of these materials in DIDP Request 20170505-1 Item 10, which sought "materials provided to ICANN by [FTI] concerning the [CPE Process] Review." (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5.)

The CPE Process Review Reports includes the information responsive to these Items. Specifically, concerning Item 3, the Scope 1 Report states, "[i]n an effort to ensure the comprehensive collection of relevant emails, FTI provided ICANN organization with a list of search terms and requested that ICANN organization deliver to FTI all email (including attachments) from relevant ICANN organization personnel that 'hit' on a search term. The search terms were designated to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI's investigation...the search terms were quite broad and included the names of ICANN organization and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website." ([Scope 1 Report](#), at Pg. 10.)

With regard to Item 15, all three CPE Process Review Reports contain detailed descriptions of FTI's investigative plan. ([Scope 1 Report](#), at Pgs. 3-7; [Scope 2 Report](#), at Pgs. 3-9; and [Scope 3 Report](#), at Pgs. 5-8.)

With respect to documents responsive to Items 3, 13, 14, and 15, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

As noted above, DotMusic acknowledges in the instant Request that the materials it seeks reflect "ICANN's deliberative and decision-making process."⁹

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would

⁹ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

FTI's interviews of CPE Provider personnel referenced the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹⁰

ICANN organization notes that FTI's notes of interviews of CPE Provider personnel reflect the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those materials, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency. ICANN organization does not have possession, custody, or control over any transcripts, recordings, or other documents created in response to these interviews.

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Items 6, 7, and 8

Items 6, 7, and 8 seek draft CPE reports concerning .MUSIC (Items 6 and 7) and draft CPE reports reflecting communications between ICANN organization and the CPE Provider concerning ICANN's questions about "the meaning the CPE Provider intended to convey" (Item 8).

The CPE Provider provided to FTI, at FTI's request, "all draft CPE reports, including any drafts that reflected feedback from ICANN organization." ([Scope 1 Report](#), at Pg. 15.)

¹⁰ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

As discussed above, the CPE provider has objected to disclosure of its work product, including working papers and draft CPE reports, and ICANN organization is contractually obligated to maintain the confidentiality of the draft CPE reports, because they are subject to the nondisclosure provision of ICANN organization's contract with the CPE Provider, which the CPE Provider has not waived.

Although the draft CPE reports may not be disclosed pursuant to the nondisclosure provision, FTI endeavored to describe the relevant aspects of the draft CPE reports in the Reports without violating the nondisclosure provision of ICANN organization's contract with the CPE Provider. As noted in the Scope 1 Report, ICANN organization's feedback on draft CPE reports was in redline form. All of the comments that FTI was able to attribute to ICANN organization "related to word choice, style and grammar, or requests to provide examples to further explain the CPE Provider's conclusions." ([Scope 1 Report](#), at Pg. 16.) ICANN organization's feedback included "an exchange between ICANN organization and the CPE Provider in response to ICANN organization's questions regarding the meaning the CPE Provider intended to convey." ([Scope 1 Report](#), at Pg. 16.) It was "clear" to FTI "that ICANN organization was not advocating for a particular score or conclusion, but rather commenting on the clarity of reasoning behind assigning one score or another."

FTI concluded in the Scope 1 Report that "ICANN organization had no role in the [CPE] evaluation process and no role in the writing of the initial draft CPE report." ([Scope 1 Report](#), at Pg. 9.) Further, based on its interviews of ICANN organization and CPE Provider personnel, and its review of relevant email communications, FTI concluded that "ICANN organization was not involved in the CPE Provider's research process." ([Scope 1 Report](#), at Pg. 9.) Only after the CPE Provider "completed an initial draft CPE report, the CPE Provider would send the draft report to ICANN organization," which "provided feedback to the CPE Provider in the form of comments exchanged via email or written on draft CPE reports as well as verbal comments during conference calls." ([Scope 1 Report](#), at Pg. 9.) "FTI observed that when ICANN organization commented on a draft report, it was only to suggest amplifying rationale based on materials already reviewed and analyzed by the CPE Provider." ([Scope 3 Report](#), at Pg. 10.)

DotMusic previously requested these materials in DIDP Request 20160429-1, which sought disclosure of, among other things, internal communications and correspondence between ICANN organization and the CPE Provider, and Request 20170505-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5; [Response to DIDP Request 20160429-1](#), at Pgs. 3-7.)

With respect to documents responsive to Items 6, 7, and 8, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process

between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

DotMusic acknowledges that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”¹¹

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹²

ICANN organization notes that draft CPE reports reflect the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those documents, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 10

Item 10 seeks the 13 January 2017 engagement letter between FTI and ICANN. FTI signed an engagement letter with Jones Day, not ICANN organization. ICANN organization was not a party to the engagement. As such, the requested documentary information does not exist.

ICANN organization described the scope of FTI’s review (i.e. the terms of its engagement) and provided links to ICANN organization’s CPE Process Review Update, 2 June 2017, in response to Item 4 of DotMusic’s Request 20170604-1. ([Response to DIDP Request 20170505-1](#), at Pgs. 2-3; [CPE Process Review Update, 2 June 2017.](#))

As described in the CPE Process Review Update, dated 2 June 2017, the scope of the Review consisted of: (1) review of the process by which the ICANN organization

¹¹ DIDP Request 20180110-1, at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

¹² New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests. (See [CPE Process Review Update, 2 June 2017](#).)

The 2 June 2017 Update further explained that the Review was being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focused on gathering information and materials from ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE provider. (See [CPE Process Review Update, 2 June 2017](#).)

Further, even if documents responsive to Item 10 existed, this request is subject to the following Nondisclosure Condition:

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Items 11 and 12

Items 11 and 12 seek the CPE Provider's working papers associated with DotMusic's CPE (Item 11) and the CPE Provider's internal documents relating to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets (Item 12). DotMusic previously requested these materials in DIDP Request 20170505-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5.)

As discussed above, the CPE provider has objected to disclosure of its work product, including working papers, and ICANN organization is contractually obligated to maintain the confidentiality of the working papers, because they are subject to the nondisclosure provision of ICANN organization's contract with the CPE Provider, which the CPE Provider has not waived. Although FTI was unable to disclose the contents of the working papers in its Reports, FTI endeavored to describe the relevant aspects of the working papers in the Reports without violating the nondisclosure provision of ICANN organization's contract with the CPE Provider, although ICANN organization was required to redact some of the information that FTI originally included in the Scope 3 Report before publishing it, pursuant to ICANN organization's contractual obligations. (See, e.g., [Scope 3 Report](#), at Pgs. 18-19.)

As noted in the Scope 3 Report, FTI learned in its investigation "that the CPE Provider's evaluators primarily relied upon a database to capture their work (i.e., all notes, research, and conclusions) pertaining to each evaluation. The database was structured with the following fields for each criterion: Question, Answer, Evidence, Sources. The Question section mirrored the questions pertaining to each sub-criterion set forth in the

CPE Guidelines. For example, section 1.1.1. in the database was populated with the question, 'Is the community clearly delineated?'; the same question appears in the CPE Guidelines. The 'Answer' field had space for the evaluator to input his/her answer to the question; FTI observed that the answer generally took the form of a 'yes' or 'no' response. In the 'Evidence' field, the evaluator provided his/her reasoning for his/her answer. In the 'Source' field, the evaluator could list the source(s) he/she used to formulate an answer to a particular question, including, but not limited to, the application (or sections thereof), reference material, or letters of support or opposition." ([Scope 3 Report](#), at Pg. 9.)

As explained in the Scope 2 Report, FTI also learned that after two CPE Provider evaluators assessed and scored a CPE application in accordance with the Applicant Guidebook and CPE Guidelines, a "Project Coordinator created a spreadsheet that included sections detailing the evaluators' conclusions on each criterion and sub-criterion. The core team [evaluating the CPE application] then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet." ([Scope 2 Report](#), at Pg. 8.)

With respect to documents responsive to Items 11 and 12, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

DotMusic acknowledges in that the materials it seeks reflect "ICANN's deliberative and decision-making process."¹³

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider's working papers include references to the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN

¹³ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹⁴

ICANN organization notes that the CPE Provider's working papers reflect the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those documents, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 16

Item 16 seeks FTI's follow-up communications with CPE Provider personnel to clarify details discussed in earlier interviews and in materials provided. There is no written follow up communications from FTI to the CPE Provider. As such, ICANN organization is not in possession, custody, or control of any documents responsive to Item 16 because no such documents exist.

Items 17, 18, and 19

Items 17, 18, and 19 seek communications between ICANN organization and FTI (Item 17), ICANN organization and the CPE Provider (Item 18), and the CPE Provider and FTI (Item 19) regarding FTI's review.

DotMusic previously requested some of these materials in DIDP Request 20160429-1, which sought disclosure of, among other things, internal communications and correspondence between ICANN organization and the CPE Provider, and Request 20170505-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5; [Response to DIDP Request 20160429-1](#), at Pgs. 3-7.)

With respect to documents responsive to Items 17, 18, and 19, these documents are subject to the following Nondisclosure Conditions:

¹⁴ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

DotMusic acknowledges that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”¹⁵

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider’s correspondence with ICANN organization and FTI contains the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization’s contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹⁶

ICANN organization notes that the CPE Provider’s correspondence reflects the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of that correspondence, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

¹⁵ DIDP Request 20180110-1, at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

¹⁶ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

- Confidential business information and/or internal policies and procedures.

Additionally, documents responsive to Item 17 are subject to the following Nondisclosure Condition:

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Public Interest in Disclosure of Information Subject to Nondisclosure Conditions

Notwithstanding the applicable Nondisclosure Conditions identified in this Response, ICANN organization has considered whether the public interest in disclosure of the information subject to these conditions at this point in time outweighs the harm that may be caused by such disclosure. ICANN organization has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

About DIDP

ICANN’s DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN organization makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN organization continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN organization's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.

To: Arif Ali on behalf of DotMusic Limited

Date: 10 February 2018

Re: Request No. 20180110-1

Thank you for your request for documentary information dated 10 January 2018 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers' (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of DotMusic Limited (DotMusic). For reference, a copy of your Request is attached to the email transmitting this Response.

Items Requested

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process (the CPE Process Review or the Review):

1. All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
2. All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
3. The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”
4. All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;
5. All emails provided to FTI that (1) are “largely administrative in nature,” (2) discuss[] the substan[ce] of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;”
6. All draft CPE Reports concerning .MUSIC, both with and without comments;
7. All draft CPE Reports concerning .MUSIC in redline form, and/or feedback or suggestions given by ICANN to the CPE Provider;

8. All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN's questions "regarding the meaning the CPE Provider intended to convey;"
9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff;
10. The 13 January 2017 engagement letter between FTI and ICANN;
11. All of the "CPE Provider's working papers associated with" DotMusic's CPE;
12. "The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;"
13. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant ICANN organization personnel;"
14. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant CPE Provider personnel;"
15. FTI's investigative plan used during its independent review;
16. FTI's "follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;"
17. All communications between ICANN and FTI regarding FTI's independent review;
18. All communications between ICANN and the CPE Provider regarding FTI's independent review; and
19. All communications between FTI and the CPE Provider regarding FTI's independent review.

Response

The CPE Process Review

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications. ([Applicant Guidebook](#), Module 4.2 at Pg. 4-7; see also <https://newgtlds.icann.org/en/applicants/cpe>.) CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a

maximum of 16 points) to earn priority and thus prevail over other applications in the contention set. ([Applicant Guidebook](#) at Module 4.2 at Pg. 4-7.) CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process.

CPE is performed by an independent provider (CPE Provider). As part of the evaluation process, the CPE panels review and score a community application submitted to CPE against four criteria: (i) Community Establishment; (ii) Nexus between Proposed String and Community; (iii) Registration Policies; and (iv) Community Endorsement.

Consistent with ICANN organization's Mission, Commitments, and Core Values set forth in the Bylaws, and specifically in an effort to operate to the maximum extent feasible in an open and transparent manner, ICANN organization provided added transparency into the CPE process by establishing a CPE webpage on the New gTLD microsite, at <http://newgtlds.icann.org/en/applicants/cpe>, which provides detailed information about CPEs. In particular, the following information can be accessed through the CPE webpage:

- CPE results, including information regarding to the Application ID, string, contention set number, applicant name, CPE invitation date, whether the applicant elected to participate in CPE, and the CPE status. (<http://newgtlds.icann.org/en/applicants/cpe#invitations>)
- CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>)
- CPE Provider Contract and Statement of Work Information (SOW) (<http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>)
- CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>)
- Draft CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-16aug13-en.pdf>)
- Community Feedback on Draft CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe#invitations>)
- Updated CPE Frequently Asked Questions (<http://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>)
- CPE Processing Timeline (<http://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>)

On 17 September 2016, the Board directed the President and CEO, or his designees, to undertake a review of the “process by which ICANN [organization] interacted with the

[Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the Board's oversight of the New gTLD Program (Scope 1). (<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.) The Board's action was part of the ongoing discussions regarding various aspects of the CPE process.

Thereafter, the Board Governance Committee (BGC) determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3). (<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.) Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the following pending Reconsideration Requests would be on hold until the CPE Process Review was completed: 14-30 (.LLC),¹ 14-32 (.INC),² 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK). ([Letter from Chris Disspain, 26 April 2017](#).)

In November 2016, FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE Process Review following consultation with various candidates. On 13 January 2017, FTI was retained by ICANN's outside counsel, Jones Day, to perform the review. ([CPE Process Review Update, 2 June 2017](#), at Pg. 2-3.)

On 2 June 2017, in furtherance of its effort to operate to the maximum extent feasible in an open and transparent manner, and to provide additional transparency on the progress of the CPE Process Review, ICANN organization issued a status update. ([CPE Process Review Update, 2 June 2017](#).) Among other things, ICANN organization informed the community that FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. (See [CPE Process Review Update, 2 June 2017](#).)

The [2 June 2017 update](#) also provided the community with additional information regarding the CPE Process Review, including that it was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second

¹ Reconsideration Request 14-30 was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-30-dotregistry-request-redacted-07dec17-en.pdf>.

² Reconsideration Request 14-32 was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN organization issued the 2 June 2017 status update. (See [CPE Process Review Update, 2 June 2017.](#))

On 1 September 2017, ICANN organization issued a second update on the CPE Process Review. ICANN organization advised that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed. ([CPE Process Review Update, 1 September 2017.](#)) The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. (See [CPE Process Review Update, 1 September 2017.](#)) On 4 October 2017, FTI completed its investigative process relating to the second track. (See [Minutes of BGC Meeting, 27 Oct. 2017.](#))

On 13 December 2017, consistent with its commitment to transparency, ICANN organization published FTI's three reports on the CPE Process Review (CPE Process Review Reports or the Reports) on the CPE webpage, and issued an announcement advising the community that the Reports were available. (<https://newgtlds.icann.org/en/applicants/cpe#process-review>; <https://www.icann.org/news/announcement-2017-12-13-en>.)

For Scope 1, "FTI conclude[d] that there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process....While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization." ([Scope 1 Report](#), Pg. 4.)

For Scope 2, "FTI conclude[d] that the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook and the CPE Guidelines throughout each CPE." ([Scope 2 Report](#), Pg. 3.)

For Scope 3, "[o]f the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL, and .MERCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the reports. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting

referenced research not otherwise cited in the corresponding final CPE report. In one instance—the second .GAY final CPE report—FTI observed that while the final report referenced research, the citation to such research was not included in the final report or the working papers for the second .GAY evaluation. However, because the CPE Provider performed two evaluations for the .GAY application, FTI also reviewed the CPE Provider’s working papers associated with the first .GAY evaluation to determine if the citation supporting research referenced in the second .GAY final CPE report was reflected in those materials. Based upon FTI’s investigation, FTI found that the citation supporting the research referenced in the second .GAY final CPE report may have been recorded in the CPE Provider’s working papers associated with the first .GAY evaluation.” ([Scope 3 Report](#), Pg. 4.)

DotMusic’s DIDP Request

DotMusic’s DIDP Request seeks the disclosure of documentary information concerning the CPE Process Review. First, as a preliminary matter, the Request seeks many of the same categories of documents that it previously requested in prior DIDPs, to which ICANN has responded. (See Request Nos. [20160429-1](#), [20170505-1](#), and [20170610-1](#).) Further, the Request seeks documentary information which ICANN organization has already made publicly available. As ICANN organization explained in its responses to DotMusic’s previous Requests, and as further discussed below, ICANN organization has provided extensive updates concerning the CPE Process Review on the CPE webpage. ([CPE Webpage, New gTLD microsite](#).) ICANN organization provided updates concerning the CPE Process Review in April 2017, June 2017, and September 2017, and published all three of FTI’s Reports in December 2017. ([CPE Webpage, New gTLD microsite](#).) Additionally, a September 2016 Board resolution and October 2016 BGC minutes, both available on ICANN organization’s website ([Board Resolution 2016.09.17.01](#), [BGC Minutes dated 18 October 2016](#)) reflect more information about the status and direction of the CPE Process Review. Many of the Items sought in the Request were addressed in these publications.

Second, in addition to having been previously requested, many of the Items within the instant Request are overlapping and seek the same information. For example, and as discussed below, Item 1, which seeks emails among relevant ICANN organization personnel relating to the CPE process and evaluations, Item 2, which seeks emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations, and Item 5, which seeks three categories of emails provided to FTI, are all encompassed by Item 4, which requests all emails provided to FTI by ICANN organization. Thus, in responding to the Requests, ICANN organization grouped the Items that are overlapping.

Third, DotMusic’s blanket assertion that none of the DIDP Defined Conditions of Nondisclosure (Nondisclosure Conditions) apply because ICANN’s commitment to transparency under the Articles of Incorporation and Bylaws requires the disclosure of the materials used by FTI in the CPE Process Review misstates the DIDP Process and misapplies ICANN organization’s Mission, Commitments, and Core Values, and

adopting it would render the Nondisclosure Conditions meaningless. (See Request at 1-2.)

The DIDP exemplifies ICANN organization's Commitments and Core Values supporting transparency and accountability by setting forth a procedure through which documents concerning ICANN organization's operations and within ICANN organization's possession, custody, or control that are not already publicly available are made available unless there is a compelling reason for confidentiality. (DIDP.) Consistent with its commitment to operating to the maximum extent feasible in an open and transparent manner, ICANN organization has published process guidelines for responding to requests for documents submitted pursuant to DIDP (DIDP Response Process). (See [DIDP Response Process](#).) The DIDP Response Process provides that following the collection of potentially responsive documents, "[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN organization's website]." (DIDP Response Process; see also [Nondisclosure Conditions](#).) Thereafter, if ICANN organization concludes that a document falls within a Nondisclosure Condition, "a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure." (DIDP Response Process.) "Information that falls within any of the [Nondisclosure Conditions] may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure." (DIDP.)

Moreover, the Nondisclosure Conditions, and the entire DIDP, were developed through an open and transparent process involving the broader community. The DIDP was developed as the result of an independent review of standards of accountability and transparency within ICANN organization, which included extensive public comment and community input. (See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.) Following the completion of the independent review of standards of accountability and transparency in 2007, ICANN organization sought public comment on the resulting recommendations, and summarized and posted publicly the community feedback. (<https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.) Based on the community's feedback, ICANN organization proposed changes to its frameworks and principles to "outline, define and expand upon the organisation's accountability and transparency," (<https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>), and sought additional community input on the proposed changes before implementing them. (<https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.)

However, neither the DIDP nor ICANN organization's Commitments and Core Values supporting transparency and accountability obligates ICANN organization to make public every document in ICANN organization's possession. The DIDP sets forth circumstances (Nondisclosure Conditions) for which those other commitments or core values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public comment, that the

community has agreed are presumed not to be appropriate for public disclosure (and the *Amazon EU S.A.R.L. Independent Review Process Panel* confirmed are consistent with ICANN's Articles of Incorporation and Bylaws). The public interest balancing test in turn allows ICANN organization to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, ICANN organization may appropriately exercise its discretion, pursuant to the DIDP, in determining that certain documents are not appropriate for disclosure, without contravening its commitment to transparency.

As the Amazon EU S.A.R.L. Independent Review Process Panel noted in June of 2017:

[N]otwithstanding ICANN's transparency commitment, both ICANN's By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.

([Amazon EU S.A.R.L. v. ICANN, ICDR Case No. 01-16-000-7056, Procedural Order](#) (7 June 2017), at Pg. 3.) ICANN organization's Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that "in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission." (ICANN Bylaws, 22 July 2017, [Art. 1, Section 1.2\(c\)](#).)

Indeed, a critical competing Core Value here is ICANN organization's Core Value of operating with efficiency and excellence (ICANN Bylaws, at [Art. 1, Section 1.2\(b\)\(v\)](#))) by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider's Confidential Information. ICANN organization's contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN organization is required to "maintain [the CPE Provider's Confidential Information] in confidence," and "use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care." (New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.) Confidential Information includes "all proprietary, secret or confidential information or data relating to either of the parties and its operations, employees, products or services, and any Personal Information." (<https://newgtlds.icann.org/en/applicants/cpe>.) The materials that the CPE Provider shared with ICANN organization, ICANN organization's counsel, and FTI reflect the CPE Provider's Confidential Information, including confidential information relating to its operations, products, and services (i.e. its methods and procedures for conducting CPE analyses), and Personal Information (i.e., its employees' personally identifying information).

As part of ICANN’s commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual obligation, ICANN seeks consent from the contractor to release information.³ (See, e.g., [Response to DIDP Request No. 20150312-1](#) at Pg. 2.) Here, ICANN organization endeavored to obtain consent from the CPE Provider to disclose certain information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN organization’s request, and has threatened litigation should ICANN organization breach its contractual confidentiality obligations. ICANN organization’s contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN organization to breach its contract with the CPE Provider. The community-developed Nondisclosure Conditions specifically contemplate nondisclosure obligations like the one in ICANN organization’s contract with the CPE Provider: there is a Nondisclosure Condition for “[i]nformation . . . provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.” ([DIDP.](#))

Items 1, 2, 4, 5, and 9

Items 1, 2, 4, 5, and 9 seek either the same or overlapping documentary information. Items 1, 2, 4, and 5 seek email correspondence among ICANN organization personnel (Item 1), between ICANN organization personnel and CPE Provider personnel (Item 2), and that ICANN organization provided to FTI (Items 4 and 5). Item 9 seeks documents provided to FTI by ICANN organization staff, including Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, and Christine Willett. DotMusic previously requested these materials in DIDP Request 20160429-1, which sought disclosure of, among other things, internal communications and correspondence between ICANN organization and the CPE Provider, and Request 20170505-1, which sought disclosure of, among other things, “materials provided to the evaluator [FTI] by” the CPE Provider and by ICANN organization. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5; [Response to DIDP Request 20160429-1](#), at Pgs. 3-7.)

As set forth in the Scope 1 Report, FTI requested that ICANN provide “[i]nternal emails among relevant ICANN organization personnel relating to the CPE process and evaluations,” and “[e]xternal emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations.” ([Scope 1 Report](#), at Pg. 6). FTI’s request encompassed the documents that DotMusic now requests in Items 1, 2, 4, 5, and 9. In response to FTI’s request, ICANN organization provided FTI with 100,701 emails, including attachments. The time period covered by the emails received dated from 2012 to March 2017. The 100,701 emails (including attachments) produced to FTI encompasses the documents responsive to Items 1, 2, 5, and 9 that are in ICANN’s possession, custody or control.

³ Of note, and as discussed within the Transparency Subgroup of the Work Stream 2 effort for the Cross Community Working Group on Enhancing ICANN Accountability, ICANN’s contracting practice has evolved such that nondisclosure agreements are not entered into as a matter of course, but instead require a showing of business need.

As noted in the Scope 1 Report, a large number of the emails were not relevant to FTI's investigation. ([Scope 1 Report](#), at Pgs. 10-11.) The Scope 1 Report states that the emails "generally fell into three categories. First, ICANN organization's emails with the CPE Provider reflected questions or suggestions made to clarify certain language reflected in the CPE Provider's draft reports." "Second, ICANN organization posed questions to the CPE Provider that reflected ICANN organization's efforts to understand how the CPE Provider came to its conclusions on a specific evaluation." Third, ICANN organization's emails included "emails from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines." ([Scope 1 Report](#), at Pgs. 11-12).

ICANN organization's internal communications relating to the CPE process and evaluations (Items 1, 4, 5 and 9) are subject to the following Nondisclosure Conditions:

- Confidential business information and/or internal policies and procedures.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

Indeed, DotMusic acknowledges in the instant Request that the materials it seeks reflect "ICANN's deliberative and decision-making process."⁴

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

DotMusic asserts that "the attorney-client privilege does not bar disclosure of any requested document" because all requested documents were provided to FTI, which DotMusic describes as a third party. (DIDP Request 20180110-1, at Pg. 2.) DotMusic cites California's Evidence Code and *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229 (2004) for support of its argument. (*Id.*) However, under California's Evidence Code, "[a] disclosure that is itself privileged is not a waiver of any privilege." (Cal. Evid. Code § 912(c).) And *McKesson HBOC* explains that

where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain

⁴ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

that person's assistance so that the attorney will better be able to advise his client, the disclosure is not a waiver of the privilege.

(115 Cal. App. 4th 1229, 1236-37 (2004).) Here, ICANN organization's outside counsel, Jones Day—not ICANN organization—retained FTI.⁵ Counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN organization.⁶ Therefore, FTI's draft and working materials are protected by the attorney-client privilege under California law.

Further, even if the attorney-client privilege did not apply to documents shared with FTI (which it does), disclosing the content and choice of documents that ICANN organization and the CPE Provider provided to FTI pursuant to ICANN organization's outside counsel's direction, and FTI's draft and working materials, "might prejudice an[] internal . . . investigation"—that is, the CPE Process Review. (DIDP.) Accordingly, such documentary information is subject to a Nondisclosure Condition.

ICANN organization's communications with the CPE Provider relating to the CPE process and evaluations (Items 2, 4, 5 and 9) are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

Again, DotMusic acknowledges that the materials it seeks reflect "ICANN's deliberative and decision-making process."⁷

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

⁵ See FTI's CPE Process Review Reports, each of which indicate they were "Prepared for Jones Day", <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>

⁶ See also *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th 671, 774 (2013) (application of attorney-client privilege to communications to third parties "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted . . . clearly includes communications to a consulting expert" (internal quotation marks and citations omitted)).

⁷ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

The CPE Provider's correspondence with ICANN organization contains the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.⁸

ICANN organization notes that the correspondence between the CPE Provider and ICANN organization reflects the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those communications, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency. As noted, ICANN sought the CPE Provider's consent to waive the confidentiality, but this was not granted.

- Confidential business information and/or internal policies and procedures.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 5 seeks

[a]ll emails provided to FTI that (1) are "largely administrative in nature," (2) discuss[] the substan[ce] of the CPE process and specific evaluations," and (3) are "from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines

To the extent that this Item includes internal email correspondence among the CPE Provider personnel, as noted in the Scope 1 Report, FTI did not receive such documents. ([Scope 1 Report](#) at Pg. 6.) As such, ICANN organization is not in possession, custody, or control of those documents. .

⁸ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

Items 3, 13, 14, and 15

Items 3, 13, 14, and 15 seek FTI's list of search terms (Item 3), notes, transcripts, recordings, and documents created in response to FTI's interviews of ICANN organization personnel (Item 13) and of CPE Provider personnel (Item 14), and FTI's investigative plan (Item 15). DotMusic previously requested certain of these materials in DIDP Request 20170505-1 Item 10, which sought "materials provided to ICANN by [FTI] concerning the [CPE Process] Review." (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5.)

The CPE Process Review Reports includes the information responsive to these Items. Specifically, concerning Item 3, the Scope 1 Report states, "[i]n an effort to ensure the comprehensive collection of relevant emails, FTI provided ICANN organization with a list of search terms and requested that ICANN organization deliver to FTI all email (including attachments) from relevant ICANN organization personnel that 'hit' on a search term. The search terms were designated to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI's investigation...the search terms were quite broad and included the names of ICANN organization and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website." ([Scope 1 Report](#), at Pg. 10.)

With regard to Item 15, all three CPE Process Review Reports contain detailed descriptions of FTI's investigative plan. ([Scope 1 Report](#), at Pgs. 3-7; [Scope 2 Report](#), at Pgs. 3-9; and [Scope 3 Report](#), at Pgs. 5-8.)

With respect to documents responsive to Items 3, 13, 14, and 15, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

As noted above, DotMusic acknowledges in the instant Request that the materials it seeks reflect "ICANN's deliberative and decision-making process."⁹

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would

⁹ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

FTI's interviews of CPE Provider personnel referenced the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹⁰

ICANN organization notes that FTI's notes of interviews of CPE Provider personnel reflect the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those materials, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency. ICANN organization does not have possession, custody, or control over any transcripts, recordings, or other documents created in response to these interviews.

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Items 6, 7, and 8

Items 6, 7, and 8 seek draft CPE reports concerning .MUSIC (Items 6 and 7) and draft CPE reports reflecting communications between ICANN organization and the CPE Provider concerning ICANN's questions about "the meaning the CPE Provider intended to convey" (Item 8).

The CPE Provider provided to FTI, at FTI's request, "all draft CPE reports, including any drafts that reflected feedback from ICANN organization." ([Scope 1 Report](#), at Pg. 15.)

¹⁰ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

As discussed above, the CPE provider has objected to disclosure of its work product, including working papers and draft CPE reports, and ICANN organization is contractually obligated to maintain the confidentiality of the draft CPE reports, because they are subject to the nondisclosure provision of ICANN organization's contract with the CPE Provider, which the CPE Provider has not waived.

Although the draft CPE reports may not be disclosed pursuant to the nondisclosure provision, FTI endeavored to describe the relevant aspects of the draft CPE reports in the Reports without violating the nondisclosure provision of ICANN organization's contract with the CPE Provider. As noted in the Scope 1 Report, ICANN organization's feedback on draft CPE reports was in redline form. All of the comments that FTI was able to attribute to ICANN organization "related to word choice, style and grammar, or requests to provide examples to further explain the CPE Provider's conclusions." ([Scope 1 Report](#), at Pg. 16.) ICANN organization's feedback included "an exchange between ICANN organization and the CPE Provider in response to ICANN organization's questions regarding the meaning the CPE Provider intended to convey." ([Scope 1 Report](#), at Pg. 16.) It was "clear" to FTI "that ICANN organization was not advocating for a particular score or conclusion, but rather commenting on the clarity of reasoning behind assigning one score or another."

FTI concluded in the Scope 1 Report that "ICANN organization had no role in the [CPE] evaluation process and no role in the writing of the initial draft CPE report." ([Scope 1 Report](#), at Pg. 9.) Further, based on its interviews of ICANN organization and CPE Provider personnel, and its review of relevant email communications, FTI concluded that "ICANN organization was not involved in the CPE Provider's research process." ([Scope 1 Report](#), at Pg. 9.) Only after the CPE Provider "completed an initial draft CPE report, the CPE Provider would send the draft report to ICANN organization," which "provided feedback to the CPE Provider in the form of comments exchanged via email or written on draft CPE reports as well as verbal comments during conference calls." ([Scope 1 Report](#), at Pg. 9.) "FTI observed that when ICANN organization commented on a draft report, it was only to suggest amplifying rationale based on materials already reviewed and analyzed by the CPE Provider." ([Scope 3 Report](#), at Pg. 10.)

DotMusic previously requested these materials in DIDP Request 20160429-1, which sought disclosure of, among other things, internal communications and correspondence between ICANN organization and the CPE Provider, and Request 20170505-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5; [Response to DIDP Request 20160429-1](#), at Pgs. 3-7.)

With respect to documents responsive to Items 6, 7, and 8, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process

between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

DotMusic acknowledges that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”¹¹

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹²

ICANN organization notes that draft CPE reports reflect the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those documents, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 10

Item 10 seeks the 13 January 2017 engagement letter between FTI and ICANN. FTI signed an engagement letter with Jones Day, not ICANN organization. ICANN organization was not a party to the engagement. As such, the requested documentary information does not exist.

ICANN organization described the scope of FTI’s review (i.e. the terms of its engagement) and provided links to ICANN organization’s CPE Process Review Update, 2 June 2017, in response to Item 4 of DotMusic’s Request 20170604-1. ([Response to DIDP Request 20170505-1](#), at Pgs. 2-3; [CPE Process Review Update, 2 June 2017](#).)

As described in the CPE Process Review Update, dated 2 June 2017, the scope of the Review consisted of: (1) review of the process by which the ICANN organization

¹¹ DIDP Request 20180110-1, at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

¹² New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests. (See [CPE Process Review Update, 2 June 2017](#).)

The 2 June 2017 Update further explained that the Review was being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focused on gathering information and materials from ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE provider. (See [CPE Process Review Update, 2 June 2017](#).)

Further, even if documents responsive to Item 10 existed, this request is subject to the following Nondisclosure Condition:

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Items 11 and 12

Items 11 and 12 seek the CPE Provider's working papers associated with DotMusic's CPE (Item 11) and the CPE Provider's internal documents relating to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets (Item 12). DotMusic previously requested these materials in DIDP Request 20170505-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5.)

As discussed above, the CPE provider has objected to disclosure of its work product, including working papers, and ICANN organization is contractually obligated to maintain the confidentiality of the working papers, because they are subject to the nondisclosure provision of ICANN organization's contract with the CPE Provider, which the CPE Provider has not waived. Although FTI was unable to disclose the contents of the working papers in its Reports, FTI endeavored to describe the relevant aspects of the working papers in the Reports without violating the nondisclosure provision of ICANN organization's contract with the CPE Provider, although ICANN organization was required to redact some of the information that FTI originally included in the Scope 3 Report before publishing it, pursuant to ICANN organization's contractual obligations. (See, e.g., [Scope 3 Report](#), at Pgs. 18-19.)

As noted in the Scope 3 Report, FTI learned in its investigation "that the CPE Provider's evaluators primarily relied upon a database to capture their work (i.e., all notes, research, and conclusions) pertaining to each evaluation. The database was structured with the following fields for each criterion: Question, Answer, Evidence, Sources. The Question section mirrored the questions pertaining to each sub-criterion set forth in the

CPE Guidelines. For example, section 1.1.1. in the database was populated with the question, 'Is the community clearly delineated?'; the same question appears in the CPE Guidelines. The 'Answer' field had space for the evaluator to input his/her answer to the question; FTI observed that the answer generally took the form of a 'yes' or 'no' response. In the 'Evidence' field, the evaluator provided his/her reasoning for his/her answer. In the 'Source' field, the evaluator could list the source(s) he/she used to formulate an answer to a particular question, including, but not limited to, the application (or sections thereof), reference material, or letters of support or opposition." ([Scope 3 Report](#), at Pg. 9.)

As explained in the Scope 2 Report, FTI also learned that after two CPE Provider evaluators assessed and scored a CPE application in accordance with the Applicant Guidebook and CPE Guidelines, a "Project Coordinator created a spreadsheet that included sections detailing the evaluators' conclusions on each criterion and sub-criterion. The core team [evaluating the CPE application] then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet." ([Scope 2 Report](#), at Pg. 8.)

With respect to documents responsive to Items 11 and 12, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

DotMusic acknowledges in that the materials it seeks reflect "ICANN's deliberative and decision-making process."¹³

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider's working papers include references to the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN

¹³ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹⁴

ICANN organization notes that the CPE Provider's working papers reflect the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those documents, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 16

Item 16 seeks FTI's follow-up communications with CPE Provider personnel to clarify details discussed in earlier interviews and in materials provided. There is no written follow up communications from FTI to the CPE Provider. As such, ICANN organization is not in possession, custody, or control of any documents responsive to Item 16 because no such documents exist.

Items 17, 18, and 19

Items 17, 18, and 19 seek communications between ICANN organization and FTI (Item 17), ICANN organization and the CPE Provider (Item 18), and the CPE Provider and FTI (Item 19) regarding FTI's review.

DotMusic previously requested some of these materials in DIDP Request 20160429-1, which sought disclosure of, among other things, internal communications and correspondence between ICANN organization and the CPE Provider, and Request 20170505-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5; [Response to DIDP Request 20160429-1](#), at Pgs. 3-7.)

With respect to documents responsive to Items 17, 18, and 19, these documents are subject to the following Nondisclosure Conditions:

¹⁴ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

DotMusic acknowledges that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”¹⁵

- Personnel, medical, contractual, remuneration, and similar records relating to an individual’s personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider’s correspondence with ICANN organization and FTI contains the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization’s contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹⁶

ICANN organization notes that the CPE Provider’s correspondence reflects the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of that correspondence, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

¹⁵ DIDP Request 20180110-1, at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

¹⁶ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

- Confidential business information and/or internal policies and procedures.

Additionally, documents responsive to Item 17 are subject to the following Nondisclosure Condition:

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Public Interest in Disclosure of Information Subject to Nondisclosure Conditions

Notwithstanding the applicable Nondisclosure Conditions identified in this Response, ICANN organization has considered whether the public interest in disclosure of the information subject to these conditions at this point in time outweighs the harm that may be caused by such disclosure. ICANN organization has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

About DIDP

ICANN’s DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN organization makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN organization continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN organization's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.

Exhibit U

ICDR CASE NO. 01-15-0002-9938

BETWEEN

CORN LAKE, LLC

Claimant

-and-

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Respondent

FINAL DECLARATION

Independent Review Panel
Mark Morril
Michael Ostrove
Wendy Miles QC (Chair)

Dated 17 October 2016

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1. OVERVIEW

1.1 ICANN's Approved Board Resolutions, dated 12 October 2014 and 12 February 2014, established a new 'Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections' in the context of ICANN's New gTLD Program. Such perceived inconsistent Expert Determinations were not considered to be "in the best interest of the New gTLD Program and the Internet community". ICANN limited the scope of the new review mechanism to certain expert determinations concerning specifically designated string confusion objections. ICANN excluded from the new review mechanism the Claimant's .CHARITY Expert Determination concerning community objections.

1.2 The Claimant contends that the .CHARITY Expert Determinations "follow a pattern identical to the objection determinations for which the Board did order review." The Claimant asks the Panel in this Independent Review Process: to review the "decision or action by the Board" to exclude the Claimant's inconsistent .CHARITY Expert Determinations from the scope of the new review mechanism; to declare that "decision or action" to be "inconsistent with the Articles of Incorporation or Bylaws" of ICANN; and that this "materially affected" the Claimant. The Claimant appears also to seek review of the Expert Determination itself and/or its Request for Reconsideration of that Determination. This Final Declaration deals with the Claimant's requests for review.

2. THE PARTIES AND THEIR LAWYERS

2.1 The Claimant is Corn Lake, LLC, a limited liability company organised and existing under the laws of the State of Delaware.

2.2 The Claimant is represented by:

John Genga, Esq.
Genga & Associates P.C.
15260 Ventura Boulevard
Suite 1810
Sherman Oaks, CA
91403
USA

and

Don Moody Esq. and Khurram Nizami

The IP and Technology Legal Group P.C.
15260 Ventura Boulevard
Suite 1810
Sherman Oaks, CA
91403
USA

- 2.3 The Respondent is the Internet Corporation for Assigned Names and Numbers (“ICANN”), a non-profit public corporation organised and existing under the State of California with its principal place of business at:

12025 Waterfront Drive
Suite 300
Los Angeles, CA
90094-2536
USA

- 2.4 The Respondent is represented by:

Kate Wallace, Jeffrey LeVee and Eric Enson
Jones Day
555 South Flower Street
50th Floor
Los Angeles, CA
90071-2300
USA

3. THE PANEL

- 3.1 On 17 September 2015, the full Independent Review Process (“**IRP**”) Panel was confirmed in accordance with the International Centre for Dispute Resolution’s International Arbitration Rules (the “**ICDR Rules**”) and its Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process issued in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws (the “**Supplementary Rules**”).

- 3.2 The members of the IRP Panel are:

Mark Morril
Michael Ostrove
Wendy Miles QC (Chair)

4. PROCEDURAL HISTORY

- 4.1 On 24 March 2015, the Claimant filed a Request for Independent Review Process (the “**Request**”) with the ICDR. The Claimant alleges that ICANN’s Board of Directors (the “**Board**”) divested the Claimant of its right to compete for the .CHARITY new generic top level domain (“**gTLD**”), on the basis that “a single ICC panelist upheld a community objection against Corn Lake’s application for the .CHARITY gTLD and, at the same time, that same panelist denied an identical objection against a similarly situated applicant for the same string.”¹
- 4.2 On 15 May 2015, the Respondent filed ICANN’s Response to the Claimant’s Request for Independent Review Process (the “**Response to Request**”).
- 4.3 On 3 November 2015, the Parties and the Panel conducted by telephone the first procedural hearing.
- 4.4 On 9 November 2015, following the first procedural hearing, the Panel issued Procedural Order No. 1 (“**PO1**”) setting out the procedural stages and timetable for the proceedings and page limits for the Parties’ respective submissions.
- 4.5 On 17 November 2015, the Panel issued Procedural Order No. 2 (“**PO2**”) ruling on document production requests.
- 4.6 On 4 December 2015, the Parties produced documents as directed under PO2.
- 4.7 On 9 December 2015, the Claimant submitted its Reply (the “**Reply**”).
- 4.8 On 8 January 2016, the Respondent submitted its Sur-Reply (the “**Sur-Reply**”). In its Sur-Reply, the Respondent objected to the Claimant allegedly having exceeded the mandate for its Reply as set out by the Panel at PO1.²
- 4.9 On 20 January 2016, the Panel noted that certain aspects of the Claimant’s Reply did exceed the scope of PO1. The Panel notified the parties that it would take this into account when considering their respective written and oral submissions but that it was not inclined to

¹ Claimant’s Request for independent Review Process (“**Claimant Request**”), at page 1, para. 2.

² Respondent’s Sur-Reply (the “**ICANN Sur-Reply**”), at para. 1.

strike the Reply, instead reserving its position to take its scope into account in any costs decision.

- 4.10 Also on 20 January 2016, the Panel notified the parties that it had set time aside to meet together in London for the hearing and deliberations thereafter. It invited the parties' views as to whether or not this would be acceptable and whether they considered it necessary for the party representatives also to attend the hearing in person in London, or to join by videoconference.
- 4.11 On 20 January 2016, the Respondent informed the Panel that it had no objection to the Panel convening in London. It further proposed that, as all counsel were in Los Angeles, they could meet together at Jones Day's Los Angeles office, and the Panel could convene at Jones Day's London office to facilitate the video link.
- 4.12 On 8 February 2016, the Independent Review Process hearing proceeded by video link with the Panel convened in London and counsel convened in Los Angeles. Claimant and Respondent each submitted PowerPoint slides summarizing their hearing arguments. The Panel accepted the PowerPoint slides as part of the record.
- 4.13 On 17 February 2016, as requested by the Panel at the close of the hearing on 8 February 2016, the Claimant and Respondent each submitted a supplemental submission concerning the 3 February 2016 Board Resolution regarding .HOSPITAL (the "**Claimant Supplemental Submission**" and "**Respondent Supplemental Submission**", respectively).
- 4.14 Subsequently, on 16 May 2016, ICANN sent to the Panel the Final Declaration in the *Donuts v. ICANN* IRP proceeding issued 5 May 2016, involving the .SPORTS and .RUGBY strings. ICANN submitted that the Final Declaration addressed many issues relevant to the *Corn Lake v. ICANN* IRP and invited the Panel to permit each party to submit a four-page supplemental brief to address **only** the *Donuts* Final Declaration and its relevance to these proceedings.
- 4.15 On 18 May 2016, the Claimant disagreed with the need for additional briefing regarding the IRP Final Declaration involving the strings .SPORTS and .RUGBY and set out its detailed reasons for disagreement.
- 4.16 On 19 May 2016, ICANN provided its response to the Claimant's reasons in the form of a further written submission. On 20 May 2016, the Panel directed that the Claimant provide

its response submission, not more than 4 pages, by 25 May 2016, which was submitted (and accepted) on 27 May 2016.

- 4.17 On 11 July 2016, the ICDR notified the parties that the Panel had determined that the record for this matter had been closed as of 27 June 2016 and that the Panel expected to have the determination issued by no later than 26 August 2016.
- 4.18 On 3 August 2016, the Claimant sent to the Panel the Final Declaration in the *Dot Registry v. ICANN* IRP proceeding issued 29 July 2016. The Claimant submitted that the Final Declaration addressed many issues relevant to the *Corn Lake v. ICANN* IRP and invited the Panel to permit each party to submit a four-page supplemental brief to address **only** the *Dot Registry* Final Declaration and its relevance to these proceedings.
- 4.19 On 10 August 2016, the Panel directed that the record for this matter be reopened for the limited purpose of each party providing a brief of no more than 4 pages to address the Final Declaration in the *Dot Registry v. ICANN* IRP proceeding. On 15 August and 19 August, respectively, the Claimant and ICANN submitted further briefs accordingly.
- 4.20 On 26 August 2016, the Panel notified the parties that it had determined that the record for this matter had been reclosed as of 22 August 2016.

5. OVERVIEW OF THE ICANN NEW GTLD PROGRAM

5.1 This section sets out the relevant factual background to the ICANN Board's 12 October 2014 Resolutions, including a brief description of: (i) the ICANN New gTLD Program; (ii) the New gTLD Program application process; (iii) the New gTLD Program dispute resolution procedure; (iv) the GAC Beijing Communiqué and ICANN's response; and (v) the New Inconsistent Determinations Review Process.

(i) ICANN's New gTLD Program

5.2 ICANN is responsible for allocating Internet Protocol ("IP") address space, assigning protocol identifiers and Top-Level Domain names, and managing the Domain Name System. ICANN's Domain Name System ("DNS") centrally allocates Internet domain names for use in place of IP addresses. Top-Level Domains ("TLDs") exist at the top of the DNS naming hierarchy. These characters, which follow the rightmost dot in domain names, and are either generic TLDs ("gTLDs") or country code TLDs ("ccTLDs").

5.3 The main ICANN policy-making body for gTLDs is the Generic Names Supporting Organization (“**GNSO**”). In June 2008, the ICANN Board approved the GNSO recommendations for new gTLDs and adopted 19 specific GNSO policy recommendations for implementing new gTLDs, with certain allocation criteria and contractual conditions. Based on the GNSO recommendations as adopted, in June 2011, ICANN's Board of Directors approved a new Applicant Guidebook (the “**Applicant Guidebook**”) and authorized the launch of the 2012 gTLD Program (the “**New gTLD Program**”).³

5.4 ICANN describes the New gTLD Program’s goals as:

“enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name (IDN) top-level domains.”⁴

(ii) The New gTLD Program Application Process

5.5 The three-month registration period for the New gTLD Program opened on 12 January 2012 and closed on 12 April 2012, with applications due by June 2013.⁵ The stages of the application process are as follows:⁶

³ In relation to the Dispute Resolution Procedure, the Applicant Guidebook states that: “[f]or a comprehensive statement of filing requirements applicable generally, refer to the New gTLD Dispute Resolution Procedure (“Procedure”) included as an attachment to this module. In the event of any discrepancy between the information presented in this module and the Procedure, the Procedure shall prevail”, Applicant Guidebook, **ICANN Appendix C**, page 3-11, para. 3.3.

⁴ ICANN Response, para. 18.

⁵ Applicant Guidebook, Module 1, **ICANN Appendix C**, pages 1-2 to 1-3.

⁶ Applicant Guidebook, **ICANN Appendix C**, page 1-4.

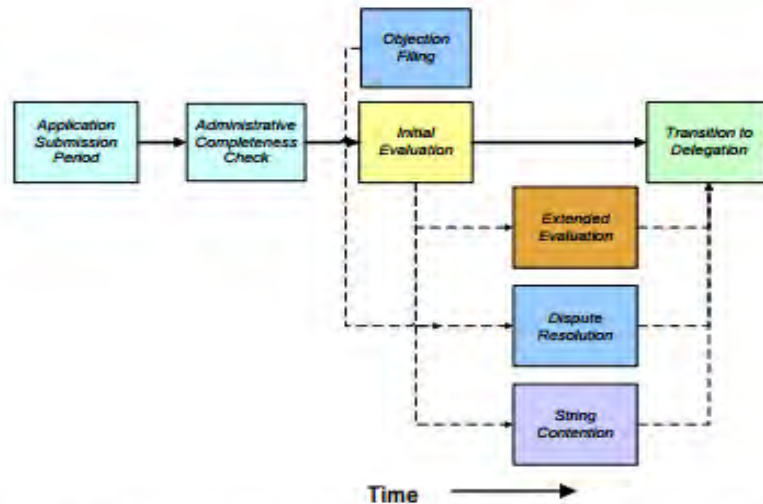


Figure 1-1 – Once submitted to ICANN, applications will pass through multiple stages of processing.

5.6 The application process allows for public comment and a formal objection procedure. The formal objection procedure is to allow full and fair consideration of objections based on certain limited grounds outside ICANN’s evaluation of applications on their merits. Formal objections may be filed on four grounds:

“String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied for gTLD string in the same round of applications.

Legal Rights Objection – The applied-for gTLD string infringes the existing legal rights of the objector.

Limited Public Interest Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.”⁷

5.7 Community objections – as in the current case – may be made by (i) “[e]stablished institutions associated with clearly delineated communities”; or (ii) the Independent Objector (“IO”).⁸ In both scenarios, “[t]he community named by the objector must be a

⁷ Claimant Request, para. 10. Applicant Guidebook, ICANN Appendix C, page 3-4, para. 3.2.1.

⁸ Applicant Guidebook, ICANN Appendix C, pages 3-7 to 3-8, para. 3.2.2.4, and pages 3-9 to 3-10, para. 3.2.5.

community strongly associated with the applied-for gTLD string in the application that is the subject of the objection”.⁹

- 5.8 The IO’s limited mandate and scope permit it to file objections against “‘highly objectionable’ gTLD applications to which no objection has been filed.”¹⁰ The Applicant Guidebook sets out that:¹¹

“The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet. In light of this public interest goal, the Independent Objector is limited to filing objections on the grounds of Limited Public Interest and Community. Neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest.”

- 5.9 Following any formal objection (including a Community Objection), the applicant can (i) “work to reach a settlement with the objector, resulting in withdrawal of the objection or the application”; (ii) “file a response to the objection and enter the dispute resolution process” (within 30 days of notification); or (iii) “withdraw, in which case the objector will prevail by default and the application will not proceed further.”¹²

(iii) The New gTLD Program Dispute Resolution Procedure

- 5.10 In the event that an applicant elects to file a response to an objection, the parties’ dispute resolution process is governed by the Applicant Guidebook, Module 3, which sets out the New gTLD Dispute Resolution Procedure (the “**Procedure**”). The designated Dispute Resolution Service Provider (“DRSP”) for disputes arising out of community objections in particular is the International Centre for Expertise of the International Chamber of Commerce (the “**ICC Centre for Expertise**”).¹³

⁹ Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.5. See also ICANN Response, para. 21.

¹⁰ Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.5.

¹¹ Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.5.

¹² Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.4.

¹³ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 3.

- 5.11 Following an initial administrative review by the ICC Centre for Expertise for procedural compliance, a response to an objection is deemed filed and the application will proceed.¹⁴ Consolidation of Objections is encouraged.¹⁵ Within 30 days after receiving the response to an objection, the ICC Centre for Expertise must appoint a panel comprising a single expert (the “**Expert Panel**”).¹⁶
- 5.12 The procedure is governed by the Rules for Expertise of the ICC, supplemented by the ICC as needed. In the event of any discrepancy, the Procedure prevails.¹⁷ The Expert Panel must remain impartial and independent of the parties.¹⁸ The ICC Centre for Expertise and the Expert Panel must make reasonable efforts to ensure that the Expert Determination is rendered within 45 days of the constitution of the Expert Panel. The Expert Panel is required to submit its Expert Determination in draft form to the ICC Centre for Expertise’s scrutiny as to form before it is signed. The ICC Centre for Expertise can make suggested modifications limited to the form of the Expert Determination only. The ICC Centre for Expertise communicates the Expert Determination to the parties and to ICANN.¹⁹
- 5.13 Substantively, the Expert Determination proceedings arising out of a Community Objection consider four tests to “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.”²⁰ These four tests, based on the Applicant Guidebook, require objector to prove²¹:
- (a) “that the community expressing opposition can be regarded as a clearly delineated community”, taking into account various identified factors;
 - (b) “substantial opposition within the community it has identified itself as representing”, taking into account various identified factors;
 - (c) “a strong association between the applied-for gTLD string and the community represented by the objector”, taking into account various identified factors; and

¹⁴ Applicant Guidebook, **ICANN Appendix C**, page 3-14, para. 3.4.1.

¹⁵ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 12.

¹⁶ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 13.

¹⁷ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 4.

¹⁸ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 13.

¹⁹ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 21.

²⁰ Applicant Guidebook, **ICANN Appendix C**, page 3-22, para. 3.5.4.

²¹ Applicant Guidebook, **ICANN Appendix C**, pages 3-22 to 3-24, para. 3.5.4

- (d) “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”, taking into account the:
- (i) “nature and extent of damage to the reputation of the community . . . that would result from the applicant’s operation of the applied-for gTLD string”;
 - (ii) “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”;
 - (iii) “interference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string”;
 - (iv) “dependence of the community represented on the DNS for its core activities”;
 - (v) “nature and extent of concrete or economic damage to the community that would result from the applicant’s operation of the applied-for gTLD string”;
and
 - (vi) “level of certainty that alleged detrimental outcomes would occur”.²²

“The objector must meet all four tests in the standard for the objection to prevail”.²³

5.14 Following an Expert Determination, the applicant may further apply for: (i) reconsideration by ICANN's Board Governance Committee (the “**BGC**”) through a (“**Reconsideration Request**”); and/or (ii) independent third-party review of Board actions alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws through an IRP.

5.15 ICANN has designated the International Centre for Dispute Resolution (“**ICDR**”) to operate the IRP for String Confusion, Existing Legal Rights, Morality and Public Order and Community Objections. The ICDR constitutes the panel of independent experts and

²² Applicant Guidebook, **ICANN Appendix C**, page 3-24, para. 3.5.4

²³ Applicant Guidebook, **ICANN Appendix C**, page 3-25, para. 3.5.4

administers the proceedings in accordance with ICANN's New gTLD Dispute Resolution Procedure, which incorporates by reference the ICDR's International Rules.²⁴

5.16 Every applicant in the New gTLD Application Process expressly agrees to the resolution of disputes arising from objections in accordance with the new gTLD Dispute Resolution Procedure (and, by reference, the relevant ICDR rules) when submitting an application to ICANN.

(iv) The GAC Beijing Communiqué and ICANN's Response

5.17 On 11 April 2013, the ICANN Board Governmental Advisory Committee ("**GAC**") proposed new safeguards for certain "sensitive strings" in sectors the GAC viewed as "regulated" or "highly regulated" (the "**Beijing GAC Communiqué**").²⁵ Specifically, the GAC recommended that ICANN adopt certain pre-registration eligibility restrictions in connection with the "sensitive strings" that it designated as "Category 1" and "Category 2." The GAC identified .CHARITY as a Category 1 sensitive string.²⁶ In this regard, the Beijing Communiqué contained important departures from the Applicant Guidebook. However, the Beijing GAC Communiqué was not binding on applicants until or unless it was adopted by the ICANN Board.

5.18 On 12 July 2013, ICANN sent to the gTLD Board a paper prepared for the New gTLD Program Committee (the "**NGPC**") setting out its concerns relating to the GAC Beijing Communiqué.²⁷ ICANN's cover email described the paper as having been "prepared for the NGPC dialogue with the GAC" taking place the following Sunday.²⁸

5.19 On 29 October 2013, ICANN wrote to the GAC to inform it that the NGPC intended "to accept the GAC Beijing Communiqué's advice concerning Category 1 and Category 2 Safeguards."²⁹ In relation to the proposed safeguards for Category 1, ICANN noted that:

²⁴ ICANN Bylaws, **ICANN Appendix A**, Article IV, Section 3(4) (See also:

https://www.icdr.org/icdr/faces/icdrservices/icann?_afLoop=290874254740950&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D290874254740950%26_afWindowMode%3D0%26_adf.ctrl-state%3D108xg7by0c_22.

²⁵ <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>

²⁶ Id., Annex I, page 9.

²⁷ NGPC Memo and Attachment, 12 July 2013, **Claimant Exhibit 22**.

²⁸ NGPC Memo and Attachment, 12 July 2013, **Claimant Exhibit 22**.

²⁹ ICANN Letter to GAC, 29 October 2013, **Claimant Exhibit 13**, page 1.

“The text of the Category 1 Safeguards has been modified as appropriate to meet the spirit and intent of the advice in a manner that allows the requirements to be implemented as public interest commitments in Specification 11 of the New gTLD Registry Agreement (“PIC Spec”). The PIC Spec and a rationale explaining the modifications are attached.”³⁰

5.20 The effect of ICANN’s 29 October 2013 statement was publicly to announce that new, mandatory registration requirements would be imposed in any and all registration agreements for Category 1 and Category 2 strings. In the case of .CHARITY, a Category 1 string, this would mean the imposition of a mandatory registration requirement under any .CHARITY registry agreement requiring that any domain operators using the .CHARITY gTLD demonstrate that they were a registered charity.³¹ This requirement would be imposed in any registry agreement, irrespective of the content of any existing PIC or gTLD application content relating to .CHARITY. As discussed in further detail below, ICANN’s 29 October 2013 announcement came while the Expert Determination process arising out of the .CHARITY community objections were underway.³²

5.21 On 5 February 2014, the ICANN Board passed Resolution 2014.02.05.NG01, formally adopting the GAC’s Beijing Communiqué recommendation.³³ Annexed to that Resolution was a list of eight safeguards that would apply to certain Category 1 strings (including .CHARITY) and that would be included in Specification 11 of the New gTLD Registry Agreement.³⁴

(v) ICANN’s New Inconsistent Determinations Review Process

5.22 In the course of the New gTLD Program, in late 2013, concerns arose in respect of a small number of Expert Determinations involving the same or similar string confusion objections (“**SCO**”s) which resulted in different outcomes. These initially included:

(a) three separate Expert Determinations arising out of SCOs by the registrants of .COM to applications to register .CAM, whereby two objections were overruled and one was upheld; and

³⁰ ICANN Letter to GAC, 29 October 2013, **Claimant Exhibit 13**, page 1.

³¹ ICANN Letter to GAC, 29 October 2013, **Claimant Exhibit 13**.

³² See paragraphs 6.24 to 6.25, below.

³³ **Claimant Exhibit 14**.

³⁴ **Claimant Exhibit 14**, Annex 2, pages 1 and 3.

(b) three separate Expert Determination arising out of SCOs by the registrants of .CAR to applications to register .CARS, whereby two objections were overruled and one was upheld.³⁵

5.23 On 10 October 2013, as a result of these perceived inconsistent decisions, the BGC requested that:

“staff draft a report for the NGPC on String Confusion Objections (SCOs) ‘setting out options for dealing with the situation raised within this [Reconsideration] Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon's Applied – for String and TLDH's Applied-for String”.³⁶

5.24 The NGPC then:

“considered potential paths forward to address perceived inconsistent Expert Determinations from the New gTLD Program SCO process, including possibly implementing a new review mechanism”.³⁷

5.25 On 5 February 2014, the NGPC published Approved Resolutions, which included discussion of the report prepared in response to the BGC's 10 October 2013 request. The NGPC directed the ICANN President and CEO to initiate a public comment period on framework principles of a potential review mechanism to address perceived inconsistent SCO Expert Determinations. The NGPC stated that the review mechanism would be “limited to the String Confusion Objection Expert Determinations for .CAR/.CARS and .CAM/.COM”.³⁸

5.26 On 11 February 2014, ICANN published its “Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections: Framework Principles” (the “**Proposed Framework Principles**”).³⁹ The Proposed Framework Principles addressed two cases where SCOs were raised by the same objector against different applications for the same string, where the outcomes of the SCOs differed, namely .CAR/.CARS and .CAM/.COM.

³⁵ ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, page 2.

³⁶ NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, page 3.

³⁷ As set out in summary in NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 3.

³⁸ NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, page 3.

³⁹ ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**.

- 5.27 The Proposed Framework Principles set out the proposed standard of review as being whether the Expert Panel could “have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and procedural rules”.⁴⁰ The proposed review process would be conducted by a new three member panel constituted by the ICDR as a “Panel of Last Resort” (the “**Inconsistent Determinations Review Procedure**”).⁴¹
- 5.28 ICANN specifically noted in the Proposed Framework Principles that the proposed review procedure mechanism must be limited and that:
- “[t]he use of a strict definition for Inconsistent SCO Expert Determinations conversely means that all other SCO Expert Determinations are *not inconsistent*. As a result, the review mechanism, or Panel of Last Resort, shall not be applicable to those other determinations.”⁴²
- 5.29 ICANN defined the “strict definition” as “objections raised by the same objector against different applications for the same string, where the outcomes of the SCOs differ.”⁴³
- 5.30 On 14 March 2014, as part of the public consultation process, the Claimant’s parent company, Donuts Inc., submitted that SCO Expert Determinations relating to .SHOP should also be included, as follows:
- “... this limited review should be extended to include a third contention set where there is an incongruent outcome. In the .SHOP vs. SHOPPING objection, the same panelist who found .SHOP to be confusing to a Japanese .IDN found in favor of the objector with regard to the Donuts’ .SHOPPING application.”⁴⁴
- 5.31 Donuts concluded: “Finally, we urge ICANN to undergo a similar review mechanism in cases of inconsistent outcomes with the Limited Public Interest and Community objections.”
- 5.32 On 12 October 2014, the NGPC issued Approved Resolutions “to address perceived inconsistent and unreasonable Expert Determinations resulting from the New gTLD Program

⁴⁰ ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, page 2

⁴¹ ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, pages 2 to 3.

⁴² ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**.

⁴³ ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, page 2.

⁴⁴ <http://forum.icann.org/lists/comments-sco-framework-principles-11feb14/pdfJC5UktBBxf.pdf>

String Confusion Objections process.”⁴⁵ The NGPC directed ICANN’s President and CEO to establish a three-member panel to re-evaluate the materials presented in the two identified SCO Expert Determinations for .COM/.CAM and .SHOP/通販.⁴⁶

5.33 The 12 October 2014 Approved Resolutions set out in detail the scope of the New Inconsistent Determinations Review Procedure:

- (a) the NGPC took “action to address certain perceived inconsistent or otherwise unreasonable SCO Expert Determinations by sending back to the ICDR for a three-member panel evaluation of certain Expert Determinations”;⁴⁷
- (b) the NGPC identified these Expert Determinations as “not in the best interest of the New gTLD Program and the Internet community”;⁴⁸
- (c) “the identified SCO Expert Determinations present exceptional circumstances warranting action by the NGPC because each of the Expert Determinations falls outside normal standards of what is perceived to be reasonable and just”;⁴⁹ and
- (d) the “record on review shall be limited to the transcript of the proceeding giving rise to the original Expert Determination, if any, expert reports, documentary evidence admitted into evidence during the original proceeding, or other evidence relevant to the review that was presented at the original proceeding”, and the “standard of review to be applied by the Review Panel is: whether the original Expert Panel could have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and the ICDR Supplementary Procedures for ICANN’s New gTLD Program”.⁵⁰

⁴⁵ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16**, pages 5 to 6.

⁴⁶ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16**, page 5. The NGPC noted in relation to the SCO Expert Determinations for .CAR/.CARS that the parties “recently have resolved their contending applications” so “the NGPC is *not* taking action to send these SCO Expert Determinations back to the ICDR for re-evaluation to render a Final Expert Determination.” NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16**, page 10.

⁴⁷ The dispute with respect to .CAR/.CARS was resolved and the new Inconsistent Determinations Review Procedure went forward with respect to the .SHOP/通販 and .CAM/.COM disputes. NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, pages 5-6.

⁴⁸ NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, page 3.

⁴⁹ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.

⁵⁰ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 7.

5.34 The NGPC also set out in detail its reasons for limiting application of the new process to the identified SCO Expert Determinations and “particularly why the identified Expert Determinations should be sent back to the ICDR while other Expert Determinations should not”.⁵¹

- (a) the Applicant Guidebook (Section 5.1) provides that the “Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application”;⁵²
- (b) “[a]ddressing the perceived inconsistent and unreasonable String Confusion Objection Expert Determinations is part of the discretionary authority granted to the NGPC in its Charter regarding ‘approval of applications’ and ‘delegation of gTLDs,’ in addition to the authority reserved to the Board in the Guidebook to consider individual gTLD applications under exceptional circumstances”;⁵³
- (c) “[w]hile some community members may identify other Expert Determinations as inconsistent or unreasonable, the SCO Expert Determinations identified are the only ones that the NGPC has deemed appropriate for further review”;⁵⁴
- (d) “while on their face some of the Expert Determinations may appear inconsistent, including other SCO Expert Determinations, and Expert Determinations of the Limited Public Interest and Community Objection processes, there are reasonable explanations for these seeming discrepancies, both procedurally and substantively”;⁵⁵
- (e) “on a procedural level, each expert panel generally rests its Expert Determination on materials presented to it by the parties to that particular objection, and the objector bears the burden of proof” and “[t]wo panels confronting identical issues could –

⁵¹ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 10 to 11.

⁵² NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 9 to 10. (*See also*: Applicant Guidebook, **ICANN Appendix C**, page 5-1, para. 5.1.)

⁵³ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.

⁵⁴ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.

⁵⁵ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

and if appropriate should – reach different determinations, based on the strength of the materials presented”,⁵⁶

- (f) “on a substantive level, certain Expert Determinations highlighted by the community that purportedly resulted in ‘inconsistent’ or ‘unreasonable’ results, presented nuanced distinctions relevant to the particular objection” which “should not be ignored simply because a party to the dispute disagrees with the end result”;⁵⁷
- (g) “the standard guiding the expert panels involves some degree of subjectivity, and thus independent expert panels would not be expected to reach the same conclusions on every occasion”;⁵⁸
- (h) “for the identified Expert Determinations, a reasonable explanation for the seeming discrepancies is not as apparent, even taking into account all of the previous explanations about why reasonable ‘discrepancies’ may exist” and “[t]o allow these Expert Determinations to stand would not be in the best interests of the Internet community”;⁵⁹
- (i) the NGPC “considered whether it was appropriate, as suggested by some commenters, to expand the scope of the proposed review mechanism to include other Expert Determinations, such as some resulting from Community and Limited Public Objections”;⁶⁰
- (j) the comments presented by various stakeholders “highlight the difficulty of the issue and the tension that exists between balancing concerns about perceived inconsistent Expert Determinations, and the processes set forth in the Guidebook that were the subject of multiple rounds of public comment over several years”;⁶¹
- (k) “[a]s highlighted in many of the public comments, adopting a review mechanism this far along in the process could potentially be unfair because applicants agreed to the

⁵⁶ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

⁵⁷ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

⁵⁸ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

⁵⁹ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

⁶⁰ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 11-12.

⁶¹ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 9.

processes included in the Guidebook, which did not include this review mechanism, and applicants relied on these processes”;⁶²

- (l) “Applicants have already taken action in reliance on many of the Expert Determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds”;⁶³
- (m) “[a]llowing these actions to be undone now would not only delay consideration of all applications, but would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook”;⁶⁴ and
- (n) the NGPC “determined that to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program”.⁶⁵

5.35 The NGPC summarized its conclusion by noting that, “while on balance, a review mechanism is not appropriate for the current round of the New gTLD Program, it is recommended that the development of rules and processes for future rounds of the New gTLD Program (to be developed through the multi-stakeholder process) should explore whether there is a need for a formal review process with respect to Expert Determinations”.⁶⁶

5.36 As a result of this analysis, the New Inconsistent Determinations Review Procedure was therefore introduced to provide an additional layer of review in the New gTLD Program Application Process for a very limited category of applications – i.e. two SCOs. The .CHARITY applications were not included.

⁶² NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.

⁶³ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 12.

⁶⁴ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 12.

⁶⁵ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 12.

⁶⁶ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 9.

6. FACTUAL BACKGROUND TO THE .CHARITY EXPERT DETERMINATIONS

6.1 A brief summary of the specific facts relating to the .CHARITY applications is below. The Panel has considered the Parties' written and oral submissions in full, even where not included in the below summary and subsequent analysis.

(i) Claimant's .CHARITY Application

6.2 On 13 June 2012, the Claimant filed application no. 1-1384-49318 to operate the new gTLD .CHARITY (the "**Application**").⁶⁷ The Claimant purports to have invested \$185,000 for the application fee along with other significant resources in making the Application.⁶⁸

6.3 The Claimant's .CHARITY Application was one of the 1,930 applications made in the New gTLD Application Process in 2015.

6.4 The Claimant applied for .CHARITY to "allow consumers to make use of the gTLD in accordance with the meanings they ascribe to that dictionary word."⁶⁹ It described the "mission/purpose" of its proposed gTLD as follows:

"The CHARITY TLD will be of interest to the millions of persons and organizations worldwide involved in philanthropy, humanitarian outreach, and the benevolent care of those in need. This broad and diverse set includes organizations that collect and distribute funds and materials for charities, provide for individuals and groups with medical or other special needs, and raise awareness for issues and conditions that would benefit from additional resources. In addition, the term CHARITY, which connotes kindness toward others, is a means for expression for those devoted to compassion and good will. We would operate the .CHARITY TLD in the best interest of registrants who use the TLD in varied ways, and in a legitimate and secure manner."⁷⁰

⁶⁷ Corn Lake, LLC June 2012 Application for .CHARITY, App. ID 1-1384-49318, **Claimant Exhibit 1**.

⁶⁸ Claimant Request, para. 9.

⁶⁹ Claimant Request, para. 9. See also ICANN Response, para. 2.

⁷⁰ Corn Lake, LLC June 2012 application for .CHARITY, App. ID 1-1384-49318, **Claimant Exhibit 1**, para. 18(a), 3. See also Claimant Request, para. 16.

(ii) SRL and Excellent First's .CHARITY Applications

6.5 Also on 13 June 2012, Spring Registry Limited ("SRL") filed a separate application, no. 1-1241-87032, also to operate the new gTLD called .CHARITY (the "SRL Application").⁷¹ In the SRL Application, SRL described the "mission/purpose" of its proposed gTLD as follows:

"... the aim of 'charity' is to create a blank canvas for online charity services set within a secure environment. The Applicant will achieve this by creating a consolidated, versatile and dedicated space to access charity information and donation services. ... [T]here will be a ready marketplace specifically for charity-based enterprises to provide their goods and services."

6.6 Further, Excellent First Limited submitted an application for the Chinese character translation of .CHARITY.⁷²

6.7 By 5 March 2013, each applicant was required to submit a TLD-specific Public Interest Commitments Specification ("PIC").⁷³ Both the Claimant and SRL submitted PICs prior to 5 March 2013.⁷⁴ Neither the Claimant nor SRL, (nor, as far as the IPP Panel is aware Excellent First), addressed eligibility requirements in their original PICs.

(iii) The .CHARITY Applications Independent Objections

6.8 On 12 March 2013, Professor Alain Pellet, acting as IO, submitted a Community Objection to the ICC Centre for Expertise in relation to the Application by the Claimant.⁷⁵ The IO's objection was submitted on the basis that .CHARITY should be limited to "charities and charitable organizations".⁷⁶ In particular, the Claimant's IO stated that a "community objection" is warranted when "there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly targeted."⁷⁷

⁷¹ Spring Registry Ltd. June 2012 application for .CHARITY, **Claimant Exhibit 10**.

⁷² ICANN Response, para. 6, <http://newgtlds.icann.org/en/program-status/odr/determination>

⁷³ <https://www.icann.org/resources/pages/base-agreement-2013-02-05-en>

⁷⁴ Donuts Public Interest Commitment (PIC), **Claimant Exhibit 9**. SRL's original PIC is not in evidence in the proceedings.

⁷⁵ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**.

⁷⁶ As per Claimant Request, para. 17. The Respondent explains the process in its Response, para. 2.

⁷⁷ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 6.

- 6.9 The IO worked through the four tests of a community objection and found these to be met, including the community test, substantial opposition, targeting and detriment. In relation to the detriment test in particular, the IO contended that the Claimant “has not addressed the specific needs of the charity community in its proposed management of the gTLD .Charity, and there are three key factors that demonstrate the likelihood of detriment to the charity community.”⁷⁸
- 6.10 The three key factors were that the Claimant’s Application: (i) “has not been framed by [the Claimant] and its subsidiary as a community based gTLD”,⁷⁹ (ii) “does not propose any eligibility criteria for the string”,⁸⁰ and (iii) proposes security mechanisms “aimed at reacting to abuse [that] are unlikely to meet the specific requirements and needs of the charity community” as well as making “no commitment concerning the specific content of the “Anti-Abuse Policy””.⁸¹
- 6.11 The IO also brought separate Community Objections against SRL and Excellent First Limited, the two other applicants for the .CHARITY gTLD in English and Chinese respectively, on similar grounds.⁸²
- 6.12 On 7 May 2013, the ICC Centre for Expertise notified the Claimant that it had decided to consolidate the IO’s objection to Claimant’s application with the two other proceedings relating to the applications by SRL and Excellent First Limited.

(iv) The .CHARITY Independent Expert Panels

- 6.13 On 6 June 2013, the Claimant submitted to the ICC Centre for Expertise a response to the IO’s objection (the “**Response to IO Objection**”).⁸³ The Claimant submitted that the IO lacked standing to make the objection and that the objection failed on its merits. It further submitted that the IO’s Community Objection constituted a restriction on “rights of free

⁷⁸ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 41.

⁷⁹ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 42.

⁸⁰ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 43.

⁸¹ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 45.

⁸² As per Claimant Request, para. 18. The Respondent provides further descriptions in its Response, para. 3.

<http://newgtlds.icann.org/en/program-status/odr/determination>

⁸³ Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**.

expression”⁸⁴ which was contrary to the New gTLD program objective “to enhance choice, competition and expression in the namespace.”⁸⁵

6.14 On the merits, the Claimant submitted that the IO invoked no clearly delineated community, demonstrated no substantial opposition within the community he claims to represent, demonstrates no strong association between the community and applied for string and does not prove material detriment.⁸⁶

6.15 Specifically in response to the IO’s objection based on material detriment, the Claimant reiterated that it had:

“clearly stated its opposition to such constraints on access, expression and innovation: ‘attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants. Restrictions on second level domain eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation we intend to see in this TLD.’”⁸⁷

6.16 On 4 July 2013, the ICC Centre for Expertise appointed Mr. Tim Portwood of Bredin Prat as the Independent Expert Panel in the consolidated proceedings.

6.17 On 22 August 2013, the IO submitted to the ICC Centre for Expertise a reply (the “**IO Reply**”).⁸⁸ Among other things, the IO observed that the detriment test standard pursuant to the Applicant Guidebook is the “likelihood of detriment.”⁸⁹ The IO considered that he had “developed many elements establishing that there exists a likelihood of detriment, in particular because of the Applicant’s unwillingness to propose preventative security measures assuring the charitable nature, the integrity and the trustworthiness of the entities represented and the information provided under the gTLD.”⁹⁰

6.18 Specifically in relation to the GAC Beijing Communiqué, the IO noted that the Claimant:

⁸⁴ As per Claimant Request, para. 19.

⁸⁵ Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**, page 1.

⁸⁶ Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**.

⁸⁷ Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**, page 13.

⁸⁸ IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**.

⁸⁹ IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**, para. 22.

⁹⁰ IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**, para. 24.

“continues to ignore the specificity of this string despite the fact that the GAC Beijing Communiqué of 11 April 2013 listed the .Charity gTLD within the ‘sensitive strings that merits particular safeguards’ because this string is ‘likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm’.”⁹¹

6.19 On 6 September 2013, the Claimant submitted to the ICC Centre for Expertise a further response (the “**Expert Panel Sur-Reply**”).⁹² In its Expert Panel Sur-Reply, the Claimant argued that the word charity does not clearly delineate any community, the separate targeting test was not satisfied, the IO demonstrates no substantial opposition and that the IO mischaracterizes the material detriment standard “in a misplaced effort to justify having failed to satisfy it.”⁹³ The Claimant further objected to the IO’s reliance on the GAC’s Beijing Communiqué,⁹⁴ submitting that it “has little (if any) bearing on the material detriment analysis” and that,

“[w]hatever measures ICANN enacts will require implementation by Applicant in the form of a PIC [Public Interest Commitment], then embodied in a formal registry agreement by which Applicant must bind itself to undertake those measures under penalty of losing the registry.”⁹⁵

6.20 On 6 September 2013, SRL also submitted to the ICC Centre for Expertise its further response (the “**SRL Sur-Reply**”).⁹⁶ In the SRL Sur-Reply, it specifically offered to amend its PIC to take into account the IO’s concerns. According to the Claimant, SRL’s amendment to its PIC:

“would impose eligibility criteria in a .CHARITY domain that would limit registration of second-level names to those who could ‘establish that they are a charity of a ‘not-for-profit’ enterprise with charitable purposes.’”⁹⁷

6.21 SRL’s amended PIC stated that SRL “appreciates the opportunity to restate and once again commit to the following operational measures, where those matters are within its control,

⁹¹ IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**, para. 24. See footnote 11: <http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf>, Annex 1, Category 1, p. 8 (annex 1).

⁹² Corn Lake 6 September 2013 sur-reply in further support of opposition to objection, **Claimant Exhibit 5**.

⁹³ Corn Lake Sur-Reply, p.5.

⁹⁴ Corn Lake Sur-Reply, p.7.

⁹⁵ Corn Lake Sur-Reply, pp.8-9.

⁹⁶ September 6, 2013 email from SRL to ICC w/attachments, **Claimant Exhibit 23**.

⁹⁷ Claimant Request, para. 22.

as outlined in our application.”⁹⁸ SRL further noted that “[w]e reserve the right to amend or change this PIC Spec once the details of the Program are finalized.”⁹⁹ Specifically in relation to eligibility, SRL stated in its amended PIC that:¹⁰⁰

“[o]nly incorporated associations or entities, foundations or trusts which can establish that they are a charity or ‘not for profit’ enterprise with charitable purposes will qualify to be a registrant of a .CHARITY domain name.”

- 6.22 On 25 October 2013, SRL notified the Expert Panel by email of its “amended PIC SPEC” and sent a link to the document on the ICANN website.¹⁰¹ In its cover email, SRL noted that it was making its unsolicited submission:

“merely to make you aware of independent evidence that our eligibility policy is progressing through the new gTLD application process, and in the interests of justice I hope you can consider this evidence. It merely confirms what was stated in our Rejoinder, and should only take a moment to consider.

Articles 17 and 18 of the Dispute Rules do provide the Panel with the power to admit additional material, and making this submission is the only way to draw it to your attention.”

- 6.23 There is no record of any objection to the 25 October 2013 communication by the IO or the Expert Panel and no record that it was rejected by the Expert Panel.

- 6.24 On 3 December 2013, the Claimant notified the Expert Panel and the IO by email of further information “to update the Panel regarding matters raised in the Objection and further submissions made by the Objector.”¹⁰²

- 6.25 Specifically, the Claimant notified the Expert Panel that “ICANN has formally announced its intention to adopt the “GAC’s Beijing Communiqué advice concerning Category 1 and Category 2 Safeguards””. The Claimant further explained that as a result, the:

⁹⁸ SRL PIC, **Claimant Exhibit 12**, page 1.

⁹⁹ SRL PIC, **Claimant Exhibit 12**, page 1.

¹⁰⁰ SRL PIC, **Claimant Exhibit 12**.

¹⁰¹ October 25, 2014 email from SRL to ICC, **Claimant Exhibit 24**.

¹⁰² Corn Lake 3 December 2013 further requested submission, **Claimant Exhibit 6**.

“... Applicant must implement the safeguards, if awarded the subject string, as a term of its registry agreement with ICANN for the string. Applicant therefore respectfully submits that, to the extent Objector claims material detriment based on Applicant’s alleged lack of GAC-recommended safeguards, ICANN’s recent action has rendered that portion of the Objection moot, and eliminates it as a basis for denying Applicant its presumptive right to compete for and, if awarded, operate the string.”

- 6.26 On 5 December 2013, the IO objected to the Claimant’s further submission on procedural and substantive grounds.
- 6.27 On 11 December 2013, the ICC Centre for Expertise wrote to the parties and Expert Panel reserving to the Expert Panel the decision as to whether to admit the Parties’ further submissions.
- 6.28 On 13 December 2013, the Expert Panel rejected the Claimant’s further submission on the grounds that (a) further submissions “were not contemplated by the procedural timetable” of 9 August 2013 and (b) “the Expert Determination in each of the consolidated cases was submitted in draft to the Centre within the 45 day time period provided for in Article 21(a) of the ICANN New gTLD Dispute Resolution Procedure (the “**Procedure**”) for scrutiny by the Centre pursuant to Article 21(b) of the Procedure and Article 12(6) of the ICC Rules for Expertise (the “**Rules**”).¹⁰³
- 6.29 There was no further correspondence between the Parties, the IO and/or the Expert Panel prior to the issuance of the Expert Determinations.

(v) The .CHARITY Applications Expert Determinations

- 6.30 On 9 January 2014, the Expert Panel issued its three separate Expert Determinations in respect of the applications by the Claimant and SRL, respectively, despite the proceedings having been consolidated.¹⁰⁴ The Expert Determination in relation to the IO in the Claimant’s Application had a different outcome to the SRL and Excellent First Expert

¹⁰³ Letter from Expert Panel to Parties, 13 December 2013, **Claimant Exhibit 7**, page 1. Article 21(a) provides that: “(a) *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. In specific circumstances such as consolidated cases and in consultation with the DRSP, if significant additional documentation is requested by the Panel, a brief extension may be allowed*”, Applicant Guidebook, **ICANN Appendix C**, Module 3, page P-10.

¹⁰⁴ Expert Determination Corn Lake, 9 January 2014, **Claimant Exhibit 8** and Expert Determination SRL, 9 January 2014,

Claimant Exhibit 11. Expert Determination Excellent First is at:

<https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-961-6109-en.pdf>.

Determinations. The reasoning sections in the Expert Panel Determinations for the Claimant and SRL community objections are virtually identical, and very similar for the Expert Determination for the Excellent First community objection, up to the determination concerning the detriment test.

6.31 The Expert Panel upheld the community objection against the Claimant, as set out by the IO on the basis that “there is a likelihood of material detriment to the charity sector community were the Application to proceed” and that:¹⁰⁵

“the targeted community ... would be harmed if access to the ‘.CHARITY’ string were not restricted to persons ... which can establish that they are a charity or a not-for-profit enterprise with charitable purposes”.¹⁰⁶

6.32 However, the Expert Panel rejected the IO’s identical community objections against both SRL and Excellent First.¹⁰⁷

6.33 In relation to SRL, the Expert Panel concluded that eligibility policy contained in its amended PIC “will be included in any registry agreement which Applicant would sign with ICANN if its Application is successful and which Applicant will therefore be contractually obliged to implement at the risk of legal action under the PIC Dispute Resolution Procedure in the event of breach.”¹⁰⁸ On that basis:

“the SRL Expert Panel found that SRL’s commitment set out its .CHARITY application to restrict registration ‘to members of the charity sector’ was sufficient to negate any concern of material detriment to the targeted community.”¹⁰⁹

6.34 In relation to Excellent First, the Expert concluded that its commitment in its application to limit registrations to: “charitable organizations or institutions which must represent and warrant that they are authorized to conduct charitable activities” was sufficient to negate concerns of material detriment.¹¹⁰

¹⁰⁵ Expert Determination Corn Lake, 9 January 2014, **Claimant Exhibit 8**. See As per ICANN Response, para. 4.

¹⁰⁶ As per Claimant Request, para. 24.

¹⁰⁷ Expert Determination SRL, 9 January 2014, **Claimant Exhibit 11**. ICANN Response, para. 6.

¹⁰⁸ Expert Determination SRL, 9 January 2014, **Claimant Exhibit 11**, para. 90.

¹⁰⁹ ICANN Response, para. 5.

¹¹⁰ ICANN Response, para. 6. See: <http://newgtlds.icann.org/en/program-status/odr/determination>

6.35 In both the SRL and Excellent First Expert Determinations, the Expert Panel included the following paragraph:

“Provided that Applicant’s undertaking [in respect of eligibility requirements] is honored, the Expert Panel considers therefore, that there would be no material detriment as identified by IO to the charity sector – registrants being limited to the members of that sector.”¹¹¹

6.36 In the preceding paragraph in the Excellent First Expert Determination (but not the SRL Expert Determination), the Expert Panel further noted that:

“... according to the Applicant the eligibility policy has been developed following and in response to the GAC Advice and will be further developed with ICANN.”¹¹²

6.37 The Expert Panel thus clearly relied on the differing PIC Specs as between SRL and Excellent First, on the one hand, and the Claimant on the other, in reaching differing results with respect to the identical community objections addressed to each application. The Expert Panel did not take into account ICANN’s 29 October 2013 announcement that it intended to adopt the Beijing Communiqué’s recommendation and the effect this would have on the three applications.

(vi) Claimant’s Board Governance Committee Reconsideration Request

6.38 On 24 January 2014, the Claimant filed a Reconsideration Request to the ICANN Board Governance Committee (the “BGC”) regarding action by ICANN that the Claimant alleged was contrary to established ICANN policies pertaining to Community Objections to New gTLD Applications.¹¹³ The Claimant requested that the BGC reconsider the action by the ICC Centre for Expertise as DRSP for community objections and, in particular, the 9 January 2014 Expert Determination.

6.39 The Claimant submitted in relation to jurisdiction in respect of the Reconsideration Request that:

¹¹¹ Expert Determination SRL, 9 January 2014, **Claimant Exhibit 11**, para. 132 and Expert Determination Excellent First is at: <https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-961-6109-en.pdf>, para. 131.

¹¹² <https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-961-6109-en.pdf>, para. 130.

¹¹³ <https://www.icann.org/en/system/files/files/request-corn-lake-24jan14-en.pdf>.

“The [Expert Determination] Ruling fails to follow ICANN processes and policies concerning community objections as expressed in Sections 3.5 and 3.5.4 of the gTLD Applicant Guidebook... . ICANN has determined that the reconsideration process can properly be invoked for challenges of the third party DRSP’s decisions as challenges of the staff action where it can be stated that ... the DRSP failed to follow the established policies or processes in reaching the decision”¹¹⁴

6.40 The Claimant submitted in relation to the merits of the Reconsideration Request that the Expert Panel contravened ICANN process and policy by reaching the opposite result in relation to two identical applications for the .CHARITY string. It pointed out that:

“In the SRL case, ... the Panel held that the alleged community would not likely incur material detriment because of obligations that SRL had indicated in a supplemental filing it would assume in its registry agreement with ICANN. The Panel in that case accepted SRL’s additional evidence negating the IO’s claim of material detriment, and denied the objection. Here, by contrast, the Panel refused to consider a proffered further submission showing that, by its proposed adoption of Government Advisory Council (“GAC”) advice regarding the String, ICANN would require Corn Lake to employ stringent protection mechanisms of the type the Panel found sufficient in SRL.”¹¹⁵

6.41 The Claimant submitted that reconsideration properly lies to remedy the Expert Determination as inconsistent with ICANN policy and process and with the Panel’s own decision in consolidated cases.

(vii) The Board Governance Committee’s Reconsideration Decision

6.42 On 27 February 2014, the BGC issued its determination in respect of the Claimant’s Reconsideration Request. The BGC determined that the Expert Panel had adhered to the factors in the Applicant Guidebook in determining whether the community invoked by the IO (the charity sector) was a delineated community and properly determined that the charity sector indeed “constitutes a clearly delineated community”.¹¹⁶

¹¹⁴ <https://www.icann.org/en/system/files/files/request-corn-lake-24jan14-en.pdf>, para. ii.

¹¹⁵ <https://www.icann.org/en/system/files/files/request-corn-lake-24jan14-en.pdf>, para. iv.

¹¹⁶ 27 February 2014 Determination, at page 8. <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

6.43 The BGC further determined that the Expert Panel did not fail to apply the proper standard for evaluating the likelihood of material detriment. It noted that:

“[t]he lack of an eligibility policy in the Requestor’s application ensuring that registration will be limited to members of the charity sector is precisely what distinguishes the Panel’s determination in the instant proceeding from that in the SRL proceeding. In the SRL proceeding, the Panel articulated the same concerns present here, namely the need to clearly distinguish charitable organizations from for-profit enterprises in particular in public giving and fund-raising activities. ... In the SRL proceeding, however, the Panel found that SRL’s proposed eligibility policy adequately assuaged the Panel’s concerns:

‘The eligibility criteria policy defined by Applicant and inspired by the criteria of the UK Charities Act 2011 which will be included in any registration agreement entered into by the Applicant with ICANN together with appropriate safeguards for registry operators respond in the Expert Panel’s view to the Detriment test concerns raised by IO.’

Specifically, SRL committed to an eligibility policy that defined the subset of the community to which registration will be limited as ‘incorporated entities, unincorporated associations or entities, foundations or trusts which can establish that they are a charity or ‘not for profit’ enterprise with charitable purposes’.”¹¹⁷

6.44 The BGC concluded that “[b]ecause the Requester presented no evidence that it intended to or was otherwise willing to adopt a similar eligibility policy, there is no support for the Requestor’s claim that “nothing distinguishes the application of SRL from that of Corn Lake.””¹¹⁸

6.45 As to the allegation of different treatment of the Claimant and SRL’s respective additional submissions dealing with eligibility, the BGC noted that SRL’s additional submission was “expressly requested and approved by the Expert Panel in the SRL proceeding before the close of evidence. Indeed, in the Panel’s determination in the SRL proceeding, the Panel stated that ‘on 9 August 2013, ... the Expert Panel wrote to the Parties informing them of its view that it would be assisted by a second round of written submissions and inviting the

¹¹⁷ 27 February 2014 Determination, at page 11. <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

¹¹⁸ 27 February 2014 Determination, at page 12. <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

Parties each to submit an Additional Witness Statement”¹¹⁹ SRL did so on 6 September 2014.

6.46 The BGC noted that by contrast, the evidence closed on 6 September 2014 and only on 4 December did the Claimant proffer new information regarding the proposed implementation of the GAC’s Beijing Communiqué. The Expert Panel had rejected that additional submission. Based on all of those grounds, the BGC concluded that the Claimant had not stated proper grounds for reconsideration and denied the Reconsideration Request. The BGC noted that “[i]f the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.”¹²⁰

(viii) Office of the Ombudsman Review

6.47 On 8 July 2014, the Office of the Ombudsman issued a report relating to the dispute resolution process used for competing applicants to new gTLDs, initiated by the Claimant or a related entity.¹²¹ The Ombudsman determined that he did not have jurisdiction to look at any of the issues raised. He stated in his report that:

“In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determination. Accordingly, the BGC is not required to evaluate the Panel’s substantive conclusion that there is substantial opposition from a significant portion of the community to which the string may be targeted. Rather, the BGC’s review is limited to whether the Panel violated any established policy or process.

“My jurisdiction is very similar, although I have a different approach, based on whether the way in which the expert processed the decisions was unfair, but like the BGC, I cannot review the substance of the determination. It is useful to refer to my bylaw which refers to unfairness and delay, but underlying this is the issue that there must be a failure of process. The comments from Donuts have looked to interpret the differences in the panel decisions as a failure of process, but that is not the correct interpretation of my jurisdiction.

Procedural fairness is very different from making an error of law in the decision itself. It is

¹¹⁹ 27 February 2014 Determination, at page 12. <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

¹²⁰ 27 February 2014 Determination, at pages 14 to 15. <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

¹²¹ Report from Ombudsman Case 14-00122 In a matter of a Complaint by Donuts, **Claimant Exhibit 25**.

not appropriate for me to enter into any discussion or evaluation of the decisions themselves however. If I were to undertake the exercise urged upon me by Donuts, then I would step well outside my jurisdiction, and have not done so accordingly.”¹²²

(ix) Claimant’s Cooperative Engagement Process Request

6.48 On 18 July 2014, the Claimant filed a Cooperative Engagement Process (“CEP”) Request pursuant to Article 5.1 of the Bylaws. Article 5.1 provides that:

“[b]efore either party may initiate arbitration pursuant to Section 5.2 below, ICANN and Registry Operator, following initiation of communications by either party, must attempt to resolve the dispute by engaging in good faith discussion over a period of at least fifteen (15) calendar days.”

6.49 The Cooperative Engagement Process description further provides that:

“prior to initiating an independent review process, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. It is contemplated that this cooperative engagement process will be initiated prior to the requesting party incurring any costs in the preparation of a request for independent review.”¹²³

6.50 On 20 March 2015, in accordance with that Cooperative Engagement Process, the Independent Review Process filing date for the Claimant was extended to 24 March 2015.¹²⁴

6.51 On 24 March 2015, the Claimant submitted the current Notice and Request for IRP. The procedural history thereafter is summarized at Section 4 above.

6.52 In its Notice and Request for IRP, the Claimant seeks, or potentially seeks, review of the following:

- (a) the ICANN Board’s 27 February 2014 decision to permit inconsistent Expert Determinations from the Corn Lake and SRL applications for .CHARITY to continue by denying the Claimant’s Reconsideration Request;

¹²² July 8, 2014 Ombudsman letter, **Claimant Exhibit 25**, page 2.

¹²³ ICANN Cooperative Engagement Process description, **ICANN Appendix H**.

¹²⁴ Cooperative Engagement and IRP Status Update 20 March 2014, **Claimant Exhibit 17**.

- (b) the ICANN Board’s 12 October 2014 decision to treat the Expert Determinations for .CHARITY differently to those for .COM/.CAM and/or .CAR/.CARS and/or .SHOP/ .通販 in respect of the new Inconsistent Determinations Review Procedure recorded in its Approved Resolutions;¹²⁵ and/or
- (c) “somewhat alternatively” (as characterized by ICANN),¹²⁶ the ICANN Board’s action to establish a new standard for review of all “inconsistent and unreasonable” decisions and decision not to apply that standard to .CHARITY, even though, in Claimant’s view, “the decisions on the .CHARITY objections, and no others [that were excluded], come within the realm of review established by the NGPC”.¹²⁷

7. IRP PANEL’S ANALYSIS OF ADMISSIBILITY

7.1 This IRP is the final stage in the ICANN New gTLD Application dispute resolution procedure. The process is governed by the ICANN Bylaws, Articles and “Core Values”.

7.2 In the course of its written and oral submissions, the Claimant invites the IRP Panel to review certain ICANN Board “actions or decisions” arising out of or relating to the Expert Determination upholding the community objection in the Claimant’s .CHARITY Application. The IRP Panel appears to be invited to review some or all of the following alleged “actions or decisions”:

- (a) the Claimant’s Expert Determination dated 9 January 2014;
- (b) the Board’s Denial of the Claimant’s Reconsideration Request dated 27 February 2014 and published in the Board Minutes of 27 February 2014, which were posted to the ICANN website on 13 March 2014, arising out of the Claimant’s Expert Determination;
- (c) the NGPC Approved Resolutions, 5 February 2014, proposing the new Inconsistent Determinations Review Procedure and the ensuing consultation (the “**5 February 2014 Decision and Action**”); and

¹²⁵ Claimant Request at para. 47.

¹²⁶ ICANN Response at para 52.

¹²⁷ Claimant Request at para. 42.

(d) the NGPC Approved Resolutions, 12 October 2014, adopting the new Inconsistent Determinations Review Procedure and omitting .CHARITY from its purview (the “**12 October 2014 Decision and Action**”).

7.3 The requirements for an IRP are that: (a) the Claimant was materially affected by a decision or action of the Board; (b) the decision or action is inconsistent with the Articles of Incorporation or Bylaws; and (c) the request for the IRP was made within 30 days of the posting of the Board minutes recording that decision or action.¹²⁸ The issues of material effect and inconsistency with the Articles of Incorporation or Bylaws are integral to the exercise of substantive review, and are dealt with in Section 8 below. The question of timeliness, by contrast, may be disposed of as a threshold admissibility issue.

7.4 As to the threshold issue of timeliness of the request to review the 12 October 2014 Decision (and to the extent that the subsequent decision was based on it, the 5 February 2014 Decision or Action), there is no dispute between the Parties. ICANN has not asserted any timeliness objection in relation to the IRP Panel’s review of these decisions and actions and proceeds on the basis that review is not precluded on timing grounds.¹²⁹ On that basis, this IRP Panel accepts that it has jurisdiction in respect of the 12 October 2014 Decision and Action (and to the extent that the subsequent decision was based on it, the 5 February 2014 Decision or Action). The IRP Panel’s review of those “decisions and actions” is set out below, including in relation to material effect and inconsistency.

7.5 As to the threshold issue of timeliness of the request to review the Expert Determination and/or Denial of the Reconsideration Request, there is a dispute between the Parties as to admissibility.

7.6 The Claimant’s primary position is that its request that the IRP Panel review the Expert Determination and the BCG’s Denial of the Reconsideration Request is timely despite its failure to file its IRP request within the time period specified in Article IV, Section 3.3 of the

¹²⁸ The Claimant’s Request for IRP was submitted on 24 March 2015, the filing deadline previously agreed by the parties. Cooperative Engagement and IRP Status Update 20 March 2014, **Claimant Exhibit 17**.

¹²⁹ Claimant Request, para. 31 and fn 26. ICANN and Claimant agreed to toll until 24 March 2015 the deadline for Claimant to file an IRP in relation to the 12 October 2014 action while Claimant pursued the CEP.

Bylaws. In particular, the Claimant contended at the hearing that the filing deadline provided in the Bylaws is “not a statute of limitations” and “lacks the rationale.”¹³⁰

7.7 ICANN, in response, denies that the Claimant’s request for IRP in relation to the Denial of the Reconsideration Request is timely. It refers to the posting on 13 March 2014 of the 27 February 2014 minutes of the meeting at which the BCG denied Claimant’s Reconsideration Request. According to ICANN, the Claimant’s right to file an IRP Request in relation to that decision expired on 28 March 2014.¹³¹ In support of that position, ICANN specifically relies on the Bylaws, which provide that:

“[a] request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws of Articles of Incorporation.”¹³²

7.8 There is no suggestion by either party that the deadline for an IPR application concerning the Reconsideration Request (or Expert Determination) has been tolled.

7.9 Having carefully considered the submissions of both Parties in relation to admissibility, the IRP Panel has determined that the Claimant’s application for review of the Expert Determination Denial of the Reconsideration Request is out of time. The Panel considers that ICANN is entitled and indeed required to establish reasonable procedural rules in its Bylaws, including in respect of filing deadlines, in order to provide for orderly management of its review processes.

7.10 Article IV, Section 3.3 of ICANN’s Bylaws clearly states that:

“[a] request for independent review must be filed **within thirty days of the posting of the minutes** of the Board meeting (and the accompanying Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws of Articles of Incorporation.”¹³³

¹³⁰ Claimant’s Hearing Slides at 5.2

¹³¹ ICANN Sur-Reply, para. 40; The Panel notes that the date 30 days after the 13 March 2014 posting of the 27 February minutes was 12 April 2014, a Saturday.

¹³² ICANN Sur-Reply, para. 40 and Bylaws, Article IV, Section 3.3.

¹³³ ICANN Sur-Reply, para. 40 and Bylaws, Article IV, Section 3.3. (Emphasis added.)

- 7.11 The Claimant failed to file its request for independent review within 30 days of the posting of the 27 February 2014 Minutes of the Board meeting in respect of the 27 February 2014 Denial of Request for Reconsideration concerning the .CHARITY Expert Determination of 9 January 2014. Claimant did not file the IRP request at issue here until 24 March 2015 and, arguably, did not raise the 27 February 2014 denial of its Reconsideration Request until its Reply Memorandum in this IRP, filed on 10 December 2015.¹³⁴
- 7.12 Moreover, the Claimant did not file its CEP request, which would have extended the independent review filing period, until 18 July 2014.¹³⁵ By that time, the 30 day period following publication of the Denial of the Reconsideration Request had already expired, i.e., on 28 March 2014, or, at latest, in mid-April 2014.
- 7.13 Although the CEP rules contemplate a process that will take place prior to initiating an IRP, the record before this Panel is insufficient to conclude that Claimant’s CEP request operated to revive the already-expired time to file an IRP as to the denial of Claimant’s Reconsideration Request or that ICANN waived that deadline.¹³⁶ Accordingly, the Panel has not considered the Denial of the Reconsideration Request (or indeed the underlying Expert Determination) in this IRP proceeding, except as background.
- 7.14 In summary, the Panel has determined that Claimant’s only timely claim in this IRP is its application for relief from the Board’s specific action to omit .CHARITY from the purview of its Resolution of 12 October 2014, and, to the extent related thereto, the 5 February 2014 Decision or Action.¹³⁷ Therefore, the Panel proceeds on the basis that the other “actions or decisions” discussed at length in the parties’ submissions are background to the specific “action or decision” recorded in the 12 October 2014 Approved Resolutions.
- 7.15 The Parties further addressed the threshold question whether or not an Expert Determination was a “board decision” capable of review within the IRP process. As the Panel has already rejected any invitation to review the Expert Determination on the basis of timeliness, it is not required to address this further threshold issue.

¹³⁴ See ICANN Sur-Reply at para. 38-40; Corn Lake Reply at fn. 60.

¹³⁵ Witness Statement of Jonathon Nevett at para. 15

¹³⁶ Claimant Request, **Appendix H**.

¹³⁷ Claimant Request, para. 31.

8. IRP PANEL REVIEW OF THE BOARD'S "ACTION OR DECISION"

8.1 The IRP of ICANN Board's 12 October 2014 Decision and Action (and its preceding 5 February 2014 Decision and Action) to adopt the Inconsistent Determination Review Process and omit .CHARITY from its purview is set out below.

(i) Summary of Alleged Grounds for Review

8.2 The Claimant has raised four separate grounds for review. **First**, the Claimant relies on Article II of the Bylaws, which sets out the powers of ICANN, including restrictions at Section 2 and non-discriminatory treatment standards at Section 3. Specifically, Article II, Section 3, provides that:¹³⁸

"ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."

8.3 The Claimant stated in its submissions to the Panel and at the hearing that "discrimination is the primary basis for Corn Lake's IRP... ." ¹³⁹

8.4 **Second**, the Claimant relies on ICANN's "Core Values" set out in the ICANN Bylaws, Article I, Section 2, together with ICANN's mission statement. Specifically, the 11 core values that the ICANN Bylaws, Article I, Section 2 states "should guide the decisions and actions of ICANN" when it is "performing its mission" include to:

- (a) preserve and enhance the operational stability, reliability, security, and global interoperability of the Internet;¹⁴⁰
- (a) respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters within ICANN's mission;¹⁴¹
- (b) to the extent feasible and appropriate, delegate coordination functions;¹⁴²

¹³⁸ ICANN Bylaws, **ICANN Appendix A**, Article II, Section 3. See Claimant Request para. 4(a).

¹³⁹ Claimant's hearing slides at 1.1 ("Framing the Issues").

¹⁴⁰ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.1.

¹⁴¹ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.2.

¹⁴² ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.3.

- (c) seek and support broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet;¹⁴³
- (d) *where feasible and appropriate, to promote and sustain a competitive environment;*¹⁴⁴
- (e) *introduce and promote competition in the registration of domain names;*¹⁴⁵
- (f) employ open and transparent policy development mechanisms;¹⁴⁶
- (g) make decisions by applying documented policies neutrally and objectively, with integrity and fairness;¹⁴⁷
- (h) act with a speed that is responsive to the needs of the Internet;¹⁴⁸
- (i) *remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness;*¹⁴⁹ and
- (j) recognize that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.¹⁵⁰

8.5 The Claimant relies in particular on core values at Article I, Sections 2.5, 2.6 and 2.10, as italicized above.¹⁵¹

8.6 Article I of the Bylaws further provides that the core values are “deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances.” The Bylaws state that:

¹⁴³ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.4.

¹⁴⁴ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.5.

¹⁴⁵ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.6.

¹⁴⁶ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.7.

¹⁴⁷ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.8.

¹⁴⁸ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.9.

¹⁴⁹ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.10.

¹⁵⁰ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.11.

¹⁵¹ ICANN Bylaws, **ICANN Appendix A**, Article I, Sections 2.5 and 2.6. See Claimant Request para. 4(b). ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.10. See Claimant Request para. 4(d).

“[a]ny ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.”¹⁵²

8.7 **Third**, the Claimant relies on the ICANN Articles of Incorporation, Article 4, which requires that ICANN operate for the benefit of the Internet community as a whole:¹⁵³

“The corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. ...”

8.8 **Fourth**, and anticipating the IRP Standard of Review provided in Article IV, Section 3.4, the Claimant asserts that the:

“Board simply failed to ‘exercise due diligence and care in having a reasonable amount of facts in front of them’ regarding the .CHARITY objection decisions when it refused to provide for their review as similarly ‘inconsistent and unreasonable’ as the determinations for which it did order review.”¹⁵⁴

8.9 As to procedure, Article IV, Section 3 of the ICANN Bylaws – as part of the accountability and review provisions – deals with the IRP. The process is confined to review of ICANN Board actions asserted by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.¹⁵⁵ In particular, Article IV, Section 3.2 provides that:

“Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's

¹⁵² ICANN Bylaws, **ICANN Appendix A**, Article I.

¹⁵³ ICANN Articles of Incorporation, **ICANN Appendix B**, Article 4. See Claimant Request para. 4(c).

¹⁵⁴ Claimant Request, para. 47.

¹⁵⁵ ICANN Bylaws, **ICANN Appendix A**, Article IV (3) (1).

alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.”

8.10 For the sake of completeness, the Panel further notes that the Applicant Guidebook is described in its preamble as being “the implementation of Board approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.” It is described in the IRP Final Declaration in *Booking.com v ICANN* as “the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”¹⁵⁶

(ii) Standard of Review

8.11 Both Parties accept that the standard of review is set out at Article IV, Section 3.4 of the Bylaws and Article 8 of the Supplemental Procedures.

8.12 Article IV, Section 3.4 of the Bylaws provides that:

“Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- (a) did the Board act without conflict of interest in taking its decision?;
- (b) did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- (c) did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?”

8.13 Article 8 of the Supplementary Rules reiterates those three questions and further provides as follows:

“8. Standard of Review

¹⁵⁶ *Booking.com v ICANN* IRP Final Declaration, 3 March 2015, **ICANN Appendix I**, at para. 54.

The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.”

8.14 The IRP Panels in *Booking.com v ICANN* and *ICM Registry v ICANN* confirmed that the defined standard quoted above does not constitute the exclusive basis for an IRP of ICANN’s Board action or inaction. Rather, they described this business judgement rule standard as “the default rule that might be called upon in the absence of relevant provisions of ICANN’s Articles and Bylaws and of specific representations of ICANN ... that bear on the propriety of its conduct.”¹⁵⁷ Where, as here, the Board’s action or inaction may be compared against relevant provisions of ICANN’s governing documents, the IRP Panel’s task is to *compare* the Board’s action or inaction to the governing documents and to *declare* whether they are consistent.¹⁵⁸

8.15 The IRP in *Booking.com v ICANN* further elaborated the standard at paragraphs 108 to 110 and 115 of its Final Declaration:

108. “The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws – or, the parties agree, with the Guidebook. In that connection, the Panel notes that Article 1, Section 2 of the Bylaws also clearly states that in exercising its judgment, the Board (indeed “[a]ny ICANN body making a recommendation or decision”) shall itself “determine which core values are most relevant and how they apply to the specific circumstances of the case at hand.”

¹⁵⁷ *ICM Registry v ICANN* Final Declaration, 19 February 2010, **ICANN Appendix K**, para. 123.

¹⁵⁸ *Vistaprint v ICANN*, Final Declaration, 9 July 2015, **ICANN Appendix E**, para. 123 to 124.

109. “In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN’s best interests; where it does so, the only question is whether its actions are or are not consistent with the Articles, Bylaws and, in this case, with the policies and procedures established in the Guidebook.”

110. “There is also no question but that the authority of an IRP panel to compare contested actions of the Board to the Articles of Incorporation and Bylaws, and to declare whether the Board has acted consistently with the Articles and Bylaws, does not extend to opining on the nature of those instruments. ...”

...

115. “[I]t is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board’s action was consistent with applicable rules found in the Articles, Bylaws and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook ... but merely to apply them to the facts.”¹⁵⁹

8.16 Taking into account the Board’s broad authority as described above, IRP Panels nonetheless consistently have declined to adopt a deferential review standard. As the IRP Panel in *Vistaprint v ICANN* stated:

“the IRP is the only accountability mechanism by which ICANN holds itself accountable through *independent third-party review* of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel’s review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel’s primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN’s commitment to maintain and improve robust mechanisms for accountability... .”¹⁶⁰

8.17 The IRP Panel in *Booking.com v ICANN* concurred, noting:

“Nevertheless, this does not mean that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN in these proceedings. Rather, ... the IRP Panel is charged with ‘objectively’ determining whether or not the Board’s

¹⁵⁹ *Booking.com v ICANN*, Final Declaration, 3 March 2015, **ICANN Appendix I**, paras. 108 to 110 and 115.

¹⁶⁰ *Vistaprint v ICANN*, Final Declaration, 9 July 2015, **ICANN Appendix E**, para. 124.

actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board’s conduct be appraised independently, and without any presumption of correctness.”¹⁶¹

8.18 Having reviewed the IRP Final Declarations in the *Vistaprint v ICANN*, *ICM Registry v ICANN* and *Booking.com v ICANN*, this Panel concludes that it is now well established that:

“... the IRP Panel is charged with ‘objectively’ determining whether or not the Board’s actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board’s conduct be appraised independently, and without any presumption of correctness.”¹⁶²

8.19 While it is in no way bound by these earlier decisions, this IRP Panel agrees with those conclusions and sees no reason to depart from the standard of review set out in *Booking.com v ICANN*, which in turn relied on the Final Declaration in *ICM Registry LLC v ICANN*, dated 19 February 2010. That the Panel is not called upon to revisit or vary the substance of the Articles, Bylaws or Guidebook generally does not lessen its charge to analyse the specific Board action or inaction at issue here objectively against the standards contained in those instruments.

8.20 The current IRP Request raises a direct and concededly timely challenge to an ICANN “action or decision”, namely the Board’s 12 October 2014 establishment of the new Inconsistent Determinations Process and specifically, the Board’s determination to limit that process to String Confusion Objections and not to extend it to inconsistent Community and Limited Public Interest Objections, such as .CHARITY.

(iii) Analysis

8.21 In accordance with the standard adopted by the IRP Panels in the *Booking.com v ICANN* and *ICM Registry v ICANN*, this Panel considers below whether the Board acted consistently with ICANN’s Articles of Incorporation, Bylaws and the procedures established in the Applicant Guidebook. We initially compare the Board’s action to Article II, Section 3 of the Bylaws. In addition, we compare the Board’s action to the standard set out in Article IV, Section 3.4 of

¹⁶¹ *Booking.com v ICANN*, Final Declaration, 3 March 2015, **ICANN Appendix I**, paras. 111.

¹⁶² *Booking.com v ICANN*, Final Declaration, 3 March 2015, **ICANN Appendix I**, paras. 111.

the Bylaws and Article 8 of the Supplementary Rules and consider other relevant Bylaws and ICANN governing documents, including the Guidebook and ICANN's Core Values.

8.22 The issues addressed in turn are:

- (a) Did the Board Apply Its Standards, Policies, Procedures or Practices Inequitably or Single Out Any Particular Party for Disparate Treatment Without Substantial and Reasonable Justification? (Bylaws Article II, Section 3)
- (b) As to the Defined Review Standard (Bylaws Article IV, Section 3.4):
 - i. Did the Board act without conflict of interest in taking its decision to omit .CHARITY, as a Community Objection determination, from the new Inconsistent Determinations Review Procedure?
 - ii. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them in taking its decision to omit .CHARITY, as a Community Objection determination, from the new Inconsistent Determinations Review Procedure?
 - iii. Did the Board members exercise independent judgment in taking the decision to omit .CHARITY, as a Community Objection determination, from the new Inconsistent Determinations Review Procedure, believed to be in the best interests of the community?
- (c) Did the Board Act in the Best Interests of the Internet Community? (Articles of Incorporation, Article 4)
- (d) Did the Board Abdicate Its Accountability Responsibility? (Bylaws, Article I, Section 2.10)

8.23 Each of these issues is considered in relation to the 12 October 2014 Decision and Action (and the preceding 5 February 2014 Decision and Action) to adopt the Inconsistent Determination Review Procedure which omitted .CHARITY from its purview of the new Inconsistent Determinations Review Procedure.

ISSUE 1: Did the Board Apply Its Standards, Policies, Procedures or Practices Inequitably or Single Out Any Particular Party for Disparate Treatment Without Substantial and Reasonable Justification?

8.24 The first ground for review is whether or not the Board applied its standards, policies, procedures or practices inequitably or singled out any particular party for disparate treatment. The applicable Bylaw is Article II, Section 3, set out above.¹⁶³

8.25 This IRP Panel is required to determine whether or not the ICANN Board, in its 12 October 2014 Approved Resolutions “action or decision” not to extend the new Inconsistent Determination Review Procedure to the Claimant’s .CHARITY Expert Determination, accorded the Claimant unfair or disparate treatment without substantial and reasonable cause as compared to other unsuccessful applicants who had received perceived inconsistent Expert Determinations, i.e., the unsuccessful applicants for the gTLDs for .CAM and .通販 (and originally .CARS).

(i) The Claimant’s Position

8.26 First, the Claimant contends that the Board’s decision to establish a review process for “inconsistent and unreasonable” determinations whilst at the same time excluding .CHARITY from that review process materially affected the Claimant. In this regard, the Claimant refers, among other things, to:

- (a) the NGPC’s 5 February 2014 proposed review mechanism “for addressing perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process”, established for public comment;¹⁶⁴
- (b) community criticism at the time that the review proposal was not sufficiently expansive and that the review process should be widened;
- (c) the Board decision to encompass the .CAM and .COM decisions as “inconsistent or otherwise unreasonable” and “not in the best interest of the Internet community” in relation to “objections raised by the same objector against different applications for the same string, where the outcomes of the [objections] differ”,¹⁶⁵ in circumstances where the description of the problem arising out of inconsistent decisions on .CAM

¹⁶³ ICANN Bylaws, **ICANN Appendix A**, Article II, Section 3. See Claimant Request para. 4(a).

¹⁶⁴ Claimant Request, para. 28.

¹⁶⁵ Claimant Request, para. 30.

and .COM applies to the .CHARITY situation, according to the Claimant, “*exactly*”;¹⁶⁶
and

- (d) ICANN’s characterization of the “strict definition” of “inconsistency” contained in the NGPC 12 October 2014 Resolution as extending to “objections raised by the same objector against different applications for the same string, where the outcome of the [objections] differ”.¹⁶⁷

8.27 Based on those factors, the Claimant submits that the Board’s decision to not include .CHARITY (as a Community Objection determination) has resulted in the Claimant being “materially affected by a decision or action by the Board”.¹⁶⁸ According to the Claimant, it was materially affected because it was deprived of an opportunity for review of an objection where another party subject to the identical circumstances was granted an opportunity for review.

8.28 The Claimant further submits that those same factors render that decision “inconsistent with the Articles of Incorporation or Bylaws”.¹⁶⁹ In the Claimant’s submission, the Board established a process for handling inconsistent and unreasonable objection decisions and then consciously disregarded that process in the case of .CHARITY.¹⁷⁰

8.29 The Claimant submits that it “does not challenge the Board’s decision not to extend review beyond only ‘inconsistent and unreasonable’ objection determinations.”¹⁷¹ Rather, it submits that its complaint arises out of “the Board’s stated rationale for limiting its review only to one type of objection, SCO”, which the Claimant submitted “raises at least three critical issues that the Board appears to have overlooked.”¹⁷² Essentially addressing the question of whether there was “substantial and reasonable cause” for the limitation, the Claimant notes, in particular:

- (a) the Board did not identify any action taken by anyone in reliance on an inconsistent objection determination of any type and, in particular, in relation to .CHARITY,

¹⁶⁶ Claimant Request, para. 31 (emphasis in original); see also Claimant Request, para. 42.

¹⁶⁷ Claimant Request, para. 31; 11 February 2014 Proposed Review Mechanism, **Claimants Exhibit 15**, at page 2.

¹⁶⁸ Claimant Request, para. 32.

¹⁶⁹ Claimant Request, para. 32.

¹⁷⁰ Claimant Request, para. 37.

¹⁷¹ Claimant Request, para. 39.

¹⁷² Claimant Request, para. 39.

nothing indicates that SRL has done anything to pursue its application further after the objection ruling in its favor;¹⁷³

- (b) the Board’s concern about actions taken in reliance on the Applicant Guidebook ignores those applications for new gTLDs made in reliance upon the Applicant Guidebook’s strict criteria and made in the expectation that experts would apply those criteria properly;¹⁷⁴ and
- (c) the Board’s conclusion that to expand the review would unfairly impact a number of participants without reasonably considering the available facts ignores the fact that “*only* the decisions on the .CHARITY community objections, and *no others*, come within the realm of review established by the NGPC.”¹⁷⁵

8.30 The Claimant further relies on recent decisions in which Final Review Panels established pursuant to the October 2014 Resolution have overturned “inconsistent and unreasonable” new gTLD objection determinations.¹⁷⁶ In particular, the Claimant relies on Final Review Determinations issued by both of the three member Final Review Panels convened as a result of the Board’s October 2014 Resolution to re-review two specifically identified string confusion objection expert determinations.

8.31 The Claimant argues that each of these Final Expert Determinations reversed the SCO challenged determinations and provide evidence that the Panel “cannot reasonably uphold the disparate treatment that Corn Lake has suffered.” The Panel is asked to correct this situation.¹⁷⁷

8.32 The Claimant submits that:

“[a]t *minimum*, it [ICANN] can and should defer to the same review mechanism provided for in the Resolution: a 3-member review panel, examining only the materials offered in the original proceedings, asking solely ‘whether the original Expert Panel could have reasonably

¹⁷³ Claimant Request, para. 40.

¹⁷⁴ Claimant Request, para. 41.

¹⁷⁵ Claimant Request, para. 42.

¹⁷⁶ Reply, paras. 21 to 28.

¹⁷⁷ Reply, para. 23.

come to the decision reached ... through an *appropriate* application of the standard review as set forth in the Applicant Guidebook.”¹⁷⁸

8.33 In the course of its written and oral submissions in this IRP, the Claimant put forward its substantive concerns as to the content of the original Expert Determination and Denial of the Reconsideration Request in support of its position for further review.¹⁷⁹ In particular, it submitted that:

- (a) “a single ICC panelist upheld a community objection against Corn Lake’s application for the .CHARITY gTLD and, at the same time, that same panelist denied an identical objection against a similarly situated applicant for the same string”¹⁸⁰ and such differing determinations are “inconsistent and unreasonable” in the same sense the Board applied those terms to the SCO determinations to which it extended the new review mechanism;
- (b) in “[r]eviewing the decision against Corn Lake and the ruling in favor [of] SRL together, it becomes clear that the PIC offered by SRL formed the sole basis for the differing outcomes. The analyses on the other three community objection criteria track closely, and often verbatim, in the two rulings”;¹⁸¹
- (c) “[n]o legitimate basis exists ... to distinguish the two applications” because “[b]oth the IO’s objection and the panel’s ruling against Corn Lake turn entirely on its perceived lack of the type of protections to which the panel found SRL had acceded in its PIC”;¹⁸²
- (d) “[b]ecause Corn Lake must in fact implement such protections as a contractual condition to an award of the TLD, and because SRL has the unilateral right to change its PIC language, the applicants should not be subject to disparate treatment”;¹⁸³

¹⁷⁸ Claimant Request, para. 45 (emphasis in original). See also, Reply, para. 15 (“Corn Lake does not, as ICANN contends, seek substantive review of the Ruling. Rather, it claims that the Ruling improperly discriminates against Corn Lake. The Board acted by failing to rectify the Ruling despite the requirement that the Board ensure the integrity of its processes, which include consistency, fairness and non-discriminatory treatment of similarly situated applicants.”)

¹⁷⁹ Claimant Request, para. 27.

¹⁸⁰ Claimant Request, Introduction. See also, Reply, para. 12.

¹⁸¹ Claimant Request, para. 26.

¹⁸² Claimant Request, para. 27.

¹⁸³ Claimant Request, para. 27.

- (e) the Claimant “made clear to the IO that it would fully comply with more stringent safeguard requirements (or PICs) should they be adopted by ICANN”¹⁸⁴ and, as a result, the disparate treatment between the Claimant’s and SRL’s eligibility criteria, which it alleges was effectively the same, was inconsistent and unreasonable;
- (f) the procedure by which SRL was permitted to make additional submissions was inconsistent with the procedure afforded to the Claimant and unreasonable. In particular, despite ICANN’s publicly stated commitment to transparency and accountability, it failed to make public the substance of SRL’s proposed amendment for almost two months – during a critical phase in the application process. Moreover, ICANN published the new mandatory PICs applicable to .CHARITY only for comment. According to the Claimant, this effectively left it in the dark;¹⁸⁵
- (g) “even though the panel had accepted SRL’s late submission, it rejected Corn Lake’s identical attempt to support its own application” to alert the Expert Panel that ICANN had accepted the GAC’s Beijing Communiqué recommendations, thereby mooting the IO’s objection;¹⁸⁶
- (h) the Expert Panel based the decision to deny the IO’s objection against SRL’s .CHARITY application entirely on the amended PIC that was the subject of SRL’s late submission and “[t]he panel’s decision to deny the objection against SRL’s application allowed SRL’s .CHARITY application to move forward in the process,” whereas Claimant’s application was disqualified and removed from contention altogether;¹⁸⁷ and
- (i) as a result, the Board’s actions have materially affected the Claimant in that it has now seemingly lost the right to the .CHARITY domain, by refusing to allow Corn Lake to provide evidence of the PIC it would have to adopt.¹⁸⁸

8.34 In relation to this position, as set out in Section 7 above, the IRP Panel has determined that, irrespective of whether or not the Expert Determination and/or Denial of the Reconsideration Request were subject to review, the current IRP application as applied to those actions is out of time. Therefore, in its analysis below the IRP Panel takes the

¹⁸⁴ Reply, para. 5.

¹⁸⁵ Reply, para. 7.

¹⁸⁶ Reply, para. 8.

¹⁸⁷ Reply, para. 9-10.

¹⁸⁸ Reply, para. 10.

aforementioned factors into account by way of background only, and does not review the merits of the Expert Determination or the Denial of the Reconsideration Request. Irrespective of what might have happened in the expert proceeding or the reconsideration process, this Panel addresses the Board's independent obligation, at the time it acted to adopt the new review mechanism, to act in accordance with the requirements of its Bylaws, other governing documents and ICANN's Core Values on the facts and the record then before it.

- 8.35 The Claimant made further post-hearing submissions regarding the ICANN Board's 3 February 2016 Resolution¹⁸⁹ to address the "perceived inconsistency and unreasonableness" of the .HOSPITAL Limited Public Interest objection Expert Determination by referring the objection proceeding to the Inconsistent Determinations Review Procedure. The .HOSPITAL Expert Determination was found to have been the only Limited Public Interest objection out of nine "health-related" Limited Public Interest objections that resulted in a determination in favor of the objector rather than the applicant. As a consequence, the Board invoked the Inconsistent Determinations Review Procedure for the third time – this time beyond the original string confusion objections scope referred to in the 12 October 2014 Approved Resolutions. In the .HOSPITAL: case, identical objections were lodged by the same objector, not to the same string, but to strings related by subject matter.
- 8.36 The Claimant contended that the Board's action with respect to .HOSPITAL provides additional evidence of the disparate treatment of .CHARITY in that the .CHARITY situation is "more similarly situated to .CAM and .SHOP than is .HOSPITAL."¹⁹⁰
- 8.37 The Claimant relies on the Final Declaration in *Dot Registry v. ICANN* to urge that ICANN must establish that it complied with its Bylaw obligations regarding accountability, diligence and independent judgment based on affirmative proof of the record on which the Board relied in denying Claimant's Reconsideration Request and in excluding the .CHARITY expert determinations from the new review mechanism.

¹⁸⁹ Claimant Post-Hearing Submission dated 16 February 2016.

¹⁹⁰ Claimant Post-Hearing Submission dated 16 February 2016.

(ii) The Respondent's Position

8.38 ICANN rejects the Claimant's arguments: (a) that the .CHARITY Expert Determinations should have been included in the 12 October 2014 Approved Resolutions relating to the limited review mechanism for expert determinations from specifically identified sets of String Confusion Objections; and (b) that the Board should have expanded the limited review process and implemented a similar review to cover the .CHARITY Expert Determinations.¹⁹¹

8.39 ICANN denies that the Claimant was materially affected by the Board establishing a review process for "inconsistent and unreasonable" determinations whilst excluding .CHARITY from that review process. It submits that the NGPC identified several bases to distinguish inconsistent Expert Determinations between specifically identified sets of objections to string confusion and other Expert Determinations which were not included in the new process. In particular:

"the NGPC identified several bases to distinguish the seemingly inconsistent determinations resulting from specifically identified sets of String Confusion Objections on the one hand, and the expert determinations resulting from Community Objections, such as those relating to .CHARITY or .慈善, on the other. Based upon these differences, the NGPC concluded that permitting the specifically identified sets of String Confusion Objections to stand 'would not be in the best interests of the Internet community,' but that 'reasonable explanations' existed for the seeming discrepancies concerning determinations on Community Objections, such as for .CHARITY."¹⁹²

8.40 ICANN further submits that the 12 October 2014 Approved Resolutions were deliberately narrow and consciously limited to only the String Confusion Objection Expert Determinations relating to .COM/.CAM and .SHOP/通販.¹⁹³ The Respondent submits therefore that the NGPC did not establish a new standard for review of all "inconsistent and unreasonable" Expert Determinations and was under no obligation to provide such a review mechanism.¹⁹⁴

¹⁹¹ ICANN Response, para. 52. See also ICANN Sur-Reply, para. 9.

¹⁹² ICANN Response, para. 11.

¹⁹³ ICANN Response, para. 53.

¹⁹⁴ ICANN Response, para. 62.

8.41 ICANN argues that in limiting the review to two specifically identified sets of String Confusion Objection Expert Determinations, the NGPC did not breach its obligations under the Bylaws or Articles of Incorporation.¹⁹⁵ It cites two recent IRP Final Declarations (claiming that such decisions have “precedential value”¹⁹⁶) that it submits contradict the Claimant’s arguments, and rejects the Claimant’s reliance on the third case.¹⁹⁷

(a) *Vistaprint v ICANN*: ICANN relies on the following findings:

- (i) “the Panel is not tasked with reviewing the actions or decisions of ICANN staff or other third parties who may be involved in ICANN activities or provide services to ICANN”,¹⁹⁸ and
- (ii) “the ICANN Board has no affirmative duty to review the result in any particular SCO [string confusion objection] case”,¹⁹⁹ and has no duty to establish an appeals process to challenge Expert Determinations in objection proceedings²⁰⁰ and “had properly limited its consideration to whether the contested actions comported with established policies and procedures.”²⁰¹

(b) *Merck v ICANN*: ICANN relies on the IRP Final Declaration findings that:

- (i) “the claimant’s disagreement with the outcome of the Merck Expert Determination cannot form the basis for an IRP”,²⁰² and
- (ii) “the Guidebook does not include any appeals process for determinations on objection proceedings.”²⁰³

(c) *DCA v ICANN*: ICANN argues that this determination is not applicable because “[t]he DCA Panel premised its declaration on the GAC’s status as an ICANN constituent

¹⁹⁵ ICANN Response, para. 11.

¹⁹⁶ ICANN Sur-Reply, para. 7. See also, ICANN Bylaws, as amended 30 Jul 2014, **ICANN Appendix A**, Art. IV, para. 3.21.

¹⁹⁷ ICANN Sur-Reply, paras. 3-6.

¹⁹⁸ ICANN Sur-Reply, para. 15, as per Final Declaration, *Vistaprint Ltd v. ICANN*, ICDR No. 01-14-0000-6505, **ICANN Appendix K**, para. 127.

¹⁹⁹ ICANN Sur-Reply, para. 16, as per Final Declaration, *Vistaprint Ltd v. ICANN*, ICDR No. 01-14-0000-6505, **ICANN Appendix K**, para. 157.

²⁰⁰ ICANN Sur-Reply, para. 17.

²⁰¹ ICANN Sur-Reply, para. 18.

²⁰² ICANN Sur-Reply, para. 20.

²⁰³ ICANN Sur-Reply, para. 20.

body, but here neither the ICC nor the expert panels it established to preside over the two objection proceedings at issue are constituent bodies of ICANN.”²⁰⁴

8.42 In addition, ICANN argues that the review mechanism which was approved was “a very narrow review mechanism to be applied only to specifically identified Expert Determinations arising out of the String Confusion Objection process. The NGPC explicitly decided not extend the review to any Community Objection expert determinations. Moreover, the NGPC was not obligated to create or implement a broader review mechanism.”²⁰⁵ There is no appellate mechanism in the Bylaws, the Articles or the Guidebook “for objection proceedings that are conducted as part of the New gTLD Programme.”²⁰⁶

8.43 ICANN rejects the Claimant’s reliance on the Final Determinations (as exhibited to the Reply) by IRP Panels convened as a result of the Board’s October 2014 Resolution to re-review two specific SCO Expert Determinations. ICANN submits that the Claimant’s reliance on these is inapplicable because: (i) the NGPC was explicit that the New Inconsistent Determination Review Process would encompass only the SCOs addressed in the October 2014 Approved Resolutions; (ii) these findings have no bearing on community objection Expert Determinations; (iii) the New Inconsistent Determination Review Process involved different Expert Panels; and (iv) the Claimant is incorrect to presuppose that the Board has an affirmative duty to intervene with respect to the Corn Lake Expert Determination.²⁰⁷

8.44 Finally in response to the Claimant’s submissions regarding the content of the Expert Determination and Denial of the Reconsideration Request, ICANN noted that:²⁰⁸

- (a) “[e]valuation of a Community Objection necessarily goes far beyond a review of the string, and instead requires careful consideration of the application materials and an applicant’s proposed commitments, which (and likely do, as here) vary among applicants. As a result, one could reasonably expect that Community Objections

²⁰⁴ ICANN Sur-Reply, para. 24.

²⁰⁵ ICANN Response, para. 12.

²⁰⁶ ICANN Response, para. 12.

²⁰⁷ ICANN Sur-Reply, para. 10.

²⁰⁸ ICANN Response, para. 24. See also Applicant Guidebook, **ICANN Appendix C**, para. 3.5.4.

filed against different applications, even applications for the same string, may be resolved differently”;²⁰⁹

- (b) the IO found that the “various comments in opposition” to Claimant’s .CHARITY Application had “mainly focused on the views that the string should be administered by a not for profit organization and/or that there are insufficient protection mechanisms in place such that non-bona fide organizations may adopt the .CHARITY gTLD, and create confusion in the mind of the public over what is in fact a charity”²¹⁰ and, as such, the IO concluded that in the absence of preventative security measures assuring the charitable nature of the applicant i.e. Corn Lake, adopting .CHARITY as a gTLD would create “likelihood of detriment to the rights or legitimate interests of the charity community, to users and to the general public”,²¹¹
- (c) the Expert Determination further found that the public opposition statements “point out the absence of any limitation in the Application of the ‘.CHARITY’ string to not-for-profit or charitable organizations ... and emphasize the need for strict registration eligibility criteria limited to persons regulated as charitable bodies or their equivalent depending upon domestic law”,²¹²
- (d) the IO and the Expert Panel clearly considered that harm would occur if .CHARITY gTLD was not limited to persons or entities who could clearly establish that they were charities or not-for-profit organizations and that the IO had established the likelihood of material detriment,²¹³
- (e) the IO had raised the same concerns in respect of the Claimant’s and SRL’s applications but the SRL Expert Panel considered that: “[t]he eligibility policy defined by the Applicant [SRL] and inspired by the criteria of the UK Charities Act 2011 which will be included in any registration agreement entered into by Applicant

²⁰⁹ ICANN Response, para. 25.

²¹⁰ As per ICANN Response, para. 28. See also IO 12 March 2013 Community Objection to Corn Lake’s Application, **Claimant Exhibit 2**, para. 4.

²¹¹ ICANN Response, para. 28.

²¹² ICANN Response, para. 32. See also Panel 9 January 2014 objection determination against Corn Lake, **Claimant Exhibit 8**, paras. 150-151.

²¹³ ICANN Response, para. 33.

with ICANN together with appropriate safeguards for registry operators respond in the Expert Panel’s view to the Detriment test concerns raised by IO”;²¹⁴

- (f) unlike the Claimant, SRL had committed to an eligibility policy that indicated registration would be limited to entities that could establish that they were a charity or a not-for-profit entity with charitable purposes;²¹⁵
- (g) “it is not the role of the Board (or, for that matter, this IRP Panel) to second-guess the substantive determination of independent, third-party experts”²¹⁶ or inject itself into the objection process and it was not for the Board to reverse the Corn Lake Expert Determination;²¹⁷ and
- (h) the Applicant Guidebook contains no suggestion – and certainly no requirement – that the Board should conduct substantive reviews of expert panel determinations.²¹⁸

8.45 As to ICANN’s post-hearing submission concerning .HOSPITAL, ICANN relied primarily on the argument that different panels assessed the nine health-related applications and only the .HOSPITAL panel sustained an objection. It also argued that the .HOSPITAL situation confirms that the Board has, and may exercise, discretion to act where it believes there has been an unjust result.

8.46 In its .HOSPITAL post-hearing submission, ICANN confirmed that it did not dispute Claimant’s position that “.CHARITY was the only other TLD ... where the same objector brought the same objection to different applications for the same strings and reached different results to the detriment of the losing applicant.”²¹⁹ Nonetheless, ICANN argued that other applicants also have complained that the results in their Expert Determinations were “unreasonable” and to give credence to Claimant’s arguments here “would risk opening a floodgate of “appeals” for other objection determinations.

²¹⁴ ICANN Response, para. 34, as per Panel 9 January 2014 objection determination in favor of SRL; **Claimant Exhibit 11**, para. 129.

²¹⁵ ICANN Response, para. 35.

²¹⁶ ICANN Response, para. 48.

²¹⁷ ICANN Response, para. 49.

²¹⁸ ICANN Sur-Reply, para. 2.

²¹⁹ ICANN letter 2 February 2016 at fn 5.

8.47 ICANN contends that the facts at issue in the *Dot Registry v. ICANN* IRP are not remotely similar to those present here and the *Dot Registry* Final Declaration has little relevance to the instant IRP.

(iii) The Panel's Decision

8.48 As stated above, this IRP Panel is not reviewing the Expert Determination or the Denial of the Reconsideration Request, as any application in respect of either is out of time. The Panel's analysis does not end there, however. Irrespective of what might have happened in the expert proceeding or the reconsideration process, this Panel has before it a separate and timely challenge to the Board's Decisions and Actions of 12 October 2014 and 5 February 2014. The Panel therefore analyses the Board's independent obligation, at the time it acted to adopt the new review mechanism, to act in accordance with the requirements of its Bylaws, other governing documents and ICANN's Core Values on the facts and the record then before it.

8.49 In its consideration as to whether or not the Board applied its standards, policies, procedures or practices inequitably or singled out any particular party for disparate treatment, this IRP Panel specifically examines the Board's "decision or action" in determining "whether it was appropriate ... to expand the scope of the proposed review mechanism to include other Expert Determinations, such as some resulting from Community and Limited Public Objections".²²⁰

8.50 In that specific context, the IRP Panel considers whether or not the Board "singled out" the Claimant for "disparate treatment" without substantial and reasonable cause, in contravention of Article II, Section 3 of the Bylaws, by excluding the .CHARITY Expert Determination, being the only community objection where the same objection from the same objector led to a different determination, from its consideration. The Panel further considers whether or not the Board's decision was based on an exercise of due diligence and care in having a reasonable amount of facts in front of it.

8.51 The IRP Panel accepts that, subject to its duty to act in the best interests of the community as discussed below at Issue 3, ICANN was under no obligation to create the new Inconsistent Determinations Review Procedure. However, once it had done so, this IRP

²²⁰ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 11-12.

Panel considers that the Bylaws required ICANN to ensure that it did not single out a similarly situated applicant for disparate treatment in relation to the application of the new Inconsistent Determinations Review Procedure without “substantial and reasonable cause”.

8.52 It is central to this Panel’s analysis that ICANN has admitted that “.CHARITY was the only other TLD ... where the same objector brought the same objection to different applications for the same strings and reached different results to the detriment of the losing applicant.”²²¹ In other words, ICANN has accepted that the Expert Determination at issue here fits within the “strict definition” of inconsistent Expert Determinations that the ICANN Board used to determine the scope of the new review procedure.

8.53 Ultimately, the 12 October 2014 Decision and Action (and its preceding 5 February 2014 Decision and Action) was not to extend the scope of the new review mechanism to apparently inconsistent Expert Determinations made as to objections other than certain designated Expert Determinations based on string confusion objections. Rather, the Board’s decision was to limit the new Inconsistent Determinations Review Procedure to a hand-picked subset of inconsistent SCO Expert Determinations.²²² ICANN accepted that “to promote the goals of predictability and fairness” a broader review mechanism “may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program,” but declined to extend the new review mechanism at the time it acted because:

- (a) “Applicants have already taken action in reliance on many of the Expert Determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds”;
- (b) “[a]llowing these actions to be undone now would not only delay consideration of all applications, but would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook”;

²²¹ ICANN letter 2 February 2016 at fn 5.

²²² Notably, the Board did not refer the full suite of inconsistent SCO determinations to the new review process to reconcile the differing outcomes. Rather, the Board selected only one determination from each set for review in the new process. Reply, fn. 10. The basis on which the Board made this selection was not disclosed, other than to state that each “falls outside normal standards of what is perceived to be reasonable and just.” Approved Resolutions, 12 October 2014 resolution, **Claimant Exhibit 16**. This Panel’s review of whether the Board had a reasonable basis to distinguish the selected string contention objection Expert Determinations, which were subjected to the new process, from the community objections to .CHARITY, which were excluded, is limited by this non-disclosure.

- (c) while on their face other SCO Expert Determinations and Expert Determinations of the Limited Public Interest and Community Objections might appear inconsistent, there were “reasonable explanations for these seeming discrepancies, both procedurally and substantively”;²²³ and
- (d) those “reasonable explanations” lay in the “materials presented,” i.e. the applications and the parties’ responses to the IO’s objection and in “nuanced distinctions” between the Expert Determinations relevant to the particular objection.”²²⁴

8.54 These factors may have explained the different treatment in respect of other perceived inconsistent Expert Determinations, but in relation to the .CHARITY Expert Determinations they are problematic for the reasons explained below.

8.55 **First**, as acknowledged by ICANN, pending the outcome of this IRP Final Determination, the .CHARITY applicant SRL has taken no action in reliance on the Expert Determination overruling the IO’s Community Objection to its application, including but not limited to signing Registry Agreements, transitioning to delegation, withdrawing its application or requesting refunds.

8.56 **Second**, as a consequence, there are no actions in respect of the .CHARITY applications to be undone such as to delay consideration of all applications, were the new review mechanism to apply. As to issues of unfairness for those that have already acted in reliance on the Applicant Guidebook, there is no evidence in the carefully documented record that the Board considered the fact that ICANN Board’s October 2013 decision that it would adopt the Beijing Communiqué recommendations – some three months prior to the .CHARITY Expert Determinations – materially changed the Applicant Guidebook requirements in respect of the .CHARITY registration eligibility requirements, equally affecting *all* applicants and potentially eliminating any meaningful distinction between the pending applications.

8.57 **Third**, given ICANN’s admission that on their face the .CHARITY Expert Determinations appear “inconsistent” within the same “strict definition” the Board relied upon in considering the new review mechanism, and in light of the Board’s October 2013

²²³ Approved Resolutions, 12 October 2014 resolution, **Claimant Exhibit 16**.

²²⁴ Approved Resolutions, 12 October 2014 resolution, **Claimant Exhibit 16**.

announcement that it would adopt the Beijing Communiqué recommendations, there do not appear to be “reasonable explanations for these seeming discrepancies, both procedurally and substantively”.

8.58 **Fourth**, as to the existence of “reasonable explanations” that the perceived inconsistency in the .CHARITY Expert Determinations could be explained by the “materials presented” or “nuanced distinctions” between the different applications, the carefully documented record of the Board’s 5 February 2014 and 12 October 2014 consideration of the new process contains no consideration of the potentially levelling impact of the October 2013 announcement that the Board intended to adopt of the GAC Beijing Communiqué recommendations – three months before the Expert Determinations were issued.²²⁵

8.59 The IRP Panel recognizes and has carefully considered the fact that the Expert Panel had rejected as untimely the Claimant’s attempt to introduce evidence of the October 2013 announcement in the Expert Determination proceeding. The IRP Panel takes no position as to the correctness of that procedural decision, as the IRP Panel has concluded that the Claimant’s IRP claims as to the Expert Determination itself are untimely. In any event, it is doubtful that such a procedural decision would in any case have been subject to an IRP, even if timely.

8.60 Nevertheless, situating this IRP Panel’s review at the time that the Board took its decision not to extend the new review procedure to the inconsistent .CHARITY determinations, nothing in the record indicates that the Board took into account the following:

- (a) that the decision that ICANN would adopt the GAC Beijing Communiqué recommendations was a major policy development for ICANN, announced in October 2013, that would lead to the establishment of new undertakings in its registry agreements, which would be mandatory and applicable across-the-board to all Category I and Category II gTLD’s, including but not limited to .CHARITY, providing an important change to the Applicant Guidebook;

²²⁵ This is despite the fact that the Claimant’s Reconsideration Request was pending at the time the NGPC first published framework principles of a potential review mechanism that would be limited only to “perceived Inconsistent String Confusion Expert Determinations.” The Claimant filed its Reconsideration Request on 24 January 2014 and the NGPC published Approved Resolutions formally adopting the recommendations of the Beijing Communiqué and describing the new review mechanism, which would be limited to identified SCO Expert Determinations, on 5 February 2014. Approved Resolutions, 5 February 2014 resolutions, **Claimant Exhibit 14**, page 3.

- (b) that the Board indicated publicly that it planned to adopt the GAC Beijing Communiqué recommendations relating to .CHARITY three months prior to the issuance of the inconsistent .CHARITY Expert Determinations;
- (c) that the effect of that decision was to render the eligibility requirements in respect of all applicants for the .CHARITY gTLD identical, including those proposed by the Claimant;
- (d) that all .CHARITY gTLD applicants originally elected to protect their positions in respect to any future action relating to the Beijing Communiqué by clearly stating in their application materials that they would comply with any ICANN registration requirements, including in the submission of their final PICs for approval;
- (e) that the IO had lodged identical objections in March 2013 to the .CHARITY applications based on the initial lack of a commitment to operate a limited registry, but the Expert Panel nevertheless overruled the IO community objection for the SRL and Excellent First applications based on their amended commitment to limit the eligibility requirements in a manner that was consistent with the GAC Beijing Communiqué recommendations and, in the case of Excellent First's amended commitment, explicitly referred to the recommendation; and
- (f) that the Expert Panel upheld the IO community objection to the Claimant's application despite the practical effect of ICANN's announcement in October 2013 that it intended to adopt the GAC Beijing Communiqué's recommendations concerning Category I and Category II safeguards, coupled with the Claimant's (and SRL and Excellent First's) advance undertakings to comply with such safeguards being to level all applications for the .CHARITY gTLD, to put all three applications on a level playing field and rendering them functionally indistinguishable in respect of eligibility requirements.

8.61 Given the procedural and substantive effect of the announcement that the Board would adopt the GAC Beijing Communiqué recommendations, at the time the Board determined the scope of the new Inconsistent Determination Review Process, any practical differences in the "materials presented", as well as any "nuanced distinctions" perceived to have existed between the .CHARITY applications in relation to eligibility requirements prior to October 2013, had ceased to have any material effect prior to the .CHARITY Expert Determinations.

- 8.62 For the same reasons, any “reasonable explanations” for perceived inconsistencies between the .CHARITY Expert Determinations based on the different eligibility requirement undertakings prior to October 2013 were eliminated by the ICANN Board’s announcement that it would adopt the GAC Beijing Communiqué recommendations. The effect of that decision, coupled with *all* applicants’ undertakings to follow any GAC Beijing Communiqué recommendations adopted by ICANN, was to render the applicants’ eligibility requirements criteria identical across all three applications.
- 8.63 The Panel concludes that the Board’s decision not to expand the scope of the proposed mechanism to include other Expert Determinations, and in particular the .CHARITY Expert Determinations, failed to take into account the following factors:
- (a) the .CHARITY Expert Determinations were the only other set of inconsistent Expert Determinations dealing with the same objection by same objector to identical strings that was outstanding at the time that the ICANN Board determined the scope of the process, making them the only other non-SCO Expert Determinations to fit the “strict definition” of “inconsistent” the NGPC set forth in the 5 February 2014 Approved Resolution;²²⁶
 - (b) the Claimant, SRL and Excellent First were the only applicants for the .CHARITY gTLD and at the time of the Expert Determinations and the Claimant’s application was distinguished only by the absence of a separately proffered amended public interest commitment to operate a limited registry in response to the IO’s objection;
 - (c) as at 12 October 2014, SRL had not taken any action in reliance on the Expert Determination, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds; and
 - (d) the effect of ICANN’s action in determining it would implement new mandatory registration requirements applicable to all Category I and Category II gTLDs was to eliminate any practical distinction between the competing .CHARITY applications, including the basis on which the Expert Panel had distinguished the Claimant’s applications by upholding the community objection in relation to it.

²²⁶ As far as the IRP Panel is aware, any other inconsistent Expert Determinations did not involve identical objections to identical strings, including .Vistaprint and .HOSPITAL. In the circumstances, there is no support in the record for ICANN’s contention that extending review to Claimant risks opening floodgates.

- 8.64 As a result of these factors, the impact on “predictability and fairness” in the application process of including this additional set of similarly situated Expert Determinations in the new Inconsistent Determination Review would be limited.
- 8.65 The fact that the inconsistent Expert Determinations in the .CHARITY applications were the only other inconsistent determinations of identical objections by the same objector to the same gTLD string that existed at the time the Board determined the scope of the new review process, and the fact that the Claimant was the only party prejudiced by such an inconsistent Expert Determination that was not entitled to participate in the new review process, strongly suggests that it was an inequitable action and did single out the Claimant. The requirement for discrimination is not that it was malicious or even intentional, and this Panel has not been presented with any evidence that ICANN acted maliciously or intentionally to single out the Claimant. Rather, the requirement for discrimination is that a party was treated differently from others in its situation without “substantial and reasonable” justification. The IRP Panel does find that this standard was met.
- 8.66 For the reasons discussed above, the Panel finds the reasons ICANN advanced for limiting the scope of the new process to the designated SCO determinations insufficient to constitute “substantial and reasonable cause” to subject Claimant to the disparate treatment of being denied access to the new process.
- 8.67 Although the Panel believes that it is appropriate to determine whether the Board acted in conformance with the Articles, Bylaws and Guidebook primarily based on the record of the Board’s contemporaneously stated rationale for its actions, the Panel also has considered two further arguments that ICANN advanced in the IRP proceeding as follows.
- (a) ICANN submitted that community and limited public interest objections differ from string contention objections in that the latter can be judged on the face of competing strings, while the two former categories of objection require recourse to the underlying applications for determination. The Panel finds this argument inconsistent, however, with the Board’s contemporaneously stated rationale in its 12 October 2014 Decision and Action to exclude apparently inconsistent Expert Determinations other than the ones referred to the new process, *including other SCO Expert Determinations*, on the basis that “reasonable explanations” of the

apparent inconsistencies in differing Expert Determinations were found in the “materials presented” and the existence of other “nuanced distinctions.”²²⁷

- (b) ICANN submitted that there was less need for an additional process to review the apparently inconsistent Expert Determinations of the competing .CHARITY applications because they were determined by a single expert panelist “who therefore had all of the evidence for both objection proceedings in hand.” ICANN contrasts this situation to the SCO determinations the Board designated for review, which were determined by different panels.²²⁸ Although ICANN at the hearing characterized the new process as a “re-evaluation” in which “a single expert panel was tasked with re-evaluating the determinations,”²²⁹ the Inconsistent Determination Review Process ICANN actually adopted did not involve reconciliation of the differing results of “both [SCO] objection proceedings”, but rather independent review of a single SCO expert determination from each of the two sets which the NGPC designated, for reasons it chose not to state. The Panel finds ICANN’s distinction on the basis that different panels issued the inconsistent SCO determinations insufficient to constitute “substantial and reasonable cause” for disparate treatment of the .CHARITY inconsistent determinations as compared to the SCO determinations that were accorded access to the new process.

- 8.68 The Panel therefore determines that the Board’s action in excluding the Claimant from the new Inconsistent Determinations Review Procedure was inconsistent with the non-discrimination provision of Article II, Section 3 of ICANN’s Bylaws.

ISSUE 2: Defined Review Standard (Article IV, Section 3.4)

- 8.69 The IRP Panel’s findings as to the Defined Review Standard (Bylaws Article IV, Section 3.4) are set out below.

- i. Did the Board act without conflict of interest in taking its decision to omit .CHARITY from the new Inconsistent Determinations Review Procedure?*

²²⁷ The distinction between open and limited registries may also be relevant to the resolution of string contention objections where the objection alleges a likelihood of confusion in relevant markets. The commitment to a limited registry, or lack thereof, appears in application materials and is not apparent from the face of the gTLD string. Report of Final Review Panel, *Verisign, Inc. v. United TLD Holdco Ltd.*, ICDR No. 01-15-0003-3822, **ICANN Appendix L**.

²²⁸ ICANN Sur-Reply at para. 49; ICANN’s hearing slides at 21.

²²⁹ ICANN hearing slides at 21.

8.70 There is no suggestion that the Board had a conflict of interest, and the IRP Panel finds that the Board acted without conflict.

ii. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them in taking its decision to omit .CHARITY from the new Inconsistent Determinations Review Procedure?

8.71 As to the 12 October 2014 Decision and Action (and its preceding 5 February 2014 Decision and Action), the research, analysis, investigation and consultation process undertaken by the ICANN Board in establishing its new Inconsistent Determination Review Process is carefully documented. The Approved Resolutions of 12 October 2014 appear comprehensively to summarize the matter on which the Board relied in determining to limit the scope of application of the new process to selected inconsistent SCO Expert Determinations.

8.72 The carefully documented record does not reflect, however, that the Board considered the effect of its then-recent adoption of the GAC Beijing Communiqué recommendations in determining the scope of application of the new review mechanism. In particular, the Board does not appear to have considered the levelling effect on the pending .CHARITY applications of its decision to adopt the new PIC requirement.

8.73 The Board's announcement that it would adopt the GAC's Beijing Communiqué recommendations was a fact known to ICANN. ICANN, in exercising due diligence and care in deciding whether or not to include the perceived inconsistent .CHARITY Expert Determinations in the new Inconsistent Determinations Review Procedure at minimum should have taken that into account. Absent such consideration, in light of the circumstances outlined above, the IRP Panel must conclude that Bylaw standard of due diligence and care was not met on this occasion. Again, we make no finding that the Board's failure to consider the impact of its adoption of the Beijing Communiqué recommendations was malicious or intentional. We find simply that the levelling effect on the eligibility requirements in the pending applications of the new PIC requirement was a material fact that should have been considered, and apparently it was not.

iii. Did the Board members exercise independent judgment in taking the decision to omit .CHARITY from the new Inconsistent Determinations Review Procedure, believed to be in the best interests of the community?

8.74 There is no indication that the Board members were acting in any way other than in good faith and exercising independent judgment, with the subjective belief that they were acting in the best interests of the community. The IRP Panel finds that the Board members exercised independent judgment, believed to be in the best interests of the community.

ISSUE 3: Did the Board Act For the Benefit of the Internet Community as a Whole? (ICANN Articles of Incorporation, Section 4)

(i) The Claimant's Position

8.75 The Claimant further submits that ICANN's Articles state that the Board must act "for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law."²³⁰ The Claimant considers that the Board has failed to do so in relation to its .CHARITY Application. By failing to reconcile differing outcomes for the same objection, at least in respect to the differing .CHARITY Expert Determinations, which Claimant contends fit the same definition of "inconsistent determinations" the Board applied to .COM and .CAM, the Board has failed to act in the best interests of the Internet community.

8.76 ICANN adopted its new gTLD programme "to enhance choice and competition in domain names and promote free expression online."²³¹ The Claimant argues that the Board must remain "faithful to 'the public interest' and 'accountable to the Internet community'."²³² Furthermore, the Claimant considers that the Board has not acted in the best interests of the Internet community in its decision in relation to the Claimant and should have granted a review for "inconsistent and unreasonable" objection rulings.²³³

8.77 The Claimant also argues that the Bylaws and Articles compel the Board to remain accountable to the Internet community, as well as acting in the best interests of the Internet community. The Claimant further argues that the Board has conceded that it has not acted in the best interests of the Internet community: "[t]he Board fails the Bylaw directive of 'remaining accountable to the Internet community' by refusing to employ the

²³⁰ Claimant Request, para. 48.

²³¹ Claimant Request, para. 9.

²³² Claimant Request, para. 7.

²³³ Claimant Request, para. 8.

very ‘mechanism’ it created to right the wrong perpetrated by the types of conflicting objection rulings that include those made regarding .CHARITY”.²³⁴

8.78 The Claimant relies on *Booking.com v ICANN* to show that “even where the Board acts reasonably and in what it believes to be the best interests of ICANN, a panel must still independently determine whether the Board acted or chose not to act in a manner ‘consistent with the Articles, Bylaws, and ... the policies and procedures of the Guidebook.’”²³⁵

(ii) The Respondent’s Position

8.79 ICANN takes the position that the 12 October 2014 Decision and Action (and the preceding 5 February 2014 Decision and Action) are purposefully narrow and limited specifically to SCOs.²³⁶ It expressly distinguished the objection decisions rendered in the context of other objection proceedings, such as those relating to Community Objections. The NGPC’s procedural rationale was that “[t]wo panels confronting identical issues could – and if appropriate should – reach different determinations based on the strength of the material presented.”

8.80 ICANN goes on to conclude that the materials presented to the two Expert Panels in .CHARITY were not the same and, in particular:

“SRL presented evidence demonstrating its commitment to limit registration in .CHARITY to members of the charity sector, while Corn Lake did not and instead maintained that .CHARITY would be ‘open to all consumers.’”²³⁷

8.81 According to ICANN, SRL’s proposed registration eligibility requirements for the .CHARITY gTLD were in the best interests of the community and the Claimant’s open registration was not.

(iii) The Panel’s Decision

8.82 The ICANN Articles of Incorporation, Article 4, require that ICANN act:

²³⁴ Claimant Request, Introduction.

²³⁵ Reply, para. 37.

²³⁶ ICANN Response, at para. 53.

²³⁷ ICANN Response, at para. 56.

“for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and ... local law.”

- 8.83 It is plainly in the best interests of the Internet community as a whole that ICANN maintains a procedurally fair system with the highest levels of consistency and integrity. The Panel is of the view that well-reasoned, non-discriminatory application of the new Inconsistent Review Procedure would be in the best interests of the Internet community.
- 8.84 Prior to the issuance of the .CHARITY Expert Determinations, ICANN had announced that it would adopt the GAC Beijing Communiqué. As a consequence, *all* applicants were committed to the same registration limitations, both because the recommendations became mandatory and, importantly, because all had indicated in their applications a commitment to comply with any adopted recommendations. The impact of the decision to adopt the GAC Beijing Communiqué recommendations was a material factor in determining whether or not there were reasonable explanations for the perceived inconsistencies in the .CHARITY Expert Determinations.
- 8.85 ICANN’s failure to take the impact of its decision to adopt the GAC Beijing Communiqué recommendations into account was not in conformity with its own Bylaws or generally accepted standards of natural justice and due process reflected in its Core Values and other governing documents. Accordingly, the Panel finds that in this instance, ICANN cannot be found to have acted for the benefit of the Internet community as a whole.
- 8.86 It is not suggested by the Claimant that ICANN was motivated by anything other than the best interests of the Internet community. However, assessing its actions from an objective standard, failure to take into account material factors in its decision-making results in a procedural unfairness and disparate treatment that is not in the interests of that community as a whole.
- 8.87 For the reasons discussed above, we find the reasons the Board advanced at the time of its action to exclude .CHARITY insufficient to meet this standard. We likewise, for the reasons discussed, find ICANN’s *post hoc* justification based on the fact that the .CHARITY applications were decided by a single Expert Panelist also insufficient.

ISSUE 4: Did the Board Action Abdicate Its Accountability Obligation?

(i) The Claimant's Position

8.88 The Claimant submits that one of ICANN's core values is for the Board to remain accountable to the Internet community through mechanisms that can enhance ICANN's effectiveness.²³⁸ It submits that:

"[t]he Board had an opportunity to bring such accountability to all of the inconsistent objection results reached on common TLDs, but excluded the sole community objection situation that fell within the ambit of what it did."²³⁹

8.89 The Claimant appears to argue that by deciding not to review all inconsistent Expert Determinations, the Board somehow abdicated its accountability obligation to uphold a certain standard in all Expert Determinations rendered pursuant to its procedures.²⁴⁰

(ii) The Respondent's Position

8.90 The Respondent submits that the Reconsideration Request is the only way for it to be involved in review of the Expert Determination of the objection to Claimant's Application because:

"[r]econsideration is an accountability mechanism available under ICANN's Bylaws and involves a review by ICANN's Board Governance Committee ("BGC"). The BGC's consideration of reconsideration requests is limited to assessing whether the challenged action (or inaction) violated established policies or procedures."²⁴¹

8.91 The Respondent also argues that the Claimant's challenge of the BGC's denial of Request 14-3 is time-barred because the Claimant did not assert any such claim in its IRP Request and waited until its Reply to raise the argument.²⁴² The Bylaws provide that such a claim should be submitted within thirty days of the posting of the Board meeting contested by the

²³⁸ Claimant Request, para. 54.

²³⁹ Claimant Request, para. 55.

²⁴⁰ Claimant Request, para. 57.

²⁴¹ ICANN Sur-Reply, para. 8.

²⁴² ICANN Sur-Reply, para. 39.

prospective applicant.²⁴³ On 27 February 2014, the BGC denied the Claimant's Request 14-3. The Claimant's right to file an IRP Request on this issue expired on 28 March 2014.²⁴⁴

8.92 The Respondent argues in favor of dismissal of the Claimant's claims in this respect on time-barred grounds alone.

8.93 The Respondent also argues that the Claimant's claims fail substantively too because the Claimant has been unable to identify any Bylaws or Articles which have been allegedly breached by the BGC.²⁴⁵

(iii) The Panel's Decision

8.94 The Panel has carefully considered the parties' respective positions concerning the allegation of ICANN's abdication of its accountability responsibilities and finds there to be no basis for those claims. We do not fault ICANN for its attempt to enhance its accountability through the creation of the new process. Rather, we have found that having created the process, ICANN's Core Values and Bylaws required that it be extended on a non-discriminatory basis to similarly situated applicants and that such distinctions as were to be made regarding the scope of the process were required to be determined based on a reasonable factual record.

8.95 As to any suggestion that ICANN abdicated obligations by its Denial of the Reconsideration Request, as set out above in Section 7, any application to review to Reconsideration Request is out of time.

IPR PANEL REVIEW CONCLUSION

8.96 In conclusion, the IRP Panel determines that the ICANN Board's 12 October 2014 Decision and Action (as preceded by its February 2014 Decision and Action) is a "decision or action by the Board" that is "inconsistent with the Articles of Incorporation of Bylaws" of ICANN and "materially affected" the Claimant.

8.97 This Panel stresses that this is a unique situation and peculiar to its own unique and unprecedented facts. The facts were rendered particularly complicated and unusual by a

²⁴³ ICANN Sur-Reply, para. 40.

²⁴⁴ ICANN Sur-Reply, para. 40.

²⁴⁵ ICANN Sur-Reply, para. 41.

combination of (i) the Claimant's insistence throughout the Expert Determination proceeding that it would operate .CHARITY as an open registry – up to and until it became apparent that ICANN had decided not to permit that to occur, and (ii) the exceedingly unlikely and difficult timing of the Board's announcement that it would adopt the GAC's Beijing Communiqué recommendations – coming after the Expert Panel had closed the record but before the Expert Determination was made.²⁴⁶ This unique set of circumstances created what was doubtless a difficult situation for ICANN to consider in establishing the scope of the new review process, but it does not relieve ICANN from its ultimate responsibility to act in accordance with its Bylaws and Articles of Incorporation.

8.98 This IRP Panel does not suggest that ICANN lacks discretion to make decisions regarding its review processes as set out in the Applicant Guidebook, which may well require it to draw nuanced distinctions between different applications or categories of applications. Its ability to do so must be preserved as being in the best interests of the Internet community as a whole.

8.99 In reaching this conclusion, the Panel carefully considered other relevant IRP Final Determinations and considers its approach to be consistent with these. In particular, the IRP Panels in *Booking.com v ICANN*, *Vistaprint v ICANN* and *ICM Registry v ICANN* were asked to review underlying Expert Determinations, which had been, or might have been, subject to Reconsideration Requests. Each considered that Reconsideration Review provides for procedural review and is not a substantive appeal (and that ICANN's Board was under no obligation to create a different appeal mechanism). For example:

- (a) *Booking.com v ICANN* found it “crucial” to its decision that the Claimant there was not challenging the validity or fairness of the process and that no such challenge would have been timely;

²⁴⁶ These circumstances, in which ICANN agreed to adopt the Beijing Communiqué recommendations while the .CHARITY Expert Determinations were still underway but after the record was closed led to a circumstance in which the Expert upheld a community objection that the Claimant could legitimately have considered moot. As noted already, however, it is outside the scope of this Panel's mission to determine whether the Expert rightly or wrongly excluded the Claimant's late submission regarding the Beijing Communiqué. It is also beyond this Panel's mission to express a view as to whether review of that Expert Determination under the Inconsistent Determinations Review Procedure, applying the standard of review determined by ICANN, should or will lead to a reversal of that Expert Determination. The sole issue before this Panel is whether the Board properly or improperly excluded the .CHARITY Expert Determinations from the Inconsistent Determinations Review Procedure in the first place.

- (b) *ICM Registry v ICANN* found the “fundamental obstacle” to the Claimant’s assertions to be that the established process had been followed in all respects and the time “long had passed” to challenge the processes themselves;²⁴⁷
- (c) *Donuts v ICANN*²⁴⁸ considered whether the Board should have extended the Inconsistent Determinations Review Procedure “to correct and prevent community objection rulings exceeding or failing to apply documented Guidebook standards”²⁴⁹ and found that “the only differences in treatment that implicate Bylaws Article II, Section 3 are those which occur in like circumstances” and thus held that the record did not allow it to conclude that the “considerable consistency issues” raised in connection with string similarity cases were present in “community objection cases as a whole...”; and
- (d) *VistaPrint v ICANN* characterized the claim as arising from “similarly situated” strings, as compared to the “inconsistent determinations” the NGPC addressed in the 12 October 2014 Resolution, (i.e. .WEB./WEBS being similar to .CAR/.CARS) and the claim of disparate treatment “a close question”,²⁵⁰ recommending that the Board conduct the Reconsideration Request step in the process that was, at the time of the IRP Panel, not yet engaged.

8.100 The Panel considers the Final Determination in *Dot Registry v ICANN*, which addressed primarily issues of adequacy and burden of proof in respect to the BCG’s denial of a Reconsideration Request, to be of little relevance here. The Panel has found the instant IRP request untimely in respect to the denial of Claimant’s Reconsideration Request. In reaching its findings in respect of the basis on which the NGPC acted in determining the scope of the new review mechanism, the Panel here has relied on a record it considered carefully documented and apparently comprehensive.

8.101 The current IRP is not a review of a Reconsideration Request or Expert Determination but, rather, of a decision not to extend the scope of the new Inconsistent Determinations Review Procedure to the .CHARITY Expert Determinations, despite those Determinations meeting the strict criteria for inclusion. This is further supported by the ICANN Board’s

²⁴⁷ *ICM Registry v ICANN*, para. 129.

²⁴⁸ As addressed in post hearing submissions.

²⁴⁹ Final Declaration of the Independent Review Panel in *Donuts, Inc. and ICANN* at para. 73.

²⁵⁰ Final Declaration, *VistaPrint Ltd. v. ICANN*, ICDR No. 01-14-0000-6505, **ICANN Appendix K**, at para. 176

subsequent decision to include the .HOSPITAL Expert Determinations, despite those Determinations appearing to have been less clearly within the criteria that the .CHARITY Determinations.

9. COSTS

9.1 The Supplementary Rules provide, at Article 11 that:

“The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP Panel may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties’ positions and their contribution to the public interest.”

9.2 The ICDR Rules, Article 34, define costs to include the fees and expenses of the arbitrators and Administrator as well as the reasonable legal and other costs incurred by the parties.

9.3 The IRP Panel considers that these IRP proceedings involve extraordinary circumstances. The relevant factors, which go to the reasonableness of the parties’ positions and their contribution to the public interest, include as follows:

- (a) the exceedingly unlikely and difficult timing of the Board’s announcement that it would adopt the GAC’s Beijing Communiqué recommendations – coming after the Expert Panel had closed the record but before the Expert Determination was made;
- (b) the unique impact of the Beijing Communiqué recommendations on the .CHARITY applications and the nuances thereof;
- (c) the Claimant’s insistence throughout the Expert Determination proceeding that it would operate .CHARITY as an open registry – up to and until it became apparent that ICANN had agreed not to permit that to occur;
- (d) the lack of any deliberate disparate treatment of the Claimant by ICANN;
- (e) the Panel’s 20 January 2016 determination that the Claimant’s Reply exceeded the scope of PO1; and
- (f) the fact that the new Inconsistent Determination Review Process is to be funded by ICANN.

9.4 These factors created what was doubtless a difficult situation for ICANN to consider in establishing the scope of the new review process. Although they do not relieve ICANN from its ultimate responsibility to do so in accordance with its Bylaws and Articles of Incorporation, they do influence the IRP Panel's costs determination.

9.5 The IRP Panel accordingly determines that, although ICANN is not the prevailing party in the IRP, due to the extraordinary circumstances described above, ICANN shall not be responsible for bearing all costs of the proceedings. Instead, pursuant to Article 11 of the Supplementary Rules, the IRP Panel determines that no costs shall be allocated to the Claimant as the prevailing party. Consequently, each Party shall bear its own costs in respect of this IRP Panel proceeding.

10. RELIEF REQUESTED

10.1 The Claimant seeks:

- (a) a direction from the Panel to ICANN's Board of Directors to reverse the .CHARITY objection ruling against CORN LAKE, LLC;
- (b) a direction from the Panel to ICANN's Board of Directors to subject that ruling to the same review as provided in the Resolution for the .COM and .CAM decisional conflicts; or
- (c) a direction from the Panel to ICANN's Board of Directors to reinstate CORN LAKE, LLC's application conditioned upon its acceptance of the PIC, agreed to by SRL; and
- (d) an order from the Panel [to ICANN's Board of Directors] to place all .CHARITY applications on hold during the course of these proceedings and for ICANN to refrain from engaging in any contracting or delegation processes related to the same.

11. DISPOSITIVE

11.1 In Accordance with Article IV, Section 3.11 of the Bylaws, the Panel:

- (a) Declares that the Claimant, Corn Lake, is the prevailing party;
- (b) Declares that the action of the Board in omitting .CHARITY from the new Inconsistent Determinations Review Procedure was inconsistent with the Articles of Incorporation and Bylaws;

- (c) Recommends that the Board extend the new Inconsistent Determinations Review Procedure to include a review of Corn Lake's .CHARITY Expert Determination;
- (d) Recommends that the Board continue to stay any action or decision in relation to SRL's .CHARITY application until such time as the Board reviews and acts upon the opinion of the IRP Panel; and
- (e) Determines that no costs shall be allocated to the prevailing party.

Signed:



Mark Morril

Michael Ostrove

Date: 17 October 2016

Date: 17 October 2016



Wendy Miles QC

Date: 17 October 2016

Exhibit V

Community Priority Evaluation (CPE) Guidelines

Prepared by The Economist Intelligence Unit

Version 2.0

Interconnection between Community Priority Evaluation (CPE) Guidelines and the Applicant Guidebook (AGB)

The CPE Guidelines are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB. This document does not modify the AGB framework, nor does it change the intent or standards laid out in the AGB. The Economist Intelligence Unit (EIU) is committed to evaluating each applicant under the criteria outlined in the AGB. The CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.

Criterion #1: Community Establishment

This section relates to the community as explicitly identified and defined according to statements in the application. (The implicit reach of the applied-for string is not considered here, but taken into account when scoring Criterion #2, “Nexus between Proposed String and Community.”)

Measured by

1-A Delineation

1-B Extension

A maximum of 4 points is possible on the Community Establishment criterion, and each sub-criterion has a maximum of 2 possible points.

1-A Delineation

AGB Criteria	Evaluation Guidelines
Scoring	
<p>2= Clearly delineated, organized, and pre-existing community.</p> <p>1= Clearly delineated and pre-existing community, but not fulfilling the requirements for a score of 2.</p> <p>0= Insufficient delineation and pre-existence for a score of 1.</p>	<p>The following questions must be scored when evaluating the application:</p> <p><i>Is the community clearly delineated?</i></p> <p><i>Is there at least one entity mainly dedicated to the community?</i></p> <p><i>Does the entity (referred to above) have documented evidence of community activities?</i></p> <p><i>Has the community been active since at least September 2007?</i></p>
Definitions	
<p>“Community” - Usage of the expression “community” has evolved considerably from its Latin origin – “communitas” meaning “fellowship” – while still implying more of cohesion than a mere commonality of interest. Notably, as “community” is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some</p>	<p>The “community,” as it relates to Criterion #1, refers to the stated community in the application.</p> <p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Was the entity established to administer the community?</i> • <i>Does the entity’s mission statement clearly identify the community?</i>

<p>understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.</p>	<p>Additional research may need to be performed to establish that there is documented evidence of community activities. Research may include reviewing the entity’s web site, including mission statements, charters, reviewing websites of community members (pertaining to groups), if applicable, etc.</p>
<p>"Delineation" relates 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.</p>	<p>“Delineation” also refers to the extent to which a community has the requisite awareness and recognition from its members.</p> <p>The following non-exhaustive list denotes elements of straight-forward member definitions: fees, skill and/or accreditation requirements, privileges or benefits entitled to members, certifications aligned with community goals, etc.</p>
<p>"Pre-existing" means that a community has been active as such since before the new gTLD policy recommendations were completed in September 2007.</p>	
<p>"Organized" implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.</p>	<p>“Mainly” could imply that the entity administering the community may have additional roles/functions beyond administering the community, but one of the key or primary purposes/functions of the entity is to administer a community or a community organization.</p> <p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Was the entity established to administer the community?</i> • <i>Does the entity’s mission statement clearly identify the community?</i>
<p>Criterion 1-A guidelines</p>	
<p>With respect to “Delineation” and “Extension,” it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the</p>	<p>With respect to the Community, consider the following:</p> <ul style="list-style-type: none"> • <i>Are community members aware of the existence of the community as defined by the applicant?</i> • <i>Do community members recognize the community as defined by the applicant?</i>

<p>community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both “Delineation” and “Extension.”</p> <p>With respect to “Delineation,” if an application satisfactorily demonstrates all three relevant parameters (delineation, pre-existing and organized), then it scores a 2.</p>	<ul style="list-style-type: none"> • <i>Is there clear evidence of such awareness and recognition?</i>
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1-B Extension

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Extension:</p> <p>2=Community of considerable size and longevity</p> <p>1=Community of either considerable size or longevity, but not fulfilling the requirements for a score of 2.</p> <p>0=Community of neither considerable size nor longevity</p>	<p>The following questions must be scored when evaluating the application:</p> <p><i>Is the community of considerable size?</i></p> <p><i>Does the community demonstrate longevity?</i></p>
Definitions	
<p>“Extension” relates to the dimensions of the community, regarding its number of members, geographical reach, and foreseeable activity lifetime, as further explained in the following.</p>	
<p>"Size" relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers - a geographic location community may count millions of members in a limited location, a language community may have a million members with some spread over the globe, a community of service providers may have "only" some hundred members although well spread over the globe, just to mention some examples - all these can be regarded as of "considerable size."</p>	<p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Is the designated community large in terms of membership and/or geographic dispersion?</i>

<p>"Longevity" means that the pursuits of a community are of a lasting, non-transient nature.</p>	<p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Is the community a relatively short-lived congregation (e.g. a group that forms to represent a one-off event)?</i> • <i>Is the community forward-looking (i.e. will it continue to exist in the future)?</i>
<p>Criterion 1-B Guidelines</p>	
<p>With respect to "Delineation" and "Extension," it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both "Delineation" and "Extension."</p> <p>With respect to "Extension," if an application satisfactorily demonstrates both community size and longevity, it scores a 2.</p>	

Criterion #2: Nexus between Proposed String and Community

This section evaluates the relevance of the string to the specific community that it claims to represent.

Measured by

2-A Nexus

2-B Uniqueness

A maximum of 4 points is possible on the Nexus criterion, and with the Nexus sub-criterion having a maximum of 3 possible points, and the Uniqueness sub-criterion having a maximum of 1 possible point.

2-A Nexus

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Nexus:</p> <p>3= The string matches the name of the community or is a well-known short-form or abbreviation of the community</p> <p>2= String identifies the community, but does not qualify for a score of 3</p> <p>0= String nexus does not fulfill the requirements for a score of 2</p>	<p>The following question must be scored when evaluating the application:</p> <p style="text-align: center;"><i>Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.</i></p>
Definitions	
<p>“Name” of the community means the established name by which the community is commonly known by others. It may be, but does not need to be, the name of an organization dedicated to the community.</p>	<p>“Others” refers to individuals outside of the community itself, as well as the most knowledgeable individuals in the wider geographic and language environment of direct relevance. It also refers to recognition from other organization(s), such as quasi-official, publicly recognized institutions, or other peer groups.</p>
<p>“Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.</p>	<p>“Match” is of a higher standard than “identify” and means ‘corresponds to’ or ‘is equal to’.</p> <p>“Identify” does not simply mean ‘describe’, but means ‘closely describes the community’.</p> <p>“Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has.</p>

	<p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Does the string identify a wider or related community of which the applicant is a part, but is not specific to the applicant’s community?</i> • <i>Does the string capture a wider geographical/thematic remit than the community has? The “community” refers to the community as defined by the applicant.</i> • <i>An Internet search should be utilized to help understand whether the string identifies the community and is known by others.</i> • <i>Consider whether the application mission statement, community responses, and websites align.</i>
<p>Criterion 2-A Guidelines</p>	
<p>With respect to “Nexus,” for a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification / name of the community.</p> <p>With respect to “Nexus,” for a score of 2, the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community. As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for “.TENNIS”) then it would not qualify for a 2.</p>	

2-B Uniqueness

<p>AGB Criteria</p>	<p>Evaluation Guidelines</p>
<p>Scoring</p>	
<p>Uniqueness: 1=String has no other significant meaning beyond</p>	<p>The following question must be scored when evaluating the application:</p>

<p>identifying the community described in the application. 0=String does not fulfill the requirement for a score of 1.</p>	<p><i>Does the string have any other significant meaning (to the public in general) beyond identifying the community described in the application?</i></p>
<p>Definitions</p>	
<p>“Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.</p>	<p>“Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has.</p>
<p>“Significant meaning” relates to the public in general, with consideration of the community language context added</p>	<p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Will the public in general immediately think of the applying community when thinking of the applied-for string?</i> • <i>If the string is unfamiliar to the public in general, it may be an indicator of uniqueness.</i> • <i>Is the geography or activity implied by the string?</i> • <i>Is the size and delineation of the community inconsistent with the string?</i> • <i>An internet search should be utilized to find out whether there are repeated and frequent references to legal entities or communities other than the community referenced in the application.</i>
<p>Criterion 2-B Guidelines</p>	
<p>"Uniqueness" will be scored both with regard to the community context and from a general point of view. For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for uniqueness if it carries another significant meaning in the common language used in the relevant community location. The phrasing "...beyond identifying the community" in the score of 1 for "uniqueness" implies a requirement that the string does identify the community, i.e. scores</p>	

2 or 3 for "Nexus," in order to be eligible for a score of 1 for "Uniqueness."

It should be noted that "Uniqueness" is only about the meaning of the string - since the evaluation takes place to resolve contention there will obviously be other applications, community-based and/or standard, with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone."

Criterion #3: Registration Policies

This section evaluates the applicant’s registration policies as indicated in the application. Registration policies are the conditions that the future registry will set for prospective registrants, i.e. those desiring to register second-level domain names under the registry.

Measured by

3-A Eligibility

3-B Name Selection

3-C Content and Use

3-D Enforcement

A maximum of 4 points is possible on the Registration Policies criterion and each sub-criterion has a maximum of 1 possible point.

3-A Eligibility

AGB Criteria	Evaluation Guidelines
Scoring	
Eligibility: 1= Eligibility restricted to community members 0= Largely unrestricted approach to eligibility	The following question must be scored when evaluating the application: <i>Is eligibility for being allowed as a registrant restricted?</i>
Definitions	
“Eligibility” means the qualifications that organizations or individuals must have in order to be allowed as registrants by the registry.	
Criterion 3-A Guidelines	
With respect to “eligibility” the limitation to community “members” can invoke a formal membership but can also be satisfied in other ways, depending on the structure and orientation of the community at hand. For example, for a geographic location community TLD, a limitation to members of the community can be achieved by requiring that the registrant’s physical address be within the boundaries of the location.	

3-B Name Selection

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Name selection: 1= Policies include name selection rules consistent with the articulated community-based purpose of the applied-for TLD 0= Policies do not fulfill the requirements for a score of 1</p>	<p>The following questions must be scored when evaluating the application:</p> <p style="text-align: center;"><i>Do the applicant’s policies include name selection rules?</i></p> <p style="text-align: center;"><i>Are name selection rules consistent with the articulated community-based purpose of the applied-for gTLD?</i></p>
Definitions	
<p>“Name selection” means the conditions that must be fulfilled for any second-level domain name to be deemed acceptable by the registry.</p>	<p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Are the name selection rules consistent with the entity’s mission statement?</i>
Criterion 3-B Guidelines	
<p>With respect to “Name selection,” scoring of applications against these subcriteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.</p>	

3-C Content and Use

AGB Criteria	Evaluation Guidelines
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Scoring	
<p>Content and use: 1= Policies include rules for content and use consistent with the articulated community-based purpose of the applied-for TLD 0= Policies do not fulfill the requirements for a score of 1</p>	<p>The following questions must be scored when evaluating the application:</p> <p><i>Do the applicant’s policies include content and use rules?</i></p> <p><i>If yes, are content and use rules consistent with the articulated community-based purpose of the applied-for gTLD?</i></p>
Definitions	
<p>“Content and use” means the restrictions stipulated by the registry as to the content provided in and the use of any second-level domain name in the registry.</p>	<p>Consider the following:</p> <ul style="list-style-type: none"> <i>Are the content and use rules consistent with the applicant’s mission statement?</i>
Criterion 3-C Guidelines	
<p>With respect to “Content and Use,” scoring of applications against these subcriteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.</p>	

3-D Enforcement

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Enforcement 1= Policies include specific enforcement measures</p>	<p>The following question must be scored when evaluating the application:</p>

<p>(e.g. investigation practices, penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms 0= Policies do not fulfill the requirements for a score of 1</p>	<p><i>Do the policies include specific enforcement measures constituting a coherent set with appropriate appeal mechanisms?</i></p>
<p>Definitions</p>	
<p>“Enforcement” means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.</p>	<p>“Coherent set” refers to enforcement measures that ensure continued accountability to the named community, and can include investigation practices, penalties, and takedown procedures with appropriate appeal mechanisms. This includes screening procedures for registrants, and provisions to prevent and remedy any breaches of its terms by registrants.</p> <p>Consider the following: Do the enforcement measures include:</p> <ul style="list-style-type: none"> • <i>Investigation practices</i> • <i>Penalties</i> • <i>Takedown procedures (e.g., removing the string)</i> • <i>Whether such measures are aligned with the community-based purpose of the TLD</i> • <i>Whether such measures demonstrate continuing accountability to the community named in the application</i>
<p>Criterion 3-D Guidelines</p>	
<p>With respect to “Enforcement,” scoring of applications against these subcriteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement</p>	

mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.	
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Criterion #4: Community Endorsement

This section evaluates community support and/or opposition to the application. Support and opposition will be scored in relation to the communities explicitly addressed in the application, with due regard for communities implicitly addressed by the string.

Measured by

4-A Support

4-B Opposition

A maximum of 4 points is possible on the Community Endorsement criterion and each sub-criterion (Support and Opposition) has a maximum of 2 possible points.

4-A Support

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Support:</p> <p>2= Applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community</p> <p>1= Documented support from at least one group with relevance, but insufficient support for a score of 2</p> <p>0= Insufficient proof of support for a score of 1</p>	<p>The following questions must be scored when evaluating the application:</p> <p><i>Is the applicant the recognized community institution or member organization?</i></p> <p>To assess this question please consider the following:</p> <p><i>a. Consider whether the community institution or member organization is the clearly recognized representative of the community.</i></p> <p>If the applicant meets this provision, proceed to Letter(s) of support and their verification. If it does not, or if there is more than one recognized community institution or member organization (and the applicant is one of them), consider the following:</p> <p><i>Does the applicant have documented</i></p>

	<p><i>support from the recognized community institution(s)/member organization(s) to represent the community?</i></p> <p>If the applicant meets this provision, proceed to Letter(s) of support and their verification. If not, consider the following:</p> <p><i>Does the applicant have documented authority to represent the community?</i></p> <p>If the applicant meets this provision, proceed to Letter(s) of support and their verification. If not, consider the following:</p> <p><i>Does the applicant have support from at least one group with relevance?</i></p> <p>If the applicant meets this provision, proceed to Letter(s) of support and their verification.</p> <p>➤ Instructions on letter(s) of support requirements are located below, in Letter(s) of support and their verification</p>
Definitions	
<p>“Recognized” means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of that community.</p>	
<p>“Relevance” and “relevant” refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied for string would be considered relevant.</p>	<p>The institution(s)/organization(s) could be deemed relevant when not identified in the application but has an association to the applied-for string.</p>
Criterion 4-A Guidelines	
<p>With respect to “Support,” it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations.</p>	<p>Letter(s) of support and their verification: Letter(s) of support must be evaluated to determine both the relevance of the organization and the validity of the documentation and must meet the criteria spelled out below. The letter(s) of support is an input used to determine the relevance of the organization and the validity of</p>

<p>Also with respect to “Support,” the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.</p> <p>The applicant will score a 1 for “Support” if it does not have support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent the community with its application. A 0 will be scored on “Support” if the applicant fails to provide documentation showing support from recognized community institutions/community member organizations, or does not provide documentation showing that it has the authority to represent the community. It should be noted, however, that documented support from groups or communities that may be seen as implicitly addressed but have completely different orientations compared to the applicant community will not be required for a score of 2 regarding support.</p> <p>To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.</p>	<p>the documentation.</p> <p>Consider the following:</p> <p>Are there multiple institutions/organizations supporting the application, with documented support from institutions/organizations representing a majority of the overall community addressed?</p> <p>Does the applicant have support from the majority of the recognized community institution/member organizations?</p> <p>Has the applicant provided full documentation that it has authority to represent the community with its application?</p> <p>A majority of the overall community may be determined by, but not restricted to, considerations such as headcount, the geographic reach of the organizations, or other features such as the degree of power of the organizations.</p> <p><u>Determining relevance and recognition</u></p> <p><i>Is the organization relevant and/or recognized as per the definitions above?</i></p> <p><u>Letter requirements & validity</u></p> <p><i>Does the letter clearly express the organization’s support for the community-based application?</i></p> <p><i>Does the letter demonstrate the organization’s understanding of the string being requested?</i></p> <p><i>Is the documentation submitted by the applicant valid (i.e. the organization exists and the letter is authentic)?</i></p> <p>To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or</p>
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	expressions of support received.
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4-B Opposition

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Opposition:</p> <p>2= No opposition of relevance</p> <p>1= Relevant opposition from one group of non-negligible size</p> <p>0= Relevant opposition from two or more groups of non-negligible size</p>	<p>The following question must be scored when evaluating the application:</p> <p style="text-align: center;"><i>Does the application have any opposition that is deemed relevant?</i></p>
Definitions	
<p>“Relevance” and “relevant” refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied for string would be considered relevant.</p>	<p>Consider the following:</p> <p>For “non-negligible” size, “relevant” and “relevance” consider:</p> <ul style="list-style-type: none"> • <i>If the application has opposition from communities that are deemed to be relevant.</i> • <i>If a web search may help determine relevance and size of the objecting organization(s).</i> • <i>If there is opposition by some other reputable organization(s), such as a quasi-official, publicly recognized organization(s) or a peer organization(s)?</i> • <i>If there is opposition from a part of the community explicitly or implicitly addressed?</i>
Criterion 4-B Guidelines	
<p>When scoring “Opposition,” previous objections to the application as well as public comments during the same application round will be taken into account and assessed in this context. There will be no presumption that such objections or comments would prevent a score of 2 or lead to any particular score for “Opposition.” To be taken into account as relevant opposition, such objections or</p>	<p>Letter(s) of opposition and their verification: Letter(s) of opposition should be evaluated to determine both the relevance of the organization and the validity of the documentation and should meet the criteria spelled out below.</p> <p><u>Determining relevance and recognition</u> <i>Is the organization relevant and/or</i></p>

<p>comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.</p>	<p><i>recognized as per the definitions above?</i></p> <p><u>Letter requirements & validity</u></p> <p><i>Does the letter clearly express the organization's opposition to the applicant's application?</i></p> <p><i>Does the letter demonstrate the organization's understanding of the string being requested?</i></p> <p><i>Is the documentation submitted by the organization valid (i.e. the organization exists and the letter is authentic)?</i></p> <p>To be considered relevant opposition, such documentation should contain a description of the process and rationale used in arriving at the expression of opposition. Consideration of opposition is not based merely on the number of comments or expressions of opposition received.</p>
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Verification of letter(s) of support and opposition

Additional information on the verification of letter(s) of support and opposition:

- Changes in governments may result in new leadership at government agencies. As such, the signatory need only have held the position as of the date the letter was signed or sealed.
- A contact name should be provided in the letter(s) of support or opposition.
- The contact must send an email acknowledging that the letter is authentic, as a verbal acknowledgement is not sufficient.
- In cases where the letter was signed or sealed by an individual who is not currently holding that office or a position of authority, the letter is valid only if the individual was the appropriate authority at the time that the letter was signed or sealed.

About the Community Priority Evaluation Panel and its Processes

The Economist Intelligence Unit (EIU) is the business information arm of The Economist Group, publisher of The Economist. Through a global network of more than 900 analysts and contributors, the EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world's leading provider of country intelligence, the EIU helps executives, governments, and institutions by providing timely, reliable, and impartial analysis.

The EIU was selected as a Panel Firm for the gTLD evaluation process based on a number of criteria, including:

- The panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined public or private community plays an important role.
- The provider must be able to convene a linguistically and culturally diverse panel capable, in the aggregate, of evaluating Applications from a wide variety of different communities.
- The panel must be able to exercise consistent and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and
- The panel must be able to document the way in which it has done so in each case.

The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.

The following principles characterize the EIU evaluation process for gTLD applications:

- All EIU evaluators must ensure that no conflicts of interest exist.
- All EIU evaluators must undergo training and be fully cognizant of all CPE requirements as listed in the Applicant Guidebook. This process will include a pilot testing process.
- EIU evaluators are selected based on their knowledge of specific countries, regions and/or industries, as they pertain to Applications.
- Language skills will also be considered in the selection of evaluators and the assignment of specific Applications.
- All applications will be evaluated and scored, in the first instance by two evaluators, working independently.
- All Applications will subsequently be reviewed by members of the core project team to verify accuracy and compliance with the AGB, and to ensure consistency of approach across all applications.

- The EIU will work closely with ICANN when questions arise and when additional information may be required to evaluate an application.
- The EIU will fully cooperate with ICANN's quality control process.

Exhibit W

BGC's Comments on Recent Reconsideration Request



During its meetings on 13 January and 1 February 2016, ICANN (Internet Corporation for Assigned Names and Numbers)'s Board Governance Committee (BGC) considered a Request for Reconsideration filed by dotgay LLC. This request asked us to reconsider the outcome of a Community Priority Evaluation (CPE), which resulted in dotgay LLC's .GAY application not achieving community priority. Having carefully considered the Request for Reconsideration, the BGC denied it at our face-to-face meeting on 1 February 2016.

The information below provides a bit more detail about CPE and Reconsideration, and clarifies what this decision means for the dotgay LLC application, dotgay LLC's supporters and the .GAY TLD (Top Level Domain).

This decision does not mean there will be no .GAY TLD (Top Level Domain). There are four applicants (including dotgay LLC) vying to operate this TLD (Top Level Domain). These applicants have the option to resolve the contention among themselves, through channels outside of ICANN (Internet Corporation for Assigned Names and Numbers) processes. If self-resolution cannot be achieved, the four applications for .GAY will be scheduled to participate in an ICANN (Internet Corporation for Assigned Names and Numbers)-facilitated "method of last resort" auction to resolve the contention.

Of the four entities applying for the .GAY TLD (Top Level Domain), dotgay LLC's application was the only community application, and therefore the only application eligible to seek community priority through CPE. If an application achieves community priority, it is then able to move forward towards contracting, and the other applications will no longer proceed. dotgay LLC's .GAY application did not achieve community priority so it continues to compete with the other three applications.

It should be noted that dotgay LLC has been through both the CPE and Reconsideration processes twice. After completion of the first CPE in October 2014, through the Reconsideration process, a procedural error in the CPE was identified and the BGC determined that the application should be re-evaluated. However, the same outcome and score were achieved both times.

The BGC, which is responsible for evaluating such requests, is limited by the Bylaws in evaluating this Request for Reconsideration. Specifically, the BGC is only authorized to determine if any policies or processes were violated during CPE. The BGC has no authority to evaluate whether the CPE results are correct.

I want to make clear that the denial of the Request for Reconsideration is not a statement about the validity of dotgay LLC's application or dotgay LLC's supporters. The decision means that the BGC did not find that the CPE process for dotgay, LLC's .GAY application violated any ICANN (Internet Corporation for Assigned Names and Numbers) policies or procedures.

It is ICANN (Internet Corporation for Assigned Names and Numbers)'s responsibility to support the community-developed process and provide equitable treatment to all impacted parties. We understand that this outcome will be disappointing to supporters of the dotgay LLC application. We appreciate the amount of interest that this topic has generated within the ICANN (Internet Corporation for Assigned Names and Numbers) community, and we encourage all interested parties to participate in the multistakeholder process to help shape how future application rounds are defined.

For more information about CPE criteria, please see ICANN (Internet Corporation for Assigned Names and Numbers)'s Applicant Guidebook, which serves as basis for how all applications in the New gTLD (generic Top Level Domain) Program have been evaluated. For more information regarding Requests for Reconsideration please see ICANN (Internet Corporation for Assigned Names and Numbers)'s [Bylaws \(/resources/pages/governance/bylaws-en\)](#).

Comments

Constantine Roussos **16:12 UTC on 03 February 2016**

Dear Chris Disspain and ICANN (Internet Corporation for Assigned Names and Numbers): In reviewing the BGC's decision it seems mistakes have been made. The BGC determined that the .HOTEL CPE found no single organization "mainly" dedicated to the hotel community (P.27&28). However the EIU did determine that the .HOTEL applicant had "support from the recognized community member organization" (.HOTEL CPE, P.6), the International Hotel & Restaurant Association (IH&RA (Registrar)). There's no policy requiring an organization to represent a community in its entirety. CPE rules permit an "entity mainly dedicated to the community." "Mainly" does not mean entirety. "Mainly could imply that the entity administering the community may have additional roles/functions." (CPE Guidelines, P.4). ILGA is an organization mainly dedicated to the gay community. If the IH&RA (Registrar) is an entity "mainly" dedicated to the hotel community then why is ILGA not treated similarly? Just as restaurants were permitted for IH&RA (Registrar), the rest of the BTQIA community should be similarly be treated as falling under "other roles/functions" too, right? The CPE process for DotGay's .GAY application did violate ICANN (Internet Corporation for Assigned Names and Numbers) CPE policies. The BGC determination again illustrates the inconsistent interpretations of AGB/CPE rules, going as far as to make statements that the EIU did not determine that the .HOTEL CPE had an organization mainly dedicated to the hotel community, when it did: the IHRA. The music community is biting its nails waiting for the .MUSIC CPE decision (which clearly exceeds CPE criteria, See <http://music.us/dotmusic-community-application-passes-cpe-consistent-with-eiu-determinations>). CPE is the most frustrating, unpredictable process in ICANN (Internet Corporation for Assigned Names and Numbers)'s history. Community applicants have worked diligently for years to meet the criteria and gather support. No doubt ICANN (Internet Corporation for Assigned Names and Numbers) staff is working hard on the subject matter but decisions seem to be a coin toss. This lack of transparency, accountability and predictability is frustrating for community applicants relying on ICANN (Internet Corporation for Assigned Names and Numbers) rules. Constantine Roussos DotMusic <http://music.us>

[Log in to Comment \(/users/sign_in\)](/users/sign_in), or [Sign Up \(/users/sign_up\)](/users/sign_up).

Exhibit X

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 14-44**

20 JANUARY 2015

The Requester, Dotgay LLC,¹ seeks reconsideration of the Community Priority Evaluation (“CPE”) Panel’s Report, and ICANN’s acceptance of that Report, finding that the Requester’s application for .GAY did not prevail in CPE. The Requester also seeks reconsideration of ICANN staff’s response to the Requester’s request, pursuant to ICANN’s Document Information Disclosure Policy (“DIDP”), for documents relating to the CPE Panel’s Report.

I. Brief Summary.

The Requester submitted a community application for .GAY (the “Application”). Three other applicants submitted standard (meaning not community-based) applications for .GAY. All four .GAY applications were placed into a contention set. As the Requester’s Application was community-based, the Requester was invited to and did participate in CPE for .GAY. The Requester’s Application did not prevail in CPE. As a result, the Application remained in contention with the other applications for .GAY. The contention can be resolved by auction or some arrangement among the involved applicants.

Following the CPE determination, the Requester filed a request pursuant to ICANN’s DIDP (“DIDP Request”), seeking documents relating to the CPE Panel’s Report. In its response

¹ At many (but not all) points throughout its Reconsideration Request, the Requester refers to itself in the plural, as “Requesters.” Since Section 1 of the Request, seeking “Requester Information,” only indicates one Requester (dotgay LLC), and since the Requester stated it was not “bringing this Reconsideration Request on behalf of multiple persons or entities” (*see* Request, § 11, Pg. 24), this Determination will deem the Request to have been filed by a single Requester, dotgay LLC.

to the DIDP Request (“DIDP Response”), ICANN staff identified and provided links to all publicly available responsive documents, and further noted that many of the requested documents did not exist or were not in ICANN’s possession. With respect to those requested documents that were in ICANN’s possession and not already publicly available, ICANN explained that those documents would not be produced because they were subject to certain of the Defined Conditions of Nondisclosure (“Conditions of Nondisclosure”) set forth in the DIDP. The Requester now seeks reconsideration of the CPE determination and ICANN’s acceptance of it, as well as ICANN’s DIDP Response. As for CPE, the Requester makes three claims: (i) the Economic Intelligence Unit (“EIU”), the entity that administers the CPE process, imposed additional criteria or procedural requirements beyond those set forth in the Applicant Guidebook (“Guidebook”); (ii) the CPE Panel failed to comply with certain established ICANN policies and procedures in rendering the CPE Panel’s Report; and (iii) the CPE Panel’s Report is inconsistent with other CPE panels’ reports. The Requester also seeks reconsideration of ICANN’s DIDP Response on the basis that it violates ICANN’s transparency principles.

The BGC concludes that, upon investigation of Requester’s claims, the CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicts an established procedure. The BGC further concludes that the CPE Panel’s failure to comply with this established CPE procedure warrants reconsideration. Accordingly, the BGC determines that the CPE Panel Report shall be set aside, and that the EIU shall identify two different evaluators to perform a new CPE for the Application.² Further, the BGC recommends that the EIU include new members of the core team that assesses the evaluation results.³

² While the new CPE is in process, the resolution of the contention set will be postponed. Therefore, Requester’s request that ICANN stay the processing of the .GAY contention set is rendered moot.

³ See Annex B-3, CPE Panel Process Document, Pg. 4 (summarizing role of core team).

With respect to the Requester's other arguments, the BGC finds that the Requester has not stated a sufficient basis for reconsideration.

II. Facts.

A. Background Facts.

The Requester submitted a community application for .GAY.⁴

Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings Limited each submitted standard applications for .GAY.⁵ Those applications were placed in a contention set with the Requester's community-based application.

On 23 February 2014, the Requester's Application for .GAY was invited to participate in CPE. CPE is a method of resolving string contention, described in section 4.2 of the Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. The Requester elected to participate in CPE for .GAY, and its Application was forwarded to the EIU, the CPE provider, for evaluation.⁶

On 6 October 2014, the CPE Panel issued its report on the Requester's Application.⁷ The CPE Panel's Report explained that the Application did not meet the CPE requirements specified in the Guidebook and therefore concluded that the Application had not prevailed in CPE.⁸

On 22 October 2014, the Requester submitted a reconsideration request, requesting reconsideration of the CPE Panel's Report, and ICANN's acceptance of that Report.⁹

⁴ See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

⁵ See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1460>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1115>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1519>.

⁶ See Community Priority Evaluation (CPE), <http://newgtlds.icann.org/en/applicants/cpe#status>.

⁷ *Id.*

⁸ See CPE Report, available at <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf> and as Annex A-1.

⁹ In this original Request, the Requester contended that the Panel failed to comply with ICANN policies and procedures because it purportedly misapplied two of the criteria an application must meet to prevail in CPE: (1) the

Also on 22 October 2014, the Requester submitted a request pursuant to ICANN's DIDP, seeking documents related to the CPE Panel's Report.

On 31 October 2014, ICANN responded to the DIDP Request.¹⁰ ICANN identified and provided links to all publicly available documents responsive to the DIDP Request, including comments regarding the Application, which were posted on ICANN's website and considered by the CPE Panel.¹¹ ICANN noted that the documents responsive to the requests were either: (1) already public; (2) not in ICANN's possession; or (3) not appropriate for public disclosure because they were subject to certain Conditions of Nondisclosure and that the public interest in disclosing the information did not outweigh the harm that may be caused by such disclosure.¹²

On 29 November 2014, the Requester submitted a revised reconsideration request ("Request" or "Request 14-44"), which sets forth different arguments than those raised in the 22 October reconsideration request, but still seeks reconsideration of the CPE Panel's Report and ICANN's acceptance of that Report, and also seeks reconsideration of the DIDP Response.¹³

B. Relief Requested.

The Requester asks ICANN to reverse the CPE Panel's decision not to grant the Application community priority status, and requests that ICANN or a newly-appointed third party "perform a new determination" after holding a hearing.¹⁴ In the meantime, the Requester asks ICANN to "suspend the process for string contention resolution in relation to the .GAY

(continued...)

Application's nexus to the community; and (2) the community's endorsement. *See* Annex A-3, Initial Reconsideration Request, § 8.1.1, Pg. 5.

¹⁰ *See* Annex A-4, DIDP Response, Pg. 1.

¹¹ *See id.*, Pgs. 3-4.

¹² *See generally id.*

¹³ ICANN confirmed with the Requester that the Requester is only pursuing the issues raised in the revised Reconsideration Request. Therefore this determination addresses the arguments raised in the revised Request, and not the claims made in the original reconsideration request.

¹⁴ Request, § 9, Pgs. 23-24.

gTLD.”¹⁵ The Requester also seeks disclosure of “the information requested” in its DIDP Request.¹⁶ Further, the Requester asks ICANN to reconsider its “position towards Requester’s allegations regarding spurious activity.”¹⁷

III. Issues.

In view of the claims set forth in Request 14-44 and ICANN’s investigation thereof, the issues are:

A. Whether reconsideration of the CPE Panel’s determination that the Requester did not prevail in CPE is warranted because:

- (1) The CPE Panel did not adhere to procedures governing the verification of letters in support of the Application;
- (2) The EIU imposed additional criteria or procedural requirements;
- (3) The EIU did not follow established policies or procedures insofar as:
 - (a) The CPE Panel declined to ask clarifying questions;
 - (b) The CPE Panel did not identify the objectors to the Application;
 - (c) ICANN did not transmit the Requester’s evidence of false allegations made against the Application to the EIU;
 - (d) The CPE Panel purportedly misread the Application;
 - (e) The CPE Panel awarded the Requester zero points with respect to the nexus element of the CPE criteria; or

¹⁵ *Id.*, Pg. 23.

¹⁶ *Id.*

¹⁷ *Id.*, § 3, Pg. 2.

(f) The CPE Panel did not consider comments made in the determination rendered in a separate community objection proceeding regarding the .LGBT string; or

(4) The CPE Panel's Report is inconsistent with other CPE panel reports in a manner constituting a policy or procedure violation.

B. Whether ICANN staff violated established policy or procedure by determining that certain documents sought in the DIDP Request were subject to DIDP Conditions of Nondisclosure.

IV. The Relevant Standards For Evaluating Reconsideration Requests, Community Priority Evaluations And DIDP Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.¹⁸ Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or the NGPC¹⁹ agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

A. Community Priority Evaluation.

The reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party service providers, such as the EIU,

¹⁸ Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

¹⁹ New gTLD Program Committee.

where it can be demonstrated that a panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.²⁰

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE reports. Accordingly, the BGC does not evaluate the CPE Panel’s substantive conclusion that the Requester did not prevail in the CPE. Rather, the BGC’s review is limited to whether the CPE Panel violated any established policy or process in making its determination.

ICANN has made public all documents regarding the standards and process governing CPE on the New gTLD microsite. (See <http://newgtlds.icann.org/en/applicants/cpe>.) The specific standards governing CPE are set forth in Section 4.2 of the Guidebook. In addition, the EIU – the firm selected to perform CPE – has published supplementary guidelines (“CPE Guidelines”) that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.²¹

CPE will occur only if a community-based applicant selects this option and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.²² CPE is performed by an independent community priority panel appointed by the EIU to review such applications.²³ A CPE panel’s role is to determine whether the community-based application satisfies the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed

²⁰ See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

²¹ The CPE Guidelines may be found here: <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>, and as Annex B-4.

²² Guidebook, § 4.2.

²³ Guidebook, § 4.2.2.

string and community; (iii) registration policies; and (iv) community endorsement. To prevail in CPE, an application must receive a minimum of 14 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points (for a maximum total of 16 points).

B. Document Information Disclosure Policy.

ICANN's DIDP is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, that is not already publicly available is made available to the public unless there is a compelling reason for confidentiality.²⁴ As part of its commitment to transparency, ICANN makes available a comprehensive set of materials on its website as a matter of course.²⁵

In responding to a request submitted pursuant to ICANN's DIDP, ICANN follows the guidelines set forth in the "Process For Responding To ICANN's Documentary Information Disclosure Policy (DIDP) Requests"²⁶ ("DIDP Response Process"). Specifically, the DIDP Response Process provides that "[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Conditions] of Nondisclosure identified [on ICANN's website]."²⁷ ICANN reserves the right to withhold documents if they fall within any of the Conditions of Nondisclosure.²⁸ In addition, ICANN may refuse "[i]nformation requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) [which] are made with an abusive or vexatious purpose or by a vexatious or querulous individual."²⁹

²⁴ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

²⁵ See *id.*

²⁶ See <https://www.icann.org/resources/files/didp-response-process-2013-10-29-en>.

²⁷ *Id.*; see also <https://www.icann.org/en/about/transparency/didp>.

²⁸ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

²⁹ See *id.*

The DIDP Response Process also provides that “[t]o the extent that any responsive documents fall within any [Conditions of Nondisclosure], a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure.”³⁰ It is within ICANN’s sole discretion to determine whether the public interest in the disclosure of responsive documents that fall within one of the Conditions of Nondisclosure outweighs the harm that may be caused by such disclosure.³¹ Finally, the DIDP does not require ICANN staff to “create or compile summaries of any documented information,” including logs of documents withheld under one of the Conditions of Nondisclosure.³²

V. Analysis And Rationale.

The Requester first objects to the CPE Panel’s Report finding that the Application did not prevail in CPE, asserting three overarching arguments as to why reconsideration is warranted. As discussed below, only one of the Requester’s claims identifies conduct that contradicted an established policy or procedure, as required to support reconsideration. Specifically, in the course of evaluating the Requester’s claims, ICANN discovered that the EIU failed to verify 54 letters of support for the Application, and on that ground (only), the BGC determines that reconsideration is warranted.

The Requester also objects to ICANN staff’s DIDP Response. However, the Requester presents only its substantive disagreement with ICANN staff’s application of the DIDP Response Process, which does not support reconsideration.

³⁰ See <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

³¹ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

³² *Id.*

A. Reconsideration Of The CPE Report Is Warranted Because The EIU Did Not Verify All Relevant Letters Of Support, But The Remainder Of The Requester’s Claims Do Not Support Reconsideration.

1. Reconsideration Is Warranted Because The CPE Panel Did Not Adhere To Procedures Governing The Verification Of Support Letters.

CPE panels “will attempt to validate all letters” submitted in support of or in opposition to an application “to ensure that the individuals who have signed the documents are in fact the sender, have the authority to speak on behalf of their institution, and that the panel clearly understands the intentions of the letter.”³³ Only letters that the EIU deems “relevant” to the CPE are forwarded to the CPE evaluators, and it is only those letters that the evaluators must verify.³⁴ Here, the Requester claims reconsideration is warranted because it contends that the CPE Panel only attempted to verify “less than 20%” of the letters of support received.³⁵

Over the course of investigating the claims made in Request 14-44, ICANN learned that the CPE Panel inadvertently did not verify 54 of the letters of support it reviewed. All 54 letters were sent by the Requester in one correspondence bundle, and they are publicly posted on ICANN’s correspondence page.³⁶ The 54 letters were deemed to be relevant by the EIU, but the EIU inadvertently failed to verify them. Given that established policies and procedures require relevant letters to be verified, reconsideration is warranted.

The BGC’s acceptance of Request 14-44 should in no way reflect poorly upon the EIU. Rather, this determination is a recognition that, in response to the Requester’s claims and ICANN’s investigation of the circumstances surrounding the CPE Panel’s Report, ICANN

³³ See Annex B-5, FAQ Page, Pg. 6

³⁴ Annex B-3, CPE Panel Process Document, Pg. 5.

³⁵ Request, §§ 8.4-8.5, Pgs. 8-10.

³⁶ See <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-2-05may14-en.pdf>.

discovered that the EIU inadvertently did not adhere to established policies and procedures insofar as it did not verify some of the support letters it considered.

2. The EIU Did Not Improperly Impose Any Additional Criteria Or Procedural Requirements.

The Requester claims that the EIU has promulgated documents that impose requirements that are inconsistent with and supplemental to those set forth in the Guidebook.³⁷ Specifically, the Requester claims that the following four documents, all finalized after the Guidebook was published, “contain additional criteria, accents and specifications to the criteria laid down in the Applicant Guidebook”³⁸: (1) the EIU’s “Community Priority Evaluation Panel and Its Processes” document (“CPE Panel Process Document”)³⁹; (2) the CPE Guidelines⁴⁰; (3) ICANN’s CPE Frequently Asked Questions page, dated 10 September 2014 (“FAQ Page”)⁴¹; and (4) an ICANN document summarizing a typical CPE timeline (“CPE Timeline”)⁴² (collectively, “CPE Materials”). However, the Requester cites no example of any contradiction with established procedures set forth in the Guidebook within the CPE Materials.

First, the CPE Panel Process Document is a five-page document explaining that the EIU has been selected to implement the Guidebook’s provisions concerning CPE⁴³ and summarizing those provisions.⁴⁴ The CPE Panel Process Document strictly adheres to the Guidebook’s criteria and requirements. The Requester has identified no specific aspect of the CPE Panel

³⁷ Request, § 8.3, Pg. 6.

³⁸ *Id.*

³⁹ Annex B-3.

⁴⁰ Annex B-4.

⁴¹ Annex B-5.

⁴² Annex B-6.

⁴³ The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues was selected as the CPE panel firm through ICANN’s public Request for Proposals process in a 2009 call for Expressions of Interest. *See* Annex B-3, CPE Panel Process Document; *see also*, ICANN CALL FOR EXPRESSIONS OF INTEREST (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, *available at* <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

⁴⁴ Annex B-3, CPE Panel Process Document.

Process Document that imposes obligations greater or different than those set forth in the Guidebook. Indeed, none exists.

Second, the CPE Guidelines expressly state that they do “not modify the [Guidebook] framework [or] change the intent or standards laid out in the [Guidebook].”⁴⁵ Rather, the Guidelines are “an accompanying document to the [Guidebook] and are meant to provide additional clarity around the scoring principles outlined in the [Guidebook] . . . [and to] increase transparency, fairness, and predictability around the assessment process.”⁴⁶ Moreover, the CPE Guidelines were published after extensive input from the Internet community,⁴⁷ and are “intended to increase transparency, fairness and predictability around the assessment process.”⁴⁸ Indeed, the final version of the CPE Guidelines “takes into account all feedback from the community.”⁴⁹ The Requester does not provide any examples of a requirement set forth in the CPE Guidelines that contravenes the Guidebook.

Third, the FAQ Page does not impose any CPE requirements whatsoever. Rather, the FAQ Page summarizes requirements in the Guidebook and accompanying CPE Materials, and provides information such as the estimated duration of a CPE and applicable fees. The FAQ Page makes clear that all CPE procedures must be consistent with the Guidebook: “The CPE guidelines are an accompanying document to the [Guidebook] and are intended to provide additional clarity around process and scoring principles as defined in the [Guidebook]. The CPE

⁴⁵ CPE Guidelines, Pg. 2.

⁴⁶ *Id.*

⁴⁷ See <http://newgtlds.icann.org/en/applicants/cpe>.

⁴⁸ CPE Guidelines, Pg. 2.

⁴⁹ See newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en.

guidelines do not change the [Guidebook] framework or change the intent or standards established in the [Guidebook].”⁵⁰

Fourth, the CPE Timeline does not impose any requirements, but instead summarizes the timeframes typical for the CPE process. The Guidebook does not impose any deadlines upon either CPE participants or the EIU, thus there is no conflict between the CPE Timeline and any applicable policy or procedure.

The Requester claims ICANN should have permitted applicants to amend their applications after the promulgation of the CPE Materials.⁵¹ However, as set forth above, the CPE Materials did not effectuate any amendment to the Guidebook, or render more stringent any requirement set forth therein. Furthermore, the CPE Materials the Requester now challenges were promulgated quite some time ago; the CPE Guidelines, for instance, were made final on 27 September 2013, and the CPE Panel Process Document was published on 7 August 2014.⁵² Any challenge to ICANN action or inaction concerning the publication or implementation of these documents would be time-barred in all events.⁵³

For these reasons, no reconsideration is warranted on the grounds that any of the CPE Materials improperly impose obligations upon community applicants in a manner inconsistent with the Guidebook.

3. The Remainder Of Requester’s Claims Regarding Policies And Procedures Applicable to CPE Do Not Support Reconsideration.

(a) No Policy Or Process Requires The EIU To Ask Clarifying Questions.

⁵⁰ Annex B-5, FAQ Pg. 4.

⁵¹ Request, § 8.3, Pg. 7.

⁵² See <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>; <http://newgtlds.icann.org/en/announcements-and-media/announcement-07aug14-en>.

⁵³ Bylaws, Art. IV, § 2.5 (setting forth fifteen day deadline for reconsideration requests).

The Requester claims reconsideration is warranted because the EIU “deliberately decided” not to ask the Requester any clarifying questions during the course of CPE.⁵⁴ The Requester, however, acknowledges that there is no established policy or procedure *requiring* the CPE panels to pose clarifying questions to applicants and that the decision to ask clarifying questions is optional.⁵⁵ Indeed, the CPE Panel Process Document provides: “*If the core team so decides, the EIU may provide a clarifying question (CQ) to be issued via ICANN to the applicant*”⁵⁶ Because there is no established policy or procedure requiring any CPE panel to ask clarifying questions, no reconsideration is warranted based on the fact that the CPE Panel here did not.

(b) No Policy Or Process Requires The CPE Panel To Identify Objectors To The Application.

The fourth CPE criterion, community endorsement, evaluates community support for and/or opposition to an application through the scoring of two elements—4-A, “support” (worth two points), and 4-B, “opposition” (worth two points).⁵⁷ Pursuant to the Guidebook, to receive a maximum score for the opposition element, there must be “no opposition of relevance” to the application, and a score of one point is appropriate where there is “[r]elevant opposition from one group of non-negligible size.”⁵⁸ Here, the CPE Panel awarded the Requester one out of two points, because it:

determined that there is opposition to the application from a group of non-negligible size, coming from an organization within the communities explicitly addressed by the application, making it relevant. The organization is a chartered 501(c)(3) nonprofit organization with fulltime staff members, as well as ongoing events and activities with a substantial following. The grounds of the objection do not fall under any of those excluded by the

⁵⁴ Request, § 8.4, Pg. 9.

⁵⁵ *Id.*

⁵⁶ Annex B-3, CPE Panel Process Document, Pg. 3 (emphasis added).

⁵⁷ Guidebook, § 4.2.3.

⁵⁸ *Id.*

[Guidebook] (such as spurious or unsubstantiated claims), but rather relate to the establishment of the community and registration policies. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.⁵⁹

The Requester contends that reconsideration is warranted because the CPE Panel did not identify *which* opponent to the Application the CPE Panel refers to in the above-quoted analysis.⁶⁰ While the Requester objects that it is “impossible to verify” whether the opposing entity is relevant and of non-negligible size, the Requester points to no Guidebook or CPE Guideline requiring the CPE Panel to provide the Requester with the name of the opposing entity, and none exists. Notably, the CPE Guidelines explicitly set forth the evaluation process with respect to the “opposition” element, and do not include any disclosure requirements regarding the identity of the opposition.⁶¹ The Requester contends that the Guidebook should have included such a procedural requirement and, on that basis, argues that reconsideration is warranted. However, the Guidebook was extensively vetted by the community over a course of years and included a total of ten versions with multiple notice and public comment periods, and it does not impose such a requirement. No reconsideration is warranted by virtue of the CPE Panel’s decision not to identify the opposition.

(c) No Policy Or Procedure Requires ICANN To Directly Transmit The Requester’s Evidence Of False Allegations Made Against The Application To The EIU.

The Requester claims reconsideration is warranted because the evidence of alleged “spurious activity” that the Requester submitted to ICANN prior to the issuance of the CPE Panel’s Report was not provided to the EIU.⁶² For example, the Requester brought to ICANN’s

⁵⁹ Annex A-1, CPE Report, Pg. 8.

⁶⁰ Request, § 8.6, Pg. 11.

⁶¹ CPE Guidelines, Pgs. 19-20.

⁶² Request, § 8.7, Pgs 12-13.

attention its views regarding the motivations and financing sources of certain objectors to the Application, derogatory statements about the Requester made in the press by other applicants for the .GAY string, and similar allegations of untoward conduct.⁶³ However, there is no established policy or procedure requiring ICANN to provide the EIU with supplemental information at an applicant's request.

Further, there is no suggestion that any of the alleged spurious activities that the Requester references (such as Requester's allegation that "a community center from Portland, Oregon (USA) – the city where one of the other applicants for the .GAY gTLD is based" provided false information to ICANN⁶⁴) had any effect upon the CPE Panel's Report. Moreover, the Requester had the opportunity to refute these negative claims. Specifically, as ICANN reminded the Requester in a 14 November 2014 letter,⁶⁵ the public comment forum provides applicants with the ability to refute any negative remarks or allegations, and evaluators, including CPE panels, are instructed to review those comments and responses.⁶⁶ In the 14 November letter, ICANN also noted that it had "not identified anything that indicates the evaluation processes of the New gTLD Program were compromised by the activities cited, and [] determined that all of these processes have been followed in all respects" concerning the Application.⁶⁷ In other words, the Requester had ample opportunity to be heard as to the alleged "spurious activities" and to bring its concerns to the attention of the CPE Panel.

⁶³ Annexes C-2-C-12.

⁶⁴ Request, § 8.7, Pg. 12.

⁶⁵ See Annex C-3, Pgs. 2-3.

⁶⁶ *Id.*, citing Guidebook §§ 1.1.2.3, 4.2.3.

⁶⁷ Annex C-3, Pg. 5.

In sum, the Requester has identified no policy or procedure requiring ICANN to directly send to the EIU information concerning the alleged “spurious activities,” and no reconsideration is warranted based on any decision ICANN may have reached not to do so.

(d) The Requester’s Claim That The CPE Panel Misread The Application Does Not Support Reconsideration.

The Requester claims reconsideration is warranted because the CPE Panel awarded the Requester’s Application zero out of four points on the second criterion, which assesses the nexus between the proposed string and the community.⁶⁸ This criterion evaluates “the relevance of the string to the specific community that it claims to represent” through the scoring of two elements—2-A, “nexus” (worth three points), and 2-B, “uniqueness” (worth one point).⁶⁹ The Requester contends that the CPE Panel misinterpreted the Application and therefore erred in awarding no points in the nexus category. Specifically, the CPE Panel’s Report construed the Application as providing that membership with an “Authenticating Partner” is a prerequisite for becoming a member of the community the Application defines.⁷⁰ The Requester contends that the CPE Panel wrongly interpreted the Application because the Requester intended only that Authenticating Partners would merely screen potential registrants to ensure they match the community definition.⁷¹

While this interpretation may have been the Requester’s intended meaning in drafting the Application, the CPE Panel’s interpretation does not evince any policy or procedure violation. The Application states that the Requester is “*requiring* community members to have *registered*

⁶⁸ Guidebook, § 4.2.3; Request, § 8.9.3, Pgs. 16-17.

⁶⁹ Guidebook, § 4.2.3.

⁷⁰ Annex A-1, CPE Report, Pg. 5.

⁷¹ Request, § 8.9.3B, Pg. 19.

with one of our Authenticating Partners.”⁷² The CPE Panel applied the Guidebook provisions and found this assertion signaled a mismatch between the string and the community as defined in the Application. While the Requester states that “[t]his is, in the Requester’s opinion, an obvious misreading of the Application,”⁷³ the Requester’s substantive disagreement with the CPE Panel’s conclusions does not form a basis for reconsideration.

(e) The CPE Panel Properly Applied Element 2-A (Nexus).

The Requester contends that the CPE Panel also erred in its analysis of the nexus element because it did not take into account the specific arguments raised in the Application relating to the parameters of the gay community.⁷⁴ The Requester, however, does not identify any policy or procedure violation, but instead only offers substantive disagreement with the CPE Panel’s determination that zero points were warranted with respect to the nexus element.⁷⁵

In awarding zero points for element 2-A (nexus), the CPE Panel accurately described and applied the Guidebook scoring guidelines.⁷⁶ Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the nexus element, the applied-for string must “match[] the name of the community or [be] a well-known short-form or abbreviation of the community name.”⁷⁷

The Application describes the gay community as including:

individuals who identify themselves as male or female homosexuals, bisexual, **transgender**, queer, **intersex**, **ally** and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream

⁷² See .GAY Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/444> (“... dotgay LLC has established a conservative plan with [Authenticating Partners] representing over 1,000 organizations and 7 million members. This constitutes our base line estimate for projecting the size of the Gay Community and the minimum pool from which potential registrants will stem.”).

⁷³ Request, § 8.9.3B, Pg. 19.

⁷⁴ Request, § 8.9.3, Pgs. 16-17.

⁷⁵ The Requester also claims that the CPE Panel’s analysis of the nexus element was inconsistent with other CPE reports (Request, § 8.9.3.A, Pg. 18), which argument is addressed in section V.A.2(b) *infra*.

⁷⁶ See Annex A-1, CPE Report, Pgs. 5-6.

⁷⁷ Guidebook, § 4.2.3.

cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. . . .

The membership criterion to join the Gay Community is the process of “coming out”. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, ***dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E).***⁷⁸

The CPE Panel determined that the Application did not merit a score on the nexus criteria because the string does not “identify” the community. As the CPE Panel noted, according to the Guidebook, “identify” in this context “means that the applied for string closely describes the community or the community members, *without over-reaching substantially beyond the community.*”⁷⁹ The CPE Panel provided two independent reasons why “the applied-for string substantially over-reaches beyond the community defined by the application” and therefore does not merit any points in this category.⁸⁰

First, the Application stated that the community will include only those who have registered with one of the Requester’s “Authenticating Partners,” and the CPE Panel held that this subset of the “gay community” is not commensurate with the “large group of individuals – all gay people worldwide” to which the string corresponds.⁸¹ In fact, the CPE Panel noted that the Application itself estimates the self-identified gay community as 1.2% of the world population, or about 70 million people, whereas “the size of the community it has defined, based on membership with [Authenticating Partners], is 7 million.”⁸² As discussed in section V.A.2(d), *supra*, while the Requester contends that the CPE Panel misinterpreted the Application in this

⁷⁸ See Response to Question 20(a), .GAY Application Details, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

⁷⁹ *Id.* § 4.2.3 (emphasis added).

⁸⁰ Annex A-1, CPE Report, Pg. 5.

⁸¹ *Id.*

⁸² *Id.*

regard, the CPE Panel’s reasonable interpretation does not evince any policy or procedure violation.

Second, the CPE Panel found that the Application defines the community as those who have *publicly* “come out” as homosexual, whereas the word “gay” encompasses also “those who are privately aware of their non-heterosexual sexual orientation.”⁸³ The CPE Panel concluded that the string did not match the Application’s definition of the community because there are people who are members of the gay community who have not come out, and also, there are “significant subsets of the [Application’s] defined community that are not identified by the string .GAY,” such as transgender or intersex persons, or allies of what is commonly considered the gay community.⁸⁴ In other words, the CPE Panel held that the definition of community proposed in the Application was both over- and under-inclusive in comparison to the string. As to this rationale for the CPE Panel’s award of zero points, the Requester claims that the EIU “has not taken into account Requester’s specific arguments for including ‘allies’ in its community definition.”⁸⁵ Yet the Requester offers no evidence that the CPE Panel improperly excluded any document or information from its consideration in rendering the CPE Panel’s Report.

In sum, the Requester does not identify any policy or procedure that the CPE Panel misapplied in scoring element 2-A, and the Requester’s substantive disagreement with the CPE Panel’s conclusion does not support reconsideration.

(f) No Policy Or Procedure Requires The CPE Panel To Consider Determinations Rendered In Community Objection Proceedings.

⁸³ *Id.*

⁸⁴ Annex A-1, CPE Report, Pg. 6.

⁸⁵ Request, § 8.9.3, Pg. 17.

The Requester claims reconsideration is warranted because the CPE Panel’s Report did not take into account statements made in a determination overruling a community objection to an application for a different string, namely .LGBT.⁸⁶ The New gTLD Program’s dispute resolution processes, such as the community objection process, provide parties with the opportunity to object to an application and have their concerns considered by an independent panel of experts. In contrast, CPE is a method of resolving string contention and is intended to resolve cases where two or more applicants for an identical or confusingly similar string *successfully complete* all previous stages of the evaluation and dispute resolution processes. The dispute resolution and string contention procedures were developed independently of each other with their distinct purposes in mind, as is made clear by the fact that the Guidebook addresses each in separate provisions. There is no instruction or even suggestion that CPE panels should consider statements made in objection determinations, especially those made in objection determinations regarding a different gTLD. Given that no established policy or procedure requires CPE panels to consider expert determinations issued to resolve community objections, no reconsideration is warranted on the ground that the CPE Panel here did not do so.

- 4. The CPE Panel’s Report Is Not Inconsistent With Other CPE Panels’ Reports In A Manner Constituting A Policy Or Procedure Violation.**
 - (a) The CPE Panel’s Reference To The Oxford English Dictionary Presents No Ground For Reconsideration.**

The Requester suggests that reconsideration is warranted because the CPE Panel consulted the Oxford English Dictionary (“OED”) in seeking to define the string name, whereas the Requester claims that other CPE panels, in considering other applied-for strings, did not.⁸⁷ However, the Guidebook expressly authorizes CPE panels to “perform independent research, if

⁸⁶ Request, § 8.8, Pg. 13.

⁸⁷ Request, § 8.9.1, Pg. 14.

deemed necessary to reach informed scoring decisions.”⁸⁸ The Requester cites no established policy or procedure (because there is none) requiring every CPE panel to use the same sources of independent research in their analyses. As such, the fact that the CPE Panel consulted the OED does not support reconsideration.⁸⁹

(b) The CPE Panel’s Analysis Of Element 2-A (Nexus) Is Not Inconsistent With Other CPE Panels’ Reports In A Manner Constituting A Policy Or Procedure Violation.

With respect to the nexus element, the Requester contends that the EIU has “used double standards in preparing the various CPE panel reports, and is discriminating between the various community-based applicants[.]”⁹⁰ Specifically, the Requester notes that the CPE Panel found that the Application lacked a nexus to the gay community because the Application’s community definition was over-inclusive insofar as it included “allies”—specifically, the CPE Panel determined that because the proposed community included allies, “there are significant subsets of the defined community that are not identified by the string ‘.GAY’.”⁹¹

The Requester cites two CPE panel reports that purportedly show that “the EIU does not seem to have issues with similar concepts” with respect to other applications.⁹² First, it cites the CPE panel evaluating an application for the string .OSAKA, which awarded full points in the nexus category even though the community definition included not just those living in Osaka but also “those who self identify as having a tie to Osaka.”⁹³ Second, the Requester cites the CPE panel evaluating an application for the string .HOTEL, which awarded partial points in the nexus

⁸⁸ Guidebook, § 4.2.3.

⁸⁹ Furthermore, the Requester states that the OED comprised the “sole basis” for evaluating the definition of the community (Request, § 8.9.1, Pg. 14); to the contrary, the Report cites the OED only in a footnote, and includes a detailed discussion of the community definition separate and apart from the OED definition. Annex A-1, Pgs. 5-6.

⁹⁰ Request, § 8.9.3.A, Pg. 18.

⁹¹ Annex A-1, CPE Report, Pg. 6.

⁹² Request, § 8.9.3A, Pg. 18.

⁹³ Annex C-13, Pgs. 1, 4.

category even though it noted there was an insubstantial amount of overreach inherent to the community definition, which includes some entities that are merely “related to hotels.”⁹⁴

However, comparing these reports to the CPE Panel’s Report here discloses no inconsistency that could comprise a policy or procedure violation.

Different outcomes by different independent experts related to different gTLD applications is to be expected, and is hardly evidence of any policy or procedure violation. For instance, the .OSAKA string has been designated a geographic name string, unlike .GAY.⁹⁵ As such, a host of distinct considerations come into play with respect to each step of the evaluation and, in addressing the nexus component, the CPE Panel evaluating .OSAKA specifically referred to the governmental support the applicant had demonstrated.⁹⁶ As for .HOTEL, the CPE panel awarded partial credit to the applicant, finding the “string nexus closely describes the community,” and noted only one potential deficiency, namely the possibility that a “small part of the community” identified in the application might not match the string name.⁹⁷ Here, in contrast, the CPE Panel’s Report found that the proposed community was both over- and under-inclusive.⁹⁸ There is no policy or procedure violation because there is simply no inconsistency: the .HOTEL report found only mild problems with the proposed community definition and awarded a partial nexus score, whereas the CPE Panel’s Report here identified multiple mismatches between the proposed community and the string name, and awarded no points for the nexus element.

In essence, the Requester complains that it lost whereas other applicants prevailed in

⁹⁴ Annex C-14, Pg. 4.

⁹⁵ See Initial Evaluation for Interlink Co., Ltd.’s Application for .OSAKA, *available at* <http://newgtlds.icann.org/sites/default/files/ier/viun4exoaqie2hl0qojm7uvi/ie-1-901-9391-en.pdf>.

⁹⁶ Annex C-13, Pg. 4.

⁹⁷ Annex C-14, Pg. 4.

⁹⁸ Annex A-1, CPE Report, Pgs. 5-6.

scoring nexus points, but no reconsideration is warranted on this ground given that the Requester has failed to show any policy or procedure violation that led to the award of zero points.

(c) The CPE Panel’s Analysis of Element 4-A (Support) Is Not Inconsistent With Other CPE Panels’ Reports In A Manner Constituting A Policy Or Procedure Violation.

The Requester contends that reconsideration is warranted because it claims two other CPE panels have awarded the applicants the full two points with respect to the support criterion (element 4-A) even while finding there was no single organization representative of the entire community, whereas the CPE Panel here awarded the Requester only one point because no such organization exists.⁹⁹ Once again, it is to be expected that different panels will come to different conclusions with respect to different applications. Moreover, there is no inconsistency in the first instance.

The CPE Guidelines provide that an Application will be awarded one point for element 4-A if it demonstrates “[d]ocumented support from at least one group with relevance.”¹⁰⁰ The CPE Panel found that the Application met this one-point standard because at least one relevant group supported the Application.¹⁰¹ To warrant an award of *two* points, though, it must be the case that the “Applicant is, or has documented support from, *the* recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community[.]”¹⁰² Here, the CPE Panel concluded that the Requester was ineligible for a two-point award given that it is “not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from

⁹⁹ Request, § 8.9.4, Pg. 20.

¹⁰⁰ CPE Guidelines, *available at* <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>, Pg. 16.

¹⁰¹ Annex A-1, CPE Report, Pgs. 7-8.

¹⁰² CPE Guidelines, *available at* <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>, Pg. 16 (emphasis added).

the recognized community institution(s)/member organization(s)” in part because “[t]here is no single such organization recognized by the defined community as representative of the community.”¹⁰³

The Requester cites two CPE panel reports where the CPE panel awarded the full two points as to the support element, namely one CPE panel report evaluating an application for .RADIO, and the other for .HOTEL. Nevertheless, there is no inconsistency between those reports and the CPE Panel’s Report giving rise to the instant Reconsideration Request: neither of the previous reports *expressly* found that *no* single organization represents the community.¹⁰⁴ The Requester recognizes as much, arguing merely that it “does not appear to Requester that there is one single organization recognized by the ‘radio’ community or the ‘hotel’ community[.]”¹⁰⁵ In other words, the purported inconsistency between the CPE Panel’s Report here and others simply does not exist; the .RADIO and .HOTEL CPE reports did *not* include an express finding that the community is *not* represented by any single organization. Here, in contrast, the CPE Panel explicitly found that no such organization exists with respect to the gay community. The CPE Panel thereafter followed the Guidebook, which does not permit a two-point award in the absence of support from a “recognized” organization, defined as one that is “clearly recognized by the community members as representative of the community.”¹⁰⁶

Far from identifying any procedural irregularity with respect to the “support” prong of the community endorsement element, the Requester appears to fault the CPE Panel for adhering to the applicable rules and policies. As such, no reconsideration is warranted on this ground.

¹⁰³ Annex A-1, CPE Report, Pg. 8.

¹⁰⁴ See .RADIO CPE Report, available at <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>; .HOTEL CPE Report, available at <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

¹⁰⁵ Request, § 8.9.4, Pg. 20.

¹⁰⁶ See Guidebook § 4.2.3.

B. ICANN’s DIDP Response Did Not Contravene Any Established Policy Or Procedure.

1. ICANN Staff Adhered To Applicable Policies And Procedures In Responding To The DIDP Request.

The Requester disagrees with the ICANN staff’s determination that certain requested documents were subject to DIDP Conditions of Nondisclosure, as well as ICANN’s determination that, on balance, the potential harm from the release of the documents subject to the Conditions of Nondisclosure outweighs the public interest in disclosure.¹⁰⁷ The Requester claims that in declining to produce documents, ICANN’s violated its core commitment to transparency.¹⁰⁸ The Requester, however, does not identify any policy or procedure that ICANN staff violated in responding to the DIDP Request. As such, reconsideration is not appropriate.

The DIDP identifies a number of “conditions for the nondisclosure of information,” such as documents containing “[c]onfidential business information and/or internal policies and procedures” and/or containing “[i]nternal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications.”¹⁰⁹ It is ICANN’s responsibility to determine whether requested documents fall within those Conditions for Nondisclosure. Pursuant to the DIDP process, “a review is conducted as to whether the documents identified as responsive to the Request are subject to any of the [Conditions for Nondisclosure] identified [on ICANN’s website].”¹¹⁰

¹⁰⁷ Request, § 8.10, Pgs. 20-22.

¹⁰⁸ *Id.*

¹⁰⁹ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

¹¹⁰ See <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf> (Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests); *see also*, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

The Requester states that it does not find ICANN's position in the DIDP Response "convincing" that three categories of documents are not suitable for public disclosure because they fall into one of the enumerated Conditions of Nondisclosure: (1) agreements between ICANN and the organizations or individuals involved in the CPE; (2) "communications with persons from EIU who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE [...]"; and (3) work papers of CPE Panel members.¹¹¹ The Requester, however, fails to demonstrate that ICANN contravened the DIDP Response Process in determining that these categories of documents fall under one or more of the Conditions of Nondisclosure.

Indeed, in finding that each of these three categories of requested documents were subject to Conditions of Nondisclosure, ICANN adhered to the DIDP Response Process. First, ICANN has made public all documents regarding the standards and process governing CPE, as well as its instructions to the EIU on how the CPE process should be conducted, on its new gTLD microsite. (See <http://newgtlds.icann.org/en/applicants/cpe>.) In particular, Section 4.2 of the Guidebook, the CPE Panel Process Document, and the CPE Guidelines, set forth the guidelines and criteria by which the CPE panels are to evaluate applications undergoing CPE. These documents also encompass the instructions from ICANN to the EIU on how the CPE process should be conducted. There are no CPE process documents, guidelines, or instructions from ICANN to the EIU on how the CPE process should be conducted that have not been publicly posted. As to the contract between ICANN and the EIU for the coordination of the independent panels to perform CPEs, ICANN analyzed the Requester's request in view of the DIDP Conditions of Nondisclosure. ICANN determined that the contract was subject to several Conditions of Nondisclosure, including those covering "information . . . provided to ICANN pursuant to a

¹¹¹ Request, § 8.10, Pgs. 20-21.

nondisclosure agreement or nondisclosure condition within an agreement” and “confidential business information and/or internal policies and procedures.”¹¹²

Second, as to ICANN’s determination that it will not publicly disclose “communications with persons from EIU who are not involved in the scoring of a CPE,” ICANN analyzed the Requester’s requests in view of the DIDP Conditions of Nondisclosure. ICANN noted that it had already determined in response to a previous request (No. 20140804-1) that this category of documents is subject to several Conditions of Nondisclosure.¹¹³ The DIDP response to which ICANN referred discloses that the requested category of documents falls under Conditions of Nondisclosure including those covering information that “if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of . . . [a third] party[,]” “information exchanged, prepared for, or derived from the deliberative and decision-making processes,” and “confidential business information and/or internal policies and procedures.”

Third, as to the work papers of CPE evaluators or other documents internal to the EIU, ICANN indicated that it is not involved with the EIU’s deliberative process in order to “help assure independence of the process,” and therefore ICANN does not possess any such documents that might be responsive to this requested category.¹¹⁴

As ICANN noted in the DIDP Response, notwithstanding the fact that the Requester’s “analysis in [the DIDP] Request concluded that no Conditions for Nondisclosure should apply, ICANN must independently undertake the analysis of each Condition as it applies to the documentation at issue, and make the final determination as to whether any [Conditions of

¹¹² Annex A-4, DIDP Response, Pg. 2.

¹¹³ *Id.*, Pg. 3 (citing Response to DIDP Request No. 20140804, *available at* <https://www.icann.org/en/system/files/files/response-donuts-et-al-03sep14-en.pdf>).

¹¹⁴ Annex A-4, DIDP Response, Pgs. 2, 4.

Nondisclosure].”¹¹⁵ In conformance with the publicly posted DIDP process,¹¹⁶ ICANN undertook such analysis, as noted above, and articulated its conclusions in the DIDP Response. ICANN also noted that at least some of these documents were draft documents and explained that drafts not only fall within a Condition of Nondisclosure but also are “not reliable sources of information regarding what actually occurred or standards that were actually applied.”¹¹⁷ While the Requester may not agree with ICANN’s determination that certain Conditions of Nondisclosure apply here, the Requester identified no policy or procedure that ICANN staff violated in making its determination, and the Requester’s substantive disagreement with that determination is not a basis for reconsideration.

2. ICANN Staff Adhered To The DIDP Response Process In Determining That The Potential Harm Caused By Disclosure Outweighed The Public Interest In Disclosure.

The DIDP states that if documents have been identified within the Conditions of Nondisclosure, they “may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”¹¹⁸ The Requester’s substantive disagreement with the determination made by ICANN staff in this regard in responding to the DIDP Request does not serve as a basis for reconsideration.

The Requester argues that ICANN’s determination not to make public the documents it requested through the DIDP “restricts [its] fundamental rights to challenge” the CPE Panel’s evaluation, and “ultimately, to use the transparency and accountability mechanisms embedded

¹¹⁵ *Id.*, Pg. 5.

¹¹⁶ See <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

¹¹⁷ Annex A-4, DIDP Response, Pg. 5.

¹¹⁸ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

into ICANN’s By-laws.”¹¹⁹ Yet, the fact that the Requester believes that in this case the public interest in disclosing information outweighs any harm that might be caused by such disclosure does not bind ICANN to accept the Requester’s analysis. In accordance with the DIDP Response Process, ICANN conducted a review of all responsive documents that fell within the Conditions of Nondisclosure, and determined that the potential harm did outweigh the public interest in the disclosure of certain documents.¹²⁰ The Requester identifies no policy or procedure that ICANN staff violated in reaching this decision.

Finally, the Requester states that “[i]n Requester’s opinion, the EIU . . . is subject to the same policies—especially those relating to transparency and accountability—as ICANN.”¹²¹ However, as stated in the DIDP Response, “DIDP is limited to requests for information already in existence *within ICANN* that is not publicly available,”¹²² as the DIDP is “intended to ensure that information contained in documents concerning ICANN’s operational activities, *and within ICANN’s possession, custody, or control*, is made available to the public unless there is a compelling reason for confidentiality.”¹²³ The documents are not within ICANN’s possession, custody or control.¹²⁴ Even though the Requester wishes it otherwise, there is no established policy or procedure that requires ICANN to gather documents from third party service providers such as the EIU.

In sum, ICANN staff properly followed all policies and procedures with respect to the Requester’s DIDP Request—ICANN staff assessed the request in accordance with the guidelines set forth in the DIDP and determined, pursuant to those guidelines, that certain categories of

¹¹⁹ Request, § 8.10, Pg. 21.

¹²⁰ Annex A-4, DIDP Response, Pgs. 2-5.

¹²¹ Request, § 8.10, Pg. 22.

¹²² Annex A-4, DIDP Response, Pg. 5 (emphasis added).

¹²³ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

¹²⁴ Annex A-4, DIDP Response, Pg. 2.

requested documents were subject to Conditions of Nondisclosure, and that the potential harm from the disclosure of certain documents outweighed the benefits. The Requester's substantive disagreement with that determination is not a basis for reconsideration.

VI. Accepting The Reconsideration Request.

Based on the foregoing, the BGC concludes that reconsideration is warranted. Specifically, ICANN discovered in the course of investigating the claims presented in this Request that the CPE Panel inadvertently neglected to verify some of the letters submitted in support of the Application. This conduct is in contradiction of an established process. Accordingly, the BGC has determined that the CPE Panel's Report will be set aside and that new evaluators will be appointed to conduct a new CPE for the Application. The BGC also recommends that the EIU include new members of the core team to assess the evaluation results.

The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final.¹²⁵ As discussed above, Request 14-44 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board (or the New gTLD Program Committee) is warranted.

The BGC's decision to accept this reconsideration request and convene a new CPE Panel to evaluate the Requester's Application does not mean that a newly constituted CPE panel necessarily will overturn, reverse, or otherwise alter the decision that ultimately serves as the basis of this Request, namely that the Requester's application for .GAY did not meet the CPE criteria. Accepting the Request merely allows the appointment of new CPE evaluators (and

¹²⁵ Bylaws, Art. IV, § 2.15.

potentially new core team members) to conduct a new evaluation and issue a new report that will supersede the existing CPE Panel's Report.

In terms of the timing of the BGC's Determination, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical.¹²⁶ To satisfy the thirty-day deadline, the BGC would have to have acted by 29 December 2014. Due to the intervening holidays, it was impractical for the BGC to render a determination on revised Request 14-44 prior to 20 January 2015.

¹²⁶ Bylaws, Article IV, § 2.16.

Exhibit Y

ICANN BOARD SUBMISSION NO. 2013.04.11.1h

TITLE: Accountability Structures Bylaws Effective Date
PROPOSED ACTION: For decision

EXECUTIVE SUMMARY:

ICANN convened the Accountability Structures Expert Review Panel (ASEP) to perform the review of ICANN's accountability structures called for in Recommendations 23 and 25 of the Accountability and Transparency Review Team (ATRT) Recommendations. The ASEP produced a report in October 2012 that was posted for public comment along with proposed Bylaws revisions to implement the ASEP's recommended changes to ICANN's Reconsideration and Independent Review processes (IRP). At the Board's 20 December 2012 meeting, the Board adopted the Bylaws revisions, but directed staff to proceed with implementation work and notify the Board at its Beijing meeting as to the date that the Bylaws should be effective.

During implementation, consideration was given to public comment relating to the potential concern of comprising a standing panel. Accordingly, minor revisions were made to the Bylaws to address public comment. With those minor revisions, the recommendation is that the Bylaws be made effective as of 11 April 2013.

BGC RECOMMENDATION:

The Board Governance Committee (BGC) recommends that the Board deem 11 April 2013 the effective date for the Bylaws revisions to Article IV, Section 2 (Reconsideration) and Article IV, Section 3 (Independent Review) as approved by the Board on 20 December 2012. The BGC also recommends that the Board approve the further minor revisions to Article IV, Section 3 of the ICANN Bylaws addressing the standing panel issue for the Independent Review process.

PROPOSED RESOLUTION:

Whereas, the Accountability and Transparency Review Team's Recommendations 23 and 25 recommended that ICANN retain independent experts to review ICANN's accountability structures and the historical work performed on those structures.

Whereas, ICANN convened the Accountability Structures Expert Panel (ASEP), comprised of three international experts on issues of corporate governance, accountability and international dispute resolution, which after research and review of ICANN's Reconsideration and Independent Review processes and multiple opportunities for public input, produced a report in October 2012.

Whereas, the ASEP report was posted for public comment, along with proposed Bylaws revisions to address the recommendations within the report.

Whereas, after ASEP and Board review and consideration of the public comment received, on 20 December 2012 the Board approved Bylaws revision to give effect to the ASEP's recommendations, and directed additional implementation work to be followed by a staff recommendation for the effective date if the revised Bylaws.

Whereas, as contemplated within the Board resolution, and as reflected in public comment, further minor revisions are needed to the Bylaws to provide flexibility in the composition of a standing panel for the Independent Review process (IRP).

Resolved (2013.12.20.xx), the Bylaws revisions to Article IV, Section 2 (Reconsideration) and Article IV, Section 3 (Independent Review) as approved by the Board and subject to a minor amendment to address public comments regarding the composition of a standing panel for the IRP, shall be effective on 11 April 2013.

PROPOSED RATIONALE:

The Board's action in accepting the report of the Accountability Structures Expert Panel (ASEP) and approving the attendant Bylaws revisions is in furtherance of the Board's commitment to act on the recommendations of the Accountability and Transparency Review Team (ATRT). The ASEP's work was called for in ATRT Recommendations 23 and 25, and the work performed, including a review of the recommendations from the President's Strategy Committee's work on Improving Institutional Confidence, is directly aligned with the ATRT requested review.

The adoption of the ASEP's work represents a great stride in ICANN's commitment to accountability to its community. The revised mechanisms adopted today will bring easier access to the Reconsideration and Independent Review processes through the implementation of forms, the institution of defined terms to eliminate vagueness, and

the ability to bring collective requests. A new ground for Reconsideration is being added, which will enhance the ability for the community to seek to hold the Board accountable for its decisions. The revisions are geared towards instituting more predictability into the processes, and certainty in ICANN's decision making, while at the same time making it clearer when a decision is capable of being reviewed. The Bylaws as further revised also address a potential area of concern raised by the community during the public comments on this issue, regarding the ability for ICANN to maintain a standing panel for the Independent Review proceedings. If a standing panel cannot be comprised, or cannot remain comprised, the Bylaws now allow for Independent Review proceedings to go forward with individually selected panelists.

The adoption of these recommendations will have a fiscal impact on ICANN, in that there are anticipated costs associated with maintaining a Chair of the standing panel for the Independent Review process and potential costs to retain other members of the panel. However, the recommendations are expected to result in less costly and time-consuming proceedings, which will be positive for ICANN, the community, and those seeking review under these accountability structures. The outcomes of this work are expected to have positive impacts on ICANN and the community in enhanced availability of accountability mechanisms. This decision is not expected to have any impact on the security, stability or resiliency of the DNS.

This is an Organizational Administrative Function of the Board for which the Board received public comment.

Submitted by: Amy Stathos, Deputy General Counsel (Amy.stathos@icann.org);
Samantha Eisner, Senior Counsel (Samantha.eisner@icann.org)

Date: 8 April 2013

ICANN BOARD SUBMISSION NO. 2013.04.11.1h

TITLE: Accountability Structures Bylaws Effective Date
PROPOSED ACTION: For decision

BACKGROUND:

Immediate Adoption Is Important for Scalability

Now that initial evaluation results for new gTLD applications are being released, it is of utmost importance that the enhanced Reconsideration and Independent Review processes be put into place. The ASEP recommendations provide more clarity for the community on scope and standing, and will allow for more scalability in proceedings, the ability for summary disposition of claims, the consolidation of proceedings where appropriate, the institution of page limitations, and more predictability on timing. To the extent that decisions arising out of the New gTLD Program result in initiation of Reconsideration or Independent Review proceedings, having the new Bylaws in place will provide consistency to those seeking reconsideration or independent review.

Bylaws Updates – Background

In Resolution 2012.12.20.18, the Board approved the Bylaws amendments to Article IV, Section 2 (Reconsideration) and Article IV, Section 3 (Independent Review) as posted for public comment. The Board further requested that staff report in Beijing on the status of implementation and provide a recommendation for an effective date for the Bylaws. The resolution noted that there may be implementation issues regarding the creation of a standing panel for the IRP, and that minor revisions to the Bylaws could be made to the Board prior to the effective date. Implementation work has proceeded sufficiently now to allow for the Bylaws to be effective as of the 11 April 2013.

Independent Review Process – Creation of Standing Panel

ICANN has coordinated with the current IRP Provider, the International Centre for Dispute Resolution (ICDR) to determine how to best create the standing panel. The ICDR is in the process of recommending a fee structure that can help mitigate costs within the proceedings. As the ICDR is working to identify panelists for ICANN consideration, and finalizing fee structure recommendations, we recommend that the Bylaws can now be implemented. Per the 20 December 2012 resolution, additional

language relating to the standing panel will provide flexibility to use either the standing panel OR individually selected panelists for any proceeding initiated when a standing panel is not comprised. The revised language is provided as Exhibit A to these Reference Materials. Because the standing panel issue was specifically identified in the public comment forum as a topic for potential change, the Bylaws should be made effective without further public comment.

ICANN continues to work diligently with the ICDR on the standing panel member selection so that IRP proceedings are administered in conformity with the new Bylaws regime as soon as possible.

Reconsideration Process – Further Enhancements to ICANN’s Accountability

The work towards implementation of the revised Reconsideration process required far less effort than the IRP, and we are ready for those revised Bylaws to become effective.

Submitted by: Amy Stathos, Deputy General Counsel (Amy.stathos@icann.org);
Samantha Eisner, Senior Counsel (Samantha.eisner@icann.org)

Date: 8 April 2013

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in [Section 2 of this Article](#), ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.
2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.
3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.
4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
 - a. did the Board act without conflict of interest in taking its decision?;
 - b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
 - c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
5. Requests for independent review shall not exceed 25 pages (double-spaced, 12-point font) of argument. ICANN's response shall not exceed that same length. Parties may submit documentary evidence supporting their positions without limitation. In the event that parties submit expert evidence, such

evidence must be provided in writing and there will be a right of reply to the expert evidence.

6. There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.
7. All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN ("the IRP Provider"). The membership of the standing panel shall be coordinated by the IRP Provider subject to approval by ICANN.
8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this [Section 3](#).
9. Either party may request that the IRP be considered by a one- or three-member panel; the Chair of the standing panel shall make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.
10. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP panels.
11. The IRP Panel shall have the authority to:
 - a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;

- b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
 - c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
 - d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
 - e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
 - f. determine the timing for each proceeding.
12. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.
13. All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.
14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.
15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.
16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in

the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.

17. All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.
18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.
19. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ICANN's website when they become available.
20. The IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.
21. Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.

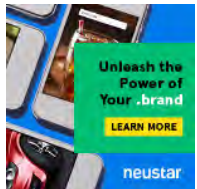
Exhibit Z



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More security issues prang ICANN site

Kevin Murphy, March 3, 2015, 10:14:39 (UTC), [Domain Tech](#)

ICANN has revealed details of a security problem on its web site that could have allowed new gTLD registries to view data belonging to their competitors.

The bug affected its Global Domains Division customer relationship management portal, which registries use to communicate with ICANN on issues related to delegation and launch.

ICANN took GDD down for three days, from when it was reported February 27 until last night, while it closed the hole.

The vulnerability would have enabled authenticated users to see information from other users' accounts.

ICANN tells me the issue was caused because it had misconfigured some third-party software — I'm guessing the Salesforce.com platform upon which GDD runs.

A spokesperson said that the bug was reported by a user.

No third parties would have been able to exploit it, but ICANN has been coy about whether any it believes any registries used the bug to access their competitors' accounts.

ICANN has 'fessed up to about half a dozen crippling security problems in its systems since the launch of the new gTLD program.

Just in the last year, several systems have seen downtime due to vulnerabilities or attacks.

A similar kind of privilege escalation bug took down the Centralized Zone Data Service [last April](#).

The RADAR service for registrars was offline for two weeks after [being hacked last May](#).

A [phishing attack](#) against ICANN staff in December enabled hackers to view information not normally available to the public.

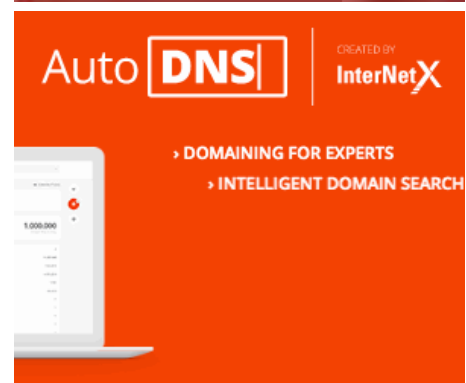
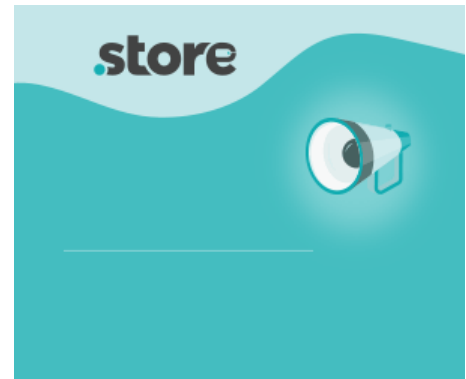
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Reg

March 11, 2015 at 8:10 pm

Looks like the same explanation we got for the TAS issue—and that was only reported when someone notified ICANN that they could see another user's information. Seems likely that that's what happened here, too.

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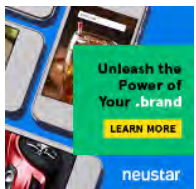
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Dumb ICANN bug revealed secret financial data to new gTLD applicants

Kevin Murphy, April 30, 2015, 17:00:31 (UTC), [Domain Registries](#)

Secret financial projections were among 330 pieces of confidential data revealed by an ICANN security bug.

Over the last two years, a total of 19 new gTLD applicants used the bug to access data belonging to 96 applicants and 21 registry operators.

That's according to ICANN, which released the results of a third-party audit this afternoon.

Ashwin Rangan, ICANN's new chief information and innovation officer, confirmed to DI this afternoon that the data revealed to unauthorized users included private financial and technical documents that gTLD applicants attached to their applications.

It would have included, for example, documents that dot-brand applicants reluctantly submitted to demonstrate their financial health.

But Rangan said it was not clear whether the glitch had been exploited deliberately or accidentally.

While saying the situation was "very deeply regrettable", he added that applicant data deemed confidential when it was submitted back in 2012 may not be considered as such today.

The vulnerability was in ICANN's Global Domains Division Portal, which [was taken offline for three days](#) at the end of February and early March after the bug was reported by a user.

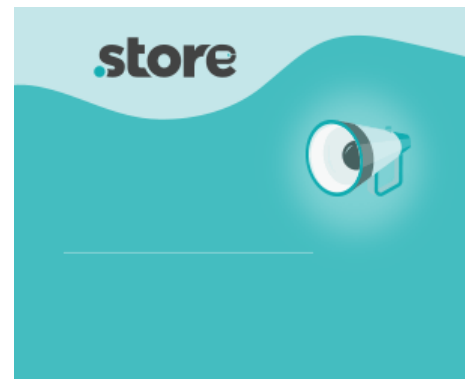
Two outside consulting firms were brought in to scan access logs going back to the launch of the new gTLD portal back in April 2013.

What they found was that any user of the portal could access any attachment to any application, whether it belonged to them or a third-party applicant, simply by checking a radio button in the advanced search feature.

It was a misconfiguration by ICANN of the Salesforce.com software used by GDD, rather than a coding error, Rangan said.

"The public/private data sharing setting can be On or Off and here it was set to On," he said.

On 330 occasions, starting "in earliest part of when the portal first became available" two years ago, these 19 users would have



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been exposed to data they were not supposed to be able to see.

The audit has been unable to determine whether the users actually downloaded confidential data on those occasions.

What's confirmed is that only new gTLD applicants were able to use the glitch. No third-party hackers were involved.

The 19 users who, whether they meant to or not, exploited this vulnerability are now going to be sent letters asking them to explain themselves. They'll also be asked to delete anything they downloaded and to not share it with third parties.

Before May 27, ICANN will also contact those applicants whose secret data was exposed, telling them which rival applicants could have seen it.

Rangan said that there have been almost 600,000 GDD sessions in the last two years, and that only 36 of them revealed data to unauthorized users.

"It's a small fraction," he said. "The question is whether they just stumbled across something they were not even aware of..."

Looking at the log files it is not clear what is the case."

ICANN seems to be giving the 19 users the benefit of the doubt so far, but still wants them to explain their actions.

As CIO, Rangan was not able to comment on whether the breach exposes ICANN or applicants to any kind of legal liability.

It's not the first time sensitive applicant data has been exposed.

Back in 2012, DI discovered that the [home addresses of the directors of applicants had been published](#), despite promises that they would remain private.

At the time of the original GDD portal misconfiguration, ICANN had noted security expert Jeff "The Dark Tangent" Moss as its chief security officer.

Earlier this week, ICANN's board of directors authorized expenses of over \$500,000 to carry out security audits of ICANN's code.

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Avri Doria

April 30, 2015 at 5:51 pm

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For the sake of transparency I hope the names of those applications that did access the data are released. Let them explain themselves to the community. Let them make their explanations to the court of public opinion.

avri

[Reply](#)

Reg

April 30, 2015 at 5:58 pm

+1, Avri.

[Reply](#)

Peter Lynch

April 30, 2015 at 7:05 pm

The applicants who have had their files breached should receive notification. Period.

[Reply](#)

Kevin Murphy

April 30, 2015 at 7:27 pm

They will before May 27, according to ICANN.

[Reply](#)

Rubens Kuhl

April 30, 2015 at 7:35 pm

I've only got the "your data was not viewed" messages, but it seems from the release that ICANN wouldn't reveal today to those who have been viewed, by whom.

If any of the applications were among those 96, I would immediately reply with a formal request for ICANN to identify who viewed the specific set of data.

[Reply](#)

Acro

May 28, 2015 at 7:43 pm

All your data belongs to ICANNT.

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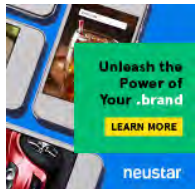
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ICANN fingers perps in new gTLD breach

Kevin Murphy, May 28, 2015, 13:33:30 (UTC), [Domain Services](#)

A small number of new gTLD registries and/or applicants deliberately exploited ICANN's new gTLD portal to obtain information on competitors.

That's my take on ICANN's latest update about the exploitation of an error in its portal that laid confidential financial and technical data bare for two years.

ICANN said last night:

Based on the information that ICANN has collected to date our investigation leads us to believe that over 60 searches, resulting in the unauthorized access of more than 200 records, were conducted using a limited set of user credentials.

The remaining user credentials, representing the majority of users who viewed data, were either used to:

- Access information pertaining to another user through mere inadvertence and the users do not appear to have acted intentionally to obtain such information.
- Access information pertaining to another user through mere inadvertence and the users do not appear to have acted intentionally to obtain such information. These users have all confirmed that they either did not use or were not aware of having access to the information.
- Also, they have all confirmed that they will not use any such information for any purpose or convey it to any third party; or

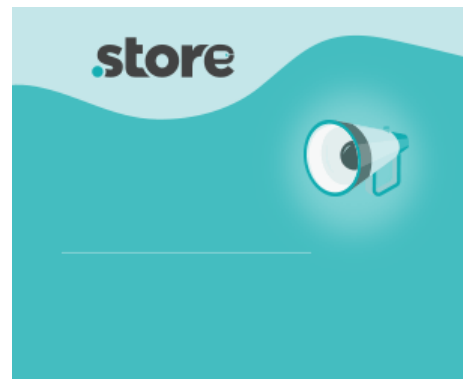
- Access information of an organization with which they were affiliated. At the time of the access, they may not have been designated by that organization as an authorized user to access the information.

We can infer from this that the 60 searches, exposing 200 records, were carried out deliberately.

I asked ICANN to put a number on "limited set of user credentials" but it declined.

The breach resulted from a [misconfiguration in the portal](#) that allowed new gTLD applicants to view attachments to applications that were not their own.

ICANN knows who exploited the bug — inadvertently or otherwise — and it has told the companies whose data was exposed, but it's



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not yet public.

The information may come out in future, as ICANN says the investigation is not yet over.

Was your data exposed? Do you know who accessed it? [You know what to do.](#)

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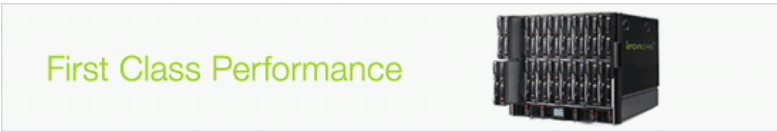
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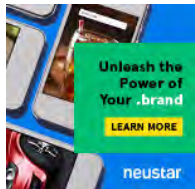
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.berlin CEO prime suspect in ICANN data breach

Kevin Murphy, May 28, 2015, 19:02:01 (UTC), [Domain Registries](#)

dotBerlin CEO Dirk Krischenowski is suspected of using a bug in ICANN's new gTLD portal to access hundreds of confidential documents, some containing sensitive financial planning data, belonging to competing gTLD applicants.

That's according to ICANN documents sent by a source to DI today.

Krischenowski, who has through his lawyer "denied acting improperly or unlawfully", seems to be the only person ICANN thinks abused [its portal's misconfigured search feature](#) to deliberately access rivals' secret data.

ICANN [said last night](#) that "over 60 searches, resulting in the unauthorized access of more than 200 records, were conducted using a limited set of user credentials".

But ICANN, in private letters to victims, has been pinning all 60 searches and all 200 access incidents on Krischenowski's user credentials.

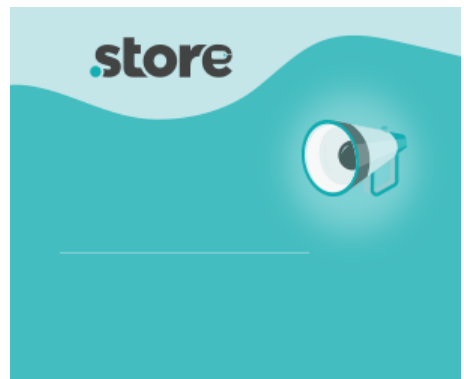
Some of the incidents of unauthorized access were against applicants Krischenowski-run companies were competing against in new gTLD contention sets.

The search terms used to find the private documents included the name of the rival applicant on more than one occasion.

In more than once instance, the data accessed using his credentials was a confidential portion of a rival application explaining the applicant's "worst case scenario" financial planning, the ICANN letters show.

I've reached out to Krischenowski for comment, but ICANN said in its letters to victims:

[Krischenowski] has responded through legal counsel and has denied acting improperly or unlawfully. The user has stated that he is unable to confirm whether he performed the searches or whether the user's account was used by unauthorized person(s). The user stated that he did not record any information pertaining to other users and that he has not used and will not use the information for any purpose.



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Krischenowski is a long-time proponent of the new gTLD program who founded dotBerlin in 2005, many years before it was possible to apply.

Since .berlin launched last year it has added 151,000 domains to its zone file, making it the seventh-largest new gTLD.

The bug in the ICANN portal was [discovered in February](#).

The [results on an audit](#) completed last month showed that over the last two years, 19 users used the glitch to access data belonging to 96 applicants and 21 registry operators.

There were 330 incidents of unauthorized access in total, but ICANN seems to have dismissed the non-"Krischenowski" ones as inadvertent.

An ICANN spokesperson declined to confirm or deny

Krischenowski is the prime suspect.

Its investigation continues...

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Tagged: .berlin, dotberlin, gdd portal, glitch, ICANN, new gTLDs, security

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Acro

May 28, 2015 at 7:42 pm

First, we take Manhattan. Then, we take .Berlin.

Reply

LC

May 29, 2015 at 5:51 am

I don't like this .fashion business, mister.

Reply

kd

May 28, 2015 at 8:06 pm

Did this guy do anything wrong? If there was a bug in the system, that issue lies on ICANN. Unless ICANN put terms in the TLD contracts that says "If we produce a bug in our system, you explicitly will not look at other people's private data." A bug in the system sounds to me like this guy did not "hack in", but ran some searches and got access to interesting data. While most probably won't admit it, most people that might have noticed this would probably have done the same thing.

I'm not a lawyer, so I really don't know what laws would apply. But it sounds like ICANN wants to point the finger instead of take the blame for not protecting applicant's data properly.

Reply

Kevin Murphy

May 28, 2015 at 8:21 pm

To the best of my knowledge, nobody's claimed anyone has done anything illegal. Nor has the word "hack" been used.

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CarlosM

May 28, 2015 at 10:22 pm

If you leave your home's door open and someone enters and steals your TV set, it is still a crime.

[Reply](#)

Richard Funden

May 29, 2015 at 8:43 am

Shame, shame, shame!

[Reply](#)

Dirk Jessel

June 2, 2015 at 11:41 am

So is there something new with this issue? Did anyone get additional infos? Will this all be lost in space?

[Reply](#)

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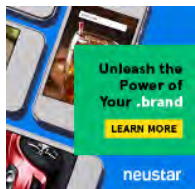
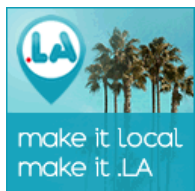
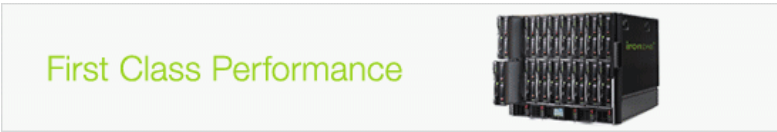
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Afilias takes over .hotel, sidelines Krischenowski over hacking claims

Kevin Murphy, May 12, 2016, 09:02:21 (UTC), [Domain Registries](#)

Afilias has sought to distance itself from DotBerlin CEO Dirk Krischenowski, due to ongoing claims that he improperly accessed secret data on rival .hotel applicants.

The company revealed in a recent letter to ICANN that it has bought out Krischenowski's 48.8% stake in successful .hotel applicant Hotel Top Level Domain Sarl and that Afilias will become the sole shareholder of HTLD.

The move is linked to claims that Krischenowski exploited a glitch in ICANN's new gTLD applicants' portal to access confidential financial and technical information belonging to rival .hotel applicants.

These competing applicants have ganged up to demand that HTLD **should lose its rights to .hotel**, which it obtained by winning a controversial Community Priority Evaluation.

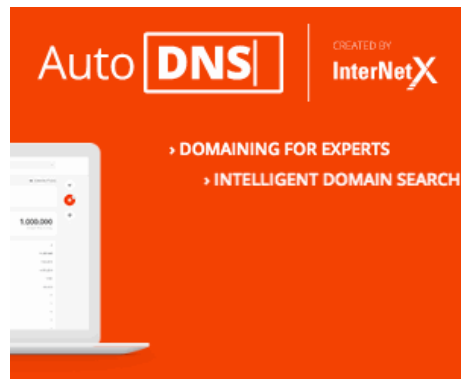
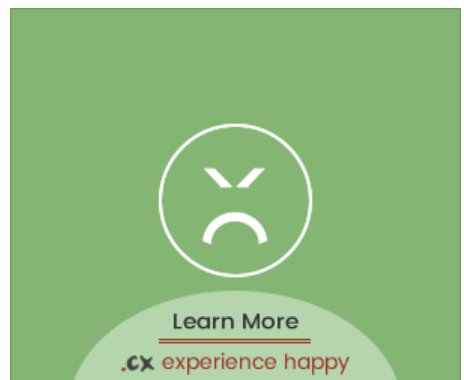
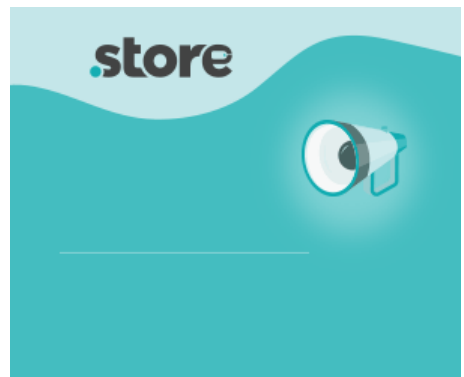
Afilias chairman Philipp Grabensee, now "sole managing director" of HTLD, wrote ICANN last month ([pdf](#)) to explain the nature of the HTLD's relationship with Krischenowski and deny that HTLD had benefited from the alleged data compromise.

He said that, at the time of the incidents, Krischenowski was the 50% owner and managing director of a German company that in turn was a 48.8% owner of HTLD. He was also an HTLD consultant, though Grabensee played down that role.

He was responding to a March ICANN letter ([pdf](#)) which claimed that Krischenowski's portal credentials were used at least eight times to access confidential data on .hotel bids. It said:

It appears that Mr Krischenowski accessed and downloaded, at minimum, the financial projections for Despegar's applications for .HOTEL, .HOTEIS and .HOTELES, and the technical overview for Despegar's applications for .HOTEIS and .HOTEL. Mr Krischenowski appears to have specifically searched for terms and question types related to financial or technical portions of the application.

Krischenowski has denied any wrongdoing and told DI last month that he simply used the portal assuming it was functioning as intended.



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Grabensee said in his letter that any data Krischenowski may have obtained was not given to HTLD, and that his alleged actions were not done with HTLD's knowledge or consent.

He added that obtaining the data would not have helped HTLD's application anyway, given that the incident took place after HTLD had already submitted its application. HTLD did not substantially alter its application after the incident, he said.

HTLD's rival .hotel applicants do not seem to have alleged that HTLD won the contention set due to the confidential data.

Rather, they've said via their lawyer that HTLD should be disqualified on the grounds that new gTLD program rules disqualify people who have been convicted of computer crime.

Even that's a bit tenuous, however, given that Krischenowski has not been convicted of, or even charged with, a computer crime.

The other .hotel applicants are Travel Reservations, Famous Four Media, Radix, Minds + Machines, Donuts and Fegistry.

ICANN is now pressing HTLD for more specific information about Krischenowski's relationship with HTLD at specific times over the last few years, in a letter (pdf) published last night, so it appears that its overdue investigation is not yet complete.

Policies are guidelines, not actual day to day run of a system. At the end of the day someone has to do the job, and tha... [read more](#)

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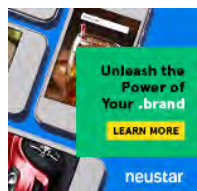
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Afilias set to get .hotel despite hacking claims

Kevin Murphy, August 19, 2016, 09:42:22 (UTC), [Domain Registries](#)

Afilias is back on the path to becoming the registry for .hotel, after ICANN decided claims of hacking by a former employee of the applicant did not warrant a rejection.

The ICANN board of directors decided last week that HOTEL Top-Level Domain Sarl, which was [recently taken over by Afilias](#), did not gain any benefit when employee Dirk Krischenowski accessed competing applicants' confidential documents via an ICANN web site.

Because HTLD had won a Community Priority Evaluation, it should now proceed to contracting, barring any further action from the other six applicants.

ICANN's board said in its August 9 decision:

ICANN has not uncovered any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD's application for .HOTEL; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's application to prevail in CPE.

It authorized ICANN staff to carry on processing the HTLD application.

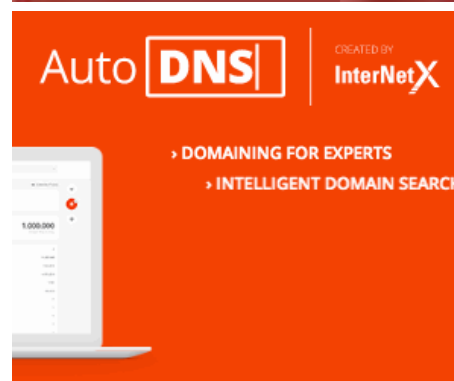
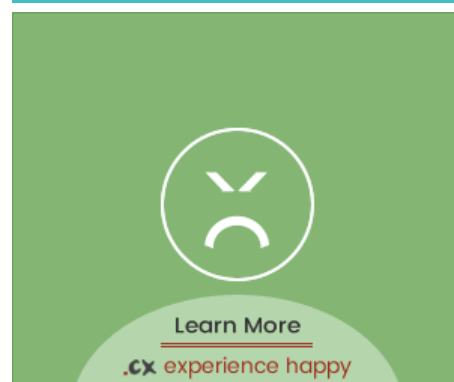
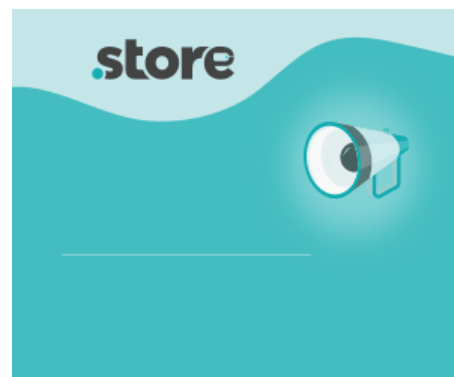
The other applicants — Travel Reservations, Famous Four Media, Radix, Minds + Machines, Donuts and Fegistry — had called on ICANN in April to [throw out the application](#), saying that to decline to do so would amount to "acquiescence in criminal acts".

That's because an ICANN investigation had discovered that Dirk Krischenowski, who ran a company with an almost 50% stake in HTLD, had [downloaded hundreds of confidential documents](#) belonging to competitors.

He did so via ICANN's new gTLD applicants' portal, which had been misconfigured to enable anyone to view any attachment from any application.

Krischenowski has consistently denied any wrongdoing, telling DI a few months ago that he simply used the tool that ICANN made available with the understanding that it was working as intended.

ICANN has now decided that because the unauthorized access incidents took place after HTLD had already submitted its CPE



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application, it could not have gained any benefit from whatever data Krischenowski managed to pull.

The board reasoned:

his searches relating to the .HOTEL Claimants did not occur until 27 March, 29 March and 11 April 2014. Therefore, even assuming that Mr. Krischenowski did obtain confidential information belonging to the .HOTEL Claimants, this would not have had any impact on the CPE process for HTLD's .HOTEL application. Specifically, whether HTLD's application met the CPE criteria was based upon the application as submitted in May 2012, or when the last documents amending the application were uploaded by HTLD on 30 August 2013 – all of which occurred before Mr. Krischenowski or his associates accessed any confidential information, which occurred from March 2014 through October 2014. In addition, there is no evidence, or claim by the .HOTEL Claimants, that the CPE Panel had any interaction at all with Mr. Krischenowski or HTLD during the CPE process, which began on 19 February 2014.

The HTLD/Afilias .hotel application is currently still listed on ICANN's web site as "On Hold" while its rivals are still classified as "Will Not Proceed".

It might be worth noting here — to people who say ICANN always tries to force contention sets to auction so it possibly makes a bit of cash — that this is an instance of it not doing so.

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Exhibit Z1

Ms. Christine A. Willett
Vice President, GDD Operations
Internet Corporation for Assigned Names and Numbers (ICANN)
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Via E-Mail, Fax and Federal Express

23 March 2016

New gTLD Applicant Portal
Your letter dated 16 March 2016

Dear Ms. Willett,

Reference is made to your letter dated 16 March 2016. We thank you for the opportunity to respond.

HOTEL Top-Level-Domain S.à.r.l. ("Applicant") deeply regrets that, further to the GDD portal misconfiguration, Mr. Krischenowski has apparently accessed proprietary information that Applicant's competitors submitted to ICANN in support of their applications for the .HOTEL gTLD. However, the competitors' request that ICANN cancel Applicant's application for .HOTEL for that reason is unfounded. In accessing the proprietary information, Mr. Krischenowski did not act on Applicant's behalf, and he did not act in support of Applicant's application for .HOTEL. In particular, any proprietary information that Mr. Krischenowski could have obtained could not have supported Applicant's application as the application had already been submitted at the time of the incident.

Applicant has itself investigated the incident and has implemented significant changes to the management and ownership of Applicant as outlined in paragraph 5 below.

Based on the information available to date, we would like to inform you as follows:

1. At the time of the incident, Mr. Krischenowski was (through a wholly-owned company) a 50 % shareholder and managing director of HOTEL Top-Level-Domain GmbH, Berlin (the "GmbH"), the minority (48,8%) shareholder of Applicant. He was not an employee of Applicant. To a very limited extent, Mr. Krischenowski also acted as business consultant of Applicant. In these functions, however, he did not have the general power to represent Applicant. (However, in the individual case of the String Confusion Objections, he was authorized by the Applicant to represent the Applicant in this matter. The reason for this individual representation of Applicant was that the string confusion objections were based on IP rights held by the GmbH and Mr. Krischenowski was the managing director of the GmbH at the time.)

In accessing the proprietary information, Mr. Krischenowski did not act on Applicant's behalf, nor did he use Applicant's User Login ID.

2. Mr. Krischenowski did not inform Applicant's personnel of his action and did not provide any of the accessed information to Applicant or its personnel. Applicant's personnel did not have any

knowledge about Mr. Krischenowski's action, and did not consent to it or approve it. They only learned about it on 30 April 2015 in the context of ICANN's investigation.

3. The portal misconfiguration issue occurred between 17 March 2014 and 27 February 2015. As is clear from the chronology of events, any information that Mr. Krischenowski could have obtained during the portal misconfiguration could not have supported Applicant's application for .HOTEL.
 - Applicant's application had already been filed in May 2012.
 - The last documents amending the application were uploaded on 16 August 2013 and 30 August 2013 (change of address and additional endorsements), well before the issue occurred.
 - In the context of ICANN's initial evaluation in 2013, Applicant answered two questions related to technical issues on 11 June 2013.
 - On 30 April 2014, Applicant submitted a clarifying comment regarding the language of the policy description in the public part of its application.
 - On 11 June 2014, Applicant prevailed in Community Priority Evaluation.
 - On 24 December 2014, Applicant informed ICANN of the change of legal form of its shareholder Afilias Ltd. to Afilias plc.

The chronology clearly shows that by 17 March 2014, the start date of the portal misconfiguration issue, Applicant had long since submitted its entire application which formed the basis for the Community Priority Evaluation on 11 June 2014. The clarifying comment of 30 April 2014 regarding the policy description took place after the incident but concerned the public part of Applicant's application. As policy descriptions by all applicants are public from the beginning of the application process and are not proprietary information, the Applicant could not have benefitted from the incident with respect to the submission of this clarifying comment. The change request of 24 December 2014 concerning the shareholder's legal form did not impact the substance of the application. Therefore, due to the chronology of events, it is clear that any information which Mr. Krischenowski may have obtained through the portal misconfiguration could not have influenced the application, and there is no link whatsoever between Mr. Krischenowski accessing such information and the application.

4. To our knowledge, none of the proprietary information Mr. Krischenowski may have obtained through the portal misconfiguration has influenced or supported Applicant's application. Statements to the contrary would be unsubstantiated.
5. Applicant has asked Mr. Krischenowski to step down as a managing director of the GmbH, to which Mr. Krischenowski has agreed with effect as of 18 March 2016. In this function, he has been replaced by Mr. Lenz-Hawliczek and Ms. Ohlmer. Further, as of 18 March 2016, Mr. Krischenowski has caused his wholly-owned company to transfer its 50 % shareholding in the GmbH to Ms. Ohlmer (via her wholly-owned company). Finally, the contract on business consultancy services between Applicant and Mr. Krischenowski was terminated with effect as of 31 December 2015.

In addition to the action taken above, and to reflect our responsibility and commitment to the HOTEL community, we jointly took the following decision:

Afilias plc, the majority shareholder of Applicant, and the GmbH have agreed that the GmbH shall transfer its shares in Applicant to Afilias plc. Subject to notarization and registration, and an agreement between the parties regarding an initial cash payment and deferred purchase price for such interest, Afilias plc will in the near future be the sole shareholder of Applicant, and there will not be any corporate relationship between Applicant and the GmbH. Also we would like to inform you that Mr. Lenz-Hawliczek and Ms. Ohlmer have been replaced as managing directors of Applicant by myself (Philipp Grabensee) as the sole Managing Director. In addition, a Change Request has been submitted on 23 March 2016 to replace the primary and secondary contacts of the .HOTEL application by myself and Mr. John Kane of Afilias plc, respectively.

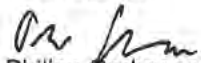
In light of the facts as set forth in this letter, including the actions taken by the Applicant as set forth herein, we do not believe that Mr. Krischenowski's actions should impact Applicant's eligibility as a TLD applicant/operator per the provisions of the Applicant Guidebook nor disqualify or otherwise affect the legitimacy of the HOTEL community.

We believe that the comprehensive steps outlined above demonstrate the seriousness with which we take ICANN's inquiry into this matter, and we are confident that Applicant remains best suited to operate the .HOTEL TLD on behalf of the global hotel community - an important community that has been enthusiastically preparing for the launch of this important new resource.

In summary, we are of the opinion that a cancellation of Applicant's application for .HOTEL would not be appropriate and would unfairly penalize the global hotel community. We therefore kindly ask you to uphold our application.

Please do let us know if we can assist with the investigation of the facts surrounding this matter or if you have any questions.

Kind regards,



Philipp Grabensee
Sole Managing Director

Exhibit Z2

1.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
INDEPENDENT REVIEW PROCESS
ICDR CASE NO. 01-15-0005-9838

In the Matter of an Independent Review Process

Between:

ASIA GREEN IT SYSTEM
BILGISAYAR SAN. VE TIC. LTD. STI., ("AGIT")
Claimant

Vs.

INTERNET CORPORATION for ASSIGNED
NAMES AND NUMBERS ("ICANN")
Respondent

FINAL DECLARATION

Independent Review Process Panel:

Calvin Hamilton, FCI Arb (Chair)

Honourable William Cahill (Ret.)

Klaus Reichert SC

PROCEDURAL HISTORY

2. The relevant procedural history of this Independent Review Process ("IRP") is set out in the following paragraphs. The Panel has only recorded those matters which it considers, in its appreciation of the file of this IRP, necessary for this Final Declaration.
3. The parties to the IRP are identified in the caption and are represented as follows:

Claimant: Mike Robenbaugh
Robenbaugh Law
548 Market Street (Box No 55819)
San Francisco, CA 94104

Respondent: Eric Enson, Jeffrey A. LeVee, Kelly Ozurovich
Jones Day
555 South Flower Street 50th Floor
Los Angeles, CA 90071

4. The authority for the IRP is found at Article IV, Section 3 of the ICANN Bylaws. The IRP Panel is charged with “declaring whether the Board has acted consistently with the Provision of ICANN’s Articles of Incorporation and Bylaws.”
5. The applicable procedural rules are the International Centre for Dispute Resolution’s (ICDR) International Dispute Resolution Procedures, as amended and in effect as of 1st June 2014, as augmented by ICANN’s Supplementary Procedures, as amended and in effect as of 2011.
6. On 7th February 2014, ICANN’s chairman informed AGIT that, following the New gTLD (“gTLD”) Programme Committee (“NGPC”) decision and subsequent Resolution made on 5th February 2014, “the NGPC will not address the applications further until such time as the noted conflicts have been resolved”.¹ AGIT submit that from this point, their applications were “On Hold”.²
7. On 26th February 2014, AGIT filed a Request for Reconsideration with ICANN’s Board Governance Committee (“BGC”). AGIT’s request was summarily dismissed by the BGC on 13th March 2014, and this decision was accepted by the NGPC.³
8. On 21st February 2014, AGIT requested that ICANN engage in a “Cooperative Engagement Process” in accordance with the Bylaws of ICANN.⁴ The Cooperative Engagement Process was terminated on 13th November 2015 and no resolution was reached.
9. AGIT submitted a Request for Independent Review Process (“IRP Request”) on 16th December 2015, which ICANN responded to on 1st February 2016. AGIT submitted a supplemental brief on 6th January 2017, which ICANN responded to on 3rd February 2017.

¹ See Annex 12 I

² This status was confirmed by Mr Enson in paras 13 – 25, pg 95 – Telephonic Hearing

³ See Annex 14

⁴ S3, Article IV, ICANN Bylaws

10. A preparatory conference call was held on 19th April 2016 during which a procedural calendar was agreed upon (Procedural Order No.1).
11. Pursuant to Procedural Order No. 1, AGIT submitted their ‘Observations on the Scope of Panel Authority’ on 3rd May 2016, which ICANN responded to on 13th May 2016.
12. With respect to document requests, pursuant to Procedural Order No. 1, AGIT were required to submit their request for document production on 3rd May 2016. ICANN were to answer by 13th May and, if appropriate, were to both request documents and object to AGIT’s request. On 23rd May 2016, AGIT were to both reply to ICANN’s objection, and file their own objection against ICANN’s request if appropriate. ICANN were to answer AGIT’s objection by 2nd June 2016. The 2nd June 2016 was set for ICANN’s document production, and 13th June 2016 for AGIT. The issue of document disclosure was eventually resolved by the parties themselves with little involvement by the Panel.
12. A telephonic hearing took place on 4th May 2017. Present for the hearing were the IRP Panel (Calvin Hamilton (Chair), Honourable William Cahill, Klaus Reichert SC), Mike Rodenbaugh for AGIT (“the Claimant”), Eric Enson for ICANN (“the Respondent”). Amy Stathos and Casandra Fure were also present on behalf of the Respondent. The hearing was reported by Jana J. Bommarito.

PANEL AUTHORITY

13. The authority of this Panel is set out in the following paragraphs.
14. Article IV, Section 3.4 ICANN Articles of Incorporation and Bylaws:

Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a) Did the Board act without conflict of interest in taking its decision?;

- b) Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c) Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

15. As articulated by the IRP Panel in *Merck KGaA v ICANN*⁵ and as stipulated by the parties in this IRP:

“The analysis which the Panel is mandated to undertake is one of comparison. More particularly, a contested action of the Board is compared to the Articles of Incorporation and Bylaws in order to ascertain whether there is consistency. The analysis required for comparison requires careful assessment of the action itself rather than its characterisation by either the complainant or ICANN. The Panel, of course, does take careful note of the characterisations that are advanced by the Claimant and ICANN.

As regards the substantive object of the comparison exercise, namely, was there consistency as between the Articles of Incorporation and Bylaws, the parameters of the evaluation for consistency are informed by the final part of Article IV, Section 3.4, which is explicit in focusing on three specific elements. The phrase “defined standard of review” undoubtedly relates to the exercise of comparison for consistency, and informs the meaning of the word “consistent” as used in Article IV, Section 3.4. The mandatory focus on the three elements (a-c) further informs the exercise of comparison.⁶”

FACTS OF THE CASE

16. The salient facts are set out in the following paragraphs.

17. ICANN is a non-profit, multi-stakeholder organisation incorporated in California, United States of America. It was established in 1998, and is charged with registering and administering both top and second level domain names. ICANN operates pursuant to its Articles of Incorporation and Bylaws.

⁵ International Centre for Dispute Resolution, Independent Review Process, Case No. 01-14-0000-9604

⁶ *Merck KGaA v ICANN* International Centre for Dispute Resolution, Independent Review Process, Case No. 01-14-0000-9604IRP Final Declaration Paras 16-18

18. From 2004-2011, the Generic Names Supporting Organisation (“GNSO”) of ICANN developed a programme to introduce new top-level domain names into the domain name system (gTLD). An applicant guidebook (“Guidebook”) was developed by ICANN in consultation with stakeholders, detailing a “transparent and predictable criteria” for applications.⁷
19. The Guidebook includes detailed procedures for applying for and objecting to the issuance of top level domain names. ICANN aimed to create “an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval.”⁸ Applicants must provide detailed responses to 50 questions, which seek to establish the competency of applicant. The objection process includes an Independent Objector (“IO”) and the prospect of an objection by one or more of the Governments that make up ICANN’s Government Advisory Committee (“GAC”). The IO can lodge an objection, which ordinarily results in the appointment of one or more independent experts to consider and determine the merits of the objection.⁹
20. In addition to the IO and GAC formal objections, GAC members are permitted to file an “Early Warning Notice”, detailing concerns about applications.¹⁰ Early Warning Notices simply act to place an applicant on notice. It is not a formal objection, however it “raises the likelihood that the application could be the subject of GAC Advice on New gTLDs or of a formal objection at a later stage in the process.”¹¹ Concerning GAC Advice, in situations where members of the GAC provide “consensus” advice against an application, a strong presumption is created against that application. Should the Board of ICANN decide to act contrary to this advice, they must provide a rationale for doing so.¹² Concerning formal objections, the objection must fall within one of four specified grounds - String Confusion, Legal Rights, Limited Public Interest or Community Objection.¹³ In determining whether an objector has standing to object, they must satisfy one of these four identified Objection Grounds which are dependent of the ground being

⁷ Recommendation One, S.1.1.5, ICANN, gTLD Final Applicant Guidebook.

⁸ Preamble, ‘New gTLD Program Background’ gTLD Applicant Guidebook Version 2012-06-04

⁹ S3.2.5 Applicant Guidebook

¹⁰ S1.1.2.4 Applicant Guidebook

¹¹ Ibid (1.1.2.4)

¹² S1.1.2.7 Applicant Guidebook

¹³ S3.2.1 Grounds for Objection

used.¹⁴ In addition, a Limited Public Interest Objection comment process¹⁵ is available, which allows for the “participation of many stakeholder groups in a public discussion.”¹⁶

21. In early 2012, Asia Green IT System (“AGIT”), a Turkish cooperation, submitted two applications to ICANN under the new gTLD programme to operate the .ISLAM and .HALAL top-level domains. Following their applications, Early Warning Notices were submitted by the United Arab Emirates (UAE) and India¹⁷ in November 2012, to which AGIT filed formal responses.¹⁸ Within their responses, AGIT included a proposed Governance Model and Public Interest Commitments (“PICs”), which it hoped would alleviate the concerns raised in the Early Warning Notices.¹⁹

22. In addition, the IO, Dr Pellet, was instructed to evaluate the applications. The UAE then filed two formal objections under the grounds of a Community Objection against each of the applications. The Applicant Guidebook details those with standing to submit a Community Objections as “(e)stablished 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.”²⁰ Following this, Mr Cremades, a Panellist from the International Chamber of Commerce, was instructed to consider the objections.

23. On 11th April 2013, the GAC, in accordance with the Applicant Guidebook,²¹ published a Communique to the ICANN Board following a meeting in Beijing to consider the two applications. The Communique noted:

“The GAC recognizes that Religious terms are sensitive issues. Some GAC members have raised sensitivities on the applications that relate to Islamic terms, specifically .islam and .halal. The GAC members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC members that these applications should not proceed.”²²

¹⁴ See 3.2.2 Applicant Guidebook,

¹⁵ See telephonic pg 69 lines 20-25

¹⁶ See Guidebook I.1.2.3

¹⁷ India did not post formal objections following their Early Warning Notices.

¹⁸ See Annex 6

¹⁹ Ibid - 6

²⁰ See 3.2.2.4

²¹ S3.1 Applicant Guidebook

²² See full text of Communique at <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>

24. Following this, a scorecard system was produced to assist in the evaluation of the applications, and a subsequent meeting took place in Durban in July 2013.
25. On 25th July 2013, both Kuwait and the Gulf Cooperation Council (“GCC”) expressed objections to the applications by AGIT and support of the Community Objection by the UAE.²³
26. On 30th August 2013, AGIT were informed that both the .ISLAM and the .HALAL applications were accepted by ICANN’s expert evaluation Panels,²⁴ and that their applications had passed Initial Evaluation²⁵.
27. On 4th September 2013, Lebanon expressed objections to the applications by AGIT and support of the Community Objection by the UAE.
28. On 24th October 2013, Mr Cremades published a report evaluating the Community Objection filed by the UAE against both applications. In his decision, Mr Cremades found there was neither substantial opposition to the applications, nor would the applications create a “likelihood of any material detriment to the rights or legitimate interests of a significant portion of the relevant community.”²⁶
29. On 4th November 2013, a letter was received by the ICANN Board, and subsequently sent to the GAC, from the Organisation of Islamic Council (“OIC”). The letter contained a formal objection to the use of top-level domain names by “any entity not representing the collective voice of the Muslim people.”²⁷ Following receipt of this letter, dialogue was recommended and a meeting held in Buenos Aires. It is submitted by ICANN that the letter of objection by the OIC was received as part of their “public comment” process,²⁸ which allows for the “participation of many stakeholder groups in a public discussion”²⁹ thereby giving a platform to interested parties outside of the formal objection process. Time constraints are provided for the consideration of comments during the Initial

²³ See telephonic pg 67 Lines 6-1

²⁴ See Annex 2

²⁵ Ibid

²⁶ See Annex 8

²⁷ See pg10 AGIT’s request for an IRP wherein they note: “in November 2013, the Chair of the ICANN Board forwarded to the GAC Chair a letter from the OIC which requested the GAC to “kindly consider this letter as an official opposition of the Member States of the OIC ... [to] use of these [TLDs] by any entity not representing the collective voice of the Muslim people.”

²⁸ See telephonic pg 69 lines 20-25

²⁹ See Guidebook 1.1.2.3 and telephonic g 61 lines 10 - 16

Evaluation review (the formal objection period runs for seven months following the posting of applications³⁰), however the Guidebook allows for comments received after this period to be “stored and available (along with comments received during the period) for other considerations, such as the dispute resolution process, as described below.”³¹

30. On 19 December 2013, the OIC informed ICANN that a unanimous resolution had been adopted by the 57 Member States of the OIC objecting to the operation of .ISLAM and .HALAL by “any entity not reflecting the collective voice of Muslim people”.³² The Panel notes that this resolution is not amongst the materials placed before it.

31. On 24th December 2013, the Government of Indonesia filed its objection with ICANN to both of the applications.

32. On 5th February 2014, the NGPC applied the objections raised to the scorecard, and on 7th February 2014, AGIT were informed “the NGPC will not address the applications further until such time as the noted conflicts have been resolved.”³³ The letter informed AGIT that two IGOs and two Government representatives (the GCC, the OIC, Lebanon and Indonesia) had indicated conflicts with AGIT’s Governance model and the PIC.

33. The task of this Panel is to determine whether ICANN have acted in a manner consistent with ICANN’s Articles of Incorporation, Bylaws and Guidebook.

PROVISIONS OF ICANN’S ARTICLES OF INCORPORATION, BYLAWS AND THE APPLICANT GUIDEBOOK

34. The salient provisions of these governance documents are listed below:

35. Article 4, Articles of Incorporation

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and

³⁰ Guidebook 1.1.2.6

³¹ Ibid

³² See telephonic pg 70 lines 8-13

³³ See Annex 12

consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

36. S3 (4) Article IV Bylaws and Rule 8 of ICANN Supplementary (Independent Review of Board Actions)

The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. *Did the Board act without conflict of interest in taking its decision?*
- b. *Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. *Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

37. S2 Article I Bylaws (Core Values)

In performing its mission, the following core values should guide the decisions and actions of ICANN:

- a. *Core Value 3*
- b. *To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
- c. *Core Value 7*
- d. *Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*
- e. *Core Value 8*
- f. *Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
- g. *Core Value 9*
- h. *Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*

38. Article II, Section 2 (3) Bylaws (Non-Discriminatory Treatment)

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

39. Article II, Section 2 (1) Bylaws (General Powers)

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in Section 7.1). With respect to any matters that would fall within the provisions of Section 3.6(a)-(c), the Board may act only by a majority vote of all Directors.

40. Article III, Section 3 (6) Bylaws (Notice and Comment on Policy Actions)

(a) With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN shall:

- i. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;*
- ii. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments (such comment period to be aligned with ICANN's public comment practices), prior to any action by the Board; and*
- iii. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee ("GAC" or "Governmental Advisory Committee") and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.*

(b) Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 3.6(a)(ii), prior to any final Board action.

(c) *After taking action on any policy subject to this Section 3.6, the Board shall publish in the meeting minutes the rationale for any resolution adopted by the Board (including the possible material effects, if any, of its decision on the global public interest, including a discussion of the material impacts to the security, stability and resiliency of the DNS, financial impacts or other issues that were considered by the Board in approving such resolutions), the vote of each Director voting on the resolution, and the separate statement of any Director desiring publication of such a statement.*

41. Article VI, S 4 (6) Bylaws and Article I Supplemental Procedures

There shall be an omnibus standing Panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected. The Panelists shall serve for terms that are staggered to allow for continued review of the size of the Panel and the range of expertise. A Chair of the standing Panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing Panel. In the event that an omnibus standing Panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member Panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more Panelists, as required, from outside the omnibus standing Panel to augment the Panel members for that proceeding.

42. §1.1.5 Applicant Guidebook

The following scenarios briefly show a variety of ways in which an application may proceed through the evaluation process (...)

a. *Scenario 4 – Pass Initial Evaluation, Win Objection, No Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing (refer to Module 3, Objection Procedures). The objection is heard by a dispute resolution service provider Panel that finds in favor of*

the applicant. The applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD

43. §3.1 Applicant Guidebook

The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.³⁴

44. §3.1 (II) Applicant Guidebook

GAC Advice may take one of the following forms:

(...)

II. The GAC advises ICANN that there are concerns about a particular application “dot-example.” The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

45. §3.2 Applicant Guidebook

As described in section 3.1 above, ICANN’s Governmental Advisory Committee has a designated process for providing advice to the ICANN Board of Directors on matters affecting public policy issues, and these objection procedures would not be applicable in such a case. The GAC may provide advice on any topic and is not limited to the grounds for objection enumerated in the public objection and dispute resolution process.

46. §5.1 Applicant Guidebook

ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.

³⁴ “May” no requirement to adhere to advice of experts, or indeed to appoint in the first place. Cf pg 21 AGIT Request for IRP

47. GNSO Recommendations:

ICANN GNSO, Final Report — Introduction of New Generic Top-Level Domains:³⁵

Recommendation No. 1: The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

Recommendation No. 9: There must be a clear and pre-published application process using objective and measurable criteria.

Recommendation No. 12: Dispute resolution and challenge processes must be established prior to the start of the process.

Principle G:

The String Process must not infringe on the applicant's freedom of expression rights that are protected under internationally recognised principles of law.

PARTIES' POSITIONS

48. Having set forth the procedural history, the relevant facts and the applicable provisions of ICANN's governing documents, the Panel now sets forth the issues raised by the parties.

POSITION OF THE CLAIMANT

49. AGIT seeks a declaration that the Board of ICANN acted in a manner inconsistent with certain provisions, discussed below, of ICANN's Articles of Incorporation, Bylaws and/or Guidebook in connection with its granting of an "On Hold" status to AGIT applications for .HALAL and .ISLAM. AGIT makes the following contentions, set out below.

50. ICANN consulted in secret with the GAC and Objectors regarding the delay or denial of AGIT's application, in violation of Core Values 7 and 9. Core Value 7 mandates open and transparent policy development that promote well informed decisions based on expert advice. Core Value 9 mandates ICANN to act promptly while, as part of the decision-making process, obtaining informed input from those entities most affected.

³⁵ See AGIT Request for IRP – pg 18

51. In particular, through meetings in Beijing and Durban, and via correspondence with the OIC:

Beijing meeting:

Only ICANN staff, executives and Board members were allowed in the room – Restricted to “Members Only”³⁶ (although this policy changed shortly afterwards) No minutes, transcripts or rationales from the meeting were released;

Durban meeting:

Closed meeting held with “some GAC representatives”. No transcript has ever been produced outside of the 32 minute recording.³⁷

52. No effort was made to reach out to AGIT to participate in the discussion or provide input. The meeting was only attended by a “few GAC members” without inviting or informing the entire GAC what took place, or informing AGIT, the public or the GNSO of what occurred at the meeting.

53. Despite requests, no Board member met with AGIT CEO/MD while in Durban.

54. ICANN held a number of meetings with the OIC, despite the untimely and undocumented procedure for further objections. AGIT were unable to obtain further information on these meetings.

55. ICANN failed to obtain informed input from either AGIT or the Objectors prior to reaching its 5th February 2014 resolution, in violation of Core Value 9.

56. ICANN violated Core Value 8 by failing to inform AGIT of the conflicts which it must resolve in order to progress from “On Hold” status.

57. ICANN have violated Core Values 3, 7 and 8, along with §3.1 of the Guidebook by deciding in a manner inconsistent with expert advice, and this action is discriminatory.

³⁶ Annex 20

³⁷ See telephonic pg 22 lines 22 – 25

58. ICANN have acted in a discriminatory manner, contrary to Article II, §2 (3) Bylaws (Non-Discriminatory Treatment) by differentiating between the treatment of .KOSHER/.SHIA with .HALAL/.ISLAM.
59. Under Module 3³⁸, the GAC were responsible for rejecting any applications which violated public interest. By the GAC failing to recommend rejection of AGIT's applications to the Board as per the Guidebook §3.1, they provided implicit consent to both applications. This should have been taken into account by the Board.
60. ICANN have violated §1.1.5 of the Guidebook by acting in a manner inconsistent with the scenarios laid down.
61. The non-disclosure by ICANN of requested documents under the Document Disclosure Policy ("DIDP") violates Core Values 7 and 8.
62. ICANN have violated Article 4, §3 (6) by failing to create a Standing Panel as required by their Bylaws.

POSITION OF THE RESPONDENT

63. ICANN disputes each of AGIT's contentions, and asserts that the Board did not violate the Articles of Incorporation, the Bylaws or the Guidebook.
64. ICANN refutes the accusation that secret consultations took place with GAC Objectors, specifically as regards the *Beijing Meeting*: the ICANN Board examined, discussed, evaluated and responded to the GAC's advice from the Beijing meeting. Meetings prior to mid-2013 were held with GAC members only, making the decision to hold the Beijing meeting with members-only routine.
65. Specifically as regards the *Durban Meeting*, neither the Articles of Incorporation, Bylaws nor the Guidebook mandate a full complement of GAC members or Board members to be present during such a meeting.
66. Neither the Articles of Incorporation, Bylaws nor the Guidebook mandate that members of the Board meet with an applicant on the applicant's request.

³⁸ See pg7 AGIT - Supplementary Brief

67. Specifically as regards *OIC correspondence* ICANN staff members' responsibilities include outreach and dialogue with stakeholders in the Middle East, which includes the OIC.
68. There is no evidence that any communications with the OIC influenced the Board's decision to place the applications on hold.
69. The Board not only fulfilled but exceeded its requirements under §3.1 (2) by:
- a. Entering into dialogue with concerned GAC members at the Durban meeting;
 - b. Reviewing correspondence from various Objectors;
 - c. Its use of the 5th February Scorecard; and
 - d. Communicating the rationale behind its decision in a letter to the Claimant, dated 7th February 2014, by informing the Claimant of the conflicts arising, the identities of the objectors, the nature of their objections and what the Claimant must do before the Board would resume consideration of the applications.
70. The Board will resume consideration of the .ISLAM and .HALAL applications once the conflicts noted have been resolved, however ICANN is not required to act as liaison between the Claimant and those who objected to its application.
71. New policy has not been created, rather the Board have followed §5.1 of the Guidebook in exercising their discretion to consider individual applications and whether they are in the best interests of the Internet community.
72. The Board is not mandated under either the Articles of Incorporation, Bylaws or Guidebook to follow expert opinion.
73. No discrimination has occurred with the granting of .KOSHER/.SHIA and .HALAL/.ISLAM. Any difference in treatment of the referenced applications was a result of different circumstances.
74. Scenario 4 contained in §1.1.5 Guidebook is not "any sort of promise by ICANN"³⁹, and instead provides scenarios by which an application may proceed. This provision does not mandate that an application must proceed.⁴⁰

³⁹ Supplementary Response by ICANN pg 22 para 50

75. ICANN staff are tasked with responding to document requests, not the ICANN Board. Board involvement takes place when a reconsideration request, seeking the Board's review of staff action regarding document disclosure, is requested by a Claimant. As a reconsideration request was not filed, no Board action was taken. An IRP is concerned only with Board actions. However, should ICANN's response to the DIDP request be subject to review by the IRP, ICANN submits that staff complied with "standards applicable to DIDP requests."⁴¹
76. The decision not to produce certain documents under the DIDP request but to do so under the IRP conforms to standards and processes in place.

STATEMENT OF REASONS

77. The Panel is of the view that in order to address the party's positions as posed in this IRP, the analysis utilised in the *Merck* declaration is instructive. Applying Article IV, §3.4 Articles of Incorporation and Bylaws, with, where relevant, consideration to the following questions:
- a. Did the Board act without conflict of interest when taking its decision?
 - b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?
 - c. Did the Board members exercise independent judgement in taking the decision, believed to be in the best interests of the company?

BEIJING MEETING:

ACTION: RELIANCE ON LIMITED OUTPUT FROM THE BEIJING MEETING

78. In order for the GAC to properly evaluate gTLD applications, geographic meetings are held in accordance with §3.1 Guidebook.
79. The GAC was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly in matters where there may be an

2. _____

⁴⁰ See telephonic pg. 97 lines 2-10 "These are simply 2 examples of ways in which applications may proceed. This is not intended it be an exhaustive list of possibilities."

⁴¹ Ibid pg 23 para 54

interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

80. The framework and structure for how these meetings are convened, minuted and disseminated are a matter of convention, outside of structured rules. Guidance can be taken from convention, noting from an interview held on 10th May 2014 between Heather Dryden, Head of the GAC with Brad White, ICANN Communications, that, although policy has now changed, previous GAC meetings were held through a 'closed format.'⁴² It is instructive that in May 2013, Heather Dryden confirmed that going forward, GAC meetings would be more open.⁴³

81. The sole output from the Beijing meeting was a Communique of 6 pages.⁴⁴ The only wording relating to the Claimants application consisted of 58 words, detailing concerns on 'religious sensitivity' of the gTLDs.⁴⁵ In addition, the Communique stated that the GAC members concerned were of the view that the applications should not proceed.⁴⁶ No more is said. Core Value 7 calls upon ICANN to employ "open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process". It is the opinion of the Panel that a 58 word output in this manner and language is insufficient to comply with the open and transparent requirements mandated by Core Value 7. Anyone not physically present at that meeting would have little idea, if any, beyond the general contours contained the Communique, as to what actually happened during the meeting nor what was said by any of the participants.

Did the Board act without a conflict of interest?

82. This is not applicable. There is no evidence of a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

⁴² See Annex 21 – Claimant's Supplemental Brief

⁴³ Ibid

⁴⁴ Excluding Annexes.

Full Communique available here: <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>

⁴⁵ As quoted in para 23 above

⁴⁶ The GAC recognizes that Religious terms are sensitive issues. Some GAC members have raised sensitivities on the applications that relate to Islamic terms, specifically .ISLAM and .HALAL. The GAC members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC members that these applications should not proceed.

83. The closed nature and limited record of the regarding the Beijing meeting provides little in the way of ‘facts’ to the Board. Of the 6 page document produced by the GAC to the Board, only 58 words concerned the .HALAL and .ISLAM applications, utilising vague and non-descript terms. For the reasons set out in paragraph 81 above, any reliance on the Beijing Communique by the Board in making their decision would necessarily be to do so without a reasonable amount of facts.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

84. This is not applicable. There is no evidence of a lack of independence with regards the Beijing Communique and the manner in which the Board considered this document.

DURBAN MEETING:

ACTIONS: LIMITED OUTPUT FROM THE MEETING; INSUFFICIENT INVOLVEMENT BY GAC MEMBERS; INSUFFICIENT INVOLVEMENT BY ICANN BOARD; INSUFFICIENT INVOLVEMENT BY CLAIMANT

85. The meetings in Durban were held in July 2013, post the noted policy change⁴⁷ of employing a more open structure to GAC meetings. The Claimant has received a 32-minute audio recording of this meeting, however no Communique was issued.

86. The Guidebook, under §3.1, references the process of the GAC providing advice to the ICANN Board where objections exist to the gTLD application. It would appear eight Board members and ten GAC members were present.

87. The Claimant claims the limited number of GAC attendees at the Durban meeting to discuss the objections renders the advice insufficient to constitute “GAC Advice”. §3.1 does not specifically state what constitutes GAC Advice insofar as whether a full complement, majority, minority or affected parties need be present.

88. The Claimant claims that §3.1 should be interpreted using an *Expressio Unius* model in such that as other sections of the Guidebook and Bylaws use a restricted composition of the GAC, then any other reference automatically applies to the full GAC. For example:

⁴⁷ Para 71

§2.2.1.4 of the Guidebook states, with regard early warnings: “... *GAC Early Warning typically results from a notice to the GAC by one or more governments that an application might be problematic, e.g., potentially violate national law or raise sensitivities.*” and

“... *GAC consensus is not required for a GAC Early Warning to be issued.*”

89. The argument that a full complement of GAC members need to be present in order to constitute GAC advice is flawed. There is no reference to quorum requirements in §3.1 and it is practical that only relevant and concerned members be in attendance.
90. Contrastingly, the Claimant did not reference the statement in Guidebook §3.1 which states the “... *GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors...*” This gives rise to an implication that more than the mere objectors should be present at a GAC advisory meeting.
91. The Claimant uses a number of emails in order to demonstrate disagreement with the manner in which the meeting was carried out. The emails range in date from 1st July 2013 – 12th July 2013, and the Claimant relies specifically on emails sent by Ray Plzak, member of the ICANN Board, between the 1st July 2013 and 10th July 2013, questioning the form in which the meeting was to take place.⁴⁸ These emails indicate that Mr Plzak had a number of questions and queries regarding the format of the meeting. Heather Dryden stated that this was to be “*a meeting available to the subset of Members in the GAC that has a direct interest in these strings.*”⁴⁹ Mr Plzak acknowledges in his 2nd July email “*The fact is that not all GAC members are either interested in all matters or participate in all discussions, or even attend discussions on all matters.*”⁵⁰
92. The Claimant claims that the full Board membership should have been present for the Durban meeting. However, it is the view of this Panel that neither the Bylaws nor the Guidebook mandate full Board attendance.
93. The Claimant claims that a breach of Core Values 7 and 9 occurred through the lack of involvement by the CEO/MD⁵¹ of Claimant during the meeting in Durban. The CEO/MD

⁴⁸ See Annex 22, Claimants Supplementary Annexes

⁴⁹ Annex 22 - Email dated 2nd July 2013

⁵⁰ Ibid

⁵¹ Please note that both titles are present in the 11th July email from Mehdi Abbasnia, and as such, both are used here.

of the Claimant company attempted to meet with ICANN Board members during the Durban meeting (annex 25). The CEO/MD emailed all ICANN Board members on 11th July but was unsuccessful in meeting with any Board members.

Did the Board act without a conflict of interest

94. Claimants claim that the reason for the reduced complement of Board members at the Durban and Beijing meetings was, in the end, to ensure the gTLD string was made available to a 3rd party during the next round of applications.

95. Furthermore, the meetings were deemed to have been organised and structured in a way that was outside of usual GAC and Board meetings. It was accepted that this was not a meeting of the GAC but rather a discussion for the board to understand the concerns of the GAC. The Panel finds on this record the Board did not have a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it

96. The Board is mandated under the Guidebook §3.1 to review advice from the GAC at such meetings in collaboration with additional advice it deems necessary. The Respondent claims that it was unnecessary to include members over and above those with an interest in the gTLD which may have provided more rounded advice.

97. It is the opinion of this Panel that, whilst a meeting with the CEO/MD of the Claimant company may have increased the volume of facts which the Board had in front of it, the lack of available Board members to meet with the Claimant's CEO/MD is not inconsistent with Core Values 7 or 9. The meeting requests were private matters, and therefore at the discretion of each party.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

98. Judgement involving the make-up of the meetings being only those who have an interest is based on the Guidebook, which states:

II. The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to

understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

99. The ICANN Board met with the GAC members who had an interest in .HALAL and .ISLAM in order to greater understand the concerns. There is no evidence that the reduced number of GAC members in attendance was not following the exercise of independent judgment.

ACTION: CONTINUED CONSULTATIONS WITH THE ORGANISATION OF ISLAMIC STATES (“OIC”)

100. There would appear to be a lack of openness and transparency with regards discussions with the OIC, in particular with regards alleged meetings which occurred via telephone on or around 29th October 2013⁵² and in November 2013 in Buenos Aires.⁵³ ICANN acknowledged through their Supplementary Response that that they are both unclear as to whether the meeting took place and unclear as to what was discussed beyond membership or failed community objections.⁵⁴ Whilst it is acknowledged that the OIC had lodged objections to the Claimant’s applications through the public comment process, it is the opinion of this Panel that such meetings, held with ICANN staff and not ICANN Board members, are not in breach of Core Value 7. ICANN staff do not hold decision making authority, and it is evidenced through Annex 28 that the OIC were advised of their obligations to follow ICANN procedure.⁵⁵ It is further noted that the members of staff which communicated with the OIC at this time were specifically tasked with outreach to the Middle East,⁵⁶ making such communications and meetings an expected element of such outreach.

Did the Board act without a conflict of interest

101. ICANN, in its Response to the Claimant’s request for an IRP, acknowledge that an outreach programme is operating with the Middle East, and with the OIC representing 57

⁵² See Claimant Supplementary Brief pg 5

⁵³ Ibid

⁵⁴ See para 21 ICANN’s Response to Claimant’s Supplementary Brief: “*Likewise, it is not clear that the meeting discussed in Annex 26 ever took place and, if it did, what was discussed beyond the OIC’s GAC membership or the OIC’s failed community objection against the Applications*”

⁵⁵ No. 129, Email from ICANN Senior Advisor – OIC Rep “asked the funny question whether the two strings could be delegated to the OIC. We told him never outside the process”.

⁵⁶ See ICANN Response to AGIT Request for IRP – pg 4.

Muslim states, consultations with the body throughout Claimant's application process were inevitable. ICANN have informed the Panel through their Supplementary Response that ICANN staff do not have decision making authority with respect to applications, and it is ICANN staff who were conducting the outreach. It is therefore the opinion of this Panel that the Board acted without a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it?

102. The content of the meetings between ICANN staff and the OIC is unclear. However, it is the remit of this IRP to consider Board actions, and it is the opinion of this Panel that the Board have exercised due diligence and care in light of a reasonable amount of facts in front of it.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

103. This Panel has no evidence of staff members passing on any information from the undocumented meetings discussed above to Board members. In light of the lack of evidence to the contrary, it is the view of this Panel that on this record, independent judgement was made.

ACTION: EXTENT OF INPUT OBTAINED FROM ENTITIES MOST AFFECTED

104. It is the opinion of the Panel that the numerous meetings and subsequent Communiqués demonstrate involvement by entities most affected in the context of the objectors, and therefore ICANN did not breach its obligation under Core Value 9. Core Value 9 mandates "acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected". Input was received by ICANN from objectors on numerous occasions, including and notably during the Durban meeting. Numerous communications have taken place between the GAC and the objectors, through both the Community Objection, subsequent support of the Objection and the public comment process. ICANN stated the following in their 7th February letter to the Claimant:

"... a substantial body of opposition urges ICANN not to delegate the strings .HALAL and .ISLAM. The Gulf Cooperation Council (25 July 2013: applications not supported by the community, applicants did not

consult the community; believe that sensitive TLDs like these should be managed and operated by the community itself through a neutral body such as the OIC); the Republic of Lebanon (4 September 2013: management and operation of these TLDs must be conducted by a neutral, nongovernmental multistakeholder group); the Organisation of Islamic Cooperation (19 December 2013: foreign ministers of 57 Muslim Member States supported a resolution opposing the strings; resolution was unanimously adopted); and the government of Indonesia (24 December 2013: strongly opposes approval of .islam) all voiced opposition to the AGIT applications... ”⁵⁷

Did the Board act without a conflict of interest?

105. This is not applicable. There is no evidence that the Board acted under a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

106. Based on the lack of information provided by the Board of the ‘religious sensitivities’ or information on how the Governance model offered by the Claimant could be improved, amended or adapted, it is the view of this Panel that, based on this record, the Board did not exercise the appropriate due diligence and care, due to not having a reasonable amount of facts in front of it. Had the Board been in a position to elaborate on the religious sensitivities and subsequent amendments which could be made to ensure the Governance model of the Claimant would be sufficient, the Claimant would have been in an improved position with regards removing itself from the current “On Hold” position in which it finds itself.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

107. The lack of detailed content obtained from the meetings held with concerned GAC members, along with insufficient information on the revisions needed by the Claimant for their Governance model, coupled with the significant reliance placed on the views of the objectors leads this Panel to the view that the Board did not exercise independent judgement with regards the objectors. Independent judgement requires a reasonable

⁵⁷ See Para 37, Pg 16 ICANN’s response to AGIT’s Supplemental Brief

amount of facts to be placed before the decision maker. Without such a reasonable amount of facts, independent judgement cannot be achieved.

ACTION: PLACING THE CLAIMANT'S APPLICATIONS "ON HOLD" WITHOUT DOCUMENTED PROCEDURE FOR SUCH AN OCCURRENCE

108. The Claimants maintain that they were not informed as to which conflicts they were to resolve with the objectors, why they must do so, how they might do so, who will judge whether it has done so, by what criteria or following which schedule.⁵⁸ ICANN maintains that their behaviour and information provision went over and above that necessary when informing the Claimant.
109. It is the opinion of this Panel that the Claimant was expressly informed as to what conflicts they were to resolve through the letter dated 7th February 2014. Through this letter, the Claimant was informed which countries had raised objections through documented, dated letters, detailed over 2 paragraphs.⁵⁹ Although somewhat brief, the conflicts were identified. However, the manner in which the Claimants and objectors were to resolve such conflicts, ascertain whether this had been successfully completed, upon which timescale and adjudged by whom was not and is not clear. Whilst it is clear that the Board required conflicts to be resolved, the Claimant was left with little guidance or structure as to how to resolve the conflicts, and no information as to steps needed to proceed should the conflicts be resolved.
110. The Panel accepts the contention made by ICANN that it is not ICANN's responsibility to act as intermediary, however it is the opinion of this Panel that insufficient guidance is currently available as to the means and methods by which an "On Hold" applicant should proceed and the manner in which these efforts will be assessed. Without such guidance, and lacking detailed criteria, the applicant is left, at no doubt significant expense, to make attempts at resolution without any benchmark or guidance with which to work.
111. During the telephonic hearing, ICANN submitted that by placing the .HALAL and .ISLAM applications in an "On Hold" category, the Claimants were given an opportunity to work with the community and group which they sought to represent.⁶⁰ However, ICANN went on to acknowledge that there is no obligation on the Objectors to speak with

⁵⁸ See, for example, pg 10 AGIT Supplementary Response

⁵⁹ See Ibid

⁶⁰ Telephonic - pg 72 – 73 lines 13-25 and 1 - 7

the Claimant, and ICANN does not have the jurisdiction to require such communication takes place.⁶¹ ICANN stated that should this be the case, and the Claimant is unable to make progress with the Objectors, they should inform ICANN in “some official manner” and inform the Board. This statement, made by Mr Enson on behalf of ICANN, is unacceptably vague, and even at this late stage, fails to provide the Claimant with a structured means of addressing a potential lack of cooperation in resolving in the conflicts noted. It is this absence of procedure and documented policy which concerns this Panel with regards the “On Hold” status. In addition, the Claimant has noted that “*there’s been no other applicant put on hold*”⁶² and this statement was not refuted by ICANN.

112. Core Value 8 mandates “making decisions by applying documented policies neutrally and objectively, with integrity and fairness”. There is a distinct lack of documented policy with regards the next steps required by the Claimant, and in particular how and when these steps will be assessed. Rather, it is unclear as to which or how many objectors have authority to even negotiate a resolution to the objections. Even if that were known, the Claimant is left entirely at the mercy of the Objectors, who may not agree to cooperate, may insist that unreasonable conditions be imposed on the Claimant or indeed any number of other potential unknown outcomes. The Guidebook provides for a detailed, clear, comprehensive and structured approach to applications, documenting policies and providing assistance with the application process. This does not mean that every application has an expectation of success, but rather that applicants know the “rules of the game” and exactly what the requirements for success are. However, the situation in which the Claimant finds itself does not feature in the Guidebook. It is the opinion of this Panel that this is a glaring omission, and should be rectified promptly. Without such a documented procedure, it is the view of this Panel that ICANN is acting in a manner which is inconsistent with Core Value 8.
113. The Claimant claims that by placing its application “On Hold”, ICANN has created a new policy, and by doing so without following documented procedure, inconsistency has occurred. The Panel agrees.
114. As discussed above, the Claimant argues that it was not informed as to what conflicts it must resolve with the Objectors, why it must do so, how it might do so, who will judge whether it has done so, and by what criteria or schedule.⁶³

⁶¹ Telephonic – pg 77 lines 16 - 25

⁶² Telephonic – pg 36 lines 19-25

⁶³ See, for example, pg 10 AGIT Supplementary Response

115. There are, therefore, two possible paths to consider with regards the “On Hold” status.
116. First, this is a new concept. A new norm has been created, which ICANN will have the discretion to apply to future applications, which in turn will have new policy creation implications as per the Bylaws.
117. Secondly, this is a one-off. Relevant only to the circumstances surrounding these two applications, in which case, the question of non-discrimination arises.
118. Based on the lack of previous use, and the positive light in which ICANN presented this “On Hold” status during the telephonic hearing (*“Judge Cahill, it’s a good question and I think it demonstrates what ICANN is doing here. And ICANN, rather than just denying the applications based on every Muslim country saying they don’t want this, the ICANN Board gave the Claimant the opportunity to work with the very community (...)”*)⁶⁴, this Panel are minded to consider this a new policy.
119. Placing the applicant on hold is markedly distinct from a ‘yes’ or ‘no’. Where a ‘yes’ is given, the Guidebook offers detailed procedure and policy to follow. When a ‘no’ is given, an application is refused. Both of these options follow clear and concise paths, which are prescribed and available. In contrast, the “On Hold” status is neither clear nor prescribed. One cannot easily predict the way in which such a status will be applied in the same way as they can a ‘yes’ or ‘no’. This is a very specific status, and one which requires greater clarification and explanation. It is for these reasons that the designation of these applications as “On Hold” is considered a new policy, created, without notice or authority, by ICANN.
120. Following the Bylaws, where a new policy is created, a structured procedure must be followed, and ICANN has failed to adhere to this obligation. In addition, with respect to Core Value 7, which calls for the employment of open and transparent policy development mechanisms, it is the opinion of this Panel that such openness and transparency with regards this policy development has not been forthcoming. The first opportunity which the Claimant had to learn of the new policy was when it was imposed upon them through the 7th February letter.

⁶⁴ Telephonic – Pg 72 lines 18 – 24

Did the Board act without a conflict of interest?

121. The Claimant contends that the decision to place the applications “On Hold”, without method or procedure which the Claimant could utilise to move its application forward, was done in order to allow a third party to submit a applications for these two TLDs. However ICANN staff have rebutted this contention, and no applications for .HALAL or .ISLAM have been accepted, some three or more years after the applications were placed on hold. Whilst questions surround the manner in which this policy has been implemented, it is the opinion of this Panel, on this record, that no conflict of interest has occurred.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it?

122. The decision to place the applications on hold, without foreseeing the need for a formalised mechanism to be in place under which applications placed in this category are to proceed, would indicate that the Board has not acted with sufficient facts in front of it. The Board could not have had a reasonable amount of facts in front of them pertaining to the operation of the on hold status, as such facts do not exist as yet. Had ICANN created a policy under which decisions such as this would operate and formulated a suitable framework, then the Panel could appreciate how the Board may have been acting with a reasonable amount of facts in order to make the decision to place the applications on hold. However, without such a procedure or mechanism in place to accompany the new policy, it is the view of this Panel that the Board has not exercised due diligence with regards this decision as the Board did not have a reasonable amount of facts in front of it.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

123. By the Respondent failing to foresee the need for or advance a formalised mechanism under which an “On Hold” applications are to proceed, the parties find themselves in front of this IRP in order to resolve the questions which have arisen following the “On Hold” decision. It is the opinion of this Panel that, although independent judgement was exercised by the Board, the decision to place the applications “On Hold” without foreseeing the difficulties that could arise from such a decision was not in the best interests of the internet. Clear, efficient and effective mechanisms are essential in ensuring that the best interests of the internet are suitably considered and served by ICANN.

ACTION: DECIDING IN A MANNER INCONSISTENT WITH EXPERT ADVICE

124. Core Value 7 calls for “well-informed decisions based on expert advice”, but does not mandate that once advice is provided, it must be followed.
125. The Guidebook permits the Board to consult with independent experts under §3.1 *The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.*
126. The Guidebook therefore does not mandate consulting with independent experts, rather the discretion is left to the Board. This is clear through the inclusion of the term “may”. It would therefore be counter-logical if this Panel were to interpret the Guidebook as to allowing the Board discretion to determine *whether* to obtain an expert opinion, but should they decide to, *bind them* to the contents of the opinion.
127. In light of the provisions of both the Guidebook and the Bylaws, it is the opinion of this Panel that the Board is entitled to decide in a manner inconsistent with expert advice.

Did the Board act without a conflict of interest?

128. This is not applicable. There is no evidence that the Board acted under a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it?

129. Although ultimately deciding to follow a course contrary to expert opinion, ICANN was privy to the opinions of experts when making their decision, including that of the Independent Objector, Dr. Pellet and of Mr. Cremades, the Community Objection Expert. There is no evidence of a lack of due diligence and care in having a reasonable amount of facts in front of it.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

130. Although deciding contrary to expert opinion, ICANN submitted that it did so in light of all of the facts in front of them. Expert opinion was sought and considered, and those experts were considered to be independent. This fact has not been contested. It is therefore the view of this Panel that the Board did exercise independent judgement in reaching its decision with regards expert opinions.

ACTION: DISTINGUISHING BETWEEN THE GRANTING OF .KOSHER/.SHIA AND “ON HOLD” STATUS OF .HALAL/.ISLAM

131. ICANN informed the Panel through their Response to the Supplemental Brief of the following:

“The applications for .KOSHER and .SHIA were not the subject of any GAC advice or successful Community Objections, and thus were properly delegated pursuant to the procedures set forth in the Guidebook”⁶⁵

132. In reaching its decision, the Panel have considered the .AMAZON case, whereby an allegation arose of disparate treatment by the NGPC against the Claimant.⁶⁶

Amazon argues that the NGPC discriminated against it by denying its application for .amazon, yet an application by a private Brazilian oil company for the string .ipiranga, another famous waterway in Brazil, was approved. Amazon contends that by approving .ipiranga and denying .amazon, the ICANN Board, here the NGPC, engaged in disparate treatment in violation of Article II, Section 3 of the Bylaws.

(...) As pointed out by ICANN’s counsel, in this instance neither the Board nor NGPC, acting on its behalf, considered, much less granted, the application for .ipiranga and, therefore, did not engage in discriminatory action against Amazon. We agree. In the context of this matter, the Bylaws’ proscription against disparate treatment applies to Board action, and this threshold requirement is missing.

⁶⁵ See ICANN’s response to the Supplemental Brief Pg 21, Para 48

⁶⁶ G : Para 120 – 121 AMAZON EU S.A.R.L

Thus, we do not find the NGPC impermissibly treated these applications differently in a manner that violated Article II, Section 3 of the Bylaws regarding disparate treatment.

133. It is the opinion of this Panel that, as with .AMAZON, no Board action took place with regards the .KOSHER application, and therefore the threshold for this requirement is missing. No action inconsistent with Article II, S3 of the Bylaws has occurred.

Did the Board act without a conflict of interest?

134. This is not applicable as the Board decision is not being considered due to the distinction made above.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

135. This is not applicable as the Board decision is not being considered due to the distinction made above.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

136. This is not applicable as the Board decision is not being considered due to the distinction made above.

ACTION: IMPACT OF THE GAC FAILING TO REJECT AN APPLICATION

137. This is outside of the remit of this Panel, which is tasked with ascertaining whether or not there have been actions by the Board which are inconsistent with the Bylaws, Articles of Incorporation or the Guidebook. However, as an observation, following the Guidebook, the GAC are not mandated to expressly accept or reject an application, and therefore their decision not to reject is in accordance with the Guidebook.

ACTION: DECIDING IN A MANNER INCONSISTENT WITH GUIDEBOOK SCENARIO

138. Following the overarching aim of the Guidebook, one must assume that the scenarios referenced were included in order to assist candidates with their applications, but with no intention of binding the Board. The following, found under §1.1.5, is deemed instructive of this: *“The following scenarios briefly show a variety of ways in which an application*

may proceed through the evaluation process.” The express inclusion of the term “may” is further indication that §1.1.5 was not intended to be binding on the Board, nor provide applications with a guaranteed route of success.

139. It is the opinion of this Panel that such scenarios act merely to provide examples of how an application may proceed, but do not purport to provide a roadmap to follow to ensure success. Although it is understandable that a certain level of reliance may be placed on such scenarios by applicants, one would expect in the majority of cases for there to be distinguishing factors. As such, the scenarios cannot be considered binding on the Respondent, and no inconsistent act occurs should ICANN deviate from the scenarios.

Did the Board act without a conflict of interest?

140. The Board were not mandated to follow the scenarios laid down in the Guidebook, as it is found by this Panel that the scenarios were merely instructive. There is no evidence that the Board were conflicted in making this decision, rather they were exercising their judgement in order to distinguish the Claimant’s application from the scenario listed.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

141. The decision to act in a manner contrary to the Guidebook scenario was made following an assessment of the objections, independent expert opinions and the applications, whereupon ICANN made the decision to distinguish the scenario from the applications. The status of the scenarios being advisory rather than mandatory confirms the notion that the Board acted with due diligence in choosing to distinguish the applications and act in a manner contrary to the scenario listed.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

142. Independent judgement is evidenced by the Board choosing to distinguish the applications from the scenarios. It is submitted that it is in the best interests of the internet for consideration to be given to each case in turn, rather than mandate through prescribed scenarios the way in which a case must proceed. The Board have utilised their right of independent judgement in taking the decision, and it is submitted that this path is in the best interests of the internet.

ACTION: CLASSIFICATION OF A NUMBER OF DOCUMENTS AS CONFIDENTIAL

143. ICANN has a published Documentary Information Disclosure Policy (DIDP) which states:

“ICANN's Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”

144. The Claimant claims a request was made under this policy for documents related to the parties' dispute, which was subsequently declined by ICANN, thereby acting in breach of Recommendation No. 1, Core Value 7 and Core Value 8. ICANN claims that the Claimant did not file a reconsideration request seeking the Board's review of ICANN staff's DIDP response. As no reconsideration request was filed, the DIDP response involved no Board action.⁶⁷

145. The remit of this Panel is restricted to the analysis of Board actions or inactions. The Claimant has not produced any evidence to indicate that a reconsideration request was filed, and it is therefore outside the purview of this IRP to consider the actions of ICANN staff members.

ACTION: FAILING TO ESTABLISH A STANDING PANEL

146. §4 (6) of the Articles of Incorporation and Bylaws requires a 'Standing Panel' be established, and this Panel recommends, along with previous IRP panel recommendations⁶⁸, that one is created. However, for clarity, this is not to be taken as or in any way inferred as a binding order (as the Panel has no such authority). Also, whether or not there is a standing panel seems to have no direct relationship with the facts of this IRP.

CONCLUSION

147. For the reasons stated above, the Panel concludes that ICANN has acted in a manner inconsistent with ICANN's Articles of Incorporation and Bylaws. Specifically:

⁶⁷ See ICANN's Supplementary Response para 4 and <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-cn.pdf>

⁶⁸ See *.AFRICA (DotConnectAfrica Trust v ICANN – Case #50 2013 001083)*

148. Core Value 7 – Articles of Incorporation and Bylaws

It is the opinion of the Panel that the volume and quality of information disseminated following the meeting of the GAC in Beijing constituted an act which was inconsistent with Core Value 7; to be consistent with Core Value 7 requires ICANN to act in an open and transparent manner.

149. Core Value 8 - Articles of Incorporation and Bylaws

It is the opinion of the Panel that, by placing the Claimant's applications "on hold", the Respondent acted inconsistently with Core Value 8; to be consistent with Core Value 8 requires the Respondent to make, rather than defer (for practical purposes, indefinitely), a decision ("making decisions by applying documented policies neutrally and objectively, with integrity and fairness") as to the outcome of the Claimant's applications. The Respondent, in order to act in a manner consistent with its Articles of Incorporation and Bylaws, needs to promptly make a decision on the application (one way or the other) with integrity and fairness. However, nothing as to the substance of the decision should be inferred by the parties from the Panel's opinion in this regard. The decision, whether yes or no, is for the Respondent.

150. Article III (S3 (b)) Articles of Incorporation and Bylaws

It is the opinion of the Panel that, by placing the Claimant's applications "on hold", the Respondent created a new policy. In light of this, the Respondent failed to follow the procedure detailed in Article III (S3 (b)), which is required when new policy is developed.

151. We further conclude that Claimant is the prevailing party in this IRP. We hold this view consistent with the finding that the designation of "On Hold" is a new policy. ICANN failed to implement procedures pursuant to which applications placed in an "On Hold" status are to proceed. As a result, the Board has not acted with due diligence in this regard.

152. The failure to determine how Claimant should proceed under the new "On Hold" policy has largely resulted in the Claimant's costs in this IRP. Accordingly, pursuant to Article IV, Section 4.3(18) of the Bylaws, Rule 11 of ICANN's Supplementary Procedures and Article 34 of the ICDR Rules, ICANN shall bear the costs of this IRP, the cost of the Reporter, as well as the cost of the IRP provider.

153. The administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totalling US \$6,279.84 shall be borne by ICANN.

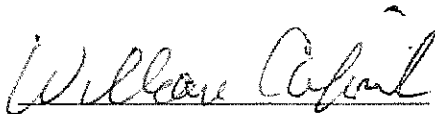
154. The compensation and expenses of the Panelists totalling US \$175,807.82 shall be borne by ICANN.
155. The fees and expenses of the Reporter, Ms. Bommarito, shall be borne by ICANN. ICANN has already settled Ms. Bommarito's invoices.
156. Therefore, ICANN shall reimburse AGIT the sum of US \$93,918.83, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Respondent.
157. Each party shall bear its own expenses and attorneys' fees.
158. This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

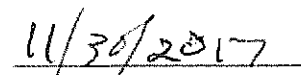
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Respectfully submitted:

Calvin A. Hamilton FCI Arb., Chair

Date


Honourable William Cahill (Ret.)


Date

Klaus Reichert SC

Date

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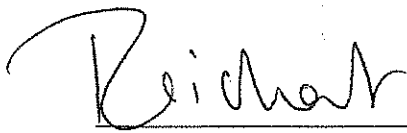
Respectfully submitted:

Calvin A. Hamilton FCI Arb., Chair

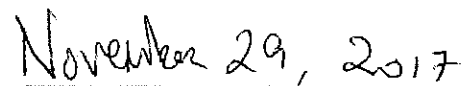
Date

Honourable William Cahill (Ret.)

Date



Klaus Reichert SC



Date